Part one: Introduction to Comparative Private Law

Chapter 1: What is Comparative Law?

I. The Meaning of Comparative Law

A. "Comparative Law" Defined

1. Difficulties of a Definition

Books on comparative law traditionally start with a definition – or an 1 attempt at a definition – of their subject. What is comparative law, they ask? What is its object and purpose? These questions have been asked more or less insistently since the birth of modern comparative law in 1900, when French scholar *Raymond Saleilles* (1855-1912) organised the first International Congress of Comparative Law in Paris (see N 52). More than a century later, there is still no general consensus on what comparative law actually is. Is it simply a technique, a method of study and research? Is it a proper science, with its own subject matter? Or is it indeed both?

The traditional view is that comparative law is a method (or several 2 methods).[1] Others consider this view too narrow and suggest that comparative law is a body of knowledge, a science in its own right.[2] The diversity of replies to the question "What is comparative law" can be confusing, especially as scholars rarely explain the impact (if any) of the science-method distinction.[3] The precise meaning of the terms "science" and "method" is also far from clear.[4] In order to understand the nature of

1 See eg *Otto Kahn-Freund,* Comparative Law as an Academic Subject, Oxford 1965, 4; *Rheinstein,* 11; *Glendon/Carozza/Picker*, 4; *Peter de Cruz*, Comparative Law in a Changing World, 3rd edn, London 2007, 3; for further references see *Reimann*, 50 Am J Comp L 671, 683–684 (2002).

2 See eg *Legrand*, 58 MLR 262, 264 (1995); *Reimann*, 50 Am J Comp L 671 (2002); for further references regarding the science-or-method debate, see *Mattei/Ruskola/Gidi*, 48–52; *Esin Örücü*, Developing Comparative Law, in: Esin Öcürü/David Nelken (eds), Comparative Law: a Handbook, Oxford 2007, 43–65.

3 The discussion sometimes revolves around the question whether comparative private law should be taught as an autonomous subject or rather seen as an integral part of all forms of legal endeavour: *Glenn*, Aims, 65; see also *Watson,* 1–2.

4 Cf also *Watson,* 1–2.

comparative law, it is perhaps easier to consider what comparative law is *not.*

2. What Comparative Law is *Not*

a. Comparative Law is Not a "Law"

3 Unlike, for example, commercial law or tax law, comparative law is not an actual branch of law. It is not a body of rules in force in a particular country or area.[5] It has no normative content; it does not prescribe, govern or prohibit. This explains why some scholars find the traditional English term "comparative *law*" misleading, preferring instead to refer to "comparative legal traditions,"[6] "comparison of laws and legal traditions,"[7] "comparative analysis of law,"[8] "comparative study of law,"[9] or "comparative legal studies."[10]

4 The German term "*Rechtsvergleichung*," which can be translated as "the comparing of law," better illustrates that comparative law is not a body of rules, but, first and foremost, a process.[11] It is the process of first surveying different legal systems, or parts thereof, and then comparing them with each other in order to discover similarities or differences.

b. Comparative Law is Not Merely a Process

5 We have just described comparative law as a process. Comparative law, however, is more than that. Comparative law also endeavours to evaluate and provide explanations for the similarities or differences between legal systems. This requires an understanding of the surveyed legal systems that goes beyond a simple description of their laws.

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5 See eg *Mattei/Ruskola/Gidi*, 7.

6 See eg *Mary Ann Glendon/Paolo G Carozza/Colin B Picker*, Comparative Legal Traditions, 3rd edn, St Paul 2008; nonetheless, these authors use the term "comparative law" throughout their book.

7 *Mattei/Ruskola/Gidi*, 7.

8 Cf Legrand, 58 MLR 262, 264 (1995).

9 See eg *John Brierley/René David*, Major Legal Systems in the World Today: an Introduction to the Comparative Study of Law, 3rd edn, London 1985.

10 See eg *Pierre Legrand/Roderick Munday* (eds), Comparative Legal Studies: Traditions and Transitions, Cambridge 2003.

11 *Gutteridge*, 1.

To start with, an understanding and critical evaluation of modern legal systems and their laws calls for an appreciation of the historical factors that shaped them.[12] The influential German comparatists *Konrad Zweigert* (1911-1996) and *Hein Kötz* aptly describe comparative law and the history of law as twin sisters, cut from the same cloth.[13] French scholar *Édouard Lambert* (1866-1947) considered comparative legal history ("*histoire comparative*") a particular division of comparative law, although with a distinct goal: that of determining "a universal history of law".[14] 6

Laws and legal systems are not only shaped by history, but also by political, economic, geographic, demographic, cultural, religious and other factors.[15] By considering such factors, the law is placed in a wider context, and this, in turn, can help us understand the differences and similarities between legal systems. However, the systematic study of the law's *social* context is not the object of comparative law, but of a different discipline: that of legal sociology, or sociology of law. Legal sociology is concerned with the interaction between law and society. It aims to discover the law's effect on human behaviour, on the one hand, and the impact of social change on the law, on the other.[16] 7

The relationship between comparative law and legal sociology has often been discussed,[17] but rarely examined in detail.[18] Although comparative law research could certainly profit from empirical enquiry and data collected by legal sociologists, comparatists tend to work with plausible *as-* 8

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12 See *Mathias Reimann*, Rechtsvergleichung und Rechtsgeschichte im Dialog, ZEuP (1999), 496.

13 *Zweigert/Kötz*, 8.

14 *Édouard Lambert,* La fonction du droit civil comparé, Paris 1903, 914, 918; *id*, Comparative Law, in: Edwin RA Seligman/Alvin Johnson (eds), Encyclopaedia of the Social Sciences IV, New York 1931, 126–129. See also *Watson,* 3; *John Henry Wigmore*, A New Way of Teaching Comparative Law, JSPTL 6–16 (1926); *Cotterrell*, 131–132.

15 This will be explored in more detail in chapter 4.

16 Cf *Manfred Rehbinder*, Rechtssoziologie, 7th edn, Munich 2009, paras 1–2; *Zweigert/Kötz,* 10.

17 See eg *Zweigert/Kötz*, 10–12; *David/Brierley,* 13–14; *Dieter Martiny,* Rechtsvergleichung und vergleichende Rechtssoziologie, ZfRSoz (1980), 65–84; *Konrad Zweigert,* Die soziologische Dimension der Rechtsvergleichung, RabelsZ 38 (1974), 299–316; *Andreas Heldrich,* Sozialwissenschaftliche Aspekte der Rechtsvergleichung, RabelsZ 34 (1970), 427; for a more recent discussion, see *Cotterrell,* 127–143.

18 See *Cotterrell*, 126.

sumptions about the interaction between law and society, instead. This is perhaps regrettable, yet also understandable, for "presenting comparative legal analysis in a contextual matrix embracing entire cultures is a task suited only to those few who can command with assurance the vast range of historical and sociological reference required."[19] Some comparatists prefer to avoid sociological references altogether. In his influential work on legal transplants,[20] for example, Scottish comparatist *Alan Watson* suggests that comparative law should be restricted to the study of the relationship, particularly the historical relationship, between legal systems[21] (on legal transplants, see chapter 4).

c. Comparative Law is Not Merely "Comparative Legislation"

9 Comparative law is concerned with the law as it is actually practiced, as it lives and breathes. Its focus is the "law in action," ie the law as it is applied. This is not necessarily the same as the "law in the books."[22] Lawyers wishing to compare Swiss and German tort law, for example, cannot restrict themselves to reading the pertinent provisions in the Swiss Code of Obligations (*Schweizer Obligationenrecht*) and the German Civil Code (*Bürgerliche Gesetzbuch)*. They will also need to consult case law in order to grasp the meaning of the term "wrongful" ("*widerrechtlich*") used in both codes[23] and to assess whether the concept of wrongfulness ("*Widerrechtlichkeit*") is the same in both systems. The study of cases is central to comparative law endeavour,[24] which is why many books on comparative law are devised as casebooks.[25]

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19 *Id*, 132.

20 On the reception of law and legal transplants in general see below chapter 4.

21 *Watson*, 9; for a discussion of Watson's theses from a sociological perspective, see *Cotterrell*, 135–139.

22 The famous distinction between law in books and law in action was first made by the American legal scholar *Roscoe Pound* (1870-1964), Law in Books and Law in Action, 44 Am L Rev 12–36 (1910).

23 See Article 41(1) of the Swiss Code of Obligations and § 823(1) of the German CC.

24 See eg *Basil Markesinis,* Comparative Law – A Subject in Search of an Audience, 53 MLR 1 (1990).

25 See eg *Ugo A Mattei/Teemu Ruskola/Antonio Gidi, Schlesinger's Comparative Law*, Cases-Text-Materials, 7th edn, New York 2009; *James Gordley/Arthur T von Mehren*, An Introduction to the Comparative Study of Private Law, Readings, Cases, Materials, Cambridge 2007; *Stefan A Riesenfeld/Walter Pakter*, Comparative Law Casebook, Ardsley 2001; *John H Merryman/David S Clark/John O Haley*, The Civil Law Tradition, Charlottesville 1994, (reprinted

“Law in action” goes beyond case law, however. Standard terms and conditions, uniform commercial terms such as Incoterms,[26] domestic and international trade usages and practices must also be taken into account. “Law in action” is shaped by practicing lawyers and their professional understanding. This is especially true in the area of commercial law. Legal provisions such as provisions on liability, for example, may routinely be modified or excluded in contract. The impact of these factors on the law can only be examined and understood through empirical research, particularly as many legal issues never reach the courts but are resolved through alternative dispute resolution mechanisms, such as arbitration or mediation, instead. Micro-comparative research (see N 170) in particular can benefit from empirical studies. There has been an increase in empirical research in recent years,[27] in particular in law and economics scholarship. In many other areas, however, empirical enquiry remains comparatively underdeveloped.[28] 10

Comparatists must also consider the *systematic* context of legal rules, ie their relationship with other rules and institutions within the same legal system. The practical importance of the English law of torts (delicts), for example, can only be appreciated by considering its relationship with contract law, in particular the contract doctrines of *consideration* and *privity*. Under the doctrine of consideration, a promise is only binding and enforceable if the party receiving the promise has given the party making the promise something of economic value (“consideration”) in return for the promise. If consideration is absent, liability in contract will, as a rule, fail, and the party seeking damages will try to “escape” out of contract and into tort (delict).[29] Under the doctrine of privity, only parties to a contract may assert contractual rights and incur contractual obligations. Contracts granting a third party independent contractual rights (*jus quaesitum tertio*) are only available in very limited circum- 11

Charlottesville 2000); *Mary Ann Glendon/Michael W Gordon/Christopher Osakwe*, Comparative Legal Traditions, Text, Materials and Cases, 2nd edn, St Paul 1994; *Ingeborg Schwenzer/Markus Müller-Chen,* Rechtsvergleichung: Fälle und Materialien, Tubingen 1996.

[26] Incoterms (or International Commercial Terms) are a series of commercial terms published by the International Chamber of Commerce (ICC).

[27] See for an example *Ingeborg Schwenzer/Pascal Hachem/Christopher Kee*, Global Sales and Contract Law, Oxford 2012, paras 5.05ff with further references.

[28] See also *Reimann*, 50 Am J Comp L 671, 674 (2002).

[29] *Widmer*, 57; *Deakin/Johnston/Markesinis,* 20–31.

stances.[30] The doctrines of consideration and privity make English contract law comparatively rigid and, in consequence, tort law more attractive.[31]

12 The interplay between contract and tort law is illustrated by the House of Lords' decision in *White v Jones*.[32] The case concerned the liability of a solicitor who had negligently failed to draw up a will before the death of the claimants' father. One of the judges, Lord *Robert Goff of Chieveley,* compared the German and English approaches toward this kind of problem and referred to the particular difficulties created in the English law of contract by the doctrines of consideration and privity. He explained that these problems "encourage us to seek a solution to problems of this kind within our law of tortious negligence."[33] As "the doctrine of consideration still forms part of our law of contract, as does the doctrine of privity of contract which is considered to exclude the recognition of a jus quaesitum tertio [...]," the court would have to "return to the law of tort for a solution to the problem."[34]

13 The importance of systematic context is also illustrated by the interplay between punitive damages and procedural law in the USA. Unlike compensatory damages, punitive damages are awarded in order to punish and deter the defendant from engaging in similar conduct in the future.[35] Although punitive damages are also available in other common law jurisdictions,[36] the sums awarded in the USA tend to be far higher. Comparatists seeking to understand why will not be able to stop at a comparison of the different requirements of punitive damages. Rather, they will also need to consider the procedural framework. In the USA, it is usually the jury that decides whether to grant punitive damages and if so, how much. Jury panels are generally composed of laypeople without any legal training. By contrast, in England, civil jury trials have all but disappeared,[37]

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30 Cf *Widmer*, 58; on the doctrine of privity in general see *Michael Furmston,* Cheshire, Fifoot & Furmston's Law of Contract, 16th edn, Oxford 2012, 562–590.

31 Cf *Widmer*, 56–57; *Deakin/Johnston/Markesinis*, 20–25.

32 *White v Jones* [1995] UKHL 5, [1995] AC 207, [1995] 1 All ER 691.

33 *White v Jones* [1995] UKHL 5 at [14].

34 *White v Jones* 1995] UKHL 5 at [17]-[18].

35 Cf *Widmer*, 301.

36 For an overview see *John Y Gotanda,* Punitive Damages: a Comparative Analysis, 42 Colum J Transnat'l L 391, 395–420 (2004).

37 Two notable exceptions are defamation actions (libel and slander); cf *Bailey/Ching/Taylor*, para 15-007.

and punitive damages are usually awarded, if at all, by professional judges who tend to be more dispassionate than the average juror. This difference in procedural law is one of the reasons why punitive damages awards in England are more seldom and also much more modest than in the USA. The role and function of the jury and the jury selection process in US trials are important factors in understanding American punitive damages law "in action."[38]

Another example of the importance of systematic context in American 14
law is the relationship between punitive damages and lawyers' fees. In a case brought against a motel chain which had rented rooms to guests despite knowing that the rooms were infested with bedbugs,[39] judge *Richard A Posner* pointed out that it was important to grant a sufficient amount of punitive damages, as a claimant might otherwise have difficulty finding a lawyer willing to take on the case for the usual contingent fee.[40] Under a contingent fee agreement, a lawyer will only charge the client if the client wins the case ("no win, no fee"). If the case is successful, the lawyer will receive a fixed percentage of the amount awarded to his client. The lawyer working on a contingent fee basis has a personal interest in the outcome of the case: the higher the award, the higher the fee. Taking a case on a contingent fee basis will only appeal to lawyers if the stakes are high enough, and this, as *Posner's* statement shows, can induce the courts to grant higher awards. Lawyers' fee agreements are therefore a further factor to consider when comparing punitive damages laws in different legal systems.

B. Neighbouring Disciplines

1. Foreign Law Studies

Comparative law is traditionally distinguished from the study of foreign 15
law or foreign legal systems. From a student's perspective, "foreign law" is the law of any legal system other than that in which the student originally received his legal education. In principle, the distinction is clear:

38 Cf *Widmer*, 318–321, 366–369.
39 *Mathias v Accor Economy Lodging and Motel 6,* 347 F 3d 672 (2003).
40 *Mathias v Accor Economy Lodging,* N 41, at [14]; on contingent fees in general, see *Widmer,* 370–377.

comparative law requires a comparison of some kind, whereas the study of foreign law or a foreign legal system does not require comparison any more than the study of one's own legal system does.

16 However, legal systems (or parts thereof) can only be contrasted and compared by those who have first studied the systems they wish to compare. Studying foreign legal systems is a necessary prerequisite to any comparative enterprise.[41] Conversely, any person studying foreign law or learning about a foreign legal system will inevitably draw comparisons with their own law while doing so.[42] Such comparisons might not be methodical, but they are comparisons nonetheless.

17 Reports on foreign legal systems are often compiled by comparatists; it has even been said that production of knowledge on foreign law "is what comparatists do most of the time."[43] Nonetheless, the mere *description* of one or more foreign legal systems, laws or legal provisions does not, in itself, constitute comparative law. Comparison is more than just description. We will explore the methods of comparison in detail in chapter 2.

2. Legal History and Sociology of Law

18 We have already touched upon the relationship between comparative law and legal sociology (see N 8), on the one hand, and legal history (see N 7), on the other. Although both disciplines are important for understanding the law, legal history has had a greater impact on comparative scholarship than legal sociology. In particular, legal history has been a major factor in classifying the world's legal systems into "legal families," ie groups of legal systems (see N 188–194). A historical perspective remains essential to understanding the world's legal systems. Indeed, recent scholarship has placed particular emphasis on the importance of legal history for comparative law endeavour.[44]

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41 See eg *Rheinstein,* 22; *Reimann,* 50 Am J Comp L 671, 675 (2002).
42 See eg *Mattei/Ruskola/Gidi*, 8.
43 *Reimann*, 50 Am J Comp L 671, 675 (2002).
44 See in particular *Glenn,* Legal Traditions, 5–6; *James Gordley,* Comparative Law and Legal History, in: Mathias Reimann/Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law, Oxford 2008, 753–775.

3. Private International Law

a. General Remarks

Private international law, in particular conflict of laws, and comparative law are often considered sister disciplines. Both are concerned with foreign laws, and neither would exist were there no disparities between legal systems. Nonetheless, they are clearly distinct. 19

Conflict of laws is the first branch of private international law. It is a body of rules that determine which law applies to a dispute connected to more than one legal system. It tells us, for example, which national law applies to the divorce of a Turkish woman and a South African man married in Texas and now living in Switzerland. Because it aims to determine the applicable law out of several potential "candidates," conflict of laws is *selective* rather than *comparative.*[45] 20

The second branch of private international law is the law of international civil procedure. It comprises the rules that determine which national court has jurisdiction over a dispute connected to more than one legal system. In the case mentioned above, for example, a court called upon by the husband or wife will first need to decide whether it has jurisdiction over the divorce. It will determine this issue by consulting its rules on international civil procedure. The law of international civil procedure is also concerned with the recognition and enforcement of foreign decisions. If, for example, a woman living in France and divorced in Tel Aviv wishes to remarry in Paris, the French authorities will first need to determine whether the Israeli divorce can be recognised, ie whether it is effective in France. If the woman's divorce is not recognised as valid in France, her marriage will still be considered intact by the French authorities, even though Israel considers her divorced. In consequence, she will be unable to remarry in France. 21

Despite the term "private *international* law," rules on both conflict of laws and international civil procedure are primarily domestic. Each legal system has its own set of rules on private international law, and these rules are applied exclusively by the courts belonging to that legal system. In the case of the Turkish-South African couple mentioned above (N 20), for example, Swiss courts called upon by either 22

[45] *Zweigert/Kötz*, 6–7.

the husband or wife (or both of them together) to open divorce proceedings will consult *Swiss* private international law, including any international conventions to which Switzerland is party, in order to determine whether they have jurisdiction over the case and, if so, which law shall apply to the couple's divorce. In turn, Turkish courts will consult Turkish law, South African courts will consult their law, and US American courts likewise.

23 For the member states of the European Union, the relevant rules on private international law can be found in several EU regulations, eg Regulation No 593/2008 of European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I").[46] In the USA, state and federal courts apply different theories to determine the applicable law, eg the "vested rights theory",[47] the "interest analysis theory",[48] the "better law theory" or the "most significant relationship theory".[49] A majority of courts follow the choice-of-law principles of the Restatement (Second) of Conflict of Laws[50] (on the Restatements of Law, see N 122).

24 Although private international law and comparative law are two distinct disciplines, comparative law has an important role to play both in the application of private international law and in its development. The four main areas of interaction are the problem of classification, the *ordre public* exception, the application of foreign law and the unification of private international law.

[46] The regulation can be retrieved at ‹http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2013:177: SOM:EN:HTML›, accessed 2 September 2013.

[47] *Alan B Morrison*, Fundamentals of American Law, New York 1996, 184–185.

[48] *Hay*, para 240.

[49] *Hay*, para 241.

[50] According to § 6(2) Restatement (Second) of Conflict of Laws (1971) "the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied".

b. The Problem of Classification

Because the rules on private international law are essentially domestic, the concepts they use are also rooted in domestic law. This can create difficulties when a court is confronted with a foreign legal institution that has no equivalent in domestic law or is distinctly different from that law's concepts. This is best illustrated by an example. When the Swiss Act on Private International Law (PILA)[51] was adopted in 1987, its rules on "marriage" were rooted in the Swiss concept of marriage. It was not envisaged at the time that other legal systems might one day not only create a special legal union for same-sex couples, but actually open up the institution of marriage. Once that happened, however, novel problems arose. It was now possible, for example, that a Swiss court would be called upon by a same-sex couple in the process of separating to determine which partner could remain in the family home. If the couple had married or entered into a civil partnership abroad, the court would have to decide whether same-sex unions fell under the PILA's provisions on "marriage" or not. To this end, it would have to determine the scope and meaning of the term "marriage" under the PILA. In the meantime, the problem of same-sex unions has been solved in Switzerland, as provisions on civil partnerships have been introduced in domestic law and also the PILA.[52] Nonetheless, it is a good example of the difficulties that can arise because of the diversity of legal systems. 25

Defining the meaning of concepts such as marriage in rules on private international law is discussed under the heading of "characterisation," "classification" or "qualification."[53] There are several approaches to this problem, two of which are rooted in comparative law. We will consider these after looking at the two traditional methods of classification, ie the *lex fori* method and the *lex causae* method. 26

51 SR 291.

52 According to Art 45(3) PILA, same-sex marriages concluded abroad are considered a civil partnership for the purposes of the PILA. On the PILA's provisions, see *Corinne Widmer,* Moving to Switzerland: Legal Implications for Civil Partners Registered Abroad, IFL (2007), 93–98.

53 See eg *James Fawcett/Janeen Carruthers/Peter North,* Cheshire, North & Fawcett: Private International Law, 14th edn, Oxford 2008, 41–50 ("classification"); *Kurt Lipstein,* Characterization, in: International Encyclopedia of Comparative Law III: Private International Law, Tubingen 1999, ch 5, 5-3–5-67; *Zweigert/Kötz,* 6–7 ("qualification").

27 Under the *lex fori* approach, terms used in private international law provisions are given the same meaning as in domestic law.[54] If the concept of marriage is classified by reference to the *lex fori*, "marriage" under the PILA will be given the same meaning as under domestic Swiss law. It will thus be restricted to heterosexual unions, as the Swiss *Zivilgesetzbuch* (Civil Code) does not allow same-sex marriage.

28 Under the *lex causae* approach, the meaning of a term is determined by the law potentially applicable to the dispute.[55] If the court were to adopt the *lex causae* method in our example, it would first determine which national law *would govern* the dispute *if* the PILA's provisions on marriage were to apply. Having determined that law, it would then examine the meaning given to the term "marriage" under that law, and that same meaning would be given to the concept of "marriage" under the PILA. Thus, if the applicable foreign law allowed both opposite-sex and same-sex marriages, then the term "marriage" under the PILA would be construed to include marriages of both the opposite and the same sex. Conversely, if only heterosexual couples were allowed to marry under the foreign law, same-sex unions would not fall under the PILA's provisions on marriage.

29 From a comparatist's perspective, classification by reference to the *lex fori* or the *lex causae* is unsatisfactory. By relying on domestic law terminology, both methods disregard the international dimension of the case. In order to introduce a truly international perspective, the comparatist and scholar *Ernst Rabel* (1874-1955) (see N 54) developed a third method of classification based on comparative law. *Rabel* argued that concepts of private international law should be distinguished from domestic law concepts of the *lex fori* and the *lex causae*, and that independent concepts should be developed on the basis of comparative law, instead.[56] This method of classification is called the "comparative" or "autonomous" method. Although *Rabel's* approach is appealing, it has the drawback of being very hard to put into practice and is therefore of-

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[54] The Latin term *lex fori* means "law at the place of jurisdiction," ie the court's domestic law.

[55] *Lex causae* means "law applicable to the cause," ie the law applicable to the matter in dispute.

[56] *Ernst Rabel,* Das Problem der Qualifikation, RabelsZ 5 (1931), 241–288, reprinted in: *Hans G Leser* (ed), Ernst Rabel: Gesammelte Aufsätze II, Tubingen 1967, 189–239.

ten neglected. It is, however, the favoured approach for developing and interpreting uniform laws on private international law (on uniform laws, see N 43–44). Drawing on domestic law concepts when applying uniform laws and conventions would contradict the very purpose of unification of law. Thus, domestic courts interpreting the term "habitual residence" used in many of the Hague Conventions[57] may not refer to their domestic laws in order to determine its meaning, but must develop a uniform standard, instead. The comparative law reports compiled during the drafting process of uniform laws can serve as a valuable tool for this task (on the interpretation of uniform law conventions, see below N 97).

The fourth and final method of classification, the so-called *functional* method, is also firmly rooted in comparative law. A court using this method will take the concepts of its domestic law as a starting point for interpretation. Thus, the concept of "marriage" under the Swiss PILA will cover any legal union between man and wife that has similar legal consequences to those provided under domestic Swiss law. In addition, however, the concept will be given a wide meaning in order to encompass foreign institutions that, while not identical to the Swiss concept of "marriage," serve the same *function*. We will explore the functional method of comparative law in more detail in chapter 2. 30

The functional method is usually adopted when courts are dealing with a foreign legal institution that is unknown to their own legal system. A classic example is the Anglo-American *trust.* A trust is an arrangement set up by a person (the "settlor") in order to allow a third party (the "trustee") to hold and administrate property for the benefit of another (the "beneficiary"). In legal systems where this institution is unknown, courts must first "translate" the trust into the conceptual categories of their domestic law; only then can they apply their provisions on private international law. A decision by the Swiss *Bundesgericht* (Federal Supreme 31

[57] The Hague Conventions are conventions developed by the Hague Conference on Private International Law with a view to unifying various areas of private international law. The Hague Conference is an inter-governmental organisation founded in 1893. It currently has 74 members (73 states and the European Union) representing all continents. Its conventions cover such different areas as the taking of evidence abroad, access to justice, international child abduction, maintenance obligations, recognition of divorces, and securities held with an intermediary. Many of these conventions have been extremely successful. For a list of the Hague conventions, see ‹www.hcch.net/index_en.php?act=conventions.listing›, accessed 31 August 2013.

Court) illustrates this method. The court noted that "the legal institution of the trust [...] is unknown to Swiss law. [...] We must therefore examine the legal effects of the trust in dispute and determine which Swiss legal institution it is most similar to."[58] After a detailed examination of the elements of the trust in question, the court decided that in Swiss domestic law, similar legal effects could be achieved by means of a contract. Accordingly, the dispute was treated as a contractual dispute and the conflict of laws rules on contracts were applied.[59]

c. The *Ordre Public* Exception

32 The *ordre public* (public policy) exception is a kind of "emergency stop" in private international law. It applies both in the field of conflict of laws and in international civil procedure. Its aim is to protect the fundamental values of the forum state.

33 In the field of conflict of laws, the *ordre public* exception allows the courts to ignore the *lex causae* (see N 28) selected by the conflict of laws rule, but only in exceptional circumstances. Such exceptional circumstances arise when an application of the foreign *lex causae* would breach fundamental values of the forum state. Note that the question is not whether the foreign *provision* violates the forum's *ordre public,* but rather whether its *application* in the case at hand would lead to an unbearable *result*.[60]

34 In order to determine whether the forum's *ordre public* would be violated by an application of the *lex causae,* the court must consider how the dispute would be resolved under domestic law. This process requires a comparison between the foreign and domestic law, which is why the *ordre public* exception is considered a further example of comparative law's "inroad" into private international law.[61]

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58 BGE 96 II 79, 88.

59 BGE 96 II 79, 89; in the meantime, Switzerland has ratified the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition. The PILA now includes a chapter on trusts; see Arts 149(a)ff PILA.

60 See eg Art 21 of the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations): "The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."

61 See eg *Zweigert/Kötz,* 7.

The *ordre public* exception is typically a discretionary measure. It is up to the court to decide whether the application of a foreign law violates the forum's *ordre public* or not. In certain areas, however, the legislator may wish to clarify the meaning of *ordre public.* This approach is illustrated by Art 135(2) of the Swiss PILA.[62] According to this provision, where product liability claims before a Swiss court are governed by foreign law, the maximum amount that may be awarded to the claimant is the amount that would be available under domestic Swiss law. The main purpose of this provision is to prevent Swiss courts from granting punitive damages under US American law, should it apply to the dispute.[63] Applying this provision again requires a comparison between Swiss law and the foreign *lex causae.* 35

In practice, the *ordre public* exception plays a more important role in international civil procedure, where it can, in exceptional circumstances, prevent the recognition and enforcement of a foreign decision. Here also, the starting point for determining whether the foreign decision violates fundamental values of the forum will be the forum's domestic law, and this again implies a comparison.[64] 36

d. Application of Foreign Law

As a consequence of the rules on private international law, a court may have to apply foreign (domestic) law. Several important questions arise in this context:[65] 37

Firstly, it is crucial to know what the procedural requirements for the introduction of foreign law in civil proceedings are. In most continental European countries, the courts must consider the choice of law rules *ex* 38

62 See above fn 53.

63 *Robert P Umbricht/Nicole Zeller*, Commentary on Art 135 PILA, in: Heinrich Honsell/Nedim P Vogt/Stephen V Berti (eds), Basler Kommentar: Internationales Privatrecht, 2nd edn, Basel 2007, para 18; *Paul Volken*, Commentary on Art 135 PILA, in: Daniel Girsberger et al (eds), Zürcher Kommentar zum IPRG, 2nd edn, Zurich 2004, paras 88–93. This provision and the similar rule in Art 137(2) PILA on restraint of competition are sometimes referred to as the *lex americana*.

64 See eg Art 34 of the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters): "A judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought [...]."

65 *Zajtay*, sec 11ff.

officio (*iura novit curia*).[66] Other jurisdictions follow the principle of *facultative choice of law*. This means that – where the subject matter is dispositive – the parties are free to invoke foreign law or refrain from doing so.[67] In consequence, international cases will be adjudicated on the basis of domestic law if the parties do not plead foreign law.[68]

39 Secondly, it is important to determine who is responsible for asserting the contents of the foreign law. In Switzerland, the courts may require the assistance of the parties.[69] In cases dealing with pecuniary rights, Swiss courts can even order the parties to identify the content of the foreign law themselves.[70] In Germany, the Code of Civil Procedure[71] states that foreign law does not need to be proven by the parties unless the particular law is unknown to the court. The court can do its own research, eg by commissioning an expertise. Conversely, in common law jurisdictions it is the parties' task to identify and prove the contents of foreign law.[72] Under the US Federal Rules of Civil Procedure,[73] the court "may consider any relevant material or source (...) whether or not submitted by a party (...)".

40 Thirdly, there is no international consensus regarding the nature of foreign law in civil proceedings. In most civil law countries foreign law is considered to be a matter of *law*. This usually – but not always – means that appeal courts can review the applicability of foreign law with full discretion.[74] In contrast, in common law countries such as England and the USA, foreign law is treated as a *fact*.[75] Accordingly, the parties will have to prove the contents of foreign law, just as they have to prove other facts. This is often done by a declaration of a foreign expert who will

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66 Eg Switzerland (Art 16(1) sentence 1 PILA), Germany, Austria, Italy, Spain, the Netherlands etc, see *Trautmann*, 712.

67 See eg Rule 44.1 of the Federal Rules of Civil Procedure (USA): "A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing."

68 Eg England, France, Hungary; see *Trautmann*, 712.

69 See Art 16(1) sentence 2 PILA.

70 See Art 16(1) sentence 3 PILA. A similar solutions exists in France and the Scandinavian countries: *Trautmann,* 715.

71 Art 293.

72 *Trautmann*, 715.

73 Rule 44.1.

74 Eg Switzerland, Austria, Belgium, Greece, Italy and Germany. There is no full review of foreign law by the supreme courts in France, the Netherlands and Spain, see: *Zajtay*, sec 25ff; *Trautmann,* 713.

75 For a historical background see *Zajtay*, sec 5ff; *Mattei/Ruskola/Gidi*, 53; *Trautmann*, 711.

present the law, its interpretation and application to the litigious question to the judge. One might expect that the appeal courts only have limited discretion to review the applicability of the foreign law by the lower court since foreign law is treated as a fact. A comparative overview reveals that there is no such correlation.[76] Rule 44.1 of the US Federal Rules of Civil Procedure illustrates this approach. It states that the court's determination of foreign law must be treated as a ruling on a question of law. As a result, appellate review will not be narrowly confined by the "clearly erroneous" standard which usually applies to findings of fact.[77] The same holds true for English courts.[78]

A further question the court must deal with is the issue of interpretation 41
of foreign law. In general, the court should "place itself in the shoes of the court of the foreign country and (...) interpret the rule of the applicable foreign law in accordance with the principles of the legal system in question".[79] It should be noted, though, that in practice courts tend to use their own methods of interpretation and not the ones of the applicable foreign law.

When interpreting foreign law, courts are confronted with a wealth of 42
material. They have to consult foreign case law, commentaries or other literature in order to correctly apply the pertinent rules of foreign law. This can be difficult if foreign documents are not accessible or due to language barriers. There are, however, several institutions and conventions that aim to facilitate access to information on foreign law. In Switzerland, the aforementioned Institute of Comparative Law (ISDC) (see N 54) can assist courts with legal opinions. Most European countries have ratified the "European Convention on Information on Foreign Law".[80] Each contracting state has appointed a domestic agency to supply information on its law and procedure in civil and commercial fields as well as on its judicial organisation to the judicial authorities of another

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76 *Trautmann*, 711–713.

77 See the Notes of the Advisory Committee on Rule 44.1, available at ‹www.law.cornell.edu/rules/frcp/rule44.1› accessed 2 September 2013. According to the normal rule, "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous": see Rule 52(a)(6).

78 Parkasho v. Singh [1968], International and Comparative Law Quarterly 1967, 1192-1157/1967 2 WLR 946.

79 *Zajtay*, sec 23ff.

80 Cf ‹http://conventions.coe.int/Treaty/en/Treaties/Html/062 .htm›, accessed 2 September 2013.

contracting state. A similar convention was set up by the Organization of American States (OAS).[81] Recently, there have been suggestions to establish a global system for administrative and/or judicial co-operation under the auspices of the Hague Conference on Private International Law.[82]

e. Unification of Private International Law

43 Because each legal system has its own private international law (see N 22), disputes connected to more than one legal system may be decided differently in different states. In some legal systems, for example, succession is governed primarily by the law of the state in which the deceased was domiciled or habitually resident at the time of death, whereas others favour the law of the state of which the deceased was a national at the time of death.[83] This disparity is at odds with one of the objectives of private international law, which is that disputes should be subject to the same law regardless of the country in which they are adjudicated. This objective can be achieved, at least in part, through the unification of substantive or private international law. In order for such unification projects to succeed, extensive preliminary comparative enquiry is required (see N 250).

44 The Hague Convention on the Law Applicable to Maintenance Obligations[84] and the Rome I Regulation[85] are examples of unified rules on *conflict of laws*. Unified laws on *international civil procedure* ensure that member states follow the same rules when determining their jurisdiction. The Lugano Convention[86] and the Hague Convention on Parental Responsibility and Protection of Children[87] are examples of unified rules on international civil procedure.

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81 Cf ‹www.oas.org/juridico/english/treaties/b-43.html› accessed 2 September 2013.

82 *Shaheeza Lalani*, A Proposed Model to Facilitate Access to Foreign Law, in: Andrea Bonomi/Gian Paolo Romano (eds), Yearbook of Private International Law 2011 (13), 299–313, 300ff.

83 Contrast eg Art 90(1) Swiss PILA with Art 25(1) German EGBGB.

84 Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations; on the Hague Conventions, see above fn 60.

85 See above fn 63.

86 Lugano Convention of 30 October 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

87 Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

4. Public International Law

Public international law is the body of law that governs the relations between states or intergovernmental organisations (eg the European Union, the United Nations or the World Trade Organisation). Unlike comparative law (see N 3), public international law is a body of positive law. Although comparative law and public international law are clearly distinct, comparative law also has a contribution to make to public international law, in particular to the law of treaties. Treaties form part of public international law, as they are concluded by, and binding on, sovereign states or intergovernmental organisations. This is also true for those treaties that deal with the unification of private international or substantive law (eg the Lugano Convention,[88] the Hague Conventions[89] or the CISG).[90] In order for such conventions to succeed, a certain international consensus on their content must be reached, and such consensus is generally predicated on preliminary comparative research. Extensive comparative reports are usually compiled during the drafting process of international conventions.[91] 45

Another potential meeting point between comparative law and public international law is the field of treaty interpretation. General rules on the interpretation of international treaties are included in Arts 31–33 of the Vienna Convention on the Law of Treaties (VCLT).[92] Although none of these rules refer to comparative law (and it is still controversial whether the VCLT's rules even apply to conventions on uniform private law),[93] it has often been suggested that comparative law could serve as an additional tool for treaty interpretation.[94] However, while such an approach 46

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88 See above fn 90.
89 See above fn 60.
90 On the relationship between uniform private law conventions and the law of treaties, see *Basedow,* 11 Unif L Rev 731–747 (2006).
91 See eg *Bischoff*, 982, 985.
92 On these rules see *id*, 982, 983–985; *Linderfalk*, 2–3, 133–192. The VCLT was concluded in Vienna on 23 May 1969 and entered into force on 27 January 1980. As of 24 August 2013, the Convention has entered into force in 112 states.
93 See *Basedow*, 11 Unif L Rev (2006), 731, 741–745; *Bischoff*, 982, 983; *Linderfalk*, 3–4; all in favour of the VCLT's application.
94 See eg *Wolfgang Meyer-Sparenberg*, Staatsvertragliche Kollisionsnormen, Berlin 1990, 110 with further references; *Arnold F Rusch*, Methoden und Ziele der Rechtsvergleichung, Jusletter (13 February 2000), para 10; *Karin Linhart,* Internationales Einheitsrecht und einheitliche Auslegung, Tubingen 2005, 211; *Niklaus Meier*, Auslegungseinheit von LugÜ und EuGVVO – unter besonderer Be-

can be reconciled with the VCLT's provisions,[95] there are practical difficulties to consider. Only few courts have the time and resources to base their judgments on extensive comparative studies.[96]

II. The Origins of Comparative Law in Europe

A. Continental Europe

47 There are many precedents for comparative endeavour in the history of law, going back at least as far as ancient Greece.[97] The beginnings of the modern study of comparative law in continental Europe, however, are generally traced to the second half of the 19th century.[98] It was then that "comparative law" began to be recognised as a science (or at least a method; on this debate, see N 2), that its aims and benefits were systematically studied and discussed, and that it received its name of "comparative law."[99]

48 On the Continent, the development of comparative law goes hand in hand with the fundamental changes that took place in the legal landscape of 19th century Europe. Up until the 18th century, the local laws and customs were primarily the concern of practitioners and politicians.[100] The law that was studied and taught by scholars, however, was Roman and Canon law. The study of Roman law in particular contributed to a common continental tradition that transcended the disparities in local laws and customs.

rücksichtigung der Schweizer Beteiligung am Vorabentscheidungsverfahren vor dem EuGH, SZIER (2012), 633, 636; *Linderfalk*, 13.

95 Cf *Bischoff*, 982, 985.

96 *Id*, 985.

97 On the history of comparative law, see *Zweigert/Kötz,* 48–62; *Gutteridge,* 11–22; *David/Brierley,* 1; *Walther Hug*, The History of Comparative Law, 45 Harv L Rev 1027–1070 (1932); *Charles Donahue,* Comparative Law Before the Code Napoléon, in: Mathias Reimann/Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law, Oxford 2008, 3–34.

98 Cf *Gutteridge,* 17; *Grossi*, 125; *David/Brierley,* 2–3.

99 *David/Brierley,* 2.

100 *Id,* 2.

Everything changed, however, in the 19th century, "the century of states, of laws and of codes."[101] The codification movement began in the late 18th and 19th century. Sparked by the philosophy of the Age of Enlightenment, it led to the nationalisation of the law on the European Continent. Scholarship was no longer concerned with Roman and Canon law, but with the new codes and their exegesis. Likewise, the focus of legal studies at the universities changed.[102] 49

The birth of "national laws" and the shifting of focus that came with it was, at first, not conducive to comparative law in the modern sense of the term. Comparative studies were made, but with a few exceptions – notably those of German scholar *Carl Joseph Anton Mittermaier* (1787-1867)[103] and French scholar *Jean Jacques Gaspard Foelix* (1791-1853)[104] – their focus lay on description.[105] Their main purpose was to provide the drafters of the new national laws with information on foreign legislation.[106] This type of comparative endeavour was a means to a very practical end, a helpful tool in the legislative process. By the middle of the 19th century, however, the practical interest in foreign laws had waned. The law – and legal scholarship – had became nationalised and insular, and the legal landscape in Europe appeared "as an archipelago of legal systems, each wedded to its own insularity."[107] 50

Although the fragmentation of laws in 19th century Europe initially prevented the "openness of climate"[108] necessary for comparative law in the modern sense of the term to develop, it was, at the same time, also a prerequisite to its birth. For with the nationalisation of law came the distinction between "domestic" and "foreign" law, and without that distinction, 51

[101] *Grossi*, 125.
[102] *David/Brierley,* 3.
[103] *Carl Joseph Anton Mittermaier* was a scholar in criminal law and criminal procedure. Together with *Heinrich Albert Zachariä* (1806-1875), he co-founded and co-edited the world's first comparative law journal, the *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes,* which first appeared in 1829. See *Hug,* 45 Harv L Rev 1027, 1057–1060 (1932).
[104] *Jacques Gaspard Foelix* founded the *Revue étrangère de législation et d'économie politique,* which first appeared in 1834. See *Hug,* 45 Harv L Rev 1027, 1061–1062 (1932).
[105] Cf *Ranieri*, 221, 225–226.
[106] See in particular *Zweigert/Kötz,* 53–55; *Schwenzer,* Oxford Handbook, 69, 74–75.
[107] *Grossi*, 125.
[108] The phrase is borrowed from *Grossi*, 125.

there would be no comparison.[109] In the final analysis, the development of comparative law on the Continent was a reaction to the fragmentation of laws in the 19th century.[110]

52 Several steps mark the development of modern comparative law on the Continent. The second half of the 19th century saw the creation of new societies and institutions dedicated to comparative law, starting with the *Société de législation comparée* in Paris in 1869.[111] New journals dedicated to comparative law were launched, such as the *Zeitschrift für vergleichende Rechtswissenschaft* (ZvglRWiss),[112] and, perhaps most importantly for the academic discipline of comparative law, universities established new Chairs of comparative law.[113] The efforts to strengthen comparative law as a proper academic discipline found their culmination in the first International Congress of Comparative Law that took place in Paris from July 31 to August 4, 1900, at the same time as the World Exhibition (*Exposition Universelle*).[114] For the first time, scholars from across Europe came together and debated the purposes, utility and methods of comparative law, with a particular focus on the role of comparative law in legal education.[115] The Paris Congress is inextricably linked to the names of French scholars *Saleilles* (see N 1) and *Lambert* (see N 6). *Saleilles,* who organised the Congress on behalf of the *Société de législation comparée,* held the Chair of Civil Law at the Paris Law Faculty and was a renowned scholar. The younger *Lambert* was a member of the Law Faculty in Lyon. It was he who wrote the general report on the concept, methods and purposes of comparative law presented at the Paris Congress.[116]

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109 Cf *Ranieri*, 221, 224.
110 *David/Brierley,* 3; *Glenn,* Aims, 65, 66.
111 The society exists to this day; see ‹www.legiscompare.fr›, accessed 31 August 2013.
112 See *Gutteridge,* 17–8.
113 *Zweigert/Kötz,* 59–61.
114 On *Saleilles* and *Lambert,* see *Jamin*, 50 Am J Comp L 701 (2002).
115 On the objectives of the Congress, see *Raymond Saleilles,* Rapport présenté à la Commission d'organisation sur l'utilité, le but et le programme du Congrès, in: Congrès international de droit comparé: Procès-verbaux des séances et documents I, Paris 1905, 14–15. The minutes (*procès-verbaux*) of the Congress are available in their entirety at ‹http://archive.org/stream/congrsinternati00compgoog#page/n9/mode/2up›, accessed 31 August 2013
116 Congrès international de droit comparé: Procès-verbaux des séances et documents I, Paris 1905, 26–61. For the internet link to the minutes (*procès-*

Several aspects of the Paris Congress are essential to a proper understanding of comparative law as it developed on the Continent in the 20th century. Firstly, the vast majority of participants were continental Europeans.[117] With a few exceptions, they were concerned only with the legal systems of the modern states of Europe,[118] which, given the comparative youth of these states, is perhaps not surprising.[119] Nonetheless, the Paris Congress lay the foundation of what in recent years has come to be criticised as the Euro-centric approach of comparative law.[120] Moreover, although reports on public and criminal law were also included,[121] the main focus of the Congress lay on *private* law. To this day, comparative law research is mainly pursued by private law scholars,[122] although comparative public law, in particular comparative constitutional law, has gained in importance. 53

Comparative law's development did not, of course, stop in 1900. In particular, several important comparative law institutes were founded after the Paris Congress, many of which still operate today. Most of the institutes dedicated to comparative law were established after World War I, but already in 1916, Austrian-born *Rabel*[123] founded an institute for comparative law in Munich. *Rabel* was a highly influential scholar and comparatist. He held Chairs at various universities in Germany and Switzerland and, in 1926, became the first director of the newly established *Institut für ausländisches und internationales Privatrecht* (Institute for foreign private law and private international law) in Berlin.[124] The Insti- 54

verbaux) of the Congress, see above fn 116; see also *Jamin,* 50 Am J Comp L 701–702 (2002).

117 For the provenance of the reporters at the Congress, cf the index in: Congrès international de droit comparé: Procès-verbaux des séances et documents II, Paris 1907, 609–621. For the internet link to the minutes (*procès-verbaux*) of the Congress, see above fn 116.

118 Cf the index in: Congrès international de droit comparé: Procès-verbaux des séances et documents II, Paris 1907, 609–621.

119 Cf *Mathias Reimann,* Beyond National Systems, 75 Tul L Rev 1103, 1103–1105 (2001).

120 See *William Twining,* Comparative Law, 49–51.

121 See the index in: Congrès international de droit comparé: Procès-verbaux des séances et documents II, Paris 1907, 609–621.

122 *Örücü*, 171–179.

123 See above fn 58. On *Rabel's* importance for the development of comparative law, see *Schwenzer,* Oxford Handbook, 69, 77–79.

124 Because of his Jewish origins and the Nuremburg laws, *Rabel* was forced to abdicate in 1937. Like many of the leading intellectuals of the time, he emigrated to the USA in 1939, but returned to Germany in 1950.

tute, which was financed in particular by the *Kaiser Wilhelm Gesellschaft,* relocated to Tubingen and finally to Hamburg, where it still operates today as the *Max-Planck-Institut für ausländisches und internationales Privatrecht*.[125] 1920 saw the creation of the *Institut de droit comparé* (Institute of Comparative Law) in Lyon, which is still operated today under the name of its founder, *Édouard Lambert*.[126] The International Academy of Comparative Law (*Académie internationale de droit comparé*), which organises an international congress every four years, was established in 1924 at The Hague.[127] Further institutes have been foundes since then, such as the *Institut suisse de droit comparé* (ISDC) in Lausanne.[128]

B. England

55 The codification movement, a defining moment for the development of comparative law on the Continent (see N 49), completely bypassed England (see N 611). Because the "nationalisation" of law had taken place far earlier in England than on the Continent (see N 49), English lawyers were also accustomed to distinguishing between "foreign" and "domestic" law long before their colleagues on the Continent were (see N 51). Nonetheless, although "it was in England, the reputed home of legal isolationism, that much of the pioneering work in the domain of comparative law was carried out,"[129] this was mainly due to the isolated efforts of individuals.[130] Comparative law as a *systematic* discipline started at much the same time in England as it did on the Continent, ie in the 19th century.[131]

56 As on the Continent (see N 50), interest in foreign laws was fuelled primarily by practical concerns. The vast British Empire brought judges and practicing lawyers into contact with the foreign laws of the colonies and other countries, and access to these laws was crucial. The Judicial Committee of the Privy Council, which was the highest appellate court for the

125 See ‹www.mpipriv.de›, accessed 31 August 2013.
126 *Institut de Droit Comparé Édouard Lambert*; see ‹http://idcel.univ-lyon3.fr›, accessed 31 August 2013.
127 See ‹www.iuscomparatum.org›, accessed 31 August 2013.
128 See ‹http://isdc.ch›, accessed 31 August 2013.
129 *Gutteridge,* 13.
130 On these efforts see in particular *Gutteridge,* 11ff.
131 Cf *Gutteridge,* 17.

entire British Empire (except for the United Kingdom itself), heard appeals from extremely diverse legal systems, including Roman-Dutch law, French customary law, Spanish law, the French *Code civil*, Hindu law and Muslim law.[132] Commercial lawyers needed to acquire knowledge of foreign laws as world-wide trade expanded.

In order to meet these needs, British lawyer *William Burge* (1786-1849) 57
published his famous treatise, the "Commentaries on Colonial and Foreign Laws," in 1838. The Commentaries provided information on the laws of the British Empire, Scotland and other European states[133] and also included a comparative analysis of disciplines such as family and inheritance law. *Burge*'*s* treatise was for a long time considered the main work on comparative law both on the Continent and in the USA.[134] Practical concerns also fuelled the remarkable treatise on the "Commercial Law of the World" by the Italian-born British lawyer *Leone Levi* (1821-1888) published in 1850-1852. *Levi* was the first to promote the idea of a unified commercial law for the whole British Empire.[135] The utility of comparative law was also emphasised by Sir *Henry James Sumner Maine* (1822-1888), professor of historical and comparative jurisprudence at Oxford since 1869. According to *Maine,* the chief function of comparative studies was to facilitate legislation.[136]

The needs of the Privy Council and commerce led to the foundation of 58
the Society for Comparative Legislation in 1895.[137] In 1958, the Society merged with the Grotius Society, which had been founded in 1915 to advance the study of international law. It was renamed the British Institute of International and Comparative Law and operates to this day.[138]

132 *Cairns,* 131, 134; *Zweigert/Kötz,* 56.
133 *Cairns*, 131, 134.
134 *Hug,* 45 Harv L Rev 1027, 1064–1065 (1932).
135 See *Gutteridge,* 16; *Hug,* 45 Harv L Rev 1027, 1065–1066 (1932).
136 See *Cairns*, 131, 138.
137 *Id,* 131, 138–139.
138 See ‹www.biicl.org›, accessed 31 August 2013.

III. Purposes and Benefits of Comparative Law

A. Introduction

1. The Point of the Question

59 What are the purposes and benefits of comparative law? The question was first asked at the first International Congress of Comparative Law in Paris in 1900 (on the Paris Congress, see N 52). Much has been written – and controversially discussed – about the matter since then. One of the controversies is whether comparative law has to be "useful" or whether it is not sufficient as an end in itself.[139] Italian comparatist *Rodolfo Sacco* has argued that enquiring after the purposes and benefits of comparative law is "asking the wrong question,"[140] as it implies a need for justification. Be that as it may, the practical and theoretical uses of comparative law can help us better understand its nature.

60 Generally, the purposes and benefits will vary depending on the context in which comparative law is used: educational, academic, or practical.[141] The following is a selection of the vast number of purposes and benefits suggested in the literature.

61 A number of general purposes and benefits are common to all comparative law endeavour:

– comparative law helps increase our knowledge and understanding of the law.[142] As *Rabel* (see N 29) succinctly wrote: the purpose of comparative law is the quest for knowledge;[143]

– comparative law facilitates access to foreign legal systems through description and analysis of their differences and similarities;[144]

139 Cf *Nelken*, 1, 32–39; *Glenn,* Aims, 65, 67.
140 *Sacco,* 14.
141 Cf eg *Zweigert/Kötz*, 15–31; *Cotterrell*, 130–131; *Mattei/Ruskola/Gidi*, 2.
142 *Marc Ancel,* Utilité et méthodes du droit comparé, Neuchâtel 1971, 10; *David/Brierley,* 6–13; *Glendon/Carrozza/Picker*, 6–7; *Koch/Magnus/von Mohrenfels*, 278; *Sacco*, 17–19; *Zweigert/Kötz*, 15.
143 *Ernst Rabel,* Aufgabe und Notwendigkeit der Rechtsvergleichung, Rheinische Zeitschrift für Zivil- und Prozessrecht 13 (1924), 279, 285, reprinted in: *Hans G Leser* (ed), Ernst Rabel: Gesammelte Aufsätze III, Tubingen 1967, 1, 6.
144 *Gutteridge,* 8.

– comparative law promotes cross-cultural understanding,[145] a view which has, however, been criticised as "overly sentimental."[146]

2. Purposes and Benefits in Academia

Comparative law has an important role to play in academia.[147] The following purposes are traditionally identified in this context: 62

– comparative law teaches students and scholars that their national laws and institutions are not the only ones in the world, and not necessarily the best, either;[148]

– studying and comparing foreign laws and legal systems can deepen students' and scholars' understanding of their own system by giving them a more distanced view of their own law, offering new insights and challenging their perceptions of what the law is or should be;[149]

– a heightened awareness and appreciation of difference will aid students and scholars in their professional dealings with foreign lawyers, for they will have learnt that not all lawyers share the same concepts or think alike; thus, comparative law facilitates communication;[150]

– comparative law opens the mind to novel approaches and solutions that might help improve one's own legal system.[151]

– comparative law broadens scholars' horizon, allowing them to better analyse and challenge the rules and institutions of their own legal system, to find sources of inspiration, discuss alternatives and contribute novel solutions to domestic law;[152]

– awareness and appreciation of the differences between legal systems can promote and strengthen cross-border research and collaboration;

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145 Cf *René David/Camille Jauffret-Spinosi,* Les grands systèmes de droit contemporains, 11th edn, Paris 2002, para 11.
146 *Sacco,* 15.
147 See in particular *Gutteridge,* 127–144; *Rheinstein,* 1 Am J Comp L 95 (1952).
148 See eg *Rheinstein,* 1 Am J Comp L 95, 104 (1952); *Zweigert/Kötz*, 20–21.
149 Cf *Rheinstein*, 1 Am J Comp L 95, 104 (1952); *Zweigert/Kötz,* 21; *Pierre Lepaulle*, The Function of Comparative Law with a Critique of Sociological Jurisprudence, 35 Harv L Rev 838–858 (1922); *Koch/Magnus/von Mohrenfels*, 279.
150 See *Rheinstein,* 1 Am J Comp L 95, 104 (1952); *Glendon/Carrozza/Picker*, 5.
151 See eg *Rheinstein,* 1 Am J Comp L 95, 104 (1952); *David/Brierley*, 6–7; *Watson*, 17.
152 See eg *Koch/Magnus/von Mohrenfels*, 279; *Glendon/Carrozza/Picker*, 7.

- awareness and appreciation of the differences between legal systems can also facilitate the harmonisation and unification of the law. This goal is often pursued or prepared by academics (N 128), but has come under increasing criticism in recent years by comparatists who "seek to defend the virtues of diversity."[153]

63 We will explore the potential advantages of comparative law for academics in more detail below (N 67).

3. Purposes and Benefits in Legal Practice

64 Comparative law is also an important tool for legislators, courts and practitioners.[154]

- Comparative law can be an important tool for law reform.[155] In particular, it can be used in the process of preparing or improving legislation, as it allows the legislator to study solutions adopted in other legal systems and to benefit from their experience;[156]
- comparative law endeavour is essential for harmonising or unifying the law across national borders.[157] We will explore this in more detail below (N [■]);
- comparative law can help courts verify the appropriateness of traditional solutions of their legal system.[158] It can also inspire or lend sup-

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153 The phrase is borrowed from *Nelken,* 3, 25; on the benefits of diversity see in particular *Pierre Legrand*, The Same and the Different, in: Pierre Legrand/Roderick Munday (eds), Comparative Legal Studies: Traditions and Transitions, Cambridge 2003, 240, 277; *id,* European Legal Systems are not Converging, 45 ICLQ 52–58 (1996); *id*, Antivonbar, 1 JCL 13–38 (2006); *Glenn*, Legal Traditions, 377*;* see also *Paul Feyerabend,* Farewell to Reason, 4th edn, London 1999, 99.

154 See generally *Patrick H Glenn,* Comparative Law and Legal Practice: On Removing the Borders, 75 Tul L Rev 977–1002 (2001).

155 See eg *Otto Kahn-Freund,* On Uses and Misuses of Comparative Law, 37 MLR 1–27 (1974).

156 See eg *Koch/Magnus/von Mohrenfels*, 278.

157 See eg *Joachim Michael Bonell*, The UNIDROIT Principles of International Commercial Contracts, in: Roger Cotterrell (ed), Process and Substance: Butterworth Lectures in Comparative Law 1994, London 1995, 45–107; *Werner Menski*, Comparative Law in a Global Context, 2nd edn, Cambridge 2005; *James Gordley*, Comparative Legal Research: its Function in the Development of Harmonized Law, 43 Am J Comp L 555–567 (1995).

port to novel solutions to problems which have already been adjudicated in other legal systems;[159]

- comparative law is especially important in the European Union. EU regulations and directives are often based on comparative law;[160]
- the European Court of Human Rights also draws on the national law of member states in its decisions;[161]
- comparative law can supply practioners with additional legal arguments when issues arise that have not yet been decided in domestic courts.

We will explore the potential advantages of comparative law in practice in more detail below (N 104–111). 65

B. A Tool for Academia

Comparative Law has been recognized as an academic discipline since the late nineteenth/early twentieth century.[162] Most law schools around the globe nowadays incorporate one or the other course on comparative or foreign law in their curriculum.[163] There are a number of LLM programmes specialising in comparative law. 66

Yet, curiously enough, it cannot be said that the comparative law method is universally used in legal academic publications. Probably the majority of publications deal with the respective problem from a purely national perspective (apart from those dealing with genuinely international topics). This is a pity since the comparative law method 67

158 For a highly controversial example, see the US Supreme Court decision *Roper v Simmons* 543 US 551, 125 S Ct 1183, in which comparative law was used by the majority of the court to support their rejection of the death penalty for criminal offenders under 18 in domestic law.

159 See eg *Fairchild v Glenhaven* [2002] UKHL 22 at [23]-[32]. On the role of comparative law in case law, see generally *Ulrich N Drobnig/Sjef van Erp,* The Use of Comparative Law by Courts, The Hague 1998.

160 See eg *Bischoff*, 982ff.

161 See *François R van der Mensbrugghe,* Comparative Methodology as a Means of Dissipating Tension, in: François R Van der Mensbrugghe (ed), L’utilisation de la méthode comparative en droit européen, Namur 2003, 41–66.

162 *Peter de Cruz*, A modern approach to comparative law, Deventer 1993, para 1.6.

163 *Zweigert/Kötz*, 21–24.

– helps to expand the knowledge of the law by studying foreign laws;
– serves to appraise the quality of the domestic law;
– lends a fresh perspective on legal concepts of the own legal system;
– makes it easier to discover different solutions to similar problems[164] and
– is an inspiration for legal doctrine to introduce new models and concepts.[165]

68 So, to conclude, the comparative law method is an important tool for legal research, which in turn helps the other persons involved in legal affairs (legislators, judges, attorneys etc.) to better understand the problems and issues involved in certain areas of domestic and foreign law.

C. A Tool for the Legislator

1. Historical Development

69 Throughout the history of law there has been a close interplay between legislation and comparative law. We jump right to the 19th and 20th century to illustrate this assumption. At that time the European countries all faced similar economic and social problems: land reform, introduction of market economy and the challenges of industrialization. It therefore does not come as a surprise that the legislators influenced one another eg in the area of commercial, corporate, competition, maritime and securities law as well as real-estate credit.[166]

[164] *Rheinstein*, 13.
[165] Examples from German legal scholarship can be found in: *Ranieri*, 240–242; *Ted M de Boer*, The Missing Link – Some thoughts on the relationship between private international law and comparative law, in: Katharina Boele-Woelki/Willem Grosheide/Ewoud Hondius/Gert Steenhoff (eds), Comparability and Evaluation – Essays on comparative law, private international law and international commercial arbitration – In honour of Dimitra Kokkini-latridou, Dordrecht/Boston 1994, 15–25, 17.
[166] *Tanja Guddat,* Ein europäischer Jurist des 19. Jahrhunderts – Jean-Jacques G. Foelix und die rechtsvergleichende Methode im (internationalen) Privatrecht, Berlin 2006, 153; *Zweigert/Kötz*, 16.

This is not to say that this cross-fertilization necessarily depends on the 70
similarity of the underlying social and economic conditions. It can be argued that legal rules can be taken out of context and nevertheless serve as a valid model for a legal development in and for a different society, even though their effects in practice are different.[167] We will come back to that issue in chapter 4 (see N [■]).

At the same time France, Germany, England and the United States of 71
America were also exporters of legal ideas. Some of the Codes in Asia and in Latin America are the result of extensive comparative study and adoption of these models. Turkey has taken over the Swiss Civil Code (Schweizerisches Zivilgesetzbuch, ZGB) and the Swiss Code of Obligations (Schweizerisches Obligationenrecht, OR) which still is in force today. Japan adopted the German Civil Code (Bürgerliches Gesetzbuch, BGB). Of course reception is not always voluntarily but it can be forced through military or political pressure (see N 77).This is what happened to some developing countries in Africa.[168]

2. Purpose

There are several reasons for a legislator to use comparative law in the 72
process of law-making:

– It can be that a legal, economic or social problem arises that domestic law does not deal with properly. Comparative law helps the legislator to understand the problem, serves as a source of inspiration and as an eye-opener to solutions that could not be envisioned by simply working in the realm of domestic law.[169]

– Comparative law can help to prevent legislative mistakes when drafting an act.[170] The comparative analysis will show what has worked (or not) in the foreign legal system. Possible flaws in a reform proposal can thus be identified.[171]

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[167] *Watson Alan,* Legal change – Sources of Law and Legal Culture, 131 University of Pennsylvania Law Review 1121–1157, 1146–1147 (1983).
[168] Cf *Mattei/Ruskola/Gidi*, 223–227/230–235; cf as well *De Cruz,* 20; *Glendon/Gordon/Carozza*, 45.
[169] *Glendon/Gordon/Carozza*, 4/6–7.
[170] *Rheinstein,* 13.
[171] *Mattei/Ruskola/Gidi*, 277.

– The study of foreign models and the (reasonable) transformation into national law can improve economic efficiency and wealth-producing capacity. One interesting example is the task of many legislators to deal with the excesses and mismanagement in companies. One strategy is to implement principles of corporate governance in company law to strengthen and protect the rights and interests of the various stakeholders of an organization, to substantiate the role and responsibilities of the board, to encourage integrity and ethical behavior of the management as well as to ensure disclosure and transparency.[172] In this area a lot can be and has been learned from the Common Law legislators such as the UK or the USA.

73 One has to bear in mind, though, that the national legislator has to always carefully check if the foreign solution has stood the test of time in the country of origin and if it is suitable for the domestic system with its own legal, economic, social and political structure.[173]

3. Scope of Application of Comparative Law

a. New Domestic Legislation

74 An obvious case for the use of comparative law is the drafting of a new piece of domestic legislation. This presents the drafters with the chance to get inspired by foreign law (see N [■]).

b. Ratification of International Law

75 Comparative studies have an important function when a state is considering to ratify an existing international convention or treaty. The responsible ministry, often either the Ministry of Justice or the Foreign Department, has to assess the rules contained in the respective convention and compare it with the legal rules and principles of domestic law.

76 This comparative assessment is even more important in countries where a separate national act is necessary to transform international law into national law ("dualistic" system).[174] These countries, eg England, the

[172] See *Glenn*, 61.
[173] *Zweigert/Kötz*, 17.
[174] See *Rolf Herber*, Die Vorbereitung eines Gesetzesentwurfs innerhalb der Bundesregierung, in: Werner Maihofer *et al* (eds), Theorie und Methoden der Gesetzgebung, Frankfurt aM 1983, 31–40, 31, 33, 36–38.

Scandinavian countries or Germany, consider international law and national law to be two separate systems. For that reason the rules contained in international conventions or supranational law such as European law have to be explicitly transformed into national law to be effective. Switzerland, the United States of America and most of the European countries are monistic systems: International conventions are self-executing and are part of national law as soon as they come into force.[175]

c. Reconstruction of a Legal System

77 A third scope of application of comparative law in legislation is when a country undergoes a severe political and/or economic transformation and old structures are entirely wiped out. Historically, this happened in colonial time when the colonizing powers forced laws similar to their own on the colonies[176] and again in the process of decolonization in Africa after World War II.[177]

78 This process also took place when the former communist regimes in Eastern Europe broke down (1985–1990). In a relatively short time the entire private law had to be recreated to match the new political and economic realities. The European Union and the United States of America sent specialists to Russia and other countries of Central and Eastern Europe for the preparation, drafting, as well as the educational and administrative implementation of the new laws that were largely a product of comparative law studies.[178] The result is a mix of civil and common law with occasional references to international conventions such as the United Nations Convention on Contracts for the International Sale of Goods (CISG).[179]

[175] *Philip Kunig,* Völkerrecht und staatliches Recht, in: Wolfgang Vitzthum *et al* (eds), Völkerrecht, Berlin 2013, 61–130 paras 1–187, 77–78, paras 30–31, 82–89, paras 47–61; *Matthias Herdegen*, Völkerrecht, 12th edn Berlin 2013, 166–168 paras 1–4.
[176] *Barak-Erez,* 15 Colum J Eur L 477, 481–482 (2009); *Örücü*, 98.
[177] *Kötz,* RIDC (1999), 753–758.
[178] *Zweigert/Kötz*, 17; *De Cruz*, 20.
[179] *Kötz*, RIDC (1999), 753–758s.

4. Some Examples

a. Switzerland

79 Comparative studies are often undertaken for the *lex ferenda* in private law. The Ministry of Justice will either do the research itself or outsource it to the ISCL in Lausanne. The ISCL is a federal agency with the legal mandate to provide legal advice and assistance in all areas of national legal systems, international private and public law and European law. A typical example of the ISCL's work is an extensive comparative study on the law of prescription in Germany, France, England and Denmark that was written for the legislative project on a reform of the Swiss law of prescription.[180]

80 Before the Federal Parliament debates a bill the Federal Council prepares a dispatch which contains the legislative draft itself, the results of the consultation process and a commentary on the articles of the draft. According to Art 141(1) and (2)(a) of the Parliament Act (Parlamentsgesetz, ParlG) this dispatch has also to include a commentary on the compatibility of the proposed law with international and European law. This provision forces the drafters of a bill to do (at least some) comparative studies on the subject to make sure that the legislative draft is in line with European law. Comparative studies are resource-intensive which is why the extent of the research will vary depending on the subject area as well as the economic impact and importance of the law in question.[181]

b. Nordic Countries

81 Sweden, Denmark, Norway and Finland traditionally try to coordinate their national laws or even unify them.[182] A good example is the sales

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180 ‹www.bj.admin.ch/content/dam/data/wirtschaft/gesetzgebung/verjaehrungsfristen/gutachten-sir-d.pdf›, accessed 2 September 2013.

181 See eg Swiss Federal Dispatch for the amendment of the Swiss Civil Code of the 28 June 2006, FF 2006 7001ff, 7024–7025, where the comparative notes are just half a page with a brief summary of other countries reform projects; more extensive are the comparative explanations in the Swiss Federal Dispatch of the amendment of the code of obligations of the 21 December 2007, FF 2008 1589ff, 1630, which makes sense since there is a lot of European regulation in the area of accounting law.

182 *Harald Kindermann*, Aktuelle Probleme der Gesetzgebungslehre – Ein Diskussionsbericht, in: Werner Maihofer *et al* (eds), Frankfurt aM 1983, 87–100, 93.

law. Before the CISG came into force the Sale of Goods Acts of Denmark, Norway, and Sweden were virtually identical.

c. Common Law Countries

In England (and Scotland) it is the Law Commission that "reviews areas of the law that have become unduly complicated, outdated or unfair. Following a process of research and consultation, the Commission makes recommendations for reform of the law to Government."[183] The Law Commission is an advisory non-departmental public body sponsored by the Ministry of Justice. 82

According to Art 3(1)(f) of the Law Commission Act of 1965, it is the duty of the Commission "to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions." The comparative method is thus an important tool for the Commission in fulfilling its duty. 83

The United States (federal and state) legislators are more reluctant to study the comparable laws of foreign countries when drafting new legislation.[184] 84

d. European Union

It goes without saying that the comparative law method is important for the preparation (and implementation) of EU legislation.[185] It is indispensable to compare member states laws if the goals of an economic and political union shall be reached. A single market requires a standardized set of law that in turn has to allow for the individual characteristics of national laws. This is especially true for the recent efforts to create a harmonized European private law (see N [■]). 85

5. A Cautionary Word

As we have pointed out, comparative law is an important and useful tool for the legislator. At the same time it must not be overestimated. Firstly, 86

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183 ‹http://lawcommission.justice.gov.uk/about/what-we-do.htm›, accessed 25 November 2013.
184 *Mattei/Ruskola/Gidi*, 244.
185 *Michaels*, 299–300.

extensive comparative research is expensive and time-consuming. The realities of contemporary legislative processes are that ministries are often understaffed, lack the financial resources and that political pressure forces the legislator to produce bills fast. Secondly, Members of Parliament do not always have the time (and patience) to sift through elaborate essays on foreign law and think about how to adopt it into domestic law. The danger therefore is that comparative law is reduced to citing a couple of provisions of a foreign law in a report to confirm a preset outcome.[186] Thirdly, the selection of the laws to be compared can be arbitrarily or influenced by the desired result.

87 Furthermore, the use of comparative law can lead to an unwanted "race to the bottom" when foreign solutions are adopted for purely economic reasons or to position the country in a more favorable position on the international market. Examples are the enactment of lenient tax legislation for companies (such as eg in Delaware) to attract investors or lowering labor or consumer protection regulation for the sake of stimulating economic growth.[187]

D. A Tool for the Judiciary

1. Relevance of Comparative Law in the Courtroom

88 There are mainly three situations where comparative law can be an important tool for the judiciary: Firstly, when the courts have to apply foreign law because of the rules of private international law; secondly, when they interpret domestic law and thirdly, when they have to fill a gap in domestic law.

89 The use of comparative law in the courtroom is independent of the legal system. Comparative law can contribute to the development of the law

[186] *Gerard-René De Groot/ Hildegard Schneider*, Das Werturteil in der Rechtsvergleichung – Die Suche nach dem besseren Recht, in: Katharina Boele-Woelki (ed), Comparability and evaluation – Essays on comparative law, private international law and international commercial arbitration – In honour of Dimitra Kokkini-latridou, Dordrecht/Boston 1994, 53–68, 62–63.

[187] *Barak-Erez,* 15 Colum J Eur L 477, 483 (2009).

by the judiciary in various systems; however, not all national courts are equally inclined to make use of it.[188]

a. Interpretation and Gap-Filling of Domestic Law

aa. In General

It depends on the national rules on interpretation if and to what degree the judge can use comparative law as a tool for the interpretation or gap-filling of domestic law.[189] Even when the national courts *could* do it, there are differences in the *willingness* to use the comparative law method.[190] French courts are more or less dismissive,[191] German courts are reluctant[192] and Swiss Courts are more open (see below N [■]). English judges are used to interpreting the law through cases of other common law countries such as the USA, Australia, and Canada; they more and more also show willingness to consider decisions based on civil law.[193] 90

[188] For common law jurisdictions see: *Harold Cooke Gutteridge*, An introduction to the comparative method of legal study & research, 2nd edn Glashütten im Taunus 1971, 37–40; *Mattei/Ruskola/Gidi*, 52–66; *Glenn*, 61; see also N 90 below.

[189] See *Drobnig/van Erp*, 16–17.

[190] See the rather pessimistic outlook of *Drobnig/van Erp*, 4–5: Most courts neither undertake comparisons or the methods used by scholars, nor do they explain why a certain law was selected.

[191] For the historical development see Esmein Adhémar, La jurisprudence et la doctrine, Revue trimestrielle de droit civil (1902), 5–19, 17: *“ (...) il [le droit comparé] ne peut guère être utilisé par la jurisprudence (...). Dans chaque pays la jurisprudence (...) [est] dominée[…] par la technique du droit national”*; also remarkable a quote from the French judge Denis (1910) who addressed the *Cour de cassation* (French Supreme Court) with the words: *“French courts must regard French law as preferable, better, more equitable, incorporating a more refined notion of the law. I would like French courts, whenever they may, to judge in accordance with French rather than with foreign law, which they do not know. I like French law better than foreign law”*, cited in: *Zajtay*, 9.

[192] Many sources (see eg *Zweigert/Kötz*, 19–20) cite three decisions of the German Federal Court where it relied on foreign sources: BGHZ 35, 363 and BGHZ 39, 124: Damages because of an infringement of personality rights; BGHZ 86, 240: wrongful life. It seems, however, that these are more of a singular nature than the norm; *Ranieri*, 244–245; *Hans Dölle*, Der Beitrag der Rechtsvergleichung zum deutschen Recht, in: Ernst von Caemmerer *et al* (eds), Hundert Jahre deutsches Rechtsleben – Festschrift zum hundertjährigen Bestehen des Deutschen Juristentages 1860–1960 II, Karlsruhe 1960, 19–47, 33–34.

[193] *Örücü*, 80–81; *Zweigert/Kötz*, 19–20.

91 It is interesting to note that historically the European courts of the 19th century often incorporated foreign authorities in their decisions, especially notable was the influence of French jurisprudence.[194]

92 Like in legislation, there is (unfortunately) a tendency that comparative law is used to simply reinforce an argument for a particular point that has been reached through the "normal" domestic methods and reasoning.[195] Such usage of the comparative law method can be said to be purely "ornamental".[196]

bb. The Swiss Example

93 In Switzerland Art 1 Swiss CC is pertinent to interpretation: (1) *"The law applies according to its wording or interpretation to all legal questions for which it contains a provision"*. (2) *"In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator."* (3) *"In doing so, the court shall follow established doctrine and case law."*

94 In general there is consensus that the Swiss judge can use several methods to determine the objective meaning of a legal provision ("pluralism of methods").[197] The Swiss court can employ grammatical, systematical, historical, teleological and interest-based elements to interpret the law. Modern theory also includes the comparative law method,[198] which is less problematic when gap-filling than when purely interpreting the law.

95 It is also possible that the law does not at all provide an answer to a legal question (Art. 1(2) Swiss CC). In that case the judge has to fill the gap primarily with customary law and if no customary law exists – which is often the case in private law – in accordance with a rule that the legislator would have made if it knew the problem at hand. This means that the judge has to be led by general, objective motives and not only decide the

[194] *Filippo Ranieri*, Rezeption und Assimilation ausländischer Rechtsprechung – Dargestellt am Beispiel des europäischen Einflusses der französischen Judikatur im 19. Jahrhundert, Ius Commune VI (1977), 202–233, 203–204.
[195] *Ranieri*, 244.
[196] *Örücü*, 80–81/88.
[197] See eg DSC 124 III 266, 268.
[198] See eg *Peter Tuor/Bernhard Schnyder/Jörg Schmid,* Die Rechtsanwendung, in: Peter Tuor/Bernhard Schnyder/Jörg Schmid/Alexandra Rumo-Jungo (eds), Das Schweizerische Zivilgesetzbuch, 13th edn, Zürich/Basel/Genf 2009, 33–52, 38.

particular case. The comparative law method is a suitable aid in this quest for a proper solution.[199]

In all of this the judge "shall follow established doctrine and case law" (Art 1(3) Swiss CC). This can also imply to take foreign doctrine and case law into account, provided that they relate to comparable provisions of foreign law. Additionally, the court should not just pick any foreign law that provides a solution that seems to be the most fitting to the court.[200] Instead the court is called to conduct a proper research according to the principles we will lay out in chapter two. Of course the width and depth of the endeavor may be limited by time constraints or the language abilities of the judge. That is why it is recommendable to get a legal opinion from the ISCL (see above N [■]).[201] 96

b. Applying Uniform Law or a Provision Derived from International Law

The comparative law method is especially important when the judge has to interpret a rule that stems from an international instrument.[202] This can be eg a case involving international sales law when both parties are domiciled in member states of the CISG. The judge has then to take into account the case law of other member states' courts. The same holds true for the application of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.[203] According to Art 1(1) of Protocol 2 on the uniform interpretation of the Lugano Convention *"any court applying and interpreting this Convention shall* 97

199 DSC 126 III 129, 138; *Kunz*, Einführung, 42–43; *Kunz*, Instrumente, 70; *Zweigert/Kötz*, 18–20.
200 *Zweigert/Kötz*, 18–19.
201 Comparable institutes are the British Institute for International and Comparative Law in London; the *Max Planck Gesellschaft* (Max Planck Society) in Germany or the *Internationaal Juridisch Instituut* (International Judicial Institut) in the Netherlands.
202 For a comparative overview see *Drobnig*, 8ff noting a *"broad willingness to consider the attitude and practice of other contracting states in the interpretation of international uniform law (...) in Germany"*. In rare cases a provision makes reference to "international standards" such as Art 8(3) Federal Law on Stock Exchanges and Security Trading (Bundesgesetz über die Börsen und den Effektenhandel, BEHG) which obligates the Swiss stock exchanges to accommodate internationally recognized standards when issuing their listing rules, cf *Kunz*, Einführung, 43.
203 ‹www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/intrea/depch/misc/conlug2.Par.0014.File.tmp/mt_090325_en.pdf›, accessed 2 September 2013.

pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned [...] rendered by the courts of the States bound by this Convention and by the Court of Justice of the European Communities".

98 Another occasion to use the comparative law method arises when the court has to interpret domestic law that is derived from another country or EU-law.[204] This is eg the case for many statutes in the area of consumer protection law. The Swiss Federal Act on Product Liability (Produktehaftpflichtgesetz, PrHG) is an autonomous adaptation of the *"EU-Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products"*. Comparative research has to be undertaken in order to ascertain how the rule operates in other countries where the model rule has also been adopted.[205] This is an important step towards the goal of uniform interpretation of national provisions implementing EU-law.[206]

2. Examples

a. Swiss Federal Supreme Court

99 The *Bundesgericht* (Swiss Federal Supreme Court) is known to be open to the use of comparative law.[207] The reason for this phenomenon might be that Switzerland is a small country with many legal and economic connections to other nations and with a multicultural background.[208] Decisions with a strong comparative influence often deal with EU-related law, such as the different bilateral or multilateral treaties between Switzerland and the EU (eg Lugano-Convention, see above N [■]).[209] Sometimes the Bundesgericht (Swiss Federal Supreme Court) also uses com-

[204] Comparative overview in: *Drobnig/van Erp*, 12ff.
[205] *De Cruz*, 21; *Mattei/Ruskola/Gidi*, 227.
[206] *Zweigert/Kötz*, 20–21.
[207] *Kunz*, Einführung, 44; *Zweigert/Kötz*, 19; *Graziano,Kadner* 3 ERPL 687, 702 (2013).
[208] *Kunz*, Einführung, 44.
[209] *Kathrin Klett,* Der Einfluss europäischen Rechts auf die schweizerische Rechtsprechung im Vertragsrecht, recht (2008), 227–236, 229; *Gerhard Walter*, Die Rechtsvergleichung in der Rechtsprechung des Schweizer Bundesgerichts, recht (2004), 91–103, 96; cf *Kunz*, Instrumente, 72–76.

parative law to "import" a legal construct from foreign law, eg the theory of liability for breach of trust ("Vertrauenshaftung", „responsabilité fondée sur la confidence") (see N [■]).[210]

b. European Court of Justice

The function of the European Court of Justice (ECJ) is - among other things - to guarantee that EU law is applied in the same way in all EU countries. In the area of private law this is mainly done by way of the preliminary ruling procedure (art. 234 of the Treaty establishing the European Community, Nice consolidated version). If a national court has to apply a provision of EU law (or a rule derived from EU law) and is unsure about the correct interpretation of the rule, it must under certain prerequisites ask the ECJ for advice. The advocate general responsible for the case will do extensive comparative research and then give the ECJ his opinion on the case.[211] Through that mechanism the decisions of the ECJ - especially in the area of private (consumer) law - are based on a wide comparative footing. This leads to an autonomous interpretation of EU-instruments which in turn will eventually help to achieve uniformity in interpretation of national laws based on EU law.[212] 100

This can be exemplified with the Leitner case[213]. The family of Simone Leitner booked a package club holiday in Turkey where Simone got food poisoning. She later filed a claim for damages in Austria for the loss of enjoyment. The decisive legal question was whether the word "damage" in Art. 5 of the package travel directive[214] also includes non-material damage. The Advocate General compared several international conventions and the development in the legislation and case-law of several Member States.[215] This eventually led to the result that the ECJ ruled that the *"Directive implicitly recognizes the existence of a right to compensa-* 101

[210] *Corinne Widmer*, Vertrauenshaftung: von der Gefährlichkeit des Überflüssigen, ZSR (2001), 101-125; *Widmer Pierre*, Rechtsvergleichung und Gesetzgebung, LeGes (2003), 9–17, 15.
[211] *Michaels*, 300.
[212] *De Cruz*, 21–22.
[213] Case C-168/00 of 12 March 2002 – *Simone Leitner v TUI Deutschland GmbH & Co. KG.*
[214] Council Directive 90/314 ECC of 13 June 1990 on package travel, package holidays and package tours.
[215] Case C-168/00 – *Simone Leitner v TUI Deutschland GmbH & Co KG* – Opinion of Advocate General Tizzano of 20 September 2001, paras 37–43.

tion for damage other than personal injury, including non-material damage" such as loss of enjoyment. Thus it awarded *"consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday"*.[216]

c. Tribunals in International Arbitration

102 Many of today's largest legal disputes are resolved by private arbitral tribunals. Due to the international nature of the disputes these tribunals often have to deal with multiple legal systems to reach their final award. This might also involve a number of different languages and cultures. It is therefore not surprising that comparative law is often used in international arbitration.[217] International commercial arbitration can be said to have revolutionized the field of comparative law, transforming it into an eminently practical and often lucrative discipline.[218] It is important to note that in arbitral proceedings comparative law is not only used regarding the substantive part of the case but is also crucial in respect to the procedure that will govern the arbitration.[219]

d. US-American Courts

103 Historically, there has been a strong inclination of US-American courts to use civil law as a basis for comparison, but this has been declining since the second half of the 19th century in favor of a more global approach.[220] Indeed, it seems that nowadays there is a certain reluctance of US-American courts to rely on foreign case law at all.[221]

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216 Case C-168/00 of 12 March 2002 – *Simone Leitner v TUI Deutschland GmbH & Co. KG*, paras 23–24.

217 *Frédéric Gilles Sourgens*, Comparative Law as Rhetoric – An Analysis of the Use of Comparative Law in International Arbitration, 8 Pepperdine Dispute Resolution Law Journal 1–23 (2007).

218 *Emmanuel Gaillard*, The Use of Comparative Law in International Commercial Arbitration, in: Pieter Sanders (ed), Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation, ICCA Congress Series, The Hague 1989, 283–289, 283.

219 *Judd Epstein*, The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation, 75 Tulane Law Review 913–927, 915–916 (2000–2001).

220 Cf *Mattei/Ruskola/Gidi*, 3–7; *Kadner Graziano*, 3 ERPL 687, 704 (2013).

221 See *Ewoud Hondius,* Comparative Law in the Court-Room – Europe and America Compared, in: Andrea Büchler/Markus Müller-Chen (eds), Festschrift für

E. A Tool for Legal Practitioners

1. International Legal Service Providers

The internationalization of trade and services has a strong impact on the providers of legal services. Almost all the larger law firms that operate internationally have a diverse geographical structure. Young lawyers do post-graduate education (LLM) in countries with a legal tradition other than their own. Even lawyers not working in one of these global firms are regularly confronted with legal problems of a transnational nature.[222] Not only the lawyers themselves have become increasingly mobile but also the legal information they rely upon and provide to clients.[223] 104

The in-house counsel of a corporation is affected by the globalization of the markets as well. He has to deal with questions that come up because the economy is global and the respective regulations are often local (national). This creates many problems because the national rules regularly diverge.[224] 105

Ingeborg Schwenzer zum 60. Geburtstag I, Bern 2011, 759–778, 768–769 quoting Antonin Scalia, the Senior Associate Justice of the Supreme Court of the United States of America: Scalia wrote in Roper v Simmons, 543 US 551 (2005): '*I do not believe that the meaning of (...) our Constitution should be determined by the subjective views of five Members of this Court and like-minded foreigners. 'Acknowledgment' of foreign approval has no place in the legal opinion of this Court.*' The *Supreme Court held with a narrow 5-4 majority that it is unconstitutional to impose capital punishment for crimes committed while under the age of 18, mentioning, among other arguments that "only seven countries other than the United States ha[d] executed juvenile offenders (...): Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of the Congo, and China". As a reaction to this and other decisions of the Supreme Court the US House of Representatives (House Resolution 568, 108th Congress (2004), reintroduced as House Resolution 372, 110th Congress (2007-2008) resolved "that (...) judicial interpretations regarding the meaning of the Constitution of the United States should not be based (...) on judgments, laws, or pronouncements of foreign institutions (...)"*. Or, as US Supreme Court Justice Thomas has put it in another death capital case: *"While Congress (...) may wish to consider the actions of other nations (...), this Court's (...) jurisprudence should not impose foreign moods, fads, or fashions on Americans"* (*Foster v Florida*, 537 US 990 (2002)).

222 *Hanns-Christian Salger*, Die Internationalisierung der Anwaltschaft – Eine Betrachtung aus deutschem Blickwinkel, in: Ingeborg Schwenzer (ed), Schuldrecht, Rechtsvergleichung und Rechtsvereinheitlichung an der Schwelle zum 21. Jahrhundert, Tübingen 1999, 89–113, 90–91.

223 *Glenn*, 64.

224 *Herbel,* 3ff.

106 Lastly, it might also be a question of professional responsibility to have a basic idea of foreign law, or at least to know where and whom to ask.[225]

107 On this background it is evident that comparative law plays a vital role for attorneys of all sorts to understand the problems arising from differences among legal systems.[226] We have already dealt with the importance of comparative law in transnational litigation (see above N [■]). In the following section we focus on the correlation between comparative law and international commercial contracts.

2. Comparative Law and International Commercial Contracts

108 International commercial contracts are often a blend of different legal systems and concepts. To a large extent such contracts are developed by the method of "copy and paste": Clauses from existing contracts are copied and then pasted into the new contract together with the drafter's own standard clauses and provisions.[227] That is how these contracts become "hybrids" – with a strong emphasis on common law principles.[228] The reason for this is that US-based big companies – long time ruling their respective markets – used law firms from the USA (mainly the East Coast) and the UK that in turn dominate(d) the international legal market with their way of doing business.

109 Even though such contracts routinely contain a choice-of-law clause in favor of a certain national law, the international elements can not be ignored: They often contain terminology, concepts or clauses that are unknown to the particular legal order or – even more dangerous, because misleading – seem to be known but in truth mean something different. A good example is the standard expression "to act in good faith" (in Ger-

[225] See *Mattei/Ruskola/Gidi*, 56.
[226] *Mattei/Ruskola/Gidi*, 52–68; *Marc Ancel*, Utilité et méthodes du droit comparé – Éléments d'introduction générale à l'étude comparative des droits, Neuchâtel 1971, 9–10; *René Rodière*, Introduction au droit comparé, Paris 1979, 38; cf as well *Glendon/Gordon/Carozza*, 5.
[227] *Norbert Horn*, Uniformity and diversity in the law of international commercial contracts, in: Norbert Horn/Clive M Schmitthoff (eds), The transnational law of International Commercial Transactions, Antwerp/Boston/London/Frankfurt aM 1982, 3–18, 7–8.
[228] *Grosheide*, 74–75.

man: "nach Treu und Glauben handeln", in French: "se comporter selon le principe de bonne foi"). Even though the literal translation is correct, the Civil and the Common Law lawyer will understand something different. Civil law systems take an expansive approach to the obligation of good faith, applying it to both the formation of a contract and its performance. Good faith in common law *"is at best only applicable to the performance of the contract and is most often only recognized by statute"*.[229] This shows that an attorney drafting or implementing such a contract has to be aware of the legal background of such clauses in order to properly understand and execute the true intentions of the parties.

In that sense international commercial contracts exemplify the principle 110
of "legal borrowing":[230] Concepts and solutions provided for by a foreign legal system are adopted and integrated into domestic law. What could be a valuable contribution to the comparative study of law and the development of a legal system is unfortunately largely lost, since most of these contracts are not publicly accessible.

3. Advising Clients and Choosing the Applicable Law

There are different practical situations where the knowledge of the 111
method of comparative law is useful for the attorney.

– Clients doing trans-border business need to be advised which legal system they are going to face and what legal requirements are to be expected.[231]

– When drafting a contract between parties domiciled in different countries the question will arise as to which law should govern the contractual relationship. The lawyer will not be able to decide on the most favorable law – and recommending an appropriate choice-of-law clause – without a basic understanding of the foreign law(s) involved.[232] It is

[229] *William Tetley*, Good Faith in Contract – Particularly in the Contracts of Arbitration and Chartering, 35 Journal of Maritime Law and Commerce 561–616, 567 (2004).
[230] *Grosheide,* 70–72.
[231] *De Cruz,* 22–23.
[232] In practice the lawyer will often seek advice from a colleague in the respective jurisdiction.

a popular mistake to believe that the client's own law is always the most suitable.[233]

– Attorneys often negotiate on behalf of their clients and thus have to deal with lawyers from other jurisdictions. In order to be able to be on par with the other party they need to know and evaluate the foreign law. This situation of course can also come up in the context of either international litigation or arbitration.[234]

F. A Tool for Harmonisation and Unification

1. Introduction

112 Comparative law is of central importance as regards both harmonization and unification of law. The harmonization of law consists in intentionally making the legal rules of two or more legal systems more alike. The unification of law consists in intentionally introducing identical rules into two or more legal systems.[235]

113 The political goal behind unification or harmonization is to eliminate, respectively reduce as far as possible, the discrepancies between national legal systems by inducing them to adopt common principles and rules of law.[236]

114 The underlying ground for unification or harmonization is to facilitate trade and other contacts between the countries involved. The advantage of unified law is thus that it makes international legal business easier. Unified laws avoid the hazards of applying private international law and foreign substantive law. Thus unified law promotes greater legal predictability and security, not only for international business people but also for tribunals which have to resolve disputes in this field of law[237]. Unification or harmonization of law is never done for the beauty of it, but for bringing about some significant practical advantages.[238]

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[233] For the choice of law cf *Herbel,* 8–11.
[234] *Glenn*, 62.
[235] *Bogdan*, 18; *Marc Ancel*, Utilité et méthodes du droit comparé, Neuchâtel 1971, 70–86.
[236] *Zweigert/Kötz*, 24.
[237] *Zweigert/Kötz*, 25.
[238] *Bogdan*, 18.

Harmonizing or unifying law is a challenging process. The biggest obstacle to this endeavour is the lack of understanding of one another's way of legal thinking and legal concepts.[239] Comparative law serves to build the conceptual bridges between the different solutions found in the legal systems one seeks to harmonize or unify (see chapter 2). 115

At the beginning of the 20th century, it was suggested that comparative law had to serve to progressively approximate the different existing commercial laws which, one day, would be able to melt into a universal common law.[240] Indeed, scholars were of the opinion that unification of laws was the ultimate goal to be achieved by comparative legal studies.[241] Although that aim retrospectively seems overly ambitious, the invention of modern comparative law at the beginning of the 20th century nevertheless laid out the methodological foundation for a future unification of private law in Europe (N [■]). 116

The idea of a post-national unification of private law took root as early as 1916, when *Vittorio Scialoja*[242] was suggesting a Code of obligations common to France and Italy.[243] The proposal for unification went beyond a simple exercise in legal comparative technique. It represented the continuity and promotion of the underlying ideas of justice and equality present throughout the waves of codifications of the 18th and 19th centuries.[244] Combining tradition and innovation with the aim of defending Latin legal culture, a project of a common Code of obligations for France and Italy was ready in 1927.[245] However, the national and international political context of the times, permeated with nationalistic ideals, brought the project to an abrupt halt. It would never find the hoped for legislative concretisation.[246] 117

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239 *Bogdan*, 18.

240 *Christophe Jamin*, Le vieux rêve de Saleilles et Lambert revisité, RDIC (2000), 733–751, 748.

241 *René David*, Traité élémentaire de droit civil comparé, Paris 1950, 141.

242 *Vittorio Scialoja* (1856-1933), Senator, Minister, and Professor of Roman law in Rome.

243 *Alpa Guido/Chiodi Giovanni*, Il progetto italo francese delle obbligazioni (1927), Milano 2007, 47–48.

244 See *Deroussin*, N 1.

245 *Deroussin*, N 4.

246 See *Caroline Maisonneuve*, Approche historique du droit européen des contrats, in: Olivier Deshayes (ed), Le livre vert «relatif aux actions envisageables en vue de la création d'un droit européen des contrats pour les consommateurs et les entreprises», Cergy-Pointoise 2011, 32; *Deroussin*, NN 43-44.

2. Methodology and Examples

118 Comparative legal thinking is an indispensable tool, not only for building the necessary bridges between the legal traditions involved, but also for finding innovative solutions in the approximation of laws. Unification or harmonization cannot be achieved by simply making up ideal laws regulating the relevant issues and then trying to have them adopted. One must first find out what is common[247] to the concerned legal systems (see chapter 2). In areas where there are differences, one has to try to overcome them either by bringing about a consensus about the "best" existing solution, or by finding a new one which is deemed better than any of the existing ones (see chapter 2).[248]

119 Comparative law plays a decisive part in the preparation of projects for the international unification or harmonization of law. The method used in the past and still practiced today is to draft a uniform law on the basis of expert studies in comparative law. As regards unification, the draft project[249] is then incorporated in a *multipartite treaty*, which obliges the signatories, as a matter of international law, to adopt and apply the uniform law as their domestic law.[250]

120 A significant unification achievement is the United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980, which had 80 Contracting States in 2013.[251] However, the CISG illustrates the numerous difficulties such a unification project has to overcome. First, it took twenty years from the first works by UNCITRAL on unification of sales law in 1968 to the entry into force of the CISG on 1 January 1988. Second, the scope of application of the CISG is limited, as it applies only to international sales contracts. This however means that each signatory State has two concurrent sets of rules in the same area, municipal law for internal sales contracts and the CISG for international sales contracts. Third, important issues, such as in particular the validity of the sales contract and the effect which the sales contract may have on the property of

[247] See eg the project "*Common Core of European Private Law*", ‹www.common-core.org/›, accessed 22 November 2013.
[248] *Zweigert/Kötz*, 24.
[249] For a model of such preparatory study, see *Ernst Rabel*, Das Recht des Warenkaufs, vol. 2, Tübingen 1958, 395–441.
[250] *Zweigert/Kötz*, 24.
[251] ‹www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html›, accessed 22 November 2013.

the goods sold (Article 4 CISG) had to be excluded from the scope of application of Convention, in order not to jeopardize the acceptance of the draft. Other matters not expressly excluded by Article 4 CISG, such as jurisdictional matters or limitation of actions[252], are likewise outside of the sphere of application of the CISG. This is probably one of the main reasons why parties to international sales contracts often exclude the application of the CISG. Fourth, there is a risk that the various national State courts apply the unified sales law differently depending on the legal culture of the seat of the State court. This is why Article 7(1) CISG provides that "[i]*n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade*".

However, multilateral treaties are very difficult to achieve and, as the example of the CISG illustrates, rather cumbersome in operation.[253] The *model laws* are a more flexible and indeed more efficient way. A model law is created as a suggested pattern for law-makers to consider adopting as part of their domestic legislation. States enacting legislation based upon a model law have the flexibility to depart from the suggested text. A good example for a rather successful model law is the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.[254] The United Nations Commission on International Trade Law (UNCITRAL) focuses on the modernisation and harmonisation of rules on international business.[255] 121

The same method has been used for the internal unification of law, especially in the United States. The American Law Institute (ALI), founded in 1923, aims at overcoming the lack of agreement on fundamental principles of the Common Law and the numerous variations within the different jurisdictions of the United States.[256] The ALI addresses uncertainty in the law through a restatement of basic legal subjects that tells judges and lawyers what the law is. Between 1923 and 1944, Restate- 122

[252] Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG), 3rd edn, Oxford 2010, Art. 4, N 49 and 50.
[253] *Zweigert/Kötz*, 25.
[254] ‹www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html›, accessed 22 November 2013.
[255] ‹www.uncitral.org/uncitral/en/about_us.html›, accessed 22 November 2013.
[256] ‹www.ali.org/index.cfm?fuseaction=about.creation›, accessed 22 November 2013.

ments of the Law were developed for Agency, Conflict of Laws, Contracts, Judgments, Property, Restitution, Security, Torts, and Trusts. In 1952, the ALI started the Restatement Second with works that covered subjects not included in the first Restatement, as well as new editions of the original Restatements that updated them and reflected new analyses and concepts. A third series of Restatements was inaugurated in 1987. Work on that series continues today. In additional to the initial subjects, the Restatements now include Foreign Relations Law of the United States, the Law Governing Lawyers, Suretyship and Guarantee, and Unfair Competition.[257] The Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws), established in 1892, provides states of the United States "*with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law*".[258] The Uniform Commercial Code (UCC), a joint project of the ALI and the ULC and first published in 1952, is probably the most influential uniform act. It works like a model law, which means that it achieved the goal of substantial uniformity in commercial laws and, at the same time, allowed the states the flexibility to meet local circumstances by modifying the UCC's text as enacted in each state.

123 There is yet another form of harmonisation and unification of private law, through trade usages and their "codification" by private entities. Trade usages or customs of business are the practice of a certain field of the economy which are the same or similar in many countries.[259] Probably the most ambitious example of such a "codification" are the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles).[260] The International Institute for the Unification of Private Law (UNIDROIT) is an independent, intergovernmental organisation set up in 1926 with its seat in Rome. Membership of UNIDROIT is restricted States acceding to the UNIDTROIT Statute.[261] UNIDROIT's 63 member States are drawn from the five continents and represent a variety

[257] ‹www.ali.org/index.cfm?fuseaction=about.instituteprojects›, accessed 22 November 2013.
[258] ‹www.uniformlaws.org/Default.aspx›, accessed 22 November 2013.
[259] *Zweigert/Kötz*, 26.
[260] ‹www.unidroit.org/english/principles/contracts/main.htm›, accessed 22 November 2013.
[261] ‹www.unidroit.org/english/presentation/statute.pdf›, accessed 22 November 2013.

of different legal, economic and political systems as well as different cultural backgrounds. The last edition of the UNIDROIT Principles of 2010 consists of 211 Articles on topics such as the formation of the contracts, authority of agents, ground for avoidance, illegality, interpretation, third party rights, conditions, performance, hardship, termination, damages, set-off, assignment of rights, transfer of obligations, assignment of contracts, limitation periods and plurality of obligors and obliges. UNIDROIT recently also suggested a draft model clause for use by parties intending to indicate in their contract more precisely in what way they wish to see the UNIDROIT Principles used during the performance of the contract or when a dispute arises.[262] Another example are the INCOTERMS (International Commercial Terms) which are published by the International Chamber of Commerce (ICC) (last edition of 2010). The INCOTERMS are a set of three-letter trade terms (e.g. EXW for Ex Works, FOB for Fee on Board) reflecting business-to-business practice in contracts for the sale of goods. They specify the tasks, costs and risks involved in the delivery of goods from sellers to buyers. The ICC has also published a series of model contracts such as the occasional intermediary contract, the international franchising contract, the selective distribution contract, the contract for the supply of an industrial plant, the share purchase agreement, the international trade mark licence, the international transfer of technology, the subcontract, etc. Some authors are of the opinion that such rules and model contracts are the precursors of a future *lex mercatoria*.[263]

3. Harmonisation and Unification of the Law within the European Union

a. The Example of the Draft Common Frame of Reference

aa. Political Context

One of the most ambitious comparative projects in recent years for harmonizing European legal systems is the Draft Common Frame of Refer- 124

[262] ‹www.unidroit.org/english/principles/modelclauses2013/modelclauses-2013.pdf›, accessed 22 November 2013.
[263] *Zweigert/Kötz*, 26.

ence (DCFR). Its main goal is to serve as a basis for a possible political Common Frame of Reference (CFR).[264]

125 The European's Commission's Action Plan on a More Coherent European Contract Law of 2003[265] sought for feedback on three proposed measures: increasing the coherence of the "*acquis communautaire*" (*acquis*),[266] the promotion of EU-wide standard contract terms,[267] and further examination whether there might be a need for an instrument of contract law which would not be limited to particular sectors.[268] The most remarkable proposal for implementing these measures was to develop a CFR,[269] which could be used in reviewing the existing *acquis* and drafting new legislation,[270] namely an "*optional instrument*"[271] in European contract law (see N [■]). The contemplated CFR, which the Commission said it intends to elaborate via research "*and the help of all interested parties*",[272] should provide for the best possible solutions both in terms of common terminology and rules.

264 *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 6.

265 *Communication from the Commission to the European Parliament and the Council: A More Coherent European Contract Law: An Action Plan*, COM(2003) 68 final, ‹http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com_2003_68_en.pdf›, accessed 22 November 2013.

266 The "*acquis communautaire*", to which the Commission refers in its Communications, is mainly made out of heterogeneous EU Directives relating to consumer law.

267 This aspect of the plan was abandoned (see *Report of the Commission: First Progress Report on European Contract Law and the Acquis Review*, COM(2005) 456 final, 10, ‹http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0456:FIN:EN:PDF›, accessed 22 November 2013).

268 *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 49.

269 See *Communication from the Commission to the European Parliament and the Council: A More Coherent European Contract Law: An Action Plan*, COM(2003) 68 final, 2.

270 *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 49; *Communication from the Commission to the European Parliament and the Council: A More Coherent European Contract Law: An Action Plan*, COM(2003) 68 final, 19.

271 See *Communication from the Commission to the European Parliament and the Council: A More Coherent European Contract Law: An Action Plan*, COM(2003) 68 final, 23-24.

272 *Communication from the Commission to the European Parliament and the Council: A More Coherent European Contract Law: An Action Plan*, COM(2003) 68 final, 2.

In 2004, the Commission published the Communication *European Contract Law and the Revision of the Acquis: The Way Forward*.[273] It furthered the idea of the CFR by stating that it should provide for fundamental principles, definitions and model rules,[274] which could help to improve the existing *acquis* as well as serve as a basis for elaborating an optional instrument in European contract law.[275] Model rules would take the lion's share as regards the overall contents of the CFR.[276] The main purpose of the CFR is to serve as a kind of multifunctional "*tool box*"[277] or legislator's guide. 126

While the future existence of a political CFR remains doubtful at best, academics completed a draft CFR (DCFR).[278] 127

bb. Academic contribution

The DCFR is ambitious not only in terms of personnel and efforts consented in elaborating it, but also as regards its scientific value and political impact (see N 134). In 2008, the *Joint Network on European Private Law* (*Network of Excellence*)[279] delivered the DCFR to the European 128

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273 *Communication from the Commission to the European Parliament and the Council: European Contract Law and the Revision of the Acquis: The Way Forward*, COM(2004) 651 final, ‹http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0651:FIN:EN:PDF›, accessed 22 November 2013.

274 See *Communication from the Commission to the European Parliament and the Council: European Contract Law and the Revision of the Acquis: The Way Forward*, COM(2004) 651 final, 11.

275 *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 49; *Communication from the Commission to the European Parliament and the Council: European Contract Law and the Revision of the Acquis: The Way Forward*, COM(2004) 651 final, 14.

276 *Communication from the Commission to the European Parliament and the Council: European Contract Law and the Revision of the Acquis: The Way Forward*, COM(2004) 651 final, 11.

277 *Communication from the Commission to the European Parliament and the Council: European Contract Law and the Revision of the Acquis: The Way Forward*, COM(2004) 651 final, 14.

278 An "Interim Outline Edition" and an "Outline Edition" of the DCFR were successively made available to the public in 2008 and 2009 respectively. None of the provisional versions contain the explanatory and illustrative comments on each model rule found in the "Full Edition" published later in 2009.

279 The *Network of Excellence* comprises the following research groups: The *Study Group on an European Civil Code* (*Study Group*), the *Research Group on Existing EC Private Law* (*Acquis Group*), the *Project Group on a Restatement of European Insurance Contract Law* (*Insurance Group*), the "*Association Henri Capitant des Amis de la Culture Juridique Française*" forming with the "*Société de*

Commission. The DCFR was prepared by the *Study Group on a European Civil Code* (*Study Group*) and the *Research Group on Existing EC Private Law* (*Acquis Group*), and is accompanied by a set of additional texts of other participants in the *Network of Excellence*.[280]The DCFR is a text initiated by European legal scholars.[281] It is the result of decades[282] of independent research and co-operation by academics from jurisdictions across Europe with expertise in private law, comparative law and European Community law. Nothing in the DCFR has been approved or mandated by a politically legitimated body.[283]

cc. Contents

129 In conformity with the scheme set out by the Commission in its Communications (see N [■]), the DCFR contains definitions, model rules, and principles. The DCFR is published in English. This has been the working language for all the Groups responsible for formulating the model rules.

130 Definitions have the function of suggestions for the development of a uniform European legal terminology.[284] Indeed, a uniform terminology is one of the prerequisites for harmonising or unifying law. Some particularly significant concepts (eg, "good faith and fair dealing", "reasonableness", "consumer", etc) are defined at the outset in the General provisions (Book I) of the model rules. Other definitions are listed in an Annex and are expressly incorporated as part of the DCFR by virtue of

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législation comparée" the *AHC-SLC Group*, the *Research Group on the Economic Assessment of Contract Law Rules* (*Economic Impact Group*), the *Common Core Group*, the *Data Base Group*, and the *Academy of European Law* (ERA) (see the website of the Network at ‹www.copecl.org/›, accessed 22 November 2013).

280 See eg for one of the drafts completing the DCFR and produced by the *AHC-SLC Group*, *Fauvarque-Cosson/Mazeaud*.

281 *Von Bar Christian*, A Common Frame of Reference for European Private Law – Academic Efforts and Political Realities, vol. 12.1. Electronic Journal of Comparative Law (May 2008), 4-5, ‹www.ejcl.org/121/art121-27.pdf›, accessed 22 November 2013.

282 The books II and III of the DCFR find their roots in rules set out by the *Principles of European Contract Law* (PECL) of the former *Commission on European Contract Law* ("*Lando Commission*") which studies started as early as 1982 (see eg Lando/Clive/Prüm/Zimmermann).

283 *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 5.

284 *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 23.

Article I.-1:108(1) DCFR.[285] This drafting technique, by which definitions are listed in an Annex to the main text, was chosen for its flexibility. It keeps the first chapter of the model rules short and enables the list of terminology to be extended easily without great editorial effort.[286] The definitions and model rules set out by the DCFR are interdependent. In order to provide for a coherent system, the definitions have been tested in the model rules and amended and refined as the model rules have been developed. Useful definitions cannot be drafted without model rules and useful model rules can hardly forego definitions providing uniform terminology.[287]

The bulk of the DCFR however is made out of model rules. The adjective "model" emphasizes the lack of any normative force. The model 131
rules of the DCFR belong to soft law as do for instance the UNIDROIT Principles of International Commercial Contracts (PICC; see N [■])[288] or the Principles of European Contract Law (PECL; N [■]).[289] Besides a possible incorporation by the parties into their contract, the particular rules might be used as model for drafting legislation, on the UE level for improving the *acquis* for instance,[290] as well as on the national level for Member States in their own legislative efforts. While the DCFR is based in part on the PECL,[291] its coverage is wider. Not only does it incorporate the general contract law rules found in the PECL, but it provides for rules on specific contracts, non-contractual obligations and some matters of movable property law. The DCFR is divided into ten books: i) General Provisions, ii) Contracts and Other Juridical Acts, iii) Obligations and Corresponding Rights, iv) Specific Contracts and the Rights and Obligations Arising from Them, v) Benevolent Intervention in Another's Affairs, vi) Non-contractual Liability Arising out of Damage Caused to Another, vii) Unjustified Enrichment, viii) Acquisition and Loss of Ownership of Goods, ix) Proprietary Security in Moveable Assets, and

[285] Art. I.-1:108(1) DCFR: „*The definitions in the Annex apply for all purposes of these rules unless the context otherwise requires*".
[286] *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 23.
[287] *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 23.
[288] See the Preamble of the PICC 2010 (UNIDROIT, International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts 2010, Rome 2010).
[289] See Lando/Clive/Prüm/Zimmermann.
[290] See *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 24 and 51.
[291] Books I and II of the DCFR adopt many rules of the PECL.

x) Trusts. Furthermore, each model rule set out in the DCFR is commented and annotated. The comments explain the objective of the particular model rule, place it in the overall context of the DCFR and, where necessary, deliver information about its origins and possible alternative solutions. In order to further the understanding of the effects of each rule, the comments are completed by practical illustrations, often derived from case law of Member states. The notes present the current legal position in the Member States, Community law, and, where available, international instruments such as the CISG or the PICC.[292]

132 Finally, the DCFR also formulates principles. The principles are "fundamental" in the sense that they are an expression of both the legal policies and the higher values permeating the model rules.[293] The DCFR distinguishes "underlying principles" (freedom, security, justice and efficiency)[294] from "overriding principles" of a high political nature (the protection of human rights, the promotion of solidarity and social responsibility, the preservation of cultural and linguistic diversity, the protection and promotion of welfare, and the promotion of the internal market).[295] Whereas the former are to some extent an aspect of contractual security viewed from the standpoint of a party's expectative as regards conduct in accordance with good faith and fair dealing,[296] the latter reveal the underlying model of society and economic system more directly than the model rules do. The formulation of overriding principles in particular helps to clarify the position of the DCFR in the range between liberalism and invasive regulation favouring consumers, small and medium sized businesses and all other parties possibly considered as weaker members of society.[297] The authors of the DCFR rightfully consider that the principles of freedom, security, justice and efficiency have a double role to play and are part also of the overriding principles.[298] That is the reason why the DCFR, after an introduction, starts with a part called «Principles»,[299] before even formulating any definitions or model rules.

[292] *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 4.
[293] See *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 11.
[294] See *Von Bar/Beale/Clive/Schulte-Nölke*, Principles Full Edition DCFR NN 1-62.
[295] *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR NN 16-21.
[296] See *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 15.
[297] See *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Interim Outline Edition DCFR N 20.
[298] See *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 16.
[299] See *Von Bar/Beale/Clive/Schulte-Nölke*, Principles Full Edition DCFR NN 1-62.

This part discusses at length all aspects of the four principles of freedom, security, justice and efficiency[300] which underlie the whole of the DCFR.[301] Of course, all these underlying and overriding principles have to be balanced out. It is in the nature of such fundamental principles that they conflict with each other. For instance, freedom of contract needs to be limited for the sake of human rights[302] if rules on non-discrimination apply. Legal policy aims cannot be pursued in a rigid manner by model rules. [303] One of the functions of the model rules is to strike a balance between conflicting aims and values found in the principles set out by the DCFR. Hence, the model rules are the expression of the underlying values of the DCFR. They are the result of a possible balance between different fundamental principles. But this is just one proposition; other choices remain possible in view of potential future political instruments of European private law.

dd. Impact

The impact of the DCFR is twofold. On the one hand, it has played a political role; on the other hand, it represents a significant contribution to comparative legal science. 133

From the outset, one of the goals of the DCFR was to be a possible model for a *political* CFR. For those in charge of deciding of the means, the role, and the existence of a future CFR, the DCFR provides guidance in the form of a concrete and detailed text. Currently, questions as to the contents and the very existence of a CFR remain politically unresolved. Even if a CFR were to come into being, it would not necessarily have the same scope or contents as the DCFR.[304] However, part of the DCFR has had a political impact, albeit an indirect one. Indeed, the Commission's Proposition of Regulation for an (optional) common European Sales Law (see N [■]) was elaborated[305] on the basis of the «*Feasability Study for a* 134

300 The drafters of this part relied heavily on the "*Guiding Principles of European Contract Law*" which form the second part of *Fauvarque-Cosson/Mazeaud*.

301 *Von Bar/Beale/Clive/Schulte-Nölke*, Principles Full Edition DCFR N 1.

302 See *Mak Chantal*, The Constitutional Momentum of European Contract Law, ERPL 2009, 516-517.

303 *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Interim Outline Edition DCFR N 23.

304 See *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 6.

305 See *Proposal for a Regulation of the European Parliament and Council on a Common European Sales Law*, COM(2011) 635 final, 7-8.

Future Instrument in European Contract Law»[306] which based itself on the DCFR.[307]

135 The DCFR is more than just a blueprint for possible political concretisations. The DCFR is a tool which has a meaning on its own. Undoubtedly, it will promote knowledge of private law both within the borders of the EU and abroad. According to the hopes of its contributors, it should help to show how much national laws resemble one another and stimulated each other in their respective developments. The DCFR contributes to highlight that national laws are only regional manifestations of a common European legacy. It may establish the notion of a European private law based on new foundations increasing mutual understanding and encouraging the debate on the future of private law in Europe.[308] Independently of what happens politically in relation to a CFR, the DCFR is already an academic toolbox of a stature few other similar projects may claim to have. Future will tell if it will be acclaimed as soft law contributing to an informal Europeanization of private law.

b. Other Examples

136 Preparatory comparative works (see N [■]) serve also as a basis for proposals of the European legislator for the adoption of measures aiming at harmonizing a specific field of law. Harmonization of private law occurs overwhelmingly by means of EU Directives. In this ongoing process of Europeanization of private law, a Regulation for a Common European Sales Law (CESL) is currently in the pipeline, the Commission having adopted a Proposition[309] in this regard in 2011. This Commission proposal for a CESL foresees a comprehensive set of uniform contract law rules covering the whole life-cycle of a contract, which would form part of the national law of each Member State as a “second regime” of con-

[306] See *Commission Expert Group on European Contract Law*, Feasability Study for a Future Instrument in European Contract Law (3 May 2011), available on the Internet at ‹http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf›, accessed 22 November 2013.

[307] See *Commission Expert Group on European Contract Law*, Feasability Study for a Future Instrument in European Contract Law, 5.

[308] See *Von Bar/Beale/Clive/Schulte-Nölke*, Introduction Full Edition DCFR N 7.

[309] See *Proposal for a Regulation of the European Parliament and Council on a Common European Sales Law*, COM(2011) 635 final, available on the Internet at ‹http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF›, accessed 22 November 2013.

tract law. This “second regime” of contract law would be identical in every Member State. The choice of this Common European Sales Law would be voluntary (Articles 3 and 8 CESL). A trader would thus be free to choose to offer a contract under this regime (opt-in system) or to remain with the existing national contract law. The Proposition focuses on “sales” contracts (Article 5 CESL) and is limited to cross-border contracts (Article 4 CESL). It provides for an identical set of consumer protection rules. It is a comprehensive set of contract law rules in the sense that it covers issues such as the rights and obligations of the parties and the remedies of non-performance, pre-contractual information duties, the conclusion of a contract (including formal requirements), the right of withdrawal and its consequences, avoidance resulting from a mistake, fraud and unfair exploitation, interpretation, the contents and effects of a contract, the assessment and consequences of unfairness of contract terms, restitution after avoidance and termination as well as prescription.[310]

Another example of the harmonisation process of European private law is the Principles of European Contract Law (PECL). As early as 1980 the Commission on European Contract Law (“Lando Commission”), an independent private association of European legal scholars, set itself the task of formulating general European principles for a common system of contract law.[311] Their work culminated in the publication of the Principles of European Contract Law (PECL), which were released between 1995 and 2002.[312] Their aim was to simplify trade within Europe, to strengthen the European market, to build an infrastructure for a common contractual law, to create guidelines for national courts and for national lawmakers and to bridge the gap between continental European law and Common law. The basic rules (200 articles) contain rules and guidelines 137

310 See *Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 October 2011*, COM(2011) 636 final: *A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market*, p 7ff, available on the Internet at ‹http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF›, accessed 22 November 2013.

311 *Ole Lando,* The Rules of European Contract Law, in: Study of the systems of private law in the EU with regard to discrimination and the creation of a European Civil Code, European Parliament, Directorate General for Research, Working Paper, Legal Affairs Series, JURI 103 EN (June 1999), chapter III, 127ff.

312 ‹http://frontpage.cbs.dk/law/commission_on_european_contract_law/pecl_full_text.htm›, accessed 22 November 2013.

covering for instance the formation, validity, interpretation, performance and remedies for non-performance of a contract and many other topics that would also be included in a traditional Civil law code (such as eg the plurality of parties, assignment of claims, set-off or prescription). These principles are again only soft law, ie not state law. It depends on the national private international law whether parties to can choose the PECL as the applicable law.

138 Yet another example of the harmonisation process of European private law is the Principles of European Tort Law (PETL) published in 2005 by the European Group on Tort Law.[313] These principles contain provisions on the general conditions of liability (damage, and causation), the bases of liability (liability based on fault and strict liability), the liability for others, defences, contributory conduct or activity, multiple tortfeasors and remedies.

[313] ‹http://www.egtl.org/›, accessed 22 November 2013.

Chapter 2: How to Compare

I. Introduction

Comparative law correlates legal rules as problem resolution means in order to solve concrete legal or factual problems of a society or gain scientific knowledge.[1] The way one wants to go from the choice of the subject of the comparison to the achievement of the scientific knowledge has to be carefully examined before starting any comparative work. The choice of the "right" method depends on the nature and the characteristics of the subject of comparison and the scientific goal one seeks to achieve. There might be various scientific goals to achieve (see above, N 59-138). 139

The way of treating the subject must be understandable, manageable, rationally reproducible and verifiable. A detailed set of rules such as the one governing the interpretation of national statutes does not exist. Every comparative work has its own tailor made working technique and hypothesis. Even today the right method must largely be discovered by gradual trial and error.[2] Comparative law has however developed some fundamental principles and rules which give guidance to find the appropriate method. 140

II. Method of Functionality

A. Introduction

The most fundamental of these principles is the one of functionality.[3] This principle goes back to *Ernst Rabel* who put the systematic study of comparative law on a new basis in the beginning of the 20th century. 141

1 *Ebert*, 140.
2 *Zweigert/Kötz*, 33.
3 *Zweigert/Kötz*, 34ff.

Two concepts are key to *Rabel*'s understanding of the field: function and context.

142 According to the functional method, any comparison starts from a concrete factual problem and not from a legal figure (see, however, for the legal approach as opposed to the factual approach, below, N 182-183). This factual problem must first be formulated in a form which is freed from the technical notions of one's own legal system.

143 The functional method is based on the assumption that law is basically confronted with the same factual problems in every society (for a critique of this assumption, see below, N 155-156). However, the ways of resolving these same problems are very different in the various legal systems.[4] The task of comparative law consists therefore in exploring these different ways and in finding out how the problem is resolved in a foreign legal system. Legal institutions are thus not examined with respect to their forms, but with respect to the functions they fulfill, i.e. the solutions they provide.[5]

144 "Functionality" means therefore in the first place that in comparative law, the only legal institutions and figures which are comparable are those which fulfill the same function. From this basic principle stem all the other rules which determine the various steps of the comparative method, i.e. the setting of a working hypothesis (see below N 175-183), the scope and strategy of comparison (see below, N 184-187), the choice of the legal system(s) to compare (see below, N 188-233), the description of the various solutions found (see below, N 234-238), the explanation of the similarities and differences (see below, N 239-244) and the evaluation of the various solutions found (see below, N 245-251).[6] This first aspect of the principle of functionality is also called its negative aspect (see below, N 147-149).

145 *Rabel*'s second main concept was the one of context: you cannot know how legal rules, institutions, or systems function without situating them in their legal, economic and cultural context.[7] This second aspect of the principle of functionality may also be referred to as its positive aspect (see below, N 150-153).

4 See also *Zweigert/Kötz*, 34.
5 *Piek*, 62.
6 *Zweigert/Kötz*, 34.
7 *Glendon/Carozza/Picker*, 16.

Zweigert/Kötz observe that as a general rule developed nations answer the needs of legal business in the same or in a very similar way: "[…] *the comparatist can rest content if his researches through all the relevant material lead to the conclusion that the systems he had compared reach the same or similar practical results, but if he finds that there are great differences* […], *he should be warned and go back to check again whether the terms in which he posed his original question were indeed purely functional, and whether he has spread the net of his researches wide enough*".[8] According to them, this holds at least true for those parts of private law which are relatively "unpolitical" such as the law of contracts or corporate law. In those parts, this observation almost amounts to a *praesumptio similitudinis*, i.e. a presumption that the practical results are indeed similar. This tendency is not confirmed in fields which are heavily impressed by moral views or values, mainly to be found in family law and in the law of succession.[9] 146

B. The Negative Aspect of Functionality

The negative aspect of functionality means that one has to disregard the formal characteristics of legal figures and institutions as they appear in the legal system. The comparatist is for instance less interested in the question as to which field of law (eg corporate law or contracts) a certain rule belongs. This does of course not mean that the formal status and place of a rule in a legal system is of no value at all. On the contrary, the comparatist must become familiar with the structure of the foreign law, its divisions, its modes of application, etc.[10] 147

However, the starting point of every comparative work must rather be a concrete factual or societal problem (for the legal approach as opposed to the factual approach, see however below, N 182-183). Once this societal problem is identified, the comparatist examines the question as to how the different legal systems attempt to resolve this problem. This question must be formulated in purely functional terms and without any reference to the concepts of one's own legal system. The comparatist has thus to free herself from any biases derived from her own (legal) culture in order 148

8 *Zweigert/Kötz*, 40.
9 *Zweigert/Kötz*, 40.
10 *Ancel*, 92ff.

to avoid a "cognitive lock-in".[11] In other words, one has to avoid looking at the problem with the eyes of his own system and eradicate the preconceptions of his native legal system.[12]

149 Liberating oneself from the conceptual categories of one's own system may sometimes mean that an institution has to be broken down into separate parts. This is for example the case when one seeks to find out how legal systems without the Anglo-American trust handle the diverse problems the Common Law treats with that single multi-purpose device. Sometimes, several seemingly unrelated legal institutions have to be analyzed together because it is only their joint operation that meets a particular social need. For example, in many legal systems, the problem of balancing freedom of testation with protection of family members against disinheritance must be analyzed by taking into consideration also marital property law.[13]

C. The Positive Aspect of Functionality

150 The positive aspect of functionality is that one has to take into account all (legal) instruments which have or ought to have the function of resolving the problem under review. This means that all elements which shape and create law (see below, N 420-439, for the Civil Law; N 620-645, for Common Law and Related Systems) (the so-called legal formants in a broad sense)[14] must be taken into consideration.

151 Modern legal systems know a great number of legal formants. In every system, one might distinguish different legislative formants, such as constitutional, statutory and regulatory ones, and a certain number of jurisdictional and doctrinal formants.[15] Other legal formants than the codes or statute books, such as court opinions or writings of scholars, may show

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[11] *Grosswald Curran Vivian*, Cultural Immersion, Difference and Categories in U.S. Comparative Law, 46 Am. J. Comp. L. 58 (1998).

[12] *Zweigert/Kötz*, 35.

[13] *Glendon/Carozza/Picker*, 18.

[14] Some scholars like *Pier Giuseppe Monateri* define formant of the law in a narrower sense, i.e. as a group, or type of personnel, or community, institutionally involved in the activity of creating law (*Monateri Pier Giuseppe*, Methods in comparative law: an intellectual overview, in: Monateri Pier Giuseppe (ed), Methods of Comparative Law, Cheltenham/Northampton 2012, 7).

[15] *Gambaro/Sacco/Vogel*, 4.

that what is regarded as the law in that society is quite different from what one might have thought it to be if one looked only at the statutes.[16] Any comparative work presupposes therefore that the various formants are clearly distinguished in the different legal systems under scrutiny.

This preparatory work enables the comparatist to measure the gap which 152
exists between one formant and another in a foreign legal system: The wider the gap between the different formants, the more diffuse the legal system; the smaller the gap between the different formants, the more compact the legal system. The fact that the comparatist might reveal and measure such gaps in a foreign legal system will not necessarily please the lawyers of this system. They work under the natural assumption that the legal rules contained in the various formants do not contradict themselves. Comparative law can thus help overcoming optical illusions about one's own legal system.[17]

The comparison must even go a step further, as it must go beyond the 153
paper institutions, or rules and doctrines as they appear in books (law in the books). The comparatist's province is the rule as it is applied and executed in legal reality (law in action).[18] Therefore, the comparatist must examine many other aspects than purely legal ones: the factual conditions in which the legal institution is applied, the factual (ie political, economic, criminological, etc.) problem it is deemed to resolve, how it is supposed to obtain which solution and which solutions it really produces, the position of the legal institution within the legal system and its interactions with other fields of the legal system, the methods and usages of its concrete handling by courts, administrative authorities and parties concerned, etc. It is impossible to draw a complete list if one wants to apprehend the whole reality of a legal institution.[19] The subject of comparative research should thus be not an ideal law (as it ought to be) but law as it is lived in practice (as it is). In most legal systems, there are important gaps between the law in the statute books and the law actually applied by the courts. Comparative law should be interested in both, and especially also in the reasons given by participants in the legal system to explain this gap because these explanations may reveal a great deal about legal reasoning in that system.

16 *Reitz*, 629.
17 *Gambaro/Sacco/Vogel*, 4.
18 *Glendon/Carozza/Picker*, 16.
19 *Zweigert/Puttfarken*, 402.

D. Criticism

154 In recent years, the functional method has been increasingly criticized.[20] Some authors question the fundamental assumptions on which the functional method is based such as the distinction between law and society and in particular the idea that the evolution of the society and the evolution of law would regulate each other. According to these critics, law is so intimately interwoven with the live of society that it is not possible to oppose them as separate entities.[21] These authors also question whether law is at all able to resolve societal problems.[22]

155 Other scholars put into question whether the problems and functions are truly universal.[23] For them, to assume that one can describe foreign law like one's own law by a functional analysis denotes a lack of awareness for the fact that the comprehension of one's own law is always very specific.[24] *Konrad Zweigert* and *Hans-Jürgen Puttfarken* concede that universality cannot be assumed between economically developed countries and developing countries or between communist and capitalist countries.[25]

156 If one admits the universal character of societal problems, does this imply that the solutions are necessarily similar (*praesumptio similitudinis*)?[26] Many legal writings underline that one cannot simply assume that the results of comparative analysis are similar, but one has to attempt by all reasonable means to falsify one's working hypothesis (see below, N 175-183). According to them, the *praesumptio similitudinis* favors the

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[20] *Piek*, 60ff; *Michaels Ralf*, The Functional Method of Comparative Law, in: Reimann Mathias/Zimmermann Reinhard (eds), The Oxford Handbook of Comparative Law, Oxford 2006, 339ff, who distinguishes between eight different concepts of functionalism and seven functions of function.

[21] *Frankenberg*, 26 Harv. Int'l L.J. 423ff, 437ff (1985); *Graziadei Michele*, The functionalist heritage, in: Legrand Pierre/Munday Roderick (eds), Comparative Legal Studies: Traditions and Transitions, Cambridge 2003, 118ff.

[22] *Hyland*, 189.

[23] *Brand Oliver*, Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies, 32 Brook. J. Int'l L. 418 (2007); *Legrand*, The Same and the Different, 276ff.

[24] *Samuel Géoffrey*, Dépasser le fonctionnalisme, in: Legrand Pierre (ed), Comparer les droits, résolument, Paris 2009, 409.

[25] *Zweigert/Puttfarken*, 403.

[26] *Hyland*, 194.

similarities and ignores the differences.[27] Such a policy focused on similarities implies to artificially ignore the cultural dimension of law. This leads to a narrow-minded method favoring similarities, which does not respect the foreign law. If comparison takes place between culturally remote systems this kind of assumption of similarity is pointless as a basic methodological rule of thumb.[28] This is why the comparatist has not only to accept law as a cultural phenomenon but must also favor the differences following from that, in the sense of a *principium individuationis.*[29]

This criticism accuses the functional method also of privileging an external over an internal perspective and thus refraining from the unsafe immersion in the depth of a foreign legal culture: "*"Escape attempts"* […] *from Western law's overpowering and ethnocentric everyday are bound to fail, unless comparatists realize that their everyday is shaped and dominated by a grid of concepts, research techniques, professional ethics, and politics, by which the prevailing culture imposes on the individual scholar its canons of how legal scholarship is to be conducted. Although the tragic scholar may reject with impunity a fake organic complicity with the exotic and distant other, she may receive criticism for her illusory search for a new language or new hermeneutic instead of deconstructing the hegemonic grid. Only after such a deconstructive move – after breaking down the conceptual repression – will the entire world, including her own, appear as a foreign land*".[30] 157

Yet other scholars challenge the neutrality claim by the old canon of functional comparative law. They consider the idea of neutral referent or *tertium comparationis* (see below, N 175-176) as being misleading.[31] *Zweigert/Puttfarken* acknowledge that comparative law almost always leads to criticism or value judgments with respect to the various solutions found (see below, N 245-251). They consider that this is inherently more difficult between societies with fundamentally divergent values than between related social orders.[32] 158

27 *Legrand Pierre*, The Return of the Repressed: Moving Comparative Legal Studies beyond Pleasure, 75 Tul. L. Rev. 1036ff (2001): «*commonalities envers et contre tout,* […] *no matter how much manipulation of data intervene in the process*» (1036).
28 *Husa*, RabelsZ 67 (2003), 419, 425.
29 *Coendet*, 161.
30 *Frankenberg*, 1997 Utah L. Rev. 259, 270 (1997).
31 *Frankenberg*, 1997 Utah L. Rev. 259, 263ff (1997).
32 *Zweigert/Puttfarken*, 403.

159 Notwithstanding this criticism, the method of functionality remains a suitable tool, if one knows how to tap its full potential. The criticism raised against the functional method had however two main consequences: first, the functional method is not any longer seen as the only method. The methodology of comparative law has become a pluralistic one.[33] Second, the functional method integrated some of the criticism raised against it and thereby further evolved by absorbing the criticism.[34] This is why some scholars consider that there is anyway no serious alternative method. According to them, all scholarly writings not abstractly concerned with comparative methodology, but making concrete comparisons apply predominantly some kind of functional method.[35]

160 The only alternative method that has been favored by a number of comparatists in recent years is the one of legal culture. Some authors consider in fact that the functionalist method has been replaced by the cultural method.[36] Such a cultural understanding of law widens the perspective in methodology by taking into account also the multifaceted cultural context. However, the functional method tries already to take into account such a wider context (see above, N 153).[37] Furthermore, a criterion as large as the one of legal culture is much more difficult to apply in practice than the one of functionality.

III. Economic Analysis in Comparative Law

161 The economic analysis in comparative law is one of the most discussed alternatives to the method of functionality (see above, N 141-160). This approach starts from the premise that comparative law may gain theoretical perspective by using the tools employed in economic analysis of law. At the same time, comparative law is rather critical towards the

[33] *Husa*, RabelsZ 67 (2003), 419, 444.
[34] *Husa*, RabelsZ 67 (2003), 419, 443, who supports a «*moderate version of functionalism*».
[35] *Piek*, 86.
[36] *Coendet*, 161 ff; *Cotterell Roger*, Comparative Law and Legal Culture, in: Reimann Mathias/Zimmermann Reinhard (eds), The Oxford Handbook of Comparative Law, Oxford 2006, 710ff.
[37] *Zweigert Konrad*, Des solutions identiques par des voies différentes (Quelques observations en matière de droit comparé), RIDC 18 (1966), 5ff.

"mainstream" economic analysis of law.[38] It is in particular the Western-centrism (ie American and European-centrism) of mainstream law and economics, which raises problems when approaching legal systems with a different legal process structure.[39]

One of the central tenets of comparative law and economics is the idea 162
that there is a competitive market for the supply of law.[40] It is true that interactions with other jurisdictions create external competition for the supply of law. This competition may materialize in the pressure exercised on the legislators by national industries which find that their national legal system imposes on them higher costs than those incurred by foreign competitors. This pressure may be strengthened by the threat of migration to a more favorable jurisdiction. Different legal systems are also competing when parties to an international contract have to choose the applicable law which best meets their needs.[41] A classical example of the competition in the market of legal doctrines is the trust, commonly considered as more efficient than its civilian counterparts. Despite the very peculiar institutional background in which the law of trusts has developed, the trust has been adopted in many mixed jurisdictions and in several civilian systems.[42] In 1985, Civil Law and Common Law countries have even entered into a Convention on the law applicable to trust and their recognition.[43]

Especially in its earlier stages, comparative law and economics assumed 163
that there would be a convergence of legal systems as a movement towards efficiency, as "*every legal system or every component of it produces different legal doctrines or techniques for the solution of a given problem. All these different inputs enter what we may call the market of legal culture. Within this market the suppliers meet the need of the consumers. This process of competition may determine the survival of the most efficient legal doctrine*".[44]

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38 *Raffaele*, 193.
39 *Mattei*, 75.
40 *Raffaele*, 191.
41 *Ogus Anthony*, Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law, 48 Int'l & Comp. L.Q. 406ff (1999).
42 *Raffaele*, 192.
43 ‹www.hcch.net/upload/conventions/txt30en.pdf› accessed 21 January 2014.
44 *Mattei Ugo*, Efficiency in Legal Transplants: An Essay in Comparative Law and Economics, 14 Int'l Rev. L. & Econ. 8 (1994). See also *Ajani Gianmaria/Mattei Ugo*, Codifying Property Law in the Process of Transition: Some Suggestions

164 The legal reality, however, is one of very high transactional costs. Such costs, opposing the spread of efficient law, are created by the so-called legal traditions or, worse, by legal parochialism. It might be difficult for an efficient English solution to be adopted in France because the two systems are built on profoundly different traditions (see below, N 283).[45] *Anthony Ogus* has provided an economic interpretation of legal culture, considered as an obstacle to change generated by competition.[46] More recent approaches therefore reject simplistic assumptions about a necessary evolution towards efficiency: "*Competition between sources of law, although influenced by considerations of efficiency, may not be resolved by them. Traditional or cultural factors may be construed as real-world transactions costs and/or patterns of path dependency that resist the evolution toward efficiency*".[47] For instance, in the context of the analysis of legal culture as a network, it was suggested that when this network is regulated by a cast of legal professionals, these legal professionals may seek – and should often be able – to render the law more formalistic, more complex and more technical than is economically optimal, because this enhances the demand for their services.[48]

165 Economic analysis may nevertheless play a role in different stages of a comparative law analysis.

166 It may first help to explain why certain legal systems are different or alike (see below, N 239-244).[49] Economic analysis may be valuable because it offers a model for explaining human behavior. Economists will assume that a legal actor, be it the member of a legislative body or a judge, will adopt the rule from which he or she derives the greatest personal utility. Ideally, this personal utility will correspond to the utility of the society as a whole because the person in question simply tries to "do a good job". However, neither economists nor comparative lawyers may

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from Comparative Law and Economics, 19 Hastings Int'l & Comp. L. Rev. 135 (1995): «*Broadly speaking, we may assume that the more efficient legal theories and solutions would spread around the world with zero transaction costs.* […] *In such a world, efficient legal solutions would survive, while inefficient legal solutions would disappear*». See also *Örücü Esin*, Unde venit, quo tendit comparative law?, in: Harding Andrew/Örücü Esin (eds), Comparative Law in the 21st Century, London/The Hague/New York 2002, 5.

45 *Raffaele*, 193.

46 *Ogus*, 22 Oxford Journal of Legal Studies 419ff (2002).

47 *Mattei*, 121.

48 *Ogus*, 22 Oxford Journal of Legal Studies 427 (2002).

49 *Faust*, 845.

disregard the fact that legislators and judges are also motivated by other, purely egoistic, considerations.[50]

Economic analysis of law may also play a role during the evaluation phase (see below, N 245-251).[51] In this phase the comparatist needs a standard for her evaluation. Which standard is to be applied depends on the purpose for which the comparative study is conducted (see above, N 59-138). For example, if the goal of the comparative study is to strengthen the position of consumers dinging in restaurants, the chosen rule should offer consumers the best protection in that context. However, it will often be far from clear what the "best" protection is. In this regard, economic analysis may be very helpful. It will point out, for instance, that consumer protection is not without costs. First, there is a trade-off between consumer protection and other goals such as retaining sufficient incentives for opening restaurants. Second, different ways of attaining a chosen level of consumer protection may cause different amounts of transaction costs (eg because they lead to a different level of litigation). Economic analysis is able to predict the consequences of the potential solutions for the competing goals and for the amount of transaction costs incurred so that the comparatist can make a more informed choice.[52] 167

Finally, if the comparison reveals the superiority of a foreign rule, this rule cannot simply be introduced into domestic law. Instead, one must test whether the foreign rule will maintain its superiority within the context of domestic law and the domestic legal and social culture[53] because each transplantation of a rule form a legal system into another one causes transaction costs (see below, N 261-262). Again, economic analysis can help to predict the amount of these transactions costs and thus assist in deciding whether the transplantation makes sense.[54] 168

50 *Faust*, 845.

51 *Van Aaken Anne Sophia-Marie*, Vom Nutzen der ökonomischen Theorie des Rechts für die Rechtsvergleichung, in: Jud Brigitta/Bachner Thomas et al. (eds), Jahrbuch junger Zivilrechtswissentschaftler 2000: Prinzipien des Privatrechts und Rechtsvereinheitlichung, Stuttgart/München/Hannover/Berlin/Weimar/Dresden 2001, 146ff.

52 *Faust*, 847.

53 *Zweigert/Kötz*, 17.

54 *Faust*, 847ff.

IV. Micro-comparison and Macro-comparison

169 The functional method may be applied in the form of a micro-comparison or of a macro-comparison.

170 The micro-comparison compares legal systems with respect to specific and precise issues, such as for instance the one of damages for the loss of a chance. The micro-comparison thus uses a narrow focus comparing very specific legal institutions and legal rules.[55] In the early stages of comparative private law, it was common to compare specific legal institutions. One compared for instance the Common Law doctrine of consideration with the Continental notion of *causa* or the legal figure of possession in French and German law. However, one often realized that notions that appeared to be identical or similar seldom had the same meaning. One noticed that the same legal institution could fulfill very different functions depending on the socio-cultural circumstances and that conversely different legal concepts in various legal systems could often serve the same purpose. For instance, the Anglo-American notion of "contract" is quite different from the contract in the Romanistic terminology. Similarly, the law of torts that has exclusively a compensatory function in Civil Law may serve a penalty function in Common Law (punitive damages).[56]

171 The macro-comparison refers to the study of two or more entire legal systems (eg French law and German law) or even two entire legal families (eg the Common Law and the Civil Law). It also refers to the comparison between parts of legal systems (eg the Swiss and the US corporate law). The macro-comparison uses a broad focus comparing only fundamental characteristics and typical structures of legal systems in order to carve out the general similarities and differences.[57]

172 The difference between macro-comparison and micro-comparison lies exclusively in the scope of the analysis. With respect to the method of functionality, there is no difference.

55 *Zweigert/Kötz*, 5.
56 *Rheinstein Max*, Einführung in die Rechtsvergleichung, Munich 1974, 32.
57 *Zweigert/Kötz*, 4.

The limits between micro-comparison and macro-comparison are not clear-cut, despite the rather precise definitions of the two notions.[58] The zoom is often blurred and they tend to shade into one another, since micro-comparison furnishes examples and means of verification, while knowledge of legal systems in turn furnishes the indispensable context for the study of particular problems.[59] A micro-comparison can thus not content itself with comparing the precisely identified legal institution. It must also take into account the legal environment which only reveals the specific purpose and importance of the legal institution (see above, N 153). By asking how a legal institution of one system may achieve more or less the same result as another institution of another system without using the same terminology or even the same rule or procedure, the comparatist is thus pushed to appreciate the interrelationships between various areas of law, including especially the relationships between substantive law and procedure.[60] 173

None of these two types of comparison is superior or more important than the other. The choice between the two depends mostly on the goal the comparatist wants to achieve: if the comparatist wants to use the foreign law in order to reform her own law on a specific issue, she will choose a micro-comparison; on the contrary, if the comparatist wants to examine the social, economic and cultural background of different legal systems, to achieve a better understanding of the law or to classify legal systems, he will choose a macro-comparison. Examples for the use of the functional method within a macro-comparison might be topics such as "the dispute resolution mechanisms" or "the law as a means to achieve peace and social justice". The smaller the zoom, the greater is the risk of taking a specific legal institution out of its context and of neglecting the social, economic and cultural background. This is why one must avoid overly narrow comparisons. Conversely, the larger the zoom, the better knowledge one has to have of the different legal systems in order to avoid errors when determining the content and the meaning of the foreign law. This is why one must be equally careful with overly broad comparisons. 174

[58] *Rusch Arnold F*, Methoden und Ziele der Rechtsvergleichung, Jusletter of 13 February 2006, N 14.
[59] *Glendon/Carozza/Picker*, 18.
[60] *Reitz*, 621ff.

V. Setting of a Working Hypothesis

A. Introduction

175 For a comparison to be meaningful, the two (or more) objects of the comparison (*comparatum* and *comparandum*) must share some common type of characteristics, ie a common denominator. This common feature, called *tertium comparationis*, is required not only for comparisons of law, but for any comparison in general. Thus, this imposing bit of jargon refers to nothing more than the common point of departure for the comparison, typically either a real-life problem or an ideal.[61] A bag of apples and a package travel to Tokyo can, for instance, be compared in terms of price, as both are sold for money. It would, on the other hand, be less meaningful to compare them in terms of taste, as the package travel does barely have such feature.[62] Thus, properly comparative propositions in their simplest form draw a triadic relation between two objects and a certain quality, the *tertium comparationis.*[63]

176 In a comparison in the field of law, the notion of common point of departure seems inherent in the process. Either one legal system has the same legal rule or legal institution as another, or it has different rules or institutions which perform the same function, or it provides different results for a particular problem, or it does not seem to address this problem at all. Nevertheless, the term of *tertium comparationis* may be useful as a way of reminding ourselves to be clear about the point of or the framework for comparison and to hold that point or framework constant until the comparison is completed. The term has further utility in underlining the importance of looking into the question of functional equivalences (see above, N 147-149).[64]

177 The working hypothesis may be based on a factual approach (see below, N 178-181) or a legal approach (see below, N 182-183).

[61] *Reitz*, 622.
[62] *Bogdan*, 47ff.
[63] *Jansen*, 310.
[64] *Reitz*, 622ff.

B. The Factual Approach

The negative aspect of the method of functionality (see above, N 147-149) imposes that the comparatist disregards to a large extent the names and labels of the legal rules. She should instead consider the real situations that the rules being studied are intended to regulate. The starting point of the factual approach therefore consists in a concrete social problem or need in a society. The comparatist then discovers the legal institution that deals with it. Finally, he looks at other societies for institutions, legal or otherwise, which address the same problem or need, that is, functional equivalents. This approach therefore assumes the parallelism of social problems.[65] 178

When starting with a concrete social problem or need in a society, the question must thus be asked exclusively with regard to the underlying problem and without any reference to legal terms and figures.[66] Therefore, the object of comparative work is a matter of fact or a concrete societal problem formulated in abstract terms. 179

Such a question might for instance be: how do two different legal systems protect their citizens from dangerous products such as defective cars? Let us imagine that the comparison shows that one country affords the necessary protection by a strict products liability and by compulsory public law insurance, whereas the other country puts into place a public testing authority which controls periodically the cars and forbids the use of the care in case of a negative test result. The wrong question would have been to ask: How do the two legal systems regulate their products liability for cars? An exclusive comparison of the private-law based products liability would have led to the conclusion that one country does afford only an incomplete protection. However, a comprehensive analysis and evaluation does probably lead to the conclusion that both countries have found an appropriate and functional solution, depending on the respective role of the State and the way of life. 180

This example underlines not only the importance of asking the right question at the beginning of every comparative work. It also highlights once more that the whole legal systems and all relevant societal circum- 181

[65] *Örücü*, Encyclopedia, 562.
[66] *Zweigert/Puttfarken*, 401ff.

stances must be taken into account when comparing them.[67] A pure micro-comparison or a limitation to one legal field respectively one legal institution bears a high risk of errors (see above, N 150-153).

C. The Legal Approach

182 A generally less efficient way of setting a working hypothesis is to start from the substantive contents of legal rules, which is called the legal approach. Such comparison requires again that the legal rules being compared deal with the same matter of fact (*tertium comparationis*). When comparing legal rules from different systems, one should consequently strive to compare such rules that regulate the same situations in people's lives. This is why, in the legal approach as well, one must immediately ask oneself: "What is the purpose or function of this institution in this society?" It is only once the comparatist has ascertained this that he can look for functional equivalents in other societies.[68]

183 Whether two legal rules, which at first glance seem to be comparable, deal with the same factual problem will often not be apparent until the first steps of the comparison have been accomplished. Consequently, one frequently has to start on the assumption that they are comparable (*praesumptio similitudinis*). To compare rules and institutions bearing the same name (a nominalistic comparison) or occupying the same place in the structure of the different legal systems (a structural comparison) can thus sometimes be useful as a starting point for the purpose of determining whether they deal with the same problem and are comparable as to their contents.[69]

VI. Scope and Strategy of Comparison

184 Before starting to identify similarities and differences between legal systems or legal institutions, one has to consider the scope of comparison: what is going to be compared with what? This step presupposes the

[67] See also the examples given by *Ancel*, 40 ff, 53, 93.
[68] *Örücü*, Encyclopedia, 562.
[69] *Bogdan*, 47.

study of foreign law, which means that one has some grasp of the essential characteristics of the systems to be compared as functioning wholes. With regard to the particular institutions under study, one needs to know how their roles fit within the whole. What values do they protect and promote? Through what technical devices do they operate?[70]

By determining the scope of comparison, the comparatist faces for the first time the difficulty of translation (see below, N 283, last item). In one sense every term can be translated because there are things in each legal system that are roughly the functional equivalent of things in the other legal system. In another sense nothing can be translated because the equivalents are different in ways that matter at least for some purposes. Sometimes, a system uses terms and notions which have no equivalent in another system and which do not correspond to any known concept in that system. This is the case for instance for notions like "equity", "estoppel", "dissenting opinion" or "trust" of Common Law which have no equivalent in Civil Law.[71] At a minimum, generally equivalent terms in each language often have different fields of associated meaning, like, for example, "fairness" and "*loyauté*". The same applies to the example of consideration (in Common Law) which is a very different requirement from *causa* (in Civil Law).[72] Differences between legal rules in the systems under comparison sometimes raise further translation problems. The French term "*contract*" obviously relates to the English notion of "contract" and in most instances, one term is the exact translation of the other. However, contrary to French law, in English law donations or agreements to transfer property are not considered as "contracts".[73] This is why sometimes, it is simply better not to translate (eg terms such as "trust" or "*šarī'a*"). This difficulty raises similar issues as the one of qualification in International Private Law.[74] 185

One is thus always in some sense comparing apples and oranges. This is why good comparative analysis should pay careful attention to the problem of equivalency by probing how similar or how different the aspects of each legal system under study are. This implies to devote substantial effort to exploring the degree to which there are or are not functional 186

70 *Glendon/Carozza/Picker*, 17.
71 *Gambaro/Sacco/Vogel*, 7.
72 *Reitz*, 621.
73 *Gambaro/Sacco/Vogel*, 8.
74 *Ancel*, 94.

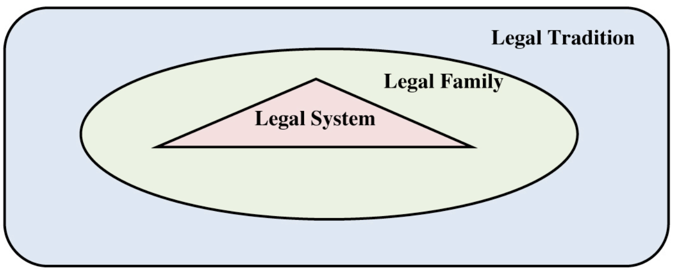
equivalents of the aspect under study in the various systems under comparison.

187 This conceptualization process also requires that a choice is made between different strategies of comparative inquiry: whether one wants to undertake a structural comparison, an institutional comparison, or a functional comparison leads to different descriptions (see below, N 234-238) and evaluations (see below, N 245-251) of the various solutions found in the later stages of the process. Depending on the concrete factual problem under comparison, other strategies might be successful, such as psychological approach, behavior oriented focus, area study approach, problem based orientation, "most similar" or "most different" approach, or multi-approach strategy.[75]

VII. Choosing the Legal System(s) to Compare

A. Terminology

188 Before we get into the details of the choice between various legal systems to compare, we need to clarify the term of "legal system" and differentiate it from the frequently used notions of "legal family" and "legal tradition". The three terms are interrelated, which the following figure shall illustrate. It shows that "legal tradition" is the broadest term, which is why it will be explained first.



189 There are several ways to explain what legal tradition means. One of the most convincing definitions is the one of *John Henry Merryman*:[76] "*A*

[75] *Örücü Esin*, Trees, 38.
[76] *Merryman John Henry/Pérez-Perdomo Rogelio*, The Civil Law Tradition, An Introduction to the Legal Systems of Europe and Latin America, 3rd ed, Stanford 2007, 2.

legal tradition […] *is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.*"

This does not mean that legal traditions are once and for all pre- 190
determined by their history thus remaining static and adverse to change. The contrary is true: Tradition can serve as the catalyst for change in the future.[77]

The definition makes it clear that a legal tradition does not only contain 191
legal rules and similar institutions. It also encompasses the "attitudes", ie the underlying, written or unwritten cultural, political, moral, etc. assumptions and views on what the purpose of law should be. It is thus much wider than the notion of a legal system.

A *legal system* comprises a set of legal institutions, procedures, concepts, 192
models, theories and rules that govern the relationships between individuals, legal entities and the state in a certain society, most frequently in the boundaries of a nation-state.[78]

Legal systems are thus a sub-category of legal traditions. Civil law as a 193
legal tradition is comprised of many Civil law countries such as Switzerland, Germany, France, the Netherlands, Brazil, Russia, etc. – all with quite different political, economic and legal institutions and rules (see below, N 388-577). Additionally a legal system can belong to more than one legal tradition; it can be a "mixed" or in other words a "hybrid" system (see below, N 229-233; eg Scottish law which is a legal system belonging to the Civil law and Common law tradition). The Civil law tradition is thus not a monolithic block. However, there are certain common characteristics of the Civil law tradition, which we will explore in more detail below (see below, N 395-486).

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77 *Glenn*, 2-3; *Mani Matter*, a popular Swiss singer-songwriter (1936-1972) expressed the same thought when he wrote that: "*was unsere väter schufen / war / da sie es schufen neu / bleiben wir später / den vätern / treu / schaffen wir neu*".

78 *Head*, 6.

194 There are many legal systems in the world – by one account approximately 350.[79] It is thus not possible to reasonably compare them with one another. This is why one has to group the legal systems of the same legal tradition into "*legal families*". These are categories that share some common characteristics. There is, however, no uniform doctrine among comparative law scholars what the right or most rational way it is to classify legal families. There are several approaches and all have their own virtues and shortcomings (see below, N 195-201).[80]

B. Introduction

195 The solutions the comparatist will find in the various legal systems are different simply because the legal systems themselves are different. Often one can even find different legal systems within one single State. In Germany and Italy, the law differs from one region to the other with regard to several fundamental matters. The differences between English and Scottish law or Canadian law and the law of Quebec are even more important. Even in a small country like Switzerland, some parts of the law are not the same in the various cantons (eg administrative procedure). On the contrary, the same set of rules might apply in several States (eg international conventions, uniform law). The differences between the legal systems might be more or less important. French and Belgian law were (and still are to a large extent) very similar, whereas Chinese and Norwegian law do not have much in common.[81]

196 In order to facilitate the presentation and understanding of the overwhelming diversity of legal systems throughout the world, many authors suggested structuring them into groups or families by reducing them to a limited number of types of legal systems (classification or taxonomy). The idea was to follow the example of other disciplines which also recognize the existence of different families such as religion (Christianity, Islam, Hinduism, etc), linguistic (Roman languages, Slavic languages, etc) or natural sciences (mammals, reptiles, birds, etc).[82]

79 *Head*, 6.
80 See *Head*, 11.
81 *Gambaro/Sacco/Vogel,* 10.
82 *David/Jauffret-Spinosi*, 15.

Classification serves the purpose of systematization and thus responds to a fundamental scientific need: taxonomy and mutual delimitation lead to greater knowledge. Order and grouping of objects belonging together simplify the study of a certain field and free the mind for the essential elements.[83] The attempt to classify legal systems is as old as comparative private law and there are almost as many classifications as there are comparatists.[84] 197

The main problem, when dividing the legal systems into families of law, is to find an appropriate criterion for the division. Previously, many comparatists attempted to find one single criterion, for instance the economic system or the historical origins. Nowadays, however, most consider that a meaningful division should be based on several different criteria.[85] 198

Taxonomy is not an end in and of itself. It is conducted for particular purposes and a division appropriate for one purpose may not necessarily be useful in another connection.[86] The division's primary objective is normally (albeit not always) pedagogical, ie to facilitate our comparative understanding of legal systems. Most divisions of legal systems into families of law serve therefore as very basic and blunt pedagogical instrument, which should be used primarily to provide beginners with a quick overview over the legal systems of the world. The purpose is to provide a "legal world atlas". JuriGlobe, a research group formed by professors from the Faculty of Law of the University of Ottawa,[87] has actually produced such a world map of legal systems (see below, N 233).[88] In connection with more advanced and detailed studies, the pedagogical divisions should only be used with great care and with necessary caveats. 199

Classifications of legal systems for pedagogical purposes do not hinder other classifications for other purposes. For example, a comparative re- 200

83 *Heiss*, ZVglRWiss 100 (2001), 396, 398.
84 *Heiss*, ZVglRWiss 100 (2001), 396, 396.
85 *Bogdan*, 72.
86 *Bogdan*, 73.
87 ‹www.juriglobe.ca› accessed 21 January 2014.
88 See also the early attempt of *Wigmore John Henry*, A Panorama of the World's Legal Systems, III, St. Paul 1928, 1133ff, who distinguished in his «World-Map of Present-Day Legal Systems» between the Anglican, Chinese, Germanic, Hindu, Japanese, Mohammedan, Romanesque, Slavic and Soviet Slavic Systems as well as the Tribal Customary Law. He also distinguished between pure systems, blends and composites.

search project on dissolution of marriage may be well served by a grouping of legal systems reflecting how easy or difficult they make it to obtain a divorce. Any classification can be justified if it serves its specific purpose and no classification can claim being the only correct one.[89] Therefore, no taxonomy can claim universality by serving every comparative purpose better than every alternative one. It is quite obvious that, in comparing constitutional orders, the Common Law versus Civil Law opposition may be less useful than the federal versus unitary one.

201 Different classifications may therefore coexist for different purposes, and any new taxonomy should be evaluated on the basis of whether it serves a given aim better than the previous ones that share the same purpose.[90] The choice of the appropriate legal systems to compare presupposes therefore an answer to the question of the purpose of comparative work in the case at hand. Those who compare without a goal, lose themselves in a time consuming task and gain only a mass of useless knowledge instead of valuable information.

C. The Prevailing Classifications

202 Probably the most powerful and enduring modern taxonomies are the one proposed by *René David* in 1950[91] and by *Zweigert/Kötz* in 1971.[92] Despite severe criticism (see below, N 218-223), they are still very influential today due also to numerous editions and translations of their main works into other languages over the years.[93]

203 *David*'s taxonomy is built upon the epistemic foundation of private law, mainly of the western nation-states. *David* proposes two equally decisive

[89] *David/Jauffret-Spinosi*, 16: «*Ces discussions ont fait couler beaucoup d'encre; elles n'ont pas pour autant beaucoup de sens. La notion de «famille de droits» ne correspond pas à une réalité biologique; on y recourt seulement à une fin didactique, pour mettre en valeur les ressemblances et les différences qui existent entre les différents droits. Cela étant, toutes les classifications ont leur mérite et aucune n'est sans critique. Tout dépend du cadre dans lequel on se place et de la préoccupation qui, pour les uns et les autres, est dominante*». See also *Zweigert/Kötz*, 73.

[90] *Mattei*, 45 Am. J. Comp. L. 5, 8 (1997).

[91] *David*, 215ff.

[92] *Zweigert/Kötz* (1971), 67ff.

[93] See eg *David/Jauffret-Spinosi*; *David/Brierley*; *Zweigert/Kötz* (1996); *Zweigert/Kötz*.

criteria for his division: The first criterion is of "technical" nature: one should ask whether a jurist educated in a particular legal system is able without great difficulty to work within another legal system. If the answer is in the negative, it must be concluded that the two legal systems most probably do not belong to the same family.[94] This criterion is however insufficient in and of itself, according to *David*, as two legal systems despite their similarities in legal and technical terminology cannot be regarded as belonging to the same family of law if they are based on opposite philosophical, political and economic principles and strive to create entirely different types of societies.[95] These two criteria (the technical and the ideological), according to *David*, should be used cumulatively, not separately.[96]

Based on these two criteria, *David* first distinguished, in the first edition of his treaty of 1950, six great legal systems: the first Occidental law system (French group), the second Occidental law system (Anglo-American group, including Louisiana, Quebec, Scotland and South Africa), the Soviet law system, the Muslim law system, the Hindu law system and the Chinese law system.[97] In the last edition of his book of 2002, *David* suggests a classification which has evolved over the decades comprising the Roman-German family; the Common Law family; Russian law as part of the former family of socialist systems; the Muslim, Hindu and Jewish laws; Far Eastern laws; African laws and the law of Madagascar.[98] 204

David's system was long accepted as convincing by many, even though its weaknesses were known.[99] Its focus on private law, its (former) handling of the Socialist law, its attempt to attribute a predominant position to French law and its presentation in too general lines (which prevented it from giving helpful guidelines to practice) are among the main critics.[100] 205

94 *David/Brierley*, p. 21.
95 *David/Brierley*, p. 21.
96 *David/Brierley*, p. 21.
97 *David*, 215ff.
98 *David/Jauffret-Spinosi*, 16ff.
99 *Esquirol Jorge L*, René David: At the Head of the Legal Family, in: Riles Annelise (ed), Rethinking the Masters of Comparative Law, Oxford/Portland 2001, 212ff.
100 *Markesinis*, 4ff.

206 However, fresh editions and translations continued to appear and there are also modern followers like *Michael Bogdan* (who concedes however that *David*'s classification method would probably not lead to the same results today as several decades ago)[101] and *Raymond Legeais*.[102]

207 In 1971, *Zweigert/Kötz* published their influential and wide spread system of legal families.[103] In the first edition of their book, they discerned the Roman family, the German family, the Anglo-American family, the Nordic family, the Socialist family and the other families (Far Eastern, Islamic and Hindu families.[104] After the collapse of the Socialist system, they distinguished in their third edition of 1996 the Roman, the Germanic, the Anglo-American and the Nordic legal family, as well as the law in the Far East (Chinese and Japanese law) and the religious legal systems (Islamic and Hindu law).[105] Their basic idea is to use a group of criteria and not to lean on any single criterion. Their most important criterion is that of (juristic) style: the comparatist must strive to grasp the legal style of a system and to use distinctive stylistic traits as a basis for classifying legal systems into groups.[106] As with their predecessors, the classification is made from the point of view of private law.

208 According to *Zweigert/Kötz*, the following factors are crucial for the style of a legal family: 1) its historical background and development, 2) its predominant and characteristic mode of thought in legal matters, 3) particularly distinctive institutions, 4) the kind of legal sources it acknowledges and the way it handles them, and 5) its ideology.[107] In this sense their system is a combination of many of the features of earlier classification attempts (see below, N 213-216).

209 Their most important novelty was the division between the Roman and the German family.[108] They also recognized the problem of hybrid systems that are difficult to place within a single legal family.[109]

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[101] *Bogdan*, 75ff.
[102] *Legeais Raymond*, Grands systèmes de droit contemporains, 2nd ed Paris 2008.
[103] *Zweigert/Kötz* (1971).
[104] *Zweigert/Kötz* (1971), 67ff.
[105] *Zweigert/Kötz* (1996).
[106] *Zweigert/Kötz*, 67ff.
[107] *Zweigert/Kötz*, 68.
[108] *Zweigert/Kötz*, 74ff (for the Roman family) and 132ff (for the Germanic family). For a critical analysis of German law as a legal family, see *Heiss Helmut*, Deutscher Rechtskreis?, in: Büchler Andrea/Ernst Wolfgang/Oberhammer Paul

When choosing the legal system(s) to compare in the framework of a macro-comparison (see above, N 171), *Zweigert/Kötz* recommend to compare only the parent systems (eg French law in the Roman family, German law in the German family, English law in the Common Law family, etc) and to ignore the affiliate system (eg Italian law in the Roman family, Swiss law in the German family, US law in the Common Law family, etc). 210

They concede however that this proposition is more a working rule than a firm conclusion of comparative methodology, since in fact the matter is rather subtle and complex. This is best illustrated by the Common Law: The eighteenth-century comparatist could safely have limited himself on the law of England and ignored North America. Today the situation is the opposite. Though England remains unquestionably the parent system of the Common Law family, the law of the United States, while staying in the family, has developed so distinctive a style that a comparatist would slip up if she drew only on English, to the exclusion of U.S. law[110]. 211

It is difficult to give general guidelines for the selection of the legal systems to compare in the framework of a micro-comparison (see above, N 170), since it all depends on the precise topic of the research. *Zweigert/Kötz* provide however the following rule of thumb: [111] For classical private law problems in the fields of contracts, torts, or property, it is normally sufficient to study English and American law in the Common Law family, French and Italian law in the Romanistic family, and, in the German systems, Germany and Switzerland. *Zweigert/Kötz* also recommend not to forget Denmark and Sweden of the Nordic systems, despite the language difficulties [see below, N 283, last item], because of their refreshing lack of dogma. For questions outside the heartlands of private law, *Zweigert/Kötz* suggest a different principle of selection, by underlining however that even here it is rarely safe to ignore the parents systems. For questions of anti-trust law, they advise for example to compare with US law, rather than French law, whereas the limitation of liability of trading concerns is distinctively, though perhaps not best, treated in 212

(eds), Vinculum iuris, Vorträge eines Zürcher Symposions am 23. Juni 2007 aus Anlass der Emeritierung von Heinrich Honsell, Basel 2008, 133ff.

[109] *Husa*, 497.

[110] *Zweigert/Kötz*, 41.

[111] *Zweigert/Kötz*, 41ff. See also *Ebert*, 143ff.

Liechtenstein. With respect to more topical problems, *Zweigert/Kötz* recommend to compare with the solutions offered by quite small jurisdictions, such as English law for issues related to the carriage by sea or Quebec law for issues related to the compensation of victims of car accidents through accident insurance rather than through tort law. Zweigert/Kötz conclude by underlining that "*the rule proposed is simply a rule of thumb, and no substitute for the experience and flair which a comparatist urgently needs if he is to make a proper choice of legal systems to study*".[112]

D. The Previous Classification Attempts

213 At the first Congress of comparative law in Paris in 1900, *Adhémar Esmein* presented a classification based on multiple criteria. The division was based on history, geography, religion and race. He came up with five different families of law, which were Roman, Germanic, Anglo-Saxon, Slavic and possibly Islamic law.[113] The laws of Asia and Africa were simply left out.

214 In 1913, *Georges Sauser-Hall* suggested a classification in which the grouping was based on the idea of dividing humanity into different races. From this criterion he came up with the law of the Aryan or Indo-

[112] *Zweigert/Kötz*, 41ff.

[113] *Esmein Adhémar*, Le Droit comparé et l'Enseignement du Droit, in: Congrès international de droit comparé – Procès-verbaux des séances et documents, I, Paris 1905, 451: «*En s'en tenant à la civilisation occidentale, - et sans parler ici de l'étude comparée des coutumes primitives, pourtant si importante pour la sociologie, - ces groupes, sauf meilleur avis, pourraient être arrêtés au nombre de quatre: le groupe latin, comprenant la France, le Belgique, l'Italie, l'Espagne, le Portugal, la Roumanie et les républiques latines de l'Amérique centrale et méridionale; - le groupe germanique, dont les peuples scandinaves sont un rameau important, et auquel il faut rattacher l'Autriche Cisleithane et même la Hongrie, quoique celle-ci représente une race différente; - le groupe anglo-saxon comprenant l'Angleterre, les Etats-Unis, et les colonies de langue anglaise; - et enfin le groupe slave. Nous n'avons point fait une place à part au droit romain et au droit canonique, qui sont pourtant deux systèmes originaux, parce que ce sont, en même temps, les sources profondes et communes où les divers groupes ci-dessus indiqués ont puisé d'importants éléments de leurs législations. Mais peut-être faudrait-il ajouter, comme cinquième groupe, le droit musulman, qui constitue aussi un grand système original, et qui intéresse si sérieusement un certain nombre de nations européennes, à cause des populations musulmanes de leurs colonies*».

European people, Semitic, Mongolic (primarily China and Japan) and the law of barbarous people (ie mainly the Africans and Melanesians).[114] It goes without saying that as a parameter for classification the idea of race attracts a very critical eye today.

At the beginning of the second half of the 20th century, we find the influential grouping attempt by *Pierre Arminjon*, *Boris Nolde* and *Martin Wolff* of 1951.[115] It was firmly based on private law and took into account criteria such as history, legal sources, legal techniques, legal terms and concepts, culture and language. Their taxonomy resulted in seven families: French, German, Scandinavian, English, Russian, Islamic and Hindu. Somewhat surprisingly, the vast Sino-Tibetan language group was left out.[116] Nonetheless, their grouping was the intellectual basis upon which the later widespread taxonomy suggested by *Zweigert/Kötz* (see above, N 207-212) was constructed. 215

In 1961, *Adolf Schnitzer* aimed at building a system that would reflect legal history as well as previous classification attempts by others. He identified five basic groups of legal systems, which were the law of primitive people (in a broad meaning of the word), the law of the cul- 216

114 *Sauser-Hall Georges*, Fonction et méthode du droit comparé: Leçon inaugurale faite le 23 octobre 1912, Geneva 1913, 102ff: «*Ce facteur fondamental de nos groupements législatifs, ce sera la race, phénomène naturel et spontané, race formée par le sol et le climat, et dont les transformations s'opèrent si lentement qu'elles échappent complètement à notre action.* […] *Le premier groupe comprendra le droit des peuples de race aryenne ou indo-européenne où il nous faut distinguer les variétés: a) hindoue; b) iranienne (droits persan, arménien, etc.); c) celtique (droits celte, gallois, irlandais ou gaélique); d) gréco-latine (droits grec, romain, canonique et néo-latins); e) germanique ou teutonne (droits scandinaves, germaniques, hollandais et suisse); f) anglo-saxonne (droits anglais, anglo-américains et néo-saxons); g) letto-slave (droits russe, serbo-croate, slovène, tchèque, polonais, ancien prussien, lithuanien, ruthène, slovaque et bulgare* […]*). Le second groupe sera formé du droit des races sémitiques, à l'intérieur desquelles il conviendra, derechef, de ne pas confondre les variétés a) assyrienne; b) égyptienne; hébraïque; arabo-musulmane. Un troisième groupe embrassera les institutions juridiques des races mongoles, avec les variétés: a) chinoise (droits chinois, indo-chinois et thibétain); b) japonaise. Enfin, alors que dans ces trois premiers groupements rentreront tous les droits des peuples civilisés, le quatrième ne comprendra que les droits des peuples barbares, droit essentiellement coutumiers, dont les points de contact sont nombreux et proviennent simplement d'un fond humanitaire commun; tels sont les usages négritiens, mélanésiens, indonésiens, australiens, polynésiens, ainsi que ceux des indigènes de l'Amérique et des Hyperboréens*».

115 *Arminjon Pierre/Nolde Boris/Wolff Martin*, Traité de droit comparé, Paris 1951.

116 *Husa*, 495.

ture-people of the Mediterranean, the Euro-American legal sphere, religious law containing Jewish, Christian and Islamic law, and the law of African-Asian people.[117]

E. Variations and Criticism of the Doctrine of Legal Families

217 Some scholars such as *Léontin-Jean Constantinesco* (in 1983),[118] Mary Ann *Glendon, Michael Wallace Gordon* and *Christopher Osakwe* (in 1985)[119] and *Antonio Gambaro* and *Rodolfo Sacco* (in 1996, last edition in 2008)[120] proposed variations of *David*'s classification. Similarly, *Esin Örücü*, *Elspeth Attwooll* and *Sean Coyle* (in 1996)[121] suggested that the hybrid systems should form a major third legal family (alongside the Common Law and the Roman-German law) and not remain on the periphery of comparative law analysis (see below, N 229-233). *Vernon Valentine Palmer* (in 2001, last edition in 2012) continued this novel epistemic move within the legal families approach by transferring previously peripheral systems like South Africa, Scotland, Louisiana, Quebec, Puerto Rico, the Philippines, Botswana, Malta and Israel to the mainstream discussion.[122] In 2004, *Esin Örücü* made a further attempt to renew the legal families doctrine through the "family trees" approach. Within this approach, legal systems would be classified according to their parentage, their constituent elements and the resulting blend. They would then be grouped on the principle of predominance: "*Our main work now is therefore, to deconstruct the conventionally labeled pattern of legal systems and re-construct them with regard to parentage, relationships and the diverse fertilisers, grafting and pruning used in their development. It is only then that we can draw up family trees, leaving*

117 *Schnitzer Adolf F*, Vergleichende Rechtslehre, I, Basel 1961.
118 *Constantinesco Léontin-Jean*, Traité de Droit Comparé, III: La Science des Droits Comparés, Paris 1983.
119 *Glendon Mary Ann/Gordon Michael Wallace/Osakwe Christopher*, Comparative Legal Traditions, St. Paul 1985.
120 *Gambaro Antonio/Sacco Rodolfo*, Sistemi giuridici comparati, 3rd ed Turin 2008; see also the «successor» of this book: *Gambaro/Sacco/Vogel*, 17ff.
121 Örücü Esin/Attwooll Elspeth/Coyle Sean (eds), Studies in Legal Systems: Mixed and Mixing, London 1996.
122 *Palmer*.

ample space for new and inevitable growths”.[123] Besides *Örücü*, there are other attempts such as the ones of *F. Reyntjens* (in 1991)[124] and *Helmut Heiss* (in 2001)[125] to renew the old tradition of legal families or legal spheres.

The doctrine of legal families has been heavily criticized. As a consequence, *Hein Kötz* has even raised the issue whether this doctrine should simply be abandoned.[126] He finally rejects the criticism, probably because he anyway attributes only a limited benefit to the classification attempts. According to *Kötz*, they are at least useful, but in any case not detrimental.[127] Again, for him, the classification into legal families is merely a first rough tool which is in particular useful for the beginner.[128] 218

The criticism mainly focuses on the four following aspects. 219

The most vigorous criticism relates to the Euro-American centric approach of the doctrine of legal families, ie to the fact that the comparatists focus too much on European and American legal traditions.[129] It is true that in the traditional doctrine of legal families, legal systems outside Europe or America are not treated at all (see above, N 204 and 207) or in such a superficial way that a comprehensive and coherent classification is hardly possible.[130] This is well illustrated by legal families which are very widely labeled “Other Conceptions of Law and the Social 220

[123] *Örücü*, Trees, 375.
[124] *Reyntjens*, 41ff.
[125] *Heiss*, ZVglRWiss 100 (2001), 396, 396ff.
[126] *Kötz*, 493ff.
[127] *Kötz*, 494ff: «*Mit allen diesen Einschränkungen – so möchte man meinen – lässt sich die Klassifizierung nach Rechtskreisen oder Rechtsfamilien als ein Konzept bezeichnen, das immerhin nützlich, jedenfalls nicht schädlich ist und es durchaus verdient, im Theoriegebäude der Rechtsvergleichung auf einem Seitenaltar den Gläubigen zu ruhiger Verehrung dargeboten zu werden*».
[128] *Zweigert/Kötz*, 72: «*In any case, as the example of ‘hybrid’ systems shows, any division of the legal world into families or groups is a rough and ready device. It can be quite useful for the novice, by putting the confusing variety of legal systems into some kind of loose order, but the experienced comparatist will have developed a ‘nose’ for the distinctive style of national legal systems and will either not use the device of legal families at all, or will use it with all the circumspection called for by any attempt to force into a schematic order social phenomena as highly complex as living legal systems*».
[129] *Gambaro/Sacco/Vogel*, 13ff; *Glenn*, 434ff; *Markesinis*, 50ff; *Frankenberg*, 26 Harv. Int’l L.J. 411, 442ff (1985); *Hill Jonathan*, Comparative Law, Law Reform and Legal Theory, 9 Oxford Journal of Legal Studies 1989, 107.
[130] *Heiss*, ZVglRWiss 100 (2001), 396, 401.

Order"[131] or "Law in the Far East",[132] whereas on the European continent the Roman and the German families are distinguished in a detailed manner.[133] This was described by *René Rodière* as making as much sense as a jurist from the islands of Touamoutou lumping together civil, common and Islamic law in the same group.[134] The current Europeanization process serves only to reinforce this criticism.[135] The danger of such a narrow focus lies in the marginalization of the "radically different cultures" from the mainstream of comparative legal research.[136] *Bogdan* however tempers this criticism by pointing out that a jurist desiring to obtain an almost comprehensive overview over the legal systems existing in the world today should study the basic features of Anglo-American, French, German, Chinese and Islamic law. According to him, the majority of the law students and jurists need, because of purely practical reasons, to know more about the main Western legal systems than about the laws of the "chthonic" peoples (see below, N 228). According to this author, most of the legal systems in the third world are to a substantial extent based on the law of their former colonial masters, so that studies of for example English and French law open the door to studies of the law of many non-Westerns countries.[137]

221 A second criticism relates the fact that the traditional classifications are too static.[138] Legal systems are dynamic in nature. Legal systems never *are*, they always *become.*[139] Law is a living thing that evolves and changes constantly, even while some cultural and traditionally deeply rooted basic features do change at a remarkably slow pace.[140] The traditional taxonomy does not take into account a serious of fundamental changes in the world during the last decades. The current classifications in legal families thus need to be revised because the geo-legal map of the world is substantially different from the one charted by *David* in the

131 *David/Brierley*, 453.
132 *Zweigert/Kötz*, 286ff.
133 *Zweigert/Kötz*, 74ff (for the Romanistic legal family) and 132ff (for the Germanic legal family).
134 *Rodière René*, Introduction au droit comparé, Paris 1979, 26ff.
135 *Twining William*, Globalization and Comparative Law, 6 Maastricht Journal of European and Comparative Law 217ff (1999).
136 *Mattei*, 45 Am. J. Comp. L. 5, 8 (1997).
137 *Bogdan*, 75ff; see also *De Cruz*, 34ff; *Markesinis*, 50ff.
138 *Glenn*, 426ff.
139 *Mattei*, 45 Am. J. Comp. L. 5, 14 (1997).
140 *Husa*, 492.

1950s. *Zweigert/Kötz* have taken into account this criticism by pointing out in the third edition of their book (of 1996) that "[m]*uch also depends on the period of which one is speaking. Usually comparatists may largely ignore sudden legislative changes, since the meat of comparative law is not positive law but critical comparison. But the division of the world's legal systems into families, especially the attribution of a system to a particular family, is susceptible to alteration as a result of legislation or other events, and can therefore be* only temporary. *For example, current developments in Japan make it seem increasingly difficult to class it along with the People's Republic of China in a 'Far-Eastern' legal family, as was done in the previous edition*".[141] There are at least four major geo-political changes which a modern taxonomy must take into account:[142] (1) The "fall" of Communist ideology in Central and Eastern Europe, an event which called into question the "socialist law" family;[143] (2) The "success" of that same political system in China, and the consequently increased importance of legal sinology among comparative disciplines; (3) The increased awareness on part of the Islamic world of its cultural, and consequently legal, peculiarities ("Islamic spring"); and (4) The independence achieved by the entire African continent. A last significant change can be seen in the fact that the Continental and the Common Law family may one day in the future merge into a common family of Western law ("*droit occidental*"),[144] especially in Europe under the influence of the European integration process.[145]

A third criticism relates to the fact the legal families approach concentrates on private law. Comparative law in general and macro-comparison in particular have for a long time almost omitted such areas as constitutional law,[146] administrative law and criminal law. Hardly without recognizing it, we are forced to use private law terminology as a kind of proxy for judging the nature of entire legal systems. The flaw lies in 222

[141] *Zweigert/Kötz*, 66.
[142] *Mattei*, 45 Am. J. Comp. L. 5, 10ff (1997).
[143] *Schlesinger Rudolf B/Baade Hans W/Herzog Peter E/Wise Edward M*, Comparative Law, 6th ed New York 1998, 285ff.
[144] *De Cruz*, 499 ff.
[145] *Bogdan*, 75; *Koch Harald/Magnus Ulrich/Winkler von Mohrenfels Peter*, IPR und Rechtsvergleichung, 3rd ed München 2004, 319ff.
[146] *Venter François*, Constitutional Comparison, Cape Town 2000, 19ff.

making it insufficiently clear that this is a classification of the world's private-law systems, not their entire legal system.[147]

223 The fourth main criticism relates to the fact that existing classification schemes make no space for hybrids and mixed systems (see below, N 229-233). Yet according to a census by the Faculty of Law of the University of Ottawa, mixed systems outnumber all other kinds in the world (see below, N 233).[148] This is why some authors have suggested that the mixed jurisdictions of the world could actually form a third major legal family, together with Romano-Germanic law and Common Law.[149]

F. Further Proposals

224 It is easy to criticize the classification attempts that have been made by others, while it is much more difficult to come up with something better in their place.[150] Following this criticism, new proposals of classifications have however been made during the last decades.

225 An interesting proposition was made by *Jacques Vanderlinde* in 1982. His private law focused approach classified the systems into different groups based on the principal sources of law: customary law systems ("*COUTUME – Doctrine – Loi – Jurisprudence*"), legislative systems ("*LOI - Coutume – Jurisprudence – Doctrine*") and doctrinal systems ("*DOCTRINE – loi - jurisprudence – coutume*").[151] Echoing the criticism of *Vanderlinde*, some scholars have suggested a so-called "pluralistic" family.[152] Others have advocated broader approaches to comparative law in general and to the classification of legal systems in particular. In doing so, they attempt to move away from a "law as rules" concept to using

147 *Palmer*, 12.1 Electronic Journal of Comparative Law 1, 5 (March 2008), ‹www.ejcl.org› accessed 21 January 2014.

148 ‹www.juriglobe.ca› accessed 21 January 2014. See also *Fathally Jabeur/Mariani Nicola*, World Legal Systems (= Les systèmes juridiques dans le monde), 2nd ed Montreal 2008, 55, 60-61, according to which around 45% of the legal systems are mixed.

149 *Palmer*.

150 *Bogdan*, p. 74.

151 *Vanderlinde Jacques*, A propos des familles de droits en droit civil comparé, in: Hommage à René Dekkers, Bruxelles 1982, 363ff. Voir également *Vanderlinde Jacques*, Comparer les droits, Diegem 1995, 338ff.

152 *Reyntjens*, 41 Revue de Droit international et de Droit comparé 41ff (1991).

key conceptions such as "tradition",[153] "*mentalité*"[154] and "culture".[155] Using such an approach, they essentially argue that law, and the understanding of law, involves much more than the mere reading of statutory rules and judicial decisions. In other words, law cannot be understood unless it is placed in a broad historical, socio-economic, psychological and ideological context.[156]

Ugo Mattei suggests an interesting taxonomy, which is based on the role of law as a tool of social organization.[157] The idea behind it is that in all societies there are three main sources of social norms or social incentives that affect an individual's behavior: politics, law and philosophical or religious tradition.[158] Legal systems may thus be classified in a tripartite scheme according to the source of social behavior that plays the leading role in them. The underlying assumption is that not only law in the Western sense, but also politics and tradition are patterns of law in a larger sense. Law in this sense means whatever functions in the world's legal systems as law, ie whatever gives individuals incentives strong 226

153 *Bell John*, English Law and French Law – Not So Different?, 48 Current Legal Problems – Part II 63, 69 (1995): «*A tradition may be defined as a complex of rules, concepts, institutions and practices which characterise the way the law works in a particular area. These features build together into a process. In short, a tradition is a way of doing things, which is handed down and shapes the way in which the law operates*».

154 *Legrand Pierre*, Comparative Legal Studies and Commitment to Theory, 58 Mod. L. Rev. 262, 272ff (1995): «*It is through this necessary broadening of the habitual province occupied by comparative legal studies that one can hope to conduct a meaningful inquiry at the level of* mentalité *into the mythologies of the civil law and common law worlds, with specific reference to the way in which rationalities are constructed*».

155 *Friedman Lawrence M,* Some Thoughts on Comparative Law Culture, in: Clark David S (ed), Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday, Berlin 1990, 49ff: *«Comparative law, in the traditional sense, is concerned, above all, with issues of translation, as it were. It is a search for equivalences, or contrariwise, it is a «display of diversity.»* […] *It has the virtues and the faults of a dictionary. A dictionary is an essential reference tool; but nobody can learn a foreign language, or grasp its essential genius, from a dictionary alone.* […] *Comparative law is similarly geared to practical goals. But from the standpoint of basic research, or for understanding a legal system in its social setting, comparative law seems clearly inadequate. A living body of law is not a collection of doctrines, rules, terms, and phrases. It is not a dictionary, but a culture; and it has to be approached as such».*

156 *Van Hoecke/Warrington*, 47 Int'l & Comp. L.Q. 495, 496 (1998).

157 See also *Heiss*, ZVglRWiss 100 (2001), 396, 416ff.

158 *Mattei*, 45 Am. J. Comp. L. 5, 12 ff (1997).

enough to affect their social behavior.[159] In such a classification, systems may belong to the rule of professional law, the rule of political law, or the rule of traditional law.[160] The family of the rule of professional law is composed of the legal systems of the Western legal tradition (with a subdivision between Civil Law and Common Law). The homogeneity of the systems belonging to the rule of professional law is largely due to two factors, ie (1) the legal arena is clearly distinguishable from the political arena; and (2) the legal process is largely secularized.[161] The second family, based on the rule of political law (also called the law of development and transition), comprises all systems in which the political process and the legal process cannot be separated, in the sense of having achieved autonomous fields of operation.[162] The third family, based on the rule of traditional law (the Oriental view of law) consists of those systems where the separation between law and religious and/or philosophical tradition has not taken place.[163]

227 *Mark Van Hoecke* and *Mark Warrington* suggest a sociological or anthropological approach with a division on the basis of "legal cultures". They distinguish four broad legal cultures in the world: African legal culture, Asian legal culture, Islamic legal culture and Western legal culture. In comparison with the other three legal cultures, Western legal culture is characterized by individualism and rationalism. In contrast, Asian legal culture appears to be neither individualistic, nor rationalist. The Asian collectivist approach, seen most prominently in China, but also in Japan, was determined principally under the influence of Confucian theory of the natural order of reality. In Islamic legal culture there is no division between law, morals and religion. The way of traditional African legal thinking is again not individualistic. For *Van Hoecke/Warrington*, a common legal culture includes shared understandings on, at least, the following points: (1) a concept of law; (2) a theory of valid legal sources; (3) a methodology of law, both for making and for adjudicating of the law; (4) a theory of argumentation; (5) a theory of legitimation of law; and (6) a common basic ideology.[164] Within their "law as culture" ap-

[159] *Mattei*, 45 Am. J. Comp. L. 5, 13 (1997).
[160] *Mattei*, 45 Am. J. Comp. L. 5, 19ff (1997).
[161] *Mattei*, 45 Am. J. Comp. L. 5, 23 (1997).
[162] *Mattei*, 45 Am. J. Comp. L. 5, 27ff (1997).
[163] *Mattei*, 45 Am. J. Comp. L. 5, 35ff (1997).
[164] *Van Hoecke/Warrington*, 291ff. See also *Van Hoecke/Warrington*, 47 Int'l & Comp. L.Q. 495, 495ff (1998).

proach, *Van Hoecke/Warrington* distinguish three levels. At a first level, legal systems have to be located in the context of the four large cultural families at world scale. At a second level, comparative law in the more traditional, strict sense is possible within each of the large cultural families, by using the six elements, which form the hard core, the paradigm of every legal system. At a third level a more or less purely technical comparison is possible when confronting legal systems having the same paradigmatical theories in each of those six areas, as is for instance the case with the continental Member States of the European Union.[165]

Last but not least, *Patrick Glenn*'s approach is based on legal traditions. He distinguishes between a Chthonic (according to *Patrick Glenn*, people who live ecological lives), a Talmudic, a Civil Law, an Islamic, a Common Law, a Hindu and a Confucian legal tradition. He also examines whether these different traditions may be reconciled or whether one must accept a sustainable diversity in law.[166] 228

G. Mixed Legal Systems

There are a large number of legal systems that are difficult to place into the basic categories used in legal literature. The pedagogical divisions are made for the purpose of obtaining an overview (see above, N 196-197), which makes it difficult to take nuances and special features into consideration.[167] Among the special cases, the legal systems that historically represent a mixture of legal traditions from two or more different families of law are the most important one. These systems are called "mixed", "hybrid" or "composite" legal systems. 229

Vernon Valentine Palmer identifies roughly 16 political entities, of which 12 are independent countries, in this category.[168] Most (excluding Scotland and Israel) of these are the former colonial possessions of France, the Netherlands and Spain, which were subsequently transferred to Great Britain or the United States. In these mixed or hybrid systems, 230

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165 *Van Hoecke/Warrington*, 291ff. See also *Van Hoecke/Warrington*, 47 Int'l & Comp. L.Q. 495, 495ff (1998).
166 *Glenn*.
167 *Bogdan*, 77.
168 *Palmer*, Elgar Encyclopedia of Comparative Law, 590.

the sources of law are far from uniform and these differences shape the style of individual systems.

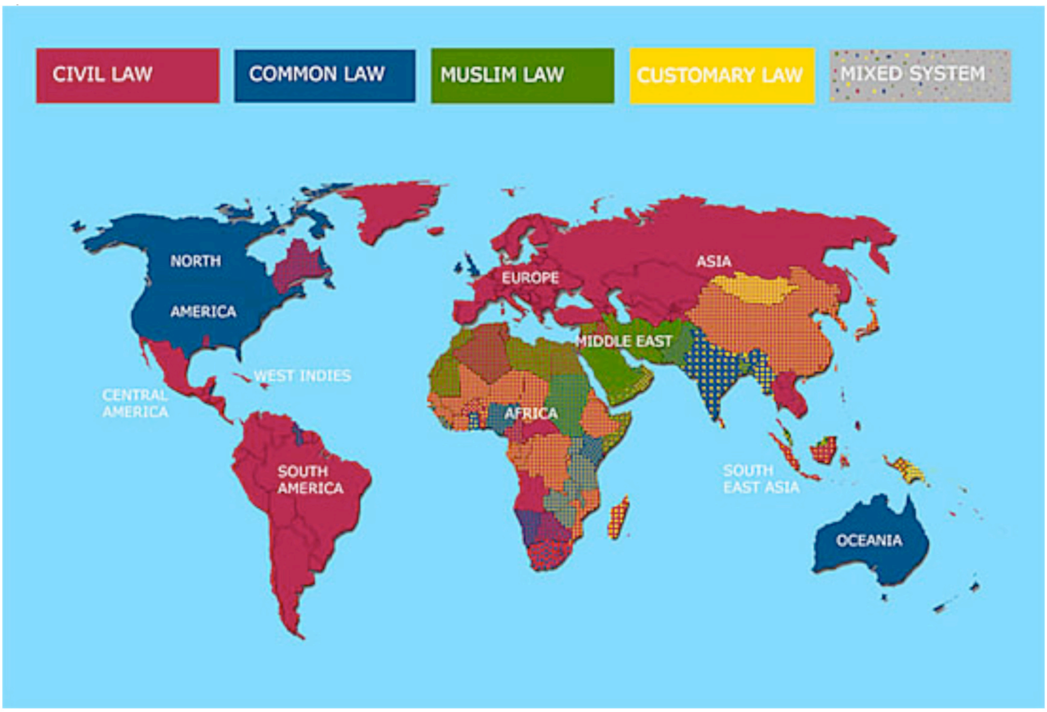
231 The French group (eg Quebec, Louisiana, Mauritius) is characterized by the influence of the French Civil Code and thus possesses civil law in a codified form. This is why the representatives of this group are thought to be more resistant to Common Law penetration than the mixed systems, which are not based on a code. The Dutch group (eg South Africa, Sri Lanka) consists of uncodified Roman-Dutch law that stems from institutional writers such as *Hugo Grotius* (1583-1645) and *Johannes Voet* (1647-1713) and necessitates a stronger system of *stare decisis* (see below, N 624-625). The Spanish group (eg Puerto Rico, the Philippines) is somewhat like the French group because the Spanish Civil Code of 1889 was drafted in the mould of the French Civil Code.[169] In the Common Law group, the development of the mixed systems depends foremost on whether the jurisdiction's Common Law footing stems from Great Britain or the US. Civil Law in South Africa and Quebec, for instance, has cohabited exclusively with the English Common Law, and thus has been influenced by English courts, judges and literature. On the other hand, Civil Law in Louisiana, Puerto Rico, and the Philippines has lived in turbulent monogamy with US law.[170]

232 *Palmer* even suggests that mixed systems outnumber all other kinds in the world and represent diversified blends with unlimited possible combinations.[171] He lists and exemplifies several existing mixtures, such as mixed systems of Civil Law and Common Law (eg Quebec [Canada]); Civil Law and customary law (eg Ethiopia); Civil Law and Muslim Law (eg Iraq); Civil, Common and customary law (eg Indonesia); Common and Muslim Law (eg Qatar); Common and customary law (eg Hong Kong [China]); Common, Muslim and customary law (eg India); Common, Muslim and Civil Law (eg Iran); and Talmudic, Civil and Common Law (Israel).[172] The study of the experiences of the existing mixtures of Civil and Common Law traditions is useful in view of the European integration process, which at its start was deeply rooted in Continental le-

169 *Palmer*, Elgar Encyclopedia of Comparative Law, 590.
170 *Palmer*, 6ff.
171 *Palmer*, 12.1 Electronic Journal of Comparative Law 1, 5 and 16 (2008), ‹www.ejcl.org› accessed 21 January 2014).
172 *Palmer*, 12.1 Electronic Journal of Comparative Law 1, 24ff (2008), ‹www.ejcl.org› accessed 21 January 2014). See also *Örücü*, Family Trees, 375.

gal culture but must, after the UK and Ireland became members, also deal with Common Law thinking, both by being affected by it and by, in turn, influencing the thinking of English and Irish jurists.[173]

The following chart established by JuriGlob illustrates the importance of mixed legal systems.[174] 233



VIII. Description of the Findings

After having established the content of the different legal systems under scrutiny, the comparatist must first describe the norms, concepts and institutions of these systems.[175] Here, the comparatist must again be aware of possible problems of observer effect (see above, N 147-149), difficul- 234

173 *Castellucci Iganzio*, How Mixed Must a Mixed System Be?, 12.1 Electronic Journal of Comparative Law 1, 10 (2008), ‹www.ejcl.org› accessed 21 January 2014.
174 ‹www.juriglobe.ca› accessed 21 January 2014.
175 *Dannemann*, 412ff.

ties of language (see below, N 283, last item) and access and appreciation of cultural differences.[176]

235 However, a mere description of a foreign legal system may provide a basis for comparison, but is not in any acceptable sense comparative.[177] It will present this legal solution by using the legal terminology of this system, by making references to statutory rules and case law of this system and by using the legal concepts of this system. A purely objective report which sets out the law of a particular legal system (*Länderbericht, compte-rendu pays par pays*) will give an account of its legal solution to a practical problem, but it does so through the glasses of this very system (see Annexe).

236 This is why the findings in the various systems can only be compared if they are freed from the context of their respective system and set in the context of all the findings from the other systems under investigation.

237 Comparative law is particularly useful for noticing gaps in the law of one country which – almost like the blind spot in our eyes – can be difficult to detect from within (see above, N 152). The capacity of minors to enter into contracts, and therefore also to make gifts to their parents, under German and English law might illustrate this. According to German law, minors cannot transfer property without the consent of their parents as statutory agents (§ 107 of the German Civil Code [Bürgerliches Gesetzbuch, BGB]). Furthermore, § 181 German CC makes it impossible for an agent (including statutory agents) to enter into a legal transaction with himself on behalf of his principal (ie the minor). Parents can thus not consent to a gift and transfer of property to themselves. As title does not pass, minors can vindicate their presents during a certain time period (§ 985 German CC). Therefore, under German law, minors cannot give birthday presents to their parents, at least in legal theory. This blind spot in German law is best revealed by a comparison with English law, which knows the notion of necessities, which may include gifts made by a minor.[178]

238 Comparative study could end with a delineation of relevant similarities and differences. This would satisfy the minimum goal of comparative

[176] *Örücü Esin*, Elgar Encyclopedia of Comparative Law, 569.
[177] *Merryman*, 479-480.
[178] *Dannemann*, 416ff.

study and that goal alone requires that the problems of functional equivalence are investigated thoroughly (see above, N 150-153).

IX. Explanation of the Similarities and Differences

Once one has carefully determined the similarities and differences between the legal systems under comparison, these observations naturally lead to the question "why?" One of the most interesting and most important tasks of comparative law is to attempt to explain such similarities and differences.[179] Alternatively, one may ask what the significance of the identified similarities and differences is for an understanding of the respective legal systems and the broader cultures of which they are a part.[180] While searching for conceivable explanations, one learns which factors influence the structure, the development and substantive contents of the legal systems, as it is the similarities and differences between these factors that create the similarities and differences in the field of law.[181] When explaining for example the existence of punitive damages in US law and their absence in Civil Law, one will have to take into account differences with respect to procedure (eg the existence or not of jury trial), to party representation (eg the way to calculate attorneys' fees) or to social security (eg the extent to which some losses are covered or not by social security).[182] 239

For this, the comparatist must adopt a new point of view from which to consider all the different solutions (*tertium comparationis*; see above, N 175-176).[183] The next step in the process of comparison is thus to build a system of the solutions found and cleaned through the functional filter (see above, N 147-149): The solutions one founds in the different jurisdictions must be seen, once again, purely in the light of their function, as an attempt to satisfy a particular societal need.[184] 240

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179 *Dannemann*, 416ff.
180 *Reitz*, 626.
181 *Bogdan*, 55.
182 *Widmer Corinne*, A Civil Lawyer's Introduction to Anglo-American Law: Torts, Berne/Vienna 2008, 297ff.
183 *Zweigert/Kötz*, 42.
184 *Zweigert/Kötz*, 44.

241 This system must be flexible enough to embrace the quite heterogeneous legal institutions which are functionally comparable.[185] Even with a purely functional approach, the legal institutions to be compared in each legal system remain in some important senses apples and oranges. This is not a bad thing, because the real power of comparative analysis arises precisely from the fact that the process of comparing "apples" and "oranges" forces the comparatist to develop constructs like "fruit". It forces the comparatist to articulate broader categories to accommodate terms that are at least in some significant way functional equivalents and to search on broader levels for functional similarities and differences.[186] This is why a more general legal category like "objective liability" would for instance be more appropriate than narrower more nationally tainted ones like "*Gefährdungshaftung*", "*théorie du risque*" or "strict liability".[187]

242 Such a system of comparative law will inevitably be rather a loose structure. The component concepts cast a wider net than those of national systems because the functional approach of comparative law concentrates on the real life problems which are sometimes less directly addressed by the concepts of national systems. This does not prevent the comparative law system from being functionally coherent. Its concepts and categories are based on concrete problems a particular societal need poses for the law in all systems where the social and economic conditions are similar. They provide a realistic context within which to compare various solutions, however much they differ formally and substantially.[188] *Zweigert/Kötz* give the following illustration of this step of the comparative method: "*The task is not, however, different in nature from that of the librarian who needs a supranational system of concepts if he is to arrange his foreign material in topical categories rather than simply in national groupings*".[189]

243 The similarities and differences between legal systems are two sides of the same coin. "*A similarity signifies the lack of differences, while a difference is no more than a lack of similarity*".[190] The purpose of the en-

185 *Zweigert/Kötz*, 44.
186 *Reitz*, 625ff.
187 *Zweigert/Kötz*, 45.
188 *Zweigert/Kötz*, 45.
189 *Zweigert/Kötz*, 45.
190 *Bogdan*, 55.

quiry (see above, N 59-138) will be the most important factor in determining where one should primarily look for difference, where for similarity, and where for both in equal measures.[191] In concrete cases one usually concentrates on only one side of the coin, ie explaining either the similarities or the differences. Which approach should be chosen depends upon the (often instinctive) assumption that the compared systems are similar respectively different. Such assumptions or expectations of the similarities and differences must be stated and explained. As a good scientist working on the basis of a hypothesis (see above, N 175-183) should try to falsify it rather than to prove it, one should in particular explain the opposite of one's initial assumption. If one works based on the hypothesis that the legal systems to be compared are fundamentally similar, the discovered differences need to be explained. If one starts from the opposite assumption, ie that the legal systems are different, it is the discovered similarities that require explanation.[192]

For this explanatory phase to lead to accurate results, a socio-cultural 244
overview is essential. Whether in a micro-comparison or in a micro-comparison (see above, N 169-174), the topic under comparison must be placed in the context of the entire legal system. This phase therefore consists in formulating interrelationships involving political, economic, cultural and other social phenomena. The help of economists, historians, anthropologists or cognitive psychologists may be needed.[193] For instance, economic analysis (see above, N 161-168) may help to understand why certain legal systems are different or alike. They may enrich the analysis by the scientific rigor and explanatory power of modern economics.

X. Evaluation of the Findings

After having chosen the legal systems to compare (see above, N 188- 245
233), and after having described (see above, N 234-238) and explained their similarities and differences concerning a particular issue (see above, N 239-244), it is often difficult to avoid the question which of the

[191] *Dannemann*, 418.
[192] *Bogdan*, 55.
[193] *Örücü*, Methodology of comparative law, 570.

compared findings is the best or the better one.[194] The last step of the comparative work may thus consist in a critical evaluation of the various findings.

246 These findings may be similar. Such a result would confirm *Zweigert/Kötz*'s initial assumption of similarity (see above, N 146). However, such an assumption is exaggerated, not only because it artificially ignores the culture dimension of law (see above, N 178-181), but also because it bears the risk that the comparatist loses its open mind when getting to the last stage of the comparison.[195]

247 These findings may also be different. This second option leaves open two possible evaluations: the different solutions may be equally valid or one might be "superior" to the others. It is once again (see above, N 59-138) only the purpose of the research that can determine the superior value of one solution over another, as the findings have to be pitched against what the comparatist regards as the touchstone. Law cannot be "good" or "better" in and of itself. Law can only be more or less successfully responsive to particular circumstances or be more or less influential in a given environment.[196] For instance, the comparatist could be looking for the most "efficient" rule and therefore using the "law and economics" approach (see above, N 161-168) as the touchstone, or she could be looking for other values such as "cheapness of procedure", "speed of procedure", "better protection of the victim", "cost-effectiveness", "user-friendliness", etc. Thus, what is being looked for will determine the evaluation of the solutions found.[197] Comparison as such does not prove the truth of a belief or reveal one legal rule or doctrine to be superior to others. It is therefore only an assessment of what matters.[198]

248 Each comparative evaluation must therefore be made in relation to a certain subjective set of values (value judgment). This does not mean, however, that the evaluations are meaningless, but one must be conscious of the fact that the set of values one applies is perhaps not shared by others. To follow one's own set of values is perfectly acceptable if, for instance, the purpose is to utilize the experience of foreign countries within one's

[194] *Bogdan*, 65.
[195] *De Cruz*, 239.
[196] *Legrand*, The Same and the Different, 296.
[197] *Örücü*, 570.
[198] *Jansen*, 337.

own country: the comparatist naturally chooses to propose the solution that he himself regards to be the best for its own system.

The fact that there is always an underlying set of values triggers two main consequences: first, the comparatist must be conscious of his own set of values. Second, he must make his set of values transparent. He thus must openly communicate his set of values and avoid any hidden agenda. 249

One must exercise greater caution with respect to foreign values for instance when suggesting a unification of laws intended to result in an adoption of harmonized rules by a large number of States. In other words, one can legitimately determine what is best for oneself, but should be very careful not to apply one's own values to determine what is best for others.[199] 250

When doing this critical assessment, one must be extremely careful and not lose sight, once again, of the purely functional criterion to judge the various solutions (see above, N 147-149). Comparative studies should always be undertaken in a spirit of respect for the other. They must favor an ecumenical appreciation of what are but equal evidential claims made by diverse laws on the world.[200] No solution is contemptible simply because it is different from the other. In analyzing a foreign legal system, the comparative scholar has to make extraordinary efforts to discern the sense of foreign solutions. Therefore, before the comparatist criticizes, she must make all possible efforts to avoid any narrowly chauvinistic view. She must try to see the sense of the foreign solutions even if they are strangely different from her own and seem to represent values directly contrary to her own.[201] 251

[199] *Bogdan*, 65.
[200] *Legrand*, The Same and the Different, 296.
[201] *Reitz*, 634ff.

Chapter 3: Transplanting and Receiving Legal Concepts

I. Introduction

No legal system just popped out of nowhere or was put in place ready-made. National legal systems evolve through time, they are the product of various factors such as the history of the people or nation they were created by, the driving political, social and economic forces, their place on the earth (the availability of natural resources, the geography and climate play an important role in the shaping of legal rules),[1] the alliances made between nations, wars won or lost etc. 252

This also means that there is no "stand-alone" legal system. No national law is "pure", ie free of foreign influences.[2] This is certainly true in our age where no nation can escape the effects of (wanted or unwanted) migration, global commerce and trade, fast and boundless communication, war or economic and financial crisis. Legal systems are thus forced to constantly change and adapt themselves. Just like human beings legal systems can learn from each other to ameliorate existing or find new, better solutions to cope with the challenges. One way to do this is to borrow ideas and concepts from each other and implement them – often with modifications – into its own system. 253

This process of legal receiving and borrowing has received many names, the most prominent being "*legal transplants*" (see below, N 256).[3] As we will see this theory is not undisputed in comparative law scholarship, but – as also will be shown – it is a fact that the import and export of legal concepts and systems has happened and still is happening worldwide. 254

In this chapter we will first explain the meaning of the legal transplant theory and the terminology used in literature. We will explain some of the 255

1 Müller–Graff, 266.
2 Janssen/Schulze, 2 ERPL 225, 254–255 (2011).
3 Watson Alan, Society and legal change, in: Merryman John Henry/Clark David S/Haley John Owen (eds), Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America and East Asia, New Providence 2010, 74–76, 74–75.

reasons for transplanting legal ideas or concepts (or even systems) and what potential pitfalls lurk. We will then give some classic (general) examples of legal transplants to show that this process has happened in the past many times: The reception of Roman Law in Europe and in other parts of the world; the reception of the French and German Civil Codes and the diffusion of Common Law. The chapter will end with a specific example of the transplantation of parts of Swiss private law into Turkish law.

II. Terminology

256 The moving of a rule or a system of law from one country to another country, or from one people to another has been given many different names: It has been called "*legal transplant*" which evokes the association of organ transplantation from one human body into another. Of course this also implies that the receiving body possibly rejects the donor organ. Especially for the adaptation of Roman law in Europe the term "*reception*" is used. Then we find many more colourful metaphors such as: "*grafting*", "*implantation*", "*re-potting*", "*transposition*", "*cross-fertilization*", "*contaminants*", "*legal irritants*" or "*competition of legal systems*".[4] As far as we can see the term "*legal transplant*" is the most widely used to describe the movement of legal ideas and concepts from one legal system to another. For that reason we will use it as well.

257 Take note that all the various terms make clear that the process of moving a legal concept is not done by merely taking over a specific rule or system. Once the foreign concept has been accepted it must be integrated into the new system. The musical term "*transposition*" aptly illustrates this:[5] Each note that has been transposed takes the same relative place in the scale of the new key as in the old. This means that the incorporation of the new rule requires some fine-tuning of both the adapted rule and the existing rules. This insures that the transplanted idea or concept fits the particular social, economic and political needs of the recipient.

[4] Örücü, 97; in music transposition is "the shifting of a melody, a harmonic progression or an entire musical piece to another key, while maintaining the same tone structure, i.e. the same succession of whole tones and semitones and remaining melodic intervals" (<http://en.wikipedia.org/wiki/Transposition_%28music%29> accessed 2 September 2013).

[5] Örücü, 97–98.

Likewise, the term "*legal transplant*" conveys the importance of carefully doing everything necessary to ensure the proper functioning of the new organ in the body of the receiver, ie the new legal, social, economic and political environment. It is safe to say that the process of transplanting should be seen not only as a legal operation but also as a political, cultural and social procedure.

III. The Theory of Legal Transplants and its Challenges

A. Theory of Legal Transplants

As has been rightly observed law (and lawyers) are in general resistant to change, if not even stubborn.[6] It is thus not surprising that a legal system often needs a more or less subtle nudge to change.[7] A legal transplant can be such a nudge. In chapter one (see above, N 66-111) we have identified the agents of such change (legislator, academics, judges, practicing lawyers). In the following we will now explain the theory of legal borrowing to better understand the process of transplanting a legal idea from one system to the other and the risks associated with it. 258

Every society changes constantly due to many factors. The legal system has to keep up with these developments. The appropriate solution cannot always be found internally, which is why the need for an external idea or concept arises. For that purpose a rule or a system of law can be moved from one country to another and thereby fertilize legal development. The Western legal tradition is indeed comprised of a variety of legal rules and styles that were adopted either from within the Civil or Common law tradition or across the borders of these legal traditions.[8] 259

Alan Watson, who – as far as we know – coined the term "*legal transplant*", states that in the Western world the development of the law of most jurisdictions, especially with respect to private law, is often the result of borrowing from elsewhere. He argues that private law can 260

6 Watson, Law, 223.
7 See in general Thaler/Sunstein, 1ff.
8 Mattei Ugo, Efficiency in Legal Transplants: An Essay in Comparative Law and Economics, International Review of Law and Economics March 1994, 3–19, 4.

survive without any close connection to any particular people, particular period of time or any particular place.[9] According to this view, legal rules can be taken out of context and serve as a model for legal development in a very different society.[10] This means that it is not necessary that the donor system and the receiving system share a common culture, history or have similar political and socio-economic structures or traditions. According to *Watson* the legal transplant can continue to live relatively autonomously. Examples in favour of this argument are:

– the Civil law tradition could establish itself in countries as linguistically, politically, economically, culturally and geographically diverse as Germany and Brazil;

– the Swiss Civil Code and the Code of Obligations could be successfully transplanted to Turkey with its different religious, economic and social background;

– German law was received in Japan despite cultural and language differences.

B. Challenges

261 Not everybody agrees with *Watson*, though. According to the *mirror theory* law always reflects the particular society that has shaped it. A legal concept therefore cannot be exported *and* keep its identity at the same time.[11] This means that when legal rules are taken out of their political, economic and social context they will invariably change. According to this view legal cultures are so inextricably linked with their surrounding culture that – if at all – legal transplants can only work if the donor and the receiving system are very similar (historically, legally, politically, socio-culturally and economically).[12]

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9 Watson Alan, Legal Transplants and Law Reform, 92 LQR. 79-84, 81 (1976).

10 Grosheide Frederik Willem, Legal Borrowing and Drafting International Commercial Contracts, in: Boele-Woelki Katharina/Grosheide Frederik Willem/Hondius Ewould Herman/Steenhoff G J W (eds), Comparability and Evaluation, AH Dordrecht 1994, 69–83, 70–71.

11 Wendehorst, 25.

12 Teubner, 61 MLR 11, 12 (1998); sceptical also Müller-Graff, 262.

Others deny the possibility of legal transplants altogether (eg *Pierre Legrand*).[13] Like the proponents of the mirror theory they also argue that legal rules cannot be separated from their cultural, economic or political context. A legal rule as such is considered to be just an empty shell that only comes to life or can only effectuate legal change if it is embedded in the concrete socio-economic background that created it. Transferring just the legal rule is therefore of no avail since the very transfer will change the core of the rule and it becomes useless for the new jurisdiction. 262

C. Assessment

We do not need to dive in this controversy too deeply. Suffice to say that the phenomenon of legal transplants has a long history and that it cannot be denied that legal concepts were (and are) transplanted.[14] We have put together a few examples below (see below, N 297-387) that show that legal ideas and concepts have indeed always circulated between different states, territories or cultures. 263

In addition common sense tells us that even though 264

"*we must not enslave ourselves to other legal families, […] we must also not re-invent the wheel. We must draw interpretive inspiration from any proper source*".[15]

Or, as the German lawyer *Rudolf von Jhering* (1818–1892) famously said: 265

"*The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden*".[16]

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[13] Legrand Pierre, The Impossibility of Legal Transplants, 4 MJ 111–124, especially 120–122 (1997); see for further references and discussion Watson, Legal transplants, 21–22.
[14] Watson, Legal transplants, 21.
[15] Aharon Barak, The Israeli Legal System: Tradition and Culture, 40 HaPraklit 197–217 (1992).
[16] Örücü, 96.

266 On the other hand we agree with the critics of the legal transplant theory that the mere transfer of a legal rule into a new jurisdiction will not per se be a useful endeavour. The agents of the receiving system have to carefully consider the historical, political, social, religious and cultural context, including the legal culture of the donor system and thus understand the background of the rule or concept to be adopted.[17] Then they must evaluate the parameters of their own system and – if necessary – make adjustments to it to fit the new concept (see also below, N 283).

267 Finally the long-term effect of legal transplants should not be overestimated. If the receiving legal system is highly developed and the borrowed concept concerns only a specific part of the law, the foreign roots of the transplant may soon wither.[18]

IV. Types of Transplants

268 The types of and the reasons for legal transplants are manifold. Legal transplants come in all different forms, shapes and sizes and sometimes even in disguise (a court may eg tacitly adopt a solution from another legal system to solve a case). Thus, the reasons for legal transplants are often not clear-cut:

– It may be completely *voluntarily* because eg a national legislator is convinced that a certain foreign legal concept is superior to its own solution. An often-discussed example is the question how to increase organ donations. Countries with a low donation rate (such as Germany: ca 12% of its population are willing to donate an organ) may look to countries with a high rate (such as Austria with a consent rate of 99.98%) and understand the legal framework. This may lead them to change their own system, in this case from an opt-in to an opt-out method.[19]

– On the other hand a legal transplant may be *imposed by force*. This was the case in the era of colonization (see above, N 77) when Euro-

[17] De Cruz, 511–512; see also Schacherreiter, RabelsZ 77 (2013), 272, 283–285.
[18] Mattei/Ruskola/Gidi, 228, give the example of the US-American Workers' Compensation Acts, which since 1910 have been adopted in every US state. It is nowadays forgotten that they were largely based on a German model.
[19] See for more details Thaler/Sunstein, 177–184.

pean countries imposed their entire legal systems or at least a major part of them to African or Asian cultures.

- Maybe a legal concept is not imposed by force but by economic necessity. This can be called a "*semi-voluntary*" transplant (see below, N 275).
- Finally we will show that legal transplants also can occur through *factual transplants* (see below, N 279).

A. Voluntary Transplants

Firstly, voluntary legal transplants can be, as has been shown in chapter one, the result of an intentional choice made by national legislators (see above, N 69-87). Secondly, a legal concept can be adopted by the judiciary through case law (see above, N 88-103). Thirdly, legal transplants can be introduced by the contract drafting practice of international law firms or companies (see above, 108-110). 269

A voluntary legal transplant was eg the well-known and widely researched *reception* of Roman law in Europe. In its core the reception of Roman law was the academic study and practical application of Roman law between the 11th and 19th century (see below, N 297-308).[20] It is characteristic for the process of reception that a certain legal occurrence is *willingly, intentionally and voluntarily* adopted into another system as established law. 270

Even when the foreign legal concept is adapted voluntarily the question remains *why* it happened. It could be asserted that it is the quality of the foreign concept that is considered to be superior to the one in place in the receiving country. However, there are scholars that believe the reasons to be much more mundane. *Paul Koschaker*, an Austrian legal historian (1879–1951) argues that is not the quality of the foreign concept that is decisive for receiving a legal transplant but that it is purely a question of *power*.[21] He believes that a legal transplant is the result of an intellectual or cultural position of power of the donor's political and legal system. Therefore the true reason for receiving a legal transplant is the *authority* 271

[20] Janssen/Schulze, 2 ERPL 225, 226 (2011); Wiegand, 39 Am J Comp L 229, 229–230 (1991).

[21] Koschaker, 137–138.

(or at least the perceived authority) of the donor system. *Koschaker* says that this also explains the reception of Roman law in Europe since at that time the Roman empire and law and everything connected with it was held in high estimate. He further claims that the same holds true for the reception of the Swiss Civil Code and Code of Obligations in Turkey, whereas *Ferid Ayiter* is of the opinion that the reception of the Swiss Codes was primarily due to their quality, clarity and simplicity (see also below, N 321-378).[22]

272 We shall add to these considerations that individual persons can sometimes play a decisive role in the process of transplanting. For instance, *Mahmud Esad Bozkurt* (1892–1943), the third Turkish Justice Minister, studied law in Lausanne and Fribourg (Switzerland). His familiarity with Swiss law facilitated the adoption of the Swiss Civil Code in Turkey. Another example is the transplant of the German theory of liability for breach of trust into Swiss law (see above, N 99). It was a Federal Supreme Court Judge, *Hans Peter Walter*, who was instrumental in borrowing the theory.[23]

B. Imposed Transplants

273 On the other side of the spectrum is the forceful *imposition* of foreign law. This form has been witnessed in human history many times, esp in periods of colonization.[24] We have touched upon this in chapter one (see above, N 77).

274 However, the lines between voluntary take-over and imposition are often blurry: Economic necessity or globalization may force a country to adopt certain rules (eg accounting standards), but it does it voluntarily, without coercion from another state or organization. We will treat this occurrence in the next section.

[22] Bandak Hülya, Die Rezeption des schweizerischen Zivilgesetzbuches in der Türkei, Bielefeld 2008, 76-77, with reference to Ayiter Ferid, Das Rezeptionsproblem im Zeichen der kulturhistorischen Perspektive “Europa und das Römische Recht” und unter Berücksichtigung der Rezeption westeuropäischer Gesetzbücher in der modernen Türkei, in: L’Europe e il diritto Romano, Studi in memoria di Paolo Koschaker, Milano 1954, 131–156, 146–147.
[23] See also Wiegand, Canaris, 890.
[24] Örücü, 95.

C. Semi-Voluntary Transplants

Semi-voluntary legal transplants are probably very frequent,[25] even though it is hard to put a number on it. We believe it often occurs because of the overwhelming trend of globalization which reaches almost all aspects of life – the economic and financial sector, political systems, trade and commerce and communications, just to name a few. This trend has severe consequences for the various legal systems. They are being challenged to compete with other legal systems to offer the most favourable conditions in a certain market. 275

The following examples shall illustrate this thought: 276

- In the area of tax law many states vie to attract industries and businesses to generate more tax revenues. There is a high likelihood that rules will be transplanted that offer advantageous tax settings for companies or individuals.
- One nation's tax legislation can also lead to changes in tax and banking laws of other countries. A prominent example is the 2010 US-American Foreign Account Tax Compliance Act (FATCA) with it's impact on legislators commercial banks, businesses and individuals around the world.
- Not only national legislators but also international organizations can exert some (political and economic) pressure to adopt certain standards. One example is the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters that has so far been ratified by 37 countries.[26] As the name suggests the convention provides for mutual administrative assistance and the so-called spontaneous exchange of information in tax matters. The adaptation of the convention results in substantial changes of national banking laws.
- Another example is environmental law. Every state has to decide how to react to the challenges posed by climate change. These considerations are not done in a vacuum but again in close interactions with ideas and regulations of competitor-states, which again may lead to a legal transplant.
- Many more examples could be made but we restrain ourselves to one more: the protection of consumer rights. Nowadays it is as easy to or-

25 Cf Watson, Legal transplants, 30.
26 See http://conventions.coe.int/Treaty/Commun/

der goods over the Internet from a foreign provider as to go to the local shop to buy them. At the same time this exposes the buyer to the risk of buying defective goods or of being ripped off. There is no common level of consumer protection: More liberal, market-economy driven countries will be more favourable to the seller; countries where consumer advocates are strong will lean towards protecting the consumer more. What we can observe, however, is a certain levelling of the national standards in Europe through the EU-consumer Directives. This also holds true for Switzerland, which has adopted – albeit only selectively – some of these directives. The implementation of these directives into national law is nothing else than a form of legal transplanting.

277 Another term that can be used for these semi-voluntary legal transplants is "*imposed reception*".[27] As exemplified above it is a seemingly voluntary import of a legal concept, idea, system or strategy but under circumstances in which the market leaves the importer no other choice than to pick the most efficient model.

278 As has been observed by comparative law scholars semi-voluntary legal transplants have often occurred in the Central and East European States that have a need for new laws and regulations after the dramatic political changes of the last 20-30 years. There is also a vivid exchange between continental European Civil law countries that are trying to export their Codes to the realm of Common law countries. This can be currently witnessed within the context of the efforts to create a European private law (see below, N 124-135).[28]

D. Factual Transplants

279 Another way legal transplants can occur is when a group of people migrating from one place to the other take their own law with them.[29] This happened during the European migration period in the early part of the first millennium.

280 More recently we can observe this with religious laws such as Islamic law (the *Scharīʿa*). Esp emigrants from northern African countries

[27] See, also for the following, Örücü, 102–103.
[28] Janssen/Schulze, 2 ERPL 225, 243–244 (2011).
[29] Rheinstein/von Borries, 124–127.

submit to principles of Islamic law even when they live in European Civil law countries since these legal principles are part of their religion and thus applied as a matter of course. This has the potential to create tensions in the receiving country as the following examples illustrate:

– The need of the Islamic (and also Jewish) community for separate burial grounds can meet political, religious and legal resistance in the host country.
– Islamic or Jewish parents might be reluctant or unwilling to send their girls to (mandatory) swimming lessons in school. This raises the question whether the girls can be legally compelled to participate.
– In the United Kingdom the Islamic Shari'a Council was established in 1982.[30] It deals with the Muslim Personal Law which covers Marriages, Divorces and Inheritance issues. Even though the Council has no legal authority in the United Kingdom (Muslims accept the rules voluntarily), its rulings can lead to a parallel, maybe even isolated development of legal (and social) standards next to those of the host country.
– There are also rabbinical courts of Judaism ("*beth din*"). They have legal power in religious matters not only in Israel but also in Jewish communities in other countries. The legal authority of its judgements depends upon the jurisdiction and the subject matter.[31] Similar problems arise as described above with the Shari'a Council.

V. Pitfalls of (Semi-) Voluntary Transplants and Ways to Overcome Them

A. Starting Point

Legal transplants are not always well received despite a push by the relevant agent (legislator, judiciary, academics, practitioners). Such an example is the Uniform Law on Negotiable Instruments Law, which was widely adopted in the United States, but failed in Colombia.[32] The Swiss Civil Code was successfully exported to Turkey but the population 281

30 See http://www.islamic-sharia.org/index.html (last visited November 26, 2013).
31 See eg the Beth Din in the United States of America: http://www.bethdin.org/.
32 De Cruz, 511.

rejected the part on family law because it was incompatible with the social and religious norms.

282 In this section we shall explore some of the risks associated with semi-voluntary and voluntary transplants and find out how comparative law can help to overcome such potential pitfalls to successfully transfer a foreign legal concept or rule.

B. Potential Pitfalls and Some Remedies

283 Some of the perils noted below are not only relevant when considering a legal transplant but also for comparative law in general:[33]

- It is very demanding to grasp a foreign legal system, concept or idea in its fullness. Comparative legal studies at their core often remain somewhat superficial for linguistic reasons, the available time and financial resources. This carries the risk that not the entire relevant legal, historical, socio-economic and political background of the would-be transplant is properly understood. It is consequently imperative that all of these factors are diligently taken into consideration, including extra-legal factors such as informal customs and practices that influence the concrete applicability of the transplant.
- The closer (and therefore seemingly similar) the donor and the receiving system are, the greater the temptation to think that the law and its operation are the same. This can be the source of misconceptions about the content of a legal transplant since the differences are less noticeable.[34] This means that especially legislators and the judiciary have to be extra vigilant when adapting a legal idea or concept from a source similar to their own. Here again it is paramount to use a careful teleological context analysis to check if a specific legal tool of one country really is suited to solve a certain problem in the receiving country.[35]
- On the other hand, it is also important not to overemphasize the differences between various legal systems, as legal transplants might incorrectly seem impossible.[36]

[33] See for the following Watson, Legal transplants, 10–15.
[34] Cf Watson, Law, 232.
[35] Müller-Graff, 262.
[36] Schacherreiter, RabelsZ 77 (2013), 272, 295.

- It is difficult to properly evaluate and interpret foreign rules of law and the endeavour is prone to errors. Often the agent interested in the legal transplants heavily relies (or must rely due to language barriers) on secondary sources (such as doctoral theses or comparative encyclopedias) instead of using original references. This methodology can lead to ill-founded conclusions and thus hamper the process of properly transplanting a legal rule.
- We have talked about the necessity to carefully choose the right legal system for the comparative study in general (see above, N 194). This is also important when considering a legal transplant. The conclusions might lack significance if the donor system has no proper relationship with the receiving system or when the two systems are compared at different times in their development. Especially *Bernhard Grossfeld* points out that it is important to also take into account the "*cultural climate*" (resulting from the people's unconscious axioms, collective feelings and prevalent ideas of reality), the geographical situation, language and religion.[37]
- All too often one can observe that a foreign legal concept is just transplanted because it promises to solve an issue according to the preconceived notion of the receiving agent without regard for the impact on other aspects of the receiving system. An example for this is the introduction of the German concept of liability for a breach of trust into Swiss law (see above, N 272).
- There is the risk that the necessary fine-tuning of the legal transplant is neglected. This is especially needed when the legal transplant is imported through legislative action (see above, N 269): Not only the foreign concept will potentially have to be adjusted but the receiving system will have to make some conformations as well (eg adapting existing laws). This is of course much easier if the transplant is compatible with institutions of the receiving system.
- When a major transplant occurs (eg an entire code is imported) it is often necessary (and equally difficult) to integrate it into the existing local legal, political, socio-economic and – potentially – religious circumstances. This is by nature a challenging piece of work, which may take a lot of time and resources. We like to point out, however, that there are counter examples such as the past receptions of Civil law

[37] Grossfeld Bernhard, The Strength and Weakness of Comparative Law, Oxford 1990, 73–109.

(and Roman law) into English law. The English framework absorbed these rules so that the borrowed law was quickly truncated from the legal system it was derived.[38]

– Linguistic and terminological problems are an important barrier for successfully implanting legal transplants. A seemingly clear term in a foreign code may be a homonym with a different meaning. Or the term carries a legal concept unbeknownst to the receiving agent. It is possible that legal terms in the donor and receiving system are used in an identical way, but their substantive content or their actual application is different. There also might be linguistic nuances in a sentence or paragraph that are lost in translation. Hence it seems obvious that a successful legal transplant – at least if an entire code or any other major portion of a foreign law is transplanted – depends upon an exact translation and the use of precise legal terminology.

VI. Extent of Legal Transplants

284 Independent of the type of and the reason for the legal transplant the extent of the adaption can widely differ. In some cases only one single provision of a foreign law is taken over, in other instances an entire statute is adapted (eg the Swiss Code of Obligations in Turkey (see below, N 321-378)) or anything in between.[39] The process differs depending on the size and complexity of the transplant.

A. Transplanting an Entire Code

285 Examples of major transplants are the French Code Civil, and – at least to some degree – the German Civil Code, which serve(d) as a model for legislation in many countries (see below, N 311-320).[40] Furthermore, Common law expanded to many places. This was (and is) also propelled by the fact that English is the third largest language by number of native speakers (after Mandarin Chinese and Spanish) and the official language in 54 countries. It also contributes to the popularity of the Common law

[38] Teubner, 61 MLR 11, 12 (1998).
[39] Rheinstein/von Borries, 127.
[40] Cf de Cruz, 511.

that English is the lingua franca of numerous international organizations as well as of international trade and commerce.

Should it be necessary to make changes to the transplant it is possible to adapt it to the particularities of the receiving system at the time of reception (eg when the Swiss Civil Code was adopted in Turkey (see below, N 344)). Alternatively it can be revised through the normal legislative process later on. Such revisions can take the development of the donor system in account (as has been the case with Turkey (see below, N 355-361)). Lastly adaptations to the needs of legal practice can be done by way of judicial interpretation.[41] 286

The transplant of an entire Code does (of course) not necessarily mean that the application of the law in practice is the same in the donor and in the receiving system. It may be that portions of the Code remain dead letter because of different socio-economic conditions. Thus, it can be interesting to compare the development of the respective law in the two countries (such as eg with the Swiss and Turkish Code of Obligations) to identify potential weaknesses in the law. 287

B. Transplanting a Singular Legal Concept or Rule

The transplant of a singular legal concept, model or rule probably happens quite often in practice, especially through the judiciary. One example that we mentioned above is the taking over of the German theory of liability for breach of trust in Switzerland (see above, N 99).[42] 288

As already discussed (see above, N 266) the necessity arises to interface the transplant with the existing dogmatic structures and to creatively develop it further in light of the needs of the practice. In this way a certain momentum can be created that can be fruitful for the receiving system.[43] 289

41 Wiegand, Canaris, 893.
42 Id, 893.
43 Id, 893.

VII. Convergence and Uniformity through Legal Transplants?

A. In General

290 We have seen that legal transplants were and are a reality – be it in form of a major transplant such as the adoption of an entire code or in the shape of just a singular foreign legal concept, model or rule.

291 The question arises if the process of legal transplants, spurred by the familiar trend of globalization, will lead to convergence and uniformity of law. The theory behind this thought is based on the assumption that at the core of all the divergent national laws there are common (or even global) rules that can be unearthed. In that sense local/national rules are "*only the expression of regional deviations from universal principles of law which have not yet been fully discovered or realized*".[44] The efforts to harmonize European Private Law seem to rest on this suggestion. We are, however, sceptical, since this assumption tends to neglect the importance of the systemic, economic and cultural framework of legal provisions.

B. Globalization and Convergence of Legal Systems

1. Notion of Globalization

292 Under the umbrella term of *globalization* a few important yet also conflicting trends can be observed that impact the development of the national legal systems. Globalization can be described as "*those processes, which tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe*".[45] However, this is mainly the Western view, which wants to propagate its political, economic and financial system, its technology, open markets, and human rights. There is also a global movement of *islamization* as the percentage of the world muslim population rose from approximately 15% in 1960 to 23.2% in 2010).[46]

[44] Müller-Graff, 263.
[45] Twining, 4.
[46] Glenn, 52; <www.pewforum.org/global-religious-landscape-exec.aspx> accessed 2 September 2013.

Additionally, as especially China takes a more prominent role on the world stage (the "*sleeping giant awakens*"), the Eastern way of doing business or of management is getting more important on a global scale as well.[47] On the other hand there are a growing number of people (especially from developing countries) who resist these global trends, as they are afraid globalization will destroy the environment, rob them of their livelihood or threaten their way of life or religious beliefs.[48]

However one's position towards globalization may be, fact is that it 293
"*links localities in such a way that local happenings are shaped by events occurring many miles away and vice versa*".[49] This process calls into question the relevance of national, cultural and societal boundaries and it presents new challenges to comparative law in general and the effect of legal transplants in particular.

2. Effects of Globalization

In our opinion it is possible that the process of globalization will 294
(eventually) lead to a *convergence* of legal systems, ie make boundaries of any sort less important.[50] This tendency can be currently witnessed in the European Union where private law is (at least partially) harmonized (see below, N 384-387). The question of how to deal with legal transplants will thereby get a whole new meaning. The judiciary and legal practice in Europe will have - and already has to when implementing EU-directives - to deal with concepts foreign to them since the unified or harmonized law is comprised of rules from different legal traditions. Conversely, the greater the political and/or socio-economic pressures toward convergence are, the more willing legislators become to borrow legal concepts from other legal systems (see above, N 275-276).[51]

[47] Glenn, 47–49, 52–53; see also de Cruz, 518.

[48] Glenn, 54; Tomuschat Christian, Möglichkeiten und Grenzen der Globalisierung, in: Schwarze Jürgen (ed), Globalisierung und Entstaatlichung des Rechts – Ergebnisse der 31. Tagung der Gesellschaft für Rechtsvergleichung vom 20. bis 22. September 2007 in Halle, Tübingen 2008, 21–53, 46.

[49] Giddens Anthony, The Consequences of Modernity, Cambridge 2007, 64.

[50] Cf Twining, 102–105; Örücü Esin, Unde Venit, Quo Tendit Comparative Law?, in: Harding Andrew/Örücü Esin (eds), Comparative law in the 21st century, London 2002, 1–17, 16–17.

[51] Nelken David, Legal Transplants and Beyond: of Disciplines and Metaphors, in: Harding Andrew/Örücü Esin (eds), Comparative law in the 21st century, London 2002, 19–34, 26–27; Cotterrell Roger, Seeking Similarity, Appreciating Differ-

295 There are other examples of convergences as a result of legal transplants:

- It is nowadays much more common for Common law countries to use the legislative process to change, amend or repeal laws than in the 19th century. This is seen as a faster way to implement legal reforms rather than wait for the judiciary to further develop the law at their own pace.[52] Civil law countries, on the other hand, rely increasingly on case law to change the law, ie the courts take a much more active role than before.
- The transition from central planning to a market economy and the wave of democratization in some countries of Eastern Europe (eg Czechoslovakia, Hungary, Poland, Romania) led to a (at least limited) convergence of legal systems in Europe.[53]
- The consumer protection directives of the EU, Dutch law and the CISG heavily influenced the reform of the German law of obligations in 2002.[54] These legal transplants resulted in a convergence of the German Civil Code to these instruments.

296 We think that convergence is not the only option. It might be as well that legal systems hold on to their own traditions and resist the push for unification. This can be seen eg seen in the discussion whether it is feasible to create a European Civil Code. The French fiercely fought against this project. They thereby explicitly affirmed that not all legal systems buy into the theory of convergence but rather uphold century-old distinctions. This is also a call not to neglect differences between legal systems when general principles are sought.[55] Finally, it is also a warning sign towards the rash use of legal transplants.

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ence, in: Harding Andrew/Örücü Esin (eds), Comparative law in the 21st century, London 2002, 35–54, 43–45.

52 See Ponzetto Giacomo A M/Fernandez Patricio A, Case Law versus Statute Law: An Evolutionary Comparison, 37 JLS 379–430, 382 (2008).

53 De Cruz, 500–504; de Groot René, European Education in the 21st century, in: de Witte Bruno/Forder Caroline (eds), The Common Law of Europe and the Future of Legal Education, Deventer/Maastricht 1992, 9–11; Markesinis Basil S, Learning from Europe and Learning in Europe, in Markesinis Basil S (ed), The gradual convergence, Oxford/New York 1994, 1–32, 29–30.

54 Janssen/Schulze, 2 ERPL 225, 244 (2011).

55 Müller-Graff, 265.

VIII. Some Classic Examples of Legal Transplants

A. The Reception of Roman Law in Europe

1. In General

297 The reception of Roman law in Europe is a classic example of a major legal transplant. The reception period started with the academic study and practical application of Roman law in the Middle Ages (11th century) at the universities of Pavia and Bologna and made its way to other parts of Europe.[56]

298 The backdrop of the interest in Roman law was that in the Middle Ages there were numerous overlapping and competing jurisdictions and sources of law. This not only made trade and commerce extremely difficult but also was unsatisfactorily for the rising of the city-states.[57] Roman law was seen as a perfect tool to overcome this fragmentation. The Church used it as a subsidiary law in case canon law did not provide an answer.[58] It also sparked the interest of the academics at the northern Italian Universities and a period of intensive study of Roman law started.[59] This study primarily encompassed the *Codex Iustinianus*, the *Corpus Iuris Canonici* and the *Digests*. In the 12th century the so-called commentators and glossators edited the ancient texts. They worked on the texts to harmonize the often conflicting documents and deduct general principles from them.

299 The lawyers that were trained in Pavia and Bologna were awarded influential positions in the administration and the judiciary especially in the *Holy Roman Empire* in Central Europe.[60] The empire spanned the Kingdoms of Germany, Bohemia, Italy and Burgundy between the 10th and 19th century.[61] Through that process Roman law made its way out of

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56 Janssen/Schulze, 2 ERPL 225, 226 (2011).
57 Glendon/Carozza/Picker, 57.
58 Cf Id, 55.
59 Head John W, Great Legal Traditions, Durham 2011, 74.
60 Voltaire famously said that "This agglomeration which was called and which still calls itself the Holy Roman Empire was neither holy, nor Roman, nor an empire" (Essai sur l'histoire générale et sur les mœurs et l'esprit des nations, chapter 70 (1756), see <http://en.wikiquote.org/wiki/Voltaire#Attributed> accessed 2 September 2013).
61 <www.britannica.com/EBchecked/topic/269851/Holy-Roman-Empire> accessed 2 September 2013.

the confinement of the universities into the "real" world of court decisions, law making and the drafting of legal documents.[62]

300 With the help of the expansion of commerce,[63] the enthusiasm of legal scholars, the wide-spread acceptance of the church, the common Latin language and easily accessible and understandable translations the Roman-Canonical law was able to develop into the so-called *ius commune* in continental Europe.

301 This is remarkable when one considers that at that time there were no strong centralized political administrations and no unified legal systems, but many authorities and forces competing for power.[64]

302 To clarify: The *ius commune* was a "common law" because it applied to all the people in Europe (with the exception of England) whenever the local laws ("*örtliches Gewohnheitsrecht*") did not provide any solution to a particular legal question. It also served to supply principles of interpretation for those local laws in doubtful cases.[65]

303 Local law was perceived to be the law of a conservative, closed, backwards-oriented society whereas the *ius commune* had the appeal of a universal, open and future-oriented society. This in part explains its success.[66]

304 Different countries enacted legal statutes with the goal to codify local laws between the 13th and the 18th century. However, this proved to be difficult, since local laws were often out-dated and incomplete. For that reason the drafters also incorporated the *ius commune* – and with it the Roman-Canonical Law – into these statutes.[67] This at the same time led to the somehow paradoxical phenomenon that the *ius commune* was localized. This trend culminated in the 18th/19th century when the first large codifications emerged (esp the Austrian, French and German Civil Codes). This constituted the end of the development of the *ius commune* and with it of the reception of the Roman-Canonical Law, traces of which can be still found in these codifications.

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62 Glendon/Carozza/Picker, 58.
63 Cf Hattenhauer Hans, Europäische Rechtsgeschichte, 4th edn Heidelberg 2004, paras 814–817.
64 Glendon/Carozza/Picker, 59.
65 Id, 58.
66 Müller-Gugenberger, 100.
67 Id, 102.

2. Reception of Roman Law in Germany and France

We have seen that the *ius commune* had a dominant rule in the Holy Roman Empire. The latter ceased to exist after 1806. It left a number of individual, sovereign German States, rather than "Germany" as such.[68] The received Roman law truly became the common law of all the regions of Germany. There are various reasons for this:[69] 305

- There was no prevailing legal profession, no central court system and no existing common body of German law that hindered the expansion of the *ius commune*.
- The German States saw themself as the successor of the Holy Roman Empire, which facilitated the reception.
- Roman law simplified cross-border trade and commerce since it relieved business people from the inconvenience of having to deal with the many local rules and customs.
- The dominant legal movement in the first half of the 19th century was the "*Historische Schule*" ("Historical School"). It taught that private law is the product of historical development and that it forms an indispensable part in the configuration of a national identity.[70] The *romanistic* fraction of the Historical School, led by *Carl Friedrich von Savigny* (1814–1875) and *Georg Friedrich Puchta* (1798–1846), put great emphasis on the reception of Roman law and its influence on the education of lawyers.[71]

It is clear that Roman law, as received in the Middle Ages and in the early modern time, was not fit for the needs of the 19th century. It therefore had to be adapted to the economic and social demands of an era that was radically different from the time before: The industrialization that started in the 18th century and the Enlightenment have fundamentally changed the way people lived and looked at life. *Savign*y's seminal "*System des heutigen römischen Rechts*" was probably the most important 306

[68] Janssen/Schulze, 2 ERPL 225, 229 (2011).
[69] For the following see Glendon/Carozza/Picker, 58; cf Grasmann Günther/David René, Einführung in die grossen Rechtssysteme der Gegenwart, 2nd edn München 1988, 100; Müller-Gugenberger, 101.
[70] Janssen/Schulze, 2 ERPL 225, 229 (2011); see for example von Savigny Friedrich Carl, Über den Zweck dieser Zeitschrift, Zeitschrift für geschichtliche Rechtswissenschaft 1 (1815), 1–17, 6.
[71] Janssen/Schulze, 2 ERPL 225, 230 (2011); see for example von Savigny Friedrich Carl, System des heutigen römischen Rechts, 8 volumes, 1840-1849.

and influential piece of work for this process of adapting the legal transplant of Roman law in the then-modern times.[72] It can be described as a draft for a modern code of private law, resting on the principles of Roman law. *Savigny* himself, however, was of the opinion that the time was not ripe for a codification; instead the law should develop organically. *Anton Friedrich Justus Thibaut* (1772–1840) on the other hand argued for codification.[73] In the second half of the 19th century the so-called *pandectists* built upon this body of knowledge to develop the German private law, which eventually had a great influence on the German Civil Code. This Code was enacted on 1 January 1900 (makes it easy to remember) after the creation of the German Empire under the first Chancellor, *Otto von Bismarck* (1815–1898), in 1867 (see below, N 502-504).

307 The reception of Roman law in France, ie the territories that now are part of France, was not as homogenous and straightforward as it was in Germany. In northern France ("*pays de coutumes*") the reception started earlier (ca 13th century) than in the German territories but was less prevalent. In southern France ("*pays de droit écrit*") Roman law never really disappeared due to the strong influence of Roman civilization. When the *Corpus Iuris* came into scholarly focus it was easily accepted as the "*living law of the land*" since Roman law was the common law.[74]

308 In contrast to Germany, Roman law has never been incorporated as state law in France. It was accepted because it was considered to be custom and because of its persuasive quality ("*non ratione imperii sed imperio rationis*").[75] Additionally, the kings in the 16th century were successful in compiling the local customs into officially recognized, written law.[76] A caste of influential and well-educated lawyers contributed to the subtler, indirect reception of Roman law because they were interested in a centralized Royal Court where national law would be applied.[77] Eventually, especially with the help of *Robert Joseph Pothier* (1699–1772), Roman law found its way into the French Civil Code (eg

72 Janssen/Schulze, 2 ERPL 225, 231 (2011).
73 De Cruz, 85–86.
74 Id, 59, 63.
75 Müller-Gugenberger, 100.
76 Olivier-Martin François, La Coutume de Paris – Trait d'union entre le droit romain et les législations modernes, Paris 1925, 13; de Cruz, 63.
77 Koschaker, 56

definition of ownership in property law or the traditional categorization into obligations arising out of contracts, quasi-contracts, torts and quasi-torts etc).[78] All in all it can be said that French law is based on Roman law – but in the form it was practiced in France.[79]

B. The Reception of the French and German Civil Code

The French and German Civil Code are among the most famous and 309
most influential codifications. Numerous codes, models and rules around the globe contain more or less elements that can be traced back to one of these codes.

It is interesting that both codes also mutually influenced one another 310
early on:

- (Post-revolutionary) French law was in force in some part of German territories that were annexed by France (esp departments at the eastern side of the Rhine such as the departement de la Sarre). Later, the French Civil Code of 1804 was also introduced in other parts such as the Grand-Duchy of Baden (where it was translated and eventually became what was to be known as the "*Badisches Landesrecht*").
- Additionally, its reputation led German scholars to write influential treatises on the French Civil Code such as *Karl Salomo Zachariä von Lingenthal* (1769–1843) ("Handbuch des französischen Civilrechts, 2 vol., 1808–1828"). In turn *Charles Aubry* (1803–1883) and *Frédéric Charles Rau* (1803–1877) translated this book into French ("Cours de droit français d'après l'ouvrage Allemand de CS Zachariae", 1839-1846). Through *Aubry* and *Rau's* publication "*German legal thinking permeated French law*" in content and form.[80] The *cours de droit français* subsequently became more independent from its original translated form and helped to shape the development of French private law.

[78] Stanković Emilija, The influence of Roman law on Napoleon's Civil Code, <http://uir.unisa.ac.za/bitstream/handle/10500/3544/Feesbundel%20Stankovic%20E.pdf?sequence=1> accessed 2 September 2013.
[79] De Cruz, 72.
[80] Id, 513

1. Reception of the French Civil Code

311 The French Civil Code was enacted on 21 March 1804 by Napoléon Bonaparte. It quickly gathered a large following and was praised for its quality and linguistic beauty. It of course also profited from the reputation and prestige of the French revolution, civilization, administration and military. Additionally, the Civil Code exuded moral and intellectual authority as the product of the revolution and the Enlightenment. It was also a great achievement to unite and centrally organize a national state and guarantee its citizens legal protection and equality.[81]

312 The Civil Code spread all over the world, favoured by the military lead conquests of Napoléon coupled with its afore-mentioned qualities.[82] It comes to no surprise, therefore, that it was brought to Belgium, the Netherlands, parts of Poland, Italy and that most colonies in Africa had to adopt the French Civil Code and legal culture.[83] Many countries (eg Belgium, the Netherlands, Luxembourg) kept the imposed Code even after they regained their sovereignty.[84] Further European Codes that were influenced by the French Code are eg the Portuguese and Spanish Código Civil.[85]

313 We have already mentioned that the French Civil Code was also in force on German territory.[86] It furthermore had a profound influence on the Swiss Civil Code (1912) and the Code of Obligations (1881/1912). Between 1804 and 1815 the French Civil Code was directly applicable in Geneva and the Bernese Jura. It also served as a model in the other French speaking cantons.[87] When the Swiss Civil Code was enacted many legal concepts of the French Civil Code were transplanted through the influence of the western cantons.

314 Many codifications in Latin America adopted the French Civil Code after they became sovereign, because they needed national and unifying

81 Zweigert/Kötz, 100; cf Rainer, 68
82 Sacco, para 7.13; Rainer, 68.
83 Glendon/Carozza/Picker, 68; Rainer, 68–70.
84 Zweigert/Kötz, 101, 109.
85 Rainer, 68–69.
86 Zweigert/Kötz, 103.
87 Id, 104.

civil codes; in part also because it breathed freedom after their long fight for independence.[88]

In North America the French legal tradition survived in the former colony of Louisiana and in the province of Québec; both have Civil Codes. They thus constitute an enclave of Civil law in a region dominated by Common law.[89] 315

2. Reception of the German Civil Code and Legal Scholarship

The German Civil Code ("***B**ürgerliches **G**esetz**b**uch*", BGB) was, as already mentioned, enacted on 1 January 1900. Its influence is not only founded in the legal quality of the Code itself but is also due to the highly developed German legal scholarship of the 19th century (see above, N 306).[90] 316

Initially, the impact of the Historical School (*Savigny*) was tied to the German language. For that reason its teachings spread primarily to Austrian universities which laid the ground for the transplant of pandectistic views into the Austrian Civil Code ("***A**llgemeines **B**ürgerliches **G**esetz**b**uch*", ABGB) of 1812.[91] It also impacted the evolution of private law in Switzerland; the Swiss Civil Code ("***Z**ivil**g**esetz**b**uch*", ZGB) of 1912 and the Code of Obligations ("***O**bligationen**r**echt*", OR) of 1881/1912. 317

We need to point out, however, that the influence of the German private law was less a matter of transplanting specific rules of the Civil Code itself. This is partly due to the fact that by the end of the 19th century the French Civil Code has asserted its dominance around the globe and that the German Civil Code was drafted in a very technical manner.[92] It was rather the general dogmatic principles, theories, concepts and methods, which impacted Austrian and Swiss legal scholarship and found its way into the respective case law.[93] The background for this vivid exchange was (and still is) that many German professors teach law in Austria and 318

88 Rainer, 68–69; Zweigert/Kötz, 113; Glendon/Carozza/Picker, 68.
89 Zweigert/Kötz, 115; Sacco, para 7.14.
90 Rainer, 70.
91 Id, 71.
92 Glendon/Carozza/Picker, 63.
93 Kramer, AcP (2000), 365, 369–370, 372, 389.

Switzerland. It is natural that they tend to bring their own legal methods and concepts with them when teaching and interpreting the law of their host countries.[94] This, by the way, is an important way how foreign legal transplants can enter a receiving system.

319 German legal scholarship also had a substantial and sustainable influence in Hungary, in the Baltic States (Lithuania, Estonia, Latvia) and Greece.[95] The Greek Civil Code of 1946 took over the General Part of the German Civil Code; however, the Greek Code is not a pure German transplant. It combines local customs with foreign models.[96]

320 The impact of the German Civil Code and scholarship reached as far as China,[97] Korea[98] and Japan.[99] It was especially the linguistic, systematic and methodical precision that impressed the Asian legislators.

C. The Reception of the Swiss Civil Code in Modern Turkey

1. Introduction

321 The Swiss Civil Code has won great admiration abroad because of its intrinsic merits. Almost every legislator in countries whose private law is codified has learnt something from the Swiss experience, which it either used in drafting a new civil code – as in Italy and Greece – or in reforming existing laws. There has however been only one instance of total reception of the Swiss Civil Code, namely in Turkey. After Mustafa Kemal Atatürk (1881-1938)[100] created the Turkish Republic in

[94] Id, 365, 390.
[95] Rainer, 71–72.
[96] See Dacoronia Eugenia, Greece, in: Smits Jan M (ed), Elgar Encyclopedia of Comparative Law, Cheltenham/Northampton 2006, 289–293, 291.
[97] Wendehorst, 22; Rainer, 72.
[98] European Civil Codes were not the only sources the Koreans used; the Common law also played an important part: Wendehorst, 21.
[99] Wendehorst, 20.
[100] Gazi Mustafa Kemal Pascha, whom was later granted by decree the additional name of “Atatürk” (“father of Turks”).

1922/1923,[101] the Swiss Civil Code was brought into force almost word for word as the new Turkish Civil Code of 1926.[102]

This instance of reception is especially interesting because the context in 322
which it took place is such a remarkable one. In order to radically modernize the Turkish society, the legislator, at a stroke of a pen, abolished the Islamic legal practices which were in force for centuries,[103] having hardly been affected at all by the legislative reforms of the last Sultans of the Ottoman Empire. Replacing the ancient Islamic legal practices, Turkey introduced a code modeled to fit the needs of an entirely different society as regards its social, religious and economic structure. In no other instance may one get such an in-depth insight of how the reception of a foreign code of law effected a mutual interaction between the interpretation of that foreign text and the actual traditions and usages of the country which adopted it, gradually developing a new law of an independent nature.[104]

2. History of Turkish Reception from the Ottoman Empire to the Turkish Republic

The history of Turkish reception is often said to start with the founding 323
of the new Turkish Republic in the year 1923,[105] and seen as a unique project of reforms enacted by Atatürk – the founder of modern Turkey.[106]

Even though that assertion may certainly be true to some extent, it does 324
not entirely reflect Turkey's legal history. In fact, the history of legal reception and therefore the "Europeanization" of Turkish law go back to the second half of the 19th century.[107] The French Revolution, combined with the Enlightenment, brought forth ideas and ideals which eventually found fertile ground in the Ottoman Empire as well.[108]

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[101] Aslan Mahidé, Rückfahrkarte, Das schweizerische Zivilgesetzbuch in der Türkei, 07 Rechtsgeschichte-Legal History 33-37, 33 (2005).
[102] Zweigert/Kötz, 178.
[103] Zweigert/Kötz, 178; Singer, 264.
[104] Zweigert/Kötz, 178.
[105] The Republic was proclaimed on 29.10.1923 (see Bandak, 59).
[106] Atamer, 724.
[107] Singer, 264; Bandak, 29; Oguz, 375-380.
[108] Atamer, 724.

325 The 19th century was shaped by reform movements in the Empire and constant conflicts between the Sultan and progressive forces.[109] Civil liberties were only gradually granted by successive Decrees and legislative Acts. Albeit delayed compared to other European countries, the idea of codification, as a guarantee for an objective and rational system of State governance based on the rule of law, also took roots in the Ottoman Empire.[110]

326 Originally, law in the Ottoman Empire was founded on divine revelation and its evolution based on scholarly learning of religious duties. Compliance with the law was scrutinized by Sharia jurisdictions of spiritual nature. Religious communities of non-Muslims were subjected to the rules and jurisdictions of their own communities of belief as regards matters of legal status, family and inheritance law, but otherwise had to conform to the Sharia. Furthermore, residing foreigners in the Ottoman Empire were largely endowed with privileges such as consular jurisdiction by specific international conventions („*les capitulations*“). The legal order altogether was characterized by its plurality.[111]

327 This plurality was furthered in the 19th century by a first wave of reception. Henceforth, religious Sharia law was competing with secular law created by the reform Acts. Clerical Sharia jurisdictions were being brought into confrontation with secular jurisdictions. The influence in the preparation of the aforementioned legislative Acts was almost exclusively French.[112] Therefore, a number of codes were either a literal translation, or their substantive contents borrowed from the French Commercial Code (*Code de commerce*) and the French Code of Civil Procedure (*Code de procédure civile*) respectively. Reactionary forces however put a halt to the idea of transplanting also the French Civil Code (*Code civil*). Instead, parts of the Sharia were codified into 16 books from 1869 to1876 under the name „*Mecelle-i ahkam adliye*“.[113]

328 Notwithstanding all the efforts towards modernization, the Ottoman Empire, like other multinational States of that time, was not to be saved

[109] For a comprehensive overview, see Standford J. Shaw/Ezel Kural Shaw, History of the Ottoman Empire and Modern Turkey, Vol. II: Reform, Revolution, and Republic, The Rise of Modern Turkey 1808-1975, Cambridge 1977, 1-172.
[110] Atamer, 724.
[111] Atamer, 725; Oguz, 376.
[112] Singer, 264.
[113] Atamer, 725; Velidedeoğlu, 61; Singer, 264.

from its demise. As the diffusion of the idea of a national State sped up centrifugal forces in the Empire, its breakup was not to be held back any longer. The Empire, already weakened by previous long lasting wars, entered WWI on Germany's side, and lost. Although it never came into force, the peace Treaty of Sèvres signed in 1920 sealed the dissolution of the Empire. The remaining territories of the Empire were occupied by the Allies, namely France, England, Italy and Greece. In May 1919 however, Atatürk[114] had already begun to organize national resistance. The war for independence, which was fought on four fronts, ended in July 1923 with the signature of the Lausanne Peace Treaty.[115] The Turkish Republic was proclaimed on 29 October 1923.[116]

This was followed, up until Atatürk's death in 1938, by a phase of continuous reforms, in the framework of which radical changes in the legal order took place, such as the successive abolition of the Sultanate (1922), the Caliphate (1924), and the Sharia jurisdictions and procedure (1924), the strike off from the Constitution of the Article pertaining to State religion (Islam) (1928), the introduction of female suffrage (1934) or the introduction into the Constitution of laicism as unalterable qualification of the Turkish Republic (1937).[117] 329

That a fundamental secularization and modernization of Turkish law had to follow in the course of these radical reforms should come as no surprise.[118] The adoption of laws closer to the European model as regards the law of persons, family law and inheritance law is of special significance, since these fields of law used to be entirely subjected to religious law.[119] 330

[114] The aim of the founder of the new Turkish Republic was the total reorganization of the Ottoman Empire. From an Empire with a Monarchy headed by the Sultanate and Caliphate, its dualism of spiritual and secular State functions, its strict distinction between Muslim and non-Muslim subjects, and its different nationalities placed side by side, a Turkish national State, in form of a secular Republic culturally turned towards western civilization, was to be developed. The Constitutional act of 20.01.1921 already laid down that State authority unconditionally and unreservedly belonged to the Nation (Bandak, 59).
[115] Atamer, 727.
[116] Bandak, 59; Oguz, 380.
[117] For a complete listing see Atamer, 727.
[118] See Kubali, 65-69.
[119] Atamer, 728; Singer, 264; for further details see Bandak, 59.

331 Nevertheless, such groundbreaking change and modernization of Turkey's legal and jurisdictional system should not be depicted as having been effected by means of an inner enlightenment of Turkey alone. The decision for such an incisive and radical mutation was fed by a further decisive impulse: the allies' immense foreign-policy pressure on Turkey.[120]

332 Revising the law was an urgent political requirement because of the obligations consented by Turkey in the Lausanne Peace Treaty.[121] According to Article 42 of said Treaty, Turkey had obliged itself, in return of the repeal of the capitulations (see above, N 328) and the consular jurisdictions, to enact the law of persons and family law in a way which would also take into consideration the customs of the non-Muslim minorities.[122] In order to take the necessary measures, special commissions were established, which had to be composed out of the same number of both representatives of the Turkish government and of each possible minority.[123]

333 Turkey was well aware that it had to respect the allies' demands. Moreover, it was precisely also Atatürk's objective to implement a secular State with a modern legal system in which the rules of Islam would no longer be considered.[124] However, the goal of the Turkish delegation, at a time in which it was not yet entirely clear what concrete shape the legal system would take, was to minimize the influence of foreign States, namely on the elaboration of Acts and the effect of case law, in order to

[120] Bandak, 59-60.
[121] Oguz, 374.
[122] Atamer, 728. The Lausanne Peace Treaty of 24.04.1923 constitutes an important starting point and is therefore also a reason for the reform of the legal and jurisdictional system in place at the time. From a legal perspective, said peace Treaty is the final stroke dissolving the Ottoman Empire. Territories in which non-Turkish ethnic groups were living slowly became autonomous States after a period as mandated territories under control of the winning powers. Out of the multinational State „Ottoman Empire“ remained the Turkish part, which consolidated itself as the nation State „Türkish Republic“ having a national territory of about 670'000 square kilometers. The latter encompassed, after a population exchange with Greece, an almost ethnically and religiously uniform Turkish population of Mohammedan faith. Nevertheless, Turkey had to consent to protect the rights of the remaining minorities and recognize these in accordance with international law (Bandak, 61).
[123] Atamer, 728; for further details, see Mahidé, 33-34.
[124] Singer, 265-266.

avoid having to fear for a forceful impairment of Turkey's sovereignty.[125]

Since Turkey saw the obligations it consented as interference in its own internal affairs, it wanted to fulfill them as soon as possible. This was only to be achieved through enactment of a modern civil Code, which would regulate the law of persons and family law for all Turkish citizens without distinction.[126] 334

Preparations for a new law were undertaken early in 1923 already. A first commission was formed. After the foundation of the Republic and the radical changes in the State structure which it implemented, that commission was replaced by a new one in May 1924.[127] Up to the years 1923/1924, the commissions appointed to prepare the new Acts only elaborated small sections thereof. The only Code which could have been completed in a short period of time was the domestic Commercial Code which had benefitted from a special focus during the preparations. Concerning other drafts of bodies of laws, of a civil Code in particular, a completion thereof was not to be reckoned with anytime soon.[128] 335

Moreover, the Minister of Justice had to discover that the proposed Acts were still largely guided by Islamic law.[129] Indeed, specific provisions applying to minorities were drafted, whereas others related to the rest of the population clung to the then perceived precept that Islam still should be the inalienable foundation of the State and the legal system of the country.[130] 336

The appointed commissions' mind-set towards Islamic prevalence lost its basis when the Caliphate was abrogated, the Osman dynasty expelled from the country, the Ministry for spiritual affairs and pious foundations abolished, and the care for the educational system as a secular matter harmonized and transferred to State entities. Beyond that, influential politicians under Atatürk's leadership also saw the secularization of the State and legal system as a constitutive element of a modern form of 337

125 Bandak, 65-66.
126 Atamer, 728-729.
127 Atamer, 729.
128 Bandak, 66-67; Oguz, 381; Singer, 266.
129 Atamer, 729.
130 Bandak, 67.

government.[131] For these reasons, the work of the second commission was put to an end in 1925.[132]

338 The reception of a foreign Code of law was decided for the following reasons:[133]

- Time pressure: commitments resulting from the Lausanne Peace Treaty (see above, N 328) had to be honored as quickly as possible. Overtaking a foreign body of laws meant acquitting oneself of some of the bothersome obligations consented in the Lausanne Peace Treaty. Indeed, reception of a European legal system would render these obsolete.
- Considering the fragmentary results of the commissions (see above, N 355), an immediate enactment of new law was impossible. Hence, a shorter way of reform had to be taken.
- The abolition of the Caliphate (see above, N 329) meant that one was no longer bound by the legal provisions of the *Sharia* when drafting new Turkish law.
- Modernization and therefore alignment of Turkey on the western world were imperative requirements for *Atatürk*. This was thought to be achieved quickest by taking over a European legal system.

339 The iron will of the revolutionary cadres was taken into account and a fast paced reception accomplished. The following Acts for instance were translated in a period of only three years and enacted: the complete Swiss Civil Code, including the first two parts of the Swiss Code of Obligations (1926), the complete Code of Civil Procedure of the Canton of Neuchâtel (1927), the complete Swiss Debt Enforcement and Bankruptcy Law Act (1929), the Italian Penal Code (1926) and the complete German Code of Penal Procedure (1929).[134]

340 One essentially contented oneself with translating foreign Acts into Turkish and putting them into effect. In particular, studies of a comparative

131 Bandak, 69-70.
132 Atamer, 729.
133 Oguz, 381-382; Bandak, 70-71, 74; Kubali, 65-69.
134 Velidedeoğlu, 61; Singer, 266; for further examples of non-Swiss acts, see Atamer, 730.

nature were foregone. Such studies should have served in a thorough preparation of this reception.[135]

3. Reception of the Swiss Civil Code: Reasons Challenges

The adoption of the Swiss Civil Code in Turkey is a case of total reception of a foreign body of laws (see above, N 285-287). This however must not be understood as a Code being overtaken verbatim without any changes, like a mirror image of its "original". The total reception of the Swiss Civil Code in Turkey is no exception in this regard. Although many provisions were faithfully reproduced from the original text, there were nonetheless numerous changes and variations to be found within the Turkish legal text.[136] 341

The reasons for overtaking the Swiss Civil Code are manifold:[137] 342

– According to the official explanation of the Minister of Justice *Bozkurt*,[138] the founding of the Republic made it unavoidable that Turkish justice had to be saved from the confusion, the misery and the very primitive state of affairs it was in. A Turkish Civil Code, which would both meet the requirements of the revolution and match modern civilization, had to be created and codified in haste. For that purpose, the prepared Turkish Civil Code was abstracted from the Swiss Civil Code, which was the newest,[139] most complete and most popular amongst civil codes.

– Like Turkey, Switzerland, with its German, French, and Italian parts of the population, is a culturally diversified country. If Swiss law has the required flexibility to satisfy such cultural diversity, it appears that

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135 Bandak, 83.
136 Bandak, 95.
137 Oguz, 381.
138 Reproduced in the original Turkish language in Bandak, 75; for a German translation see Atamer, 731.
139 The French Code Civil (Code civil) was considered as being already too old and the German Civil Code (Bürgerliches Gesetzbuch, BGB) not fit for reception because of its complexity (Bandak, 80; Atamer, 731-732; Schwarz Andreas B, Das Schweizerische Zivilgesetzbuch in der ausländischen Rechtsentwicklung, Zurich 1950, 48; Singer, 266-267). The Italian Civil Code (Codice Civile) was deemed to be too Catholic for an Islamic country such as Turkey (Bandak, 80; Pritsch, 145).

it may be likewise suitable for application in a country with a 90 percent homogenous population such as the Turkish Republic.[140]

- The Minister of Justice and many other lawyers at that time had studied in the French part of Switzerland and consequently were well-versed in Swiss law.[141]
- The Swiss Civil Code had an official French version which facilitated the reception, since many Turkish lawyers already mastered French legal terminology because of the previous reception of French Acts in the mid-19th century.[142] These were important factors favoring a fast translation of a legal text which was to be enacted rapidly (see above, N 338).[143]
- Compared to the German Civil Code (Bürgerliches Gesetzbuch, BGB) the Swiss Civil Code (Swiss Code of Obligations included) counted only two thirds of the number of Articles.[144]
- Compared to German Civil Code, its language was understandable and the employed legislative technique easy to grasp for laypeople.[145]
- The Swiss Code uses a lot of comprehensive clauses ("*Generalklauseln*") allowing for flexibility in the application of the law, a quality which facilitated the reception.[146]
- *Paul Koschaker*'s thesis:[147] the reception of foreign law is a question of authority and not quality (see above, N 271) of the overtaken law.[148] This argument is also verifiable as regards Turkey. According to *Yeşin M Atamer*,[149] the reception of European Acts (see above, N

140 Bozkurt in Bandak, 76.
141 Pritsch, 144; Singer, 267; Bandak, 79.
142 Sauser-Hall, 346; Singer, 267; Atamer, 731.
143 Pritsch, 145-146; also Zweigert/Kötz, 178; Sauser-Hall, 345-346.
144 Atamer, 732; Bandak, 80.
145 Singer, 267; Pritsch, 145.
146 Atamer, 732.
147 See Koschaker Paul, Europa und das Römische Recht, Munich/Berlin 1958, 137-138.
148 According to Koschaker, a foreign law is not received because one deems it to be the best. Rather, it is a question of power of the law to be overtaken. Such position of power, in turn, is a result of the political power of the country's law to be overtaken, be it that such power still exists or that at least a memory thereof still lingers. Turkey's behavior when receiving the Swiss Civil Code is considered by him as being a characteristic example in support of his view (extensively on Koschaker's argument, see Bandak, 76-78; for an opposing view, Ayiter, 146-147).
149 Atamer, 732; Singer, 267.

327) was indeed based on the political authority of Europe. However, it was less because of the authority of a country in particular, than the intellectual and cultural leadership of Europe as a whole.

– As regards the reception of the Swiss Civil Code in particular, this perspective allows for the conclusion that Switzerland enjoyed a irrefutable „authority“, albeit not of a kind in the traditional sense. Indeed, Switzerland was one of the few countries in Europe which did not participate in WWI. Therefore, it was neither a party to the Treaty of Sèvres nor to the Lausanne Peace Treaty. The young Turkish Republic, which on one hand wanted to transform itself into a European country, was on the other hand very much anxious to emphasize its independence and in particular not to give rise to the impression of having made a concession (see above, N 333-334). From that standpoint, overtaking the Swiss Civil Code was the perfect solution.[150]

– The reception of the Swiss Civil Code in Turkey amounted to a significant domestic political success for the Turkish Republic. The Turkish State was able to break away definitively from the legal order in place at the time, which had been bound to Islam for a thousand years. Moreover, as regards foreign affairs, Turkey succeeded in proving that the State and the civil society of the new Republic lived up to the standard of contemporary civilization.[151]

– Nevertheless, the reception of Swiss law meant for Turkey that it had to overcome some obstacles. What challenges was it confronted to?[152]

– A deeply Swiss colored language with a large amount of idiomatic expressions demanded a substantial know-how on the part of the translators.

– Since the style of the Swiss legal text was oftentimes lacking precision, it demanded higher quality judges applying the law.

– Swiss Federal law had numerous gaps which were filled by Cantonal law.

– There were three – sometimes divergent – versions (French, German and Italian). In such instances in which there was a discrepancy, the Turkish legislator systematically chose to use the French version. On occasion, that circumstance brought about significant legal differences

[150] Atamer, 733; see also Bandak, 80; Pritsch, 144.
[151] Bandak, 82.
[152] Pritsch, 146; Bandak, 81, 86-95.

between the original version of the Swiss text and the Turkish translation.[153]

– The Turkish legislator followed its Swiss counterpart and tried to conceive a legal text that would be understandable, not only for the educated, but also for ordinary citizens. However, legal terminology at that time was highly intermingled with foreign Arabic words. The legislator tried to avoid using unnecessary foreign Arabic notions and replaced these with expressions coming from Turkish popular speech.

– Problems arose as regards rendering technical expressions of the Swiss legal text. Legal thinking was conditioned by Islam. For a lot of legal concepts and notions, there simply was no equivalent in Turkish law. In such instances, the translators resorted to descriptions which tried to define Swiss technical terms.[154]

– These efforts lead to roundabout formulations in the Turkish text. The created diffuseness of the rendered norms was worsened by the fact that translators were in general guided by a rather liberal style of translation.

– The Turkish translations also frequently contained errors and inaccuracies, which sometimes lead to significant difficulties in understanding and applying provisions.[155]

343 The Turkish legislator closely oriented itself by the Swiss original legal text. If criticism is to be addressed in this regard, then it is certainly that such a radical change in the legal system should have necessitated an extensive and emphatic preparation. The numerous errors and inaccuracies in the legal text find an explanation in the hasty course of action taken (see above, N 340). Nevertheless, such clear borrowing from a Code of the European legal tradition was a courageous and revolutionary step for an Islamic country such as Turkey.[156]

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[153] See also Velidedeoğlu, 62. One example is the well-known Article 1(1) Swiss Civil Code: the German text speaks of “Wortlaut oder Auslegung”, the Italian text of “la lettera od il senso” and the French text of “la lettre ou l’esprit”. For a translation one would have the choice between “interpretation”, “sense” or “spirit”. Turkey made the choice of the French text and used the notion “spirit” as a basis for its translation (Bandak, 87).

[154] See also Oguz, 383

[155] See also Velidedeoğlu, 61.

[156] Bandak, 103.

4. Changes in the Law on the Occasion of the Reception

Immediately upon the reception of the Swiss Civil Code some changes were undertaken for the following reasons:[157] 344

- Changes attributable to differences in the administrative and judicial organization. For example, references to Cantonal regulations were omitted.
- Changes based on conscious differences as regards value judgments on questions of principle, such as the rejection of the Swiss matrimonial property regime, insofar as the separation of goods became the ordinary regime instead of the community of goods, or the limitation to one year of the entitlement to maintenance of the divorced spouse.
- Changes due to social, cultural, and religious circumstances in the country. For instance, the provision excluding a divorce suit in case of consent to matrimonial misconduct was abandoned.
- Changes attributable to biological factors, such as the reduction of the age of marriage and of majority.
- Changes due to geographical or technological considerations. For instance, certain time limits were extended.

5. Law and Social Realities

The radical legal reforms, which were accomplished in less than three 345
years in Turkey, do not stem from a voluntary social transformation. In consequence, despite the changes undertaken in the law, Acts in general and the Swiss Civil Code in particular were ahead as far as the development of social realities was concerned.[158] They did not entirely reflect the social structures, customs and needs of Turkish society.[159]

Considering that the Swiss Civil Code draws its roots from a culture 346
embossed with Christian values, one might assume that popular resistance against the introduction of the new law certainly must have intensified immediately after the reception in 1926. Astonishingly enough, the larger part of the population accepted this reform of the law.

[157] Atamer, 733-734; Velidedeoğlu, 61-65; Bandak, 95-103.
[158] Atamer, 734.
[159] Zweigert/Kötz, 178; Singer, 267.

Two reasons may be named for this turn of events. First, it could be because of the strong personality of *Atatürk*, who succeeded in convincing his fellow citizens. Second, the rapidity of the reform simply did not leave any time for resistance.[160]

347 However, this does not show if and to what extent the new Acts really did assert themselves throughout the social tissue or what discrepancies did emerge in relation to this. Some institutions, such as mandatory civil marriage, marriage agreements or family foundations, either never came to be applied at all or were not applied to the desired extent after the Turkish Civil Code entered into force in 1926.[161]

348 The main problem of the reception was its impact on the affective level. The introduction of mandatory civil marriage replacing the traditional "Imam-marriage" and "*başlık*" (sort of price paid for the sale of the bride)[162] was hardly recognized by Turkish people living in villages or poor areas of the country.[163] Objections were also raised against Swiss inheritance law and its severe system of succession per stripes („*Parentelsystem*", "*système des parentèles*"), which was deemed unjust by a large part of the Turkish population. Some other provisions even had to be changed back after the coming into force of the Turkish Civil Code in 1926, because they did not fit the social values and natural living conditions. Such was the case for the minimum age of marriage for instance. After having applied the provision for some years, one became to notice that the minimum age was set at too high a level. After a few years, the age of marriage was reduced again by the Turkish legislator.[164] Another considerable problem area was polygamy[165] and the illegitimate children it fostered. Only for the sake of the children did the legislator enact temporary special Acts in order for the parents, living either in polygamy or religious marriage, to register their children as being born in wedlock.[166]

349 There were also problems on a non-affective level. For instance, there was neither a cadaster nor a centralized land register facilitating

[160] Bandak, 133.
[161] Bandak, 132-133; Atamer, 735-736.
[162] Krüger, 130.
[163] Oguz, 385; Zweigert/Kötz, 179; Singer, 268.
[164] Bandak, 134.
[165] Mahidé, 34-36; Singer, 270-271.
[166] Atamer, 736; Mahidé, 34-36.

transactions for the acquisition of real estate at the time of the enactment of the Turkish Civil Code.[167] Compared to Switzerland, the rules of acquisitive prescription (usucapion) were widely used by Turkish jurisdictions as one of the remedies against unclear ownership situations.[168]

A reason why some provisions were not applied is because they just 350
seemed too foreign to Turkish popular awareness. Difficulties arose concerning specific provisions which hampered their application. These difficulties were sometimes due to the fact that some conceptions found in the Swiss Civil Code were based on outlooks which were in part contrary to the Turkish ones.[169]

In some instances, such as the minimum age of marriage, the Turkish 351
legislator reacted and tried to find a rule doing justice to the natural living conditions and outlook of the population (see above, N 348).

In other instances, such as was the case with the introduction of 352
mandatory civil marriage (see above, N 347), changes of the provisions were consciously forgone. In these fields, a change in the applicable rules and therefore a complete assimilation of the new law was precisely what was intended with the reception of the Swiss Civil Code, the underlying goal being the modernization of Turkey. The general opinion was that the new rules would in time gain acceptance within the population by means of a slow integrative process. As regards the introduction of mandatory civil marriage, the Turkish legislation ended up being right, since the number of pure religious marriages is steadily decreasing.[170]

The question as to whether the assimilation process is finally completed 353
by now cannot definitively be answered in the affirmative. The Turkish legislator and case law nowadays still have to face up to questions in this regard. Notwithstanding all difficulties, it may nevertheless be said that over time, a national law has developed in Turkey. A further leap ahead

[167] Atamer, 737; Oguz, 384.
[168] Krüger, 130; Atamer, 737.
[169] Bandak, 133.
[170] Bandak, 135.

in modernizing the country was achieved by the civil law reform of 2002 (see below, N 360-361).[171]

354 Almost ninety years later, the Turkish reception may be considered as a great success, since problems in applying the law were limited and could be solved by several smaller reforms (see below, N 355-361).[172] The following two factors certainly significantly contributed to that success. First, legal scholars, fleeing persecution in Nazi Germany, were found to help build up a modern Turkish University at a time coinciding with the 1933 reform of the higher education system. Second, the Ministry of Justice decided to translate commentaries and textbooks on the Swiss Civil Code and the Swiss Code of Obligation into Turkish. Furthermore, translations of important decisions of the Swiss Federal Tribunal were published in legal reviews of the Ministry of Justice and the law faculties.[173]

6. Developments after the Reception

355 Historical developments, after the reception of the Swiss Civil Code, may be divided into the following three phases.

a. First Phase (1926-1980)

356 Reform project of 1971: 25 years after the coming into force of the Turkish Civil Code (1951) problems in the application of the law, and the complementary Acts which were enacted in consequence thereof (see above, N 339), prompted the Minister of Justice to constitute a commission which was to prepare a revision of the Code. It was to determine above all in which fields there existed a need for revision, and then to prepare proposals taking into account Turkish scholarly opinions and

[171] Bandak, 135; Oguz, 385-386; regarding family law in particular, doubts arise as to whether the legal transplant was not a failure. If one compares Pierre Legrand's position, which holds legal transplants to be impossible, with Alan Watson's, which affirms them, then, at first glance, the failure of the Swiss-Turkey transplant favors Legrand's opinion (see above, N 262). However, one has to take into account that family law is a very special case as regards legal transfers. The transfer is to take place in a culturally highly determined field, in a field where law is closely intermingled with a given social life, its habits, customs and religious practices (Mahidé, 36-37).

[172] Atamer, 734.

[173] Atamer, 734-735, fn 49.

case law in particular. The modernization of the language of the law in general was a further important need. Indeed, the translations of the 1920's were mostly made in the Ottoman tongue, the scholarly language of the times. Already back at the time of the enactment of the Code, that language was not understood by ordinary citizens. A quarter of a century later, it was absolutely remote from everyday life.[174] As regards substantive changes, the proposals pertained mainly to matrimonial law, inheritance law, property law and the status of children born out of wedlock (see above, N 348). Although the reform project was never enacted, its purified language and new provisions undoubtedly laid the foundation for the following drafts for a new Turkish Civil Code of 1984 (see below, N 357) and 1999 (see below, N 360), and of the partial revisions (see below, N 358) of the 1980's.[175]

b. Second Phase (1980-2002)

357 The reform project of 1984: In 1984, after a renewed seizure of power by the military in September 1980, the National Security Council convened a new commission mandated to reform the Turkish Civil Code. In preparing the draft, this second commission was guided by the following principles. First, all provisions of the Turkish Civil Code were examined as to a possible need for reform and their language purified. Second, in the course of said examination, the reform project of 1971 was taken into consideration as much as possible. Third, all changes which were made in the meantime in the Swiss Civil Code were evaluated, and those fitting Turkish needs adopted. Fourth, Turkish and Swiss case law was taken into account. Fifth, in the linguistic reformulation of the provisions, the commission tried to orient itself directly by the Swiss parent system, as long as there was no reason to depart from it.[176] On many points, the project of 1984 drew upon the project of 1971. Contrary to the latter however, the influence of Swiss legal developments on the project of 1984 can clearly be seen. In fact, many of the changes made or under discussion in the Swiss Civil Code have influenced the work of the second commission (see below, N 364) which preferred to be guided once again by this Code. As to substantive changes, the proposals pertained to the law of persons, matrimonial law, inheritance law,

[174] Atamer, 738.
[175] Atamer, 740-741.
[176] Atamer, 741-742.

property law and the improvement of the status of illegitimate children.[177]

358 Partial revisions of the Turkish Civil Code: Like the project of 1971, the project of 1984 has never been enacted. Both however were used as a template for two partial revisions of the Turkish Civil Code which were carried out in the years 1988 and 1990. In 1988, changes were made as regards protection of personality rights and correction of the register of birth, marriages, and deaths in case of a sex change. In 1990, a slightly wider revision brought changes in regard to betrothal, adoption, legal heirs, inheritance of extramarital descendants, ownership of items of property in the estate, exclusion out of a joint ownership community, building law, and mortgage.[178] A joint appraisal of the legal changes of 1988 and 1990 leads to the conclusion that there was no political will for a total revision of the Turkish Civil Code, even though changes, which were considered urgent, could not be put off any longer.[179] Some changes, which had already been proposed in the projects of 1971 and 1984, have been adopted.[180] While doing so, new social developments have only partly been taken into account.[181]

359 Role of the Turkish Constitutional Court in the further development of the Turkish Civil Code: None of the implemented legal changes aimed at conforming to the constitutional principle of equality or eliminated provisions from the Code which discriminated spouses and illegitimate children. That task had to be apprehended in part by the Turkish Constitutional Court in the 1980's. The Constitutional Court came to discuss provisions of the Turkish Civil Code on several occasions. In some cases, it produced progressive decisions, in others, it gave way to social value judgments and paid tribute to the conservative approach of the law.[182]

177 For details, see Atamer, 742-744.
178 For details, see Atamer, 746-747.
179 Atamer, 747.
180 Schwimann, 1.
181 Atamer, 741.
182 For instances in which provisions were held unconstitutional, see Atamer, 748.

c. Third Phase (2002-Today)

Entry into force of the new Turkish Civil Code in 2002: In 1994 again, a commission of scholars, judges, representatives of professional associations, non-governmental organizations and different Ministries was convened. It was mandated to reform the Civil Code and bring it up to date. The commission oriented itself in part by the projects of 1971 and 1984, but developments in Switzerland in particular, and – to the extent it was deemed necessary – in Germany, France, and Italy, were also taken into account. Furthermore, the obligations resulting from Turkey's ratification of the UN Convention on the Elimination of All Forms of Discrimination against Women were taken into consideration.[183] The final draft project of the commission was published in 1999 and accepted by parliament on 22 November, 2001. The new Turkish Civil Code entered into force on 1 January 2002.[184] It counts 1030 articles (compared to 937 articles before) and is drafted in a contemporary language. As to substance, the most important changes relate to matrimonial law,[185] where all provisions which discriminated spouses were abolished, the law of persons, where the consequences of a sex change were regulated in a separate article, the law governing children's rights, where the chief concern of all regulations became the well-being of the child, inheritance law, where the tendency to broaden the testator's freedom to dispose was confirmed, and property law, where joint ownership was modeled after Swiss law.[186] 360

Entry into force of the new Turkish Code of Obligations: In 1998, a commission was convened in order to provide for the revision of the law of obligations, in the course of the endeavors to modernize private law in Turkey (see above, N 322). A first draft project was published in 2005 and a revised draft followed in 2008. The final version of the new Turkish Code of Obligations was adopted by parliament on 11 January 2011. The new Turkish Commercial Code, which had been in preparation for over ten years, followed two days later. Both codes entered into force on 1 July 2012. The number of articles in the new Turkish Code of 361

183 Atamer, 749.
184 İnceoğlu/Atamer, 1.
185 A great part of the changes do reflect reforms which were undertaken in Switzerland in the meantime. However, the character of Turkish divorce law is still very much shaped by the principle of culpability.
186 Detailed in Atamer, 749-752.

Obligations increased from 544 to 649. In over 200 articles changes were made.[187] The most important changes concern tort law (see below, N 366), general business terms, sales contracts, tenancy law, assignment of debt and assumption of contract, and personal securities.[188]

7. Cross-fertilisation Aspects

362 If one examines the development of the Turkish legal system as regards its relationship with the Swiss parent system, one can but notice that both the new Turkish Civil Code of 2002 and the new Turkish Code of Obligations of 2012 faithfully continue to follow the systematic, partition, and structure of their Swiss counterparts.[189]

363 Changes made in the parent system were accounted for and followed in drafting the new Turkish Civil Code. Large parts of the newly introduced provisions are translations (see above, N 340) of the reforms implemented in Switzerland in the meantime.[190] The few differences with the parent legal system stem from specificities of the conditions in Turkish society. Changes made in the Turkish Civil Code in this regard were mostly carried out by the legislator without big interventions in the overall legal framework.[191]

364 As regards the new Turkish Code of Obligations, notwithstanding its seemingly extensive substantive changes (see above, N 361), it does not embody a fundamental reform. Just like the new Turkish Civil Code, the new Code of Obligations stayed true to the systematic and structure of the old one. Nothing changed as regards intrinsic value judgments. The reforms that did occur were influenced by changes made in the meantime in the Swiss Code of Obligations, some provisions of the abandoned Swiss Draft Project on the Revision and Unification of Civil Liability (see below, N 366), and by Turkish Supreme Court decisions.[192]

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187 İnceoğlu/Atamer, 1-2.
188 Schwimann, 2-8; İnceoğlu/Atamer, 4-14.
189 İnceoğlu/Atamer, 2; Atamer, 752.
190 Atamer, 752. Social and economic developments in Turkey were part of the reasons why The Turkish Civil Code was revised. The question arises as to why again refer to Switzerland if Turkish society changes (for that controversy see Mahidé, 36-37).
191 Atamer, 753.
192 İnceoğlu/Atamer, 2-3.

The transformation of the Turkish legal system and social order, which begun in 1926 and was qualified in 1938 by *Georges Sauser-Hall* as being the most radical and brutal in history,[193] seems nevertheless to be on the track for success.[194] The adventure of the Swiss Civil Code, including the Swiss Code of Obligations, is surely one of most fascinating in the history of legal transplantations and is worth following in the future.[195] 365

8. Reception in Turkey of the Abandoned Swiss Draft Project on the Revision and Unification of Civil Liability

a. Introduction

After two draft projects in 2005 and 2008, the new Turkish Code of Obligations was enacted by the Grand National Assembly on 11 January 2011, and has taken effect as of 1 July 2012 (see above, N 361).[196] While there are few profound changes as regards contract law (see above, N 361), tort law has undergone some important modifications. Again, the Turkish legislator chose to find guidance in developments of the Swiss parent system (see above, N 363). Although it has not sought to unify the regimes of contractual and extra-contractual liability,[197] it has drawn some inspiration from the Swiss Draft Project on the Revision and Unification of Civil Liability[198] (*Widmer/Wessner* Project).[199] The influence of the *Widmer/Wessner* Project on the new Turkish Code of Obligations is obvious as regards namely the introduction of a general strict liability clause for abnormally dangerous activities.[200] 366

[193] Sauser-Hall, 345.
[194] Atamer, 753; also Kubali, 65-69.
[195] Atamer, 753.
[196] İnceoğlu/Atamer, 2.
[197] Before being finally rejected, the unification of the regimes of contractual and extra-contractual liability had been extensively discussed in the Widmer/Wessner Project (Widmer/Wessner, 23-24).
[198] Draft Project of Federal Act on the Revision and Unification of the Law of Civil Liability, <www.bj.admin.ch/content/dam/data/wirtschaft/gesetzgebung/haftpflicht/vn-ve-f.pdf> accessed 16 August 2013.
[199] Büyüksagis, 45-46.
[200] İnceoğlu/Atamer, 7.

b. Grounds for the Reception

367 The reasons for adopting a new code lie on one hand, in the legislator's continued desire for Europeanization (see above, N 324-325) and modernization (see above, N 322) of its legal system, and on the other, in the necessity for more flexible solutions addressing Turkey's new social and economic realities.[201]

368 If one considers that the *Widmer/Wessner* Project has been abandoned by Switzerland in 2009,[202] the question arises as to why Turkey would nevertheless be guided by a seemingly outdated Swiss draft project, instead of turning itself towards relatively recent reforms such as those implemented in Germany (2002) or the Netherlands (1992) for instance.[203] This choice is only partially explained by Turkey's historical attachment to Swiss law, which finds its origins in the 1926 reception of the Swiss Civil Code and the Swiss Code of Obligations (see above, N 321). Indeed, the explanation resides also in the belief that the provisions set forth in *Widmer/Wessner* Project provide for practical solutions to many current and complex issues.[204]

369 Undeservedly swept aside in Switzerland, the *Widmer/Wessner* Project has received a positive echo among European lawyers and has been praised on several occasions for its innovative character.[205] Not only has it influenced some provisions on tort law in the new Turkish Code of Obligations,[206] but also the Principles of European Tort Law (PETL)[207] developed by the European Group on Tort Law,[208] a group to which one of the "fathers" of the *Widmer/Wessner* Project, *Pierre Widmer*, belongs.

201 Büyüksagis, 47-52.
202 Communication of the Federal Department of Justice and Police dated 21 January, 2009, <www.ejpd.admin.ch/content/ejpd/fr/home/dokumentation/mi/2009/2009-01-21.html> accessed 16 August 2013.
203 See İnceoğlu/Atamer, 2-3; Koziol, 23.
204 Büyüksagis, 46.
205 See Koziol, 24; see also Brüggemeier Gert, Modernizing Civil Liability Law in Europe, China, Brazil and Russia: Texts and Commentaries, Cambridge/New York 2011, 25.
206 Büyüksagis, 46.
207 See European Group on Tort Law, Principles of European Tort Law, Text and Commentary, Vienna 2005.
208 See <www.egtl.org> accessed 16 August 2013.

Some French authors have even suggested the *Widmer/Wessner* Project to serve as a basis for the reforms endeavors of French tort law.[209]

Even if some criticism was voiced against the draft version of the new Turkish Code of Obligations, which was based in part on the *Widmer/Wessner* Project, two reasons may explain why the abandonment of the *Widmer/Wessner* Project in Switzerland has not had much impact on the legislative process in Turkey.[210] 370

First, the time span between the abandonment of the Swiss project (see above, N 368) and the adoption of the new Turkish Code of Obligations (see above, N 361) was probably too short to take into account the criticism voiced in Switzerland.[211] 371

Second, even if the formulations of some of the new articles are based on those found in the *Widmer/Wessner* Project, most of the new tort provisions of the new Turkish Code of Obligations are based on standards already established by Turkish Courts, which implies that the new provisions benefitted also from an internal source of inspiration.[212] 372

c. Introduction of a General Clause of Strict Liability for Abnormally Dangerous Activities

Amongst the key innovations of the new Turkish Civil Code, the introduction of a general clause[213] of strict liability for abnormally dangerous activities illustrates the influence of the *Widmer/Wessner* Project on the legislative reform.[214] 373

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209 See Matringe Eve, La réforme de la responsabilité civile en droit suisse: Modèle pour la France?, doctoral thesis, Strasbourg 2010, <http://scd-theses.u-strasbg.fr/1860/01/MATRINGE_Eve_2010.pdf> accessed 16 August 2013.

210 Büyüksagis, 46-47.

211 See eg Schwenzer Ingeborg, Der Schweizerische Entwurf zur Reform des Haftpflichtrechts, Eine kritische Stellungnahme, in: Winiger (ed), La responsabilité civile européenne de demain: projets de révision nationaux et principes européens/Europäisches Haftungsrecht morgen: nationale Revisionsentwürfe und europäische Haftungsprinzipien, Geneva 2008, 77.

212 Büyüksagis, 47.

213 The General Provisions on Tort in the new Code include two general clauses of tort liability: one for traditional fault-based liability (art. 49 new Turkish Code of Obligations) and a new one for strict liability for abnormally dangerous activities (art. 71 new Turkish Code of Obligations).

214 İnceoğlu/Atamer, 7-8. Other key innovations as regards tort law concern for instance enterprise liability, expansion of the scope of the circumstances justifying indemnity for pain and suffering in case of severe bodily injury or death, solidari-

374 Under previous Turkish legislation, as is still the case in current Swiss law, strict liability for dangerous activities was limited to special legislative Acts.[215] However, in the absence of a special rule of strict liability, unlike Swiss courts,[216] the Turkish Supreme Court has extended strict liability by analogy to cases in which enterprises are held to have a heightened duty to avoid harm when running dangerous commercial operations. This intervention of case law has, to some extent, addressed the problem of discrimination between victims of relatively similar accidents, as some of these accidents were regulated by special Acts providing for strict liability and others were not. Nevertheless, case law alone was not deemed to sufficiently satisfy the need for legal certainty.[217]

375 In order to codify the Turkish courts' case law, the legislator turned to the *Widmer/Wessner* Project. Indeed, the project's basic idea behind a general clause of risk-based liability[218] was to introduce a sufficiently flexible provision into the Code in order to help case law to avoid unequal and therefore unjust treatment of situations presenting comparable characteristics to those, which under current Swiss law, are regulated by special dispositions providing for strict liability. The introduction of a general clause of strict liability sought to open the way for allowing the judge to make reasonable analogies, in a manner close to what she is entitled to do under the famous Articles 1(2) and 3 Swiss Civil Code. A general clause of strict liability means guaranteeing a coherent system,

ty liability which now leaves a wide discretion to the judge, or "advance payments" for injured persons who need immediate financial support to receive it without waiting for the end of the trial. Other influences of the Widmer/Wessner Project on the new Turkish Code of Obligations are noticeable for instance as regards enterprise liability: Paragraph 3 of art. 66 new Turkish Code of Obligations is modeled on art. 49a Widmer/Wessner Project (Büyüksagis, 51-52, 65).

215 Büyüksagis Erdem, Die Haftung aus unerlaubter Handlung im Entwurf eines neuen türkischen Obligationenrechts, REAS/HAVE 330-341, 332 (2006).

216 «[L']article 58 [de la Loi fédérale sur la circulation routière] consacre la responsabilité causale du détenteur de véhicule automobile […]. La [Loi fédérale sur la navigation intérieure] ne contient aucune norme semblable. Il n'existe par ailleurs aucune coutume dégagée par la jurisprudence consacrant une responsabilité causale des conducteurs de bateaux. Il en résulte que la responsabilité de ceux-ci est fondée sur la faute au sens de l'article 41 [du Code des Obligations]» (Decision of the Geneva Court of Justice of 24.04.1998, SJ 1999 I 11, 12).

217 See Büyüksagis, 68, and the cited references to Turkish case law.

218 See art. 50 Widmer/Wessner Project.

where the legislator is no longer obliged to enact special Acts as things come to keep up with social evolutions.[219]

In line with the *Widmer/Wessner* Project, article 71 new Turkish Code of Obligations extends the scope of strict liability to all dangerous activities not covered by special rules. As such, it may be seen as an articulation of the principle of equity: a person who stands to profit from the running of his enterprise's "significant risk"[220] should be obliged to compensate in the event of an accident causing damage, even if all due care expected from a specialist in such activities has been exercised.[221] 376

Furthermore, in article 71(2) new Turkish Code of Obligations,[222] just like in article 50(2) *Widmer/Wessner* Project[223] or in Article 5:101(3) PETL,[224] the concept of dangerous activity is defined by the likelihood of the danger occurring and its propensity to cause damage, two criteria which find their roots in the definition of "abnormally dangerous activity" in §§ 519 and 520 of the American Restatement of Torts (second).[225] 377

Although the *Widmer/Wessner* Project as a whole has been abandoned in Switzerland, the idea of a general clause of strict liability for abnormally dangerous activities has found lasting recognition among Swiss scholars. Indeed, article 50 *Widmer/Wessner* Project has been adopted, with a slight variation in the wording,[226] by article 60 of the recent academic 378

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219 Widmer/Wessner, 138.

220 Article 50(2) Widmer/Wessner Project: «Est réputée spécifiquement dangereuse l'activité qui, par sa nature ou parcelle des substances, instruments ou énergies utilisés, est susceptible, en dépit de toute la diligence qu'on peut exiger d'une personne spécialisée en la matière, de causer de fréquents ou de graves dommages; tel est notamment le cas lorsqu'une loi institue une responsabilité spéciale à raison d'un risque comparable».

221 Büyüksagis, 69.

222 Büyüksagis, 69.

223 Widmer Pierre, Ein erster Schritt zu einem europäischen Haftpflichtrecht?, REAS/HAVE 245-247, 247 (2005).

224 Koch Bernhard A/Koziol Helmut, Generalklausel fur die Gefährdungshaftung, REAS/HAVE 368-371, 371 (2002); for an evaluation of art. 5:101 PETL, see Werro Franz, Les principes de droit européen de la responsabilité civile en deux mots: contenu et critique, REAS/HAVE 248-250, 250 (2005).

225 Büyüksagis, 69.

226 Fellmann Walter/Müller Christoph/Werro Franz, in: Huguenin/Hilty (ed), Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil/Code des Obligations suisse: Projet relatif à une nouvelle partie générale, Zurich/Bâle/Genève, 2013, art. 60 N 1.

Project for a New General Part of the Swiss Code of Obligations (OR 2020).[227] Finally, one cannot help but notice that, in this particular instance, the Turkish legal system is ahead of the Swiss parent one.

D. The Diffusion of the Common Law

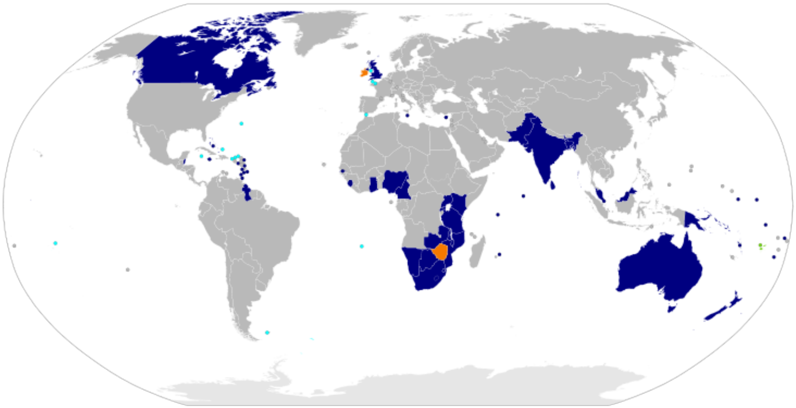
1. General Development

379 The diffusion of the Common Law has to be understood in the context of the *British Empire*. It encompassed dominions, colonies and other territories that were ruled by England. At its peak it was home to about 450 million people and covered almost a quarter of the Earth's total land.[228] England released most of its territories after the Second World War and granted them independence. Many former colonies voluntarily then joined the Commonwealth of Nations after obtaining sovereignty (currently 54 nations).[229]

Map of the British Empire[230]

[227] See Huguenin Claire/Hilty Reto (eds), Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil/Code des Obligations suisse 2020: Projet relatif à une nouvelle partie générale, Zurich/Bâle/Genève 2013.
[228] <http://en.wikipedia.org/wiki/British_Empire> accessed 2 September 2013.
[229] <www.commonwealthofnations.org/> accessed 2 September 2013.
[230] <https://commons.wikimedia.org/wiki/File:The_British_Empire.png> accessed 2 September 2013.

Map of the Commonwealth of Nations[231]



Commonwealth of Nations members
Suspended Commonwealth of Nations members (Fiji)
Former Commonwealth of Nations members (Ireland and Zimbabwe)
British Overseas Territories and Crown Dependencies

Common Law was predominantly exported to territories that were still at 380
an early stage of their civilization and politically not fully organized such as eg Australia or North America. If the territory was already under the auspices of foreign powers, the existing political and legal structures as well as certain elements of the law were preserved.[232] These elements were mostly family law, marital property and inheritance law.[233] Common law would also – more or less – adapt to local conditions. Therefore some of the customary and religious legal traditions could survive alongside the Common law.[234] That is why we find in countries such as India or South Africa a mix of legal traditions.

The expansion of the Common law did not end with the decline of the 381
British Empire. Recently some countries of the Arabian Peninsula have voluntarily taken over Common law as the applicable law in financial hubs that were set up in that region.[235]

Furthermore, the Common law has remained a stronghold in 382
international trade and commerce (soft law such as the *lex mercatoria*)

231 <http://commons.wikimedia.org/wiki/File:Commonwealth_of_Nations.svg> accessed 2 September 2013.
232 Zweigert/Kötz, 220.
233 Mattei/Ruskola/Gidi, 192.
234 Horigan, Pace Int'l L Rev 1, 2–3 (2009); Mattei/Ruskola/Gidi, 192.
235 Horigan, Pace Int'l L Rev 1, 4 (2009).

and through the phenomenon described as the "*Americanization of the law*".[236] "US-style" business and legal concepts (eg franchising, product liability law, the law and economics method etc) have wiggled themselves into Civil law systems.[237] Various factors have contributed to this (informal) transfer: the market power of big US-American companies; the dominance of US-American law firms in the commercial sector; the flow of European lawyers getting a postgraduate degree in law in the USA (LL.M.) and thereby being influenced by Common Law concepts; and maybe also the American way of life (see above, N 104).[238]

2. Expansion into Specific Countries

383 As described before, the Common law spread all over the globe. Due to the magnitude of its rule we will only be able to summarily look at a few selected jurisdictions:[239]

– The Common law in the former colony *Australia* is very close to the one of the motherland England (with the exception of family and land law).

– A few years after the early settlements in Australia, France handed *Canada* over to England (1763). After some turbulent times the English Parliament founded a federation including all the British territories in North America. With the exception of Québec the Common Law was the authoritative law.

– The situation was different for *India*. There was a political and social structure in place, which the English tried to preserve as much as possible. However, in the early 19th century the English *East India Company* annexed or subdued most of India, turning it into a British colony. After much unrest and the Indian revolution of 1857 India was put under the direct control of the British government. The English Com-

[236] Glenn Patrick H, Globalization and National Legal Traditions, in: Schwarze Jürgen (ed), Globalisierung und Entstaatlichung des Rechts – Ergebnisse der 31. Tagung der Gesellschaft für Rechtsvergleichung vom 20. bis 22. September 2007 in Halle, Tübingen 2008, 57–69, 64.
[237] Wiegand, 39 Am J Comp L 229, 236–246 (1991).
[238] De Cruz, 505.
[239] See for the following Zweigert/Kötz, 218–237.

mon law was applied without substituting customary law and religious Hindu and Islamic law.

- A somewhat similar situation can be found in eastern and western *Africa*. The Common law was introduced to the colonies, the customary (unwritten) African law and Islamic law remained applicable to a large portion of the population.
- *South Africa* is a special case insofar as it has been heavily influence by Roman (-Dutch) law. However, the latter proved unfit for modern trade and commerce, which is why the English transplanted adequate Common law rules. This left the country with a mix of these two types of laws. South Africa can therefore be qualified as a hybrid system.
- The same holds true for *Israel*. The legal system has many roots: Rules from the Ottoman Empire, the Common Law, and some home-grown legislation, which adopted concepts and rules from the European Civil law systems.

E. European Private Law

1. Preliminary Remarks

At first sight it might be unorthodox to put a section on European Private Law under the heading of legal transplants. But it makes sense if one thinks of the European private law as a result of the process of extracting legal principles and concepts from different national laws and moulding them into a new set of rules. 384

Due to the roots and the purpose of the European Union its law is mainly concerned with the economic and social aspects of the European society.[240] In view of the diversity of the EU member states and their laws it goes without saying that comparative law plays a major role in creating and applying EU law. 385

The larger part of EU-Law, the so-called *acquis communautaire*, is public law. Its main purpose is to guarantee the functioning of the European single market (the four "freedoms": free movement of goods, services, persons and capital markets). The competence to legislate for 386

[240] Zeno-Zencovich Vincenzo/Vardi Noah, European Union Law as a Legal System in a Comparative Perspective, 19 EBLR 243–265, 245–246 (2008).

the core materials of private law (such as contract law) largely remains with the member states. As a consequence, private law in the European Union is primarily unharmonized national law.

2. European Private Law as Consumer Law

387 There is one area where private law was able to break into the fortress of public law: *consumer law*.[241] The freedom of movement of goods and services require that the level of consumer protection in the different member states is equally high. For that purpose many *directives* have been issued that regulate private law issues.[242] They want to make sure that the same rules apply independent of the place where European consumers buy goods or services: The contracts should be fair, high levels of product security should be ensured, providers of goods and services shall have a duty to inform consumers about all relevant aspects of the contract; and the consumer may not be deceived by advertisements etc.[243] The directives have to be transposed into the national law of the member states. Through that transposition the various national laws are harmonized.[244] However, the EU-consumer law grew "organically" and

[241] For a discussion of European private law see also Rainer, 469-500.

[242] Examples: Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises ("Doorstep Directive"); Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts ("Unfair Contract Terms Directive"); Directive 98/6/EC of the European Parliament and the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers ("Price Indication Directive"); Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees ("Consumer Sales Directive"); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts ("Distance Selling Directive"): For further information on EU-consumer law please check: <www.eu-consumer-law.org/index.html> or <www.acquis-group.org> both accessed 2 September 2013.

[243] See <http://ec.europa.eu/consumers/> accessed 2 September 2013.

[244] It is interesting to see that the EU directives and regulations even have an impact on non-member states such as Switzerland. Some of the directives either have been integrated into the Code of Obligations or a separate statute has been modeled accordingly. Furthermore, the Swiss courts use these directives to interpret the Code of Obligations if there are gaps or ambiguities. Examples: Art 40a-g CO go back to the aforementioned distance selling directive; the product liability statute is the transposition of Council Directive 85/374/EEC of 25 July 1985 on

is thus fragmented and uncoordinated. There were several efforts to remedy this state and broaden the scope of European private law beyond consumer law as has been shown in chapter 1 (see above, N 124-138).

the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

Part two:
Selected Legal Systems

Chapter 4: Civil Law

I. Introduction

A. Terminology

We shall use the term "Civil law" to mean the legal tradition, encompassing the specific legal features but also the cultural, political and socio-economic background, the governing social norms and the formative history of the respective countries. 388

This use of the term has to be differentiated from the usage by Continental-European lawyers. Often "civil law" is used as the English translation of "*droit civil*", "*Zivilrecht*" or "*Privatrecht*". This much more narrow sense of the word only refers to areas of the law covered in the civil (and commercial) codes (such as eg law of the person, family law, contracts, torts etc). We designate these subject matters as "*private law*" which also shall include commercial law. 389

Before we turn to the question what the characteristic elements of Civil law as a legal tradition are we will present a summary of the geographic occurrence of Civil law. 390

B. Geographic Occurrence of Civil Law

The Civil law tradition is the prevailing legal tradition in the world. Civil law is in use in over 60% of the nations (including "hybrid" countries, see also the map above, N 233).[1] We are not stating that all of these countries were to give a uniform answer to a specific legal question just because they are part of the Civil law tradition. The national laws of the individual legal systems are too divergent for this,[2] as Civil law concepts 391

1 *Barnes Wayne R,* Contemplating a Civil Law Paradigm for a Future International Commercial Code, 65 La L Rev 677–774, 769 (2005).

2 *Glendon/Carozza/Picker*, 71.

have intermingled with elements of Common law, customary law and religious laws in many countries.[3]

392 The Civil law tradition is today the ruling tradition in *Europe* (including the European Union),[4] *Latin America* (here the French Civil Code had a predominant influence),[5] *many parts of Asia and Africa*, and even a *few enclaves*[6] in the common law world (Louisiana, Québec, Puerto Rico, Scotland).[7]

393 Civil law has also mixed with influences of religious law such as the *Islamic law*. We have already mentioned (see above, N 321–378) that Turkey has imported the Swiss civil code;[8] Islamic law in Turkey is limited to personal and family matters. The situation is similar in Egypt, where family law is governed by Islamic law for Muslims, the secular law is influenced by Civil law (of French origin). In countries such as Afghanistan, Syria or Morocco Civil law is mixed with Islamic law and Customary law.

394 Last but not least it is worth mentioning that the occurrence of Civil law does not necessarily correlate with a specific form of government, political or socio-economic system.[9] This holds even true in the countries belonging to the European Union with its common market and currency.[10] Countries such as Bulgaria, the Czech Republic, Estonia, Denmark, Hungary, Luxembourg, Portugal, Germany or Slovakia are politically, economically, financially and culturally different – but they all belong to the Civil law tradition. Finally, Brazil and Russia are both Civil law states but they have a different legal tradition, history and economic development.[11]

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3 Id, 71.
4 *Merryman/Pérez-Perdomo*, 2–3.
5 *Glendon/Carozza/Picker*, 69; however, the Common law "US-style" left a notable footprint on Latin American legal systems, primarily in the area of public law: *Mattei/Ruskola/Gidi,* 190.
6 *Mattei/Ruskola/Gidi,* 191.
7 *Merryman/Pérez-Perdomo,* 2–3; further details: *Mattei/Ruskola/Gidi,* 199.
8 *Mattei/Ruskola/Gidi,* 200.
9 *Glendon/Carozza/Picker*, 76. The classification *"*civil law systems*"* has no necessary connection with public law and government (…).
10 See <http://europa.eu/about-eu/countries/index_en.htm> accessed 2 September 2013.
11 See <http://en.wikipedia.org/wiki/BRIC> accessed 2 September 2013.

II. Characteristic Elements of Civil Law

A. In General

There are a number of criteria that have been worked out by comparative law scholars to outline a legal tradition and to differentiate it from others (see above, N 188–233).[12] Such factors are eg the historical development, the distinctive mode of legal thinking (juristic style), typical legal institutions, sources of law, dispute resolution methods, a particular (political, socio-economic or religious) ideology, culture, language, the significance of legal certainty and equity etc.[13] 395

In this first section we will cursorily deal with some general defining elements and then concentrate on three aspects in more detail: the sources of law, the predominant methods of dispute resolution in private law and lastly the main actors in the legal world. 396

1. Legal Historical Development

From a *legal historical* perspective the Civil law tradition is characterized by the reception of Roman law, first in Europe and later in other places of the world through legal transplants (such as eg South Africa). We have described this process above in chapter three (see above, N 297–308). Roman law has blended with local customs, canonical and commercial law and was shaped by (esp German) legal scholarship (see above, N 297–304). 397

So it may be said that the original common bond of Roman law, which forms the foundation of Civil law, unites the various countries that nowadays are considered to be part of the Civil law tradition. This is remarkable if one considers that the political,[14] military, economic, 398

12 See *Head*, 10.

13 See *Zweigert/Kötz,* 68–72; *de Cruz*, 61–82; *Merryman/Pérez-Perdomo,* 48–55.

14 It seems that the *parliamentary* and the *presidential* form of government are about evenly split among Civil law nations, even though it is not easy to put an exact number on this. In a *parliamentary* system the executive branch derives its legitimacy from the legislature to which it is responsible and the the head of state is normally a different person from the head of government (see eg <www.britannica.com/> accessed 2 September 2013; whereas in a *presidential*

demographic and social history – and current situation – of these countries are quite different.

2. Ways of Thinking and Communicating

399 A distinguishable way of thinking about and analyzing legal problems has emerged in the Civil law tradition.[15] It can be described as an enthusiasm for legal theory, for generalizing, systemizing and rationalizing, constructing legal concepts and dogmatic models, deducing individual rules from general principles and adhering to strict methods of interpreting codes (see below, N 401–439). These particularities can be traced back to the work of the glossators and commentators, the German Pandectists and other legal scholars (see above, N 298–306).

400 This way of dealing with legal issues can be opposed to the typical Common law approach that emphasizes a concrete way of arguing, building upon the individual facts of each case and the minor importance of systematic categorization. There is also less reliance on general principles and clauses, which can eg be seen in contracts where an extensive list of definitions tries to cover all possible situations.

3. Codifications and Statutory Interpretation

a. Codifications

401 As we have seen in chapter three (see above, N 304) the *ius commune* and the local customs were replaced by codifications as a source of law starting from the early nineteenth century.[16] Codifications are a comprehensive set of rules, organized systematically according to subject-matter areas derived from the *Institutes* of the Roman jurist

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system the executive branch is led by a person who serves as both head of state and head of government. The president is not responsible to the parliament and normally cannot dismiss it, see <http://en.wikipedia.org/wiki/Presidential_system> accessed 2 September 2013; see in contrast *Glendon/Carozza/Picker*, 76, claim that "*most of the civil law nations would be found to have governments of the type known as parliamentary*", but they do not indicate a source for that assertion.

[15] *Glendon/Carozza/Picker*, 72.

[16] Critical *Merryman/Pérez-Perdomo,* 29: "*Only an exaggerated rationalism can explain the belief that history could be abolished by a repealing statute*".

Gaius (161 AD).[17] In one way or the other they cover the law of persons, family law, inheritance law, property law, the law of obligations (contracts, torts, unjust enrichment) and – depending on the specific legal system – corporations.[18] This body of rules and principles constitutes the private law, which even nowadays is for many Civil law lawyers the core of the Civil law tradition.[19]

The codifications (especially the French Civil Code) were created to remove uncertainty, illogicalities and inconsistencies of the law. The ideology behind the codification is thus that it is possible to solve every legal problem through rigid, rational systematization and categorization of legal principles.[20] There were at least two paths to reach this broad goal. In the eighteenth century the French Civil Code was drafted against the backdrop of the revolution and the philosophy of *rationalism*. The Civil Code was written in a simple way so that also the layperson could correctly apply the law without the help of a lawyer. In the nineteenth century the drafters of the German Civil Code took a different ideological approach under the influence of the *Historical School* (see above, N 305). It was not the purpose to abolish ancient law and customs but to use them to scientifically unearth general principles and "data" (Roman law, Germanic law etc) that would form the building blocks for the new codification. The German Civil Code was created by lawyers for lawyers as "translators" of the law to the laypeople.[21] 402

The codifications were intended to secure individual autonomy and push back governmental influences.[22] They were also the product of the rising nationalism and the need to have legal unity in a centralized state (esp in France).[23] 403

[17] Cf Id, 6–7, 27–28.
[18] In France or in Germany the law of corporations is regulated by a separate Commercial Code.
[19] According to *Glendon/Carozza/Picker*, 72, the civil law can even be deemed to have a quasi-constitutional character.
[20] *Hahlo H R/Gower L C B,* Here Lies the Common Law, 30 Mod L Rev 241–262, 246 (1967).
[21] See *Merryman/Pérez-Perdomo,* 31–32.
[22] *Glendon/Carozza/Picker*, 73.
[23] *Merryman/Pérez-Perdomo,* 28.

404 Philosophies about the relationship between the government and its subjects as well as market conditions have changed since.[24] In the twentieth century the European codifications slowly moved away from their liberal roots. A trend towards governmental interference especially in consumer-related issues (eg labor and rent law) can be observed. This especially curtailed the freedom of contract. Sometimes, the codifications were modified or amended by integrating new provisions; sometimes, special legislation was introduced for that purpose.[25] There are instances where the judiciary has to step in and adapt the law to changing social, technological or commercial demands (eg the effects of the internet on the law).[26]

405 Unfortunately these changes are often spurred by the political wind of the moment and are thus more eclectic than systematic.[27] This bears the risk that what once was a well founded and through-composed code becomes incoherent.

406 Many Common law jurisdictions have codes or statutes as well, notably the US State of California.[28] Very similar to their Civil law counterparts they treat questions of law relating to persons, property, obligations, commercial instruments and specific contracts. But a Common law style code usually merely wants to consolidate the law in a certain subject-matter area without having the goal to be all encompassing or complete. The goal of the code is generally to supplement the existing law, not to abolish it.[29]

407 The Common law retains its significance,[30] also as a means for filling gaps in the code.[31] But there seems to be no general answer to the

24 *De Cruz*, 95–96; *Glenn Patrick H*, Legal traditions of the world, 4th edn Oxford/New York 2010, 143–144, 165–170.
25 *Merryman/Pérez-Perdomo,* 152–160.
26 Id, 154; *Apple/Deyling,* 31.
27 *Glendon/Carozza/Picker*, 73.
28 See <http://leginfo.legislature.ca.gov/faces/codes.xhtml> accessed 2 September 2013.
29 *Merryman/Pérez-Perdomo,* 33; but see to the contrary Sec. 2–21.20 Cal-Civil Code: *"[…] in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this State, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed or abrogated*".
30 See eg Sec 22.2 Cal-Civil Code: "*The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State*".

question how to deal with a conflict between a provision of a code and a rule of the Common law. Even though it is said that there is a "*tendency [...] to interpret the code provision in such a way as to evade the conflict*",[32] at least the California Civil Code in sec. 2-21.4 states the opposite: "*The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice*".

408 In summary it can be said that a codification in the sense of the Civil law tradition is an *"authoritative, comprehensive and systematic collection* of *general clauses* and *legal principles, divided into Books or Parts dealing in a logical fashion with the law relating thereto"*.[33]

b. Statutory Interpretation

409 With the establishment of the codifications the need came into being to interpret and apply their provisions to concrete legal cases. For that reason methods and techniques of interpretation had to be developed, which in the Civil law traditions became an art and field of study in itself.[34]

410 For the contemporary reader it goes without saying that judges must interpret codes to determine their meaning and apply their provisions to the concrete case. But that has not always been that obvious. In the contrary, historically there were strong objections to judges interpreting the codes. Under the doctrine of the separation of powers it was only the legislature who had the right to interpret the statutes – the judiciary was merely supposed to "mechanically" apply it. If there was doubt about the understanding of a provision, the judge was supposed to refer the question to a legislative body.[35]

411 The probably most extreme case for this philosophy was the "*Allgemeines Landrecht für die Preußischen Staaten*", the Prussian Codification, which was enacted 1794. It was the only attempt to codify not only

31 *De Cruz*, 48; *Merryman/Pérez-Perdomo,* 33.
32 *Merryman/Pérez-Perdomo,* 33.
33 *De Cruz*, 48; see also *Mattei/Ruskola/Gidi,* 399–404.
34 *Glendon/Carozza/Picker*, 248.
35 *Merryman/Pérez-Perdomo,* 39.

private law but also criminal law and other parts of public law. It contained over 17'000 (!) provisions with the goal of resolving every possible case and thereby – intentionally – reducing the influence of the judges to zero.[36]

412 In France the Supreme Court – the "*Cour de cassation*" – was originally not mandated to interpret the Code civil, but simply to *annul* decisions of lower courts that incorrectly interpreted and applied the relevant statutes.[37] It later evolved into also providing the correct answer to questions of law. This is nowadays the standard procedure of the highest courts in the Civil law tradition. Case in point is eg the appeal to the German Federal Supreme Court (*Bundesgerichtshof*), which is called "*Revision*". This means that the court not only reviews the case but also can correct it.

413 This development led to a more powerful role of the judiciary since it is now able to – in various degrees – modify, amend or correct legal provisions in the codifications. It also means that people came to accept the fact that even the best codifications are not complete and entirely coherent and are thus in need of constant fine-tuning.

414 We will now shortly turn to the method of interpretation itself. In view of the many different theories that are used in the countries of the Civil law tradition we are forced to generalize.[38]

- The first step in interpreting a provision is usually to identify the (most credible) meaning of the words used in the provision (literal interpretation).[39]
- If the meaning of the words are not clear or ambiguous or if there is a gap, the judge can turn to a number of methods to find the solution: He can try to determine the ratio legis of the provision and its proper

[36] See Id, 39.
[37] Id, 40.
[38] For an excellent account of the different methods and theories of statutory interpretation we recommend *Hager Günter*, Rechtsmethoden in Europa, Tübingen 2009.
[39] See eg Art 1 Swiss Civil Code: "*Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut oder Auslegung eine Bestimmung enthält*"; Art 12 of the Italian Civil Code: "*Nell'applicare la legge non si può ad essa attribuire altro senso che quello fatto palese dal significato proprio delle parole secondo la connessione di esse e dalla intenzione del legislatore*"; cf *Merryman/Pérez-Perdomo,* 44; *Glendon/Carozza/Picker*, 248–249.

application to the case by looking at the intention of the legislator (see expressly Art 12 Italian Civil Code),[40] apply another provision of the code by analogy or get hints from the legislative history or the systematic placement of the provision in the code.[41]

– The most contentious issue arises when the judge cannot deduce an answer from the code because it is silent on the specific point. At that point it can be said that the process of interpretation (quest for the meaning of the provision) has come to an end and something else starts. The judge has now to find a solution on his own and thus supplement the code.[42] In some jurisdiction this is done under the cloak of interpretation (eg France), in others it is done openly (eg Germany).[43] In this context we also refer the reader to the landmark provision of Art 1(2) Swiss Civil Code, which we have commented upon in chapter one (see above, N 95).[44] It reads: "In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator."

4. The Public and Private Law Dichotomy

Another prominent feature of the Civil law tradition is the distinction made between *public and private law*. This classification has far-reaching implications since it also influences the organization of the court system of Civil law countries and splits legal scholarship into the fraction that (mainly) studies either public or private law.[45] 415

Public Law as such came relatively late into being. The need developed with the creation of centralized states in the eighteenth century when different governmental bodies and agencies were established. At that time public law was mainly *administrative* law regulating the relationship between the state and its subordinates. The then existing private law was 416

40 See Footnote 39.
41 *Glendon/Carozza/Picker*, 249–250.
42 See *Merryman/Pérez-Perdomo,* 45–46.
43 *Glendon/Carozza/Picker*, 249.
44 Similar Art 12(2) Italian Civil Code: "*Se una controversia non può essere decisa con una precisa disposizione, si ha riguardo alle disposizioni che regolano casi simili o materie analoghe; se il caso rimane ancora dubbio, si decide secondo i princìpi generali dell'ordinamento giuridico dello Stato*".
45 *Glendon/Carozza/Picker*, 294–295.

not deemed to be appropriate for that purpose.[46] Additionally, the doctrine of the separation of powers stood against the adjudication of disputes between the state and its subject. So a separate set of administrative courts were established in various Civil law countries, notably in France and Germany.[47]

417 In its core public law nowadays comprises:

- Firstly *constitutional* law. This is the law governing the organization and operation of the state, the protection of the liberty, political and civil rights of the individual (such as the life and personal freedom, human dignity, equality, freedom of religion, guarantee of ownership etc).
- Secondly *administrative* law. This is the law "*governing the organization and operation of the administrative branch of government and the relations of the administrations with the legislature, the judiciary, and the public*" (such as tax law, environmental law, health law, administrative procedure law, spatial planning law etc).[48]
- Thirdly *criminal* law. However, in most Civil law countries criminal law has developed into a third pillar of the legal system next to public and private law.

418 Even though this distinction between private law and public law is often – and probably correctly so – called to be a basic feature of the Civil law tradition,[49] in many areas of the law the boundaries are eroding. A good example is competition law. It can be categorized as public law: It regulates the fair access to and the proper functioning of the market by forbidding certain practices of the market players that are deemed harmful for a free market economy. At the same time it has private law implications as well, esp in limiting the freedom of contract.

419 We shall illustrate this by the following example. Two companies are doing business in the same market. They secretly agree not to compete against one another and not to undercut their prices. Consumers thus pay more than they should and competitors are driven out of the market. If such practices come to light, the competent authority (eg the competition

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46 Id, 295.
47 See *Merryman/Pérez-Perdomo*, 88, 94.
48 Id, 134.
49 *Apple/Deyling*, 23; *Glendon/Carozza/Picker,* 294–295; critical *Merryman /Pérez-Perdomo,* 92–99.

protection agency) can fine the two companies (public law sanction); additionally, it is also possible that competitors or consumers claim damages before the ordinary courts (private law sanction).

B. Sources of Law

The question of the authority and importance of the sources of law is much discussed in comparative law theory. This controversy goes back to the formation of the nation-states in the Civil law tradition. At that time state laws (eg codifications) became the main source of law, thus edging out the *ius commune* and local customs and relegating them to a supplementary law (see above, N 304).[50] In other words: Competing sources of law came into existence that needed to be categorized and assessed. The reader should be aware that the relevance of the different sources of laws varies within the Civil law tradition. This should be kept in mind while studying the following comments. 420

It seems that the question is not of equal relevance in the Common law where a more pragmatic approach is taken.[51] This probably in part goes back to the fact that countries in the Common law tradition never went through the above-described process of codification. 421

In the following we will give an overview of the different sources of law in Civil law countries, following the usual distinction between primary and secondary sources: 422

– *Primary* sources of law are those that contain directly binding legal provisions. These are the laws enacted by the respective legislator (codes, statutes, regulations) and customs.

– *Secondary* sources are case law and (established) legal doctrine. They come into play when the need arises to clarify or supplement a primary source of law. In general it can be said that they are not (at least not directly) binding.[52]

50 M*erryman/Pérez-Perdomo,* 21.
51 Id*,* 25–26.
52 However, we believe it an over-generalization to say that they are “never” binding as *Glendon/Carozza/Picker*, 226, do; see also *Mattei/Ruskola/Gidi,* 622.

1. Primary Sources of Law

a. Law Enacted by the Legislator

423 The most important source of law is the one enacted by the *legislator*. This legislator is most often the parliament, but there are countries like Switzerland where the people can legislate by eg way of a *popular initiative* (Art 136(2) and 138 seqq. Swiss Federal Constitution)[53] or by way of a (mandatory or optional) referendum.[54]

424 There are various forms of enacted laws: We have already extensively talked about the *civil codes* (and other codifications such as a commercial code) as the centerpieces of the enacted laws in the realm of private law (see above, N 401–408). In procedural matters the codes of civil procedures take center stage.

425 Codes and statutes are not the only form of enacted laws – and quantitatively speaking the minority of legislation. Apart from the constitution there are also numerous regulations issued by governmental or other administrative agencies. The common determinant is that all of these laws are *general-abstract* in nature. They are *general* because they apply to a multitude of people and they are *abstract* because they regulate a multitude of situations. A vehicle code is eg a general-abstract law because it applies to all people using roads and it regulates different topics that are related to the vehicles and traffic (such as eg the registration, transfer and equipment of vehicles, civil liability in case of accidents, rules of the road, offenses and prosecution etc).

426 A traffic ticket for speeding is on the other hand an *individual-concrete* order (sometimes also called ordinance or notice): It is *individual* because only the specific driver that was speeding is concerned and *concrete* because it only deals with one situation: the violation of

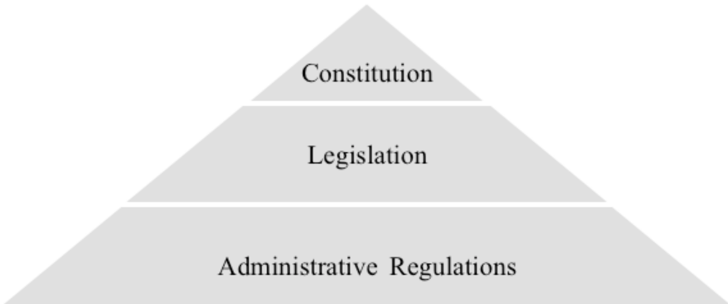
[53] Art 139 Swiss Federal Constitution states that "*any 100'000 persons eligible to vote may within 18 months of the official publication of their initiative request a partial revision of the Federal Constitution*".

[54] *Mandatory referendum*: Among other issues any amendment of the Swiss constitution or the accession to organizations for collective security or to supranational communities must be put to the vote of the people and the cantons (Art 140 Swiss Federal Constitution); *Optional referendum*: Among other issues Federal acts and certain international treaties shall be submitted to the people for vote if within 100 days of the official publication of the enactment any 50'000 persons eligible to vote or any eight cantons request it (Art 141 Swiss Federal Constitution).

speeding limits. Such orders are not laws in the sense used in this context.

There is a strict hierarchy among all these different sources of law: At the top is the constitution, followed by (parliamentary or popular) legislation (codes, statutes) and at the bottom are the administrative regulations. The rule is that a lower tier act cannot derogate an act of the higher tier; eg a provision in a code may not contradict a constitutional norm. 427

Hierarchy of Norms



In addition to these national enacted laws there are many international treaties and conventions that have an influence on the national legal system and thus must be taken into consideration.[55] The relationship between such international sources (eg the European Convention of Human Rights) and national law varies in the Civil law system (see above, N 124–138). 428

b. Custom

In contrary to enacted law, *Custom* is unwritten. It can be defined as the continuous application of a set of rules or concepts that are accepted as authoritative among the people in general or in a certain trade.[56] It's main field of application lies in commercial law.[57] 429

Even though custom is deemed to be a primary source of law in most Civil law countries, it is in practice of minor importance. In the French-influenced systems it comes only into play if there is no enacted 430

[55] *Glendon/Carozza/Picker*, 227.
[56] *Bedermann David J*, Custom as a Source of Law, New York 2010, 3ff.
[57] *Glendon/Carozza/Picker*, 241.

legislation to the contrary.[58] On the other hand custom can under certain conditions abrogate statutory law in Germany.[59]

2. Secondary Sources of Law

a. Case law

431 Case law ("*jurisprudence*", "*Rechtsprechung*") is considered to be a secondary source in Civil law countries because – at least in theory – it has no direct legally binding effect. Nevertheless it is of utmost significance for the functioning of the legal systems. The judiciary can react quickly to economic, social or technological change.[60] Notwithstanding historical reservations towards the judge as a lawmaker (separation of powers, especially in France (see below, N 531)),[61] it is nowadays (at least mostly) an accepted fact that it is necessary for the courts to interpret and further develop the enacted law (especially the old codifications) and to make them fit for the challenges of the current time.

432 On paper the Common law system with its doctrine of *stare decisis* (see more in detail below, N 624–632) operates very differently. *Stare decisis* is the "*power and obligation of courts to base decisions on prior decisions*".[62] The decisions of a higher court are thus binding on lower courts in subsequent cases if certain requirements are fulfilled.[63] But the differences are not that big in practice even though the *stare decisis* doctrine is unknown in Civil law countries and the courts are supposed to just decide the case pending before them. The de facto-influence of the decisions of the higher courts based on their intrinsic persuasiveness is not to be underestimated.[64] There are legal scholars who argue that a long-established case law can be treated as customary law and be therefore binding.[65]

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58 Cf *Merryman/Pérez-Perdomo,* 24.
59 *Larenz Karl/Canaris Claus-Wilhelm:* Methodenlehre der Rechtswissenschaft, 3rd edn Berlin/Heidelberg/New York 1995, 259.
60 It goes without saying that most of the time there needs to be a claimant with a specific request in order for the courts to become active.
61 *Glendon/Carozza/Picker*, 244; *de Cruz*, 65.
62 *Merryman/Pérez-Perdomo,* 23.
63 *Zweigert/Kötz*, 259–260.
64 *Glendon/Carozza/Picker*, 245; see *de Cruz,* 70–71, for the status of judicial decisions in France.
65 *Mattei/Ruskola/Gidi*, 618.

As an illustrative example we will in the following give a brief overview of the role of precedents in Switzerland, a Civil law country.[66] 433

According to the above-discussed Art 1 Swiss Civil Code the courts are first and foremost bound by the enacted legislation (see above, N 93–94). Only if no answer can be found therein, the court is advised to turn to customary law and is in the last resort allowed to formulate a general rule *modo legislatoris*. Art 1 para 3 Swiss Civil Code furthermore instructs the courts to "*follow / be inspired by established doctrine and case law*" when interpreting the codes and statutes.[67] The question arises as to the exact meaning of this provision. 434

– Firstly, it seems from the wording that established doctrine and case law are put on the same level – but this is deceiving. It is recognized that established doctrine is, compared to precedents, a source of minor importance.

– Secondly, legal doctrine and judicial precedents are established if they are materially convincing, reasonable and practicable.

– It is thirdly undisputed, that a lower court is at least factually bound by precedents if they are convincing and reasonable.[68] Thus, a lower court judge will in practice rarely deviate from established case law – or even from a singular landmark decision. Additionally, courts use precedents in their reasoning the same way they use statutes.

Only a few scholars argue that precedents are sources of law like enacted legislation, thus having the same binding force.[69] The majority view goes to the contrary.[70] It is a fact, though, that Swiss private law is 435

66 The following is an abridged and edited version of *Müller-Chen Markus*, Precedent in Switzerland, in: Baudenbacher Carl/Planzer Simon (eds), International Dispute Resolution – The Role of Precedent, Stuttgart 2011, 13–18.

67 The German and the French wording of art 1 para 3 Civil Code differ: Whereas the German reads: "Es [das Gericht] *folgt* [*follows*] dabei bewährter Lehre und Überlieferung", the French text says: "Il [le juge] *s'inspire* [is inspired by] des solutions consacrées par la doctrine et la jurisprudence.".

68 Majority opinion in Germany: see *Schalk Sebastian*, Deutsche Präjudizien und spanische „Jurisprudencia" des Zivilrechts, Frankfurt aM 2009, 251–252; *Kramer,* 274–275; cf *Alexy Roben/Dreier Ralf*, Precedent in the Federal Republic of Germany, in: MacCormick D Neil/Summers Robert S (eds), Interpreting Precedents, Aldershot 1997, 17–64, 27–31.

69 *Kramer*, 231–235, 273–277.

70 See eg *Emmenegger Susan/Tschentscher Axel,* Berner Kommentar zum schweizerischen Privatrecht, Einleitung und Personenrecht, Band I/1: Einleitung (Art 1–9 ZGB), Art 1 ZGB, Bern 2012, Art 1 para 490.

substantially shaped by case law, which interprets, complements and even changes statutory laws and sometimes creates new rules.[71] A Swiss judge is therefore called to take precedents into account. We see this also to a certain extent eg in Italy.[72] On the other hand a decision is not void if it does not follow a precedent of a higher court.[73]

436 Several factors constrain the use of precedents:

- Firstly, as it is in other Civil law jurisdictions the decisions of the Supreme Court do not contain a great deal of facts. They are mostly focused on the doctrine and application of the law. Often the facts and the law are not even properly separated; they are mixed together which makes it hard to recognize if the respective fact is a given or if it is part of the legal argumentation.[74] This is important when we speak about precedents because it is often difficult to decide whether the rule contained in a certain Supreme Court decision fits the particular set of facts of another case.
- Secondly, the frequent use of *obiter dicta*, ie legal views in a judgment that are not relevant for the decision, obscures the reasoning and distracts from the *ratio decidendi*, ie the decisive reasons for the outcome of the case.
- Thirdly, the Supreme Court has seven chambers (of which two are in charge of private and commercial law) with currently 38 Supreme Court Justices, 127 clerks ("*Gerichtsschreiber*") and 19 part-time judges that have other daytime jobs (eg professors, attorneys and judges from cantonal appeal courts). In many cases clerks write the drafts using text blocks that are not uniform across the different

71 *Walter Hans Peter,* Die Sicht des Schweizerischen Bundesgerichts, in: Ehrenzeller Bernhard/Gomez Peter/Kotzur Markus/Thürer Daniel/ Vallender Klaus A (eds), Präjudiz und Sprache, Zürich/St Gallen 2008, 127–146, 134.

72 Decision of the Italian Supreme Court, Nr 10741, 11.5.2009.

73 Sometimes even the opposite effect can be observed: The Supreme Court is quite willing to take dissenting decisions of lower courts into consideration; see *Hasenböhler Franz*, Richter und Gesetzgeber in der Schweiz, in: Frank Richard (ed), Unabhängigkeit und Bindung des Richters in der Bundesrepublik Deutschland, in Österreich und in der Schweiz, ZSR Beiheft, 2nd edn Basel 1997, 99–117, 112.

74 *Aemisegger Heinz*, Länderbericht Schweiz: Gedanken aus der Sicht eines Praktikers, in: Ehrenzeller Bernhard/Gomez Peter/Kotzur Markus/Thürer Daniel/Vallender Klaus A (eds), Präjudiz und Sprache, Zürich/St Gallen 2008, 171–175, 174.

chambers. This (and the large amount of judges) creates problems if a lower court is supposed to follow the "established" case law.

– Fourthly, if there is no claimant, or the claimant cannot appeal due to procedural reasons, a decision that is in contradiction of a precedent will stand. There is in principle no right to appeal:[75]
  – A decision of the lower court to the second cantonal instance if the litigious amount is less than CHF 10'000 (Art 308(2) Swiss Federal Code of Civil Procedure);
  – A decision of the cantonal appeal court to the Federal Supreme Court if the litigious amount is less than CHF 30'000 (Art 72(1) Federal Law on the Supreme Court).[76]

The constitutional right to equal treatment under the law (Art 8(1) Swiss Federal Constitution) requires that the Supreme Court observe its own precedents.[77] However, it is admissible to depart from precedents, if there are serious and objective reasons and if "*the new solution better reflects the ratio legis, changed circumstances or altered legal views*".[78] The longer the current case law has been applied, the more weight these reasons have to carry.[79] The departure from a precedent must not be just the expression of a momentary fluctuation or a singular deviation. It rather has to constitute a fundamental adjustment for all similar cases.[80] 437

b. (Established) Doctrine

A further secondary source of law is the established legal doctrine, ie scholarly writings ("la doctrine", "Rechtslehre"). It mainly exerts its influence when there are unclear, disputed or new issues to be decided by the courts and no answer can be found in the enacted law. This is explicitly stated in Art 1(2) and 1(3) Swiss Civil Code: "In the absence of a provision, the court shall decide in accordance with customary law 438

[75] This does not exclude the possibility of a complaint because of an arbitrary establishment of the facts.
[76] There is an exception if the case poses a fundamental question of law (Art 72(1) and 72(2) Federal Law on the Supreme Court).
[77] See decision of the Supreme Court 1C_356/2009, 12.2.2010, E 3.1.
[78] Decision of the Supreme Court 5A_333/2009, 4.12.2009, E 3; BGE 127 II 289, E 3.a; *Kramer*, 274–277.
[79] BGE 136 III 6, E 3; BGE 135 II 78, E 3.2; BGE 133 III 335, E 2.3.
[80] Decision of the Supreme Court 2A.573/2002, 21.5.2003, E 3.2; *Reich Markus/Uttinger Laurence*, Praxisänderungen im Lichte der Rechtssicherheit und der Rechtsrichtigkeit, ZSR I (2010), 163–186, 164–165; *Kramer*, 278–279.

and, in the absence of customary law, in accordance with the rule that it would make as legislator. In doing so, the court shall follow established doctrine and case law".

439 Legal doctrine takes on many shapes and forms in the Civil law countries. In Germany and Switzerland it is mostly expressed through commentaries, textbooks ("Lehrbücher"), dissertations, journal articles and case notes. In France the annotated reviews of cases are very important. Of course the reputation of the author plays an important role as well. Additionally, a singular opinion is rarely influential enough to change an established line of cases. It usually takes a widespread consensus among different scholars to influence the courts.[81]

C. Predominant Methods of Dispute Resolution

1. Introductory Remarks

440 We will not cover the entire range of methods of dispute resolution. Instead, we will first give a short overview of the archetypical court structures and the legal processes used in Civil law countries to resolve disputes over *matters of private law*. Additionally, we will touch upon methods of alternative dispute resolution ("ADR") such as arbitration. The latter is very important for disputes dealing with commercial law.

441 We will not elaborate on administrative and criminal proceedings even though administrative tribunals may also adjudicate disputes arising over eg individual property rights if issues of public law are involved.[82] It is also possible that a case dealing with the protection of personality rights might end up before a criminal court. However, it would go beyond the scope of this book to also outline these proceedings. We refer the reader to other comparative law books for that purpose.[83]

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81 *Glendon/Carozza/Picker*, 247; see also *Apple/Deyling*, 19.

82 *Mattei/Ruskola/Gidi* 530.

83 *Merryman/Pérez-Perdomo*, 125–133 (criminal procedure); 134–142 (constitutional review); *Head*, 199–208 (criminal procedure); *Mattei/Ruskola/Gidi*, 530–553 (administrative proceedings); *Bell*, 287–311 (administrative proceedings); *Glendon/Carozza/Picker*, 124 (administrative proceedings).

Last but not least we need to mention that this section is written from a Western legal perspective. In this culture it is a generally accepted assumption that disputes are to be settled by the rule of law and (eventually) through litigation, ie with the help of a state-backed enforcement system. However, this is not the only way to deal with conflicts. Eastern legal traditions view litigation as a second-rate way of resolving disputes, among other reasons because resort to law is considered shameful, a process where people "lose face".[84] Other (low cost) mechanism, such as conciliation and mediation are available. 442

2. Court Structure

a. Overview

On a general level the court structure of Civil law countries are similar; in their concrete design they differ, though. Civil law countries usually have two sets of court systems: The so-called "ordinary" courts and the administrative courts. Both systems have their own court structure, procedural rules and they have jurisdiction over different subject matters.[85] In France, a special "*tribunal des conflits*" decides competence disputes between the ordinary and the administrative courts. In Germany and Switzerland each court decides on its own jurisdiction with eventually the Federal Supreme Court deciding the matter.[86] 443

In most countries the ordinary courts deal with private, commercial and criminal law.[87] The rules of civil and criminal procedure are applicable. 444

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[84] *Mattei/Ruskola/Gidi,* 268–269.

[85] See *Head*, 220–228, for a good overview.

[86] *Apple/Deyling*, 26; for France see eg *Elliott Catherine/Vernon Catherine/Jeanpierre Eric*, French Legal System, 2nd edn Harlow 2006, 84–126; for Germany see eg *Glendon/Carozza/Picker*, 123–127; for Switzerland see eg *Walder-Richli Hans Ulrich*, Law of Civil Procedure, in: Dessemontet François/Ansay Tugrul (eds), Introduction to Swiss law, 3rd edn The Hague/Zurich 2004, 287–299, 288–290; *Fleiner Thomas,* Cantonal and Federal Administrative Law of Switzerland, in: Dessemontet François/Ansay Tugrul (eds), Introduction to Swiss law, 3rd edn The Hague/Zurich 2004, 27–46, 31–33.

[87] There are exceptions: Eg in Switzerland there are cantons that have separate criminal courts.

445 The administrative courts handle questions of administrative law. These courts apply the rules of administrative procedure. For historical reasons these administrative courts are outside of the judicial system in France,[88] but not in Germany.

446 In Switzerland we find one Federal Supreme Court that has the last say on questions of private, commercial, criminal, administrative and constitutional law. In addition there is a Federal Administrative Court, a Federal Criminal Court and a Federal Patent Court. In some cases an appeal is possible to the Federal Supreme Court. In Germany there are five Supreme Courts, each with its own jurisdiction.

447 In some countries the lower ordinary and the appeal courts are state courts and the Supreme Court is a federal court (eg Germany, Switzerland), in other countries there is no such distinction (eg France). Sometimes there is a separate Supreme Court responsible to decide if a rule or law is constitutional (eg the German *Bundesverfassungsgericht*, the French *Conseil constitutionnel*, the Austrian *Verfassungsgerichtshof*, and the Spanish *Tribunal* Constitucional *de España*).[89]

448 These models are different from the US-American unified court system where in principle the courts hear cases of all the legal areas. This encompasses disputes over contracts, mergers, family matters, unequal treatment of workers, crimes, etc.[90] There is, with other words, no subject matter division. Unlike the European Civil law systems the US-American court structure is divided into the state and federal system. Each has its own set of trial courts, appellate courts and Supreme Court.[91]

449 It is interesting to note that Germany employs about 20'500 judges (state and federal level) with a population of about 82 Mio. people. In the United States of America there are about 30'000 judges (state and federal

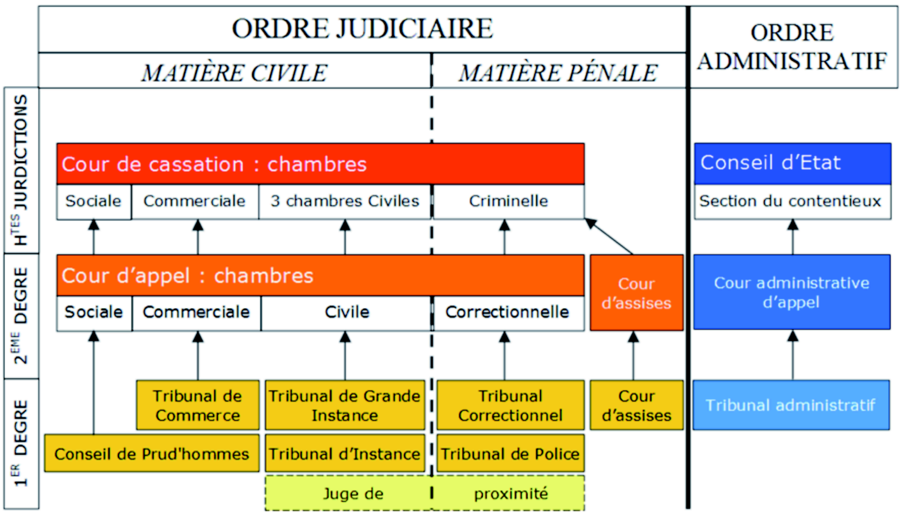
88 *Glendon/Carozza/Picker*, 122; *Merryman/Pérez-Perdomo*, 88–90.
89 In other countries the "regular" Supreme Court assumes this role, eg the United States Supreme Court.
90 There are exceptions to the unified system: There are (among others) federal administrative agencies and boards, a US tax court and military courts.
91 For a good overview of the US-American court system go to: <www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/StructureOfFederalCourts.aspx> accessed 2 September 2013.

level) with a population of about 314 Mio people.[92] This means that in Germany there are 2.5 times more judges in relation to the overall population than in the United States (ca 4'000 compared to ca 10'000) – even though the United States is frequently cited as a very litigation friendly country.

It is obvious that this influences the work of the judges and the organization of the courts. If a legal system has as many judges and courts as Germany then it is imperative to divide the work into subject matter areas of law otherwise the systems becomes unmanageable and a stable, uniform application of the law cannot be achieved.[93] 450

b. Selected Examples

Court System in France[94]



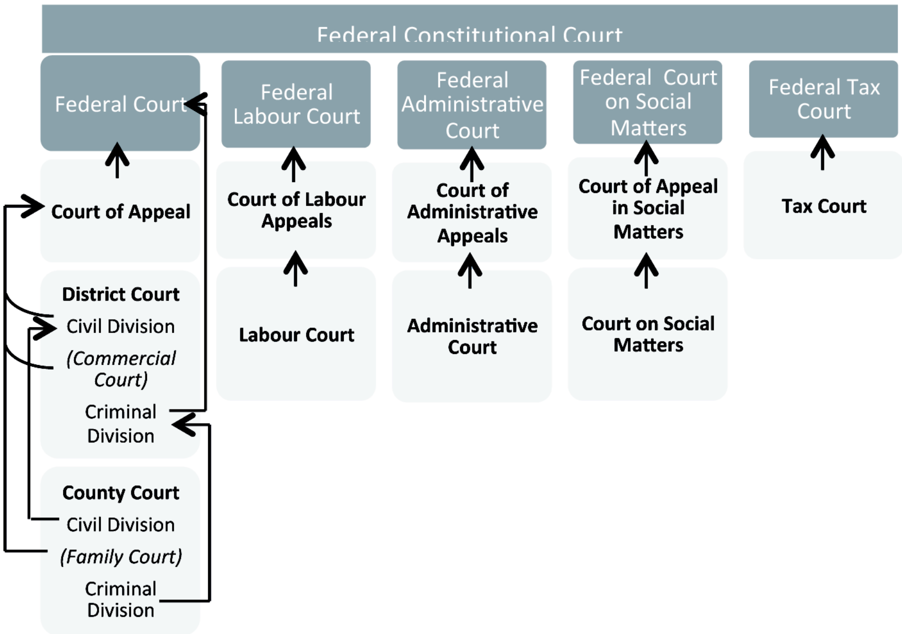
[92] <www.destatis.de/DE/> accessed 2 September 2013; cf <www.courtstatistics.org> accessed 2 September 2013; see also *Williams Victor*, A constitutional charge and a comparative vision to substantially expand and subject matter specialize the Federal judiciary: A preliminary blueprint for remodeling our national houses of justice and establishing a separate system of Federal criminal courts, 37 Wm & Mary L Rev 535–671 (1996).

[93] *Glendon/Carozza/Picker*, 132–133.

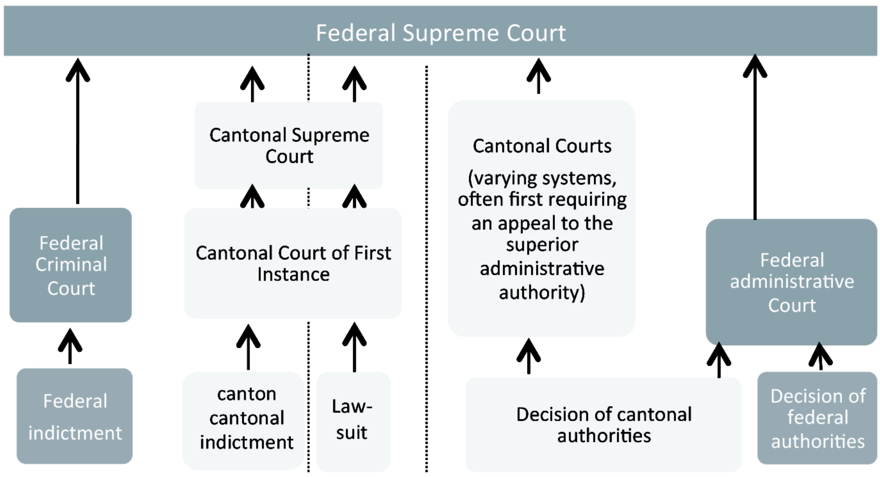
[94] <https://en.wikipedia.org/wiki/File:Organisation_juridictionnelle_nationale_fr.gif> accessed 2 September 2013.

[95] *Glendon/Carozza/Picker*, 123.

Court System in Switzerland[96]

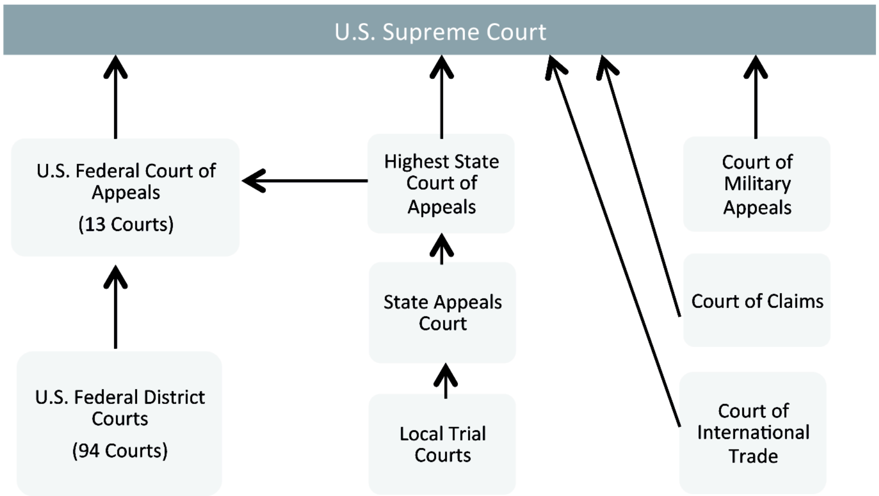


Court System in the USA[97]



96 <http://commons.wikimedia.org/wiki/File:Swiss_judicial_system.png> accessed 2 September 2013.

97 <www2.maxwell.syr.edu/plegal/scales/court.html?iframe=true&width=100%&height=100%> accessed 2 September 2013.



3. Enforcement of Private Rights and Obligations

We have seen that in Civil law countries private law is mostly embodied in the Civil Codes. But it is one thing to have a right and another thing to be able to enforce this right if the debtor is unwilling to fulfill his duties. Every law-based society therefore needs some system to guarantee its subjects that legal rights are enforced with the help of the judiciary. 451

In the Civil law countries this process is regulated by the codes of civil procedure and by codes on debt enforcement and bankruptcy proceedings. Notwithstanding the national differences it can be said that these codes provides the rules on how to enforce rights and duties arising under the substantive private law. 452

Much like the substantial private law the rules of civil procedure have common roots – albeit nowadays every Civil law country has its own code of civil procedure. However, they vary in how they form and structure civil proceedings.[98] 453

In the following we will describe how a "typical" civil proceeding in a civil law country unfolds, explain some of the main differences between the Civil and Common procedural law and lastly show alternative me- 454

[98] *Merryman/Pérez-Perdomo*, 112.

thods of dispute resolution. For the functioning of insolvency proceedings we refer the reader to the pertinent literature.[99]

a. Civil Proceedings

455 Civil proceedings are initiated by filing an action with the competent court. At this point the case becomes pending (*lis pendens*). Submitting a written brief to the court in general does this. This brief has to at least contain the names of the parties, the prayers for relief, a description of the matter in dispute, the amount in dispute (if applicable), the relevant facts and the description of the evidence offered. Depending on the court system an instructing judge is appointed next.

456 In many systems the claimant then has to pay an advance up to the amount of the expected court costs. In case the claimant eventually wins the case he is entitled to be reimbursed for these costs by the defendant.

457 The defendant subsequently submits the answer to the claim (or, as the case may be, adds a counter-claim).

458 The next stage is the *evidence taking*. The instructing judge decides which pieces of evidence that were offered by the parties will be admitted and which party carries the burden of proof. Acceptable evidence is eg witness testimony, documents, expert opinions, inspections etc.

459 The parties and third persons have a duty to cooperate in the taking of evidence. However, in general:

- Parties do not have to provide correspondence with their lawyers that concern the professional representation of the parties.
- Certain third persons have the right to refuse testimony (eg the spouse, certain family member such as children or parents, lawyers, clerics etc).

[99] For Germany see eg *Schotte Christoph*, Germany, in: Boone William J (ed), International Insolvency, 3rd edn London 2012, 183–204; for Austria see eg *Buchegger Walter/Markowetz Klaus*, Insolvenzrecht, Vienna 2010; for Switzerland see eg *Huber Ueli/Zoller Anne Sabine*, Switzerland, in: Boone William J (ed), International Insolvency, 3rd edn London 2012, 399–414; for France see eg *Henrot Hacques/Gumpelson Joanna/Giorgi Samuel*, France, in: Boone William J (ed), International Insolvency, 3rd edn London 2012, 159–182.

In some systems the parties will then provide the evidence that the instructing judge has ordered, ie witnesses are heard, documents or expert opinions are submitted etc. Contrary to an US-American civil proceeding there is no deposition and no cross-examination of the witnesses. The instructing judge (or a panel of judges) questions the witnesses. The parties (respectively their lawyers) have the right to submit questions to the judge who will in turn ask the witness. The judge will in general have also prepared his own set of questions. In the end the instructing judge will then write a summary record of the evidence, which will be provided to the judges deciding the case. 460

In other systems there is a *main hearing* where the parties, ie their lawyers, orally plead their case and the evidence is taken (witnesses heard etc). This form resembles (even though only remotely) the concept of the US-American trial (see below, N 762–767). 461

Finally, the court renders its decision. In some countries (eg Switzerland) the parties are in general served with the conclusions only, without a written statement of the grounds, unless either the parties request it or one of the parties appeals. 462

b. Appellate Proceedings

Provided that certain conditions are fulfilled (eg a certain monetary threshold is reached) the defeated party has a right to appeal the decision. In general this includes the appellate court's review of the law as well as the facts.[100] Typically there is another legal recourse to the Supreme Court. In most cases this is limited to the correct application of the law (see above, N 412).[101] 463

c. Main Differences between Civil and Common Procedural Law

aa. No Trial, No Jury

In contrast to the US-American concept the Civil law countries have *no "trial"* in which the civil proceeding is culminating.[102] As we have seen above the civil proceeding is rather constituted of a "string" of events, submissions, written communications between the parties and the court, 464

[100] See eg *Apple/Deyling,* 28–29.
[101] *Merryman/Pérez-Perdomo*, 121.
[102] See eg *Apple/Deyling*, 27.

hearings and meetings that eventually lead to the judgment.[103] This has been described as a lack of concentration in civil procedural law in the Civil law countries.[104]

465 The reason for this difference can be traced back to the fact that there is *no jury* in Civil law countries.[105] In the United States of America there is a constitutional right to a jury trial.[106] The jury is assembled from the peers of the parties; they are laypeople that have neither the time nor the resources to be involved in the time-consuming process of gathering the evidence. The parties, ie their lawyers, do this under the supervision of the court. This phase is called "*pre-trial discovery*".[107] The Common law judge has been labeled as a "*managerial*" judge because he assumes a less active role in the fact-finding process than his Civil law counterpart that controls this more actively (see above, N 458–461).[108] Once the evidence is ready, *one* trial date is set. The lawyers orally plead the case to the jury, the witnesses and experts are questioned and cross-examined and the relevant documents introduced etc. This all happens in one go; of course in complex cases this can take days, weeks or even years.[109]

[103] *Head*, 210.
[104] *Merryman/Pérez-Perdomo*, 113.
[105] See eg *Head*, 208–216; in some Civil Law countries there are lay people on the bench of the courts of first instance (eg in Germany and Switzerland).
[106] Seventh Amendment to the U.S. Constitution: "*In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law*".
[107] Civil law countries are normally very wary of this process because they suspect parties to go on "fishing expeditions" for evidence through pre-trial discovery. In contrast parties to a civil proceeding in a civil law country have to request the court and identify the documents it is looking for with a certain degree of specificity (see *Head*, 218).
[108] *Head*, 217; for a historical perspective see *Merryman/Pérez-Perdomo*, 119–124.
[109] The trial in the case of *Kemner* v. *Monsanto*, 576 N.E.2d 1146 (Ill. 1991), lasted three and a half years; the jury heard 182 witnesses, viewed 6'000 exhibits and sat in the courtroom for 460 days. The case stemmed from a 10 January 1979, train derailment in which 19,000 gallons of wood preservative spilled onto land just outside the central Missouri town of Sturgeon. Those 19,000 gallons were tainted with less than a teaspoon of dioxin, a toxic byproduct of certain chemical processing. 65 plaintiffs sued the St Louis-based Monsanto Co. claiming that exposure to the dioxin has slowed their reflexes and caused them headaches, depression, insomnia and fear of developing cancer, see: <http://articles.chicagotribune.com/1987-09-06/news/8703070473_1_david-snively-dioxin-monsanto> accessed 2 September 2013.

bb. Distribution of Court Costs and Lawyers' Fees

The general rule in Civil law countries is that the defeated party has to pay the court costs and the lawyers' fees of the prevailing party.[110] In some countries lawyers' fees are regulated by official tariffs (France).[111] In Switzerland there is a dual solution: The lawyer and his client can agree upon a certain fee (see eg § 15 Lawyers' Code of the canton of Basel-Stadt). On the other hand there is an official tariff for the amount the defeated party has to pay to the prevailing party (see eg § 1 Regulation on the fees for the lawyers of the canton of Basel-Stadt). 466

Court costs vary, but they are in general higher than in the United States of America. Example: A sues B for damages in the amount of USD 80'000 (about CHF 75'000 / € 61'000). If he initiates proceedings before a Federal District Court in New York all the cost A has to pay is the filing fee, which is currently USD 350 (about CHF 330 / € 265).[112] No other fees are due. If he sues B in the District Court of the canton of Zürich/Switzerland, A has to pay (upfront) roughly CHF 8'000 (about € 6'500 / USD 8'500).[113] In Munich/Germany, A would have to pay roughly € 630 (about CHF 780 / USD 830);[114] in Paris € 35 (about CHF 44 / USD 46).[115] 467

Parties who do not possess enough means to litigate can claim legal aid.[116] If granted, they neither have to pay the court costs, their own nor the prevailing party's lawyer's fees; all costs and fees are borne by the state. For that purpose the court will use an official tariff to determine the exact amount that will be paid to the lawyers. On the other end of the spectrum are parties that have enough resources; for them it does not matter if they have to pay the costs and fees at the end. The problem is the vast majority of mid-income people. On the one hand they do not qualify for legal aid but on the other hand they have not that many means to risk litigation if the outcome of the case is less than favorable. The afore-mentioned cost-allocation rule can thus have the effect to 468

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[110] *Merryman/Pérez-Perdomo*, 120.
[111] *Mattei/Ruskola/Gidi*, 685.
[112] 28 U.S.C. § 1914(a).
[113] § 4 ZH-Regulation on Costs.
[114] § 34 Act on Court Costs.
[115] <http://anwalt.in-und-aus-frankreich.fr/gerichtskosten-in-frankreich/> accessed 2 September 2013; see Art 695 Code de Procédure Civile.
[116] *Mattei/Ruskola/Gidi*, 688.

discourage mid-income parties from litigating their cases. One should bear in mind, though, that litigation in general costs less in Europe than in the United States due to sometimes exorbitant lawyer's fees. Furthermore, there are legal-expense insurances available. [117]

469 For that reason legal aid only partly offsets the *prohibition of contingent fees* in Civil law countries. It is considered unethical for the lawyer to have a financial interest in the outcome of a case,[118] even though some countries have now relaxed the ban. Contingent fees are permissible if they are agreed upon in addition to hourly fees that have to be high enough to cover the expenses of the lawyer.[119]

470 A notable consequence of these different rules on costs and fees are that a US-American lawyer will prefer to litigate larger cases than his Civil law counterpart because of the system of contingent fees. Furthermore, the risk of losing a court proceeding is shifted from the party to the lawyer, which can have the effect of encouraging people to enter into frivolous law suits.

cc. No Contempt of Court

471 If a party to a US-American civil procedure does not obey any "*lawful writ, process, order, rule, decree or command*", the judge can hold that party in *contempt of its authority* (18 USC § 401(3)). This means that a non-complying party can be punished by fine and/or by imprisonment. Civil contempt of court is both coercive and remedial. A Common law judge can thus impose a *civil sanction* upon a *person*.

472 This concept is foreign to the modern Civil law where the judge's (civil) powers are basically restricted to enforcing the decision into the property of a person (eg conversion of the performance due into money; eviction

[117] Id, 688.
[118] *Merryman/Pérez-Perdomo*, 120–121; *Mattei/Ruskola/Gidi*, 686.
[119] Switzerland: See eg Art 12(e) CH-Federal Lawyers' Act: "*There shall be no agreement with the client, prior to the settlement of a dispute, with regard to sharing the gains from litigation as a substitute for professional fees; in case of an unfavorable outcome of the proceedings, there may be no agreement to waive professional fees*". France: See Art 10 of Law No. 71-1130 of 31 December 1971, as modified by Art 72 of Law No. 91-647, of 10 July 1991, 1991 J.O. 9170, 1991 D.L. 310.

from the property; delegation of the required act to a third party) or threatening the unresponsive party with a criminal penalty.[120]

dd. Style of the Judgment

473 The style of judgments of Civil law vary a lot – from the cursory style of French decisions to the elaborate opinions full of legal references of German courts. However, as different they are, two characteristics set them apart from the typical Common law decision:

– As a general rule judgments of Civil law courts do not contain concurring or dissenting opinions, not even the Supreme Court decisions. From the outside they appear to be unanimous, even if in fact they are majority decisions.[121]

– A large portion of a standard Common law decision is devoted to an accurate and detailed account of the facts of the case. This is needed because of the doctrine of *stare decisis*: If a court does not want to follow a certain precedent, it has to *distinguish* it by some material difference between the facts of the cases. A regular Civil law court decision, especially an appellate or Supreme Court decision, deals with the facts much more summarily, ie only to the extent they are needed for the legal line of arguments.

d. Alternative Dispute Resolution

474 An overview over dispute resolution methods would not be complete without mentioning the trend towards using arbitration and other **a**lternative means of **d**ispute **r**esolution (ADR). Whereas an arbitral tribunal renders a binding award, other methods, such as for example negotiation and mediation, have the goal to bring the parties to an agreement without going to court. All these forms have in common that they only come into

[120] See eg Art 343 Swiss Civil Code of Procedure (Obligation to act, refrain from acting or to tolerate): (1) If the decision provides for an obligation to act, refrain from acting or to tolerate something, the enforcement court may: (a.) issue a threat of criminal penalty under Article 292 Swiss Criminal Code; (b.) impose a disciplinary fine not exceeding 5’000 francs; (c.) impose a disciplinary fine not exceeding 1’000 francs for each day of noncompliance; (d.) order a compulsory measure such as taking away a movable item or vacating immovable property; or (e.) order performance by a third party.

[121] *Merryman/Pérez-Perdomo*, 122.

play when the parties contractually agree upon them. The default conflict resolution is the use of state courts with the rules of civil procedure.

475 There are several reasons for businesses (or in rarer cases individuals) to incorporate arbitration clauses in their contracts: The ability to choose their own judges (arbitrators), the specific knowledge that arbitrators can bring to the case, the flexibility of tailor-made proceedings, and the confidentiality of the proceedings.

476 There are a number of issues surrounding the relationship between the state courts and the arbitral tribunals that parties should be aware of before agreeing upon arbitration (and thus deselect state courts). The most important is that state courts have to recognize the validity of the arbitration agreement, meaning that they have to accept the competence of the arbitration tribunal and, if necessary, enforce arbitral awards. It should be noted, however, that – outside of Europe – it is easier to enforce an arbitral award due to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") than a decision of a state court.

D. Main Actors in the Legal World and Their Role

1. Overview

477 *Maximilian K E Weber* (1864–1920), a German sociologist, philosopher and political economist, called the main actors in the legal world "*Rechtshonoratioren*".[122] It was his thesis that the character of a legal system is significantly dependent upon the predominant professional group.

478 In this last section on characteristic elements of the Civil law tradition we will therefore look at the main actors in the Civil law world and their roles. The focus will be on legal scholars and judges. They are the one

[122] *Rheinstein Max (*ed), Max Weber on Law in Economy and Society, New York 1954, 198–223; *Rheinstein/von Borries*, 170–186.

who – to a greater or lesser degree – influence the creation and development of the Civil law.[123]

Most lawyers, however, work either in private practice or in governmental agencies. Their work is of course indispensable for the functioning of the legal system and not worth less than that of legal scholars and judges. 479

- Legal practitioners do many different jobs: they represent their clients in court, draft contracts, set up companies, act as a trustee or executor of a will etc. Their work is not much different from a lawyer working in a Common law country. Both went to law school and passed the bar exam. Unlike the Common law lawyer, his counterpart in a Civil law country usually has to work as an apprentice for a certain amount of time after law school, before he can take the bar (see below, N 508, 543, 576).[124]
- Depending on the legal system the civil-law notary is either a civil servant (eg Portugal, some cantons in Switzerland, eg Zürich) or a private practitioner (most Civil law countries). They draft and authenticate legal documents when the law prescribes a certain form (esp wills, corporate by-laws, sale of land or houses) or when the parties agree upon the notarization of a document. They further act as escrow agents, certify signatures and keep records. Notaries are not always lawyers; in general they have to take some sort of a state examination.
- Lawyers working for the government or parliament are usually the ones who prepare and write first drafts of legislation, accompany the legislative process, deliver legal opinions for the political decision-makers and help to make sure that legislation is complete, concise, consistent with legal doctrine and compatible with the established legal order.[125] Other important government lawyers are the public prosecutors. They are in charge of the investigations in criminal matters and prepare the cases; in some countries they can even intervene in civil cases to represent the public interest.[126]

[123] See eg for the interaction between legal scholars and judges in France *Helleringer Geneviève*, Judicial Melodies and Scholarly Harmonies – The Music of French Legal Interpretation, RabelsZ 77 (2013), 345–367.
[124] For a comparative overview see *Glendon/Carozza/Picker*, 161.
[125] *Apple/Deyling*, 29.
[126] Id, 29–30; *Glendon/Carozza/Picker*, 165–166.

480 The foregoing showed that the legal profession in Civil law countries is fragmented.[127] In contrast to the legal market in the United States of America there are comparatively few lateral moves: Once a lawyer obtained a judicial position, he will remain there; a partner in a law firm will in general not go and teach full-time in law school and vice versa.

2. Legal Scholars

481 It is a well-established fact that legal scholars (law professors, legal researchers) are one of the main driving forces of the Civil law tradition – not only historically,[128] but also in the present-days world. Professors have shaped the *ius commune* (see above, N 298) with their annotations, glosses and commentaries. They helped to prepare the great Civil Codes (see below, N 502, 528). Even nowadays it is customary to have law professors on preparatory legislative commissions to help the legislator create new laws.[129] Once the codes or other statutes are in force professors assist the judiciary (and other people and organizations working with the law) with the *interpretation* of the codes. They write commentaries, case notes or legal opinions, supply the concepts and methods and thus influence and fine-tune the law.[130] Through the work of the scholars – who of course speak with many voices – the Civil law *doctrine* is formed, which is considered one of the secondary sources of law (see above N, 438–439).

482 The influence of law professors does not stop there. They are the one who teach and educate the future generation of lawyers who in turn will take up positions in the judiciary, governmental agencies, law enforcement and private practice. Especially in Germany there is a long tradition among professors to form "schools",[131] ie to have research and teaching assistants who will follow a certain doctrine propagated by the professor. The professor will then help them to secure professorships and by that way his doctrinal views are further disseminated.

127 *Head*, 175.
128 *Rheinstein/von Borries*, 177.
129 See also the recent project of Swiss legal academics to reform the Swiss Code of Obligations, http://or2020.ch/ accessed 28 November 2013.
130 *Glendon/Carozza/Picker,* 179–181, 183–184.
131 *Head*, 181, is probably not that far off when he says that "*senior law professors preside over what could, with little exaggeration, be called fiefdoms*".

The question arises if "*legal scholars do the basic thinking for the legal system*".[132] *John Henry Merryman*, from whom this quote comes from, is critical of the role of Civil law scholars.[133] In summary his criticism is that it is illusionary to believe that legal doctrine is objectively stated scientific truth, even though it is often clothed that way. He states that in the traditional view "*they [the scholars] believe that they should be uncommitted to any ideology or any objective other than truth – a pure scientist, distinct from the legislators and judges*".[134] *Merryman* goes on to say that "*there is a growing tendency to blame the traditional model for failures of justice, popular dissatisfaction with the legal system, and the dragging pace of social and economic development*".[135] He concludes to say that one of the reasons for these shortcomings is the resistance of legal scholars to embrace more fully newer concepts and models such as the jurisprudence of interests, legal realism, law and economics etc.[136] 483

While we agree with *Merryman's* analysis in principle, we like the reader to consider that *Merryman* might be over-generalizing. There is a recognizable trend among younger scholars to be open to these newer models and theories and not to hide behind traditional concepts and doctrines that are seemingly neutral. They acknowledge the fact that legal doctrine must not isolate itself from the socio-economic realities of life. This is notably evidenced by the fact that many of the younger law professors, esp in Switzerland, have worked as practitioners before becoming tenured professors and are thus much more aware of the practical (political, economic, cultural, social) needs of a legal system. 484

132 *Merryman/Pérez-Perdomo*, 80.
133 See also *Schermaier*, 283: "*It* [German scholarship after 1945] *no longer produced innovative theoretical suggestions; the further development of civil law was left to the judiciary [...]*."
134 *Merryman/Pérez-Perdomo*, 80.
135 Id, 84.
136 Id, 84–85.

3. Judges in Civil Law Countries

485 It goes without saying that judges have a crucial role in Civil law countries.[137] They are civil servants entrusted with the task to justly, fairly and equally apply the law to individual cases. They are not simply "*operators of the law*" nor do they simply perform "*important but essentially uncreative functions*".[138] We have shown above that Civil law judges are "co-architects" of the legal system by interpreting the codes and, through publication of the cases, developing the law further (see above, N 431–437).[139] Case law is considered to be a secondary source of law; the (at least de-facto) importance of precedents should not be underestimated (see above, N 431).

486 Nevertheless the Civil law judge has less influence and control over the development of the law than his Common law counterpart. The Common law judge is the person who predominantly shapes and moulds the legal system through the doctrine of *stare decisis*.[140] For historical reasons the Civil law judge also commands less respect and authority than the Common law judge who is still a fatherly (or motherly) figure with considerable moral authority.[141]

III. Illustrative Examples

487 So far we have gained an overview over the Civil law tradition in general. We talked about Civil law as a legal tradition and learnt which countries belong to it. Furthermore, we discovered some of the characteristic features that bond the different legal systems of the Civil law tradition in spite of their political, socio-economic and legal differences. Such typical elements are the legal historic development, the style and the ways of thinking, the sources of law, the methods of dispute resolution and the main actors of the legal world.

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[137] Cf *Dawson John P*, The Oracles of the Law, Ann Arbor 1968, 432.
[138] *Apple/Deyling*, 29; *Merryman/Pérez-Perdomo,* 81; *Glendon/Carozzo/ Picker*, 167.
[139] *Merryman/Pérez-Perdomo*, 83.
[140] Id, 34.
[141] Cf Id, 35–36, 123–124.

As has been pointed out various times these considerations are more general in nature, thus sometimes leaving out the specific traits of a certain legal system. To make up for that we will in the following present three countries that are archetypical for the Civil law tradition: *Germany* as the "motherland" of the Germanic legal family; *France* as the respective counterpart for the Romanistic family and finally *Switzerland* as a blend of these. 488

These country reports will focus on a short description and the key features of the history, the political, economic and legal system as well as the legal education. 489

A. Germany

1. History

Before 1871 there was no effective central government in the German territory; there was a confederation of many independent political entities each with its own judicial system and very mindful of their local customs.[142] As we have seen in chapter three, the *ius commune*, which had been shaped by the reception of Roman-Canonical law and commercial law, helped to satisfy the growing need for a common law (see above, N 297–306). It was later further developed by German legal scholars to meet the contemporary conditions of the 17th and 18th century; they incorporated Germanic legal content into it (eg in the area of property law). 490

Germany as a nation-state with unified borders and a common political order was founded on 18 January 1871 with the "*Kaiserproklamation*" (proclamation of the emperor) in Versailles. Germany was a constitutional monarchy, with Emperor *Wilhelm I* (1797–1888) being the head of state. *Otto von Bismarck* (1815–1898) was the first Chancellor ("*Reichskanzler*"), ie the head of the executive branch of government. About 42 million people lived at that point in 22 states ("*Bundesländer*"), in the 491

[142] *De Cruz*, 84–85; for a detailed account of the legal and political history of Germany before 1871 see *Foster/Sule*, 9–47; *Schermaier*, 273–275; *Zweigert/Kötz*, 132–141.

"*Reichsland*" Elsass-Lothringen and in the three "*Hansestädte*" (independent city-states Lübeck, Hamburg and Bremen).

492 The German Empire didn't last too long. It was defeated in the First World War and ultimately abolished by the "*Weimar Constitution*" (1919). The Weimar Republic itself was dissolved after only 14 years by Hitler's dictatorship (1933). Four years after the ensuing World War II the Federal Republic of Germany was founded with the enactment of the constitution ("*Grundgesetz*") on May 23, 1949. The Federal Constitutional Court ("*Bundesverfassungsgericht*") was established on 28 September 1951.

493 An important step of re-integrating Germany into the family of nations after the World War II was the creation of the *European Economic Community*. Belgium, Germany, France, Italy, Luxembourg and the Netherlands founded it (Treaty of Rome 1957). The purpose was to avoid conflict and war through the creation of a common market: Those who trade with one probably fight one another less. Germany is also a member of the European Council (since 1950) and the United Nations (since 1973). It furthermore ratified the European Convention on Human Rights (1953).

494 On 3 October 1990 the former German Democratic Republic acceded the Federal Republic of Germany, thus adding five states to the country.

495 Germany is politically and economically one of the most influential members of the European Union. It is a member of the United Nations and NATO.

2. Political System

a. Basic Principles of State

496 According to Art 20(1) and 20(28) German Constitution Germany is a *republican*, *democratic*, *social federation*. It furthermore can be characterized as a "*Rechtsstaat*".[143]

[143] The term "Rechtsstaat" is difficult to translate. An approximate expression would be "a state abiding by the rule of law".

– *Republican*: Germany is a Republic because all state authority is derived from its people (Art 20(2) GG) and not from a monarch. The Federal Assembly ("Bundesversammlung") elects the head of state ("*Bundespräsident*"). It consists of all the Members of the House of Representatives ("*Bundestag*") and an equal amount and members elected by the parliaments of the Bundesländer.

– *Democratic*: This means that the people entitled to vote elect their representatives, thus all authority is derived from the people (Art 20(2) German Constitution). The representatives form the federal legislator, which passes legislation and controls the government and the administration. The democratic nature is also visible in the judiciary as courts pass judgments "in the name of the people".

– *Social*: The German constitution does not define the notion of a social state. It is widely accepted that the German state has the authority to intervene into the free market through an active social politics to achieve social goals, such as to secure the subsistence level, to make sure that everybody has health insurance or to protect the family.

– *Federation*: Germany consists of sixteen partly sovereign *Bundesländer*. This means that both the federation and the *Bundesländer* possess the quality of states. Their authority is derived from Art 30 German Constitution.[144] Already the Weimar Republic had a federal organization. Additionally, the formation of the federal state can be seen as a reaction to the Nazi centralistic state.[145]

– *Rechtsstaatsprinzip*: This principle has many facets. In its core the principle of the "rule of law" serves to protect the individual against interference and an abuse of power by the state or other individuals. It implies that all acts of the executive and judicial branch of government must be in compliance with the principles of the constitution, such as the civil rights ("*Grundrechte*", Art 1–19 German Constitution), the separation of powers, the legality of administration, legal certainty etc.[146]

[144] "*Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Bundesländer*" (principle of subsidiarity).
[145] *Schermaier,* 277.
[146] *Foster/Sule*, 178–187; *Schermaier,* 280–281.

b. Organization of the State

497 The German legislature consists of two bodies: The Federal Parliamentary Assembly ("*Bundestag*") and the Federal Council ("*Bundesrat*"). The members of the *Bundestag* are the directly elected representatives; the *Bundesrat* is the representation of the states.

498 The Federal Chancellor heads the Federal Government. He or she is elected by the Federal Parliament and appointed by the head of state, the Federal President. The latter does not have any executive powers; its position is more representative in nature.

499 The Federal Constitutional Court is responsible for ensuring that all legislation is in compliance with the constitutional order. It guards the constitutional civil rights, the political and legal system and develops it further through judicial review of statutes ("*Normenkontrolle*"). It can also declare legislation as unconstitutional if it contravenes the Constitution ("*Verfassungsbeschwerde*").[147]

3. Economic System

500 Germany has a social market economy. It is one of the world's largest economies in terms of GDP. The manufacturing industries have a strong export orientation (including automobiles, chemicals, machinery, engineering products etc). The service sector contributes around 70% of the total GDP. A distinctive feature of Germany's industrial structure is the family-owned medium-sized company.[148] Germany is relatively poor in raw materials. Natural resources such as gas and oil are, for the most part, imported from other countries. Since 1999 (for book money) and 2002 (for cash) the official German currency is the Euro.

4. Legal System

501 This section will focus on the German Civil Code and the judiciary. Other parts of the legal system (constitutional, administrative, criminal

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[147] *Schermaier,* 277–278.

[148] *OECD* (2004), Regulatory Reform in Germany, in OECD Reviews of Regulatory Reform: Germany 2004: Consolidating Economic and Social Renewal, OECD Publishing, 24.

law and the corresponding procedural issues) fall outside the scope of this book.[149]

a. German Civil Code

We have already addressed the German Civil Code ("BGB") and the development that led to its enactment (see above, N 306).[150] The BGB is a product of the pandectist's school, reflecting the legal values of bourgeois liberalism. It is thus less oriented towards the future than concerned with systematically clarifying and harmonizing pre-existing law.[151] The BGB was made for "the moneyed entrepreneur, the landed proprietor, and the official, people who can be expected to have business experience and sound judgment, capable of succeeding in a bourgeois society with freedom of contract, freedom of establishment, and freedom of competition, and able to take steps to protect themselves from harm".[152] 502

The BGB was written for lawyers, not for lay people. It is highly dogmatic, analytical and logical in its structure. It rigorously and uniformly employs legal concepts and its language is abstract, dry, but very precise.[153] It cannot be correctly understood without knowing the legal ideas, theories and concepts behind the words. 503

Its first book is the "General Part" that contains legal institutions that are relevant for all other subject matters regulated in the BGB (eg capacity to act, agency, theory of a legal act, associations, declaration of intent, form, prescription etc). Four books follow the General Part: the law of obligations (eg contracts, torts, unjust enrichment, and specific contracts 504

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149 For constitutional law see: *Heun Werner*, Die Verfassungsordnung der Bundesrepublik Deutschland, Tübingen 2012; for administrative law see: *Bell,* 287–311; *Fehling Michael/Kastner Berthold/Störmer Rainer* (eds), Verwaltungsrecht: VwVfG – VwGO – Nebengesetze: Handkommentar, 3rd edn Baden-Baden 2013; for criminal law see: *Satzger Helmut,* Internationales und europäisches Strafrecht: Strafanwendungsrecht, europäisches Straf- und Strafverfahrensrecht, Völkerstrafrecht, 6th edn Baden-Baden 2013; *Dölling Dieter/Duttge Gunnar/Rössner Dieter* (eds), Gesamtes Strafrecht: StGB – StPO – Nebengesetze: Handkommentar, 3rd edn Baden-Baden 2013; for administrative and constitutional courts see: *De Cruz,* 86–88; *Schermaier,* 279.

150 For an account of the preparatory work leading to the BGB see *Schermaier,* 275–276.

151 *Zweigert/Kötz*, 144, 148; *De Cruz*, 88.

152 *Zweigert/Kötz*, 144.

153 *De Cruz*, 90, 93.

such as sale, rent, service contracts etc), property law, family law and inheritance law.

b. Judicial Structure Relevant for Enforcement of Private Law

505 For a general overview over the German court system please see above (N 450). In this section we concentrate specifically on the courts that have jurisdiction over matters concerning private law. We will exemplify this with the help of the following example: A sues B because she claims that B owes her € 4’000 damages for breach of a sales contract.

506 The competent court for such a claim is the County Court ("*Amtsgericht*"), the first instance of the ordinary courts.[154] Unfortunately for A the *Amtsgericht* dismisses her claim. A has now the option to appeal her case to the District Court ("*Landgericht*").[155] She is happy when the *Landgericht* reverses the decision of the *Amtsgericht* – whereas B now has a problem since he has to pay damages. B brings the case to the Court of Appeal ("*Oberlandesgericht*") and – eventually – to the Federal Court ("*Bundesgerichtshof*"), provided that it (or the previous court) has granted leave to appeal.

507 The lower appeal courts review the facts of the case and the law, whereas the *Bundesgerichtshof* only reviews the legal assessment of the facts.[156]

c. Legal Education

508 German legal education follows a "one size fits all" model.[157] Independent of the future career of the graduates (attorney, prosecutor, judge etc) the curriculum is geared towards the qualification for judicial office.[158] The legal education has two stages: The first part is the theoretical study of law at a university, which is completed with the First State Examination ("*Erstes Staatsexamen*"). This is a mixture between a university and a state exam. The second part, the so-called "*Referendariat*" consists of practical training at various legal institutions such as a civil court, a public

154 See in more detail Id, 86–87.
155 If the litigious amount is over 5’000 Euro the Regional Court is the first instance.
156 *Schermaier*, 278.
157 See for a more detailed account of the German legal education: *Mattei/Ruskola/Gidi*, 648–649; *Schermaier*, 279–280.
158 See § 5 of the German Judiciary Act (=Deutsches Richtergesetz, DRiG).

prosecutor's office or a law firm and takes approximately two years to complete. Thereafter the candidates have to pass the – very rigorous – Second State Examination ("*Zweites Staatsexamen*"), which is organized by a Judicial Examination Office. After passing the *Zweites Staatsexamen* the person is a so-called "*Volljurist*" and can be appointed as a judge or a public prosecutor. He is also allowed to work as an attorney.

The drawback of this system is that it takes about seven years from be- 509
ginning to start, so that the typical German lawyer is between 25 and 30 years old when he finally passes the *Zweites Staatsexamen*.

The attractiveness of a German legal education is unbroken, even though 510
the competition is stiff. The financial crisis has also hit law firms, especially those that specialize in transactional law (such as mergers & acquisitions). There were even lay-offs. This does not seem to deter the almost 20'000 students that commence their legal studies every year.[159]

Given these number it is thus not surprising that Germany has a lot of 511
lawyers with a bar exam: There were 158'426 attorneys on 1 January 2012. This equals to one attorney per 525 residents. This is a high number compared to eg Switzerland (1'032) or Austria (1'751) – but a small number in relation to the USA (270 residents per lawyer).[160]

B. France

1. History

a. Pre-Revolutionary Period

One notable point from the pre-revolutionary period is that there were a 512
multitude of kings and emperors that ruled over the territories that are nowadays French. The different monarchies with their various dynasties spanned almost 14 centuries: From the Frankish kingdoms of Clovis, the Merovingian Dynasty (5th and early 6th century), Charlemagne and the Carolingian House (8th century) to the Houses of Capet and Valois

159 <http://de.statista.com/statistik/daten/studie/37308/umfrage/studienanfa enger-rechtswissenschaften-und-wirtschaftsrecht/> accessed 2 September 2013.

160 <http://de.wikipedia.org/wiki/Rechtsanwalt> accessed 2 September 2013.

between the 10th and 15th century and finally the Bourbons from the 16th century up to Louis XVI (1774–1792).

513 This shows that from a historical point of view France almost always had more or less absolutistic rulers that through military power, influence gained through marriages, religious politics and economic resources were able to dictate how people lived, what was right and wrong and eventually what the law was. There were local law courts, but in the end they had little influence.

b. French Revolution

514 France was engaged in numerous armed conflicts in Europe and in North America in the 18th century. These efforts depleted the treasury and effectively bankrupted France. This and poor harvests led to poverty, hunger and dissatisfaction with the royal system and the many privileges for the aristocracy and the clergy. People were literally starving – but they were also starving for liberty and personal rights. They were supported by French philosophers such as *Voltaire, Montesquieu, Descartes* and *Rousseau* who taught that a rational society was the outcome of a liberated, freethinking and reason-based people with religious tolerance.

515 The Revolution 1789 marked the end of the *Ancien Régime*. As we will see later it was also the beginning of a new era of the French legal system (see below, N 528). The Code Civil was enacted 1804 based on the moral and ethical values of the Revolution. Three years after the Revolution, in 1792, the National Convention founded the First Republic. France gained influence not only in Europe but also far beyond under *Napoléon Bonaparte* (1769–1821).

c. 19th and 20th Century

516 In the nineteenth century and in the time before World War I France was not only one of the world's leaders in industrialization, science and technology, but also in social legislation. France was also a major colonial power in Africa, the Middle East, and the Far East.[161]

[161] <www.nationsonline.org/oneworld/History/France-history.htm> accessed 2 September 2013.

France was invaded by Nazi Germany in 1940 and liberated in 1944 when *Charles de Gaulle* (1890–1970) headed a provisional government. When he resigned in 1946 the Fourth Republic with a new constitution was set up; it lasted until 1958 when overseas conflicts (Indochina, Vietnam, Algeria) almost provoked a military coup. *De Gaulle* was called back to power and the current 5th Republic ("*Ve République*") with its semi-presidential system and reduced legislative powers was established in 1958 (see below, 519–524). 517

France has always been a driving force and influential voice in the European Union. It is a member of the United Nations and NATO. 518

2. Political System

a. Semi-Presidential Republic

France is a republic, unitary and heavily centralized state.[162] It is divided into 22 metropolitan regions and five overseas regions (French Guyana, Guadeloupe, Martinique, Mayotte, and Reunion) and subdivided into 96 metropolitan departments and 5 overseas departments (which are the same as the overseas regions). 519

The governmental system can be described as semi-presidential. The executive plays a dominant role with the President having many important executive powers. In contrast to the German Head of State (see above, N 498) he – there has never been a female president – is not merely a representative figure. He has the constitutional role of an arbitrator that is responsible for the proper functioning of the state (Art 5(1) French Constitution 1958: "*Il assure, par son arbitrage, le fonctionnement régulier des pouvoirs publics ainsi que la continuité de l'État*"). Furthermore, he: 520

- is directly elected by the people for five years (Art 6 French Constitution 1958);
- is the guardian of the constitution (Art 5(1) French Constitution 1958) and the commander-in-chief (Art 15 French Constitution 1958) and he

[162] Some decentralization efforts since the 1980's have given locally elected representatives more power.

has extensive powers in conducting the foreign politics of France ("*domaines réservés*");

- has wide law-making powers (Art 13 French Constitution 1958): He can especially refuse to sign a statute and instead ask the Parliament to deliberate it again (Art 10(2) French Constitution 1958);
- can submit certain acts of legislation directly to the people for a referendum (Art 11 French Constitution 1958);[163]
- has the power to dissolve the House of Representatives ("*Assemblée Nationale*", Art 12(1) French Constitution 1958);
- appoints and dismisses the Prime Minister as well as, upon proposal of the Prime Minster, the other members of the government (Art 8 French Constitution 1958);
- guarantees the independence of the judiciary (Art 64 French Constitution 1958);
- is not responsible to the Parliament and cannot be impeached by it.[164]

b. The Government

521 The second part of the executive branch is the government who is headed by the Prime Minister (Art 21 French Constitution 1958). The government is in charge of the national politics (Art 21 French Constitution 1958)[165] and is responsible to the Parliament.

522 The "*Conseil d'État*" is the advisory board of the government. It examines, among other duties, drafts of statutes. It is the highest administrative court.[166]

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[163] "*Le Président de la République [...] peut soumettre au référendum tout projet de loi portant sur l'organisation des pouvoirs publics, sur des réformes relatives à la politique économique, sociale ou environnementale de la nation et aux services publics qui y concourent, ou tendant à autoriser la ratification d'un traité qui, sans être contraire à la Constitution, aurait des incidences sur le fonctionnement des institutions*".

[164] *Sonnenberger/Autexier,* 51–53; *Grosse Ernst Ulrich/Lüger Heinz-Helmut*, Frankreich verstehen, Darmstadt 2000, 40; *Lüsebrink Hans-Jürgen*, Einführung in die Landeskunde Frankreichs, Stuttgart 2000, 169–172; cf *Glendon/Carozza/Picker,* 85.

[165] "*Le Gouvernement détermine et conduit la politique de la Nation*".

[166] *Sonnenberger/Autexier*,57–58.

c. The Parliament

The French Parliament has two chambers: The "*Assemblée Nationale*" and the "Sénat" (Art 24(2) French Constitution 1958). Its main task is to legislate and to supervise the government (Art 24(1) French Constitution 1958).[167] 523

The people directly elect the members of the Assemblée Nationale every five years (Art 24(3) French Constitution 1958). The Sénat is elected indirectly by the people through an electoral college (Art 24(4) French Constitution 1958); its function is to represent the territorial units of France. 524

3. Economy

France has a mixed economy with a combination of capitalist and socialist elements.[168] It is with other words a capitalist state in which the government tries to maintain social equity by means of laws, tax policies and social spending to reduce income disparity and the impact of free markets on public health and welfare. It is the fifth largest economy by nominal GDP. The private sector includes agriculture, industry and service sector. Its main trade partner is Germany; its main export goods are, among other things, machinery, aircraft, iron and steel as well as tourism. 525

The France government modernized the economy between 1944 and 1983 under a program known as "*dirigisme*". It thereby took control of and developed important industry sectors such as transportation, energy and telecommunication. Under President *François Mitterrand* (1981–1995) *dirigisme* was abandoned and the state (at least partly) drew back from economic intervention (so-called era of "*riguer*"). Large firms such as Air France or Renault were partially or fully privatized. Today France's economy is mostly liberalized, even though the government continues to hold substantial shares in big corporations eg in banking, energy, automobiles, and defense. Labor conditions and wages are 526

[167] "*Le Parlement vote la loi. Il contrôle l'action du Gouvernement. Il évalue les politiques publiques*".

[168] The following information is mainly taken from the CIA World Factbook, <https:www.cia.gov/library/publications/the-world-factbook/geos/fr.html> accessed 2 September 2013.

highly regulated. The unemployment rate is at about 10–11% (at the end of 2012), which is about the average rate in the European Union.

527 As a reaction to the financial and euro crisis austerity measures (eg elimination of tax credits, freezing of most government spending) were taken to reduce the budget deficit and to strengthen fiscal discipline.

4. Legal System

a. French Civil Code

528 As it has been mentioned above, the French Civil Code is considered to be one of the most influential codifications in the Civil law traditions. The Civil Code was imprinted by various schools of thought. We have described in chapter 3 the somehow indirect impact of Roman law (see above, N 307–308). Then there was the French Revolution 1789 that did away the old institutions, the old Feudal laws and the old privileges (and some heads, as well): Something new started such as the introduction of equal rights, the guarantee of individual rights, the secularization of marriage, and the protection of property.[169] But the old customs of the monarchial period (1500–1789), eg the Custom of Paris, and various Royal Ordinances were not disregarded. Especially *Robert Pothier's* work (1699–1772) on the old sources furnished material for the drafters of the Civil Code. The latter is thus a mixture of the old *droit écrit* (from the southern regions) and the *coutumes* (from the Northern regions) as well as of some Canonical law.[170]

529 The Civil Code, enacted 1804, is known for its clear, concise and easily comprehendible language. It was written for lay people. Unlike the German Civil Code it contains more general principles and is not always concerned with all the details (see eg the famously terse Art 1382 CC: "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer*").

530 There are five books in the Civil Code:

– Book 1 "*Of Persons*" deals with the status of persons, marriage, divorce, minors, guardianship and domicile.

[169] *De Cruz*, 65.
[170] *Zweigert/Kötz*, 87–88; *De Cruz,* 65, 67.

– Book 2 "*Of Property and Different Kind of Ownership*" deals with property, usufructs and servitudes.

– Book 3 "*Of the Different Ways of Acquiring Property*" deals with a mix of subject matters that are only loosely connected: The law succession, the law of obligations in general (contracts, torts, unjust enrichment), product liability, specific contracts (sale, lease, partnership, marriage contracts etc), partnerships, and the statute of limitations.

– Book 4 "*Of Securities*" deals with personal, movable and immovable securities such as guarantees, pledges, and mortgages.

– Book 5 deals with the application of the Civil Code to the French overseas department of Mayotte.

b. Judicial Structure in Relation to Private Law

As we have noted above the French court system is bifurcated (see above, N 445). On the one side is the judicial system ("*ordre judiciaire*"), on the other side the administrative courts ("*ordre administratif*").[171] The reason for this is the doctrine of separation of powers: The judicial branch was not allowed to control the executive branch; for that reason this function was entrusted to a separate system of courts with the Conseil d'État on top. 531

In this section we are solely concerned with the judicial system with respect to matters of private and commercial law. The French judicial organization differentiates between the ordinary courts ("*jurisdictions de droit commun*") and the special courts ("*jurisdictions d'exceptions*"). The difference is that the ordinary courts are always competent in their respective areas unless the law states something else. The competence of the special courts thus supersedes the ordinary courts insofar the law provides for this.[172] 532

[171] See also *de Cruz*, 73; *Glendon/Carozza/Picker*, 94.

[172] See L211-3 Code de l'organisation judiciaire: "*Le tribunal de grande instance connaît de toutes les affaires civiles et commerciales pour lesquelles compétence n'est pas attribuée, en raison de leur nature ou du montant de la demande, à une autre juridiction*".

aa. Ordinary Courts

533 The ordinary court of first instance for matters of private law with a litigious amount in excess of € 10'000 is the *Tribunal de Grande Instanc*e (TGI) (Art L211-1 Code de l'organisation judiciaire).

534 Decisions of the TGI can be appealed to the competent *Cour d'Appel* (Art L311-1 Code de l'organisation judiciaire), which is a regional court. Every Cour d'Appel has several chambers that deal with different subject matters (eg family law, property law, commercial law etc). The Cour d'Appel reviews the facts and the law of the case.[173]

535 There are currently 36 Cours d'Appel and 165 Tribunaux de Grande Instance.[174]

bb. Special Courts

536 The *juge de proximité* is competent to hear the case if the litigious amount of a case is less than € 4'000 (Art L231-3 Code de l'organisation judiciaire). These decisions cannot be appealed (Art R231-3(1) Code de l'organisation judiciaire).[175] The *juge de proximité* is a sole, non-professional judge. Originally the *jurisdiction de proximité* was created to relieve the judges of the Tribunaux d'Instance (see below, N 537) of their workload resulting from the petty cases of everyday life (small debt collection, neighbors' quarrels etc). However, due to financial reasons the *jurisdiction de proximité* will be abolished by 1 January 2015.

537 All private law cases with litigious amounts between € 4'000 and 10'000 fall into the competence of the *Tribunal d'Instance* (Art L221-1 and 4 Code de l'organisation judiciaire). There are currently 307 Tribunaux d'Instance. In contrast to the other courts they are presided by a sole judge. Their decisions can be appealed to the Tribunal de Grande Instance unless the law states otherwise (Art R211-3(1) Code de l'organisation judiciaire).

538 There are two more special courts that are of relevance in our context:

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173 *De Cruz,* 74.

174 <www.justice.gouv.fr/budget-et-statistiques-10054/chiffres-cles-de-la-justice-10303/> accessed 2 September 2013.

175 Subject to a complaint to the Cour de Cassation for incorrect application of the law.

– The Commercial Courts ("*Tribunaux de Commerce*") are competent to adjudicate all matters of commercial law between merchants (see Art L721-1 seqq Code de Commerce). The three judges on the bench are elected professionals from all areas of trade and industry.

– The labor courts ("*Conseils de prud'hommes*") hear cases concerning private labor law (see Art 879 Code de Procédure Civil).[176]

cc. The Cour de Cassation

The French Supreme Court is the *Cour de Cassation*. It has five civil chambers and one criminal chamber. Its main task is to guarantee the uniformity of the interpretation of the law; it thus only reviews the correct application of the law, not the facts (Art L411-2 Code de l'organisation judiciaire).[177] 539

In general the *Cour de Cassation* only annuls the decision of the lower court but does not render a decision on the merits (for exceptions see Art L411-3 Code de l'organisation judiciaire). If the decision is annulled (which is the case in about 20% of all appeals),[178] the case is sent back for rehearing to another court of the same level as the one that originally decided the case. In principle every decision of a French Court can be attacked before the Court of Cassation, provided that other remedies are unavailable or have been exhausted.[179] 540

c. Legal Education

The basic education of lawyers in France takes place at the so-called "*Unités de formation et de recherché en droit*", also known as faculties of law of a university. This part of the education is the same for all the legal professions (attorneys, judges, notaries, in-house counsels, and magistrates of the court such as the "*huissier de justice*" [bailiff]). Legal 541

[176] *Rainer Michael J*, Europäisches Privatrecht, 2nd edn Frankfurt aM 2007, 141.

[177] "*La Cour de cassation statue sur les pourvois en cassation formés contre les arrêts et jugements rendus en dernier ressort par les juridictions de l'ordre judiciaire. La Cour de cassation ne connaît pas du fond des affaires, sauf disposition législative contraire.*" See also *de Cruz*, 75; *Zweigert/Kötz*, 121.

[178] See <www.courdecassation.fr/institution_1/activite_cour_chiffres_58/> accessed 2 September 2013.

[179] *Zweigert/Kötz*, 121.

studies typically also include contextual subjects such as courses in economics, sociology, or public administration.[180]

542 In order to be admitted to the exams for the specialized professional schools a student must at least obtain the title "*Maîtrise en droit*" (baccalaureate plus four years of study). In practice almost all the candidates who want to become an independent attorney ("*avocat*") have a "*Master en droit*" (baccalaureate plus five years of study).

543 After that first stage the education and training for the different legal professions differ:[181]

- Someone who wishes to become an *avocat* has to enroll in an "*institute d'études judiciaires*" which is attached to a university. These institutes prepare the students for the written test to be admitted into the professional school in charge of the education of the *avocats* ("*Centre regional de formation professionnelle des avocats*"). During 18 months the "avocats-stagaires" are being prepared theoretically and practically (internships) for the so-called CAPA ("*certificate d'aptitude à la profession d'avocat*"). After successfully passing the exam the *avocat* has to be inscribed in a lawyer's register and be solemnly sworn in before one of the appeal courts.[182]
- Students wishing to pursue a career in the judiciary must attend the "*École nationale de la magistrature*" in Bordeaux or Paris. It is notoriously difficult to get into this school; there is a competition with an exam. The admission rate in 2011 was only 10.8%.[183] Once admitted, the "*auditeur de justice*" undergoes a theoretical and practical training of 31 months. Internships include a six months stint in a law firm and twelve months in the judicial system.
- Last but certainly not least a person with a law degree can take the entry exam for the elite "*École nationale d'administration*". Graduates from this school hold prestigious positions in the most influential

180 See eg <http://ecolededroitdelasorbonne.univ-paris1.fr/formations/formati on-fondamentale/licences> accessed 2 September 2013.
181 *Zweigert/Kötz*, 125.
182 For education and training of lawyers in France in general see *Mattei/Ruskola/Gidi*, 650–654.
183 See <http://en.wikipedia.org/wiki/French_National_School_for_the_Judici ary> accessed 2 September 2013.

branches of government such as the Conseil d'État or the Ministry of Foreign Affairs.[184]

C. Switzerland

1. History

The mystical origins of Switzerland date back over 700 years when Uri, Schwyz and Unterwalden pledged their alliance to defend peace in their territories in August 1291 (so-called "*Rütlischwur*"). This confederation of independent states grew over the centuries and had to defend itself numerous times against foreign powers such as the Habsburg Dynasty from Austria. 544

With the peace treaty of Westphalia (1648) Switzerland gained formal independence from the Holy Roman Empire. This marked the end of the Thirty Years' War (1618–1648), which was caused by religious division between catholicism and protestantism, the struggle for power in the early formation of states and the fight for supremacy in Europe. 545

After the French revolution Switzerland was invaded by French troops in 1798, which led to the creation of the Helvetic Republic with a unitary constitution. This Republic lasted until 1815 when the old Confederation was restored. The period between 1815 and 1848 was characterized by tension and war between liberal and conservative cantons; this was eventually settled by a military intervention of federal troops. 546

1848 is the birth year of the first federal constitution that transferred many competences from the cantons to the federal government. It centralized important areas such as customs, military service, and coinage. The two chamber Parliament and the Federal Council (see below, N 554–556) as well as different civil rights for the citizen (eg religious freedom) were created. Switzerland thereby transitioned from being a confederation to a federal state with a common market and a uniform judiciary. The content of the constitution was heavily influenced 547

[184] See eg <www.ranker.com/list/famous-%C3%A9cole-nationale-d_adm inistration-alumni-and-students/reference> accessed 2 September 2013; the alumni list is a who's who of French politics: Former (and current) Presidents Valéry Giscard d'Estaing, Jacques Chirac and François Hollande; Prime Ministers Laurent Fabius, Édouard Balladur, Alain Juppé, Lionel Jospin, Dominique de Villepin; Jean-Claude Trichet (European Central Bank) etc.

by the constitution of the United States of America (1787) and the ideas of the French Revolution.

548 The second constitution (1874) strengthened the democratic rights of the people (to be precise: of the men), the right to a referendum was introduced, and later also the popular initiative. This constitution (with many amendments) lasted a full 126 years. In the year 2000 the fully revised third constitution came into force (see below, N 552).

549 Even though Switzerland was not directly involved in World War I the social and economic situation was dire in these times. This led to social unrest culminating in a general strike in 1918.

550 Switzerland's role in World War II and its dogma of neutrality has undergone some critical evaluation by an independent expert commission that was installed by the Swiss Parliament to account for the past.[185]

551 In the second half of the 20th century Switzerland prospered considerably. Some political milestones were:

– in 1971 women were granted the right to vote and participate in elections on the federal level;

– in 1979 the canton of Jura was created to become the 26th Swiss canton;

– in 1992 voters rejected Swiss membership in the European Economic Area;

– in 2002 Switzerland becomes a full member of the United Nations.

2. Political System

a. Brief Overview

552 Switzerland (official name: "*Confoederatio Helvetica*")[186] is a small country of about 8 Mio. people (of which are about 20% foreign natio-

[185] So-called "*Bergier-Commission*", named after the president of the commission, the late historian Jean-François Bergier. The report consists of interim reports, studies, juridical and research publications as well as a final report published between 1997 and 2002, see <www.uek.ch/en/index.htm> accessed 2 September 2013.

nals) in the heart of Europe with four official languages (German, French, Italian, Romansh). The current core political characteristics and state's structures have their roots in the Constitution of 1848.[187] The current Federal Constitution from 18 April 1999 is in force since 1 January 2000.

The political system can be described as follows. Switzerland is a: 553

– *federal* state, composed of the 2'495 communes, 26 cantons and the Confederation itself. Every level, from the smallest towns to the confederation has its own set of competences and responsibilities. The cantons have all powers that are either listed in the constitution or that are not granted to the confederation itself (principle of subsidiarity, Art 5a Swiss Constitution). All cantons have their own constitution, parliament and government as well as equal rights and a relatively high degree of independence. The cantons are represented on the federal level through the Council of States ("*Ständerat*").
– *semi-direct democracy*, ie the people directly elect their representatives into the National Council ("*Nationalrat*") and they can directly engage in the legislation process through the instruments of the popular initiative and the (mandatory and optional) referendum. It is the purpose of this mixture of a representative-democratic and a direct-democratic model of state to allow minorities to have a substantial say in the political decision-making process. This, however, only works if there is a significant willingness to accept compromises. That is why Switzerland is sometimes called a consociational democracy ("*Konkordanzdemokratie*").

b. Parliament ("Bundesversammlung")

Subject to the rights of the People and the cantons, the Swiss Parliament is the highest authority of the Confederation. It consists of two chambers, the National Council and the Council of States (Art 148 Swiss Constitution). They deliberate and vote only in certain cases together (Art 157 Swiss Constitution, eg election of the Federal Council, of the 554

[186] This name is actually misleading. Switzerland is not a confederation of independent states but a federally structured uniform nation (see above, N 547).

[187] For an excellent brief guide to Switzerland visit <www.admin.ch/dokumentation/00104/index.html?lang=en> accessed 2 September 2013; most of the facts and figures in this section are taken from this publication.

Federal Chancellor or of the member of the Swiss Supreme Court). It is then called the (United) Federal Assembly. Apart from these special cases both chambers deliberate and vote separately (Art 156(1) Swiss Constitution). To pass a federal law both chambers have to agree (Art 156(2) Swiss Constitution). Apart from legislating, the parliament also adopts the budget, approves the federal accounts, has supervisory control over the Federal Council and administration and has certain powers in the area of military and foreign policy etc (see Art 163–173 Swiss Constitution).

c. Government ("Bundesrat")

555 The Federal Council has seven equal members. It is the supreme governing and executive authority of the confederation (Art 174 seq. Swiss Constitution). The Federal Chancellor directs the Federal Chancery (general staff of the Federal Government). The United Federal Assembly elects the Federal Council following each general election to the National Council (every four years, Art 175 Swiss Constitution). The President of the Confederation is elected each year by the Parliament according to seniority. He or she is considered to be the first among equals ("*primus inter pares*") (Art 176 Swiss Constitution). He or she is not the Prime Minister since he or she cannot give the other ministers (Federal Councilors) instructions. The President chairs the sessions of the Federal Government and undertakes special ceremonial duties. According to the separation of powers, members of the Parliament cannot be members of the government at the same time.[188]

556 The Federal Council's competences are listed in Art 180–187 Swiss Constitution. Among other things the Federal Council:

– Shall decide on the objectives of federal government policy and the means by which they should be achieved (Art 180 Swiss Constitution),

– shall submit drafts of Federal Assembly legislation to the Federal Assembly and ensure the implementation of legislation (Art 181 Swiss Constitution),

– is responsible for foreign affairs (Art 184 Swiss Constitution),

[188] *Pichonnaz Pascal*, Switzerland, in: Smits Jan M (ed), Elgar Encyclopedia of Comparative Law, Cheltenham/Northamton 2006, 702–708, 704.

– shall take measures to safeguard external security, independence and neutrality of Switzerland (Art 185 Swiss Constitution).

3. Economy

Switzerland has a market economy with a low unemployment rate (ca 3%), (almost) no inflation, a very low state deficit and one of the highest per capita GDP in the world (USD 48’815 PPP [purchasing power parity][189] as well as a stable currency.[190] The driving forces in the Swiss economy are the highly developed service sector (esp financial services), tourism and a strong manufacturing industry (watches, precision instruments, high-technology, and pharmaceuticals). The economy benefits from political stability, a transparent legal system, a very good infrastructure (esp public transportation), efficient capital markets, and low corporate tax rates. Agricultural production is highly subsidized. Apart from water there are very few natural resources. 557

The main trade partners are all located in the European Union with the notable exceptions of the United States of America, China and Japan.[191] Switzerland is one of the countries with the highest percentage of foreign trade in relation to its GDP. Even though the global financial crisis also hit Switzerland in 2009 and led to an economic downturn, Switzerland’s economy recovered in 2010 with a 2.7% growth. The current sovereign debt crisis in the European Union also impacts Switzerland since foreign investors use the Swiss franc as a safe haven, which appreciated the Swiss currency. This put considerable hardship on the industries that are dependent on exporting their goods or services such as tourism or the manufacturing industry. This development slowed down the GDP growth.[192] 558

Unlike France or Germany the labor market is very liberal; employers can easily dismiss their employees (“hire and fire”). Even though this policy allows employers to promptly and in a flexible way react to times of economic downturn, it puts (financial and social) burdens on the 559

[189] http://stats.oecd.org/index.aspx?queryid=558.
[190] Most facts in this section are taken from the CIA-Factbook of the World: <https://www.cia.gov/library/publications/the-world-factbook/geos/sz.html> accessed 2 September 2013.
[191] <www.bfs.admin.ch/> accessed 2 September 2013.
[192] <www.seco.admin.ch/themen/00374/00456/> accessed 2 September 2013.

employees. For that reason social partnerships are looked after carefully. There are many collective wage agreements with mutual obligations of employers and employees to maintain good labor relations. As a result, strikes are rare in Switzerland.[193]

560 One of the biggest economic (and political) challenges Switzerland is facing is the unresolved tax problem with its neighboring countries, the EU and the USA. The problems mainly stem from the Swiss banking secrecy laws and the fact that for many years foreign nationals used Swiss banks to evade taxes in their own country. In addition, low corporate taxes are seen as giving the Swiss economy an unfair advantage. Consequently, the Federal Council had to renegotiate its double taxation agreements with numerous countries to conform to OECD standards.[194] These developments (and the looming automatic information exchange for dividends and interest payments) have a big impact on the banking industry, which is a very important economic factor.[195]

4. Legal System

561 At the heart of Swiss private law are two major codifications: The Civil Code of 10 December 1907 and the Code of Obligations of 30 March 1911 (both are in force since 1 January 1912). They are, technically speaking, two separate codes (two volumes) with individual titles and numbering. However, they are in substance connected by an inner, material bond (see below, N 568).

562 Switzerland is one of the few countries that has two codifications to regulate the various forms of private legal relationships. Other European countries have just one code for rights and obligations of private individuals (French *Code Civil*, German *Bürgerliches Gesetzbuch*, Austrian *Allgemeines Bürgerliches Gesetzbuch*, Italian *Codice Civile* etc). It is noteworthy, though, that some countries have a separate

193 <www.news.admin.ch/message/index.html?lang=de&msg-id=46571> accessed 2 September 2013.
194 See <www.news.admin.ch/message/?lang=de&msg-id=25863> accessed 2 September 2013.
195 See <www.snb.ch/en/iabout/finstab/id/finstab_banksector> accessed 2 September 2013.

Commercial Code (eg Germany, France). It deals with specific legal questions that are relevant for trade and commerce. Switzerland (as well as eg Italy) does not have a separate Commercial Code. It is in this sense a "monist" system. The rules contained in the Code of Obligations are in general also applicable to the legal relationship between merchants. There are a few provisions, eg in sales law, that exclusively apply to commercial affairs (such as eg Art 215(1) CO).[196]

It goes without saying that Swiss private law is not just regulated by these two codes. There are different other statutes containing rules that are relevant for private relationships. Particularly important for contract law is eg the Federal Act on Insurance Contracts. 563

A particular feature of the Swiss legal system is that all acts of legislation have *three* official versions. Due to Swiss multilingualism, they must be published in German, French and Italian. The three versions are equal, ie none of them is considered a translation of another version. They are therefore all the original version. This has also implications for the drafting and interpretation of the provisions. First, the legislator may discover ambiguities in the text of one language when reviewing and editing. This can help to improve the other versions.[197] Second, a glance at the provision in another language can help when interpreting it. 564

The following example shall illustrate this. Nowadays a large body of so-called *soft law* exists. These rules are non-state law, often developed by non- or intergovernmental organizations such as eg the International Institute for the Unification of Private Law (Unidroit).[198] The question arises if parties to an international contract can choose such non-state rules as the applicable law. In Switzerland the relevant statute for an answer to this question is the Private International Law Act (PILA). If a state court has to decide the case, Art 116 PILA is relevant. It states that the parties may choose the law applicable to their contract. This reads in German as 565

[196] "*Where the buyer in a commercial transaction fails to discharge his payment obligation, the seller is entitled to compensation for the difference between the sale price and the price at which he has subsequently sold the object in good faith*".

[197] <www.news.admin.ch/message/index.html?lang=de&msg-id=46571> accessed 2 September 2013.

[198] See <www.unidroit.org/dynasite.cfm> accessed 2 September 2013.

follows: "*Der Vertrag untersteht dem von den Parteien gewählten Recht*" (Art 116(1) PILA). In the French version it reads: "*Le contrat est régi par le droit choisi par les parties*". Both versions are identical: they both use the term "law" (*Recht/droit*) which is understood to mean "*state* law". However, should the parties have included an arbitration clause in their contract, the case would be adjudicated by an arbitral tribunal. Then Art 187(1) PILA is relevant, which states that the arbitral tribunal decides the case according to the law chosen by the parties. The German reads: "*Das Schiedsgericht entscheidet die Streitsache nach dem von den Parteien gewählten Recht*". It uses the same term ("law") as Art 116 PILA. One could therefore reach the conclusion that the parties cannot chose soft-law as the applicable law to the contract. However, the French version of Art 187(1) PILA is slightly, but decisively, different. It reads: "*Le tribunal arbitral statue selon les règles de droit choisies par les parties*". This difference led to a wider interpretation of the German version: Because the French text speaks of "rules of law" instead only of "law" (as in the French version of Art 116 PILA), it is now accepted that the parties can choose non-state law to their contract when they at the same time agree on an arbitral tribunal as the competent dispute resolution authority.

a. Civil Code and Code of Obligations

566 The Swiss Civil Code and the Code of Obligations are written in a simple, clear, popular and concise style. They are addressed to the layperson that wants to know what his rights and obligations are. Unlike the German Civil Code it is less dogmatic and rigorous.

567 The Swiss Civil Code contains an Introductory Part (Art 1–10 CC) and four titles with articles pertaining to the law of persons (Art 11–89), family law (Art 90–456), inheritance law (Art 457–640) and property law (Art 641–977).

568 As the Civil Code and the Code of Obligations form a union, the rules contained in the Civil Code are also valid for the Code of Obligations. The rules on the (legal) capacity of natural persons (Art 11–19 CC), the general rules on legal entities (Art 52–59 CC) and the articles on the acquisition of property (Art 656 seq and 714 seq CC) are of particular significance for contract law.

The Code of Obligations has four big parts: 569

- *General Provisions* (Art 1–183 CO) that deal with the creation of obligations arising from contracts, torts and unjust enrichment, the performance, non-performance and extinction of obligations as well as the assignment of claims and the assumption of debts;
- *Specific Contracts* (Art 184–529 CO): This part regulates different contracts such as eg the contract for the sale of goods, lease, mandate or the labor contract;
- *Simple partnership and commercial enterprises* (Art 530–964 CO);
- *Negotiable securities* (Art 965–1186 CO).

The general provisions also apply to the subject matters of the Civil 570
Code (law of persons, family law, inheritance law, property law) irrespective of their individual placement in the Code of Obligations.[199]

b. Judicial Structure

Switzerland, as we have noted above (see above, N 553), is a federal sta- 571
te. However, unlike the United States of America, there is not a federal and a state court system. The ordinary courts of first and second instance are cantonal and there is only one Supreme Court, the Federal Supreme Court.[200] In commercial disputes some cantons have established a Commercial Court (Zürich, Bern, St Gallen, Aargau). Since 1 January 2011 the Federal Code of Civil Procedure ("*CCP*") is applicable to all private law disputes. Before 2011 there were 26 cantonal civil procedural laws. The organization of the courts is still in the competence of the cantons (subject to certain minimum standards required by federal law).

According to Art 197 CCP, litigation shall in principle be preceded by an 572
attempt at conciliation before a conciliation authority.[201] If no agreement can be reached, the conciliation authority records this fact and grants authorization to proceed.[202] The plaintiff is then entitled to file an action in court within three months (Art 209 CCP).

[199] BGE 124 III 370, E.3.a.
[200] See <www.bger.ch> accessed 2 September 2013.
[201] In some cantons the conciliation authority is a judge of the first instance, in others the courts have delegated this responsibilty to clerks ("Gerichtsschreiber").
[202] The vast majority of the cases are settled by the conciliation authorities (eg 70% settlement quota in the city of Zurich, see <www.stadt-zuerich.ch/portal/de/index/

573 The decision of the lower cantonal instance can be appealed to the cantonal Court of Appeal if the litigious amount is at least CHF 10'000 (Art 308 CCP). Grounds for appeal are the incorrect establishment of the facts or application of the law (Art 310 CCP). The enforceability of the contested decision is in principle suspended by the appeal (Art 315 CCP). The court of appeal can make a new decision itself or remand the case to the first instance if an essential part of the claim was not considered or if essential issues of fact must still be established (Art 318 CCP).

574 The decision of the cantonal Court may be appealed to the Federal Supreme Court.[203] In financial matters (concerning an issue of private law) the minimum litigious amount is in general CHF 30'000 (Art 74 Federal Supreme Court Statute).[204] The Supreme Court only reviews the correct application of the law and the arbitrary appreciation of facts (Art 95–97 Federal Supreme Court Statute). In principle, if the recourse is admitted, the case is sent back to the cantonal level for a new decision.

c. Legal Education

575 The legal education in Switzerland is in general tailored to students who wish to take the bar exam and practice law (in a law firm or as in-house counsels). The first stage is to attend law school.[205] The first degree is a Bachelor in Law (BLaw), which is awarded after the student obtains 180

politik_u_recht/friedensrichteramt/aktuell/jahresberichte.html> accessed 2 September 2013).

203 The Federal Supreme Court has two seats: one in Luzern for social insurance cases and the other in Lausanne for all other cases.

204 If the litigious amount is less than CH 30'000, the federal appeal is only admissible if the case poses a question of law of fundamental significance ("*Rechtsfrage von grundsätzlicher Bedeutung*", Art 72(2)(a) Federal Law on the Supreme Court).

205 There are nine law schools in Switzerland: German speaking: Basel (<http://ius.unibas.ch/> accessed 2 September 2013), Berne (<www.rechtswissenschaft.unibe.ch/content/index_ger.html> accessed 2 September 2013), Lucerne (<www.unilu.ch/deu/rechtswissen schaft_2511.html> accessed 2 September 2013), St Gallen (<www.unisg.ch/Schools/Law> accessed 2 September 2013), Zurich (<www.ius.uzh.ch/index.html> accessed 2 September 2013); French-speaking: Neuchâtel (<www2.unine.ch/droit> accessed 2 September 2013), Geneva (<www.unige.ch/droit/index.html> accessed 2 September 2013), Lausanne (<www.unil.ch/droit> accessed 2 September 2013); bilingual: Fribourg (<www.unifr.ch/ius/de/home> accessed 2 September 2013).

ECTS (about three years of study).[206] After the BLaw students qualify for an internship at a law firm. The vast majority, however, chooses to directly continue their studies with a Master program in law. There are a variety of programs offered: General law masters and specialized Masters in eg commercial, family, public, and international law. The title Master of Law is awarded after completing 90 ECTS (about 1.5–2.5 years of study).

The holder of a Master's degree in law is admitted to the bar exam after 576
completing a mandatory internship (at least one year). The internship can be done with eg a law firm, a court, and the legal office of an administrative agency. After passing the bar and fulfilling the other personal requirements the lawyer is inscribed in the lawyer's register of the canton where he practices law.[207]

Many legal positions do by law not require a bar exam (eg judges, in- 577
house counsel, public prosecutors etc). But in practice almost all the lawyers who work in such positions have passed the bar.

[206] One ECTS equals 30 hours of work.
[207] *Fellmann Walter*, Anwaltsrecht, Bern 2010, paras 673–685.

Chapter 5: Common Law and Related Systems

I. Introduction

A. "Common Law" Defined

The expression "common law" can mean different things, depending on the context in which it is used. In the broadest sense of the term, it denotes a certain legal tradition, which stands in contrast to the civil law tradition (see chapter four). A legal tradition "is a set of deeply rooted, historically conditioned attitudes about the nature of law, ... the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the was law is or should be made, applied, studied, perfected, and taught."[1] Unless otherwise indicated, this is the meaning we intend in this chapter, in which we will explore the characteristics of the common law tradition. Common law in this sense of the term is also called "Anglo-American law".[2] 578

In a narrower sense, the term "common law" is used to refer to a certain source of law, namely that body of law based on judicial decisions ("case law") as opposed to the written laws passed by a legislative body ("statutory law").[3] 579

In its third and narrowest sense, "common law" describes a certain type of case law, namely the case law developed by the so-called courts of law (or "common law courts"). In contrast, the case law developed by the courts of equity (or chancery) is referred to as the law of equity.[4] Like many common law institutions, the distinction between "law" and "equity" is rooted in English legal history, which we will explore in more detail below (N 607–608). 580

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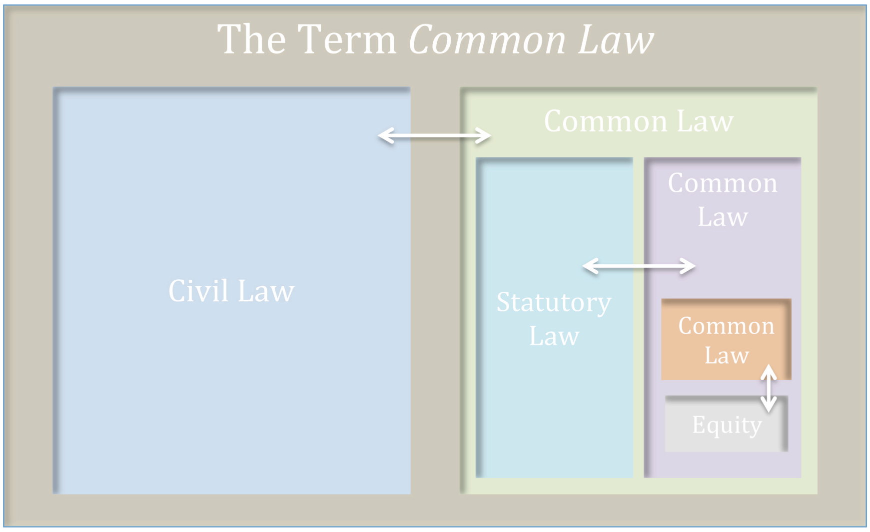
1 *John Henry Merryman/Rogelio Pérez-Perdomo,* The Civil Law Tradition, 3rd edn, Stanford 2007, 2.
2 See eg *Widmer,* 5.
3 See eg *Bailey/Ching/Taylor,* para 1-004.
4 *Widmer,* 5; *Fletcher/Sheppard*, 338ff.



581 All legal systems belonging to the common law tradition (in whole or in part; on hybrid legal systems, see N 651, 775) have one thing in common: important historical ties to England and, in particular, the British Empire. We will see that the English legal system is the mother of all common law systems (N 585), and that the common law family includes all those systems modelled on English law.[5] Despite this shared historical denominator, the individual legal systems with a common law tradition also possess distinct and individual characteristics, brought forth by differing geographical, political, economic, cultural or religious circumstances, and sometimes also by ties to other colonial powers (eg Louisiana).

582 In order to grasp the meaning of the common law tradition, it is important to distinguish between the terms "England", "Great Britain" (GB) and the "United Kingdom" (UK). These terms have different meanings and are often a source of confusion.

- The *United Kingdom* (UK) is short for the "United Kingdom of Great Britain and Northern Ireland". It is the name of the sovereign state and is made up of four parts: England, Wales, Scotland and Northern Ireland. The UK is a member of the European Union.
- In contrast, *Great Britain* is primarily a geographic term. It refers to the largest island of the United Kingdom and consists of England, Wales and Scotland. However, the expressions "UK" and "Britain" are often used loosely, so that only the context will indicate whether

[5] See eg *David/Brierley*, 24.

the term “Britain” (or “GB”) is actually meant as a reference to the island or to the country (the UK). To complicate matters further, the abbreviation “GB” is also used on number plates to indicate the sovereign state.

- In a historical context, *Great Britain* denotes the Kingdom that was created through the Union of the Kingdoms of Scotland and England in 1707. The new Kingdom of Great Britain was later united with the Kingdom of Ireland in 1801 to form the new sovereign state of the United Kingdom of Great Britain and Ireland.
- Until the political union between England and Scotland in 1707, *England* was an independent kingdom and sovereign state. It now forms part of the United Kingdom and, as such, is governed by the Parliament of the United Kingdom. Unlike Scotland, Northern Ireland and Wales, England has no so-called devolved government (on devolution, see N 655).

Try to locate the UK, Great Britain and England on the following map:[6] 583

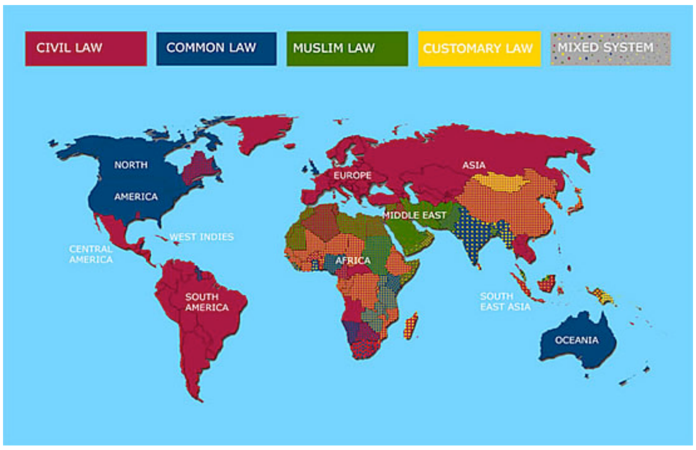
[6] Map retrieved from ‹www.factmonster.com/atlas/country/unitedkingdom.html›, accessed 22 November 2013.

B. Geographic Distribution

1. Reach of the Common Law

584 Approximately a third of the world's legal systems belong, in whole or in part, to the common law tradition.[7] The expansion of the common law beyond the boundaries of its parent country, England, goes hand in hand with English colonisation (see N 617). Generally, every country that once was colonised by England or the United Kingdom (see N 583) has been influenced, to a smaller or larger degree, by the common law of England. Thus, eg, Northern Ireland, Ireland (Eire), the United States (except Louisiana[8]), Canada (except Québec[9]), Australia, New Zealand, the Cayman Islands and Jamaica all belong to the common law family; their legal systems are essentially rooted in the English common law. Other legal systems are so-called hybrids, with roots in both the common law as well as in one or more different legal traditions such as the civil law or Muslim law. Such hybrid systems can be found, eg, in countries as diverse as Scotland (see N 777), South Africa, Kenya, Cameroun, Israel, Hongkong, India, Pakistan, Sri Lanka, Bahrain, Puerto Rico and Malta.[10]

585 The following map illustrates the reach of the common law:[11]



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7 *Zweigert/Kötz,* 219.

8 See *Zweigert/Kötz,* 114–116; *Tetley,* 60 La L Rev 677, 697–699 (2000).

9 See *Zweigert/Kötz,* 115ff.

10 For a list of hybrid countries influenced, in part, by the common law, see ‹www.juriglobe.ca/eng/sys-juri/class-poli/common-law.php›, accessed 22 November 2013.

11 Map retrieved from ‹www.juriglobe.ca/eng/index.php›, accessed 22 November 2013.

2. The Commonwealth of Nations

The Commonwealth of Nations (formerly “The British Commonwealth of Nations”) is a voluntary intergovernmental association of 53 independent states.[12] It is headed by Queen Elizabeth II; however, her function is purely symbolic. The aim of the Commonwealth is to co-operate freely and equally “in the pursuit of peace, liberty and progress”[13]. 586

The vast majority of member states are former territories of the British Empire, and, as such, have been influenced by the English common law. However, membership is also open to countries with no historical ties to the British Empire. Accordingly, the members of the Commonwealth do not necessarily belong to the common law family, although of course many of them (eg Australia, New Zealand) will. 587

For some member states of the Commonwealth (eg Jamaica) as well as for the UK overseas territories (eg Bermuda) and Crown Dependencies (ie Jersey, Guernsey and the Isle of Man), the final court of appeal is the Judicial Committee of the Privy Council (JCPC), which was established in 1833.[14] For Commonwealth members, however, the appellate jurisdiction of the JCPC is voluntary. An increasing number of Commonwealth countries (eg Australia and New Zealand) have abolished appeals to the JCPC.[15] Disputes before the JCPC are usually heard by a panel of Justices of the UK Supreme Court.[16] 588

C. A History of the Common Law

1. Introductory Remarks

We have already pointed out that understanding a legal system or tradition requires an appreciation of its historical development (N 6).While this applies to all legal systems, it is particularly pertinent to the common law tradition.[17] Many of the modern-day institutions and concepts of the 589

[12] On the historical origin of the Commonwealth, see *Roberts-Wray*, 3ff.
[13] See ‹http://thecommonwealth.org/our-history›, accessed 22 November 2013.
[14] *Bailey/Ching/Taylor,* para 2-075.
[15] See *Bailey/Ching/Taylor,* para 2-075; *Widmer,* 21.
[16] See ‹www.jcpc.gov.uk›, accessed 22 November 2013.
[17] See eg *Glendon/Carozza/Picker,* 154.

common law, such as the jury trial,, the law of equity or the trust, can only be understood by studying the history of the common law, and this history was, until the 18th century at least, the history of the law of England.[18] But why are historical considerations so crucial with respect to the common law tradition? The main reason put forth by comparative scholars is the autonomous development of English law, which, unlike its continental European counterparts (see N 48), remained unaffected by Roman law, was not troubled by revolutions or foreign invasions and resisted the codification movement (see N 611–613) entirely. This comparative continuity is characteristic of English law.

590 Despite the fact that the history of the common law is, to a large extent, the history of the English law, "English law" and "common law" are not synonyms. Although the common law first developed in England (see N 593–594), it was later "exported" into other countries where, over time, it developed distinctive features through its interaction with local laws, customs, culture and religion and its contact with diverse economic, political and geographic conditions. That the law of England was "exported" into other countries despite the fact that a law based largely on precedent is less easily received than codified law[19] is due to the enormous political power and reach of the British Empire. The common law which was, at the time, the law of England, was distributed throughout the British Empire (see N 616–618), thus laying the foundation for the development of today's common law family.

591 In all of the former territories subject to British rule, the commonlaw exported by the Empire has, since then, taken on a distinct local flavour. This is especially true with respect to the United States of America, which issued forth from the Thirteen British Colonies founded on the Atlantic coast of North America in the 17th and 18th centuries. Whilst England is the mother of the common law family, the US-American legal system is certainly her most famous and influential daughter. We will

[18] *David/Brierley*, 307. On the history of English law, see in particular *Winfield,* 4–5; *Frederick Pollock/Frederic W Maitland,* The History of English Law before the Time of Edward I, 2nd edn, Cambridge 1898, (reprinted Indianapolis 2010); *Frederic Maitland W/Charles Montague,* A Sketch of English Legal History, London/New York 1915, 73, 131ff; *Raoul C Van Caenegem*, The Birth of the English Common Law, 2nd edn, Cambridge 1988.

[19] *Glendon/Carozza/Picker,* 174.

consider the history of US-American law in more detail below (N 701–708).

2. The History of English Law

a. The Norman Conquest

1066 is generally considered the starting point for the formation of the common law.[20] It is the year of the Norman invasion led by William I ("William the Conqueror"), Duke of Normandy, who, after his victory at the Battle of Hastings, was crowned the first Norman king of England. After his coronation, William I was concerned primarily with expanding and consolidating his rule in his new dominions. He achieved this goal by installing feudalism throughout England and by introducing an extremely efficient centralised administration. The model of feudalism established by William I was "military and highly organized".[21] All land was held from the king, excluding the notion of private ownership.[22] The land allocated by William I to his lords and barons was inventoried in the Domesday book (1086), which greatly facilitated taxation.[23] To this day, the influence of the feudalistic system is still felt in the English law of property, both with respect to its concepts, its structure and its terminology.[24] 592

Upon conquering England, William I did not replace the existing laws, which consisted of Anglo-Saxon local customs.[25] Nor did he replace the local courts which applied these customs.[26] However, in order to consolidate his power, he established a centralised administration in London and also exercised jurisdiction in exceptional cases that touched upon royal interests, in particular revenue (taxes) and disputes over land. In such cases, the king, assisted by trusted officials, administered justice. 593

[20] On the Anglo-Saxon period preceding William I's rule and the Germanic laws that applied during that time, see *David/Brierley*, 310–311.
[21] *David/Brierley*, 312.
[22] *Samuel,* 169, 170–171.
[23] *Glendon/Carozza/Picker,* 156.
[24] See eg *Samuel,* 169, 183–184.
[25] *David/Brierley*, 311.
[26] On the nature of these local courts, see *David/Brierley*, 312.

This council of royal advisors was called the *Curia Regis*.[27] It is from the *Curia Regis* that the three royal courts of justice at Westminster issued forth in the 13th century: the Court of Exchequer, the Court of Common Pleas, and the Court of King's Bench. At first, the jurisdiction of these centralised courts was limited, but gradually, their power and status increased. They were perceived as being more modern than the local courts, in particular with respect to procedure.[28] They were also equipped with more efficient instruments than the local courts, eg the power to enforce judgments and summon witnesses.[29]

594 The cases decided by the three royal courts gradually evolved into a coherent body of law which, unlike the local customs it came to replace, applied to the entire kingdom and was therefore *common* to all. It is this body of law that became the English *common law*,[30] and the courts which applied it were called the *common law courts*.

595 The common law was constructed by the common law courts on a case by case basis. The courts drew inspiration from different local customs as well as Roman and Canon law and reshaped those rules which they found appropriate to fit the needs of a medieval society.[31] Although the local customs existing in England in the 12th and 13th centuries were never formally abolished or replaced, they were gradually eclipsed by the common law. The development and expansion of the common law reached its height in the 13th century.[32]

b. "Law French"

596 The Norman Conquest also had a profound and lasting linguistic impact. Many words and phrases of the English language in general and of legal English in particular are rooted in the Anglo-Norman language that developed out of the French dialects spoken at William I's court.[33] For

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[27] See eg *David/Brierley*, 313; *Glendon/Carozza/Picker,* 157; *Ward/Akhtar (eds),* 225.
[28] See eg *Glendon/Carozza/Picker,* 157–8; *Harold Potter,* An Historical Introduction to English Law and its Institutions, 3rd edn, London 1948, 106.
[29] *David/Brierley*, 314.
[30] See eg *Samuel*, 169, 171.
[31] *David/Brierley,* 322–323.
[32] *David/Brierley,* 324.
[33] See *Winfield*, 8–12; *Rupert Haigh,* Legal English, 3rd edn, Milton Park 2012, 1; *Ishtla Singh*, The History of English, London 2005, 107; *Heikki*, 200–201, 222–229; *Elliott/Quinn*, 1–39.

many centuries, French was the language of the royal court and nobility and, in consequence, also of the royal administration, including the courts of law. The language used in the courts of law (see N 580) was called "Law French". Its use as the formal spoken language in court was abolished in the 14th century by the Pleading in English Act (1362) in order to ensure that parties involved in court proceedings understood what was being said(!). Henceforth, English was the language used in court, although a "degenerate" form of Law French continued to be used as a written language until the end of the 17th century.[34]

A much-quoted example of the curious mix of French and English terms 597 in use in legal writing until the 17th century is the following excerpt from Chief Justice Treby's Notes to Dyer's Reports regarding a prisoner who threw a stone at the judge, Sir Thomas Richardson. The prisoner missed, and the stone broke through the panelled wooden wall lining. For this act, the prisoner had his hand cut off and was then hanged. Or as Justice Treby put it:

Richardson, ch. Just. de C. Banc al Assises at Salisbury in Summer 1631. fuit assault per prisoner la condemne pur felony que puis son condemnation ject un Brickbat a le dit Justice que narrowly mist, & pur ceo immediately fuit Indictment drawn per Noy envers le Prisoner, & son dexter manus ampute & fix al Gibbet, sur que luy mesme immediatement hange in presence de Court.[35]

Many legal terms rooted in Law French are still in use today, eg *cestui* or 598 *cestui que* (ie the beneficiary of a trust; on the trust, see N 31), *chattel* (ie moveable goods), *torts* (ie delicts or wrongs), *voir dire* (ie the stage in the jury selection process in which potential jurors are subjected to extensive examination and questioning in order to disqualify all persons who give cause to doubt their impartiality; see also N 765),[36] *parole* (ie

[34] See *Frederic W Maitland,* Introduction to Volume 17 of the Selden Society, xxiii-lxxxix; *John Baker,* A Manual of Law French, 2nd edn, Aldershot 1990, 3; *Ruth Morris*, Great Mischief – An Historical Look at Language Legislation in Great Britain, in: Douglas A Kibbee (ed), Language Legislation and Linguistic Rights, Philadelphia 1988, 32, 48; *Heikki*, 200.

[35] For a reproduction of this anecdote, see eg *Richard Braybooke,* Memoirs of Samuel Pepys, 2nd edn, London 1828, 353. *Samuel Pepys* (1633-1703) was an English naval administrator and is considered one of the greatest diarists of the Western world. His diaries are still widely read today.

[36] See *Widmer,* 369.

the conditional release of a prisoner before his prison term has expired), *plaintiff* (ie claimant), *defendant,* and *attorney*.

c. The System of Writs

599 As pointed out above, the common law courts that developed in the 13th century did not, at first, have general jurisdiction; indeed, they only became "ordinary courts" in the 19th century.[37] Until then, in order to bring a case before the common law courts, the plaintiff had to apply for a so-called writ from the chancellor, who was a high-ranking official of the king. A writ was a formal written document issued in the King's name.[38] It consisted of a brief description of the matter in dispute and an order addressed to the responsible officials to summon the defendant and hear the case in court.[39] The case could only proceed before the royal courts if a writ was granted.

600 Each writ was issued in order to resolve a specific factual situation and were, at first, developed "to meet the particular circumstances of the particular cases without any studious respect for precedent"[40]. Typical situations which arose again and again, such as disputes regarding feudal claims to land, resulted in increasingly standardised writs,[41] each with their own particular formula. By the end of the 12th century, approximately 75 writs were in use.[42] They had assumed distinct forms with distinct names, eg the writ of right or the writ of debt. Registers of writs had formed.[43] Their number further increased further in the following two centuries,[44] and, with time, became a matter of routine.[45] In 1285, the Statute of Westminster restricted the invention of new writs by the Chancellor and his officers to circumstances similar to those already protected by existing writs ("*in consimili casu*").[46]

[37] *David/Brierley*, 315.
[38] *Widmer,* 49.
[39] *Zweigert/Kötz,* 184–185.
[40] *Maitland*, 16–32, available at ‹www.fordham.edu/halsall/basis/maitland-formsofaction.asp›, accessed 22 November 2013.
[41] See eg *Zweigert/Kötz,* 184–185.
[42] *Zweigert/Kötz,* 184.
[43] *Maitland,* 33–42.
[44] *Zweigert/Kötz,* 184.
[45] *Maitland*, 16.
[46] *Zweigert/Kötz,* 185; *David/Brierley*, 315–316.

Each writ started a distinct procedure, known as “forms of action”. If a plaintiff wished to seek redress in the royal courts, it was imperative that he know which form of action was proper for his claim. It was “not enough that in some way or another [the plaintiff] should compel his adversary to appear in court and should then state in the words that naturally occur[ed] to him the facts on which he relies and the remedy to which he thinks himself entitled.”[47] English law was based on the forms of action, and the plaintiff had to choose the appropriate form of action before applying for the writ to commence the action. This choice was of the utmost importance, for each form of action had its own particular rules of procedure attached to it.[48] If the plaintiff’s case did not fit within a form of action, his case would not be able to proceed before the royal courts (“where there is no writ, there is no right”;[49] *non potest quis sine brevi agere*[50]). 601

The procedural differences between the forms of action were pronounced. They related, eg, to questions such as the type of trial (eg by jury; by a judge without a jury; by battle; by wager of law, which required a certain number of witnesses to attest to the defendant’s credibility[51]), the availability of a judgment by default, ie if the defendant failed to appear in court (default judgments in some actions, not available in others), or the form of execution of a judgment. For the most part of English legal history, the main focus of lawyers was therefore on *procedural* issues rather than on substantive law. This emphasis on procedure finds its expression in the adage “Remedies precede rights”.[52] 602

This emphasis on procedure has had a great impact on the development of the common law and on the way lawyers from common law jurisdictions think. Because of the writ-system, substantive law, ie the law granting a person rights, the starting point for lawyers from civil law jurisdictions, developed more as an "afterthought" in the common law tradition: "So great is the ascendency of the Law of Actions in the infancy of the 603

[47] *Maitland*, 1–2.
[48] See eg *David/Brierley*, 316.
[49] See *Glendon/Carozza/Picker,* 158.
[50] *Henry Campell Black (ed),* A Law Dictionary, Ancient and Modern, 2nd edn, New Jersey 1995, 827.
[51] *David/Brierley*, 316.
[52] *David/Brierley*, 316.

Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure"[53]

604 In a lecture series on the forms of action given at the beginning of the 20th century, the great English legal historian *Frederic William Maitland* (1850-1906) pointed out that the "substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law, and it is with great caution that we may argue from what is found in one to what will probably be found in another [...] It is quite possible that a litigant will find that his case will fit some two or three of these pigeon-holes. If that be so he will have a choice [...] [H]e may make a bad choice, fail in his action, and take such comfort as he can from the hints of the judges that another form of action might have been more successful. [...] Lastly he may find that plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that *where there is no remedy there is no wrong*."[54]

605 The writ-system also had a lasting impact on legal education in England (see N 687–694). The procedural intricacies which developed throughout the centuries were not based on any apparent system of reason or logic. Learning to apply them required, more than anything, "training on the job", ie a highly practical legal education in the hands of experienced practitioners and directed toward applying the law. The lack of university courses in English (as opposed to Roman) law up until the late 18th century[55] is certainly no coincidence.

606 The forms of action were abolished through a series of reforms in the 19th century (see N 614). Nowadays, the focus in lawsuits in common law jurisdictions is on substantive law, no less than is the case in civil law jurisdictions. Nonetheless, many areas of law cannot be grasped without an appreciation of the writ-system.[56] It is, for example, a consequence of the writ-system that there is no general principle of tort law, but rather a collection of torts which issued forth from diverse forms of

53 *Henry Maine,* Early Law and Custom, London 1890, 389.
54 *Maitland*, 4 (emphasis added).
55 Cf *David/Brierley*, 338–339.
56 See also *David/Brierley*, 317.

action with different goals, requirements and remedies.[57] Also, the style of reasoning typical of lawyers from common law jurisdictions is firmly rooted in the system of writs. Characteristic of this style is a preference for the practical and concrete over the abstract, a distaste for generalisations and a focus on inductive reasoning (ie reasoning from case to case) rather than deductive reasoning (see N 612).

d. Common Law and Equity

By the end of the 14th century, the rigidity of the writ-system had reached its peak. Procedures in the common law courts had become increasingly formalistic; success or failure in court was often determined by procedural technicalities rather than by the merits of the case.[58] Increasingly, plaintiffs who were unable to obtain redress in the common law courts turned to the king in the hope of finding relief, either because their case did not fall within any of the available forms of action or because they had not been successful in the common law courts. The plaintiff would petition the king's chancellor to grant a remedy and the chancellor would decide whether to intervene on the plaintiff's behalf. At first, the chancellor's function was not considered to be legal in nature. Up until Thomas More's appointment as Chancellor in 1529,[59] the Chancellor was not a lawyer, but a clergyman and the king's confessor. His decisions were not based on the common law, but on general principles of fairness and justice. His decisions were free of the procedural constrictions of the writ-system. 607

In the beginning, interventions by the chancellor were exceptional. With time, however, proceedings before the chancellor became more frequent, and his decisions evolved into a set of rules and doctrines. By the 15th century, equity had developed into a distinct body of law which corrected and complemented the severity and rigidity of the common law, and the chancellor started to operate as an actual judge, with his staff as a court.[60] This led to increasing rivalry and resistance from the common law courts and also from parliament, which was finally resolved in the 608

57 *Widmer,* 50; *Rogers,* Winfield and Jolowicz on Tort, para 2-3; see also *David/Brierley*, 320–321; *Ward/Akhtar (eds)*, 1–2.
58 See eg *Glendon/Carozza/Picker,* 161–162.
59 *Zweigert/Kötz,* 185; *David/Brierley*, 325.
60 *David/Brierley*, 325.

17th century.[61] One of the principles that govern the relationship between common law and equity stems from this time, namely the principle that in case of any conflict between the common law and equity, equity will prevail (see N 624).

609 From the beginning, equity proceedings followed their own set of procedural rules. These were entirely distinct from those governing the common law forms of action. In particular, cases were not submitted to a jury, and the procedure was usually written rather than oral.[62] To this day, the United States Constitution restricts the right to a jury trial to "suits *at common law*",[63] as opposed to "suits *in equity*" (see N 622).

610 Until the 19th century, the distinction between "equity" and "law" (ie the common law developed by the common law courts) was of primary importance, as only the court of chancery was entitled to apply the rules of equity. If a plaintiff sought an equitable remedy, he had to apply to the court of chancery. The Judicature Acts (1873-1891; see N 614) fused the administration of the two branches of law; henceforth, they could be applied by any court.[64] Nonetheless, the distinction between the two is still important, and different rules govern their relationship (see N 607–609).Today, equity is an integral part of English law, no less than the common law itself is (N 622).

e. The English (Resistance against the) Codification Movement

611 In the 19th century, calls for a continental-style code were raised by advocates of the English codification movement, led by the influential philosopher, lawyer and social reformer *Jeremy Bentham* (1748-1832). *Bentham*, who is considered to be the founder of modern utilitarianism, proposed to implement the principle of the greatest happiness of the greatest number through codification.[65] According to *Bentham,* English law was a "fathomless and boundless chaos made up of fictions, tautology and inconsistency," and the administration of English law "a system of exquisitely contrived chicanery which maximized delay and denial of

[61] On the compromise between law and equity, see eg *David/Brierley*, 326–328.
[62] *David/Brierley*, 326.
[63] 7th amendment; see eg *Widmer*, 364–365.
[64] *Zweigert/Kötz,* 199.
[65] See eg *Weiss,* 25 Yale J Int'l L 435, 476 (2000).

justice."[66] Much of his criticism was directed at the work of Sir *William Blackstone* (1723-1780), a famous English judge, politician and author of the standard legal treatise on the common law in the 18th century, the "Commentaries on the Laws of England". The Commentaries strove to give a systematic overview of the existing English law, and it was this conservative focus on the existing law that *Bentham* found unacceptable.[67]

Although *Bentham*'s critique of English law led to the enactment of a many important law reforms after his lifetime (see N 614),the English codification movement remained unsuccessful. This is due to a number of factors: firstly, the development of a unified, ie "common" law out of the decisions of the common law courts at a much earlier time than on the Continent. One of the main motors of the codification movement was the lack of a unified law within the boundaries of the new nation states. In England, the practical need for such unification had already been met by the case law of the centralised royal courts. Secondly, the English law's "almost total domination by procedure"[68] and, in consequence, the strong influence of practicing lawyers in the history of the common law were not conducive to the idea of codification. The codification movement was shaped primarily by university scholars who had studied Roman law and were interested in developing a coherent, "logical" system of law. In contrast, in England, the law was the domain of practitioners rather than scholars. This lack of scholarly influence is evidenced by the fact that, as pointed out earlier (N 605),there was no university training in English law up until the late 18th century.[69] All these factors contributed to English law's strong resistance to the codification movement and, in consequence, to all those factors typical of legal systems shaped by codes, ie general principles, abstract notions, deductive reasoning and a penchant for dogmatic systems and structures. 612

Bentham's attempts to ensure law reform through codification were not limited to England; indeed, he corresponded with many rulers throughout the world in order to convince them of the need for a utilitarian 613

[66] Citation taken from *Judson,* 10 Colum L Rev 41, 42 (1910).
[67] See eg *William Twining (ed),* Bentham: Selected Writings of John Dinwiddy, Stanford 2004, 52.
[68] *David/Brierley*, 338.
[69] Cf *Samuel,* 169, 187–188; *David/Brierley*, 338–339.

code.[70] In a famous letter to the American President *James Madison* in 1811, he proposed to draft a code and thereby free the American people from "that mass of foreign [ie English] law, the yoke of which, in the *wordless*, as well as boundless, and shapeless shape of *common*, alias *unwritten law*, remains still about your necks". His offer was politely, but firmly declined (on the US-American codification movement, see N 703–704).[71]

f. Developments in the 19th century

614 Although *Bentham*'s attempts to reform the common law through codification were unsuccessful, many of the fundamental law reforms enacted in England were the result of his visionary efforts.[72] A series of reforms called the Judicature Acts (1873-1891) reorganised the superior English courts and overhauled procedural law. These reforms established the new Supreme Court of Judicature, which was made up of the High Court of Justice and the Court of Appeal, abolished the writ-system and brought about the procedural fusion of law (see N 622) and equity. Although law and equity remained separate bodies of law, they could henceforth be applied by all courts.[73]

615 Rapid changes in society brought about by the Industrial Revolution also led to important changes in substantive law, many of which were introduced by statute. Unlike continental codes, however, these statutes did not attempt to order the law comprehensively, rationally and systematically. They had a more modest aim, namely either to depict *existing* case law on a particular subject so as to make it more accessible (so-called "codifying statutes") or to modify selected aspects of case law.[74] The main area of legislative activity was commercial law, which, as we have already seen (N 56–58), gained increasing importance in the 19th century.[75] Examples of such statutes are the Bills of Exchange Act 1882,

[70] See *Weiss,* 25 Yale J Int'l L 435, 476 (2000).
[71] See *Francis M Burdick*, A Revival of Codification, 10 Colum L Rev 118 (1910).
[72] See generally *Judson,* 10 Colum L Rev 41 (1910).
[73] See eg *Zweigert/Kötz,* 198–200; *Bailey/Ching/Taylor*, para 1-007; *Ward/Akhtar (eds)* , 1–2.
[74] *Zweigert/Kötz,* 200.
[75] Cf *Grant Gilmore,* On the Difficulties of Codifying Commercial Law, 57 Yale L J 1341, 1342 (1948).

which is still in force today, and the Sale of Goods Act 1893, the predecessor of today's Sale of Goods Act 1979.

3. The British Empire (1583-1914)

Unlike the civil law, which has also been received in countries with no historical ties to civil law systems (see N 261, 395),[76] all common law systems have some kind of bond with England and, in particular, with the British Empire. This has less to do with any intrinsic advantages of the civil law than with the fact that codes are far easier to receive than "a matrix of case law and statutes" and the language of the common law is more complex.[77] 616

The Empire's attitude towards the pre-existing local laws, customs and institutions of its colonies depended on the type of colony involved. *Blackstone* (see N 611) distinguished between "conquered or ceded" colonies, on the one hand, and "settled" colonies, on the other. In those colonies within the first category, the previous laws and customs generally remained in effect until changed by the British government. The law applied within these colonies was a "potpourri" or "patchwork" of law, "ranging from predominantly English law, through mixed systems, to informal or customary law".[78] "Settled" colonies were those which the British government did not recognise as "civilized", eg Australia, New Zealand, or North America.[79] Indigenous laws in these areas were either ignored or erased.[80] 617

Even this very simplified account shows that the legal landscape in the colonies of the British Empire was extremely varied and complex. This complexity also explains why it was in England that the call for a unified commercial law was first raised (see N 57). A certain unifying effect was achieved through the case law of the Judicial Committee of the Privy 618

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[76] *Glendon/Carozza/Picker,* 174.
[77] *Glendon/Carozza/Picker,* 174.
[78] *John MacLaren,* Colonial Administration and Law, in: The New Oxford Companion to Law, Oxford 2009 (online version), available at ‹www.oxfordreference.com/view/10.1093/acref/9780199290543.001.0001/acref-9780199290543-e-337›, accessed 22 November 2013.
[79] See *Glendon/Carozza/Picker,* 175–176.
[80] *John MacLaren,* Colonial Administration and Law, in: The New Oxford Companion to Law, Oxford 2009 (see fn 78).

Council, which was established in 1833 (see N 588). The Privy Council was the highest appellate court for the entire British Empire (except for the United Kingdom itself; see N 57). Its decisions led to the development of an "imperial common law" which influenced the legal systems of the colonies.[81]

II. Characteristics of Common Law Systems

A. Overview

619 In our historical overview, we saw that case law is a central and defining feature in the development of the common law. To this day, case law, not written law, is the typical starting point for legal reasoning in the common law. However, since the 20th century, legislation has become more and more dominant in common law systems. This is true in England, but especially so in the USA. Large areas of law that are still predominantly case law in England have been the object of legislation in the USA. Thus, all US states have passed statutes on criminal law, on family law and on inheritance law, whereas these areas are still governed by case law in England. Some US states have even enacted actual codes, although we will see that these differ from their civil-law counterparts (see N 703). Case law, however, still remains dominant in important areas of US private law, eg contracts and torts.[82] Despite the increase in legislation, we will see that the common law lawyer's approach to written law differs from that in civil law systems in a number of respects.

620 The division of law into public and private law is characteristic of civil law countries (see N 416). In countries belonging to the common law family, other categories have traditionally been much more important. Not surprisingly, given the common law's historical development, the division between substantive law and so-called adjective or adjectival law, ie the law of procedure and evidence, has always been central.[83] The

[81] Cf *Helmut Janssen*, Die Übertragung von Rechtsvorstellungen auf fremde Kulturen am Beispiel des englischen Kolonialrechts, Tubingen 2000, 16–17; *Roberts-Wray*, 572–575.
[82] See *von Mehren/Murray,* 46–47.
[83] See eg *Tetley,* 60 La L Rev 677, 707 (2000); *Farnsworth/Sheppard,* 105–106.

same applies to the division between common law and equity, which is as familiar to common law students as the public law-private law dichotomy is to civil law students. To this day, distinguishing between the categories of "private law" and "public law" is of little practical importance in US law, especially as US courts can apply both.[84] This also used to be the case in England. This started to change, however, during the early 20th century, and increasingly so with the accession of the UK to the European Economic Community. Since the 1980s, public law has been recognised as a distinct branch of law.[85]

B. Sources of Law

1. In General

The sources of law in common law jurisdictions are: case law (including equity), written law (legislation), and custom. Although scholarly writings may enjoy a certain authority,[86] they do not constitute a source of law. 621

2. Case Law

a. Common Law and Equity

As discussed earlier (N 607–608), the distinction between equity and common law has historical roots. Today, equity is an integral part of the law. In most common law jurisdictions, equity and common law (or "law" for short) can be administered by the same courts (see N 679). Despite this procedural fusion, law and equity remain two separate bodies of law, although the practical impact of the distinction differs between countries. In the USA, it retains particular importance, as the right to a jury trial is generally limited to suits at common law (see N 609). 622

[84] See *von Mehren/Murray,* 106–108.

[85] See eg the entry for "common law" in the Encyclopædia Britannica, online version available at ‹www.britannica.com›, accessed 22 November 2013). On English public law, see eg *David Feldman,* English Public Law, 2nd edn, Oxford 2009. See generally also *Glendon/Carozza/Picker,* 305–307.

[86] See eg *Farnsworth/Sheppard,* 91ff.

623 Remedies developed in equity ("equitable remedies") are terminologically distinguished from those which originated in the common law courts ("legal remedies"). *Legal* remedies are typically limited to damages, whereas *equitable* remedies include specific performance (ie a court order requiring a party to perform a contractual obligation) and injunctions (ie a court order requiring a party to do something or to refrain from doing something).

624 Although equity is a body of law, its primary function is still to complement and correct the common law, and the relationship between the two is governed by different rules. Thus, equitable remedies are only available if the legal remedy (ie the remedy at common law) is inadequate.[87] In case of conflict between the rules of equity and the rules of common law, equity will prevail.[88]

b. Doctrine of Binding Precedent

625 Every modern legal system endeavours to ensure legal certainty and consistency. The law cannot change at a whim, and those affected by the law must be able to rely on it. Judges do not only decide individual disputes, but must also provide certainty for the future as to what the law is. At the same time, there must be room for adapting the law to changing needs and circumstances. In common law jurisdictions, these concerns for consistency and flexibility are addressed by the doctrine of binding precedent.[89] The doctrine is also known as *stare decisis (et non quieta movere),* which means that one must stand by decisions and not disturb settled points of law.[90] Only the decisions of higher courts can become binding precedent. The doctrine also applies to decisions in which statutes are applied.[91]

626 Under the doctrine of binding precedent, a court must abide by earlier decisions ("precedents") of higher courts in the same jurisdiction, which

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87 See eg *Farnsworth/Sheppard,* 105; *Alastair Hudson,* Equity and Trusts, 7th edn, London 2013, 1168; *Sarah Worthington,* Equity, 2 edn, Oxford 2006, 11.

88 See eg section 49(1) of the Senior Courts Act 1981; *Philip H Pettit,* Equity and the Law of Trusts, 11th edn, Oxford 2009, 8 (England and Wales); *William Weldon*, Equity in its Relations to Common Law: A Study in Legal Development, Boston 1917, 5.

89 See generally *Bailey/Ching/Taylor,* para 7-001.

90 See eg *Farnsworth/Sheppard,* 58.

91 See *von Mehren/Murray,* 15.

is why it is so important to understand the structure of the judiciary in common law jurisdictions. Some common law courts must even follow their own decisions, eg the English Court of Appeal (see N 680).[92] However, previous decisions are only binding if the facts of the case are sufficiently similar ("on all fours"). If the facts of the case before the court are materially different from those in the previous decision, the cases will be "distinguished", meaning that the previous decision will not apply. As each case has a unique set of facts, the crucial question is whether the difference in facts is material or not. In order to decide, the court will need to determine the so-called "*ratio decidendi*", or "holding", of the previous case.[93] The *ratio decidendi* is the reason for the decision, ie the legal proposition that was necessary for the court's decision.[94]

The *ratio decidendi* of a case is always a rule of *law*. Mere *factual* conclusions can never become binding precedent. Accordingly, it is important to distinguish between law and fact, a line which is not always easy to draw.[95] However, because of the technique of distinguishing, the analysis of the facts of the case is of crucial importance to the doctrine of binding precedent. Not surprisingly, common law decisions usually contain lengthy and detailed descriptions of the facts, much more so than is common in civil law jurisdictions. This traditional focus on facts also explains why common law judges are sometimes described as professional storytellers[96] – something their colleagues in civil law jurisdictions are unlikely ever to hear. 627

The technique of distinguishing shows that the doctrine of binding precedent is flexible, for whether or not the facts of a case are sufficiently similar or not is a matter of argumentation.[97] There is also no general consensus on how to determine what the ratio of a case actually is, and this, again, leaves room for interpretation and flexibility. Searching for the ratio of a case has been likened to the search for the holy grail.[98] The difficulty of the task will depend on the form of judgment. Traditionally, common law courts do not produce single, composite judgments, unlike 628

92 See generally *von Mehren/Murray,* 9–10.
93 The term "*ratio decidendi*" is common in England, whereas "holding" is more commonly used in the USA; see *Farnsworth/Sheppard,* 62.
94 *Farnsworth/Sheppard,* 62; *Bailey/Ching/Taylor,* para 7-001.
95 *Widmer,* 10; *Bailey/Ching/Taylor,* para 7-002.
96 See *Tony Weir,* An Introduction to Tort Law, 2nd edn, Oxford 2006, 6.
97 Cf *Widmer,* 9.
98 *Bailey/Ching/Taylor,* para 7-008.

courts in civil law jurisdictions. Instead, each judge sitting on the case may present his or her own individual legal reasoning (called an "opinion"), and this opinion may or may not be the same as the opinions of the other judges. Even if all the judges reach the same conclusion, their legal reasoning may be very different. If the majority agrees on the same legal reasoning, it will be easier for later courts to determine what the ratio of the decision was. Opinions of judges who agree with the decision of the majority sitting on the case, but for different legal reasons, are called concurring opinions.[99]

629 In some common law jurisdictions, courts have started to produce a so-called "opinion of the court", ie a single, composite judgment supported by the majority and presented by one of the judges. This is common in the highest appellate courts in the USA, where judgments will often begin with a sentence such as the following: "Justice Stevens delivered the opinion of the Court (…)".[100] Only the opinions of the minority judges (so-called dissenting opinions) will be individualised.[101] In England, "opinions of the court" are still the exception, although the Court of Appeal especially has shown an increasing tendency to deliver a single "opinion of the court".[102] This practice has met with criticism. It is a shift in the direction of the civil law family, where courts traditionally hand down anonymous, collective judgments.[103]

630 In civil law jurisdictions, dissenting opinions, ie open disagreement in judicial decisions, are considered to undermine the public's confidence in the law. The common law's view is different. Dissenting opinions are a prominent feature of the common law tradition. As a former judge on the High Court of Australia said: "The demand by observers for unanimity amongst judges is often infantile. If it is an insistence that judges

99 For an example, see *Herskovits v Group Health Cooperative of Puget Sound* 99 Wash 2d 609, 664 P2d 474 (1983), in which Justice Pearson stated: "I agree with the majority that the trial court erred in granting (...) summary judgment. I cannot, however, agree with the majority's reasoning in reaching this decision"; this passage is reprinted in *Widmer,* 262.

100 See eg *BMW v Gore* 116 S Ct 1589 (1996); *Widmer,* 11.

101 For an example of a dissenting opinion, see *Chester v Afshar* [2004] UKHL 41, [2004] 3 WLR 927, excerpts reprinted in *Widmer,* 216, 223, 224 (dissenting opinions of Lord Bingham of Cornhill and Lord Hoffmann).

102 See *Bailey/Ching/Taylor,* para 2-071.

103 See *Roderick Munday,* "All for One and One for All:" The Rise to Prominence of the Composite Judgment Within the Civil Division of the Court of Appeal, 61 CLJ 321–350 (2002); *id,* Judicial Configurations, 61 CLJ 612–656 (2002).

hide their disagreements from the public they serve, it denies the ultimate sovereign, the people, the right to evaluate, and criticise, judicial choices. Pretending that everything is certain in the law, and that judges simply operate on automatic pilot, will deceive relatively few."[104]

Not all precedents carry the same weight, even if they are binding. Dis- 631
senting and concurring opinions may weaken the authority of a precedent; conversely, the prominence of the court that created the precedent may strengthen it, and the opinions of renowned judges will generally carry more weight. Precedents are also weakened if the decision is based on not only one, but on several different legal grounds (so-called "multi-legged holdings").[105]

Unlike binding precedent, judges are free to follow persuasive precedent. 632
Persuasive precedent includes *obiter dicta,* ie additional comments on and illustrations of the law included in the judges' opinions that were not actually necessary to their decision.[106] The distinction between the actual holding of a case and mere obiter dicta is not always clear cut and leaves additional room for flexibility. Persuasive precedent also comprises decisions of courts lower down in the judicial hierarchy as well as decisions of courts from other jurisdictions.[107]

In exceptional circumstances, a court may refuse to follow precedent. 633
This is called "overruling". However, it will do so only if circumstances have changed considerably, for example if the previous decision is extremely old, or if the legal rule adopted in the previous case is recognised as being clearly wrong.[108] Generally, courts will try to distinguish the previous decision rather than overrule it outright.[109]

c. Style of Cases

The style of common law decisions is quite distinct from the civil law 634
tradition. First of all, the facts of the case are often described at much

[104] *Michael Kirby*, Change: The Importance of Dissent, address delivered at James Cook University, Cairns, on 26 February 2005, available at ‹www.michaelkirby.com.au›, accessed 22 November 2013.
[105] See *Farnsworth/Sheppard,* 60–61, 65–66.
[106] See eg *Farnsworth/Sheppard,* 62–63.
[107] *Widmer,* 12.
[108] See *Widmer,* 13.
[109] See eg *Farnsworth/Sheppard,* 65.

more length, in much more detail and often in much more dramatic terms. This is a natural consequence of the doctrine of binding precedent, for it is the factual analysis that will show whether there is a precedent for the case or not (see N 628, 680).

635 The fact that common law courts do not produce a single, composite judgment also has a strong impact on the style of case law. The word "opinion" (see N 628) illustrates that the law is openly recognised as precisely that – an *opinion.* The judges express their personal view of the law, and in consequence, sentences including the words "I think", "I believe", or "in my opinion" can often be found in common law decisions.[110] This would be unthinkable in civil law jurisdictions. The opinions of the individual judges can be very short or very long; there are no formal restrictions. Accordingly, decisions will often be very long, unless the court produces an "opinion of the court".

636 The personality and reputation of the individual judges carry much more weight in common law jurisdictions. The more renowned the judge, the more authority they will have. Their names and views will be familiar to lawyers, law students and even the general public. Examples of particularly prominent judges are US Supreme Court justice *Oliver Wendell Holmes* (1841-1935), *Benjamin Nathan Cardozo* (1870-1938), judge on the NY Court of Appeals and later member of the US Supreme Court, *Learned Hand* (1872-1961), judge on the District Court for the Southern District of New York and later on the Court of Appeals for the Second Circuit, *Lord Alfred Denning* (1899-1999), Master of the Rolls (see N 674) of the English Court of Appeal, and *Thomas Bingham, Baron Bingham of Cornhill* (1933-2010), Master of the Rolls, Lord Chief Justice and later Lord of Appeal in Ordinary (see N 666) on the House of Lords.

d. Law Reporting

637 A system that relies on precedent as a source of law needs to ensure that precedents are readily accessible.[111] Accordingly, all common law coun-

[110] See eg *Sayers v Harlow Urban District Council* [1958] 1 WLR 623, [1958] 2 All ER 342, per Lord Evershed: "I cannot (…) think that [the claimant] could be condemned for having failed to see from the very start that the whole thing was impossible"; passage reprinted in *Widmer,* 43, 44–45.

[111] On the history of law reporting, see *Bailey/Ching/Taylor,* para 7-039.

tries have a system of law reporting. Law reports (or reporters) are written compilations of the cases of the higher courts published in book form. Law reports can be official or unofficial. Official law reports are either published by the courts themselves (eg the United States Reports in which the decisions of the US Supreme Court are published) or revised by the judges prior to publication (eg the Law Reports published by the Incorporated Council of Law Reporting for England and Wales, ICLR). Unofficial law reports are those published by private entreprises without prior review by the judges.

In England and Wales, only the most important cases are included in law 638
reports. About 2,500 decisions (less than 2% of all decisions) are published each year, of which the majority are handed down by the Supreme Court and the Court of Appeal.[112] All unreported cases decided by the Supreme Court and the Court of Appeal since 1980 are available on LexisNexis.[113]

Unlike in England and Wales, many appellate courts in the USA have 639
their own official reporters in which their decisions are published. Many cases can also be retrieved from the court's websites. The most important unofficial reporters are published in the National Reporter System of West publishing company, which includes reporters for both state cases and federal cases. West's regional reporters cover different geographical areas of the USA, and there are also special sets for federal cases.[114]

In recent years, several countries have introduced so-called neutral cita- 640
tion systems in order to facilitate the retrieval of cases of the higher courts on the internet.[115] Neutral citations are assigned to each case by the court handing down the decision; they do not refer to published law reports.[116] Cases with neutral citations are available online from official

[112] See ‹www.law.ox.ac.uk/lrsp/overview/law_reports.php›, accessed 22 November 2013.
[113] *Bailey/Ching/Taylor,* para 7-037.
[114] See *Farnsworth/Sheppard,* 55–56.
[115] Eg the UK (see ‹www.bailii.org›), Australia (see ‹www.austlii.edu.au›), New Zealand (see ‹www.nzlii.org›), all websites accessed 22 November 2013.
[116] See *Widmer,* 4–15.

websites.[117] A great many cases can also be retrieved from computerised databases such as LexisNexis and Westlaw.

3. Legislation

641 As already pointed out, written laws play an extremely important role in modern-day common law systems. Nonetheless, there are still important differences between common law and civil law systems with respect to legislation.

642 A first important difference relates to the purpose of legislation. Written laws in common law jurisdictions are often simply a compilation of rules previously developed by the courts, ie an expression of case law. Sometimes legislation is even passed with the sole objective of modifying selected aspects of case law.[118]

643 The style and structure of legislation in common law jurisdictions are also quite different. Acts of legislation generally begin with a so-called definition section, in which terms used in the Act are defined. Abstract, general principles, the hallmark of civil law codes, are extremely rare in common law legislation. Precision is valued much higher than elegance of expression, and if precision can only be achieved through inordinately long, detailed and complex provisions, then that is a price the common law is willing to pay: "Civil law codes and statutes are concise (*le style français*), while common law statutes are precise (*le style anglais*). Common law statutes (…) provide detailed definitions, and each specific rule sets out lengthy enumerations of specific applications or exceptions (…)."[119] This difference in style has to do with the fact that in the common law tradition, case law is the rule, and written law is the exception. Despite the vast quantity of written laws in today's common law jurisdictions, this traditional outlook still permeates legal thinking, both in practice and in legal education. Cases, not statutes are the starting point for discussing, arguing and developing the law.

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[117] See the references in fn 115, above. For the UK, see generally *Bailey/Ching/Taylor,* para 7-039.
[118] An example of this type of legislation is the British Compensation Act 2006, which effectively reversed the ruling of the House of Lords in *Barker v Corus* [2006] UKHL 20, [2006] 2 WLR 1027; see *Widmer,* 241–242.
[119] *Tetley,* 60 La L Rev 677, 703 (2000); see *Widmer,* 30–31.

Because the common law tradition is a case law tradition, inductive reasoning comes more naturally to the common law lawyer. Written laws are often regarded as a simple expression of case law, and even where this is not the case, they will generally have more authority once they have become the object of judicial decisions. Statutes are generally read and interpreted against a background of case law.[120] 644

The interpretation of statutes in common law has changed over time. Whilst the body of statutory law was still comparatively small, common law judges were willing to interpret statutes quite broadly, by taking the statutory purpose into account. Thus, the so-called “mischief rule” established in the 16th century allowed judges to consider the “mischief” which the statute meant to remedy, ie the statute’s purpose.[121] In the 18th and 19th centuries, however, statutes began to increase and the judges’ outlook became more conservative. As statutes were perceived as interfering with case law, the courts started to take a literal approach toward interpretation. Under the so-called “literal rule” (also: “plain-meaning rule”) which became dominant during this time, a statute only applies if the case is covered by the precise words used in a statute. This approach precluded any reasoning based on analogy or the purpose of the act.[122] The literal rule has since been tempered, and other rules have developed, allowing the courts, once more, to take legislative intention into account. However, several questions remain controversial, such as the extent to which legislative materials may be relied upon.[123] 645

4. Custom

Traditionally, custom is also considered a source of law in common law jurisdictions. However, it is only recognised as law under restrictive conditions, and accordingly has little practical importance (see also N 687).[124] 646

120 *Tetley,* 60 La L Rev 677, 704–705 (2000).
121 See eg *Bailey/Ching/Taylor,* para 6-005.
122 See for English law *Bailey/Ching/Taylor,* para 6-006; for US-American law, see *Farnsworth/Sheppard,* 84.
123 See generally *Farnsworth/Sheppard,* 83ff; *Bailey/Ching/Taylor,* paras 6-001ff. For a comprehensive discussion, see *Francis AR Bennion,* Statutory Interpretation, 6th edn, London 2014.
124 See generally *Glendon/Carozza/Picker,* 284.

C. Civil Procedure

647 Questions of procedure and evidence have always enjoyed particular importance in the common law tradition. This is a consequence of the writ-system, with its particular emphasis on procedural issues, and also of the fact that practitioners have had much more influence on the development of the common law than law professors (see N 689).

648 Procedural law in common law jurisdictions differs in may respects from the civil law tradition. First of all, civil procedure in the common law system is based on the so-called *adversarial* (or *adversary*) model, whereas the civil law model is *inquisitorial*.[125] The distinction has to do with the roles attributed to the judge and the lawyers in court proceedings. In inquisitorial systems, the judge takes a much more active part in shaping the proceedings. Thus, it is the judge, and not the lawyers, who takes evidence, questions the witnesses and inquires into the merits of the case. In contrast, in the adversarial model, the judge has a much more passive role. Here, it is the lawyers who control and shape the proceedings, and accordingly, they carry more responsibility.[126] The underlying assumption is that the truth can best be found through presentation by the "adversaries", ie the parties.[127]

649 A characteristic feature of the adversarial model is that both parties are required to disclose the existence of documents that might be material to the outcome of the case and to allow the other party to inspect them. The idea is that the merits of the case, and not access to evidence, should decide the outcome. If both parties have equal access to the evidence, they will be placed on an equal footing, although certain documents may be privileged. The legal process for obtaining such information is called "disclosure" (England) or "discovery" (USA).[128]

650 Although all common law jurisdictions are based on the adversarial model, US-American civil procedure has many special features that distinguish it from other members of the common law family – most nota-

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[125] See eg *Bailey/Ching/Taylor,* para 15-002; *Friedenthal/Kane/Miller*, 2.
[126] See eg *Friedenthal/Kane/Miller*, 2–3.
[127] *Widmer,* 362.
[128] For a detailed discussion of discovery in US-American law, see *Friedenthal/Kane/Miller*, chapter 7; for English law, see *Paul Matthews/Hodge M Malek,* Disclosure, 4th edn, London 2012.

bly, the jury trial. The jury trial has had a great impact on US-American civil procedure, unlike in most other common law jurisdictions, where the role of the jury in private law today is negligible.[129] Also, US-American civil procedure includes many mechanisms that encourage, rather than discourage litigation, eg class actions and the so-called American rule on cost distribution. We will explore these particular aspects of civil procedure in the chapter on US-American law (N 768–769). However, US-American procedural law has also impacted other common law jurisdictions. Thus, although pure American-style class actions are not available in jurisdictions outside the USA, many common law and also civil law jurisdictions have introduced modified types of group action.[130]

III. The English Legal System

A. A Note on Terminology

The United Kingdom is made up of not only one, but three different legal systems: the English legal system, the Scottish legal system and the legal system of Northern Ireland. Only the legal systems of England and Wales and Northern Ireland belong to the common law tradition. Scottish law is a so-called hybrid (or "mixed") legal system, displaying elements of both the common law and civil law traditions. It is important to keep this in mind when talking about common law systems, especially in the context of comparative law. In particular, the term "English law" refers only to the law applied in England and Wales (but see N 655 on devolution). The law applied in common law jurisdictions outside England is not "English" law;[131] "English law" and "common law" are not synonyms. 651

[129] In England, for example, jury trials in private (as opposed to criminal) law disputes are generally restricted to cases of libel and slander; see *Bailey/Ching/Taylor,* para 15-007; see also *Richard Mullender,* Defamation, the Jury and the Pursuit of Justice, 60 CLJ 441–492 (2001).

[130] See *Widmer,* 378, with further references. For a detailed comparative discussion of class-action type mechanisms in common law jurisdictions, see *Rachel Mulheron,* The Class Action in Common Law Legal Systems, Oxford 2004.

[131] See eg *Glendon/Carozza/Picker,* 171.

B. Political and Economic Framework of the United Kingdom

1. Introductory Remarks

652 As pointed out above, the UK comprises three different legal systems. Nonetheless, as these systems all belong to the same country, they share certain common features and are, to a large extent, subject to the same parameters. Thus, the Parliament of the United Kingdom passes laws that regularly apply to the entire country; EU law is applicable in all three systems; all three systems share the same highest court in civil (but not criminal) law matters, ie the Supreme Court of the United Kingdom, and all are influenced in equal measure by the decisions of the European Court of Justice and the European Court of Human Rights. We will therefore first consider the framework of the United Kingdom before turning our focus toward the English legal system in particular.

2. Political Structure

653 The United Kingdom is a constitutional (or parliamentary) monarchy and a member of the European Union. Legislative powers lie primarily with the Parliament of the United Kingdom (the "British Parliament"), situated at Westminster, London. The British Parliament is made up of two chambers ("houses"), ie the House of Commons and the House of Lords, and is headed by the Queen.

654 The United Kingdom does not have a single written constitution; nonetheless, it does have a set of rules set out in different statutes such as the Habeas Corpus Act, and decisions which together make up the uncodified British constitution. Accordingly, it is a matter of interpretation what the contents of the constitution actually are.[132] Three uncontroversial principles of the British constitution are:[133] (1) the separation of powers; (2) the supremacy of Parliament, from which it follows that courts may not invalidate an Act of Parliament (see N 683); and (3) the

[132] For a detailed discussion of British constitutional law, see *Vernon Bogdanor (ed), The British Constitution in the Twentieth Century, Oxford 2004; Matt Ovortrup (ed), The British Constitution: Continuity and Change – A Festschrift for Vernon Bogdanor, Oxford 2013.*

[133] See *Elliott/Quinn,* 2ff.

so-called "rule of law", which means, in particular, that the state must not exercise its powers arbitrarily, but according to agreed rules.[134]

Although the British Parliament is the supreme legislative body for the entire country, it has granted certain legislative powers to Scotland, Wales and Northern Ireland through statute (so-called devolution). The devolved parliaments, established through different Acts passed by the British Parliament in 1998[135] (ie the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly), and the respective governments of Scotland, Wales and Northern Ireland now have different degrees of autonomy to pass their own legislation.[136] However, the devolution of powers has not quietened calls for independence, especially in Scotland. In September 2014, the Scottish people will vote on whether Scotland should become an independent country.[137] 655

3. Economic Framework

The UK is the second largest economy in Europe. It has a population of over 61 million and, as per 2012, an estimated unemployment rate of 8%.[138] At 7.7% of the Gross Domestic Product (GDP) as per 2011 and an estimated 8.2% of GDP as per 2012, the budget deficit is high. In 2012, the GDP per capita was 38,514 USD.[139] The currency of the United Kingdom is the British pound (GBP); although the UK is member of the European Union, it has not joined the Economic and Monetary Union (EMU) and has therefore not adopted the Euro as its currency. 656

[134] *Elliott/Quinn,* 5 ; on the rule of law, see in particular *Tom Bingham,* The Rule of Law, London 2010.

[135] See the Scotland Act 1998; the Government of Wales Act 1998, and the Northern Ireland Act 1998.

[136] See generally *Russell Deacon*, Devolution in the United Kingdom, 2nd edn, Edinburgh 2012.

[137] See ‹www.scotreferendum.com›, accessed 22 November 2013.

[138] The facts in this section were retrieved from the CIA-Factbook of the World, ‹https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html›, the OECD country statistical profile of the UK, ‹http://stats.oecd.org›, and the World Bank open data collection, ‹http://data.worldbank.org›, all accessed 22 November 2013.

[139] See ‹http://data.worldbank.org/indicator/NY.GDP.PCAP.CD›, accessed 22 November 2013.

657 Because of the importance of its finance sector, the global financial crisis in 2008 hit the British economy hard, resulting in a deep recession that lasted until 2009. The economy is now slowly recovering.[140] The current government under David Cameron has initiated a series of controversial austerity measures in order to stimulate economic growth.

658 The driving forces in the British economy are trade and services, in particular finance and business services. These account for the largest proportion of GDP, while the importance of industry continues to decline. The UK's main trade partners are located in Europe (EU and Switzerland). Approximately 50% of the UK's exports of services and merchandise are destined for Europe and vice versa.[141]

4. Current Trends and Challenges in Society

659 Since the middle of the 20th century, British society has become increasingly diverse, both ethnically and religiously. Migrants from Ireland, the Caribbean and India were followed by migrants from Pakistan and Bangladesh and, since the 1980s, from Africa and China. The 2001 Census showed that the Indian population form the largest non-white ethnic group in the UK (over 1 million people, ie approximately 2% of the population), followed by the Pakistani population (over 700,000 people, ie 1.3% of the population). Muslims are the second largest religious group (over 1.5 million people, ie 2.8% of the population) after Christians.[142] According to official estimates for the year 2009, the number of people belonging to ethnic minorities has grown considerably since the 2001 Census.[143] In England and Wales, approximately 11% of the population

140 See Office for National Statistics, Economic Review, November 2013, available at ‹www.ons.gov.uk›, accessed 22 November 2013.

141 See the website of the Office of National Statistics, available at ‹www.ons.gov.uk›, and the WTO-publication "Trade Profiles 2013", available at ‹www.wto.org/english/res_e/publications_e/trade_profiles13_e.htm›, both accessed 22 November 2013.

142 See Office for National Statistics, Focus on Ethnicity and Religion, 2006 Edition, available at ‹www.ons.gov.uk›, accessed 22 November 2013. The report is based on the 2001 UK Census.

143 See Office for National Statistics, Population Estimates by Ethnic Group 2002-2009, available at ‹www.ons.gov.uk›, accessed 22 November 2013.

are estimated to belong to the so-called BAME (Black, Asian and Minority Ethnic) groups.[144]

Since the 1980s, the ethnic background of legal professionals has received increasing attention, and efforts are being made to facilitate access of BAME candidates to the legal profession[145] and, in particular, to increase the number of ethnic minority judges.[146] In 2011, approximately 11% of solicitors[147] (N 690) and 10% of practicing barristers[148] (N 690) in England and Wales were from ethnic minorities. In 2012, approximately 5% of judges were from BAME groups.[149] The social background of legal professionals in general, and judges in particular, has also received much attention in the past years.[150] 660

In recent years, the increase in the Muslim population has led to the spread of Islamic law in the UK, which is administered by local Sharia courts or councils. There is concern that an unofficial, unregulated parallel legal system is developing outside the public eye and unfettered by state control. Critics are especially worried that members of the Muslim population, in particular women, may not realise that they have other rights under English law, especially concerning divorce and custody of children, and that these courts are not real courts. In 2012, a bill was proposed by Baroness Cox, a member of the House of Lords, in order to ensure equality of law, prevent discrimination on grounds of sex, eg by treating the evidence of a man as worth more than the evidence of a woman, and to prevent any person from falsely claiming to exercise any of the powers of a court to make legally binding rulings, in particular in 661

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[144] See Ministry of Justice, Improving Judicial Diversity – Judicial Diversity Taskforce Annual Report, September 2012, 66. The report is available at ‹www.gov.uk/government/publications/improving-judicial-diversity-judicial-diversity-taskforce-annual-report›, accessed 22 November 2013.

[145] See *Bailey/Ching/Taylor,* para 3-050.

[146] For the 2012 report of the Ministry of Justice on judicial diversity, see above fn 144.On this issue, see also *Elliott/Quinn,* 163–165, 197–198.

[147] See the 2012 report of the Ministry of Justice on judicial diversity (see fn 144), 70. See also the annual statistical reports of the Law Society at ‹www.lawsociety.org.uk›, accessed 22 November 2013.

[148] See the 2012 report of the Ministry of Justice on judicial diversity (*supra* fn 144), 67. Cf also The Bar Council, Bar Barometer 2012: Trends in the Profile of the Bar, available at ‹www.barcouncil.org.uk›, accessed 22 November 2013.

[149] Cf the 2012 report of the Ministry of Justice on judicial diversity (*supra* fn 144), 72.

[150] *Elliott/Quinn,* 198–199.

family and criminal law matters.[151] The bill is still going through the legislative process.

C. Judicial System in the United Kingdom

1. Overview

a. Court System

662 The UK does not have a single unified court system. Each of the three legal systems in the UK (see N 777) has its own proper court system, ie the Courts of England and Wales, the Courts of Scotland and the Courts of Northern Ireland. In civil law matters, however, The Supreme Court of the United Kingdom (UKSC),[152] which is located in London, hears appeals from all three systems and is the highest appeal court in the country. In criminal law matters, The Supreme Court only hears appeals from England and Wales and Northern Ireland. In Scotland, the High Court of Justiciary is, as a rule, the supreme criminal court. Since April 2013, however, criminal cases from Scotland may also be appealed to The Supreme Court in so-called compatibility issues, ie cases involving an alleged breach of EU law or the European Convention on Human Rights.[153]

663 In general, parties in civil proceedings can only bring an appeal to The Supreme Court if they have received permission to do so. An application for permission to appeal must first be made to the court which handed down the judgment appealed from. If permission is denied by that court, leave to appeal can still be granted by The Supreme Court itself. However, there is no general right to appeal. Permission to appeal is granted if the case raises points of law of general public importance. Special rules apply for appeals from the Court of Session in Scotland.

[151] Arbitration and Mediation Services (Equality) Bill, available at ‹http://services.parliament.uk/bills/2012-13/arbitrationandmediationservicesequality.html›, accessed 22 November 2013.
[152] For the official website of The Supreme Court, see ‹www.supremecourt.gov.uk›, accessed 22 November 2013.
[153] Sections 34ff of the Scotland Act 2012.

Other than appeals in civil and criminal law matters, The Supreme Court also hears disputes concerning devolution issues, ie issues relating to the transfer of powers to the devolved governments in Scotland, Northern Ireland and Wales (on devolution, see N 655). Such issues were previously resolved by the Judicial Committee of the Privy Council (JCPC) (on the JCPC, see N 56, 589). 664

The Supreme Court decides around 80 to 90 cases each year.[154] Currently, there are twelve Supreme Court Justices. They usually sit in panels of five. Judges are appointed by the Queen on recommendation by the Prime Minister, who in turn must nominate the person proposed by a special selection commission.[155] They have life tenure, but can be removed in case of misbehaviour on the address of both Houses of Parliament.[156] Retirement is mandatory upon reaching the age of 70, or exceptionally 75, depending on the date of appointment 665

By unwritten convention, two of the twelve Justices are Scottish. Currently, there is only one female Supreme Court Justice, and no ethnic minorities are represented. In order to encourage more women and increase ethnic diversity, the law was recently modified. There must now no longer be exactly twelve judges, but simply the equivalent of twelve full-time judges, and where two candidates are of equal merit, the selection commission may prefer one over the other for the purpose of increasing diversity.[157] 666

The Supreme Court of the United Kingdom has only been in operation since October 2009, when it took over the judicial functions of the House of Lords. Until then, the highest appellate jurisdiction in the UK was exercised by the so-called Appellate Committee of the House of Lords.[158] The judges on the Appellate Committee received a life peerage and were 667

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[154] The Supreme Court publishes annual reports on, *inter alia*, the number of permissions to appeal applied for and granted or denied and the cases disposed of by judgment according to subject area, see ‹www.supremecourt.gov.uk/news/the-supreme-court-annual-report-and-accounts.html›, accessed 22 November 2013.

[155] Sections 26ff of the Constitutional Reform Act 2005.

[156] Section 33 of the Constitutional Reform Act 2005.

[157] Crime and Courts Act 2013, section 20 and schedule 13 part 1 (in force since 1 October 2013) and part 2 (in force since 15 July 2013).

[158] On the former judicial function of the House of Lords, see eg *Louis Jacques Blom-Cooper/Brice Dickson/Gavin Drewry (eds),* The Judicial House of Lords: 1876-2009, Oxford 2011.

called Lord (or Lady) of Appeal in Ordinary ("Law Lords").[159] The Supreme Court of the United Kingdom was established by the Constitutional Reform Act 2005.[160]

b. Tribunal System

668 Certain areas of law fall within the jurisdiction of specialised courts, called tribunals. Tribunals generally deal with appeals against decisions made by a Government department or agency, ie matters of administrative law such as social security, education, immigration and asylum, agriculture, transport, taxation and pensions. An important exception are the Employment Tribunals, where disputes between employers and employees are heard.

669 In 2008, many tribunals were abolished and their functions transferred to the newly created First Tier Tribunal. The Upper Tribunal, which hears appeals from decisions of the First Tier Tribunal, was also established in 2008. The Employment Tribunals, however, still remain. Scotland and England and Wales each have separate Employment Tribunals. Appeals against the decisions of these tribunals can be brought before the Employment Appeal Tribunal (EAT), which has jurisdiction for England and Wales and Scotland, but not for Northern Ireland.

2. The Courts of England and Wales

670 Let us now consider the court system of England and Wales in more detail. As pointed out earlier (N 614), the judicial reforms in the 19th century saw the creation of the Supreme Court of Judicature. The Supreme Court of Judicature was later renamed the Supreme Court of England and Wales which in turn, in order to avoid terminological confusion with the newly established Supreme Court of Justice, was renamed the Senior Courts of England and Wales in 2009. The Senior Courts of England and Wales consist of the High Court of Justice, the Crown Court and the Court of Appeal. The Magistrates' Courts and County Courts are so-called inferior courts.

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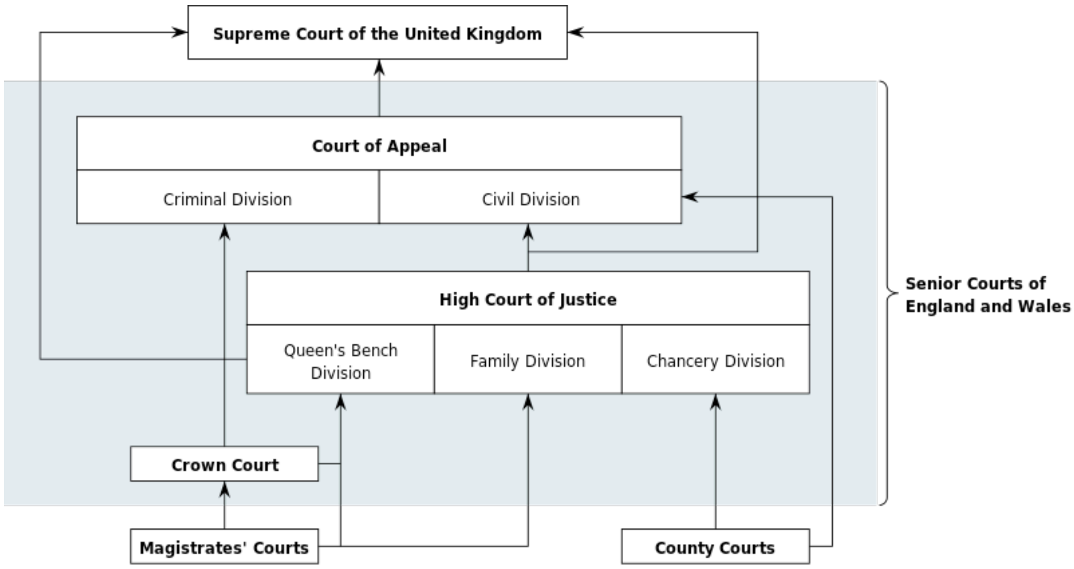
159 See eg *Bailey/Ching/Taylor,* para 4-025.
160 See *Widmer,* 22–23.

The Courts of England and Wales:[161] 671



In civil matters, the vast majority of cases are decided by the county courts, which deal with around 1.5 million civil disputes per year. There are currently around 170 county courts in England and Wales, each serving a specific geographical area. However, the current structure is soon to be a thing of the past. Under section 17(1) of the Crime and Courts Act 2013, the county courts will be abolished and replaced by a single county court with national jurisdiction for England and Wales, as part of a general civil justice reform. The aim of this reform is to allow for a more efficient administration of justice.[162] S 17(1) has not yet come into force. 672

The county courts sit as a court of first instance (so-called original jurisdiction). Its jurisdiction is often concurrent with that of the High Court of Justice, meaning that the claimant can choose whether to bring a claim before one or the other.[163] However, there are limitations on this freedom. As a rule, actions may only be commenced in the High Court if the 673

161 Diagram retrieved from ‹http://en.wikipedia.org/wiki/File:Courts.svg›, accessed 22 November 2013.

162 Cf Ministry of Justice, Solving Disputes in the County Courts: Creating a Simpler, Quicker and More Proportionate System. A Consultation on Reforming Civil Justice in England and Wales: The Government Response, February 2012, available at ‹https://consult.justice.gov.uk›, accessed 22 November 2013.

163 The distribution of proceedings between the High Court and the county courts is set out in the High Court and County Courts Jurisdiction Order 1991.

value of the claim is more than £25,000.[164] The threshold rises to £50,000 if the claim is for damages in respect of personal injury.[165] Also, the High Court of Justice has the right, in certain circumstances, to transfer proceedings started in the High Court to the county courts and vice versa.[166]

674 The High Court of Justice of England and Wales is one of the Senior Courts of England and Wales. The HCOJ has both original (ie first instance) and appellate jurisdiction in civil and criminal law matters. The civil jurisdiction of the High Court is unlimited. It has three divisions which deal with different subject areas: (1) the Chancery Division, which hears, *inter alia*, corporate insolvency disputes; business, trade and industry disputes; intellectual property disputes; inheritance disputes and disputes relating to trusts; (2) the Queen's Bench Division (QBD), which hears common law (as opposed to equity) cases, in particular torts and contract claims, and (3) the Family Division.[167] The HCOJ is located in London, but cases can also be heard at regional centres throughout the country. Appeals from rulings of the HCOJ are usually to the Court of Appeal, although exceptionally, a so-called "leapfrog" appeal to the Supreme Court is allowed.[168]

675 The Court of Appeal of England and Wales also belongs to the Senior Courts of England and Wales. It is the second highest court in the English judicial system; only the Supreme Court of the United Kingdom is superior to it. The Court of Appeal has a Civil Division, which is headed by the Master of the Rolls (MR), and a Criminal Division. The judges are called Lord or Lady Justice of Appeal (LJ). The Civil Division hears appeals against decisions from the HCOJ and, under certain conditions, also from the county courts. As a rule, appeals to the Court of Appeal require permission.[169]

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164 Art 7 of the High Court and County Courts Jurisdiction Order 1991.

165 Art 5 of the High Court and County Courts Jurisdiction Order 1991; ‹https://www.gov.uk/government/publications/crime-and-courts-bill.pdf›, accessed 19 December 2014.

166 Sections 40 to 42 of the County Courts Act 1984 and art 7(5) of the High Court and County Courts Jurisdiction Order 1991. See also *Bailey/Ching/Taylor,* para 2-048.

167 On the constitution of the High Court, see *Bailey/Ching/Taylor,* paras 2-059ff.

168 Sections 12 to 16 of the Administration of Justice Act 1969.

169 Sections 54 to 59 of the Access to Justice Act 1999

Appointment to the Senior Courts of England and Wales is "on good behaviour".[170] Judges are usually appointed from the ranks of highly experienced and respected barristers. They may only be removed by an address by both Houses of Parliament. Judges must retire on reaching the age of seventy.[171] 676

D. Sources of English Law

1. Overview

The following is a discussion of those aspects which are characteristic of the sources of law in England and Wales. For a broader discussion of the sources of law in common law systems, in particular case law, reference is made to previous sections (N 621–633). 677

The main sources of law in the English legal system are judicial precedent, ie case law, and written law, ie legislation. Traditionally, case law was the primary source of law, and it was only during the 19th century that Parliament began to pass more and more acts of legislation, in particular social legislation. At the same time, legislative powers were increasingly delegated to the government.[172] As a member of the European Union,[173] the UK – and with it the three legal systems in the UK – must also apply and implement EU legislation. Despite this "explosion" of written law, the attitude of the legal profession towards it remains uneasy. A written law will generally enjoy much more authority once it has been applied and interpreted by the judiciary.[174] 678

2. Judicial Precedent (Case Law)

We saw earlier that there are two different branches of case law in the English legal system: common law and equity. Although both are now 679

[170] See generally *Bailey/Ching/Taylor,* paras 4-031ff.
[171] Section 11 of the Senior Courts Act 1981.
[172] Cf *Bailey/Ching/Taylor,* para 5-001; *Glendon/Carozza/Picker,* 277.
[173] The UK became a member of the EU's predecessor organisation, the European Economic Community (EEC), in 1973.
[174] *Glendon/Carozza/Picker,* 277–278.

administered by the same courts,[175] they remain two separate bodies of rules, and both constitute important sources of law.[176]

680 Binding precedent (see generally N 625) is created by the High Court, the Court of Appeal and the Supreme Court of the United Kingdom.[177] Decisions of the inferior courts such as the county courts are not binding. Precedent is binding on all courts lower down in the hierarchy and sometimes also on the court that created the precedent in the first place. Thus, the Court of Appeal is bound by its own decisions, though important exceptions to this rule have been introduced though case law.[178] In contrast, the Supreme Court is not bound by its own decisions. It is free to overrule its own decisions, but will do so only rarely.[179] In general, the doctrine of binding precedent is said to be applied more rigorously in England than in the United States.[180]

3. Legislation

681 Written laws in England and Wales comprise so-called primary and secondary (also called subordinate or delegated) legislation. Primary legislation consists of statutes, which are made by Parliament. In order to be valid, Acts of Parliament must receive both the approval of each house separately by a simple majority as well as Royal Assent. Thus, each parliamentary Act starts with the same phrase: "Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: (...)."[181] Although Royal Assent is a formal requirement of validity, it is granted as a matter of course.[182] "Bill" is the term for a proposal of primary legislation (for an example, see N 661).

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175 See section 49(1) of the Senior Courts Act 1981.
176 See generally *Bailey/Ching/Taylor,* paras 7-001ff.
177 For a detailed discussion of precedent in England, see *Bailey/Ching/Taylor,* paras 7-009ff.
178 See *Widmer,* 12–13; *Bailey/Ching/Taylor,* paras 7-014ff.
179 Cf *Widmer,* 13; *Bailey/Ching/Taylor,* paras 7-026ff.
180 See *von Mehren/Murray*, 10.
181 See eg the Constitutional Reform Act 2005.
182 On the legislative process, see eg *Elliott/Quinn,* 42ff; *Bailey/Ching/Taylor,* paras 5-009ff.

In England, statutes very often do not come into force on the day Royal Assent is given, but rather gradually. It is quite common for different provisions of an Act to become effective at different times, the idea being that this gives the authorities enough time to make the necessary preparations for implementing the Act.[183] So-called commencement orders set out which sections of an Act shall become effective at a specified time. It can be difficult to determine which parts of an Act are in force at a given time. There is even an online guide called "Halsbury's Is it in Force?", which is updated on a daily basis.[184] 682

Under the doctrine of Parliamentary Sovereignty, the validity of Acts of Parliament cannot be questioned in court. Thus, for example, courts may not invalidate an Act of Parliament on the grounds that it violates the European Convention on Human Rights; rather, they are limited to making a declaration of incompatibility.[185] 683

Secondary (subordinate or delegated) legislation is based on a delegation of legislative power to different public authorities, eg courts, local authorities or government departments. These laws carry different names, eg statutory instruments[186] (ie laws passed by government departments), orders in council[187] (ie laws made by government in times of emergency), byelaws[188] (ie laws passed by local authorities) or rules[189] (ie procedural laws made for the courts by special committees made up of judges and lawyers). Secondary legislation can be challenged in court under a procedure called judicial review if it is *ultra vires,* ie if it exceeds the limits set out in the delegating Act.[190] 684

4. International Law

The UK is a so-called dualistic system. Accordingly, rules of international law do not automatically take effect in the UK, but rather must be 685

183 See *Bailey/Ching/Taylor,* para 5-019.
184 See ‹http://lexisweb.co.uk/guides/sources/halsbury-s-is-it-in-force›, accessed 22 November 2013.
185 See eg *Bailey/Ching/Taylor*, para 5-002.
186 See eg *Bailey/Ching/Taylor,* paras 5-027ff.
187 *Elliott/Quinn*, 77.
188 See *Bailey/Ching/Taylor,* paras 5-029ff.
189 See *Bailey/Ching/Taylor,* para 5-027.
190 *Bailey/Ching/Taylor,* paras 5-031–5-032; *Elliott/Quinn*, 81–82.

implemented by an Act of Parliament in order to apply. This holds true regardless of whether the international act or treaty in question is self-executing or not. Thus, although the UK is party to the European Convention on Human Rights (ECHR), the British Parliament had to pass a special Act in order to give the treaty effect in the UK.[191]

686 The same applies with respect to EU law. In order to ensure that EU legislation can become effective in the UK without an additional act of implementation for each and every treaty or regulation, the UK passed a special Act, the European Communities Act 1972.[192] EU law takes precedence over the domestic laws of the UK.[193]

5. Custom

687 Under certain restrictive conditions, local customs can also become a source of law. However, this is very rare. In general, only customs that have existed since "time immemorial", which, according to a 13th century statute, means since 1189 (!), can become a source of law.[194]

E. Legal Education and Profession

1. Introductory Remarks

688 It is usually said that the legal profession in England and Wales has two distinct branches: barristers and solicitors.[195] This distinction is indicative of the common lawyer's view of the law as, first and foremost, a practical (rather than academic) profession. Both solicitors and barristers are practicing lawyers. However, lawyers working in academia are also lawyers, even if they are not qualified as a barrister or solicitor.[196]

689 In our discussion of the historical development of the common law, we saw that practicing lawyers have always played an important role in

[191] See the Human Rights Act 1998.
[192] See *Bailey/Ching/Taylor,* paras 5-036ff.
[193] For a detailed discussion of the relationship between EU law and the domestic law of the UK, see *Bailey/Ching/Taylor,* paras 5-054ff.
[194] On the further requirements, see *Elliott/Quinn,* 114–116.
[195] See eg *Elliott/Quinn,* 181; *Bailey/Ching/Taylor,* para 3-003.
[196] Cf *Bailey/Ching/Taylor,* para 3-001.

shaping the common law, whilst law professors stayed at the periphery for much longer than in civil law systems (see N 647). This still impacts the way lawyers are perceived today. Whereas the civil-law term "Jurist" (Germany), " juriste" (France), "giurista" (Italy) or "jurista" (Spain) indicates a person who has obtained a university law degree, the term "lawyer" in common law systems is usually used in a more specific sense, namely as a reference to a person who has obtained a special qualification to practice the law: either, in England and Wales, by becoming a solicitor or barrister, or, in the United States, by passing the bar examination (see N 761–762).

2. Barristers and Solicitors

Traditionally, barristers were those lawyers who had a monopoly on advocacy, ie pleading, in the higher courts (ie the House of Lords, the Court of Appeal, the High Court, the Crown Court and the Employment Appeal Tribunal). They had no direct contact with the client, but were instructed by the client's solicitor, instead. On the other hand, the solicitors' domain was legal paperwork, eg drawing up wills and contracts, negotiation and giving legal advice to clients. They were also allowed to do advocacy work, but only in the lower courts, ie the magistrates' and county courts.[197] 690

Although calls for a fusion of the two professions have been made and the current system has been criticised for many years,[198] the distinction between barristers and solicitors still exists today.[199] The two professions have different governing bodies (ie "The General Council of the Bar" for barristers and "The Law Society" for solicitors) and the necessary qualifications and training are different. Unlike solicitors, barristers who wish to work as advocates must be self-employed and cannot form partnerships.[200] Despite these differences, the division between solicitors and barristers is less strict than it used to be, due to a series of important reforms in the 90s. In particular, solicitors are now also able to practice advocacy in the higher courts, on condition that they have completed ad- 691

197 *Elliott/Quinn,* 182–183.
198 See eg *Elliott/Quinn,* 212ff.
199 On English legal education, see generally ‹www.europaeische-juristenausbildung.de/Laender/englandframe.htm›, accessed 22 November 2013.
200 See *Bailey/Ching/Taylor,* para 3-052; *Elliott/Quinn,* 191.

ditional training. Since 2008, they are also allowed to wear wigs in court (!) – a right traditionally reserved to barristers.[201] An important change regarding barristers is that they may now receive instructions directly from clients, without a solicitor acting as intermediary.[202] In practice, however, barristers and solicitors continue to operate as distinct professions.

692 In order to qualify as a barrister, an applicant must, as a rule, have acquired a very good university degree, although not necessarily in law. Applicants without a law degree must complete a one-year course and pass an examination (the Common Professional Examination, CPE). In addition, applicants must also pass the Bar Course Aptitude Test (BCAT). After passing the BCAT, applicants must join one of the four so-called Inns of Court (ie Inner Temple, Middle Temple, Lincoln's Inn, Gray's Inn) in London. They will then follow a one-year course (the BPTC, Bar Professional Training Course) at their Inn or at an authorised institute, where they are instructed in theory, learn practical skills and undergo a rigorous training in the art of advocacy. Students who have successfully completed the course and also taken part in twelve so-called "qualifying sessions" (ie seminars, lectures, training weekends) at their Inn are called to the Bar by their Inn. The third and final stage consists of a so-called pupillage, ie an apprenticeship with an experienced barrister for the duration of one year.[203] Only then may they practice as a barrister, albeit on condition that they find tenancy, ie a permanent place in a set of chambers.[204]

693 Currently, there are around 15,000 practicing barristers in England and Wales.[205] Although they must be self-employed, they often share offices, so-called "chambers". The majority of these chambers are in London, as this is where the superior courts – the barristers' traditional "arena" – are located.[206]

694 Although a university degree is common, it is not required in order to qualify as a solicitor. All applicants must successfully complete the one-year Legal Practice Course (LPC) at an authorised institution (usually universities), where they are instructed in practical skills and theory. Ap-

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201 *Elliott/Quinn,* 183.
202 *Bailey/Ching/Taylor,* para 3-030; *Elliott/Quinn,* 191.
203 *Elliott/Quinn,* 193.
204 *Elliott/Quinn,* 193.
205 See ‹www.barcouncil.org.uk/becoming-a-barrister›, accessed 22 November 2013.
206 *Bailey/Ching/Taylor,* para 3-024.

plicants with a law degree can take the course directly, while those with a non-law university degree (around 30% of applicants!) first have to take the CPE. Exceptionally, mature students without any university degree are also able to take the LPC if certain requirements are met.[207] Applicants who have successfully passed the Legal Practice examination must then serve a two-year apprenticeship (so-called “training contract”). After completion of the training contract, students can seek admission to the Roll of Solicitors; they will then receive their practicing certificate. There are currently around 120,000 practicing solicitors.[208]

After at least ten years in practice, barristers and also, since the reforms, 695
solicitors may be elevated to the rank of Queen’s Counsel (QC, or “silk”) by an independent panel. Being appointed is considered a great honour and distinction. Judges in the higher courts are usually appointed from the ranks of barristers QC (see N 676).

3. University Law Degree

A university degree in law is not a prerequisite for becoming a solicitor 696
or a barrister, although it is still the norm. Unlike in the USA (N 759), law is studied as an undergraduate (bachelor) course. Law students usually follow a three-year university course, leading up to an LLB (bachelor of laws) degree.[209]

IV. The US-American Legal System

A. Introduction

Today’s most influential representative of the common law family is no 697
longer England, but her daughter, the USA. The USA, with the exception

[207] See *Elliott/Quinn,* 184, 185. On the different routes available, see ‹www.lawsociety.org.uk/careers/becoming-a-solicitor/routes-to-qualifying›, accessed 22 November 2013.

[208] *Elliott/Quinn,* 181.

[209] See ‹www.europaeische-juristenausbildung.de/Laender/englandframe.htm›, accessed 22 November 2013.

of Louisiana[210] and some of the US territories (eg Puerto Rico), is strongly rooted in the common law. Despite its common heritage and historical ties with England (N 617, 7001), US-American law has developed many characteristics which are quite distinct from those of English law, and there are marked differences between modern-day English and US-American law. Most importantly, the USA has a completely different political structure. As a federal republic, legislative powers are not attributed solely to a central government, but are distributed between both federal and state authorities. In consequence, there is not one body of "US-American law", but rather a plurality of law: federal law and the laws of the fifty US states and Washington DC.[211] Likewise, the USA has a dual court system, ie the federal judiciary and the individual judicial systems of the US states.

698 A further difference is that written laws have a much stronger tradition in the USA than in England. Some of the colonies had attempted to write down the existing laws in compilations as early as the 17th century,[212] and a written law still forms the cornerstone of the USA, namely the American Constitution of 1787. Each US state has adopted a criminal code, whilst criminal law in England and Wales remains uncodified. Some US states have even adopted a civil code, although the style and approach of these codes differ markedly from those of continental-style codes (N 703).

699 Although both US-American and English lawyers place a special emphasis on procedure (N 647, 689), procedural law has a much stronger impact on US practice than is the case in England. Several procedural doctrines and institutions are either unknown to English law, eg class actions or the so-called "American Rule", or have only a peripheral meaning, eg the jury trial. These procedural peculiarities have a major impact on substantive law, ie the law governing individual rights and duties (N 765–770; 773–774). A further feature of US-American law is the desire to facilitate rather than discourage litigation by lowering the threshold for access to justice (N 64).

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[210] See *Zweigert/Kötz,* 114–116; *Tetley,* 60 La L Rev 677, 697–699 (2000).

[211] See *Ralf Michaels,* in: Jan M Smits (ed), Elgar Encyclopedia of Comparative Law, 2nd edn, Cheltenham 2012, 75, 79.

[212] *David/Brierley*, 399.

Finally, legal education in the USA is quite different from legal education in England, and this, in turn, has an impact on how the law is applied in practice. 700

B. Historical Development

1. Law in the Colonies

The English colonies established in North America in the 17th century by the British Empire were considered to be "settled" rather than ceded or conquered (on this distinction, see N 617). Accordingly, the law applicable in the colonies was the English common law, albeit "adapted to [local] institutions and circumstances",[213] as well as any English acts of legislation dealing specifically with the Colonies, rather than any pre-existing local customs. In reality, however, English law had very little impact in the everyday life of 17th century settlers. As we saw earlier (N 647), the common law applied in England at the time was, first and foremost, procedural law, and highly technical. Its administration required highly experienced legal practitioners, and these were singularly lacking in the newly settled Colonies.[214] Also, life in a new country, the completely different topography and climate and a newly-forming society posed different problems and called for different rules than life in England with its strongly centralised judiciary, its age-old traditions and its established societal structure.[215] Added to that the fact that many of the settlers had been persecuted in England and were therefore sceptical toward the English law,[216] it is not surprising that many of the rules applied in the Colonies were probably more often derived from the Bible and common sense than from the English common law.[217] 701

[213] See *John Howard Hinton (ed),* The History and Topography of the United States, 2nd edn, London 1834, 343. See also *Zweigert/Kötz,* 219–220, 239–241.
[214] *Farnsworth/Sheppard,* 11.
[215] See in particular *David/Brierley*, 398–399.
[216] See *Farnsworth/Sheppard,* 9–10.
[217] *David/Brierley*, 399; *Farnsworth/Sheppard,* 10; *Zweigert/Kötz,* 239. For a comprehensive discussion of the law in early America, see *Michael Grossberg/Christopher Tomlins,* The Cambridge History of Law in America II: Early America (1580-1815), Cambridge 2008.

702 The attitude towards the law began to change in the 18th century, when commerce between the colonies on the one hand and with England on the other began to increase, bringing with it a movement in favour of applying the English common law.[218] The standard 18th century treatise on English law, *Blackstone's* Commentaries (N 611), became immensely popular in the Colonies.[219] At the time, although law courses were taught at a few isolated universities,[220] university education for individuals interested in the law was the absolute exception, and legal scholarship was generally far less developed than in England.

2. American Independence

703 When America became independent in 1783, the moment had come to decide whether the USA would emancipate itself from the laws of England or the English common law would continue to apply.[221] America also experienced its own codification movement, inspired by the codification movement on the European Continent and led by the New Yorker *David Dudley Field* (1805-1894). *Field* drafted a code on civil procedure which was adopted by the New York legislature and later formed the model for many other state codes on civil procedure.[222] *Field* also wrote a civil code which, although less successful than his civil procedure code, was still adopted by a number of states on the West Coast, most notably California[223] (see N 749).

704 Even though the codification movement was taken much more seriously and had a far stronger impact in the USA than in England, the common law tradition proved too strong to be erased.[224] Thus, the English common law as it had been in force upon Independence was received into the

[218] *David/Brierley,* 400.
[219] *Zweigert/Kötz,* 239. On *Blackstone*'s influence on American law and legal thought, see eg *Dennis R Nowlan,* Sir William Blackstone and the New American Republic: a Study of Intellectual Impact, 51 NYU L Rev 731 (1976).
[220] See *Zweigert/Kötz,* 239.
[221] This was the moment when *Bentham* decided to offer his codification services to the US president; see above N 611–612.
[222] *Zweigert/Kötz,* 242–243; *von Mehren/Murray*, 128.
[223] *Zweigert/Kötz,* 243.
[224] See generally *Mathias Reimann,* The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code, 39 Am J Comp L 95 (1989).

New World, where it took root and flourished. At first, the USA continued to follow English law quite closely.[225] Over time, however, US-American law became more and more independent, and the law acquired its own distinct identity. This development was a natural consequence of the completely different political, societal and demographic structure prevalent in the USA and was further encouraged by the economic growth which set in after the American Civil War.[226]

The economic development after the civil war also had a strong impact on legal education. Up until the mid-19th century, legal education had usually consisted in becoming apprenticed to an experienced practitioner. It was not until the late 19th century that it became common to attend so-called law schools (see N 758), ie university law faculties. This "academicisation" of the law strengthened the influence of legal scholars on US-American law. The 19th century also saw the publication of two important contributions to US-American law: the "Commentaries on American Law" by the US-American legal scholar *James Kent* (1763-1847) and the "Commentaries on the Constitution of the United States" by US Supreme Court Justice and Harvard law professor *Joseph Story* (1779-1845).[227] 705

3. Developments in the 20th Century

At the end of the 19th century, the view of the law was conservative. The purpose of the law was not to protect the weak or to interfere with the market, but rather to encourage economic growth, facilitate trade and strengthen the industry. Political and social concerns were not taken into account by the courts.[228] This changed in the 20th century, due, at least in part, to the increasing influence of legal scholars and the growing importance of law schools.[229] Both contributed to the development of different legal schools of thought in 20th century America, starting with 706

[225] *David/Brierley,* 404–405.
[226] Cf generally *David/Brierley,* 404ff; *Zweigert/Kötz,* 243ff.
[227] On the development of American law in this period, see generally *Michael Grossberg/Christopher Tomlins,* The Cambridge History of Law in America II: The Long Nineteenth Century (1789-1920), Cambridge 2008.
[228] *Zweigert/Kötz,* 243–244.
[229] On the development of US-American law in the 20th century, see generally *Michael Grossberg/Christopher Tomlins,* The Cambridge History of Law in America II: The Twentieth Century and After (1920), Cambridge 2008.

Roscoe Pound (1870-1964). *Pound,* a highly regarded law professor and legal scholar, founded the school of sociological jurisprudence with the aim of focusing on the "law in action", ie the role of law in society, instead of on the "law in the books". According to *Pound,* the role of the judiciary was not to simply apply the law without regard to the social consequences; rather, judges were, first and foremost, "social engineers".[230]

707 *Pound's* theories were further developed by *Karl Llewellyn* (1893-1962), founder of the school of legal realism in the 1930s. According to this school of thought, the law was shaped much more by the individuality of the judges deciding the dispute and the case's social and economic context than by any abstract rules of law.[231]

708 Further influential schools of thought include the economic analysis of law (or: law and economics) movement in the 1960s,[232] the critical legal studies movement in the 1970s and 1980s,[233] and the school of feminist jurisprudence in the 1980s.[234]

C. Political and Economic Framework of the USA

1. Political Structure

709 The United States of America is a federal state. It consists of 50 states, 16 so-called territories, which do not belong to the states but are subject directly to the federal government (eg Guam and Puerto Rico), and a federal district, Washington DC, which also is not part of any the states.

230 *Roscoe Pound*, The Need of a Sociological Jurisprudence, 19 Green Bag 607 (1907).

231 *Zweigert/Kötz,* 247–249; *Karl N Llewelly*n, The Common Law Tradition: Deciding Appeals, Boston 1960.

232 *Ryan P Thompson/Christopher C McCurdy*, The Power of Posner: A Study of Prestige and Influence in Federal Judiciary, 48 Idaho L Rev 49, 50–52 (2012); *Duxbury*, ch 5, 301–420; *Brian Brix*, Jurisprudence: Theory and Context, 4th edn, 2006, ch 18, 159–180.

233 See generally *Duxbury*, ch 6, 421–510; *Mark Kelman*, A Guide to Critical Legal Studies, Cambridge 1987; *Andrew Altman*, Critical Legal Studies: A Liberal Critique, Princeton 1990.

234 See generally *Patricia Smith*, Feminist Jurisprudence, New York 1993; *Judith Baer*, Our Lives before the Law: Constructing a Feminist Jurisprudence, Princeton 1999.

Because the USA is a federal state, legislative powers lie both with the federal government and the state governments. Federal legislation is passed primarily by the US parliament ("Congress") which is made up of two chambers ("houses"), ie the House of Representatives and the Senate. 710

The USA also has a split judicial system, consisting of federal courts on the one hand and state courts on the other. Whether a legal issue belongs to federal or state law can determine which court has authority to decide a dispute (see N 716, 719). 711

2. Economic Framework

The USA is the largest economy in the world. It has a population of over 311 million and, as per 2012, an estimated unemployment rate of 8.1%.[235] At nearly 9% of GDP as per 2011, the budget deficit is high, but has been reduced considerably since 2009 when, as a consequence of the sub-prime mortgage crisis,[236] the budget deficit was at a record high of 12.1 %. In 2012, the GDP per capita was 49,965 USD.[237] The currency of the United States is the US Dollar. 712

The sub-prime mortgage crisis led to falling home prices, increasing bank foreclosures, the collapse of many large financial institutions and tight credit and, finally, to a global financial crisis. In 2008, the United States entered into a deep recession which lasted until 2009. The current government under Barack Obama has initiated several measures in order to boost and stabilise the economy, control the financial sector and cut down on government spending. 713

The driving force in the US economy are services, in particular finance and business services. These account for the largest proportion of GDP, while the importance of industry continues to decline. The USA's main 714

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235 The facts in this section were retrieved from the CIA-Factbook of the World, ‹https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html›, the OECD country statistical profile of the USA, ‹http://stats.oecd.org›, and the World Bank open data collection, ‹http://data.worldbank.org›, all accessed 22 November 2013.

236 On the legal implications of this crisis, see eg the 2013 special edition of the Journal of European Tort Law (JETL) on Tort Law and the Financial Crisis.

237 See ‹http://data.worldbank.org/indicator/NY.GDP.PCAP.CD›, accessed 22 November 2013.

trade partners are Canada for exports and China for imports, both followed by the European Union.[238]

715 Current challenges for the US-American economy and society are the increasing gap between low-income and high-income households, leading to a two-tier labour market; a rapidly deteriorating infrastructure; and federal and, in particular, state budget deficits.

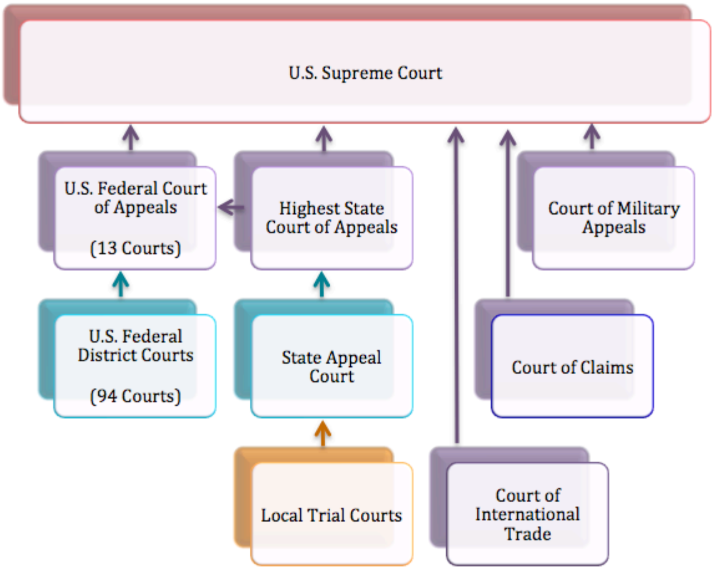
D. Judicial System in the USA

1. Overview

716 In the USA, there are two court coexisting, parallel court systems: the federal court system and the state court system. The federal court system is based in federal law; its structure covers the entire USA. In contrast, the state court systems are governed by the laws of the respective state, and so may differ. Each of the fifty states and Washington DC has its own court system. At the top of both systems is the Supreme Court of the United States.

[238] See the data of the United States Census Bureau, available at ‹www.census.gov/foreign-trade/statistics/highlights/top›, accessed 22 November 2013, and the WTO-publication "Trade Profiles 2013" (fn 141 above).

The following is a simplified diagram of the US court system:[239] 717



Because of the coexistence of two court systems in one and the same country, it is first necessary to determine whether a dispute falls within the jurisdiction of the federal courts or the state courts. This issue is treated under the heading of subject-matter jurisdiction.[240] In addition, the court must also have personal jurisdiction over the parties to the dispute; otherwise its decisions cannot be enforced (see N 726). Exceptionally, a court may decline jurisdiction even though it has authority to hear the case based on the doctrine of *forum non conveniens* (see N 729). 718

2. Jurisdiction and Venue

a. Subject-Matter Jurisdiction

Federal jurisdiction is based on article III of the US Constitution. Unlike state jurisdiction, federal jurisdiction is limited, ie restricted to certain matters. State courts have general jurisdiction, meaning that they always have the power to decide a dispute unless exclusive jurisdiction has been conferred on the federal courts. 719

The grounds for federal jurisdiction are set out in article III, section 2 of the US Constitution, which provides that the judicial power of the feder- 720

[239] Diagram retrieved from ‹www2.maxwell.syr.edu/plegal/scales/court.html›, accessed 22 November 2013.
[240] See eg *Friedenthal/Kane/Miller*, 9; *Fletcher/Sheppard*, 289.

al courts shall extends *inter alia*, "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." The constitutional provisions are supplemented by Title 28 of the United States Code (USC or US Code). The USC is not a code in the civil-law sense of the term, but rather the official compilation of all federal laws of the United States which are currently in force.[241]

721 As a rule, federal courts have subject-matter jurisdiction in two cases: firstly, if the dispute involves a federal law question ("federal question jurisdiction"), ie if a violation of federal law is alleged by the claimant,[242] and secondly, if claimant and defendant come from two different US states (diversity of citizenship). The purpose of diversity of citizenship jurisdiction is to avoid the risk of "preferential treatment" that a state court might be tempted to give its own citizens and thereby to ensure that both parties are treated equally and impartially. As private law is predominantly state law (see N), federal courts will generally only be entitled to hear a private law dispute if the requirements of diversity of citizenship are fulfilled. The law applied by federal courts in such cases is state law, not federal law. Once the federal court has determined which state law applies,[243] it must apply both the legislation and case law of that state. This follows from the famous *Erie* doctrine developed by the US Supreme Court.[244]

722 In order for diversity of citizenship jurisdiction to be established, two requirements must be met.[245] Firstly, claimant and defendant must be citizens of different US states. As a rule, corporations are citizens both of

[241] See eg *Farnsworth/Sheppard,* 82–83.
[242] On federal question jurisdiction, see generally *Friedenthal/Kane/Miller,* 15ff; *Teply/Whitten*, 59ff.
[243] See *Friedenthal/Kane/Miller*, § 4.5; *Hay,* paras 238ff.
[244] *Erie Railroad Company v Tompkins,* 304 US 64 (1938). For a detailed discussion of this doctrine and its implications, see *Friedenthal/Kane/Miller*, 207ff; for an overview, see *David/Brierley,* 411ff, in particular 414–416, and *Hay,* paras 235–237.
[245] 28 USC § 1332(a)(1). On diversity of citizenship jurisdiction, see generally *Friedenthal/Kane/Miller,* 24ff; *Teply/Whitten,* 82ff.

that state in which they are incorporated and of that state in which they have their principle place of business.[246] If one of the parties to the dispute is a citizen of a US state and the other a citizen or subject of a foreign state, federal jurisdiction is also established ("alienage jurisdiction").[247]

In cases involving more than one claimant or defendant, the requirements for diversity jurisdiction will only be met if there is complete diversity, meaning that the citizenship of all the claimants must be diverse from that of all the defendants. This requirement is practically impossible to meet in so-called class action cases. In order to expand federal jurisdiction in such cases, the complete-diversity requirement was relaxed by the Class Action Fairness Act (CAFA) 2005 (see also N 773–774).[248] The decision to expand federal jurisdiction in such cases was politically motivated; federal courts are traditionally far more reluctant to allow class actions than state courts.[249] The second requirement of diversity jurisdiction is that the amount in controversy must exceed $75,000.[250] 723

As a rule, neither federal question jurisdiction nor diversity or alienage jurisdiction are exclusive, meaning that the dispute may be heard by either a state or a federal court.[251] The claimant will usually choose the court where he or she believes to have a higher chance of success. If the claimant chooses a federal court, the defendant will have to accept that choice. If, however, the claimant chooses to bring a claim in a state court, the defendant may file a so-called petition for removal. If the requirements for removal are fulfilled, the action will be removed to the federal courts.[252] 724

The choice of court in which to bring a claim is of central importance. State courts are perceived to be more claimant-friendly than federal courts, in particular with regard to the size of damages awards. Jurisdictional questions are therefore often controversial, and either party may 725

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[246] 28 USC § 1332(c).
[247] 28 USC § 1332(a)(2).
[248] On CAFA, see generally *WB Rubinstein,* Understanding the Class Action Fairness Act of 2005, Los Angeles 2005, available at ‹www.classactionprofessor.com/cafa-analysis.pdf›, accessed 22 November 2013.
[249] See *Widmer,* 381–382.
[250] 28 USC § 1332(a).
[251] *Bonfield*, 56–57.
[252] 28 USC §§ 1441, 1446; see *Friedenthal/Kane/Miller,* 59ff.

try to manipulate the case in a certain way in order to ensure that the state courts or the federal courts will have subject-matter jurisdiction.[253] Federal jurisdiction cannot be conferred by the parties' consent.[254]

b. Personal Jurisdiction

726 In order to have authority to decide a dispute, it is not sufficient for the federal or state courts to have subject-matter jurisdiction. In addition, the court must also have personal jurisdiction over the parties. Originally, personal jurisdiction required the actual physical presence of the defendant within the court's territory, and if that was lacking, consent. In the meantime, however, this so-called "presence doctrine" has been significantly expanded. Jurisdiction can now also be based on the defendant's domicile or residence, regardless of whether the defendant is physically present or not.[255] In addition, personal jurisdiction is also established if the defendant has "minimum contacts" with the forum state, ie the state in which the (state or federal court) is located.[256] If, for example, A wishes to commence court proceedings in California because of an accident caused by N, a citizen of Nevada, whilst driving through California, the California courts will only have personal jurisdiction if N has sufficient minimum contacts with California. The question will then be whether driving through a state constitutes a sufficient connection with that state; only if the answer is in the affirmative will the California courts have authority to hear the case against N. A sufficient connection can, for example, be established if the defendant is conducting business in the forum state ("doing business"), if the defendant is incorporated in that state, or if the defendant is visiting that state.

727 The minimum-contacts doctrine was developed by the US Supreme Court in a famous decision, *International Shoe v State of Washington,* in 1945.[257] Since then, its scope has been the subject of many decisions. The doctrine is derived from the due-process clause in section 1 of the fourteenth amendment to the US Constitution.[258]

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[253] See eg *Friedenthal/Kane/Miller,* § 2.7.
[254] *Friedenthal/Kane/Miller,* 13.
[255] See *Friedenthal/Kane/Miller,* 102ff, 113ff.
[256] See generally *Friedenthal/Kane/Miller,* 125ff.
[257] 326 US 310 (1945). On this decision, see eg *Friedenthal/Kane/Miller,* 125ff.
[258] See *International Shoe v State of Washington,* 326 US 310 (1945).

c. Venue

Once it is established which court has subject-matter jurisdiction over the dispute and personal jurisdiction over the parties, the claimant will have to determine the geographical location of the (federal or state) court in which the lawsuit shall be commenced. The forum state, eg Texas or New York, will have already been determined by the minimum-contacts requirement. However, there may be many different court houses in that state, and therefore, the claimant will now have to determine the venue, ie the physical location of the court which will hear the dispute. For federal courts, the rules on venue can be found in federal law;[259] in case of state jurisdiction, this issue is governed by the law of the respective state.[260] 728

d. Doctrine of *forum non conveniens*

A particular aspect of civil procedure in common law jurisdictions in general is the doctrine of *forum non conveniens*.[261] Under this doctrine, a court has discretionary power to decline jurisdiction over a case even though both subject-matter and personal jurisdiction are present. It will do so only if it considers another forum to be more appropriate to hear the case. The doctrine, which is generally unknown to civil law jurisdictions,[262] applies both in domestic US cases and in international cases, meaning that a US court might decline jurisdiction both in favour of another US state as well as in favour of a forum abroad. When deciding whether to decline jurisdiction, the court will take different factors into account, eg the location of witnesses and evidence.[263] In practice, the doctrine is only rarely applied in international cases where the alternative forum is located outside the USA. 729

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259 28 USC §§ 1391ff; *Hay*, paras 140–141.

260 See generally *Teply/Whitten,* 332ff.

261 *Fletcher/Sheppard*, 339; *Hay*, paras 142–144. On this doctrine see generally *Michael Karayanni*, Forum non conveniens in the Modern Age, Ardsley NY 2004.

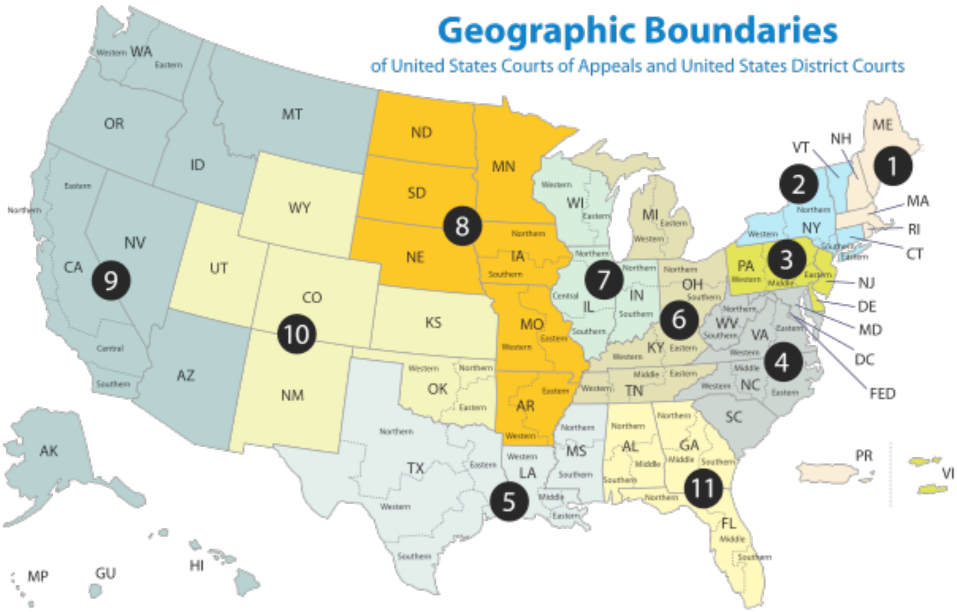
262 *Roland A* Brand, Forum Non Conveniens, History, Global Pracitce, and Future, Oxford 2007, 2; see generally *Christoph Dorsel,* Forum non conveniens: richterliche Beschränkung der Wahl des Gerichtsstandes im deutschen und amerikanischen Recht, Berlin 1996; *Monika König,* Die Anwendbarkeit des forum non conveniens im deutschen und europäischen Zivilverfahrensrecht, Frankfurt aM 2012.

263 See generally *Friedenthal/Kane/Miller,* 91–93.

3. Federal Court System

730 For the purposes of the federal court system, the United States and US territories are divided into a total of ninety-four judicial districts. These districts are in turn grouped together into twelve different judicial circuits. The number of districts within one state depends on its size; however, each US state has at least one district.[264] In addition to these regular circuits, there is also a thirteenth circuit, called the Federal Circuit. It is located in Washington DC and has nationwide jurisdiction to hear disputes relating to special subject matters, eg patents.[265]

731 The following is a diagram of the federal court system:[266]



The federal judiciary is divided into three levels. The District (Trial) Courts are the federal courts of first instance. They form the bottom level of the federal judiciary. District court decisions may be appealed to the court of appeals of the circuit in which the district court is located. Un-

[264] For the division of districts per state see 28 USC §§ 81–131; *John M Scheb*, An Introduction to the American Legal System, 2nd edn, New York 2010, 38.
[265] See 28 USC § 1295.
[266] Diagram retrieved from ‹http://en.wikipedia.org/wiki/File:US_Court_of_Appeals_and_District_Court_map.svg›, accessed 22 November 2013.

like petitions to the US Supreme Court, appeals to the courts of appeals are a matter of right, not of judicial discretion.[267]

The courts of appeals form the second level of the federal judiciary. Each of the twelve regional circuits has a Court of Appeals, which is why these courts are also called circuit courts. Cases in the courts of appeals can be reviewed by the US Supreme Court. However, such cases will only be reviewed by the Supreme Court if a court of appeals requests instructions from the Supreme Court concerning a question or proposition of law (so-called certification)[268] or if the Supreme Court has granted a so-called writ of certiorari to one of the parties to the (civil or criminal) dispute.[269] Certiorari is only granted upon petition by a party to the case. The parties are not entitled to certiorari; rather, it is a matter of the Supreme Court's discretion and will only be granted for compelling reasons.[270] When deciding whether to review a case on certiorari, the Supreme Court will consider the importance of the legal question decided by the lower court.[271] It is rare, but not impossible to receive certiorari because of erroneous factual findings or the misapplication of a properly stated rule of law by the courts of appeals.[272] 732

The Supreme Court of the United States, which is located in Washington DC, is at the top of the federal court system.[273] The Supreme Court has appellate jurisdiction and exceptionally, in cases affecting diplomats or in which a state is a party, also original (ie first instance) jurisdiction.[274] The grounds for jurisdiction are set forth in the United States Code and 733

267 See eg *Teply/Whitten,* 928; *Bonfield,* 54–55.

268 See Rule 19 of the Supreme Court of the United States of 19 April 2013, 22–23. The Rules of the Supreme Court are available at ‹www.supremecourt.gov/ctrules/ctrules.aspx› and ‹www.law.cornell.edu/rules/supct›, both accessed 22 November 2013.

269 28 USC § 1254.

270 See generally *Teply/Whitten,* 928–929.

271 Cf the Rules 10 to 16 of the Supreme Court of the United States (fn 268 above), 5ff.

272 See the Rules of the Supreme Court of the United States of 19 April 2013 (fn 268 above), 6.

273 On the Supreme Court see generally eg *Jeffrey A Segal,* The Supreme Court in the American Legal System, Cambridge 2005; *Stephen Breyer,* America's Supreme Court: Making Democracy Work, Oxford 2010.

274 Original jurisdiction of the Supreme Court is governed by 28 USC § 1251 and Rule 17 of the Supreme Court of the United States (fn 268 above), 16–18.

further defined in the Rules of the Supreme Court of the United States.[275] The Court is composed of the Chief Justice (CJ), who is the head of the Supreme Court and of the entire federal court system, and of eight "Associate Justices" (J).

734 The judges in the federal court system are all nominated by the US president and confirmed by the US Senate. They are appointed "during good behavior", ie for life.[276] They stay in office until they retire, die or are removed through impeachment by the House of Representatives and subsequent conviction by the US Senate.

4. State Court System

735 The structure of the states' judiciary differs from state to state. In general, the state court system comprises two or, more commonly, three levels, depending on the size of the state. As the state court system is rooted in the law of the individual states, the names of the state courts may also vary.[277] In some states, the court at the bottom level of the state judiciary, ie the court of first instance, is called Trial Court, in others District Court (which may cause terminological confusion with the distinct district courts of the federal judiciary), Circuit Court, Superior Court or, as is the case in New York, Supreme Court. Appeals against the decisions of the state courts of first instance can be brought before the appellate courts of the respective state. State law determines whether a party is entitled to bring an appeal before the highest appellate court or whether the appellate court has discretionary power to hear or decline the appeal.[278] Some states, eg Kansas,[279] also provide a special procedure of certification, ie allow the lower courts to request instructions from the appellate court concerning a question or proposition of law (on certification before the US Supreme Court, see N 733).

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275 See fn 274 for original jurisdiction. For appellate jurisdiction, see 28 USC §§ 1253-1260 and Rules 10 to 16 and 18 of the Supreme Court of the United States (fn 268 above).

276 See Article III of the US Constitution.

277 For an overview of the different judicial structures, see ‹www.judicialselection.us›, accessed 22 November 2013.

278 Cf *Teply/Whitten,* 928–929.

279 See *Samsel v Wheeler Transp Servs, Inc* (1990), 246 Kan 336, 789 P2d 541 (Supreme Court of Kansas).

Although the US Supreme Court forms part of the federal and not the state judiciary, the decisions of the highest state courts may also, under limited circumstances, be brought before the Supreme Court in Washington DC. As in the federal system, the Supreme Court will only review a case if it has granted a writ of certiorari. Certiorari will only be granted "where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States",[280] and even then only for compelling reasons.[281] 736

The method of selection of state court judges differs from state to state.[282] They may be appointed by the government, upon nomination or confirmation by a special commission, with some states requiring additional approval by the legislature, or elected. State law will also determine whether the state judges have life tenure or serve a fixed term which may be renewed upon confirmation or reelection. The method of selection may also be different in one and the same state, depending on the level of the court. 737

E. Sources of US-American Law

1. Overview

The following is a discussion of those aspects which are characteristic of the sources of law in the USA. For a broader discussion of the sources of law in common law systems, in particular case law, reference is made to previous sections (N 621–633). 738

The main sources of law in the US-American legal system are judicial precedent, ie case law, and written law, ie legislation. The system is more complex than in England and Wales due to the coexistence of fed- 739

[280] 28 USC § 1257.

[281] Rule 10 of the Supreme Court of the United States of 19 April 2013 (fn 268 above), 5–6.

[282] For an overview of the different methods of selection, see ‹www.judicialselection.us›, accessed 22 November 2013.

eral law and state law, on the one hand, and federal courts and state courts, on the other. Thus, federal legislation, federal case law, state legislation and state case law are all sources of law.

740 The attribution of legislative power to federal and state governments is based on the US Constitution, which has been in force since 1789. Under the US Constitution,[283] the states have so-called plenary power, meaning that they have authority to legislate in all areas not reserved to the federal government by the Constitution. In contrast, the federal government has limited law-making authority, meaning that it has only those powers enumerated in the Constitution.[284] In certain areas, both the states and the federal government have law-making powers, eg in the area of antitrust and trademark laws.

741 A common distinction in the USA is that between "primary law" or "primary authority" and "secondary authority" or "secondary sources". Primary authority is law in the actual sense of the term, ie legislative acts by public authorities and case law. In contrast, "secondary authority" is not a source of law, but covers what a civil lawyer would describe as legal doctrine, ie scholarly writings such as casebooks, textbooks, legal periodicals.[285] One of the most influential sources of secondary authority are the so-called Restatements of the Law (see N 752).

2. Common Law and Equity

742 US-American law also distinguishes between common law and equity. In most states, they are administered by the same courts.[286] New York was the first state to implement the procedural fusion when it enacted the Field Code of Civil Procedure (see N 703) in 1848. Nonetheless, they remain two separate bodies of rules.[287] The distinction is important in the USA, as the right to a jury trial under the US Constitution is limited to

283 See the tenth amendment to the US Constitution; *Robert A Carp/Ronald Stidham/Kenneth L Manning*, Judicial Process in America, London 2013, 25–26.
284 See eg *Bonfield*, 31; *Hay*, paras 17–18.
285 See *Farnsworth/Sheppard,* 91ff.
286 There are a few exceptions, eg Delaware, which has a separate court of chancery, see ‹http://courts.delaware.gov/Chancery›, or Tennessee, see ‹www.tsc.state.tn.us/courts/circuit-criminal-chancery-courts/about›, both accessed 22 November 2013.
287 See eg *von Mehren/Murray*, 4; *Farnsworth/Sheppard,* 103–105,

those claims which, historically, were developed in the common law courts (see N 607–609).[288]

3. Federal Law

Areas explicitly reserved to the federal government under the Constitution include military, money, taxes, foreign affairs, intellectual property (patents, copyrights), railroads, aviation and telecommunication. Further important powers of Congress have been derived from the Commerce Clause, which provides that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". The power to regulate commerce between the individual US states has proven especially fruitful for expanding federal lawmaking powers. As soon as an economic activity might have an impact on trade between US states, Congress will have power to pass legislation.[289] Another important source of federal legislation is the co-called "Necessary and Proper" Clause,[290] which grants the federal government the power to legislate in areas other than those enumerated in the Constitution, on condition that it be necessary and proper for executing those powers explicitly enumerated.[291] Federal law overrides state law.[292] 743

In order to be valid, the laws made by Congress ("acts") must be adopted by simple majority in both houses and approved by the US president's signature. A presidential veto can be overridden by a two-thirds majority in both houses. 744

In the landmark case of *Marbury v Madison,*[293] the US Supreme Court held that federal courts are entitled to review the constitutionality of acts of Congress and to declare them void on the grounds that they violate the US Constitution.[294] 745

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[288] See also *Hay*, paras 9ff.
[289] On the Commerce Clause and its interpretation, see eg *Bonfield,* 34ff.
[290] Article 1, Section 8 of the US Constitution.
[291] Cf *Bonfield,* 38–39.
[292] See eg *Hay*, paras 17ff.
[293] 5 US (1 Cranch) 137 (1803).
[294] On this seminal case, see eg *Breyer,* 12ff; *Farnsworth/Sheppard,* 8–9; *David/Brierley,* 440–441; *Mark Tushnet (ed),* Marbury v Madison, Stanford 2005.

746 Federal law consists of statutes, ie Acts of Congress, as well as delegated legislation, eg rules and regulations of administrative agencies and presidential orders.[295] So-called “court rules” based on judicial legislation are a particularly important source of procedural law. These rules are promulgated by the courts.[296] Thus, for example, the Federal Rules of Civil Procedure (FRCP),[297] which govern civil proceedings in the district (federal) courts, the Federal Rules of Appellate Procedure (FRAP),[298] which govern civil proceedings in the federal courts of appeals, and the Rules of the Supreme Court[299] were all promulgated by the US Supreme Court.[300]

4. State Law

a. Scope and Contents

747 As explained above, the US states have general law-making authority under the US Constitution. In particular, practically the entire area of private law (eg torts, contracts, corporation law and family law) and criminal law falls within the authority of the individual states. Accordingly, each of the fifty states has its own body of private and criminal law. Unlike federal law, the scope of state law is limited to the state in which it was enacted. Accordingly, there is no unified US-American contracts law, for example, but rather a Texas contract law, a New York contract law, a California contract law etc. Likewise, there is a Delaware corporation law, a Florida family law etc.

748 The precise sources of state law will depend on the individual state. In private law, both legislation, ie statutes, and case law will be the primary sources. Some states have even enacted codes, eg California or Georgia. These codes, however, differ markedly from their civil-law counterparts. Some state codes are merely systematic compilations of the rules developed by courts, ie an expression of case law.[301] Others are simply group-

[295] See eg *Farnsworth/Sheppard,* 81–83.
[296] Eg the Federal Rules of Civil Procedure; cf *von Mehren/Murray*, 19–20.
[297] Available at ‹www.law.cornell.edu/rules/frcp›, accessed 22 November 2013.
[298] Available at ‹www.law.cornell.edu/rules/frap›, accessed 22 November 2013.
[299] See above fn 268.
[300] Cf *von Mehren/Murray*, 19–20.
[301] See eg *Farnsworth/Sheppard,* 18.

ings of individual state laws, similar to the US Code for federal law (see N 720).

749 Despite this plethora of state laws, there is much less divergence between the laws of the individual states than one might expect. With the exception of Louisiana, which has been strongly influenced by the civil law tradition,[302] the US state laws share a great many common features.[303] American law schools do not teach the private law of individual states, but rather general courses on contracts, torts etc, and in these courses, students learn about the general principles of the subject as evidenced by the decisions of different US states.[304] Differences between state laws are looked on as variations of a common theme, rather than as individual, unconnected rules.

b. Unifying Instruments

750 As pointed out earlier, each of the 50 US states has its own body of private law. Although there is much less diversity than might be expected, the coexistence of fifty different laws in one and the same country makes for a complex system and can cause legal uncertainty. In order to further harmonise or even unify state laws, several non-state instruments and initiatives have been developed. Of particular importance are the so-called "Restatements of the Law" and uniform laws.

751 The Restatements of the Law are published by the American Law Institute (ALI), which was founded in 1923 in order to "promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work".[305] The ALI is composed of four thousand judges, practicing lawyers and scholars both from the USA and abroad. It pursues its goal by determining the basic legal principles common to all (or most) of the different US states. These principles are distilled from an extensive comparison of the states' case law. They are then set out and commented on in so-called Restatements of the

[302] See *Zweigert/Kötz,* 114–116; *Tetley,* 60 La L Rev 677, 697–699 (2000).
[303] See generally *David/Brierley,* 415ff.
[304] Cf *David/Brierley,* 417–418.
[305] See ‹http://ali.org/index.cfm?fuseaction=about.creation›, accessed 22 November 2013.

Law[306] in order to "tell judges and lawyers what the law [is]".[307] The Restatements do not, however, limit themselves to a mere collection of rules supported by the majority of states. Rather, they sometimes also recommend what a rule of law should be in order to develop and advance the law.[308]

752 Restatements have been created for many different subject areas, eg contracts, product liability, agency and conflict of laws. They can be highly influential and are often cited by legal scholars and in case law. Although they are not acts of legislation, and are therefore not binding on the courts, they can have a unifying effect if a rule is adopted by other states. A famous example of this unifying effect is § 402A of the Restatement of Torts 2d (1965). This rule provided for strict product liability in tort, a doctrine which had only recently been introduced into California tort law by a landmark decision of the Supreme Court of California.[309] The ALI endorsed this doctrine by including it in the second edition of its Restatement of Torts, and from there, "it spread like wildfire from state to state".[310] Later on, it spread even further, across the Atlantic, where it inspired the EC Product Liability Law Directive 85/374/EEC of 25 July 1985.

753 Uniformity of law in the USA is also encouraged by means of so-called uniform laws.[311] The term "law" in this context is misleading, for uniform laws are not acts of legislation passed by a legislative body, but simply proposals of legislation drafted by a private association called the National Conference of Commissioners on Uniform State Laws (NCCUSL). The NCCUSL is a non-profit organisation created in order to promote "uniformity in state laws on all subjects where uniformity is deemed desirable and practicable".[312] A uniform law which has been approved by the NCCUSL does not have force of law, but will only become effective if and to the extent that it is adopted by state legislatures.

306 *Widmer,* 27.
307 See ‹www.ali.org/index.cfm?fuseaction=about.instituteprojects›, accessed 22 November 2013.
308 *Widmer,* 28.
309 *Greenman v Yuba Power Products, Inc,* 59 Cal 2d 57, 377 P2d 897, 27 Cal Rptr 697, 13 ALR 3d 1049 (1963); see *Widmer,* 174, 176ff.
310 *DG Owen,* Products Liability Law Restated, 29 SCL Rev 273, 277 (1998); see also *Dan B Dobbs,* The Law of Torts, St Paul 2000, 975; *Widmer,* 174–175.
311 See *Widmer,* 29.
312 See ‹www.nccusl.org›, accessed 22 November 2013.

The states are completely free to choose whether or not to adopt the proposed law; they are also free to adopt only parts of it or to make modifications.

The most successful uniform law to date is the Uniform Commercial Code (UCC) which was a joint project of the NCCUSL and ALI and was drafted, *inter alia,* by *Karl Llewellyn* (see N 707).[313] The UCC has been adopted, in whole or in part, by each US state. Its subject matter is American commercial law, ie sales, letters of credit etc. The UCC is divided into different "articles", of which each covers a specific subject area. Article 2, for example, is not a single provision, but rather comprises the different rules ("sections") on sales law, whereas article 2A covers leases and article 5 letters of credit. A revised version of article 2 was presented to the states for adoption in 2003. However, it was not enacted by any of the states and was later revoked. 754

5. International Law

It is perhaps indicative of the USA's attitude toward international law that textbooks on US-American law rarely discuss international treaties in their sections on sources of law.[314] According to the US Constitution, treaties are just as much a part of federal law as domestic laws passed by federal government.[315] Although this provision suggests that the USA is a monistic system, in recent years the US Supreme Court has shown a tendency toward dualism, ie giving domestic law precedence over international law unless international law has been implemented by an additional Act of Congress. In actual fact, therefore, the USA currently appears to have a dualistic system.[316] 755

[313] See eg *von Mehren/Murray*, 18–19; *Gregory E Maggs*, Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code, 71 U Colo L Rev 541 (2000); *Imad D Abyad*, Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence, 83 Virginia L Rev 429 (1997).

[314] Cf eg *Hay*, paras 17–36; *von Mehren/Murray,* 1–26.

[315] Article VI, section 2 of the US Constitution.

[316] See *DA Jeremy Telman,* Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as US Law (Working Paper), Valparaiso University Law School Legal Studies Research Paper Series, May 2013, available at ‹http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2265880›, accessed 22 November 2013.

6. Custom

756 Although a source of law, custom – as is the case in England, but also in civil law jurisdictions – has little importance in US-American law.[317]

F. Legal Education and Profession

757 Simce the end of the 19th century, US-American lawyers have aquired their legal education at so-called law schools. Currently, there are 203 US law schools approved by the American Bar Association (ABA).[318] Most of them are part of a private or public university. These law schools vary considerably in size and in reputation, and the quality of legal education is much less homogeneous than in civil law jurisdictions.[319]

758 In the USA, law is a post-graduate degree. Students must normally acquire a bachelor degree at a college before entering law school. The undergraduate degree can be in any subject. Students interested in entering a law school must first pass the Law School Admission Test (LSAT) and then apply to the law schools of their choice. Competition for admission to the most prestigious law schools is fierce. Legal education at private law schools such as Harvard are also extremely expensive, requiring a budget of over $50,000 per year for tuition and close to $30,000 for living expenses.[320] Most students can only afford tuition by taking a loan which they will be expected to pay back during the first years of their professional careers.[321] There has been a marked decline in law school applications in the years following the economic crisis, as job prospects have declined. In 2004, around 100,000 students applied to law school; this number is estimated to have nearly halved by 2013.[322]

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317 See eg *von Mehren/Murray,* 7.
318 See ‹www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html›, accessed 22 November 2013.
319 See eg *von Mehren/Murray,* 253; *Farnsworth/Sheppard,* 18.
320 See ‹www.law.harvard.edu/current/sfs/basics/cost/budget.html›, accessed 22 November 2013.
321 See *von Mehren/Murray,* 254.
322 See eg “Law Schools’ Applications Fall as Costs Rise and Jobs Are Cut”, The New York Times, 30 January 2013, available at ‹www.nytimes.com›, accessed 22 November 2013.

The basic law degree is the JD (Juris Doctor), which is achieved after three years of successful study. Law is typically taught on the basis of the so-called Socratic (or case) method, which involves intensive preparatory case study by students. These cases are then discussed in class, with the professor calling on students to test whether they have grasped and can apply the legal rules enunciated in the cases.[323] 759

Once students have completed the JD programme, they may wish to apply for admission to a state bar. Upon passing the bar examination, they will be entitled to practice the law. Unlike England, the USA does not have a split profession with different routes of qualification and functions. 760

Each state has its own requirements for admission to the bar. The majority require a law degree.[324] Unlike in civil law jurisdictions and in England, no practical experience is required for taking the bar examination, and the examination takes much less time to prepare. US-American lawyers are expected to learn the necessary practical skills "on the job". In 2010, a total of over 50,000 applicants were admitted to the bar in the USA.[325] 761

G. US-American Civil Procedure and Access to Justice

1. Overview

One of the striking features of US-American law is its concern with facilitating access to justice, ie access to the courts. A number of mechanisms are in place that encourage litigation. In contrast, civil law jurisdictions and also other common law jurisdictions, eg England, have traditionally been more wary of litigation. Litigation can be facilitated – or discouraged – through procedural mechanisms, eg rules on cost distribution, and through substantive law, eg rules on fee agreements between lawyer and client. In general, US-American civil procedure has several distinctive features that merit a closer look. 762

[323] See *Farnsworth/Sheppard,* 22ff.
[324] *Farnsworth/Sheppard,* 27.
[325] See the yearly statistics at ‹www.ncbex.org›, accessed 22 November 2013.

763 US-American civil procedure is governed by different sources of law. Civil proceedings in federal courts are governed by federal law, in particular by the US Constitution and the Federal Rules of Civil Procedure. Conversely, court proceedings in state courts are governed by the laws of that state, including the state constitution. State courts must also respect any limits imposed by the US Constitution.

2. Jury Trial

764 The jury trial has been part of the common law family since the beginning. It was introduced in England by William the Conqueror in 1066. Today, however, the jury trial has all but disappeared in private law litigation in the common law world – with the notable exception of the USA. As pointed out earlier (N 743), the right to a jury trial in cases at common law is guaranteed by the US Constitution. Although this constitutional right only governs federal procedures, state constitutions generally provide similar rights for proceedings in state courts.[326] The restriction to disputes "at common law" means that there is no consitutional right to a jury trial in equity proceedings. Contracts and, in particular, torts are the main areas in which the right to a jury trial operates.

765 The jury is made up of persons registered as voters within the area of the court's jurisdiction. They should represent a cross-section of the community. Jurors are selected in a special process called the voir dire examination (see N 598). The main purpose of this process is to ensure that all of the persons on the jury are impartial ("challenge for cause"). However, the parties are also allowed to reject a limited number of potential jury members without stating any reason (so-called "peremptory challenge").[327]

766 In a jury trial, the judge and the jury distinct roles. It is the role of the judge to decide questions of law and procedure and to control the jury. The role of the jury is to determine questions of fact, ie to decide whether a fact has been established or not, and to apply the law to the facts. For example, it is the jury that decides whether the claimant is entitled to

[326] See *Widmer,* 364–365; on the right to jury trial in state laws, see *Friedenthal/Kane/Miller,* 507ff.
[327] See *Widmer,* 369.

punitive damages and if so, in what amount.[328] The jury is instructed on how to evaluate the evidence and apply the law by the judge.[329]

Because the jurors are laypeople (any lawyers are likely to be rejected as jurors by the parties during the voir dire examination), they are more likely to be swayed by dramatic accounts of the facts. In claims by individuals against corporations, they may also tend to sympathise with the claimant. Many studies have been conducted on the impact of jury trials on the outcome of US-American court decisions, in particular on punitive damages awards. The US Supreme Court has introduced important limits and control mechanisms in several important decisions concerning exorbitant punitive damages.[330] 767

3. American Rule

Each legal system must decide how to distribute the costs of the parties to a dispute. Most jurisdictions have adopted the loser-pays model. Under this model, the costs of litigation, in particular the opposing party's legal fees, will be borne by the losing party, usually on the basis of fee tarifs. In a loser-pays system, the risk of litigation for the claimant is high: if the case is lost, the claimant will have to pay his or her own legal fees and, in addition, the legal fees of the prevailing party. Accordingly, this rule discourages litigation. 768

The loser-pays rule is traditional in civil law jurisdictions, but also in common law jurisdictions such as England. In contrast, the method of cost distribution in the USA is quite different. Undre the so-called American Rule, each party must bear its own legal fees, regardless of who wins or loses the case. This rule encourages litigation, as it reduces the claimant's financial risk. On the other hand, it is a heavy burden for the defendant, who may spend much time and money on defending a weak claim without being able to shift the costs to the claimant. Defendants therefore have a strong incentive to settle, regardless of the merits of the claim.[331] 769

328 See *Widmer,* 318–319.
329 See *Widmer,* 366–367.
330 See the references in *Widmer,* 318ff.
331 See generally *Widmer,* 362–363.

4. Contingent Fees

770 Access to the courts is also facilitated through the generous approach of US-American law toward fee agreements between lawyers and their clients. In US tort law, lawyers for the claimant often proceed on a so-called contingent fee basis. Under this type of agreement, if the client loses the case, then the lawyer will receive no fee whatsoever; however, if the client wins, then the lawyer will receive a fixed percentage od the adjudicated sum. These percentages typically range between 33-40%. Because the client will only need to pay the lawyer if the case is won, the financial risk of litigation is shifted to the lawyer. In consequence, the risk of losing the case will have less of a deterrent effect on potential claimants.

771 In civil law and also in other common law jurisdictions, so-called no win, no fee agreeements have traditionally been considered unethical or even illegal.[332] There has been a shift in recent years, with more countries allowing for modified versions of such fee agreements. However, this shift has less to do with any real change in attitude than with economic difficulties; if the risk of litigation can be shifted to lawyers, government-funded legal aid programmes can be reduced.[333]

5. Class Actions

772 A class action is a special procedural mechanism which allows a claim to be brought by or against a party (the "class representative") who represents a larger group of unspecified persons (the "class members") who are similarly situated to the class representative.[334] Typically, a class action is a so-called plaintiff class action, meaning that the class members have suffered a common wrong at the hands of the defendant. In the more rare defendant class action, the class is composed of a group of unspecified individuals who have caused a common wrong. The defining feature of the class action is that only the class representative is a party to the proceedings. The class members do not actively participate in the case, indeed, they might not even know about the litigation. Nonetheless,

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332 See *Widmer,* 370–372. For a detailed discusssion, see *Widmer,* AJP (2011), 1445–1458.

333 See *Widmer,* AJP (2011), 1445ff.

334 See generally *Friedenthal/Kane/Miller*, 575ff; for an overview, see *Widmer,* 379.

they will generally be bound by the outcome of the case, meaning that the decision will be a res iudicata not only for the class representative, but for all the class members.[335]

The main purpose of the class action procedure is to improve access to justice. It provides a mechanism for adjudicating comparatively small individual claims which might not be pursued on an individual basis. Where the defendant's conduct has resulted in small injury to many, it makes litigation more attractive by allowing a claim for the aggregate sum.[336] However, the US-American class action mechanism is also open to abuse, especially in conjunction with the American Rule. Mounting a defence in a class action lawsuit can be extremely time-consuming and costly, and even if the claim is without merit, the defendant will have to bear its own costs. This explains why very many class action lawsuits are settled. Some concerns raised by class actions have been addressed in the Class Action Fairness Act 2005 (CAFA) (see also N 723).[337] 773

V. Related Legal Systems

A. Overview

As pointed out in our introduction to the common law, over a third of the world's legal systems have been influenced, in whole or in part, by the English common law. Some of these countries belong entirely to the common law family, eg the USA, others are so-called hybrids or mixed legal systems. The defining feature of mixed legal systems is that for historical reasons, they contain elements of different legal traditions. However, there is enormous diversity amongst hybrid systems. The legal traditions by which they have been shaped as well as the extent of these traditions' influence vary considerably. 774

Legal systems which have been influenced by the common law tradition include jurisdictions as diverse as Scotland, South Africa, Cameroun, 775

335 For a discussion of the class action mechanism, its requirements and limitations, see *Widmer,* 378ff with further references.
336 *Widmer,* 380–381.
337 See *Widmer,* 381–382.

Israel, India, and Bahrain. In this section, we will concentrate on a vibrant mixed jurisdiction located in common law territory: Scotland.

B. The Example of Scotland

1. Introductory Remarks

776 As pointed out earlier, the UK is made up of three legal systems. Two of these systems, ie the legal system of England and Wales and the legal system of Northern Ireland, belong to the common law tradition. In contrast, the Scottish legal system is rooted in the civil law tradition. However, Scottish law has come increasingly under the strong influence of the English common law, making it a mixed (or hybrid) legal system.

2. History

777 Scotland's legal system has been influenced both by the civil law and the common law tradition, and its law exhibits characteristics of both.[338] Until the Union of the Crowns in 1707, which saw the creation of the Kingdom of Great Britain (see above N 582), Scotland and England were independent kingdoms. Thus, Scottish law evolved separately, and was not influenced by the common law developing in England. In order to ensure its independence from England, Scotland entered into an alliance with France which lasted for over two hundred years (so-called "Auld Alliance", 1295-1560).[339] During this time, Scotland was not only influenced by Continental European Culture, but also by legal developments on the Continent. Scottish students studied law at universities on the European Continent, in particular in Bourges, Paris, Orléans, Avignon and Leuven and, after the Reformation, in Utrecht, Groningen and Leyden.[340] Scottish lawyers were well acquainted with the works of French and Dutch legal scholars.[341] Not surprisingly, there was an actual reception of Ro-

[338] See eg *Robin Evans-Jones*, Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law, 114 LQR 228 (1998).
[339] On the Franco-Scottish alliance, see generally *Elizabeth Bonner,* Scotland's "Auld Alliance" with France, 1295-1560, History 84 (1999), 5–30.
[340] See *Walker,* 38; *Tetley,* 60 La L Rev 677, 689 (2000).
[341] See *Walker,* 38.

man law in Scotland.[342] Thus, Scottish law comprised legislative acts passed by the Scottish parliament, the Canon law applied by the church authorities, customary law and, where gaps needed to be filled, the legal rules and principles of Roman law.[343]

Roman law was the main external influence on Scottish law until the Union of 1707. Even though the Treaty of Union provided that the Laws concerning "publick Right, Policy and Civil Government may be made the same throughout the whole United Kingdom; but that no alteration be made in Laws which concern private Right, except for evident utility of the subjects within Scotland", English law increasingly began to influence Scottish private law after 1707.[344] This influence became particularly strong in the 19th century, due to the growing legislative activity of the British parliament and the appellate jurisdiction of the House of Lords.[345] At the same time, the influence of Continental European law and legal doctrine declined. Scottish students no longer studied in France and Holland, and Scottish courts had developed their own body of case law. The "emancipation" of Scottish law from the laws of Continental Europe was also fuelled by the European codification movement in the eighteenth and nineteenth centuries (see N 49). This movement never reached Scotland; indeed, the only legislative body which might have enacted a Scottish code, ie the Scottish parliament, had been abolished by the Treaty of Union. Accordingly, Scottish private law continued to develop on the basis of judicial decisions and the statutes passed by the British Parliament.[346] Today, access to Continental European legal scholarship and case law is often prevented by the language barrier.[347] 778

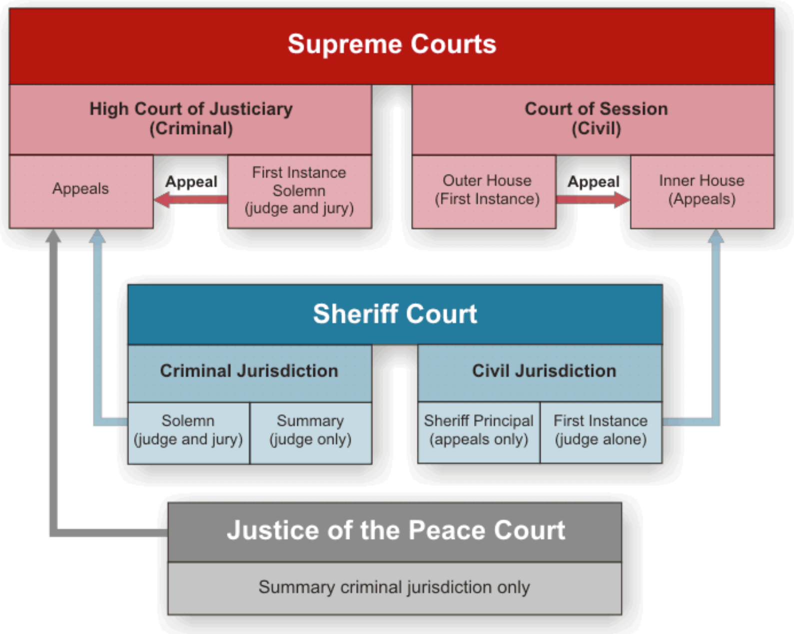
3. Judicial System in Scotland

As pointed out earlier, Scotland has its own judicial system (see N 777) 779
which comprises both tribunals, ie specialised judicial bodies such as the

[342] See eg *Tetley,* 60 La L Rev 677, 689 (2000). On Scottish legal history, see generally *Walker,* 79ff; *Kenneth Reid/Reinhard Zimmerman (eds),* A History of Private Law in Scotland, Oxford 2003-2004; for an overview, see *Tetley,* 60 La L Rev 677, 688–692 (2000).
[343] See eg *Walker,* 38–39; *Tetley,* 60 La L Rev 677, 689 (2000).
[344] See eg *Tetley,* 60 La L Rev 677, 690 (2000).
[345] See *Tetley,* 60 La L Rev 677, 690–691 (2000).
[346] Cf *Tetley,* 60 La L Rev 677, 690 (2000).
[347] See *Tetley,* 60 La L Rev 677, 691–692 (2000).

Scottish Employment Appeal Tribunal, and courts.[348] In several important areas, however, The Supreme Court of the United Kingdom is the final court of appeal for Scottish cases. It is the highest court of appeal in civil law matters, and, since 2013, exceptionally also for criminal cases (see N 662). The Supreme Court of the United Kingdom also hears disputes concerning devolution matters (see N 664).

780 The Courts of Scotland:[349]



781 As a result of the appellate jurisdiction of the UK Supreme Court, the influence of the common law on Scottish law, especially Scottish private law, is still strong. Even though appeal cases from Scotland must be decided under Scottish law, the majority of the Supreme Court judges are English, so that there is a risk that Scottish law may be misapplied or even ignored.[350] Only two of the twelve Justices on the Supreme Court are Scottish; indeed, until 1876, there were no Scottish lawyers on the Appellate Committee of the House of Lords (see N 667) whatsoever. However, the independence of Scottish law has been much strengthened since the devolution of legislative powers to the Scottish government

[348] On the Scottish judiciary, see generally *White/Willock/MacQueen*, paras 4.1ff.
[349] Diagram retrieved from ‹www.scotland-judiciary.org.uk/16/0/Court-Structure›, accessed 22 November 2013.
[350] See *George Gretton*, Farewell to their Lordships?, ZEuP (2005), 514, 515.

(see N 655). In particular, the Scottish government now has the power to legislate in the field of Scottish private law.[351]

4. Characteristics of Scottish Law

Despite the influence of Roman law and Continental legal thought, Scotland never adopted a code. To this day, Scotland's civil law remains uncodified.[352] Accordingly, case law is the main source of law, together with statutory law passed by the British Parliament and, insofar as legislative authority has been transferred to Scotland (so-called "devolution"; see N 655), by the Scottish Parliament. The devolution of legislative power has strengthened Scottish private law and contributed to its "de-Anglicisation".[353] 782

As pointed out earlier, Scottish private law exhibits characteristics of both the common law and the civil law traditions. In contract law, for example, Scottish law follows the civil law tradition; the common law doctrine of consideration (see N 12) does not apply in Scotland and, in contrast to English law, Scottish law recognises contracts for the benefit of third parties. Also, the availability of specific performance in contract law is the norm, rather than the exception.[354] The distinction between public and private law, typical of civil law jurisdictions and still comparatively new in England (and uncommon in the USA; see N 620), has long been recognised in Scottish law.[355] Unlike in England (see N 610), "law" and "equity" were never administered by different courts and are not considered to be two separate branches of law.[356] Accordingly, the term "common law" in Scotland simply refers to the case law developed by Scottish courts.[357] In contrast to English law, Scottish inheritance law provides that spouses, civil partners and descendants have a legal right to a fixed share of the deceased's estate.[358] Scottish private law is tradition- 783

[351] See sections 28–29 of the Scotland Act 1998.
[352] See eg *Tetley,* 60 La L Rev 677, 686 (2000).
[353] See generally *MacQueen,* vol 4.4 EJCL (December 2000).
[354] See eg *MacQueen,* vol 4.4 EJCL (December 2000).
[355] See *Walker,* 195.
[356] See *Walker,* 197–198
[357] Cf *Walker*, 199.
[358] Cf *Hilary Hiram,* New Developments in UK Succession Law: Report to the XVIIth International Congress of Comparative Law, July 2006, vol 10.3 EJCL

ally split into categories developed in Roman law and in Continental Europe, ie a General Part including rules on the sources of law and other principles "which apply throughout the whole of private law",[359] the law of persons, the law of obligations, the law of property (including inheritance law) and the law of actions.[360]

784 Conversely, common-law influences can be detected in the law of unjustified enrichment and agency. Like English law, Scottish contract law recognises a unified concept of breach of contract (instead of distinguishing between impossibility, late performance and defective performance, as is the tradition in civil law jurisdictions).[361] Scotland has also introduced the institution of the trust (on the trust, see generally N 32), and it has adopted the common-law doctrine of binding precedent (*stare decisis*; see generally N 625).[362] Like England (see N 690–695), Scotland has a split legal profession, drawing a distinction between solicitors and so-called advocates. Advocates are the Scottish equivalent of English barristers.[363]

785 Further sources of law in Scotland aside from precedent and legislation are custom, although its role in modern private law is negligible,[364] and, in particular, the so-called Institutional Writings. The Institutional Writings are works of particularly influential and renowned legal scholarship from the seventeenth to the early nineteenth centuries. They are systematic expositions of Scottish law, and derive their name from the fact that they were often modelled on *Justinian's* "Institutiones".[365] Even today, Institutional Writings are more than just legal commentaries on the law; rather, "a statement in one of them, in default of higher authority [ie precedent or legislation], will almost certainly be taken as settling the

(December 2006), available at ‹www.ejcl.org/103/art103-7.pdf ›, accessed 22 November 2013.

359 See eg *Walker,* 211.

360 See generally *Walker,* 210ff; see also section 126(4) of the Scotland Act 1998.

361 See *Robin Evans-Jones,* Unjustified Enrichment, in *Kenneth Reid/Reinhard Zimmerman (eds),* A History of Private Law in Scotland, Oxford 2003-2004, 369ff; Hector L MacQueen/Joes Thomson, Contract in Scotland, 3rd edn, Haywards Heath 2012, para 5.2.

362 See eg *White/Willock/MacQueen*, paras 12.1ff.

363 See ‹www.europaeische-juristenausbildung.de/Laender/schottlandframe.htm›, accessed 22 November 2013.

364 See *White/Willock/MacQueen*, para 5.23.

365 *White/Willock/MacQueen*, para 5.22.

law".[366] Accordingly, the Institutional Writings are actual sources of law.[367] The most famous and authoritative Institutional Writer is *Sir James Dalrymple, Viscount of Stair* (1619-1695), author of *Stair's* "Institutions of the Law of Scotland", written in 1681.[368]

[366] *Walker,* 456

[367] *White/Willock/MacQueen*, para 5.22.

[368] For further examples, see *White/Willock/MacQueen*, para 5.22.

Annexe

Guidelines for Writing a Paper in Comparative Private Law

Olivier Riske, MLaw, Doctoral Assistant, University of Neuchâtel

I. Introduction

These guidelines should by no means be considered as the sole and definite recipe for writing a research paper in comparative private law. There are as many approaches possible as there are purposes for comparison. Thus, most authors agree that there is no binding or "official" methodological canon for comparative legal writing.[1] Creativity and original outlooks are to be encouraged. However, that does not mean that there are no rules at all to be followed when one chooses the comparative path. The following sets up guiding posts along the way in order to help avoid some common pitfalls and wrong turns. 786

II. Methodology

A. Starting point

The starting point of a comparative analysis is to set up a clear working hypothesis (see above, N 175-183), which is then to be tested.[2] Decide on the purpose (see above, N 59-138)[3] of your comparative study first, because it will influence the choice of the legal systems or topics of 787

1 See eg *John C Reitz*, How to Do Comparative Law, 46 Am J Comp L 617-636, 617, available on the Internet at <www.jstor.org/stable/840981> accessed 9 December 2013; *Peoples*, Comparative Law Methodology, 1, <www2.okcu.edu/law/lawlib/pdfs/guide_comparative.pdf> accessed 9 December 2013.

2 *Zweigert/Kötz*, An Introduction to Comparative Law, 34; *Peoples*, Comparative Law Methodology, 1, <www2.okcu.edu/law/lawlib/pdfs/guide_comparative.pdf> accessed 9 December 2013.

3 See *de Cruz*, Comparative Law, 18-26.

comparison and the method of comparison.[4] In law school, the topic of your comparative analysis is often given or may be chosen only in a list of suggested topics.

788 Even if using the legal approach (see above, N 182-183) might be suitable in the framework of a topic related for instance to harmonisation and unification of law (see above, N 112-138), it is best to start with setting a working hypothesis (see above, N 175-183)[5] based on the factual approach (see above, N 178-181). The hypothesis should be formulated in factual terms describing a concrete social conflict, problem or need, without regard to particular legal institutions, labels or figures. The working hypothesis is a matter of fact or a concrete societal problem formulated in abstract terms.[6]

B. Structure

789 As regards structure of your paper, start with introducing the global problem to your readers. The description of the social conflict or problem (the working hypothesis) will be the center point of your introductive part. Then, tell the reader what aspects of the problem you will be examining and what insights you expect to gain from your study.[7]

790 Structure your paper in order to achieve an integrated comparison. Your paper must be more than simply a set of descriptions of different legal orders strung together by a common title. Hereunder are two possible skeletal structures.[8] The first one uses history as a contextual factor. The second one incorporates international law as the larger framework. These are generic examples. Variations thereof integrating for instance other extra-legal factors (see below, N 23(e)) or a largely different structure

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4 *Peoples*, Comparative Law Methodology, 1, available on the Internet at <www2.okcu.edu/law/lawlib/pdfs/guide_comparative.pdf> accessed 9 December 2013.

5 See *Zweigert/Kötz*, An Introduction to Comparative Law, 34.

6 Such a hypothesis might be "*how do two different legal systems protect their citizens from dangerous products such as defective cars?*" (see above, N 180).

7 *Hepting*, Arbeitshinweise, 1, <www.jura.uni-mainz.de/auslandsbuero/Dateien/Anleitungsblatt_fuer_Magisterarbeiten.pdf > accessed 9 December 2013.

8 *Arzt*, Tips for Students, 1-2, <www.law.syr.edu/pdfs/0writing_a_reseach_paper_comparative_law_topics.pdf > accessed 9 December 2013.

might prove more appropriate depending on the topic or purpose of your comparative study.

I. Introduction
II. The Global Problem of Do-Re-Mi
III. Country La
    A. History of Do-Re-Mi in La
    B. La's Original Laws to Regulate Do-Re-Mi
    C. Reform of La's Do-Re-Mi Laws
IV. Country Sol
    A. History of Do-Re-Mi in Sol
    B. Sol's Laissez-Faire Approach to Do-Re-Mi
    C. Efforts to Regulate Do-Re-Mi in Sol
V. Comparison of La & Sol's Approaches to Do-Re-Mi
VI. Recommendations to La, Sol, and Third Countries as regards Do-Re-Mi problems
VII. Conclusion

Depending on the topic, it is worth considering going beyond purely national comparative analysis.[9] Indeed, using international law aspects broadens the perspective on the problem. In Europe for instance, European private law is part of that larger framework. But supranational aspects are also to be found for instance in international Conventions, private international law rules or soft law. Here is an example of a skeletal structure incorporating international law: 791

I. Introduction
II. The Global Problem of Do-Re-Mi
III. International Law Concerning Do-Re-Mi
IV. Domestic Law Approaches to Do-Re-Mi
    A. Dealing with Do
        i. Country La's Statute
        ii. Country Sol's Case Law
    B. Dealing with Re
        i. Country La's Proposed Scheme
        ii. Country Sol's Laissez-Faire Approach
    C. Dealing with Mi
        i. Country La's Insurance Law Approach
        ii. Country Sol's Proposed Scheme
V. Lessons from La and Sol's Experience
VI. How International Law Should be Reformed to More Effectively Respond to Do-Re-Mi problems
VII. Conclusion

[9] See *Arzt*, Tips for Students, 1, <www.law.syr.edu/pdfs/0writing_a_reseach_paper_comparative_law_topics.pdf > accessed 9 December 2013.

C. Reports setting out the law of the chosen legal systems

792 The second step is examining how the chosen legal orders deal with the social problem in terms of regulatory content or otherwise ("*Länderberichte*", "*compte-rendu pays par pays*"; see above, N 235). Whenever possible, it is best to segment the problem into different aspects which may then be compared to one another across the different legal systems.

793 The selection of the legal systems to compare in the framework of a micro-comparison (see above, N 170 and 188-233) depends on the topic of your research. The rule of thumb is that it is rarely safe to ignore the parent system, in particular when dealing with problems related to contract law, torts, or property law.[10] For a research paper in these fields, it makes much more sense to compare two parent systems of different legal families (eg German law for the Germanic family and French law for the Romanistic family),[11] than all affiliates of a single legal family. Choosing an affiliate for comparison is relevant if the way that legal system approaches your problem is particularly original or part of what characterises it.[12] Keep in mind that engaging in a comparison between more than two legal systems besides your own exceeds the format of a Master thesis (see below, N 23(f)).

D. Comparison

794 The next step is the comparison as such (see above, N 234-238 and N 239-244). It is important that the essential aspects of the social problem and the regulatory answers of the respective legal orders are clearly identifiable. Concentrate on essential principles. Address only issues you really want to compare. It makes little sense to deal with an unproductive side issue just for the sake of exhaustiveness.[13]

[10] *Zweigert/Kötz*, An Introduction to Comparative Law, 41-42.

[11] As regards the Common Law family, although English Law is the parent system, the comparatist will have to take into consideration American Law not only because it has developed such a distinctive a style but also because of its sheer influence on the family (see above, N 211).

[12] See *Zweigert/Kötz*, An Introduction to Comparative Law, 42.

[13] *Hepting*, Arbeitshinweise, 1, <www.jura.uni-mainz.de/auslandsbuero/Dateien/Anleitungsblatt_fuer_Magisterarbeiten.pdf> accessed 9 December 2013.

E. Outline

Finally, you will have to outline the results of your comparison in a conclusion. You should thereby take up again the issues and goals you have formulated in your introductive part and answer the questions you initially raised. 795

III. Hands-on Tips

A. Choosing a topic

In most Swiss Universities you will be able to freely choose the topic of your Master thesis. Depending on the required length of the thesis, you will spend months working on it. Therefore, the first criterion for choosing a topic should be at least a strong interest, if not a passion for a particular social conflict, problem or need (see above, N 2). 796

Take advantage of prior knowledge and skills. What foreign language(s) do you easily read? Have you ever spent a long enough period of time abroad so as to be acquainted with a foreign culture? Are you already knowledgeable or do you have a specific interest as regards a particular social conflict or legal system? Do you have some prior knowledge or interest in a field other than law (ie history, economics, sociology, or other factors influencing the state of the law; see below, N 23(e))? Taking into account your interests, knowledge, and skills when choosing a topic will make working on your paper easier. 797

B. Scope of comparison

Comparing little but thoroughly is better than comparing a lot superficially. If you concentrate on the essential you will able to examine and evaluate details. It is fine to take up only one aspect of a larger problem, if your paper provides for an in-depth analysis, evidences relationships and confronts scholarly writings. Such a paper will be richer than one simply juxtaposing a lot of different aspects of which only the surface is 798 scratched. If you take on too much, you will hardly be able to intensively process literature and case law. Examine the legal policy behind a particular rule, the relationship of that rule with other rules relevant to your factual problem, and the effect that rules has on similar problems.[14]

C. Processing case law and literature

799 A comparative study requires from you to process case law and literature. All statements as regards the content of the compared legal orders have to be evidenced primarily through exact quotations of statutory law, then as a matter of principle first through specific case law and then through citing literature.[15]

800 Fruitful comparative law research strategy implies understanding the sources of law and the hierarchy of authorities of the system you are studying.[16] Leading cases are the primary source in Common Law systems, whereas statutory law comes first in Civil Law systems. In German law the primary source as regards literature are commentaries: it is only when one comes to an in-depth examination that one goes to (large) textbooks, monographies and contributions for sources.[17] French case law may be somewhat unsettling at first for foreigners, because the holdings of the court are only sparingly motivated. However, published case law of the *Cour de cassation* is often discussed in leading French law reviews where specialists provide for insightful comments ("*notes*").

801 Sources for foreign law coming from scholarly authorities of one's own domestic legal order should be used with some caution. It is best to refer to primary sources from the examined legal systems in the part dedicated to setting out the law of the systems in question ("*Länderberichte*", "*compte-rendu pays par pays*"; see above, N 7). Comparative law books may be used in the part of your paper dedicated to comparison (see above, N 9). The quality of your paper depends to a large degree on how

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14 *Hepting*, Arbeitshinweise, 2, <www.jura.uni-mainz.de/auslandsbuero/Dateien/Anleitungsblatt_fuer_Magisterarbeiten.pdf > accessed 9 December 2013.

15 Id.

16 *Peoples*, Comparative Law Methodology, 4, <www2.okcu.edu/law/lawlib/pdfs/guide_comparative.pdf> accessed 9 December 2013.

17 *Hepting*, Arbeitshinweise, 2, <www.jura.uni-mainz.de/auslandsbuero/Dateien/Anleitungsblatt_fuer_Magisterarbeiten.pdf > accessed 9 December 2013.

intensively you worked with case law and literature.[18] That is one of the reasons why the scope of your comparison should not be too wide in scale (see above, N 13).

D. Documentation

Whereas your University library may suffice for a preliminary research,[19] writing a paper in comparative law most often requires you to travel to specialised libraries for documentation. As regards Switzerland, not only is the Swiss Institute of Comparative Law (ISDC)[20] in Lausanne very well furnished with national, international, and comparative legal paper resources, but it also grants its visitors free access to the most important national and international legal databases (Westlaw, Kluwerlaw, Heinonline, LexisNexis, Justcite, Dalloz, Beck-online etc.). The library staff of the Institute is very forthcoming and ready to help out in getting acquainted with the library and its various resources. Recently it started holding seminars on a yearly basis on national and comparative legal research. Provided you attend the library regularly and depending on availability, the Institute may even grant you a reserved table for you studies where you will be able to keep your staple of books from one study session to the next. Do not hesitate to visit the Institute and make inquiries. 802

E. Citations

The chief rule is consistency when citing authorities. Once you have made a choice as regards a form of citation, stick to it throughout your paper. It is best to choose a widespread or common method of citation. Indeed, your method of citation should easily be understandable. 803

Cite foreign legislation according to the standards commonly used in that legal system (eg use "§" instead of "Art." for German statutory law). 804

[18] Id.
[19] For comparative law reference sources in English, see *Peoples*, Comparative Law Methodology, 4-24, <www2.okcu.edu/law/lawlib/pdfs/guide_comparative.pdf> accessed 9 December 2013.
[20] See <http://isdc.ch/> accessed 9 December 2013.

Case law should be cited using the form common in the respective country (eg "Walker & Co. v. Harrison, 81 N.W.2d 352, 355 (Mich. 1957)" for American cases).[21] When citing contributions in law journals, use the citation form and abbreviations commonly used in the country where the journal is published (eg "ZWEIGERT, RabelsZ 38 (1974), 299, 310"). Some legal systems have well established citation rules and indexes to legal abbreviations.[22]

805 Your bibliography has to be exclusively made of authorities cited in your paper. A table of cited cases is a common feature of scientific literature only in Common Law systems. Conversely, in Germany case law is neither referenced in a specific table nor in the bibliography.[23] Ultimately, the choice is yours whether or not to integrate a separate table of cited cases. However, if you choose to do so, your table must list all cited cases of all examined legal systems.

F. Style

806 When writing a paper, the rule of thumb is: one idea, one sentence; one group of ideas, one paragraph; one aspect, one subsection. Every subsection should have a title and must be incorporated to fit logically into your overall systematic structure. Help your reader to easily follow your train of thought. In structuring your ideas go from the most general points to the most specific or concrete ones. Concrete points must fit within the topic introduced by the general points. Establish a conceptual link when going from one point to the next.

807 Insert cross-references to the relevant parts of your text. For reasons of practicality and visibility, it is a good idea – provided you have not been given instructions to the contrary – to integrate references within your

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21 Example taken from *E Allen Farnsworth*, Contracts, 3rd ed., New York 1999, 581 fn 9.

22 See eg Oxford Standard for the Citation of Legal Authorities <www.law.ox.ac.uk/published/OSCOLA_4th_edn.pdf > accessed 9 December 2013; Cardiff Index to Legal Abbreviations <www.legalabbrevs.cardiff.ac.uk/site/index> accessed 9 December 2013; The Bluebook: A Uniform System of Citation <www.law.georgetown.edu/library/research/bluebook/> accessed 9 December 2013.

23 *Hepting*, Arbeitshinweise, 2, <www.jura.uni-mainz.de/auslandsbuero/Dateien/Anleitungsblatt_fuer_Magisterarbeiten.pdf > accessed 9 December 2013.

paper into the body of the text in parentheses instead of using footnotes. Cross-references should be as helpful as possible. Provided your paragraphs are numbered, refer to particular paragraphs instead of pages or subsections.

G. Major Pitfalls

One should be aware of the main hazards of an endeavor before engaging in it. For a comparatist the chief dangers lie in: 808

(a) Disregarding the fact that a fruitful comparison is a functional comparison. Comparative law is not about how legal rules and institutions outwardly resemble, but how law addresses a particular social conflict, problem or need;[24]

(b) Giving way to the tendency to impose one's own native legal conceptions and expectations on the systems being compared;[25]

(c) Ignoring linguistic and terminological problems (see above, N 283, last item). The pitfalls of terminology are some of the most challenging perils the comparatist has to face;[26]

(d) Disregarding the cultural differences between legal systems. One has to be acquainted with the particular cultural background one studies in order to fully understand the signification of a foreign text, since the choice of the words and their meaning are determined by that background;[27]

(e) Neglecting extra-legal factors. Such factors may be informal customs or social practices operating outside strict law or various non-legal phenomena such as historical, political, social or economic aspects. Ultimately, these factors influence the state of the law.[28] Therefore, incorpo-

24 See *Hepting*, Arbeitshinweise, 2, <www.jura.uni-mainz.de/auslandsbuero/Dateien/Anleitungsblatt_fuer_Magisterarbeiten.pdf > accessed 9 December 2013.
25 See *de Cruz*, Comparative Law, 229-230.
26 See *de Cruz*, Comparative Law, 220-222.
27 See *de Cruz*, Comparative Law, 222-225.
28 See *de Cruz*, Comparative Law, 230-231; *Arzt*, Tips for Students, <www.law.syr.edu/pdfs/0writing_a_reseach_paper_comparative_law_topics.pdf > accessed 9 December 2013.

rating extra-legal factors into your study means adding value to your paper;

(f) Choosing a focus of comparison which exceeds the requirements of the imposed format. For instance, engaging in a study of two or more entire legal systems or families (macro-comparison; see above, N 171) surpasses the scope of a Master thesis.[29]

IV. Conclusion

809 Writing a research paper in comparative law is undoubtedly a challenging process. On the one hand it requires open-mindedness and venturing away from the trodden paths of conventional domestic legal thinking. On the other hand, not only will you have to engage in an in-depth analysis of how a particular problem is apprehended by a foreign legal system, but you will have to incorporate fields of knowledge that are not strictly legal in nature. However, if you avoid common pitfalls and follow some basic rules, it will prove to be a highly rewarding endeavor. You will be trained in approaching a rule from the functional perspective. This broader view on a particular problem will help you with finding original solutions, even on a purely domestic level.

[29] That does not mean one should ignore the overall framework of the compared legal system, for it provides for the indispensable context of the study (see above, N 150-153).