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# Comparative Law

## 1. Term and Purpose

Comparative Law describes the comparison of various laws; it is not a distinct body of law. This is clearer from the term in German (*Rechtsvergleichung*) than from the term in other languages (comparative law, *droit comparé*). Macro-comparison is concerned with entire legal systems; micro-comparison deals with specific institutions or specific problems. Comparative Law thus goes beyond the mere study of foreign legal systems. However, the difference should not be exaggerated. First, adequate knowledge of foreign law is an indispensible prerequisite of every legal comparison. Second, even „mere" knowledge of foreign law necessarily contains a comparative element, if only because the comparatist regularly looks at another legal system from (and often for) the perspective of her own particular legal system. Foreign law is thus regularly understood and explained automatically in relationship to one's own law.

The actual comparison of legal systems – the discovery, explanation and evaluation of similarities and differences – is only one of several themes of the contemporary discipline of Comparative Law. A second theme concerns the influence between legal systems, especially the → reception of law, whether of individual legal institutions or of entire legal systems. With regard to Europe, this encompasses on the one hand the influence on European private law of different legal systems (Roman law, the law of member states, the law of non-European states). On the other hand, it includes the transmission of European law to non-European legal systems. A third theme of Comparative Law is the development of a general theory of law. Here, comparative law functions as the discipline which attempts to understand the various legal systems in their totality and in their relationship to each other, without necessarily trying to avoid or minimise the existing differences between them. This theme was prominent in the early 20th century and is once again gaining attention today.

Different purposes are ascribed to Comparative Law: it should inform national lawmaking, assist judges in the resolution of difficult questions, provide a basis for legal unification or harmonisation, or simply increase knowledge and extend awareness, especially in legal education. All these are purposes that legal science should fulfil in general. From this perspective, Comparative Law is just a special form of general legal science, or, phrased inversely, the comprehensive study of law (and, with limits, legal practice) must contain a comparative component.

## 2. Methods

In recent times there has been increased debate about the methods and theories of Comparative Law. No consensus has emerged, and the discussion has not yet exercised substantial influence on practical legal comparison. Beyond mere

doctrinal comparison, there are fundamentally two different methods, functional and cultural legal comparison.

Functional comparison, popularised above all by *Konrad Zweigert* and *Hein Kötz*, starts from the premise that the function of law lies in responding to social problems and that all societies face in essence the same problems. This makes it possible to compare legal institutions, even if they display different doctrinal structures, as long as they fulfil the same function, because in this case they are functionally equivalent. For example, the → common law institution of → consideration can be compared with the → formal requirements of German law, insofar as both fulfil the same function: as caution against the rushed formation of contracts and as → indicia of seriousness regarding a contractual promise. Understanding legal norms as responses to problems supposedly also makes it possible to designate which law is better and, on this basis, to reform domestic law or to create an international uniform law.

Cultural comparison in contrast (sometimes called comparative legal studies or comparative legal cultures) rejects the reduction of law to its function and instead understands national law as an expression and development of the general culture of a society (→ legal culture). The focus here lies on the mentality expressed in a legal system, which is not fully observable by outsiders and can only be fully experienced by participants of the legal system. Because cultural differences (particularly those between civil and common law) are seen as unbridgeable and because different legal cultures are deemed worthy of protection, cultural comparison usually opposes comparative evaluation and legal unification as both impossible and undesirable. Instead, it promotes tolerance for foreign law and for difference in general.

The discrepancies between the approaches are smaller than the sometimes fierce debate suggests. Both approaches reject a limitation of comparative law to the analysis of black letter law; instead, both search for the role of law in society. Both approaches value and accept the differences between legal systems. Properly understood, functional comparison does not, as is often claimed, fail to recognise or accept the identity of different legal systems. The focus on functional equivalence enables functional comparison to grasp simultaneously the similarities in the solutions and the differences in the ways of reaching these solutions. These differences in approaches can meaningfully be described as legal culture. Recently, this insight has been used in the attempt to bring legal culture and functional equivalence together under the concept of legal paradigms. Paradigm describes the manner in which legal systems address problems in specific (cultural) ways to attain (functionally equivalent) solutions.

### 3. Development

Comparative Law in the broad sense is as old as law itself. In a narrower sense, Comparative Law became possible only when different legal systems were distinguished, especially with the rise of the state monopoly on lawmaking. As long as European monarchs refrained from legislating in private law, private law doctrine and practice did not adopt an explicitly comparative method; instead,

legal reasoning took place with common parameters derived from the → *ius commune*, → the → *lex mercatoria* or → natural law. Here, the frequent invocation of foreign authorities (also by English courts) did not amount to comparison of different legal systems; rather, those authorities were considered sources of a common law.

Since the beginning of the 19th century, when private law in continental Europe was nationalised by way of → codification, modern European comparative law has developed. Comparative law journals were established, and comparative law societies were founded—often on a national basis, since the main purpose of Comparative law was for a long time to provide inspiration for state legislation. At the same time, comparative law experienced a double-limitation, which largely continues until today. First, it was generally concentrated on Europe. The law in former colonies (with the exception of the United States) was not seen as sufficiently independent and was largely ignored. Non-European legal systems that had not been supplanted by European law, especially in Asia, Africa and in the Pacific, were excluded from comparative law and were relegated to the newly developed field of legal ethnology. Second, comparative law largely concentrated on private law, which was viewed as apolitical and therefore appeared to be the only area of law fit for strict, scientific legal comparison. Comparative law was long focused on the comparison of legislative texts, especially between continental European legal systems, which were divided into different → legal families, in particular depending on their French or German origin. The English common law, which was uncodified and traditionally characterised by a more prominent role for case law and inductive methods, presented a considerable challenge for this *législation comparée*, as it is called in French.

Since the first Comparative Law World Congress in Paris in 1900 (which is somewhat arbitrarily viewed as the birth of modern comparative law), academic comparative law has made progress. Comparative law now goes beyond analysis of the texts of legal rules and instead compares the law in action; this makes it easier to compare civil and common law. At the same time, comparative law was aimed at the formulation of a common supranational law – if not at the global level, at least at the European level. In the 20th century, international working groups have been constituted that push forward unification, whether on a political or academic basis. However, the double-limitation of the 19$^{th}$ Century – a limitation on Europe and on a presumably apolitical private law – continued. The emphasis on apolitical law is the only way to explain why it was so controversial whether socialist law could meaningfully be compared to capitalist law. Also, the concept of private law in comparative law remained trapped in 19$^{th}$ century conceptions . The changed understanding of private law in the 20th century (constitutionalisation, materialisation, private law as a tool of regulation) is still often either ignored or seen as a corruption of private law. This is one reason why the apolitical private law of classical comparative law and the regulatory private law understanding of the EU still remain somewhat unconnected.

## 4. European Private Law Studies

European private law studies arose out of comparative law but have now transcended it. After the Second World War the first calls were made for a European-wide private law based on comparative law. Such calls have become stronger since the beginning of the 1990s. The aim had been to develop a unified European private law, based either on the similarities discovered through functional comparative law or on the old or a newly developed ius commune. Recently, more attention is being paid to the comparison among European laws in legal education and doctrine. Comparative law textbooks on European private law, some as casebooks with primary texts from the relevant legal systems, provide students with access to information on other legal systems. Even books on doctrinal questions in domestic law now regularly contain a comparative law part; explicit comparative law projects are valued more highly than previously. Finally, international cooperation has also increased (in part due to EU subsidies). Several new journals on comparative and European private law now exist. Above all various international working groups with different goals and methods are working towards a European private law on an explicitly comparative basis.

Among the various projects, comparative law plays the greatest role for the Common Core Project. This project is compiling the similarities and differences between European legal systems using detailed comparative law case studies, largely without evaluation of these solutions. Other groups connect comparative law surveys with normative searches for the best solution (→ Restatements). This is the case for the "Lando "Commission on European Contract Law (→ Principles of European Contract Law) and the → Study Group on a European Civil Code, which emerged from it, as well as the European Group on Tort Law (→ Principles of European Tort Law). Many EU projects have a more regulatory understanding of private law, whether they emphasise market-liberal or retributive-social private law, so the comparison of the usually less regulated private law of the EU member states is often less important. Altogether, comparative law is now only one of many elements of European private law; on its own it is insufficient both as a foundation and as a basis of legitimacy.

A similar development occurred among opponents of the Europeanisation of private law jurisprudence. For a long time comparative lawyers were almost unanimous in their support of a Europeanised private law; resistance came from scholars of domestic law. Now, some comparative lawyers also invoke a necessarily domestic legal culture against a Europeanised private law; others support a Europe-wide debate but not necessarily a unification of European private law. All of this means that the seemingly inextricable tie between comparative law and legal unification has been resolved, with liberating effect for both comparative law and the legal unification debate.

Most arguments on whether and how differences among legal systems can and should be overcome must be found outside comparative law. This means that comparative law is necessary but not sufficient for the development of European private law. The focus of European private law is not merely on the understanding and evaluation of differences between legal systems but also on ways to deal with

these differences. Moreover, European private law must understand the role of law in society, but it must first and foremost develop legal rules and a European legal doctrine.

### 5. European Law-Making

Comparative law work is important to European Union institutions for several reasons. The basic question of whether the EU should and is permitted to act regularly contains a comparative law component. The questions of whether legal differences create obstacles to the → internal market and whether national law is insufficient according to the → subsidiarity principle cannot really be answered without comparative analysis of the legal systems of member states. However, the empirical studies that would be necessary for this are only rarely carried out comprehensively. Often the relevance to the internal market and the need to take action on the European level are asserted without substantiation.

Once the EU decides to regulate, it depends more strongly on comparative law preparatory work than is the case in the domestic law-making process of individual states. When the EU decides on a new area of regulation, it regularly lacks its own legal tradition as a point of reference, so it must reach back to the experience of the member states or of non-European legal systems. The promulgation of EU laws is frequently preceded by comprehensive comparative law preparatory work, which is often elaborated internally and then, regrettably, not published. For larger projects, the EU often entrusts researchers outside EU institutions with such preparatory work.

Finally, comparative law is also important in the implementation phase. EU law does not merely replace national law *tout court*; it interacts with it in complex ways. As a consequence, a good comparative understanding of the member state laws, in comparison both with each other and with EU law itself, is a prerequisite for the successful implementation of EU law as well as for its monitoring pursuant to Art 211 EC Treaty/17 TFEU.

### 6. European Adjudication

Comparative law is also important in the → European Court of Justice, even though the Court is limited to the interpretation of EU law and does not address the correct interpretation of the laws of member states. For instance, the question whether the application of a member state's laws exerts excessive burdens on the citizens of other member states in addition to the burdens imposed on them by their country of origin can be answered only through a comparison between the relevant member state laws. Another use concerns the autonomous interpretation of EU law, which excludes only the direct recourse to the law of a single member state, not necessarily recourse to a comparison of member state laws in general. Comparative law is incontrovertibly necessary in the establishment of general principles of EU law. It is also used to fill gaps in EU law where the member states' legal systems are in agreement or at least show a common development. However, where the EU aims at overcoming member state laws, such recourse to comparative law is probably impossible.

At the Court of Justice, comparative law arguments are predominantly prepared by the Advocate General, although the comprehensiveness and quality of these arguments differ strongly. In addition, the European Court of Justice can also request that the parties, especially the Commission, undertake comparative law preparatory work; such comparative insights can also be drawn from submissions of the member state. Finally, the Court itself puts together internal comparative law studies that remain unpublished.

The courts of member states or European courts use decisions from the courts of other member states as precedent in the interpretation of EU law, though still too rarely. Such use does not really amount to comparative law, since it involves a discussion within one and the same legal system. In addition, comparative law is sometimes used for the interpretation and development of domestic law; this can, over time, lead to convergence of a common European private law.

## 7. Outlook

European private law jurisprudence is currently emancipating itself from comparative law in the same way that European Community Law emancipated itself from international law and national constitutional law. Now that comparative private law between the member states has achieved a considerable degree of knowledge, European private law can focus on other elements necessary. If a → Common Frame of Reference or a European civil code should be successful, it cannot be grounded merely in comparative law; it also must persuade on other grounds. At the same time that comparative law becomes less important, European private law can concentrate stronger on its normative components and its connections to the EU and its law. Simultaneously, its decreased importance within European private law should enable comparative law in Europe to once again focus on questions other than the unification of European private law. Once European private law has emancipated itself from comparative law, comparative law can hopefully turn more attention to other matters like public law and the comparison with non-European legal system, which over a long period has notably retreated into the background.

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## Literature

*International Encyclopedia of Comparative Law*, 1971 ff.; Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3d edn, 1998); Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50 AJCL 671 ff.; Pierre Legrand, Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003); François R. van der Mensbrugghe (ed), *L'utilisation de la méthode comparative en droit européen* (2003); Mathias Reimann, Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006); Jan M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (2006); Ralf Michaels, 'Two Paradigms of Jurisdiction', (2006) 27 *Michigan Journal of International Law* 1003 ff.; James

Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (2007); Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (2007).