Vorlesung / Course
Introduction to Comparative Law
Einführung in die Rechtsvergleichung

Winter term 2018-2019

http://www.eastlaw.uni-kiel.de
Legal families: concept and structures

- **Concept:** groups of legal systems with major common features. Usually focus on civil law.

- **Critique:** artificiality, differences more important than commonalities, every system is „mixed“, Eurocentrism

- **Common elements:**
  - „common“ major legislation (e.g. Civil Codes, Commercial Codes)
  - common systematic approaches
  - common legal history
  - common „typical“ elements
  - common methods of jurisprudence
  - common methods of interpretation
  - common approaches to legal practice in general, „legal culture“

- „Internal“ differences within each family
Major legal families

• **Lecture today:** **German legal family:** Germany, Austria, Switzerland, …
• **French legal family:** France, Belgium, Luxembourg, Québec, parts of Africa …
• **Anglo-American legal family („Common Law“):** U.K. (England/Wales), Ireland, Commonwealth countries, USA
• **Nordic legal family**
• Laws (legal families?) in **Eastern Europe:** „law in transition“, post-Soviet specifics?
• Laws (legal families?) in **Asia**, in particular East Asia
• **Religious laws**
• „**Mixed jurisdictions**“: e.g. civil law – common law, secular law – religious law. See South Africa, Israel, Scotland, Louisiana, India, Philippines, …
German legal family

• Countries: Germany, Austria, Switzerland, Liechtenstein, others
• Some remarks on history: general + legal history
• Major legal sources, in particular Civil Codes: German BGB, Austrian ABGB, Swiss ZGB and OR
• Methodical characteristics
• Sources of legal information
German legal family: basic Codes in Austria, Germany and Switzerland
Austria: 8 million inh., 83 km$^2$, capital Vienna, federal state (9 Bundesländer)

Germany: 80 million inh., 357 km$^2$, capital Berlin, federal state (16 Bundesländer)

Switzerland: 8 million inh., 41 km$^2$, capital Berne, federal state (20 cantons, 6 half-cantons)
Some historic remarks

• General:
  • **Germany**: united since 1871, Federal Republic of Germany and GDR founded in 1949, 1990 reunification. EEC founding member 1957.
  • **Austria**: independant since 1918. EU member since 1995.
  • **Switzerland**: origins in 1291, Federal State since 1848. Bilateral treaties with EU 1999.

• Legal history
  • Ancient times (since 5th century)
  • Period of Enlightenment. Austrian Civil Code 1811
  • 19th century developments: German Civil Code 1896/1900
  • 20th century developments: Swiss Civil Code and Code of Obligations (1883)/1907/1911

§ 6 Every human being has inborn rights, which are clear also be reason, and has therefore to be regarded as a person. Slavery or serfdom and the excise of any power relating to them is not permitted in these countries.
Methodical characteristics

• Interpretation of laws
  Compare art.1 II Swiss ZGB with sec.6 Austrian ABGB
• Judicial „style“
• Constant **dialogue science** – legal practice
• Sociological components: expectations put into the legal system
Swiss Civil Code

Article 1
1 ...  
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.

Austrian Civil Code

Interpretation.
§ 6. A law may not be given in its application another sense than the one, which shines out out of its words in their context and out of the clear intention of the legislator. 
§ 7. If a case cannot be decided either by the words or be the natural sense of a law, it must be taken account of similar cases decided in the law and the reasons of other related laws. If the case still remains doubtful, it has to be decided looking at all carefully collected and weighed circumstances under natural principles of law.  
§ 8. Only the legislator is empowered to explain a law in a generally binding manner.
German legal family: basic Codes in Austria, Germany and Switzerland
Structure of the German BGB

Book 1: General Part, sec.1 – 240
Book 3: Law of Property, sec.854 – 1296
Book 4: Family Law, sec.1297 – 1921
Book 5: Law of Inheritance (Succession), sec.1922 – 2385

„Official“ translation at
http://www.gesetze-im-internet.de/englisch_bgb/
Structure of the Austrian ABGB

• Preamble/Clause on putting into force
• Introduction: On civil laws in general (General Part)
• Part 1: On personal law (law of persons, cf. general part, family law)
• Part 2: On law of things („Sachenrecht“): property law, law of inheritance; law of obligations
• Part 3: On common provisions of personal laws and laws of things
Structure of the Swiss ZGB/OR

ZGB
- **Introduction** (Art. 1-10)
- **First Part: Law of persons** (Art. 11-89)
- **Second Part: Family law**
- **Third Part: Inheritance law** (Art. 457-640)
- **Fourth Part: Property law** (Art. 641-977)
- Final title: Application and introduction provisions

OR (= Fifth Part of ZGB)
- **First Part (Abteilung): General provisions**
  - First Title: The creation of obligations
  - First Section: Creation by contract Art. 1 - Art. 40g
  - Second Section: Creation by tort [delict]
  - Third Section: Creation by unjust enrichment
  - Second Title: The effect of obligations
  - Third Title: The extinction of obligations
  - Fourth Title: Particular situations with regard to obligations
- **Second Part: Specific contracts**
  - Sixth Title: Sales contract and barter
- **Third Part: Commercial companies and cooperative**
- Fourth Part: Commercial register, company names and commercial bookkeeping
- Fifth Part: Commercial papers [negotiable instruments, securities]
Austrian, German and Swiss Civil Codes – some comparative elements

Germany
• Structure: pandectic
• Style: logical, abstract
• Separate Commercial Code (Handelsgesetzbuch)
• Strong EU influence

Austria
• Structure: inspired by French Civil Code
• Style: often „traditional“
• Separate Enterprise Code (Unternehmensgesetzbuch)
• Strong EU influence
• Often follows German approaches

Switzerland
• Structure: pragmatic, concrete
• Style: „democratic“
• Includes commercial law
• Limited EU influence
• Takes into account German approaches
Swiss Civil Code – additional provisions

Art.2 ZGB

B. Content of legal relationships

I. Acting on good faith (Handeln nach Treu und Glauben)

Everybody has to act in the exercise of his rights and the performance of his duties in good faith.

*Distinguish: guter Glaube (also: good faith, bona fides)*

Art.4 ZGB

III. Discretion of the court

Where the law refers the court to act upon its discretion or upon the appreciation of circumstances or upon important reasons (wichtige Gründe), the court has to decide according to justice and equity

Art.7 ZGB

D. General provisions of the Law of Obligations

The general provisions of the Law of Obligations on the creation, performance and termination of contracts are also applicable to other civil law relationships.
German Federal Supreme Court (Bundesgerichtshof), 128 judges, 12 civil senates, 5 penal senates, 8 special senates

http://www.bundesgerichtshof.de
Swiss Federal Court, Lausanne, 38 full-time judges, 15 part-time judges, 2 civi law departments, 2 public law department, 1 criminal law department, 2 social law departments
Der OGH. Die oberste Instanz in Zivil- und Strafsachen.
Rechtssicherheit, Fairness und korrekte Verfahren sind Existenzgrundlagen unserer Gesellschaft und bilden eine Säule der Demokratie. Sie zu hüten ist unsere Aufgabe.
Willkommen auf den Informationssiten des Obersten Gerichtshofs.
Welcome to the Homepage of the Federal Court of Justice

The Federal Court of Justice (Bundesgerichtshof - OGH) has jurisdiction over all cases that are referred to it by the Supreme Court of the Landgericht Karlsruhe.

The task of the Federal Court of Justice is primarily to interpret the law and develop the law. In general, it reviews rulings of the respective court, the binding effect of the judgments and rulings of the Federal Court of Justice and the respective case decided, in practice the lower courts.

The far-reaching effect of rulings of the Federal Court of Justice is based on the achievement and the necessity of uniformity of the civil law, legal practice is often guided by these rulings. Divorce lawyers respond to a "ruling from Karlsruhe".

Judgments of the Federal Court of Justice

Judgments made by the Federal Court of Justice since 1995 are available in German. The judgments are available only in German. For searches please use the Common Portal of Case Law of the European Union.

Brochure

Our bilingual brochure (German and English) provides an overview of the work of the Federal Court of Justice, including information about its history and its role in the administration of justice in Germany. The brochure is available in PDF format.

© 2015 Bundesgerichtshof
Art. 52 Acting in good faith (Treu und Glauben)

All participants in the proceeding (am Verfahren beteiligte Personen) have to act in good faith.
Example: Jurisdiction in consumer disputes

Art. 32 Swiss Code of Civ. Proc (consumer contracts)
1 The following court has jurisdiction (Zuständigkeit) in disputes concerning consumer contracts:
   a. for actions brought by the consumer: the court at the domicile (Wohnsitz) or registered office of one of the parties;
   b. for actions brought by the supplier: the court at the domicile of the defendant.
2 Consumer contracts are contracts on supplies for ordinary consumption intended for the personal use of the consumer or his family and offered by the other party in the course of its professional or commercial activity.

Art. 35 Waiver of jurisdiction
The following persons may not waive the jurisdiction provided for in Articles 32 to 34, whether in by advance agreement or by entering appearance: a. the consumer;

§ 14 Austrian Consumer Prot. Law - Jurisdiction
(1) If the consumer has his domicile or habitual residence in Austria or is employed in Austria, an action against him can be brought under §§ 88, 89, 93 subpara. 2 and 104 para. 1 JN only at the court of the domicile or place of employment:
(2)—(4) …

Cf. § 29 c German Coderof civ.proc. (doorstep contracts) and Art.15 Brussels I Reg. (consumer disputes)
Swiss Institute of Comparative Law, Lausanne,
http://www.isdc.ch/
Other members of the „German legal family“?

- Turkey
- Greece
- Cf. also Italy, Spain
- Countries with cultural heritage in the Habsburg Empire – Eastern Europe?
- East Asia: Japan, Korea, China?
Sources of legal information

- Austria:
  Internet: [https://www.ris.bka.gv.at/](https://www.ris.bka.gv.at/) (also jurisprudence)

- Germany:
  Jurisprudence mostly in commercial database Juris.
  Eminent role of commentaries, e.g. Palandt (BGB).

- Switzerland:
  Kommerzielle Datenbank Swiss-lex.