Vorlesung / Course
Introduction to Comparative Law
Einführung in die Rechtsvergleichung

Winter term 2019-2020

http://www.eastlaw.uni-kiel.de
23.10.2019: Basic questions and structures of comparative law
30.10.2019  Structures of comparative law (continued)
06.11.2019: Methods of comparative law: to be postponed
13.11.2019: Methods of comparative law
20.11.2019: Legal families (overview). German legal family (deutscher Rechtskreis)
27.11.2019: French legal family
04.12.2019: Anglo-American legal family
11.12.2019: The legal systems in Northern and Eastern Europe
08.01.2020: Religious laws, in particular Islamic law
15.01.2020: Contract law I (Vertragsrecht)
22.01.2020: Contract law II
29.01.2020: Torts law (Deliktsrecht)
05.02.2020: Property law (Sachenrecht)
12.02.2020: Civil procedure
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: basic Codes in Austria, Germany and Switzerland
Quebec is a province in east-central Canada. It is the only Canadian province that has a predominantly French-speaking population, and the only one to have French as its sole provincial official language. Quebec is Canada's largest province by area and its second-largest administrative division; Quebec is Canada's second most populous province, after Ontario.
Commonwealth Legal Information Institute
Free access to Commonwealth and Common Law

1430 databases from 60 Commonwealth and common law jurisdictions via 8 Legal Information Institutes

News & Database Additions
Last updated 10 November 2015

- Law via the Internet Conference 2015, Sydney, 9-11 November 2015 - Conference programme with session times now available
- Law via the Internet Conference 2015, Sydney, 9-11 November 2015 - Registration Form (Registrations close 2 November)

- The Caribbean Law Project expanded
- Montserrat Revised Laws (CommonLII)
- Montserrat Numbered Acts (CommonLII)
- Montserrat Bills (CommonLII)
- Montserrat Court of Appeal (CommonLII)
- Montserrat High Court (CommonLII)
- Bermuda Bills (CommonLII)

- Past additions...

The Commonwealth | Declarations & Agreements | Law Reform | English Reports (1220-1873)

Regions: Africa | Asia | Europe | Caribbean | Oceania

Libraries: Criminal Law

Commonwealth Countries

Antigua & Barbuda | Australia | The Bahamas
Barbados | Belize | Botswana
What is Scandinavian Law? Concept, Characteristics, Future

Ulf Bernitz

Scandinavian Studies in Law 50 Years

The Themes of the Article

3 Scandinavian or Nordic Law? Terminology and Basic Legal Setting

4 The Classification of Scandinavian Law Within the Families of Legal Systems

5 The Peak and Decline of Inter-Nordic Legal Cooperation

6 The Relation between European Legislation
We are pleased to now offer Law in Eastern Europe in HeinOnline. This collection of books, which has been digitized for the first time and made available via HeinOnline, is a valuable resource for anyone interested in the development, enactment, and impact of the rule of law in Eastern Europe.
Legal Transition Programme

This document provides an overview of the Legal Transition Programme.
MIXED LEGAL SYSTEMS

The term "mixed", which we have chosen over other terms such as "hybrid" or "composite", should not be construed restrictively, as certain authors have done. Thus this category includes political entities where two or more systems apply cumulatively or interactively, but also entities where there is a juxtaposition of systems as a result of more or less clearly defined fields of application.

MIXED SYSTEMS OF CIVIL LAW AND COMMON LAW

- SOUTH AFRICA
- BOTSWANA
- CYPRUS
- SCOTLAND (UK)
- GUYANA
- LOUISIANA (USA)
- MALTA
- MAURITIUS
- NAMIBIA
- PHILIPPINES
- PORTO RICO (ASS. USA)
- QUEBEC (CD)
- SAINT LUCIA
- SEYCHELLES

MIXED SYSTEMS OF CIVIL LAW AND CUSTOMARY LAW

- BURKINA FASO
- BURUNDI
- CHAD
- CHINA (CN) (minus H-K and MACAU)
- CONGO
- CONGO, DEMOCRATIC REPUBLIC OF
- KOREA SOUTH
- KOREA NORTH
- MADAGASCAR
- MALI
- MONGOLIA
- MOZAMBIQUE
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
Liechtenstein

Der Titel dieses Artikels ist mehrdeutig. Weitere Bedeutungen sind unter Liechtenstein (Begriffsklärung) aufgeführt.


Liechtenstein ist mit 38'111 Einwohnern der kleinste Staat in Europa. Er ist land- und zugleich der landessprache. Der Ausländeranteil beträgt rund 34 Prozent.


Austria: 8 million inh., 83 km², capital Vienna, federal state (9 Bundesländer)
Germany: 80 million inh., 357 km², capital Berlin, federal state (16 Bundesländer)
Switzerland: 8 million inh., 41 km², 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)
  • Roman law tradition?
  • 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. Jeder Mensch hat angeborene, schon durch die Vernunft einleuchtende Rechte, und ist daher als eine Person zu betrachten. Sclaverey oder Leibeigenschaft, und die Ausübung einer darauf sich beziehenden Macht, wird in diesen Ländern nicht gestattet.

§ 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 execise 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
German legal family: basic Codes in Austria, Germany and Switzerland
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.
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

<table>
<thead>
<tr>
<th>Germany</th>
<th>Austria</th>
<th>Switzerland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Structure: pandectic</td>
<td>Structure: inspired by French Civil Code</td>
<td>Structure: pragmatic, concrete</td>
</tr>
<tr>
<td>Style: logical, abstract</td>
<td>Style: often „traditional“</td>
<td>Style: „democratic“</td>
</tr>
<tr>
<td>Separate Commercial Code (Handelsgesetzbuch)</td>
<td>Separate Enterprise Code (Unternehmensgesetzbuch)</td>
<td>Includes commercial law</td>
</tr>
<tr>
<td>Strong EU influence</td>
<td>Strong EU influence</td>
<td>Limited EU influence</td>
</tr>
<tr>
<td>Takes into account German and EU approaches</td>
<td>Often follows German approaches</td>
<td>Takes into account German and EU approaches</td>
</tr>
</tbody>
</table>
Swiss Civil Code – additional provisions

Art. 2 ZGB

B. Content of legal relationships

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

1 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 civil 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 Informationsseiten des Obersten Gerichtshofs.

Austrian Supreme Court (Oberster Gerichtshof), Vienna.
60 judges, 18 civil senates, 17 penal senates, 9 special senates
Welcome to the Homepage of the Federal Court of Justice

The Federal Court of Justice (Bundesgerichtshof - OGH), i.e., "ordinary jurisdiction". The Federal Court of Justice is located in Karlsruhe.

The task of the Federal Court of Justice is primarily to interpret, develop, and maintain law and to develop the law. In general, it reviews the binding effect of the judgments and rulings of the respective case decided, in practice the lower courts. The far-reaching effect of rulings of the Federal Court of Justice in 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 1952 are recorded in the OGH Judgments Database. 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 information about the Federal Court of Justice, including information about its history and its procedures. The brochure can be downloaded as a PDF file.

Welcome to the website of the Supreme Court of Justice

The Austrian Supreme Court is one of three judicial bodies charged with ensuring the legal order in Austria. Whereas the Constitutional Court deals with constitutional law, the Supreme Court is the highest instance in civil and criminal law at the same level, there being no superiority or subordination between them.

In its comprehensive guiding role in the administration of justice with respect to the enforcement of law, it seeks to safeguard legal uniformity, legal certainty and the development of legal theory. The Court's jurisprudence has an essential purpose in giving shape to the legal protection of the citizens and thereby ensuring the legal order of the state.

We welcome you to our website. Take a look around for further information.

Please note that decisions of the Court are only available in German.
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Schweizerische Zivilprozessordnung
(Zivilprozessordnung, ZPO)


Die Bundesversammlung der Schweizerischen Eidgenossenschaft,
gestützt auf Artikel 122 Absatz 1 der Bundesverfassung, nach Einsicht in die Botschaft des Bundesrates vom 28. Juni 2006,
beschliesst:

- 1. Teil: Allgemeine Bestimmungen
- 1. Titel: Gegenstand und Geltungsbereich
  - Art. 1 Gegenstand

Dieses Gesetz regelt das Verfahren vor den kantonalen Instanzen für:

a. Streitige Zivilsachen;
b. gerichtliche Anordnungen der freiwilligen Gerichtsbarkeit;
c. gerichtliche Angelegenheiten des Schuldubereignungs- und Konkursrechts;
d. die Schiedsgerichtsbarkeit.

- Art. 2 Internationale Verhältnisse

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. Act - 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 Code of 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/ (also jurisprudence)

• Germany:
Internet: http://www.gesetze-im-internet.de/
Jurisprudence mostly in commercial database Juris. Eminent role of commentaries, e.g. Palandt (BGB).

• Switzerland:
(amtlich) Systematische Sammlung des Bundesrechts,
https://www.admin.ch/gov/de/start/bundesrecht/systematische-
sammlung.html?lang=de. Kommerzielle Datenbank Swiss-
lex.