

An Introduction to Comparative Law

II The Institutions of Private Law

Konrad Zweigert and Hein Kötz

North-Holland

AN INTRODUCTION TO COMPARATIVE LAW

Volume II: The Institutions of Private Law

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Auf Vergleichen lässt sich wohl alles Erkennen, Wissen zurückführen.

NOVALIS*

A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably or usefully employed, than in examining the laws and customs of foreign nations.

SAMUEL JOHNSON**

Authors' Preface

The aim of the first volume of this Introduction to Comparative Law is to provide the framework which is necessary for any real study of comparative law. After some general observations (the concept of comparative law, its function and purpose, its methods and its history), it proceeds to describe the great legal families of the world on the basis of the *Stillehre* or doctrine of styles outlined by Zweigert some years ago:*** thus the account given of the development and ethos of the principal system in each great legal family is amplified and exemplified by the study of some legal institution typical of its style, with the addition, as proposed by Kötz, of a helpful review of its courts system and a discussion of the kinds of lawyer there dominant. Which legal institutions to select as typical of the style of the different systems was a matter which gave us much pause, and we are far from certain that we have hit the mark in every instance. It is precisely when one is most familiar with a system that it is hardest to descry its most characteristic legal institution, since the sense of surprise becomes dulled by acquaintance.

The second volume, on legal institutions, seems to us to fill a significant gap in the comparative law library. There are quite a few good textbooks devoted to general considerations of comparative law or to the principal legal systems of the world, but there was none which offered the student a clear impression of the process and rewards of subjecting problems in private law to the comparative treatment. That is the function of volume two: it takes important institutions in the law of contract, unjust enrichment and tort and seeks (a) to

* Works III (ed. Minor, Jena 1907) 45, fragment 229.

** Boswell's Life of Johnson I (ed. Hill and Powell, Oxford 1934) 89.

*** See Zweigert, Zur Lehre von den Rechtskreisen, in: Twentieth Century Comparative and Conflicts Law, Legal Essays in honor of Hessel E. Yntema (1961) 42 ff.

give a practical demonstration of the methods of the comparative lawyer, (b) to provide the basic information about the structure and solutions of foreign systems in these areas, and (c) to apply the conclusions critically to German law as it now is and to make suggestions about how it might develop. In no way does this volume set out to replace comprehensive comparative works such as the *Rechtsvergleichendes Handwörterbuch* or the *International Encyclopedia of Comparative Law*. In demonstrating the operation of comparative law this volume stresses the essential features of the legal institutions without filling in all the details; it is designed to ask questions rather than to answer them and to stimulate rather than to replace more specialised studies. For this reason there is no full apparatus criticus, and footnotes have been kept to the minimum. Instead, there appears at the head of each chapter a list of the specialist literature in comparative law to which the interested reader may refer.

It was a question whether we should include a report on German law along with the reports on other legal systems. We decided to do so, not only for the benefit of the foreign reader but also because a statement of the special features of German law was a necessary prerequisite to the critical and comparative section at the end of each chapter.

By contrast, the socialist legal systems based on Marxism-Leninism are not included in the comparisons made in the second volume. This is not because we think it impossible to compare the law of East and West — on the contrary, it is a most useful exercise — but because there still remains in this area some territory uncharted by truly comparative research which a textbook such as this may properly leave to the aforementioned *Encyclopedia* to explore. The socialist legal systems are covered in the first volume, where the reader will find a treatment of their history, their style and the institutions of “contract” and “ownership” which exemplify it.

How far to take legal history into account was a question which gave us great difficulty, for the disciplines of legal history and comparative law are inseparable twins. Even so, we were reluctantly compelled by reasons of space to limit ourselves to rather brief references to it.

We are indebted to many colleagues in the Max Planck Institute in Hamburg for help in the preparation of this book, as well as to the Parker School in the Law School of Columbia University in New York and the University of Chicago Law School for the opportunity they afforded us as Visiting Professors to do the preparatory research.

Our gratitude goes also to the directors and staff of the library of the Max Planck Institute in Hamburg: but for that outstanding library and the technical assistance they provided, this book could never have been written.

It was a director of that library, the late Jean-Pierre des Coudres, who provided us with the quotation from Novalis above, but the precise source of

the quotation from Samuel Johnson eluded us for a long time. Then, as so often happens in comparative law, illumination came from afar, thanks to the joint efforts of Professor Lawson and Lord McNair.

That our *Einführung in die Rechtsvergleichung* now appears in English, updated in important respects, is due to Mr. Tony Weir of Trinity College, Cambridge, England. To find a scholar of his standing prepared to undertake its translation was entirely unexpected, and the result is a rare instance of a translation both faithful and brilliant. We take a certain pride in our own style, but we must aver that at some points the translation actually outdoes the original in manner and effect. To him, therefore, we owe our especial thanks.

Hamburg/Konstanz
February 1977

Konrad Zweigert
Hein Kötz

Translator's Foreword

I was particularly pleased to be allowed to try my hand at translating the *Einführung in die Rechtsvergleichung* by Zweigert and Kötz because on first reading it I had been afraid that so excellent a work, without counterpart in English, might remain inaccessible to those with no German. The enjoyable process of translation, much facilitated by the remarkable lucidity of the original, has left me with an enhanced regard for its merits, deep gratitude for the great helpfulness of its authors and a realisation that nevertheless I have been unable quite to reproduce its calm authority.

Tony Weir

Trinity College, Cambridge
December 1976

Table of Abbreviations

1. Works cited by Authors' Name only

CHESHIRE/FIFOOT CORBIN	= The Law of Contract (ed. 6, 1964) = On Contracts, A Comprehensive Treatise on the Working Rules of Contract Law (1950ff.)
MAZEAUD	= HENRI MAZEAUD, LÉON MAZEAUD and JEAN MAZEAUD, Leçons de droit civil, Vol. I (ed. 3, 1963), Vol. II (ed. 3, 1966)
MAZEAUD/TUNC	= HENRI MAZEAUD, LÉON MAZEAUD and ANDRÉ TUNC, Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle, Vol. I (ed. 6, 1965), Vol. II (ed. 5, 1958), Vol. III (ed. 5, 1960)
PLANIOL/RIPERT	= Traité pratique de droit civil français, Vol. VI (ed. 2 by ESMEIN, RADOUANT and GABOLDE, 1954)
POLLOCK/WINFIELD	= POLLOCK's Principles of the Law of Contract (ed. 13 by WINFIELD, 1950)
PROSSER	= Handbook of the Law of Torts (ed. 3, 1964)
RIPERT/BOULANGER	= Traité de droit civil d'après le Traité de PLANIOL, Vol. I (1956), Vol. II (1957)
WILLISTON	= A Treatise on the Law of Contracts (ed. 3 by JAEGER, 1957ff.)

2. Other Abbreviations*

A. (2d)	= Atlantic Reporter (Second Series)
ABGB	= Austrian General Civil Code
A. C.	= Law Reports, Appeal Cases (from 1891)
AcP	= Archiv für die civilistische Praxis
All E. R.	= All England Law Reports (from 1936)
ALR	= General Land Law for the Prussian States
A. L. R. (2d)	= American Law Reports Annotated (Second Series)
Am. Dec.	= American Decisions (1765–1870)
Am. J. Comp. L.	= The American Journal of Comparative Law
Ann. Dir. Comp.	= Annuario di Diritto Comparato
App. Cas.	= Law Reports, Appeal Cases (1875–1890)
ArchbürgR	= Archiv für bürgerliches Recht
ARSP	= Archiv für Rechts- und Sozialphilosophie
AWD	= Aussenwirtschaftsdienst des Betriebs-Beraters
BAGE	= Decisions of the West German Federal Labour Court (Bundes-arbeitsgericht)
BankArch.	= Bankarchiv
BBL	= Bundesblatt der Schweizerischen Eidgenossenschaft
BGB	= (West) German Civil Code

* For decisions from common-law jurisdictions two citations are sometimes given in the text: the second of such citations is generally easier to follow up, and it is the only one here explained.

BGE	= Decisions of the Swiss Federal Court (Bundesgericht)
BGHZ	= Decisions of the West German Federal Supreme Court (Bundesgerichtshof) in civil matters
BlZürspr.	= Blätter für Zürcherische Rechtsprechung
Bol. Inst. Méx.	= Boletín del Instituto de Derecho Comparado de México
Bost. Ind. Com. L. Rev.	= Boston College Industrial and Commercial Law Review
Brit. YB. Int. L.	= The British Year Book of International Law
Bull. civ.	= Bulletin des arrêts de la Cour de cassation, chambres civiles
BVerfGG	= Statute of the West German Constitutional Court (Bundesverfassungsgesetz)
BVerwGE	= Decisions of the West German Federal Administrative Court (Bundesverwaltungsgericht)
BW	= Dutch Civil Code (Burgerlijk Wetboek)
Calif. L. Rev.	= California Law Review
Camb. L. J.	= The Cambridge Law Journal
can.	= canon
Can. Bar Rev.	= The Canadian Bar Review
Cass.	= Supreme Court of Cassation (Italy)
Ch.	= Law Reports, Chancery Division (from 1891)
Ch. D.	= Law Reports, Chancery Division (1875–1890)
Ch. réun.	= Cour de Cassation, Chambres réunies
Civ.	= Cour de Cassation, Chambre civile
C. L. R.	= Commonwealth Law Reports (Australia)
Clunet	= Journal du droit international, founded by CLUNET
Cmd., Cmnd.	= Command Paper
Cod. Iur. Can.	= Codex Iuris Canonici
Colum. L. Rev.	= Columbia Law Review
Com.	= Cour de Cassation, Chambre commerciale et financière
Comp. Int. L. J. S. Afr.	= Comparative and International Law Journal of South Africa
Cornell L. Q.	= Cornell Law Quarterly
Crim.	= Cour de Cassation, Chambre criminelle
D.	= Recueil Dalloz de doctrine, de jurisprudence et de législation (1945–1964); Recueil Dalloz et Sirey de doctrine, de jurisprudence et de législation (from 1965)
D. A.	= Dalloz, Recueil analytique de jurisprudence et de législation (1941–1944)
D. C.	= Dalloz, Recueil critique de jurisprudence et de législation (1941–1944)
D. H.	= Dalloz, Recueil hebdomadaire de jurisprudence (1924–1940)
D. L. R. 2d	= Dominion Law Reports, Second Series (Canada)
DNotZ	= Deutsche Notar-Zeitschrift
D. P.	= Dalloz, Recueil périodique et critique de jurisprudence, de législation et de doctrine (1825–1940)
DR	= Deutsches Recht
Duke L. J.	= Duke Law Journal
Eng. Rep.	= English Reports (1307–1865)
Ex. D.	= Law Reports, Exchequer Division (1875–1880)
F. (2d)	= Federal Reporter (Second Series)
FGO	= Ordinance of the Financial Court in Germany (Finanzgerichtsordnung)
Foro it.	= Il Foro Italiano
F. Supp.	= Federal Supplement
Gaz. Pal.	= Gazette du Palais
Gaz. Trib.	= Gazette des Tribunaux

GG	= West German Basic Law (Grundgesetz)
Giust. civ.	= Giustizia civile
GIU (NF)	= Decisions of the Austrian Supreme Court (Oberster Gerichtshof), collection founded by GLASER and UNGER (new series from 1900)
Harv. L. Rev.	= Harvard Law Review
HGB	= West German Commercial Code (Handelsgesetzbuch)
H. R.	= Dutch Supreme Court (Hoge Raad)
I. C. L. Q.	= The International and Comparative Law Quarterly
Inter-Am. L. Rev.	= Inter-American Law Review
Iowa L. Rev.	= Iowa Law Review
JBl.	= Juristische Blätter
J. Bus. L.	= The Journal of Business Law
J. Comp. Leg.	= Journal of Comparative Legislation and International Law
J. C. P.	= <i>Juris-Classeur périodique, La Semaine juridique</i>
Jher.Jb.	= Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts
J. Leg. Ed.	= Journal of Legal Education
JR	= Juristische Rundschau
J. Soc. P.T.L.	= Journal of the Society of Public Teachers of Law
JurJb.	= Juristen-Jahrbuch
JuS	= Juristische Schulung
JW	= Juristische Wochenschrift
JZ	= Juristenzeitung
K. B.	= Law Reports, King's Bench (1901–1952)
KO	= Konkursordnung
La. L. Rev.	= Louisiana Law Review
L. Contemp. Probl.	= Law and Contemporary Problems
L. J. Ch.	= Law Journal Reports, Chancery (1831–1949)
LM	= LINDENMAIER, MÖHRING et al., Reference Work to the Decisions of the West German Supreme Court (Bundesgerichtshof)
L. Q. Rev.	= The Law Quarterly Review
L. R. Ch. App.	= Law Reports, Chancery Appeal Cases (1865–1875)
L. R. C. P.	= Law Reports, Common Pleas Cases (1865–1875)
L. R. Ex.	= Law Reports, Exchequer Cases (1865–1875)
L. R. H. L.	= Law Reports, English and Irish Appeals (1866–1875)
L. R. P. C.	= Law Reports, Privy Council Appeals (1865–1875)
L. R. Q. B.	= Law Reports, Queen's Bench (1865–1875)
L. T.	= Law Times Reports (1859–1947)
LuftVG	= West German Air Traffic Act (Luftverkehrsgesetz)
LZ	= Leipziger Zeitschrift
Mass.	= Massimario
MDR	= Monatsschrift für deutsches Recht
Mich. L. Rev.	= Michigan Law Review
Minn. L. Rev.	= Minnesota Law Review
Mod. L. Rev.	= The Modern Law Review
Mot.	= Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich (1896)
n. or no.	= number
N. E. (2d)	= North Eastern Reporter (Second Series)
Ned. Jur.	= Nederlandse Jurisprudentie
New Zealand Univ. L. Rev.	= New Zealand Universities Law Review
NJ	= Neue Justiz
NJW	= Neue Juristische Wochenschrift
N. W. (2d)	= North Western Reporter (Second Series)
NW. U. L. Rev.	= Northwestern University Law Review
N. Y.	= Reports of Cases Decided in the Court of Appeals of the State of New York (1877–1921)

N. Y. S. (2d)	= New York Supplement (Second Series)
N. Y. L. Forum	= New York Law Forum
N. Y. U. L. Rev.	= New York University Law Review
ObTr.	= Decisions of the Prussian Supreme Court (Obertribunal)
OGH	= Austrian Supreme Court (Oberster Gerichtshof)
OGHZ	= Decisions in civil matters of the Supreme Court for the British Zone of Germany
ÖJZ	= Österreichische Juristen-Zeitung
OLGE	= Decisions in civil matters of the Oberlandesgerichte in Germany
OR	= Swiss Code of Obligations
P.	= Law Reports, Probate Division (from 1891)
P. (2d)	= Pacific Reporter (Second Series)
Prot.	= Protokolle der Kommission für die 2. Lesung des Entwurfs des BGB
Q. B.	= Law Reports, Queen's Bench (1891–1900, from 1952)
Q. B. D.	= Law Reports, Queen's Bench Division (1875–1890)
Quart.-GZ	= Quartalshefte der Girozentrale (Austria)
RabelsZ	= Rabels Zeitschrift für ausländisches und internationales Privatrecht
Req.	= Cour de Cassation, Chambre de requêtes
Rev. Contemp. L.	= Review of Contemporary Law
Rev. dr. int. dr. comp.	= Revue de droit international et de droit comparé
Rev. int. dr. comp.	= Revue internationale de droit comparé
Rev. trim. dr. civ.	= Revue trimestrielle de droit civil
RGZ	= Decisions in civil matters of the German Imperial Court (Reichsgericht)
RheinZ	= Rheinische Zeitschrift für Zivil- und Prozeßrecht des In- und Auslandes
Riv. Dir. Com.	= Rivista del Diritto Commerciale e del Diritto Generale delle Obbligazioni
Riv. It. Sci. Giur.	= Rivista Italiana per le Scienze Giuridiche
ROHG	= Decisions of the German Imperial Commercial Court (Reichsoberhandelsgericht)
ROW	= Recht in Ost und West
RSFSR	= Russian Socialist Federated Soviet Republic
RVO	= German Imperial Insurance Ordinance (Reichsversicherungsordnung)
s.	= section
S.	= Recueil Sirey (1791–1954, 1957–1964)
S. Afr. L. J.	= The South African Law Journal
SavZ/Rom.	= Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung
Scand. Stud. L.	= Scandinavian Studies in Law
SchwzBGR	= Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht
S. E. (2d)	= South Eastern Reporter (Second Series)
SeuffA	= Seuffert's Archiv
SJZ	= Schweizerische Juristen-Zeitung
S. L. T.	= Scots Law Times
So.	= Southern Reporter
Soc.	= Cour de Cassation, Chambre sociale
Som.	= Sommaire
Stan. L. Rev.	= Stanford Law Review
StGB	= German Penal Code (Strafgesetzbuch)
StVG	= German Road Traffic Act (Strassenverkehrsgesetz)
Süddt. JZ	= Süddeutsche Juristenzeitung
S. W. (2d)	= South Western Reporter (Second Series)
Sydney L. Rev.	= The Sydney Law Review

SZ	= Decisions of the Austrian Supreme Court (Oberste Gerichtshof) in civil and judiciary matters
Tex. L. Rev.	= Texas Law Review
T. L. R.	= Times Law Reports
Trib. civ.	= Tribunal civil
Trib. com.	= Tribunal de commerce
Trib. gr. inst.	= Tribunal de grande instance
Trib. paix	= Tribunal de paix
Tul. L. Rev.	= Tulane Law Review
U. Chi. L. Rev.	= The University of Chicago Law Review
UCC	= Uniform Commercial Code
Unidroit	= L'Unification du droit
U. Pa. L. Rev.	= University of Pennsylvania Law Review
U. S.	= United States Supreme Court Reports
UWG	= German Law of Unfair Competition (Gesetz gegen den unlauteren Wettbewerb)
Va. L. Rev.	= Virginia Law Review
Vand. L. Rev.	= Vanderbilt Law Review
Verh. DJT	= Verhandlungen des Deutschen Juristentages
VersR	= Versicherungsrecht
V. L. R.	= Victorian Law Reports (1875–1956, Australia)
VRS	= Verkehrsrechts-Sammlung
VVG	= German Law of the Insurance Contract (Versicherungsvertragsgesetz)
Wash. L. Rev.	= Washington Law Review
W. L. R.	= Weekly Law Reports
WM	= Wertpapier-Mitteilungen, Teil IV
Yale L. J.	= The Yale Law Journal
ZBernJV	= Zeitschrift des Bernischen Juristenvereins
ZBl.	= Zentralblatt für die juristische Praxis (Austria)
ZBG	= Swiss Civil Code
ZgesStaatsW	= Zeitschrift für die gesamte Staatswissenschaft
ZPO	= German Code of Civil Procedure (Zivilprozessordnung)
ZSR	= Zeitschrift für schweizerisches Recht
ZStW	= Zeitschrift für die gesamte Strafrechtswissenschaft
ZvglRW	= Zeitschrift für vergleichende Rechtswissenschaft
ZVR	= Zeitschrift für Verkehrsrecht (Austria)
ZZP	= Zeitschrift für Zivilprozeß

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A. Contract

I. THE FORMATION OF CONTRACTS

§1 Juristic Act, Contract and General Conditions of Business

(BROGGINI, Ordine pubblico e norme imperative quali limiti alla libertà contrattuale in diritto svizzero, Festgabe für Wilhelm Schöenberger (1968) 93; CARBONNIER, Théorie des obligations (1963) 69; CHLOROS, Comparative Aspects of the Intention to Create Legal Relations in Contract, 33 Tul. L. Rev. 607 (1959); ESSER, Schuldrecht I (ed. 3, 1968) 80, 90; FLUME, Allgemeiner Teil des Bürgerlichen Rechts, Vol. II: Das Rechtsgeschäft (1965) 1, 23, 599; FRIEDMANN, Law in a Changing Society (1959) 90ff.; DE GAUDIN DE LAGRANGE, La crise du contrat et le rôle du juge (1935); GORLA, The Theory of Object of Contract in Civil Law, 28 Tul. L. Rev. 442 (1954); GORLA, Il contratto (1955); GRUNFELD, Reform in the Law of Contract, 24 Mod. L. Rev. 62 (1961); E. v. HIPPEL, Die Kontrolle der Vertragsfreiheit nach amerikanischem Recht (1963); KESSLER, Contracts of Adhesion – Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629 (1943); KESSLER, Freiheit und Zwang im nordamerikanischen Vertragsrecht, Festschrift für Martin Wolff (1952) 67; KESSLER/FINE, Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study, 77 Harv. L. Rev. 401 (1964); KOCH, Formation of and Tests for a Contract, 2 Inter-Am. L. Rev. 341 (1960); LAWSON, Analogues of the Stipulatio in English Law, Twentieth Century Comparative and Conflicts Law – Legal Essays in Honor of Hessel E. Yntema (1961) 117; LENHOFF, Contracts of Adhesion and the Freedom of Contract, 36 Tul. L. Rev. 481 (1962); LLEWELLYN, What Price Contract?, An Essay in Perspective, 40 Yale L. J. 704 (1931); MERZ, Massenvertrag und Allgemeine Geschäftsbedingungen, Festgabe für Wilhelm Schöenberger (1968) 137; PARRY, The Changing Conception of Contracts in English Law (1958); POUND, Promise or Bargain?, 33 Tul. L. Rev. 455 (1959); G. RAISER, Die gerichtliche Kontrolle von Formularbedingungen im amerikanischen und deutschen Recht (1966); L. RAISER, Vertragsfunktion und Vertragsfreiheit. Hundert Jahre deutsches Rechtsleben, Festschrift zum 100jährigen Bestehen des Deutschen Juristentages I (1960) 101; RHEINSTEIN, Die Struktur des vertraglichen Schuldverhältnisses im anglo-amerikanischen Recht (1932); RICHTERLICHE KONTROLLE VON ALLGEMEINEN GESCHÄFTSBEDINGUNGEN, Arbeiten zur Rechtsvergleichung Nr. 41 (1968) with contributions from HAUSS, NEUMAYER, WILSON, MARTIN, MERZ, LANDO, L. RAISER and YADIN; F. SCHMIDT, The German Abstract Approach to Law, Scand. Stud. L. 9 (1965) 133; SCHMIDT-SALZER, Das Recht der Allgemeinen Geschäfts- und Versicherungsbedingungen (1967); TITZE, “Rechtsgeschäft”, Rechtsvergleichendes Handwörterbuch (ed. Schlegelberger) V (1936) 789; TREITEL, Mutuality in Contract, 77 L. Q. Rev. 83 (1961). }