

Major Legal Systems in the World Today

Second Edition

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John E.C. Brierley**

MAJOR LEGAL SYSTEMS IN THE WORLD TODAY

An Introduction
to the
Comparative Study of Law

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PREFACE TO THE ENGLISH EDITION

The publication in English of my book on the major systems of contemporary law gives me great pleasure—and for a reason I do not hesitate to state here. I am convinced that it is absolutely essential at the present time to develop comparative legal studies, and I believe that this book, such as it has been conceived, provides the necessary basis for a study of comparative law.

I wish to thank Professor C. M. Schmitthoff, on whose initiative the publishers became interested in the English-language publication of the work.

I would also especially like to thank Professor John E. C. Brierley, who was kind enough to undertake the translation. To do so it would not have sufficed, as the uninitiated might think, to be thoroughly conversant with English and French. It was also necessary to be a comparatist and to understand the many legal terms peculiar to the different systems studied. Few people could have translated what I have written with as much understanding as Professor Brierley has. To show my appreciation of the very considerable and intricate work that he has carried out, it seemed to me only just that this work appear under our two names—although this alone cannot repay my debt of gratitude.

October 1966.
Montreal

R.D.

Note to the Second English Edition

This is a translation and adaptation of Professor René David's *Les Grands systèmes de droit contemporains** which was originally based on the second French edition of 1966, published by Librairie Dalloz in the series known as *Précis Dalloz*. It has been revised in the light of the changes made by Professor David in the sixth French edition of 1974.

To a greater extent than in the first English edition of 1968, an adaptation to an English readership has been attempted. This has involved certain changes in the text itself as well as alterations or additions to the notes and bibliography.

J.E.C.B.

* "Couronné par l'Académie des Sciences Morales et Politiques."

ADDENDA

Please read as final paragraph to § 241 (p. 261)

Although the Soviet state structure was not included in the original programme of the Communist Party, it was articulated immediately after the 1917 Revolution. This move came as a response to anxiety over the small number of actual Party members and reflected a desire to demonstrate that power did indeed henceforth belong to the people. Since the very beginning, however, real power has resided with the Party itself, which selects candidates for elections to the different soviets and seeks to ensure that all positions of authority are filled from the list (nomenklatura) established by its various directorates.

Please read as final paragraphs to § 492 (p. 491)

The Constitution of 1954 was revised in 1975. It now declares that China is a socialist state and a workers' dictatorship. Primacy of the Communist Party is established by the statement in article 16 that the national assembly is placed under the direction of the Party and the requirement of article 17 that the assembly name and remove the premier and government on the proposal of the Party Central Committee. The chairman of the Central Committee assumes control of the armed forces (article 15), while it is the duty of every citizen to support the Party leaders.

A confrontation between rival factions in the Party was provoked by the death of Chairman Mao in September 1976. Whatever the outcome of this struggle, it can safely be predicted that China will follow a path different from that taken by western nations. The principles of legality, and law, are therefore unlikely to have the place familiar to observers in the West.

LIST OF ABBREVIATIONS

ABGB	Allgemeines Bürgerliches Gesetzbuch für Österreich
Alb. L.J.	Albany Law Journal (U.S.A.)
All E.R.	All England Law Reports (1936) (U.K.)
Amer. Bar Assoc. J.	American Bar Association Journal
Am. J. Comp. L.	American Journal of Comparative Law
Amer. J. of Int'l. Law	American Journal of International Law
Annales Fac. droit d'Istanbul	Annales de la Faculté de droit d'Istanbul (Turkey)
BGB	Bürgerliches Gesetzbuch
Bull. de droit tchécoslovaque	Bulletin de droit tchécoslovaque (Czechoslovakia)
Cal. L.R.	California Law Review (U.S.A.)
Cambridge L.J.	Cambridge Law Journal (U.K.)
Can. Bar Rev.	Canadian Bar Review
Ch.	Law Reports, Chancery Division (1891-) (U.K.)
Colum. L. Rev.	Columbia Law Review (U.S.A.)
Cornell L.Q.	Cornell Law Quarterly (U.S.A.)
Cranch	Cranch, United States Supreme Court Reports (1801-1805)
E.R.	The English Reports
Ex. D.	Law Reports, Exchequer Division (1875-1880) (U.K.)
F.	Federal Reporter (U.S.A.)
F.2d	Federal Reporter (Second Series) (U.S.A.)
Geo. Wash. L.R.	George Washington Law Review (U.S.A.)
Harv. L. Rev.	Harvard Law Review (U.S.A.)
I.L.R.	Indian Law Reports
Ind. App.	Indian Appeals (U.K.)
Int. and Comp L.Q.	International and Comparative Law Quarterly (U.K.)

J. of African Law	Journal of African Law (U.K.)
Journal of Comp. Leg.	Journal of Comparative Legislation and International Law (U.K.)
J.S.P.T.L.	Journal of the Society of the Public Teachers of Law (U.K.)
K.B.	Law Reports, King's Bench (U.K.)
L.Q.R.	Law Quarterly Review (U.K.)
Louisiana L.R.	Louisiana Law Review (U.S.A.)
L.R. Ind. App.	Law Reports, Indian Appeals (1872-1950)
McGill L.J.	McGill Law Journal (Canada)
M.H.C.R.	Madras High Court Reports (1862-1875)
Mich. L.R.	Michigan Law Review (U.S.A.)
Moo. Ind. App.	Moore's Indian Appeals (1836-1872)
Nouv. Rev. hist. de droit	Nouvelle Revue historique de droit français (France)
N.Y.	New York (State) Court of Appeals Reports
N.Y.S.	New York State Reporter, New York Supplement (National Reporter)
N.Y.S. 2d	New York Supplement Reports, Second Series (National Reporter)
N.Y.U. Law Rev.	New York University Law Review (U.S.A.)
Q.B.	Law Reports, Queen's Bench (U.K.)
Rabels Z.	(Rabels) Zeitschrift für ausländisches und internationales Privatrecht
Rep. N.Y. State Bar Assoc.	Reports of the New York State Bar Association
Rev. crit. dr. int. privé	Revue critique de droit international privé (France)
Rev. dr. int. légis. comparée	Revue de droit international et de législation comparée (France)
Rev. int. dr. comparé	Revue internationale de droit comparé (France)

List of Abbreviations

xv

Rev. jur. et pol. d'outre-mer	Revue juridique et politique d'outre-mer (France)
Rev. trim. dr. commercial	Revue trimestrielle de droit commercial (France)
Riv. dir. comm.	Rivista di diritto commerciale (Italy)
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
R.S.F.S.R.	Russian Soviet Federated Socialist Republic
S.C.R.	Supreme Court Reports (India)
Sov. Gos. i Pravo	Sovetskoe Gosudarstov i Pravo (U.S.S.R.)
S.S.R.	Soviet Socialist Republic(s)
Tulane L.R.	Tulane Law Review (U.S.A.)
U.S.S.R.	Union of Soviet Socialist Republics
U. of Pa. L.R.	University of Pennsylvania Law Review (U.S.A.)
Wheat.	Wheaton, United States Supreme Court Reports (1816-1827)
W.L.R.	Weekly Law Reports (U.K.)
Yale L.J.	Yale Law Journal (U.S.A.)
ZPO	Zivilprozessordnung

TABLE OF CONTENTS

	PAGE
<i>Preface and Note to the English Edition</i>	v
<i>List of Abbreviations</i>	xiii
Introduction	1
Section I. Comparative Law	1
Section II. The Idea of a Family of Laws	17
Section III. The Legal Families in the World Today	21

PART ONE

THE ROMANO-GERMANIC FAMILY 31

TITLE I

Historical Formation of the System	33
Chapter I. Customary Law Period	33
Section I. Ius Commune of the Universities	38
Section II. National or Regional Laws	46
Chapter II. The Period of Legislative Law	59
Chapter III. Expansion Beyond Europe	69

TITLE II

Structure of the Law	74
Chapter I. Divisions and Concepts	74
Chapter II. Concept of the Legal Rule	86

Table of Contents

TITLE III

	Sources of Law	94
Chapter I.	Legislation	99
Chapter II.	Custom	118
Chapter III.	Decided Cases	121
Chapter IV.	Legal Writing	134
Chapter V.	Super-eminent Principles	137

PART TWO

SOCIALIST LAWS	143
----------------	-----

TITLE I

	Historical Evolution	147
Chapter I.	The Legal Tradition	147
Section I.	Russian Law before 1917	148
Section II.	Other Socialist Countries	153
Chapter II.	Marxism-Leninism	155
Chapter III.	The New Order	166
Section I.	Soviet Law Since 1917	167
1.	From Bourgeois to Socialist State	168
2.	From Socialist State to Communist Society	174
Section II.	Other Socialist Countries	181
Section III.	The Principle of Socialist Legality	193
1.	Meaning of the Principle	193
2.	Guarantees of the Principle	199

TITLE II

	Sources of Law	208
Chapter I.	Legislation	208
Section I.	The Soviet Union	209
Section II.	Other Socialist Countries	222

Table of Contents

ix

Chapter II.	Decided Cases	225
Section I.	The Soviet Union	225
1.	Judicial Organisation	225
2.	Extra-Judicial Contentious Proceedings	232
A.	Arbitration	233
B.	Appeals to People's Organisations	240
3.	Role of Judicial Decisions	242
Section II.	Other Socialist Countries	247
Chapter III.	Custom and Rules of Socialist Human Intercourse	254
Chapter IV.	Doctrinal Writing	256

TITLE III

Structure of the Law	260
----------------------	-----

Chapter I.	Divisions of Socialist Law	260
Chapter II.	Socialist Legal Concepts	267
Section I.	Ownership	268
Section II.	Contracts	273
Section III.	Most-Favoured Nation Clause	280

PART THREE

THE COMMON LAW	285
----------------	-----

TITLE I

English Law	286
-------------	-----

Chapter I.	History of English Law	286
Section I.	Anglo-Saxon Period	287
Section II.	Formation of the Common Law (1066-1485)	288

Table of Contents

Section III.	Growth of Equity (1485-1832)	300
Section IV.	Modern Period	306
Chapter II.	Structure of English Law	308
Section I.	Legal Divisions and Concepts	311
1.	Common Law and Equity	314
2.	Trusts	322
3.	Importance of Adjective Law	327
Section II.	Concept of the Legal Rule	332
Chapter III.	Sources of English Law	339
Section I.	Decisions of the Courts	340
1.	English Judicial Organisation	340
2.	Rule of Precedent	348
Section II.	Statute Law	354
Section III.	Custom	358
Section IV.	Reason	360
Section V.	Conclusions	362

TITLE II

Law of the United States of America	368
-------------------------------------	-----

Chapter I.	History of Law in the United States of America	368
Chapter II.	Structure of American Law	377
Section I.	Federal Law and State Law	377
1.	Statute Law	378
2.	The Common Law	382
Section II.	Other Structural Differences	390
Chapter III.	Sources of American Law	392
Section I.	Decisions of the Courts	392
1.	Judicial Organisation	393
2.	American Legal Profession	397
3.	The Rule of <i>Stare Decisis</i>	401
4.	Restatement of the Law	404
Section II.	Statute Law	406

Table of Contents

xi

PART FOUR

OTHER CONCEPTIONS OF LAW
AND THE SOCIAL ORDER

419

TITLE I

Muslim Law

421

Chapter I.	Immutable Basis of Muslim Law	422
Chapter II.	Adaptation of Muslim Law to the Modern World	431
Chapter III.	Law of Muslim Countries	437

TITLE II

Law of India

447

Chapter I.	Law of the Hindu Community	447
Chapter II.	National Law of India	462

TITLE III

Laws of the Far East

477

Chapter I.	Chinese Law	478
Chapter II.	Japanese Law	492

TITLE IV

Laws of Africa and Malagasy (Madagascar)

505

Chapter I	Customary Basis	505
Chapter II.	Colonial Period	512
Section I.	Modern Law	513
Section II.	Traditional Law	517
Chapter III.	The Independent Nations	520

Table of Contents

APPENDIX I

BIBLIOGRAPHICAL INFORMATION 533

Section I.	Bibliographical Tools	533
Section II.	Comparative Law Reviews	536
Section III.	General Introductory Works on Comparative Law and Foreign Laws	538
Section IV.	Encyclopaedias of Comparative Law. Miscellanies	543
Section V.	Romano-Germanic Family	546
Section VI.	Family of Socialist Laws	550
Section VII.	Common Law Family	554
Section VIII.	Other Conceptions of Law and the Social Order	556
Section IX.	Unification and Harmonization of Law	562

APPENDIX II

USEFUL INFORMATION AND REFERENCES 562

Section I.	Centres of Comparative Law	562
Section II.	Comparative Law Studies	563
Section III.	Comparative Law Libraries	564
<i>Index</i>		567

INTRODUCTION

1. Outline

The majority of introductory works on comparative law published up to the present time have, for the most part, concentrated on defining the purpose of comparative law and emphasizing the value, as well as the difficulty, of comparative law studies. While these retain their interest, there is no purpose in renewing them here. Consequently, the first section of this Introduction will briefly summarize and explain, from an historical point of view, the different concepts which have been developed concerning the nature and the usefulness of comparative law.¹

The second section of the Introduction is devoted to the idea of the "legal family" (*famille juridique*). It explains how, despite the diversity of laws encountered in the world today, it is possible to concentrate on the presentation of certain "models," certain laws which can be considered typical and representative of a family which groups a number of laws.

SECTION I—COMPARATIVE LAW

2. Development of comparative law

There have always been studies of foreign laws and recourse to comparison in legal scholarship.² The comparison of laws, at least in their geographical diversity, is as old as the science of law itself. Aristotle (384–322 B.C.), in considering what form of political community would be best, studied 153 constitutions of Greek and other cities in his treatise, *Politics*; Solon (c. 640–558 B.C.), when drafting the Athenian laws, we are told, proceeded on the same basis; the decemvirs appointed in 451–450 B.C. to draw up the law of the XII Tables for Rome are also supposed to have carried out comparative

¹ For more details, cf. especially the first part of David (R.), *Traité élémentaire de droit civil comparé* (1950). Adde Gutteridge (H. C.), *Comparative Law* (2nd ed., 1949).

² See Hug (W.), "The history of Comparative Law," 45 Harv. L. Rev., 1027–1070 (1932), and Pound (R.), *Comparative Law in the Formation of the American Common Law* in *Acta Academiae Universalis Jurisprudentiae* (1928); Sarfatti (M.), *Les premiers pas du droit comparé* in *Mélanges Maury*, II, p. 237.

law enquiries in the Greek cities. In the Middle Ages, Canon law and Roman law were compared, and in sixteenth-century England the respective merits of the Canon law and the Common law were debated. The comparison of customary laws in continental Europe was the basis of the formulation of the principles of a "common customary private law" (*droit commun coutumier* in France; *Deutsches Privatrecht* in Germany). Montesquieu (1689–1755) attempted, through comparison, to penetrate the spirit of laws and thereby establish common principles of good government.

Many historical precedents can therefore be invoked. But the development of comparative law, as a science, is rather more recent. Only in the last century was its importance recognized, its method and aims systematically studied, and the term itself *comparative law* (*droit compare*) received and established in usage.

The reasons for this late development of comparative law as an independent science are not difficult to identify. For many previous centuries, the science of law was devoted to discovering the principles of just law, that is to say law conforming to the will of God, to nature and to reason, and there was little concern for positive law or the law as it applied in fact. Local or customary law was of importance to practitioners and the legislative measures of ruling sovereigns were of interest to governments of other countries, but neither was of any real significance to those who meditated upon and wrote about law. Positive law in either form was neglected in the universities. There the principal study, once thought more noble and more suitable to true legal training, was the search for just rules that would be applicable in all countries. This search, which was to reveal the true science of law, was best carried out in the study not of the various national or local laws but rather in Roman law and Canon law, the only laws common to the whole of the civilized (*i.e.* Christian) world.

It was, then, only in the latter part of the nineteenth century that the desirability and later the necessity of comparing national European laws emerged, little by little. This development occurred after the disintegration of the notion of a *ius commune* or law of universal application, which was brought about by the nationalism engendered by the adoption of national codifications and the implantation of these national laws as the proper subject-matter of legal science in the universities. In France especially, after the Napoleonic codification, it was thought that the new codes had

given final expression to law in terms having universal value. Other nations had only to follow the model provided them; those who adopted the codes could find the answer to any problem by means of their simple exegesis. Legal writing, in prevailing thought, was inspired by the famous quip of Beugnet—"Gentlemen, I do not teach the civil law; I only teach the Napoleonic Code."³ There was no place for comparative law.

The development, in the second half of the century, of comparative law, as such, was the logically inevitable aftermath of this nationalization of the idea of law which had ascendancy in the first part of the nineteenth century. It was, moreover, rendered necessary, and even urgent, by the unprecedented expansion in more modern times of international relations and contacts of all kinds.

3. Beginnings of comparative law—its importance now

Comparative law has developed enormously since the beginning of the twentieth century. Not much more than 25 years ago it was seen as a rarefied field for dilettantes; today comparative law studies are admitted to be a necessary part of any legal science and training.

The beginning of comparative law in the nineteenth century was, naturally enough, taken up with discussions attempting to define its aims and nature, to establish its place among the sciences, to characterize its methods, possible applications and general usefulness. Was it an autonomous *body* of legal knowledge or simply a *method*—the "comparative method"—applied to established legal science, was it a field distinct from comparative legal history, general legal theory and the sociology of law, in what precise areas of law would comparison be especially useful and what laws could properly, and with profit, be compared? What dangers were there in comparative law studies? Discussion of this sort constituted the basis of the first published works on the subject which appeared in several countries, and they were items on the agenda of the first International Congress of Comparative Law, held in Paris in 1900.⁴ A belated echo of them is even to be found in more recent publications.

It was, of course, only natural that such questions preoccupy

³ "Messieurs, je n'enseigne pas le droit civil; je ne connais que le code Napoléon!"

⁴ *Congrès international du droit comparé. Procès-verbaux des séances et documents* (1905-1907). Only jurists of continental Europe participated. One Englishman, Sir Frederick Pollock (1845-1937), represented the world of the English legal tradition.