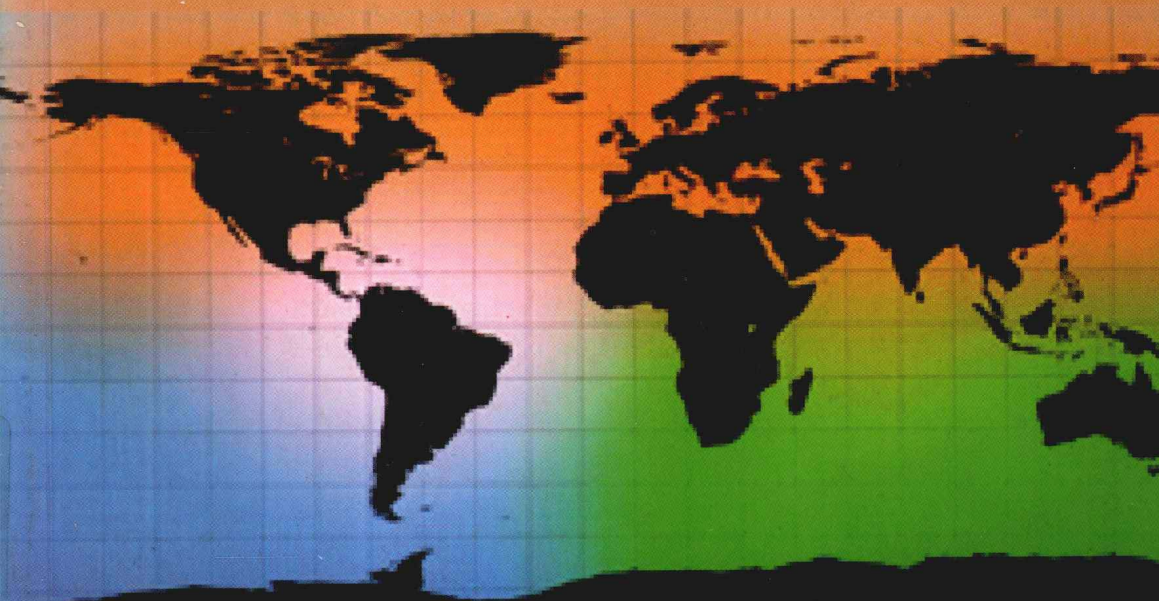


# **COMPARATIVE LAW** **in a changing world**

---

**Second Edition**



**Peter de Cruz**

CAVENDISH PUBLISHING LIMITED



# COMPARATIVE LAW IN A CHANGING WORLD

Second edition

**Peter de Cruz, LLB, LLM, PhD**  
Professor of Law  
Staffordshire University



Cavendish  
Publishing  
Limited

---

London • Sydney

First published in Great Britain 1995 by Cavendish Publishing Limited, The Glass House, Wharton Street, London, WC1X 9PX.

Telephone: +44 (0) 20 7278 8000      Facsimile: +44 (0) 20 7278 8080

E-mail: [info@cavendishpublishing.com](mailto:info@cavendishpublishing.com)

Visit our Home Page on <http://www.cavendishpublishing.com>

© Cruz, P de 1999

First edition 1995

Reprinted 1998

Second edition 1999

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, scanning or otherwise, except under the terms of the Copyright Designs and Patents Act 1988 or under the terms of a licence issued by the Copyright Licensing Agency, 90 Tottenham Court Road, London W1P 9HE, UK, without the permission in writing of the publisher.

Cruz, Peter de

Comparative law in a changing world

1 Comparative law

I Title

340.2

ISBN 1 85941 432 X

Printed and bound in Great Britain

## PREFACE

---

When I began to write about comparative law in the early 1990s, the subject was considered to be 'in need of an audience' (Markesinis) and was certainly associated only with a highly theoretical and obscure enterprise which was the preserve of a few (mostly continental) lawyers and Leeds and Oxford stood out as two of the eclectic universities which actually had a course with that title. By being highly selective, my earlier work, *A Modern Approach to Comparative Law*, was confined to 343 pages of text. By 1995, there was a far greater interest in the subject and at least several more British universities now ran courses on comparative law which prompted the next edition of the book, which was expanded to 491 pages. Reflecting on comparative law at the end of the 1990s, looking to the millennium, I find that the basic premise upon which this book was first conceived, still remains. It still seeks to provide an overview of the comparative study of law and legal systems, primarily for undergraduate study, but also aims to serve as a resource for further study by postgraduates or practitioners who may wish to have some notion of the concept and techniques of comparative law. It still focuses on France and Germany as the main civil law jurisdictions and English law as the main common law example. These jurisdictions are both very different in their historical development, juristic style, ideologies and legal traditions, yet serve as typical paradigms of the civil law parent legal family because of their common characteristics, despite their many differences. This book continues to provide comparative illustrations of selected substantive areas of law within common law and civil law systems, using the three abovenamed jurisdictions as archetypal systems. Despite some criticisms of some of its content and/or approach I have, at least, for this edition, retained my basic approach to comparative law study. The definitive, all embracing, multicultural politically correct, up to the minute, totally comprehensive (covering the jurisdictions covered here and more) and seminal book has, as far as I am aware, certainly not yet appeared, certainly not from any of this book's reviewers. The impetus for this book grew from a series of lectures which I gave on the Keele University undergraduate comparative law course in the early to mid-1990s. Accordingly, the reader may find that I was highly selective in the coverage of topics and jurisdictions. I also developed a number of ideas which may be pursued in greater depth by researchers at postgraduate level.

The expression 'comparative law' was apparently first used in the 19th century and, although it is predominantly a method of study, it has also acquired a sufficient number of methodological principles which suggest that it is becoming a branch of social science in its own right. But, comparative law does not have a substantive core content as, for example, contract law or criminal law does in English law. Therefore, once key concepts, such as the sources of law and parent legal families,

have been understood, there are several topics which equally merit comparative analysis.

As is often recounted, Aristotle collected something in the order of 150 city State constitutions in the 4th century BC in the course of devising a model constitution. Similar comparative enterprises have taken place throughout the centuries in most of what is now known as the civilised Western world. The process of codification also has a distinguished pedigree and a distinctive modern meaning in the context of the 19th century French and German Codes. The method of comparative law is, therefore, not a modern enterprise.

However, several things justify a fresh appraisal of comparative law as a methodological and socio-legal construct as we approach the new millennium. First, all other comparative law books used to assume that there are three main parent legal families – civil law, common law and socialist legal systems. This is no longer the case as a result of the disintegration of the former Soviet Union, the prototype of socialist systems and the rejection and demise of communism throughout Eastern Europe and in other parts of the world. We have therefore appeared to have returned to the pre-1917 position of having only two truly major legal families or parent systems. Socialist systems continue to exist, but are either returning to their civil law roots or undergoing a severe catharsis in ethnic conflict or are developing as part of a hybrid system of law. I have attempted to clarify the notion of parent legal families, legal systems and legal traditions in Chapter 1 and developed these points in Chapter 2. Chapter 6 provides an overview of the new Russian Federation Constitution reforms and an assessment of recent legal developments. This now assumes greater importance and poignancy in the light of dramatic and constantly changing developments in the ‘new’ Russia. Secondly, the impact of European Community law is gradually growing apace and must be taken into account as a unique supra-national legal order. This book addresses its continuing impact and the influence of European legal traditions on Community law as it is being developed by the European Court of Justice. Thirdly, none of the existing books or commentators on comparative law address adequately the techniques of comparison and no book offers a blueprint which is accessible, comprehensible, precise and practical. I have attempted to develop my original blueprint for comparison in Chapter 7. Fourthly, it has become increasingly clear that the common law distinction between contract and tort is only barely justifiable as being rooted in the difference between imposed and assumed duties and in their rules on remedies. I have attempted to provide some ideas for the future analysis of tort and contract as part of one law of obligations and this finds resonances in European civil law. Fifthly, despite a commentator’s recent remark to the effect that

comparative legal studies were not necessarily for everyone, implying that they were, arguably, too difficult and, if demystified, would be lacking in intellectual credulity, it is hoped that this textbook does provide an accessible historical and conceptual introduction to the development of civil and common law for undergraduates and postgraduate researchers and a concise, selective comparative overview of key topics, such as contract, tort, sale of goods and company law. Sixthly, developments in certain areas have also been considered – for example, the rise of the administrative tribunal in England and the blurring of the division between public and private law in English law, despite *O'Reilly v Mackman* [1983] 1 AC 147; the future of Hong Kong since it reverted to China in 1997; and the implications of German reunification are also considered, all of which have inevitably overtaken other existing texts. Finally, there is an overview of the current geopolitical map of the world as it has evolved in the 1990s and the last chapter provides a brief survey of the phenomenon of convergence of systems, as well as an evaluation of the possible reasons for any new world order that might be emerging.

I wish to thank John Morrow of University of Newcastle upon Tyne library for his continuing generosity in allowing me access to sources and materials unobtainable anywhere else. Without their help, even the earlier version of this book could not have been started. As always, all errors and inaccuracies remain the writer's sole responsibility. This book is dedicated to my wife, Lois, for her love, support and boundless patience and to my mother and late father, both of whom first sparked my enthusiasm in exploring a multiplicity of cultures in their legal and socio-legal context.

Peter de Cruz  
Staffordshire University  
July 1999

# LIST OF ABBREVIATIONS

---

ABGB .....	Allgemeines Bürgerliches Gesetzbuch für Österreich (Austrian General Civil Code)
AC .....	Appeal Cases (English Law Reports)
AG .....	Aktiengesellschaft (company)
AGBG.....	Law on General Conditions of Business (German)
AJIL.....	American Journal of International Law
Am J Comp L .....	American Journal of Comparative Law
All ER.....	All England Reports
Asia Business L Rev .....	Asia Business Law Review
BGB.....	Bürgerliches Gesetzbuch (German Civil Code)
BGH .....	Bundesgerichtshof (Supreme Court, Ordinary Jurisdiction)
BGHZ.....	Reports of civil cases of the German Federal Supreme Court
Canadian Bar Rev .....	Canadian Bar Review
Chicago UL Rev .....	Chicago University Law Review
Civ .....	Cour de cassation, Chambre civile
CLJ .....	Cambridge Law Journal
CLR.....	Commonwealth Law Reports
CMLR.....	Common Market Law Reports
Comparative Labour LJ.....	Comparative Labour Law Journal
Denning LJ.....	Denning Law Journal
DM.....	Deutsche Mark
ECR.....	European Court Reports
EEIG.....	European Economic Industry Grouping
EJIL.....	European Journal of International Law
EL Rev .....	European Law Review
European Competition L Rev .....	European Competition Law Review
FMSLR.....	Federated Malay States Law Reports
GEIE .....	Groupement Européen d'Intérêt économique
GG.....	Grundgesetz of 23 May 1949
GIE.....	Groupement d'Intérêt économique (Basic Law: West German Constitution)
GVG .....	Constitution of Courts Act 1975 (Germany)
Harvard L Rev .....	Harvard Law Review
Hastings LJ .....	Hastings Law Journal
HGB.....	German Commercial Code
HKLJ.....	Hong Kong Law Journal
ICLQ.....	International and Comparative Law Quarterly
Industrial LJ.....	Industrial Law Journal
JBL .....	Journal of Business Law
J Pub Law.....	Journal of Public Law
JSPTL.....	Journal of the Society of the Public Teachers of Law
KB .....	King's Bench Law Reports
LQR.....	Law Quarterly Review
LS .....	Legal Studies

Mich L Rev .....	Michigan Law Review
MLJ .....	Malayan Law Journal
MLR .....	Modern Law Review
New Left Rev .....	New Left Review
NJW .....	Neue Juristische Wochenschrift: German Periodical
OJLS .....	Oxford Journal of Legal Studies
Pennsylvania UL Rev .....	Pennsylvania University Law Review
Req .....	Cour de Cassation, Chambre de requetes
RGZ .....	Decisions in Civil matters of the German Imperial Court
SA .....	Société Anonyme
SARL .....	Société a responsabilité limitée
Texas L Rev .....	Texas Law Review
Times European L Rev .....	Times European Law Review
Torts LJ .....	Torts Law Journal
Tulane L Rev .....	Tulane Law Review
ZPO .....	German Code of Civil Procedure (Zivilprozessordnung)



# CONTENTS

---

<i>Preface</i>	<i>v</i>
<i>List of Abbreviations</i>	<i>xix</i>

1	INTRODUCING COMPARATIVE LAW	1
	Introduction	1
	Definitions and derivations	3
	Terminology: subject or method?	3
	The elements of 'comparative law'	7
	Comparative law distinguished from other disciplines	7
	Private international law and comparative law	8
	Public international law and comparative law	9
	Legal history, legal ethnology and comparative law	9
	Sociology of law and comparative law	10
	A rationale for comparative law	10
	The origins of comparative law	11
	Early comparative law	11
	The roots of comparative law	13
	Comparative law in England	16
	The contemporary significance of comparative law	18
	Functions and purposes of comparative law	18
	Comparative law as an academic discipline	18
	Comparative law as an academic tradition	19
	Using comparative law in research	19
	A tool of construction	21
	Aid to understanding legal rules	22
	The African situation	24
	The international law dimension	24
	Key concepts in the comparative law method	26
	The parent legal family and legal traditions	26
	Sources of law	28
	Comparative law method	29
	Selective bibliography	30
2	THE CLASSIFICATION OF LEGAL SYSTEMS	
	INTO LEGAL FAMILIES	33
	Terminology	33
	Legal traditions and legal families	33
	Classification of legal systems	34
	Criteria used to classify legal systems	36
	Examination and application of the criteria	36
	Historical development	36
	Mode of legal thinking	38

	Distinctive legal institutions	39
	Choice of sources of law	40
	Ideology of a legal system	40
	Convergence theory and legal unity	41
	Selective bibliography	42
3	THE CIVIL LAW SYSTEM	43
	Terminology	43
	Different meanings of 'civil law'	43
	Meaning of codification in the civil law context	46
	Historical development of the civil law tradition	47
	Roman law and Western civilisation	47
	History of French law	59
	Structure and overview of the French Civil Code	64
	Sources of law	66
	Doctrine	67
	Status of judicial decisions (jurisprudence) in French law	68
	Key features of the French legal system	69
	Public and private law	74
	Distinctive French legal doctrines and concepts	77
	History of German law	79
	Application of the BGB	90
	Overview of the civil law tradition	95
	Selective bibliography	96
4	THE ENGLISH COMMON LAW SYSTEM	99
	Introduction	99
	Terminology	101
	The English common law tradition	102
	The common law in the United States	107
	Preliminary observations	107
	Linguistic issues	108
	History of American law: some observations	108
	Uniformity and diversity in American law	114
	Comparative overview	118
	The common law tradition in South East Asia	118
	Historical introduction to the English legal world	
	in South East Asia	119
	Reception of English law in Singapore and Malaysia	121
	Reception of English law in Singapore	122
	Reception of English law in Malaysia	123
	The common law in India	125
	The common law in the Far East: Hong Kong	127

## Contents

---

New legislative formula	128
Hong Kong after 1997	129
Can socialism and capitalism co-exist?	131
The future of the common law in Hong Kong	132
Comparative overview	136
Selective bibliography	137
5 EUROPEAN COMMUNITY LAW	139
Introduction	139
Scope of chapter	140
Monism, dualism and accession of Britain	140
The Single European Act 1986	144
The institutional framework of the Community	144
EC institutions and traditional international organisations	145
The Council of Ministers	146
The European Commission	147
The European Parliament	149
The European Court of Justice	150
Difficulties in comparison	156
Comparison of legal style	
of Community law with other systems	157
The influence of French law	158
The influence of German law	160
The influence of the common law tradition	161
The language of Community law	162
Legislation as language	163
The Community's legal order/regime	164
Nature of Community law	164
Direct applicability and direct effect	165
Supremacy of Community law	168
Community techniques of legal interpretation	169
Distinctive legal institutions/doctrines	170
Choice of sources of law	171
Ideology of the system	172
The Maastricht Treaty	174
The general aims of the Treaty	175
Steps to European Union	175
Subsidiarity	175
European citizenship	176
A single economy	176
Powers of the European Parliament	176
Education	176
Culture	177
Justice and Home Affairs	177

	The Social Chapter and social policy	177
	Conclusions	178
	Selective bibliography	180
6	SOCIALIST LAW AND OTHER TYPES OF LEGAL SYSTEMS	183
	Scope of chapter	183
	The socialist system and Russia	183
	The socialist concept of law	184
	Differences between civil law and socialist systems	186
	Similarities between civil law and socialist systems	186
	Was the socialist system part of the civil law system?	188
	Inquest on the Russian Empire	189
	The end of the USSR and the new Russian Federation	190
	Russian law – return to civil law or hybrid system?	191
	Towards a Russian social democratic State?	200
	Other recent developments	201
	Hybrid legal systems	202
	Other types of law	203
	Eastern legal conceptions	203
	The Chinese conception of law	204
	The Japanese conception of law	207
	Selective bibliography	212
7	TECHNIQUES OF COMPARATIVE LAW	213
	Scope of chapter	213
	General considerations	213
	Linguistic/terminological problems	214
	Cultural differences between systems	216
	Arbitrary selection of objects of study	219
	‘Comparability’ in comparison	220
	Viability of theory of a common legal pattern	222
	Imposition of one’s own legal conceptions	223
	Omission of extra-legal factors	224
	The quest for methodology	225
	Introduction	225
	Clarifying the general character of comparative law	225
	The subject matter of the comparison	226
	Macro-comparison and micro-comparison	227
	Suitability of topics for micro-comparison	228
	Comparative method: requirements	228
	The test of functionality	230
	The comparative law method	233

## Contents

---

	A three stage approach	233
	A method of comparison: a blueprint	235
	Selective bibliography	240
8	A COMPARATIVE STUDY OF JUDICIAL STYLES AND CASE LAW	243
	The meaning of 'case law'	243
	Case law as a source of law	243
	Key issues	244
	The authority of case law in non-common law jurisdictions	244
	The authority of case law in non-common law countries	244
	Styles of judicial decisions	247
	Appellate court decisions	247
	The five styles of judgments	247
	<i>Ratio and dicta</i>	248
	The French style of judgment	252
	The German style of judgment	254
	General style of Federal Supreme Court judgments	256
	The Swedish type of judgment	258
	The relevance of overriding general principles	259
	<i>Aequitas</i>	259
	Selective bibliography	263
9	A COMPARATIVE STUDY OF STATUTORY INTERPRETATION	265
	Defining 'statutory interpretation'	265
	Defining 'interpretation'	265
	General comparative observations	265
	Methods/techniques of statutory interpretation	267
	Civil law approaches	267
	The logical interpretation methodology	267
	The legislative history approach	269
	The teleological approach	270
	Scope and limitations of the teleological approach	270
	Common law approaches to statutory interpretation	271
	Inadmissible evidence of statutory intent	272
	Summary of legislative history position	274
	The mischief rule	275
	Filling gaps in a statute	277
	Other linguistic canons of construction/interpretation	278
	Presumptions and precedents	280
	Conflict of statutes with other legal principles	281
	Scholarly/doctrinal writing in English	

statutory interpretation	282
Typical structure of English statutes	283
Comparative overview	284
Similarities in approaches between legal systems	285
Common judicial arguments on statutory interpretation	286
Differences in statutory interpretation between the systems	287
Conclusions	290
Selective bibliography	290
 10 THE LAW OF OBLIGATIONS: A COMPARATIVE STUDY OF CONTRACT AND TORT	 293
Introduction	293
Historical development: a comparative analysis	294
The early Roman law of obligations	294
Contracts	294
Origins of the modern English law of contract	300
Tortious or delictual liability	304
Law of obligations: contract in civil law	308
Tort and contract: contemporary comparative aspects	312
Formation of contracts	312
German law	314
French law	317
German law	318
English law	319
Scope of tortious liability	320
American law	324
Civil law	325
Tort law and traffic accidents	331
French law	331
English law	332
German law	333
Fault in the law of contract and tort	334
Interaction of tort and contract	336
Comparative overview	338
Selective bibliography	339
 11 CORPORATE AND COMMERCIAL LAW	 341
Scope of analysis	341
Problems in comparison of company laws	342
Key conceptual questions	342
Paillusseau's enterprise notion	344
Forms of business organisation: a comparative overview	345
Corporate terminology in France and Germany	345

## Contents

---

Companies and contracts	349
Partnership law	351
Company law in France	354
Legislative sources of law	356
Incorporation of a société	356
Status of a société pending incorporation	357
SAs and SARLs	357
Société à responsabilité limitée (SARL)	358
The GIE and the GEIE	359
Company law in Germany	362
Types of business organisation	363
Partnerships and sole traders	364
Sole traders	364
Partnerships	365
The silent partnership	368
Limited companies and public limited companies	368
A comparative overview of agency	371
Historical origins	371
Modern agency law: common law v civil law	373
European Community corporate law	377
The notion of European Community (EC) law	377
The <i>Daily Mail</i> case	378
Non-profit making undertakings	378
Removal of restrictions on freedom of movement	378
Statutory foundations of harmonisation of laws	379
Nature of EC company law	379
Directives already in force in the United Kingdom	380
Comparative corporate law: conclusions	380
Selective bibliography	381
 12 SALE OF GOODS	 383
Introduction	383
The historical background	384
Sale of goods in Roman law	384
The law merchant	385
Key issues in sales of goods	387
Comparative study of European civil law countries	388
French law	388
German law	394
Remedies of buyer and seller	398
Contributory fault in damages	400
Seller's remedies	402
The English common law approach	404
General	404

	Definition of goods under English law	405
	Transfer of property and transfer of ownership	406
	Transfer of ownership and risk of loss	407
	The <i>Romalpa</i> case	415
	Effect of the <i>Romalpa</i> case	415
	Principle of the <i>Romalpa</i> case	416
	Delivery at seller's own risk	417
	Duties of buyer and seller	417
	Remedies of the buyer and seller	430
	The Supply of Goods and Services Act 1982	434
	The uniform laws on international sales	436
	Meaning of 'international sale'	437
	Sale of goods	438
	Validity and passing of property excluded	443
	Interpretation of the Convention	443
	Ratifications	444
	Comparative overview	445
	Selective Bibliography	446
13	LABOUR LAW	449
	Scope of chapter	449
	Historical development	449
	Great Britain	449
	Germany	452
	France	463
	Comparative overview	472
	Selective bibliography	474
14	A NEW WORLD ORDER?	475
	Introduction	475
	The significance of legal history	477
	A new world order?	478
	Global wars and civil strife: historical perspectives	478
	Reasons for the transformation of the world order	479
	Reasons for the fall of communism in Eastern Europe	480
	Theories of convergence	481
	Current convergent trends	481
	European convergence	482
	Philosophies of convergence	485
	The <i>jus commune</i> theory	485
	Global convergence and the Fukuyama thesis	488
	Unification of legal systems	490



## Contents

---

Strategies of convergence	490
Legal transplants	491
Natural convergence	491
Convergence and divergence between common law and civil law	492
Convergence between European countries	493
The dawn of a new era in world history	494
Conclusions	495
Selective bibliography	496
 <i>Index</i>	 499