

Private Comparative Law

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1. What Comparative Law Is

What is comparative law about ?

Comparative law means different things to different people.

Since the formal day of birth of modern comparative law, at the 1900 Paris International Congress of Comparative Law, there has been a longstanding debate about whether comparative law is a methodology for the study of law or an autonomous legal discipline.

Comparative may, for instance, be about :

- (1) comparing the world's legal systems or particular elements thereof;
- (2) studying legal transplants;
- (3) exploring the relationships between law and society.

Part I – Purposes and Methods of Comparative Law



1. What Comparative Law Is

(1) Comparing the World's Legal Systems

This is the most common form of comparative studies.

It is often coupled with recourse to the so-called 'functionalist' methodology. 'Functionalism' is based upon the assumption that most legal systems face similar problems, but solve them by different means. The 'functionalist' comparative lawyer therefore explores similarities and differences in the ways in which legal systems approach similar problems.

'Functionalism' easily turns out to be prescriptive. This is why it is recurrent in contexts of legal unification / harmonization.

Part I – Purposes and Methods of Comparative Law



1. What Comparative Law Is

(1) Comparing the World's Legal Systems

Recovery in tort for non-patrimonial losses under French, Austrian, German and Italian law



	Civil code	Courts/Doctrine
France	No provision in the <i>Code civil</i>	Generous
Austria	No provision in the <i>Allgemeines bürgerliches Gesetzbuch</i>	Restrictive
Germany	§ 253 <i>Bürgerliches Gesetzbuch</i> : «1. Money may be demanded in compensation for any damage that is not pecuniary loss only in the cases stipulated by law. 2. If damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss.»	Restrictive
Italy	Art. 2059 <i>Codice civile</i> : «Compensation for pain and suffering is awarded when it is provided by law.»	Generous



1. What Comparative Law Is

(1) Comparing the World's Legal Systems

Another example of functionalism comes from the World Bank's 'Doing Business Reports'.

From 2003 to 2020, the World Bank has published every year a 'Doing Business Report', with the aim of assessing the business-friendliness of world's legal systems.

The report collected answers to a questionnaire from around 15.000 national reporters (law firms and government officials) from every country in the world.



1. What Comparative Law Is

(2) Studying Legal Transplants

Following the migration and adaptation of legal ideas requires exploring the historical origins and the developments of institutions, rules and forms of law.

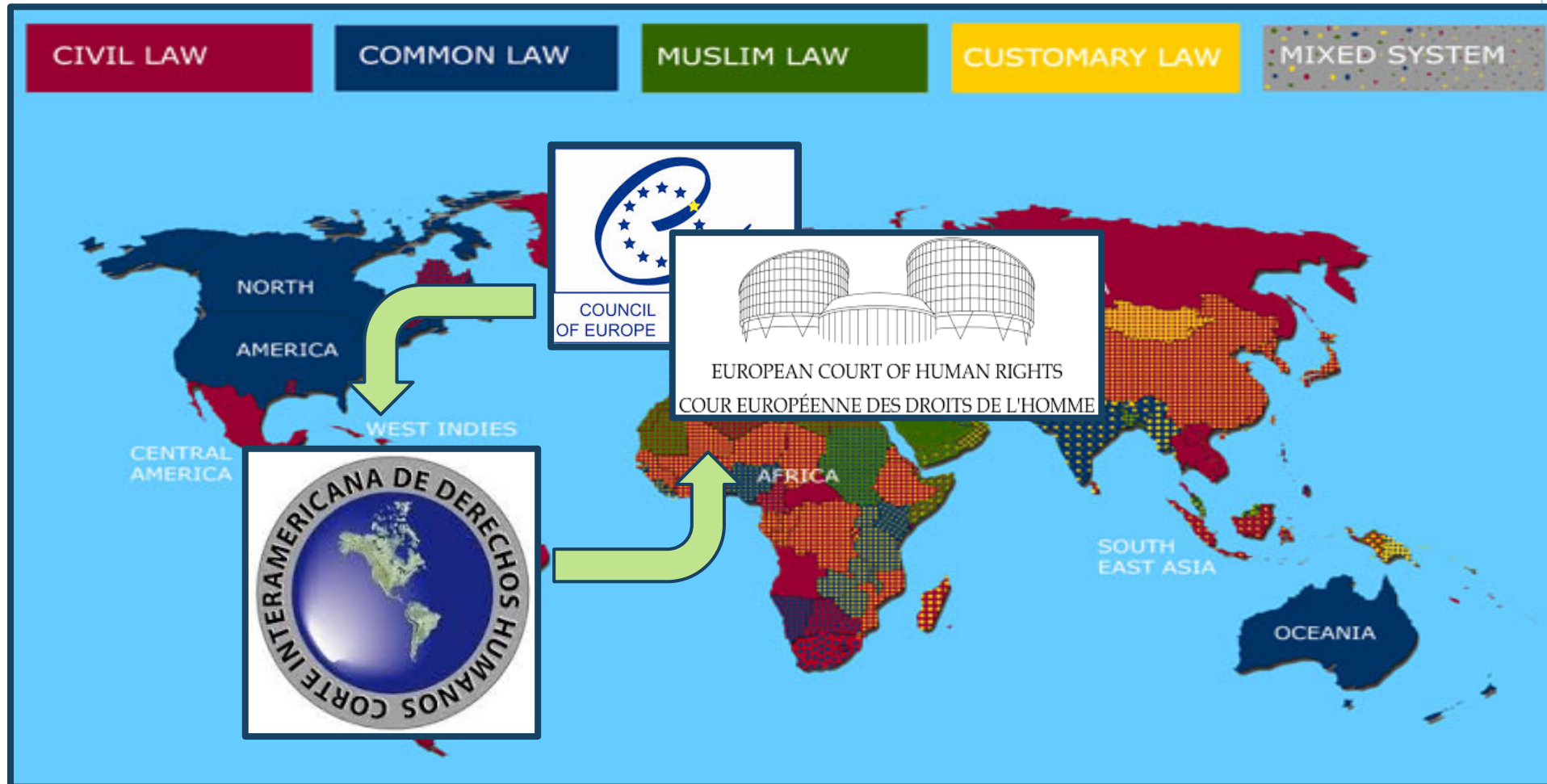


Some examples:

- the spread of the English common law abroad;
- the journeys of the French Civil Code around the world;
- the mixing up of civil law and common law in some systems;
- the re-interpretation of the pre- and colonial legacy in post-colonial jurisdictions.

1. What Comparative Law Is

(2) Studying Legal Transplants



1. What Comparative Law Is

(3) Exploring the Relationships between Law and Society

This implies studying the perceptions, assumptions and visions about the law of a given society/community, which often diverge from those characterizing other societies/communities.



Litigation
Proneness



Conflict
Avoidance

Do Creative Dishes Need Intellectual Property Law?

“There are some social habits amongst top chefs that replace formal law. ... IPRs are just one of many possible mechanisms that encourage innovation and creativity. IPRs tend to protect financial rewards, whereas the chef’s system values more reputation, public’s interest and prizes such as Michelin stars” (Salvadori, 2013)

1. What Comparative Law Is

Are there other possible ways of doing comparative law ?

Comparative law might also be about exploring similarities and differences among international law regimes and international institutions...

**MOST
FAVORED
NATION**



**BILATERAL
INVESTMENT
TREATIES**



Part I – Purposes and Methods of Comparative Law

1. What Comparative Law Is

Are there other possible ways of doing comparative law ?

... and it might be about investigating the techniques, predilections, and sensitivities that determine how people in different parts of the globe think about the same areas of law (e.g., international law in US and in Europe).



Part I – Purposes and Methods of Comparative Law

1. What Comparative Law Is

Are there other possible ways of doing comparative law ?

Or it might be about scrutinizing and comparing transnational law regimes.

law merchant

ICC's URDG and Incoterms

ICANN

SWIFT codes



FCA	Free Carrier	Loading location			
FAS	Free Alongside Ship	Port of loading			
FOB	Free On Board	Port of loading			
CFR	Cost And Freight	Port of destination			
CIF	Cost Insurance And Freight	Port of destination			
CIP	Carriage And	Delivery			



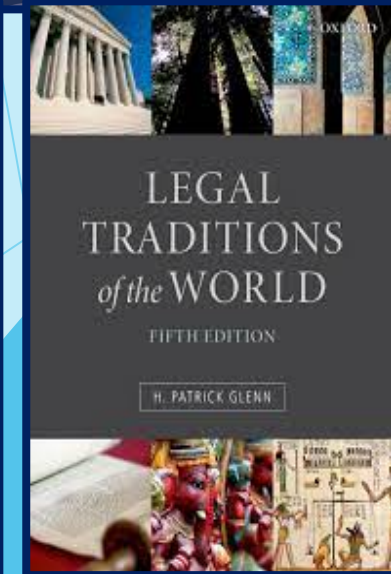
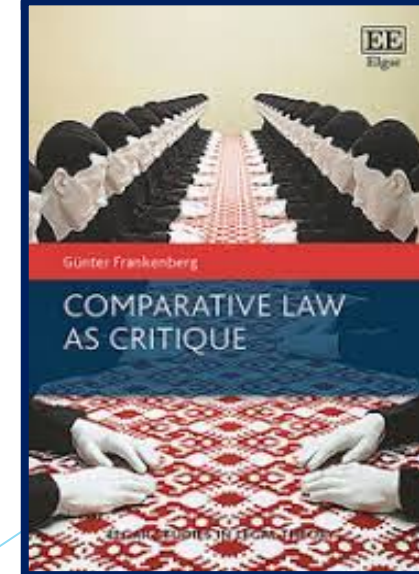
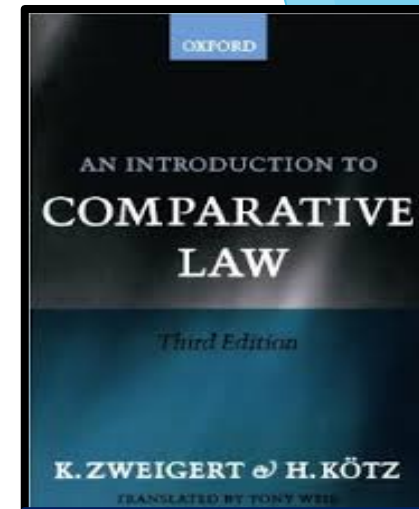
1. What Comparative Law Is

Comparative law methodologies:

- *functionalism* – Zweigert & Kötz's Introduction to Comparative Law
- *historicism* – Watson's Legal Transplants;
- *quantitative comparisons* – the Doing Business Reports;
- *legal pluralism* – Glenn's Legal Traditions of the World;
- *critical comparative law* – Frankenberg's Comparative Law as Critique.

What do these methodologies study? **Legal rules**

Part I – Purposes and Methods of Comparative Law



1. What Comparative Law Is

What is a legal rule ?

In legal systems there rarely is one single legal rule on a given issue.

More often there are many rules, resulting from the interaction of different components, which may converge or diverge with one another.

These components might be:

- ▶ statutory norms;
- ▶ judicial holdings;
- ▶ judicial obiter dicta;
- ▶ scholarly explanations;
- ▶ administrative practices;
- ▶ market practices, etc.



**LEGAL
FORMANTS**

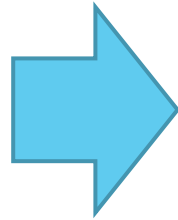
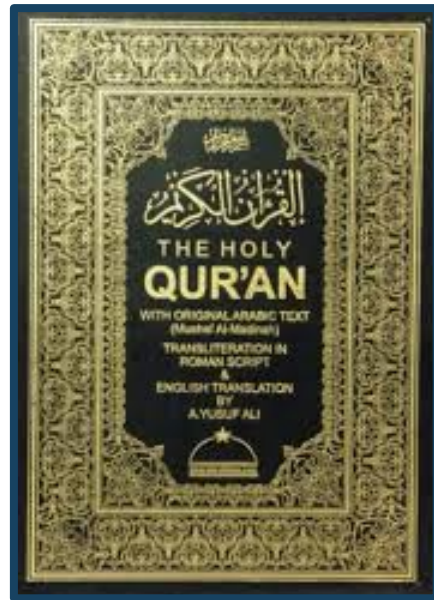
1. What Comparative Law Is

An illustration of divergence of legal formants: recovery in tort for non-patrimonial losses in France, Austria, Germany and Italy

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1. What Comparative Law Is

An illustration of the central role of interpretation: Islamic law



God's revelations are interpreted, systematized, and complemented by the **faqih**.

A **faqih** is a jurist, a person expert in legal sciences who knows how to derive ruling and judgment from foundational Islamic texts.

1. What Comparative Law Is

An illustration of the different role played by interpretive legal formants:
scholarship in England and in the US



Law was traditionally taught in London as a practical discipline within the tightly closed networks of barristers' professional associations.



Law was traditionally taught around the nation in law schools by scholars who taught a virtual, non-existent 'national' law.

1. What Comparative Law Is

Frankenberg's critiques to mainstream comparative law methodologies:

- ▶ implicit bias: comparatists rarely find it worth mentioning by which criteria they select their material. The relevant 'major' legal traditions are represented as the legitimate objects of study.
- ▶ legocentrism: comparatists do not focus on the interpretative patterns and visions of life which shape people's ways of organizing social experience".
- ▶ lack of self-reflection: comparatists rarely devote much attention to such questions as: Why should anyone undertake the task of studying the law comparatively? What is achieved by comparing the law of different societies? What is the law and how can we know it when we see it?

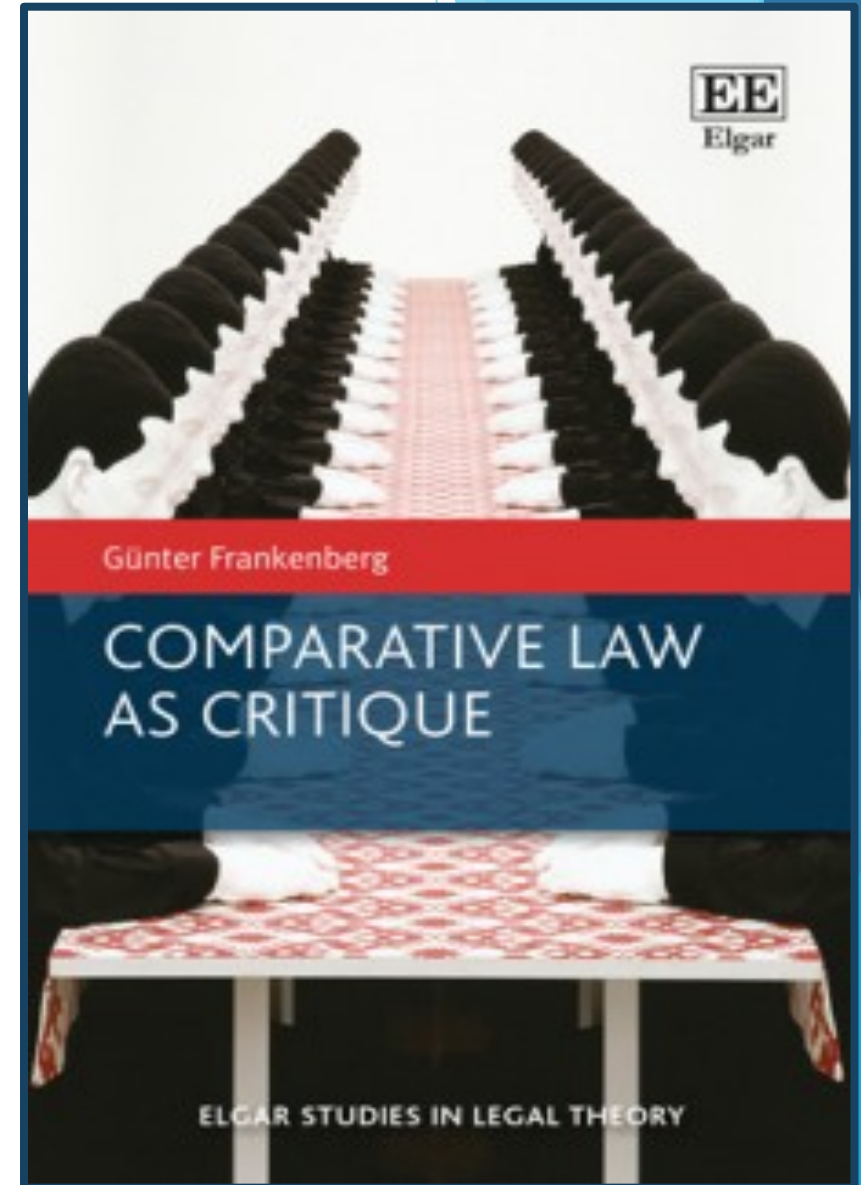
1. What Comparative Law Is

What is Frankberg's cure?

Comparatists should:

- ▶ be **self-reflective** and **self-critical**;
- ▶ challenge the **alleged 'neutrality'** of comparative law;
- ▶ recognise their own **biases** and unravel the **cultural ties** that bind them to a specific cultural framework.

Part I – Purposes and Methods of Comparative Law



1. What Comparative Law Is



The World Bank's Comparative Law



The World Bank's Doing Business Reports aimed at assessing the business-friendliness of world's legal systems.

The underlying assumption was the so-called 'legal origins' theory: a country's legal family is a significant determinant of the effectiveness of its legal system.

Countries belonging to the English common law family have the most investor-friendly laws, while French and German civil law countries have the least investor-friendly laws. The Scandinavian family fall close to the common law one.

Part I – Purposes and Methods of Comparative Law



1. What Comparative Law Is

The DB Reports have been very successful: in **17 years** they have prompted more than **3000** reforms worldwide, highlighting patterns that can be easily replicated, promoting access to the market, and offering a tool for measuring performance.

Yet the DB Reports also are:

- ▶ American biased;
- ▶ legocentric;
- ▶ premised on debatable assumptions;
- ▶ based on discretionary proxies;
- ▶ lacking any form of control or accountability.

Part I – Purposes and Methods of Comparative Law

Rank	Economy
1	New Zealand
2	Singapore
3	Hong Kong SAR, China
4	Denmark
5	Korea, Rep.
6	United States
7	Georgia
8	United Kingdom
9	Norway
10	Sweden



THE WORLD BANK
IBRD • IDA

1. What Comparative Law Is

Research demonstrates a causal relationship between economic freedom and gross domestic product (GDP) growth, where freedom regarding wages and prices, property rights, and licensing requirements leads to economic development.

Doing Business is founded on the principle that economic activity benefits from clear rules: rules that allow voluntary exchanges between economic actors, set out strong property rights, facilitate the resolution of commercial disputes, and provide contractual partners with protections against arbitrariness and abuse. Such rules are much more effective in promoting growth and development when they are efficient, transparent, and accessible to those for whom they are intended.

At its core, regulation is about freedom to do business. Regulation aims to prevent worker mistreatment by greedy employers (regulation of labor), to ensure that roads and bridges do not collapse (regulation of public procurement), and to protect one's investments (minority shareholder protections).