# Contents

List of Figures  
List of Tables  
Preface to the Second Edition  
Preface to the First Edition  
List of Abbreviations

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>List of Figures</td>
<td>xv</td>
</tr>
<tr>
<td>List of Tables</td>
<td>xvi</td>
</tr>
<tr>
<td>Preface to the Second Edition</td>
<td>xvii</td>
</tr>
<tr>
<td>Preface to the First Edition</td>
<td>xix</td>
</tr>
<tr>
<td>List of Abbreviations</td>
<td>xxi</td>
</tr>
</tbody>
</table>

## 1 Introduction

A Why Compare Laws?

1 How to Slide into Comparative-Law Thinking  
2 Purposes of Comparative Law  
   (a) Knowledge and Understanding  
   (b) Practical Use at Domestic Level  
   (c) Practical Use at International Level

B What Belongs to Comparative Law?

1 Status Quo: No Fixed Canon  
2 Substantive Scope of This Book  
3 Three Dimensions of ‘Comparative Law in Context’  
4 Conclusion: Structure of This Book

### Part I Traditional Comparative Law

## 2 The Comparative Legal Method

A Typical Structure of a Comparative Paper

1 Preliminary Considerations  
   (a) Possible Research Questions  
   (b) Countries to be Examined  
2 Description of Laws  
   (a) Finding the Right Perspective  
   (b) To Translate or Not to Translate?  
   (c) Positive Law and Beyond
### 3 Comparative Analysis
- (a) Identifying Variation  
- (b) Explaining Variation

### 4 Critical Policy Evaluation
- (a) Should This be Part of Comparative Analysis?  
- (b) Possible Recommendations

### 5 An Example from Comparative Tort Law

#### B Functionalism and Universalism in Particular
1. Functionalism: Origins, Use and Consequences  
   - (a) Attractiveness of Functionalism Elsewhere  
   - (b) Popularity of Functionalism in Comparative Law  
   - (c) Limitations Set by Functionalism
2. Comparative Law’s Interest in Finding Commonalities  
   - (a) Parallels in Philosophy and Other Fields  
   - (b) Universalism and Comparative Law
3. Example of the Common Core Project

#### C Critical Analysis
1. Simplistic Approach
2. Focus on Western Countries
3. Critics of Functionalism
4. Policy Evaluation

#### D Conclusion

### 3 Common Law and Civil Law

#### A Terminology and Origins

#### B Juxtaposing Civil and Common Law
1. Legal Methods and Sources of Law  
   - (a) Role of Statute Law and its Interpretation  
   - (b) Role of Courts  
   - (c) Role of Legal Scholarship
2. Courts and Civil Procedure  
   - (a) Which Types of Courts Exist?  
   - (b) Who Exactly is ‘the Court’?  
   - (c) What is the Main Form of Civil Proceedings?  
   - (d) What are the Roles of Judge, Parties and Lawyers in Civil Trials?  
   - (e) How are Judgments Written?  
   - (f) What Effects Do Judgments Have?  
   - (g) Conclusion
3. Comparative Contract Law  
   - (a) Introduction  
   - (b) Contract Formation
## Contents

(a) Good Faith and Precontractual Duties 70  
(d) Contractual Remedies 72  
(e) Conclusion 73  

C Critical Analysis 74  
1 Diversity in Continental Europe 74  
2 Differences Between England and the United States 75  
3 Western Law Instead of Civil versus Common Law? 78  

D Conclusion 81  

### 4 Mapping the World’s Legal Systems 84  

A Setting the Scene 84  
1 Background of Classifications 84  
2 Purposes for Legal Classification 85  

B Classifying Countries 87  
1 Bases for Classification 87  
2 Review of Main Classifications 88  
3 Main Commonalities and Differences 92  

C Critical Analysis 94  
1 Over-emphasis of Differences 94  
2 Over-emphasis of Similarities 96  
(a) Asian and African Legal Systems 97  
(b) Latin America 99  
3 Disregard of Hybrids 101  
(a) Mixed Legal Systems 101  
(b) Horizontally Divided Legal Systems 104  
(c) Vertically Divided Legal Systems 106  
(d) Parallel Legal Systems 108  

D Conclusion 109  

## Part II Extending the Methods of Comparative Law 113  

### 5 Postmodern Comparative Law 115  

A Challenging the Orthodoxy 115  

B Deep-level Analysis of Law 117  
1 Law as Requiring Immersion 117  
2 Law as Legal Pluralism 119  
3 General Legal Scholarship as Comparative Law 121  

C Deep-level Comparisons 123  
1 Jurisprudential and Structural Approaches 123  
(a) Jurisprudential Approaches 123  

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(b) Structural Approaches</strong></td>
<td></td>
</tr>
<tr>
<td>(c) Further Discussion</td>
<td>127</td>
</tr>
<tr>
<td><strong>2 Cultural and Linguistic Approaches</strong></td>
<td></td>
</tr>
<tr>
<td>(a) Cultural Approaches</td>
<td>127</td>
</tr>
<tr>
<td>(b) Linguistic Approaches</td>
<td>130</td>
</tr>
<tr>
<td>(c) Further Discussion</td>
<td>132</td>
</tr>
<tr>
<td><strong>3 Normative Cultural Comparison</strong></td>
<td>133</td>
</tr>
<tr>
<td><strong>D Critical Comparative Law</strong></td>
<td>134</td>
</tr>
<tr>
<td>1 Law as Politics</td>
<td>135</td>
</tr>
<tr>
<td>2 Law as Discourse</td>
<td>137</td>
</tr>
<tr>
<td>3 Negative Comparative Law</td>
<td>140</td>
</tr>
<tr>
<td><strong>E Conclusion</strong></td>
<td></td>
</tr>
<tr>
<td><strong>6 Socio-legal Comparative Law</strong></td>
<td>147</td>
</tr>
<tr>
<td>A Setting the Scene</td>
<td>147</td>
</tr>
<tr>
<td>1 Legal Culture and Comparative Law</td>
<td></td>
</tr>
<tr>
<td>(a) Meanings of Legal Culture</td>
<td>147</td>
</tr>
<tr>
<td>(b) Spatial Levels of Legal Cultures</td>
<td>149</td>
</tr>
<tr>
<td>2 Causality Problem in Socio-legal Research</td>
<td></td>
</tr>
<tr>
<td>(a) Mirror View and its Critics</td>
<td>150</td>
</tr>
<tr>
<td>(b) Illustrating Possible Causalities</td>
<td>153</td>
</tr>
<tr>
<td>3 Qualitative, Quantitative and Mixed Approaches</td>
<td>156</td>
</tr>
<tr>
<td><strong>B Civil Litigation, Courts and Lawyers</strong></td>
<td>157</td>
</tr>
<tr>
<td>1 Civil Litigation and Other Forms of Dispute Resolution</td>
<td></td>
</tr>
<tr>
<td>2 Litigation Rates in Five Countries</td>
<td>159</td>
</tr>
<tr>
<td>(a) United States, England, Germany and the Netherlands</td>
<td>159</td>
</tr>
<tr>
<td>(b) Japan: 'Harmony Culture' or a 'Normal Country'?</td>
<td>161</td>
</tr>
<tr>
<td>(c) Conclusion</td>
<td>163</td>
</tr>
<tr>
<td>3 Research on Judges, Lawyers and the Public</td>
<td>164</td>
</tr>
<tr>
<td>(a) Challenges and Choices</td>
<td>164</td>
</tr>
<tr>
<td>(b) Selected Comparative Information about Lawyers and Judges</td>
<td>165</td>
</tr>
<tr>
<td>(c) Comparisons of 'Access to Justice'</td>
<td>166</td>
</tr>
<tr>
<td><strong>C Substantive Law 'in Action' and Society</strong></td>
<td>167</td>
</tr>
<tr>
<td>1 Comparative Commercial Law</td>
<td>168</td>
</tr>
<tr>
<td>(a) How the Law is Applied</td>
<td>168</td>
</tr>
<tr>
<td>(b) How the Law Shapes Society – and Vice Versa</td>
<td>170</td>
</tr>
<tr>
<td>2 Comparative Criminal Law</td>
<td>173</td>
</tr>
<tr>
<td>(a) How the Law is Applied</td>
<td>173</td>
</tr>
<tr>
<td>(b) How the Law Shapes Society – and Vice Versa</td>
<td>174</td>
</tr>
<tr>
<td><strong>D Conclusion</strong></td>
<td>178</td>
</tr>
</tbody>
</table>
7 Numerical Comparative Law

A Types of Quantitative Legal Information 180

B Measuring the Impact of Foreign Legal Ideas 182
   1 Cross-Citations Between Courts 182
   2 Measuring Foreign Influence Related to Academic Research 187
   3 Measuring the Influence of Foreign Statute Law 189

C Measuring Similarities and Differences 193
   1 Formal Features of the Legal System 194
   2 Research Methods of Legal Scholars 199
   3 Substance of Legal Rules 201
   4 Combined Measures 204

D Measuring the Quality of Legal Rules and Institutions 207
   1 Measuring Legal Rules 208
   2 Measuring Courts and Other Legal and Political Institutions 212
   3 Surveying Perceptions about Law and its Enforcement 217
   4 Combined Measures 220

E Conclusion 227

Part III Global Comparative Law

8 Legal Transplants 231

A Conceptual Research on Legal Transplants 232
   1 Relevant Actors and Objects 232
   2 Rationales and Transplant Process 233
      (a) Aspired Benefits for Transplant Country 233
      (b) Aspired Benefits for Origin Country 235
      (c) Transplants Beyond Direct Benefits 235
   3 Outcomes in the Transplant Country 236
      (a) Positive View: They Work as in Origin Country 236
      (b) Sceptical View: They are Largely Irrelevant 237
      (c) Differentiated View: They Function in a Modified Way 238

B Legal Transplants Throughout History 241
   1 Legal Transplants in the West 241
      (a) Legislative Transplants and ‘Americanisation’ 241
      (b) Recent Use of Judicial Legal Transplants 244
   2 Colonialism and Post-Colonialism 246
      (a) Colonial World: Only Common and Civil Law? 246
      (b) Post-Colonial Development: Everything New? 248
   3 Transplants in Non-Colonial Countries: All that Different? 252
      (a) Transplanted Formal Law 252
      (b) Law in Practice 254
## Contents

C **Normative Views and Discussion** 255

1 Views of Optimists and Pessimists 256

2 Mapping the Argumentative Field 257

3 Designing and Preventing Transplants 259

D Conclusion 260

9 **Convergence, Regionalisation and Internationalisation** 262

A Convergence of Laws 262

1 Motivation and Terminology 263

2 Convergence Forces 265

(a) Convergence Through Congruence and Pressure 265

(b) Conflict of Laws and Extra-territoriality 267

(c) Choice of Law and Regulatory Competition 268

3 Examples: Company and Constitutional Law 270

(a) Arguments Showing Convergence 270

(b) Limitations of Convergence 274

(c) Normative Positions 278

B Regionalisation 280

1 Reasons for Regionalisation 280

2 Topics of Comparative Regionalisation 281

(a) Forms of Regional Cooperation Today 281

(b) Models, Diffusion and Design 283

3 The EU as an Example of Regional Integration 284

(a) Scope of Europeanisation 284

(b) Towards a European Legal Culture 286

(c) Critics and Design Choices 288

C Internationalisation 289

1 General Impact of International Law 289

2 Forms of Comparative International Law 291

(a) Vertical Comparative International Law 291

(b) Horizontal Comparative International Law 293

3 Example: Human Rights Law 294

(a) Protection of Human Rights in the West 294

(b) Is the ‘Western Model’ a Suitable Global One? 297

(c) Internationalisation of Human Rights 298

D Conclusion 301

10 **From Transnational Law to Global Law** 303

A General Trends and Analysis 303

1 Challenges to State Law and National Boundaries 304

2 Rise of Transnational and Global Law 305
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 Comparing 'the State in Action'</td>
<td>374</td>
</tr>
<tr>
<td>3 Classifying and Evaluating Policy Choices</td>
<td>377</td>
</tr>
<tr>
<td>C Comparative Studies of Societies and Cultures</td>
<td>382</td>
</tr>
<tr>
<td>1 Understanding Differences and Similarities Between Legal Systems</td>
<td>383</td>
</tr>
<tr>
<td>2 Showing Legal Universalities and Singularities</td>
<td>387</td>
</tr>
<tr>
<td>3 Measuring Legal Mentalities and their Relevance</td>
<td>390</td>
</tr>
<tr>
<td>D Conclusion</td>
<td>394</td>
</tr>
<tr>
<td>13 Reflections and Outlook</td>
<td>396</td>
</tr>
<tr>
<td>A Reflections</td>
<td>396</td>
</tr>
<tr>
<td>1 Revisiting the Topics of This Book</td>
<td>396</td>
</tr>
<tr>
<td>2 Diversity of Questions and Methods</td>
<td>398</td>
</tr>
<tr>
<td>B Outlook</td>
<td>401</td>
</tr>
<tr>
<td>1 The Future of Comparative Law?</td>
<td>401</td>
</tr>
<tr>
<td>2 Interdisciplinarity and Comparative Law</td>
<td>402</td>
</tr>
<tr>
<td>3 Cosmopolitanism and Comparative Law</td>
<td>404</td>
</tr>
<tr>
<td>C Conclusion</td>
<td>406</td>
</tr>
<tr>
<td>References</td>
<td>408</td>
</tr>
<tr>
<td>Index</td>
<td>489</td>
</tr>
</tbody>
</table>