

Contents

<i>List of Abbreviations</i>	xv
<i>List of Contributors</i>	xviii

PART I: COURTS AND COMPARATIVE LAW

1. Courts and Comparative Law: In Search of a Common Language for Open Legal Systems	3
<i>Mads Andenas and Duncan Fairgrieve</i>	
I. Current challenges to comparative law and comparative law as a challenge	3
II. Polycentricity and pluralism	9
III. A typology	12
IV. Some conclusions and consequences for scholarship	20

PART II: CONFLICTS AND COMPARISONS

2. Is it Legitimate and Beneficial for Judges to Compare?	25
<i>Thomas Kadner Graziano</i>	
I. Introduction	25
II. Comparative law—a method at the disposal of the courts?	26
III. Comparative law in court practice	40
IV. Conclusions	51
3. Comparative Law and the Courts: What Counts as Comparative Law?	54
<i>Geoffrey Samuel</i>	
I. Introduction: identifying the difficulties	54
II. What is ‘law’?	55
III. Hidden comparative law	56
IV. Comparing facts and receiving ideas	59
V. Beyond superficiality: structuralism versus functionalism	61
VI. Concluding remarks: danger and promise	64
4. Foreign Law before the French Courts: A Unique Procedural Treatment	66
<i>Bénédicte Fauvarque-Cosson</i>	
I. Should the French choice of law rule be applied <i>ex officio</i> by the judge?	67
II. Who is in charge of determining the content of the foreign law and how?	69
III. The parties’ right to agree upon the application of the <i>lex fori</i> (<i>accord procédural</i>)	74
IV. Conclusion	76

5. Foreign Law in National Courts: A Common Law Perspective	79
<i>Richard Fentiman</i>	
I. The foreign law problem	80
II. Practical responses	86
III. Theoretical responses	89
IV. Conclusion	99
6. Foreign Law in International Legal Practice	102
<i>Guido Alpa</i>	
I. 'Foreign law' in Italian legal culture: fashions and models from the 19th century to today	102
II. Examples of foreign models used by Italian courts	106
III. Use of <i>Anstalt</i> from Lichtenstein	110
IV. The foreign models utilized in Italian contractual practice	111
V. <i>Lex mercatoria</i> and principles of international commercial contracts processed by UNIDROIT	112
VI. The rules of the common market of the European Union	114
VII. Some tentative conclusions	115
 PART III: COMPARATIVE LAW WITHIN A EUROPEAN AND INTERNATIONAL LAW CONTEXT 	
7. Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?	119
<i>Paul Mahoney and Rachael Kondak</i>	
I. The comparative-law method as inherent in Convention law	119
II. What the Court means by 'consensus'	121
III. Evolutive interpretation	122
IV. The Court's comparative-law inquiry	125
V. Comparative-law material in the judgments of the Strasbourg Court	127
VI. Comparative jurisprudence from non-Council of Europe Member States	136
VII. International-law consensus	137
VIII. Conclusion	139
8. The Comparative Law Method and the Court of Justice of the European Union: Interlocking Legal Orders Revisited	141
<i>Koen Lenaerts and Kathleen Gutman</i>	
I. Introduction	141
II. The comparative law method in the EU judicial framework	144
III. The conceptual framework of the comparative law method in EU adjudication	158
IV. Conclusion	176

9. National Judges and Strasbourg Case Law: Comparative Reflections about the Italian Experience	177
<i>Ermanno Calzolaio</i>	
I. Introduction: the protection of human rights as case law	177
II. The style of judgments	178
III. A rule of precedent?	180
IV. The approach of Italian judges to the European Convention. Comparative remarks with the common law	181
V. Conclusion	186
10. Comparative Law and the European Union Civil Service Tribunal	187
<i>Haris Tagaras</i>	
I. Brief reminder of the institution and powers of the CST	187
II. The requirement of 'a balanced composition of the Civil Service Tribunal on as broad a geographical basis as possible... with respect to the legal systems represented'	189
III. The traditional comparative-law approach by the CST: recourse to national law	191
IV. Comparative law methods in the CST case law	198
11. Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe's Highest Courts	200
<i>Martin Gelter and Mathias Siems</i>	
I. Introduction	200
II. Population and search methodology	201
III. Bar charts of cross-citations	203
IV. Network presentation of cross-citations	207
V. Outgoing and incoming citations	209
VI. Caveats and conclusions	211
12. The International Court of Justice's Methodology of Law Ascertainment and Comparative Law	213
<i>Eirik Bjorge</i>	
I. Introduction	213
II. Customary international law	217
III. Treaty law	224
IV. Conclusion	231

PART IV: COMPARATIVE LAW BEFORE
ADMINISTRATIVE COURTS

13. Comparative Law as an Essential Feature of French Public Law: The Influence of the European Union and of the European Convention on Human Rights	235
<i>Olivier Dutheillet de Lamothe</i>	
I. The EU and the ECHR have imposed on French public law a form of comparative legal pressure	236

II. This form of imposed comparative law in the framework of the EU and ECHR has led to the development of spontaneous comparative law	238
14. Comparative Legal Methodology of the <i>Conseil d'Etat</i>: Towards an Innovative Judicial Process?	242
<i>Aurélie Bretonneau, Samuel Dahan, and Duncan Fairgrieve</i>	
I. Method: comparative law as policy	243
II. Roles of comparative law at the <i>Conseil d'Etat</i> : transforming the judicial process?	248
III. Conclusion: promising perspectives	252
15. The Use of Comparative Law before the French Administrative Law Courts: Or the Triumph of Castles over Pyramids	253
<i>François Lichère</i>	
I. Introduction	253
II. Comparative law is compulsory	255
III. Comparative law is necessary	258
IV. Comparative law is useful	262
V. Conclusion	265
16. The Use of Comparative Law before the Italian Public Law Courts	266
<i>Aldo Sandulli</i>	
I. The relevance of comparative law during a decision's preparation and the difficulties of evaluating its role concretely	266
II. The links with organizations through which comparative law may surface in the Italian public law courts	267
III. Developments in Italian public law since judges have started drawing legal comparisons	268
IV. Some examples of how the Italian public law courts have used comparative law	271
V. Conclusions	276
PART V: CONSTITUTIONAL COURTS AS USERS OF COMPARATIVE LAW	
17. Cooperation of Constitutional Courts in Europe: The Openness of the German Constitution to International, European, and Comparative Constitutional Law	281
<i>Peter M. Huber and Andreas L. Paulus</i>	
I. Constitutional courts between constitutional law and European law	282
II. Interactions between constitutional courts	291
III. Interactions between European courts in the jurisprudence of constitutional courts	295

18. Judicial Dialogue in a Multilevel Constitutional Network: The Role of the Portuguese Constitutional Court	300
<i>Ana Maria Guerra Martins and Miguel Prata Roque</i>	
I. Introductory remarks	300
II. A brief overview on multilevel constitutionalism, transnational constitutionalism, and constitutional pluralism	300
III. Judicial dialogue in a multilevel constitutional system	304
IV. The openness of the Portuguese constitutional order to the multilevel constitutionalism	309
V. The Portuguese Constitutional Court and the ‘judicial dialogue’	314
VI. Analysis of some Portuguese constitutional decisions	317
VII. Conclusions	327
19. Judges and Professors: The Influence of Foreign Scholarship on Constitutional Courts’ Decisions	329
<i>Lucio Pegoraro</i>	
I. The use of comparison in deciding cases	329
II. The references to legal literature	330
III. Purpose and method of research	332
IV. Philippines	334
V. South Africa	338
VI. Israel	342
VII. Argentina	346
VIII. Concluding remarks	351
20. South Africa: Teaching an ‘Old Dog’ New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995–2010)	353
<i>Christa Rautenbach</i>	
I. Introduction	353
II. Historical and constitutional context	359
III. Empirical analysis: making sense of statistics	360
IV. Concluding remarks	375
21. Enhancing Constitutional Self-Understanding through Comparative Law: An Empirical Study of the Use of Foreign Case Law by the Supreme Court of Canada (1982–2013)	378
<i>Gianluca Gentili</i>	
I. Introduction	378
II. The context	379
III. The empirical research	388
IV. Conclusions	404
22. Comparative Law before the Supreme Courts of the UK and the Netherlands: An Empirical and Comparative Analysis	407
<i>Elaine Mak</i>	
I. Introduction	407
II. The courts	409

III. Practice	415
IV. Constitutional implications	426
V. Concluding remarks	433
PART VI: COMPARATIVE LAW BEFORE GENERAL COURTS	
23. Constructing the ‘Foreign’: American Law’s Relationship to Non-Domestic Sources	437
<i>Judith Resnik</i>	
I. Incorporating ‘foreign’ law	439
II. Othering ‘foreign’ law	451
III. Affiliation by law	469
24. The Use of Comparative Law before the French Private Law Courts	472
<i>Guy Canivet</i>	
I. Introduction	472
II. The protection of social values by a supreme court	473
III. The importance of comparative law in the practice of the <i>Cour de cassation</i>	477
25. The Use of Comparative Law before the French <i>Cour de Cassation</i>: The View from Academia	483
<i>Alexis Albarian</i>	
I. Introduction: The less and less ‘hidden use’ of comparative law before the <i>Cour de cassation</i>	483
II. The different degrees of the use of comparative law in the preparatory works (<i>‘travaux préparatoires’</i>) of the <i>Cour de cassation</i> ’s decisions	484
III. How does the <i>Cour de cassation</i> access comparative law material?	490
IV. Conclusion: Is the <i>Cour de cassation</i> an ‘ideal supreme court’ with respect to comparative law?	493
26. Italian Courts and Comparative Law	495
<i>Annalisa Aschieri</i>	
I. Introduction	495
II. Private international law and reference to foreign case law	497
III. International conventions and reference to foreign decisions	502
IV. Italian courts’ brainstorming and foreign case law	508
V. Conclusion	511
27. The Controversial Status of International and Comparative Law in the United States	513
<i>Martha Minow</i>	
I. Introduction	513
II. The contemporary debate and the puzzle	513
III. Why the big fight?	519
IV. Reclaiming the chance to learn	528

28. Foreign Law and the Modern <i>Ius Gentium</i>	536
<i>Jeremy Waldron</i>	
I. Introduction	536
II. The law of nations (<i>ius gentium</i>)	539
III. Contrast with modern natural law argumentation	543
IV. <i>Ius gentium</i> and the juvenile death penalty	544
V. The challenge of <i>Erie</i>	546
VI. Legal problems and legal science	548
VII. Conclusion	550
29. Comparative Law before the Spanish Private Law Courts in the 21st Century	552
<i>Marta Requejo Isidro and Marta Otero Crespo</i>	
I. Introduction	552
II. A few words on the background	553
III. Empirical data on the use of comparative law before the private law courts	555
IV. Conclusion	568
30. Comparative Legal Reasoning and the Courts: A View from the Americas	569
<i>H. Patrick Glenn</i>	
I. Introduction	569
II. Comparative legal reasoning and aboriginal or chthonic law	572
III. Comparative legal reasoning and European legal traditions	573
IV. Comparative legal reasoning in the context of free trade	577
V. Conclusion	579
31. Comparative Law in the German Courts	581
<i>Hannes Unberath and Astrid Stadler</i>	
I. Introduction	581
II. Comparative law as a necessary tool	582
III. Comparative law: outlook	591
32. Comparative Law in the Syariah Courts: A Case Study of Singapore, Malaysia, and Brunei	595
<i>Kerstin Steiner</i>	
I. Introductory context: history of Islam, law, and the state in Singapore, Malaysia, and Brunei	596
II. The Syariah court systems in Singapore, Malaysia, and Brunei	599
III. Conclusion	611
PART VII: USING COMPARATIVE LAW: CASE STUDIES	
33. 'Liaison Magistrates': Their Role in International Judicial Cooperation and Comparative Law	615
<i>Bernard Rabatel and Olivier Deparis</i>	
I. Introduction	615
II. Liaison magistrates and mutual assistance in matters of international crime	616

III. Liaison magistrates and mutual assistance in civil matters	618
IV. Liaison magistrates and comparative law	618
V. The ‘rapprochement’ of judicial authorities	620
34. Comparative Law in Consumer Litigation	621
<i>Geraint Howells and Jonathon Watson</i>	
I. Introduction	621
II. Comparative law and judicial policy development: <i>White v Jones</i> and <i>Fairchild v Glenhaven Funeral Services</i>	622
III. Comparative law in the European Union law context	624
IV. European Court case law	634
V. Comparative law in courts	635
VI. Conclusion	639
35. The Use of Comparative Law by Courts in Birth-Related Tort Cases	640
<i>Romain M. Lorentz</i>	
I. Birth-related torts—a comparative perspective	641
II. The use of comparative law by courts—reasons and extent	651
III. The influence of comparative law on judicial decisions	654
IV. Conclusion	655
36. The Use of Comparative Law in <i>A & Others v National Blood Authority</i>	657
<i>His Honour Judge Michael Brooke QC and Ian Forrester QC</i>	
I. Introduction	657
II. The medicine	659
III. The English legal principles	660
IV. Preparation of the case	660
V. The request for a reference in 1999	664
VI. The non-issues	664
VII. The core issues	666
VIII. Comparative law features of the oral argument	667
IX. The judgment	669
X. Envoi	673
Postscript by Nicholas Underhill QC	674
Afterword by Mr Justice Burton	676
37. What Europeans Can Learn from an Untold Story of Transjudicial Communication: The Swiss/Turkish Experience	680
<i>Erdem Büyüksagis</i>	
I. Introduction	680
II. The global reception of Swiss private law in Turkey	682
III. The role of courts in the law-making process	683
IV. The importance of comparative law and its impact on judicial assessment	686
V. Similar observations in the EU context	692
VI. Conclusions	694

38. The Draft Common Frame of Reference in the Courts: The Remaking of Comparative Law	696
<i>Galateia Kalouta</i>	
I. Introduction	696
II. How the DCFR has been applied by the courts	698
III. Assessment of the approaches taken by the ECJ and the national courts	715
IV. Closing remarks	716
 <i>Index</i>	 719