

Comparative Civil Procedure

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I. General functions and aims of comparative law

The comparison of legal systems is a *special method* within jurisprudence. With regard to its important functions it is world-wide also regarded as a separate branch of jurisprudence.¹⁾ There is no branch of science which may base its knowledge only on ideas and findings being born within national boundaries. This is particularly true within our modern world of globalisation. Comparative law then leads not only to a better knowledge of foreign law but is also corresponding to the internationalisation of law and jurisprudence and the globalisation of politics, of trade, commerce and private life style.

Jurisprudence is not just the science of interpreting national laws, statutes, legal principles, rules and standards. It should comprise the *search for models* of preventing and solving social conflicts within a world-wide society. In looking what has been done beyond the own borders comparative law offers incentives and a broader scope of models of solving a problem that could be and have been developed within national boundaries. Lawyers of all legal systems of the world are by far more imaginative than one lawyer could think up within his short life. Comparative law thus may be an “*ecole de verité*”, enrich the “stock of possible solutions”, and moreover offer the chance to find better solutions for the particular time and the particular country than by restricting to local or national doctrinal disputes. If you take this earnestly, comparative law is an exciting intellectual adventure, calling for a maximum of phantasy and of discipline.²⁾

Most modern *codifications* or greater amendments are the *result of comparative studies*, even if the legislator did not reveal how and where he found his ideas. This is true even if most receptions are not the result of real comprehensive studies, but realised more or less incidentally, made according to the “*dernier cri*” or according to political influences or pressures.

I do not see that there is something different in procedural law even if some scholars

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1) See *J.-L. Constantinesco*, *Rechtsvergleichung*, Vol. I, 1971, 217-272; *M. Martinek*, *Rechtsvergleichung als akademische Disziplin in Deutschland*, *Ritsumeikan Law Rev.* 17 (2000), 79, 84.

2) *B. Großfeld*, *Kernfragen der Rechtsvergleichung*, 1996, 292.

claim that procedural law were not open for comparative incentives. They claim procedural rules would represent nationally based specific rules, so-called “loi politiques” which are not transferable to other countries and societies. The attempts to use foreign procedural models were a misuse of comparative law and must end in disappointment.³⁾ If this opinion were true civil procedure would be the only branch of law not open for comparative studies. Just the opposite is true. Since 1950 twelve World Congresses of Procedural Law were organized dealing with nearly all essential subjects and problems of procedural law.

There are four main functions and objectives of comparative studies in law:⁴⁾

- (1) Comparative studies may broaden your mind and knowledge and serve as a means of illustration when teaching law at the university. By building up an analytical framework⁵⁾ those studies may help to find underlying principles and thus *deepen the understanding of the own law*, sometimes help to reflect, defend or improve the own national position or the reasons for this position.
- (2) Comparative studies may serve as a *means of interpreting existing law*, in particular of interpreting foreign law before national courts, of uniform handling international conventions or in Europe regulations, or of interpreting rules which have been adopted from other countries.
- (3) Comparative studies may serve as material for the legislator to *develop proposals to reform* and improve the own legal system.
- (4) Comparative studies may serve as a *means of transnational unification or harmonisation* of law, in particular by producing model codes.

With regard to these general functions and aims there are no differences between comparison in substantial civil law, in constitutional, administrative⁶⁾ or penal law and in procedural law.⁷⁾

Borrowing from abroad is, however, not necessarily a result of thorough comparative studies. When the Munich Professor *Georg Maurer* was entrusted by King Otto, born as a Bavarian prince, to draw up the Greek Code of Civil Procedure of 1834, he was combining French and German ideas, and drafted a text according to his knowledge of French and German law but he did not undertake real comparative work. When the Japanese government in 1889 decided to adopt the German Code of Civil Procedure of 1877, it hardly undertook the German code a complete comparative analysis with the leading codes

3) *O. Kahn-Freund*, On Uses and Misuses of Comparative Law, 37 Mod. L. Rev. 1, 20 (1974).

4) See *J. Jolowicz*, On the comparison of procedures, Essays in honour of A. v. Mehren, 2002, 721; *K. Zweigert* and *H. Kötz*, Introduction to comparative law, Vol. I, 1987, 13-27.

5) See *D. Gerber*, Comparing procedural systems: toward an analytical framework, Essays in honour of A. v. Mehren, 2002, 665.

6) Cf. *M. Bullinger*, Zwecke und Methoden der Rechtsvergleichung im Zivilrecht und im Verwaltungsrecht, Festschrift für Schleichtriem, 2003, 331.

7) Thus the result of the study of *P. Gilles*, Prozessrechtsvergleichung, 1996, 125 et seq.

of that time, but just wanted to take over the model of a modern and at that time economically and politically successful nation.⁸⁾

After the Second World War US lawyers urged Japan to adopt some characteristic features of common law procedure. I do not see that this amendment was implemented after a comprehensive comparative analysis.

Borrowing from abroad must be initiated at the right time to become successful. When *John Langbein* in 1985 published an article in the *Chicago Law Review* wooing for "The German Advantage in Civil Procedure"⁹⁾, this led to a vivid debate in the U. S. The only result was, however, that borrowing was impossible and rejected.¹⁰⁾ Even if German procedure would offer some excellent ideas worthwhile to be adopted it would not harmonise with the self-consciousness of "the" super-power to accept those foreign ideas frankly.

II. General problems of comparative law

1. Comparing legal cultures

Comparative law is generally regarded as a good means, to *learn from other legal cultures* and to improve the own law. Such consideration of foreign legal cultures is of high importance. A legal system which is not open for new ideas and developments outside of the own country will fail to catch up with modern international standards. My own German law is in the end a mixture from old German, Roman, Italian, French, Dutch, English and American influences. And it is not easy to say what is really German in it. This is not much surprising as Germany is geographically situated in the centre of Europe.

Law is quite often the result of traditions, of social expectations, legal rules are applied according to national pre-understanding.

Comparative law must have in mind that it should not compare just legal texts but real legal orders or legal cultures.

In this respect you can compare models of civil justice or particular proceedings as aspects and examples of special legal culture.¹¹⁾

2. Functional analysis

Comparative studies may be misleading and come to false conclusions if they just compare dogmatic institutions or the wording of legal rules. What is required is a functional

8) See *H. Nakamura*, Die Rezeption des deutschen Rechts in Japan, ZJP 84 (1971), 74.

9) 62 U. Chicago L. Rev. 823 (1985).

10) Cf. the references at *J. Jolowicz*, Essays in honour of A. v. Mehren, p. 721, 722 N 7.

11) For instance see *M. Taruffo*, Legal cultures and models of civil justice, Festschrift für Nakamura, 1996, 621, or *Rolf Stürner*, Procedural Law and Legal Cultures, Inaugural speech for the XII. World Conference of Procedural Law in Mexico City, reprinted in *Gilles/Pfeiffer*, Prozessrecht und Rechtskulturen, 2004, 9-30.

approach comparing social problems, their solution and how these solutions operate.¹²⁾

3. Gathering information

A general problem of comparative law is the *gathering and preparation of necessary information*. Comparative law consists of a comparison between at least two legal orders according to a specific standard, the “*tertium comparationis*”. Such comparison needs much preparation by gathering information on the laws to be compared. For the preparation of comparative reports for international congresses this preparation is quite often done by so-called national reports. Despite a widespread contrary practice those reports are not a genuine part of comparative law but necessary prerequisites.

If they are drafted according to a common questionnaire or a common idea they may contain necessary information, sometime selected having in mind the comparative purpose.¹³⁾ If not, a national report may be misleading when the information is given just with regard to the classification of the own legal system and therefore may leave out just those characteristics or details which would make the comparison fruitful.

4. Comparing “living law”

To understand rules and assess their relevance or suitability to solve specific problems sometimes *sociological studies*¹⁴⁾ or practical information is in need. Comparative law is, therefore, closely affiliated with legal sociology.¹⁵⁾ Unfortunately, true analysis is difficult and not available for most problems.¹⁶⁾ To give a simple example: A comparison of the legal rules on taking evidence by hearing witnesses may be misleading unless you know whether witness coaching by lawyer is practised or not.¹⁷⁾

III. Specific problems of comparative procedural law¹⁸⁾

1. The *lex fori* principle

To solve a transnational case under substantive law conflict rules are to be applied, as

12) See *David Gerber*, Comparing procedural systems: toward an analytical framework, Essays in honour of A. v. Mehren, 2002, 665; *M. Martinek* Ritsumeikan Law Rev. 17 (2000), 79, 94.

13) E.g. see *U. Stengel/P. Hakeman*, Gruppenklage — Ein neues Institut im schwedischen Zivilverfahrensrecht, RIW 2004, 221 (comparing incidentally with the U. S. class action and the German law).

14) As to a deep analysis of the relation between dogmatics of civil procedure and sociology see: *J. Goebel*, Zivilprozessrechtsdogmatik und Verfahrenssoziologie, 1994.

15) See *Günter H. Roth*, The contribution of legal sociology to law reform, in Habscheid, Effectiveness of Judicial Protection, 1983, p. 215.

16) A rare exception are the studies of *V. Gessner*, Foreign Courts, Civil Litigation in Foreign Legal Cultures, 1996 and “Europas holprige Wege”, Festschrift für Reich, 1997, 163.

17) Cf. *Sven Timmerbeil*, Witness Coaching and Adversary System, 2004.

18) See *Peter Gilles* and *K. Lubinski*, Eigenheiten der Prozessrechtsvergleichung, in I. Andolina, Transnational Aspects of Procedural Law, Vol. III, 1998, 987-1091 and 1093-1138; *Peter Gilles*,

the case may be foreign substantive law. In civil procedure the courts of a particular country do apply practically exclusively their own national procedural rules. As a consequence, there is not much need to consider and examine foreign procedural statutes or court rules in ordinary practice of lawyers or courts.

The own procedural rules refer to foreign law mainly just with regard to requirements for the recognition of foreign judgments, for correct and timely service. Comparative studies of procedure therefore for a long time concentrated on questions of *jurisdiction* and *recognition and enforcement of foreign judgments*.¹⁹⁾ Since the development of *instruments of international judicial assistance* the problems of service and of proof taking, also have been subject of extensive comparison.²⁰⁾ Beyond this narrow field there have been mainly academic discussions or those with the intent of law reform.

2. Forum shopping

In the last years, however, even for practitioners foreign procedure becomes relevant as a matter of *forum shopping*. When severe accidents occur or complicated business disputes arise, lawyers more and more explore whether it might be useful to file a claim before an U. S. American court, not only with regard to the substantive law applied by U. S. courts but due to procedural advantages.²¹⁾ Incentives may be the *American rule* that each party bears his own costs, the extensive possibilities of *pre-trial discovery* and finally the generous *assessment of damages* by a civil jury together with the possibility to claim punitive or treble damages. To consider pros and cons carefully, the lawyers need detailed and precise knowledge of the respective procedures. Such knowledge may help when drafting an exclusive jurisdiction or forum selection clause long before initiating any court proceedings, but may also be of great advantage once a claim has been filed as possible strategies or tactics depend on the respective possibilities and duties and these quite often do not match with national-bound expectations.

3. Divergent court practice

It is common for comparatists that you should not compare just the text of statutes or the “law in the books”, but the “law in action”. With regard to substantive law this task can be solved successfully by reviewing all published court decisions, in particular those of

Prozessrechtsvergleichung, 1996; Bakker/Heringa/Stroink, Judicial control. Comparative essays, 1995.

19) R. Stürner and A. Stadler, Eigenheiten der Prozessrechtsvergleichung, in Gilles, Transnationales Prozessrecht, 1995, 263, 268 f.; see Peter Herzog and J. C. Hitters, The effect of foreign judgments and arbitral awards, in Andolina, Trans-national aspects of procedural law, Vol. III, 1998, 845 and 911.

20) See I. Andolina, La cooperazione internazionale nel processo civile, in Andolina, Trans-national aspects of procedural law, 1998, Vol. I, 313; P. Schlosser, Jurisdiction and international judicial and administrative co-operation, Rec. d. Cours 284 (2000).

21) See W. Posch, “Amerikanisierung” oder “Verwilderung der Sitten”?, Festschrift für Wolfgang Jelinek, 2002, 209; O. Chase, American “Exceptionalism” and Comparative Procedure, AmJCompL 50 (2002), 277.

the Supreme Courts.

With regard to procedural law the situation is different. As the procedural code quite often gives much *discretion to the judge* or there are no coercive means to compel the judge to apply even strict procedural rules, the practice of courts is quite divergent. What is true with a particular judge at the local court of Munich may be wrong with a judge in Berlin or Hamburg or even with another judge at the same court.

Personal impressions of a morning at a local court in Freiburg²²⁾ will apparently influence the own judgment but may be misleading if they are not representative for all German courts. Not to be not misunderstood: True comparison needs personal impression abroad. But who compares must have in mind that his experience is rather limited. If you return from a three days visit to Rome you cannot conclude: All people within the European Union are speaking Italian.

4. Courts as part of the state's power

The main objective of all enlightened systems of civil litigation proceedings is doing justice by achieving a sensible and just solution of civil cases. But the way to do justice is not subordinate to the civil law but depends and varies widely on the general relationship between the state and his citizen under a particular constitution.²³⁾ The concrete interpretation or recognition of fundamental (human) rights may have consequences for the particular scheme of legal proceedings and it makes great differences if you just want to render judgments being correct as a matter of fact and of law or whether you want to do justice within a reasonable time and using no more than proportional resources.²⁴⁾

IV. Macrocomparison and Microcomparison

1. Macrocomparison

Macrocomparison may deal with the general style of the procedural system or of code of procedure. In this respect so-called *legal families* were distinguished or basic concepts of legal culture compared.²⁵⁾

In 1983, e.g., together with *Karl Heinz Schwab* I have compared the influence of the

22) See *P. Murray*, A morning at the Amtsgericht: German Civil Justice in practice, Essays in honour of A. v. Mehren, 2002, 779-792.

23) Cf. *R. Stürmer* and *A. Stadler*, in Gilles, Transnationales Prozessrecht, 1995, 263, 275.

24) See *A. Zuckerman*, Civil Procedure, 2003, 3.

25) See *T. Kojima*, Legal families in procedural law revisited, in I. Andolina, Trans-national aspects of procedural law, Vol II, 1998, 507-625; *A. Ateia*, Le groupement des familles juridiques en droit judiciaire, *ibid.*, 627-684; generally *K. Zweigert* and *H. Kötz*, Introduction to comparative law (N 4), 63-75; *R. David/G. Grasmann*, Einführung in die großen Rechtssysteme der Gegenwart, 2nd ed., 1988, p. 46 ff.

respective constitutions on civil procedure with the intent to develop high common standards.²⁶⁾ Already a few years earlier *Mauro Cappelletti* initiated the *access to justice*-movement based upon diligent studies on the availability of judicial services and decisions with regard to the financial and time dimension.²⁷⁾ Most themes of comparative civil procedure could be classified as subthemes of access to justice in the sense of efficiency of legal protection.

The style of solving problems and, thus, a main problem of procedural culture is also discussed within comparative studies on *alternative forms* of solving civil disputes, may it be by arbitration, mediation or conciliation or any kind of mixture in between.²⁸⁾

The accessibility of legal procedures for the underprivileged,²⁹⁾ or the assessment of cost and delay with the intent to reduce both factors in order to improve procedural economy,³⁰⁾ is an essential aspect of procedural culture.

In this respect you could make researches as to the reception or adoption waives, for instance as to the influences of the German or the Austrian Code of Civil Procedure to other countries³¹⁾ or you could try to find out the respective influences of the French Code of Civil Procedure or of the American Rules, and so on.

Mere broadening of knowledge is the purpose of comparative studies on civil justice systems,³²⁾ on *the position and status of judges*, on the adversary or more inquisitorial style of proceedings in various countries. I refer insofar to the analysis of *Walther Habscheid*,³³⁾ to the general reports of *Gustav Möller* and *Roberto Berizonce* for the XI. World Congress of Procedural Law in Vienna,³⁴⁾ the study of *Marcel Storme* on “role and status of the judiciary as a State power”³⁵⁾ and the article of *Harald Koch*, *Rechtsvergleichendes zum “gesetzlichen Richter”*.³⁶⁾ And the same is true for a comparison of the *position of*

26) *Karl Heinz Schwab* and *Peter Gottwald*, *Verfassung und Zivilprozess*, in *Habscheid*, *Effectiveness of Judicial Protection and Constitutional order*, 1983, 1-89.

27) *M. Cappelletti*, *Access to justice*, 1979; for modern contributions s. *A. Zuckerman* and *R. Cranston*, *Reform of Civil Procedure*, *Essays on ‘Access to Justice’*, 1995.

28) See *E. Blankenburg* and *Y. Tanguchi*, *Informal Alternatives to or within ordinary litigation*, in *Wedekind*, *Justice and Efficiency*, 1989, 335; *C. Punzi*, *Relazioni fra l’arbitrato e le altre forme non giurisdizionali di soluzione delle liti*, in XII. World Congress of Procedural Law, 2003, 145.

29) See *V. Denti*, in *Storme/Casman*, *Towards a justice with a human face*, 1978, 167-183.

30) See *Sergio Chiarlioni* and *Adrian Zuckerman*, in *Procedural law on the Threshold of a new Millennium*, 2002, 149-196; *A. Zuckerman*, *Justice in crisis: Comparative Perspectives of Civil Procedure*, 1999 (with contributions to many countries).

31) See *Habscheid*, *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen*, 1991.

32) See *H. Kötz*, *Civil justice systems in Europe and the United States*, *Duke J. Comp. & Intern. L.* 13 (2003), 61.

33) In *Introduzione al diritto processuale civile comparato*, 1985.

34) In *Procedural Law on the Threshold of a New Millenium*, 2002, 203 and 321; as to courts and lawyers in England see *K. Zweigert* and *H. Kötz*, *Introduction* (N 4), 214-225; as to the former socialist systems see *R. David* and *G. Grasmann* (N 25), No. 232-249.

35) In *F. Carpi* and *M. Lupoi*, *Essays on transnational and comparative civil procedure*, 2001, 29.

36) In *Festschrift für Nakamura*, 1996, p. 281.

lawyers.³⁷⁾ There are comparative papers on independence and responsibility of judges and lawyers, on their organisation and social status, on the organisation of law firms, on professional ethics and procedural fairness,³⁸⁾ on the assignment of paraprofessionals in the respective countries³⁹⁾ and on the general role of the courts with regard to the application of statutory law and the guidance by procedural rules.⁴⁰⁾

Such comparison may also include the historical perspective.⁴¹⁾

Problems of effective legal protection include questions as to what extent a *joinder of parties* and *third party practice* is permissible.⁴²⁾

Problems of efficiency are also discussed under the title “The protection of diffuse, fragmented and *collective interests* in civil litigation”,⁴³⁾ or under the headline of “courts and lawyers facing complex litigation problems”.⁴⁴⁾

In the last decades many comparative studies have been devoted to the influence of the technical development of the civil justice system, in particular to the influence of modern electronic *information technology*.⁴⁵⁾

Questions of general style are reflected in studies on “*systems of appeal in Europe*”.⁴⁶⁾

Of great practical importance, in particular for the legal protection, in competition cases, are comparisons on *provisional remedies* or *summary proceedings*.⁴⁷⁾ Relatively new are comparative studies on means and *law of enforcement*.⁴⁸⁾

37) See *Shimon Shetreet, David S. Clark and Günter Roth*, in *Judges and Lawyers in Contemporary Societies*, 1991.

38) See *Gerhard Walter*, Professional ethics and procedural fairness, 1991; *W. Fisch and M. Serra Domínguez*, Recent tendencies in the position of the lawyer, in *Procedural law on the Threshold of a new Millennium*, 2002, 383 and 411.

39) See *Yasuhei Taniguchi*, Jurists and paraprofessionals, in *Storme/Casman, Towards a justice with a human face*, 1978, 495.

40) See *K. Zweigert and H. Kötz*, Introduction (N 4), 264-284.

41) For instance see *Ulrike Seif*, Historische Bemerkungen zur Rolle des Richters in Deutschland und England, *Festschrift für Musielak*, 2004, p. 535.

42) See *Wolfgang Lücke*, Die Beteiligung Dritter im Zivilprozess, 1993.

43) See *Mauro Cappelletti and Bryant Garth*, in *Habscheid, Effectiveness of Judicial Protection and Constitutional Order*, 1983, 11.

44) See *P. Lindblom and G. Watson*, Courts and Lawyers facing complex litigation problems, in *Pessao Vaz, Role and organization of judges and lawyers in contemporary societies*, 1995, 421.

45) See *A. Koers and W. Pelger*, Information technology and court administration, in *Wedekind, Justice and Efficiency*, 1989, 407; *Helmut Rüßmann*, Herausforderung Informationsgesellschaft: Die Anwendung moderner Technologien im Zivilprozess, in *Procedural Law on the Threshold of a new Millennium*, 2002, 205; *M. Griese*, Electronic filing in the US, Australia and Germany, *DAJV-Newsletter* 2002, 88.

46) *Walther Habscheid*, Zivilprozessuale Rechtsmittelsysteme in Europa, in *Sawczuk, Unity of Civil Procedural Law*, 1994, 208-231.

47) See *J. Normand and K. Kerameus*, Provisional remedies in transnational litigation, in *Andolina, Transnational aspects of procedural law*, 1998, 1167; *A. Pelegrini Grinover, Janet Walker and Garry Watson*, Preliminary and summary proceedings, in *XII World Congress of Procedural Law*, 2003, 107; *P. Meijknecht and R. Verschuur*, Usage et abus des procédures sommaires, in *Wedekind, Justice and Efficiency*, 1989, 367.

48) Cf. *G. de Leval*, Une harmonisation des procédures d'exécution dans l'Union Européenne est-elle

2. Microcomparison

- a) Microcomparison is by far prevailing. But it is not easy to draw a line between macrocomparison und microcomparison.

If you examine the U. S.-American *public interest litigation* with European equivalents⁴⁹⁾ or in particular with the *class action* you could regard it as a matter of microcomparison, but the class action is an essential element for a specific legal culture, and, therefore, the comparison cannot be restricted to specific rules but must have in mind the complete system of legal protection.⁵⁰⁾

The system of *legal aid* is a special field of procedure as well as a typical part of procedural culture to be compared.⁵¹⁾

- b) If you are dealing with real special problems you might compare any special procedural devices as to the functional equivalents in other countries as to the willingness and to the desirability or undesirability to adopt such an institute into the own law.

(1) An example for the first type is *Harald Müller*, “Die Gerichtspflichtigkeit wegen “doing business”: ein Vergleich zwischen US-amerikanischem und deutschem Zuständigkeitssystem”, 1992. An example for second type is my own study on “Jurisdiction based on “business activities” in the Hague Convention on Jurisdiction and Foreign Judgments in civil and commercial matters”, *European Journal of Law Reform* 4 (2002), 199.

(2) The deep differences between the *laws of evidence* have very early stimulated scholars to review those conceptions and try to develop common features,⁵²⁾ like the search for the truth or the *right to proof*.⁵³⁾ Other scholars prepared comparisons as to the *standard of proof*.⁵⁴⁾

conceivable ?, in Andolina, *Trans-national aspects of procedural law*, 1998, 729.

49) See *Harald Koch*, *Prozessführung im öffentlichen Interesse*, 1983.

50) See only recently *Frank Ebbing*, *Class action, Die Gruppenklage: Ein Vorbild für das deutsche Recht?*, *Zeitschrift für vergleichende Rechtswissenschaft* 103 (2004), 31; *A. Gidi*, *Class actions in Brazil—a model for Civil Law Countries*, *AmJCompL* 51 (2003), 311; or a bit older: *P. Gottwald*, *Class action auf Leistung von Schadensersatz nach amerikanischem Vorbild im deutschen Zivilprozess*, *ZZP* 91 (1978), 1.

51) See *F. Carpi*, *Legal aid in Italy and Europe*, in *Carpi and Lupoi*, *Essays on transnational and comparative civil procedure*, 2001, 3.

52) See *Heinrich Nagel*, *Die Grundzüge des Beweisrechts im europäischen Zivilprozess*, 1967; *Nagel/Bajons*, *Beweis — Preuve — Evidence*, 2003.

53) See *Roger Perrot*, *La droit à la preuve*, in *Habscheid*, *Effectiveness of Judicial Protections*, 1983, 91-115.

54) See *G. Baumgärtel* and *P. Kargados*, *Das Beweismaß*, in *Habscheid/Beys*, *Grundfragen des Zivilprozessrechts*, 1991, 539 and 581; *P. Gottwald*, *Das flexible Beweismaß im englischen und deutschen Zivilprozess*, *Festschrift für Henrich*, 2000, pp. 165-176; *M. Taruffo*, *Rethinking the Standards of Proof*, *AmJCompL* 51 (2003), 659; *K. Clermont* and *E. Sherwin*, *A comparative puzzle: Standards of proof*, *Essays in honour of A. v. Mehren*, 2002, 629-644 and *AmJCompL* 50 (2002), 243.

- (3) A main concern of comparatists have also been the *systems of appeal*.⁵⁵⁾ In 1993, *Frederique Ferrand* published her comparative studies on French cassation and German revision.⁵⁶⁾ This comparison has been one of systems or one with particular interest, e.g. whether typical states have an overload in courts of appeal and how could they manage it.⁵⁷⁾
- (4) Quite often scholars have compared the divergent concepts of *res iudicata* or issue preclusion. This was sometimes done just as a means to broaden the own mind, as by *Gerfried Fischer*⁵⁸⁾ or by *Ulrich Spellenberg*.⁵⁹⁾ Sometimes foreign law was used for illustration that the own concept should or should not be changed.⁶⁰⁾

V. Comparison as a means of law reform

Quite often the reason for comparative research is not a mere academic one. Practitioners feel that their own law in certain fields is insufficient and are looking around whether they could find and adopt more suitable regulations from other legal systems.

Many comparative reports are directly drafted with the intent to initiate improvements of the procedural system :

- to improve civil litigation according to arbitration practice and standards,⁶¹⁾
- to improve civil litigation by lessons derived from administrative proceedings,⁶²⁾ or
- to improve procedures for the recognition and enforcement of foreign judgments and arbitral awards.⁶³⁾

In this respect many comparative studies were written on *judicial case management* or *judicial activism versus party freedom*⁶⁴⁾ or *party responsibility*.⁶⁵⁾

For instance in Germany many books have been published on the gathering of

55) See *J. Jolowicz*, Appellate proceedings, in *Storme/Casman*, Towards a Justice with a human face, 1978, 127; recently *M. Stürner*, Die Anfechtung von Zivilurteilen, 2002 (German and English law).

56) *F. Ferrand*, Cassation française et révision allemande, 1993.

57) See *J. Jolowicz* and *J. Németh*, Managing overload in appellate courts, in *Wedekind*, Justice and Efficiency, 1989, 71 and 95.

58) Objektive Grenzen der Rechtskraft im internationalen Zivilprozessrecht, Festschrift für Henckel, 1995, p. 199.

59) Prozessführung oder Urteil — Rechtsvergleichendes zu Grundlagen der Rechtskraft, Festschrift für Henckel, 1995, p. 841.

60) So by *P. Gottwald*, Präjudizialwirkung der Rechtskraft zugunsten Dritter ?, Festschrift für Musielak, 2004, p. 183, and *Walther Habscheid*, Zur materiellen Rechtskraft des Unzuständigkeitsentscheids, Festschrift für Nakamura, 1996, p. 203.

61) See *W. Habscheid* and *P. Schlosser*, in *Wedekind*, Justice and Efficiency, 1989, 149.

62) See *Bryanth Garth* and *Enrico Vescovi*, in *Wedekind*, p. 265 and 282.

63) See *J. C. Barbosa Moreira* and *K. Kerameus*, in *Wedekind*, p. 191 and 226.

64) *P. Gottwald*, Aktive Richter — Managerial Judges, Festschrift 30 Jahre Institut für Rechtsvergleichung der Waseda-Universität, 1988, 705.

65) See *P. Gottwald*, Die prozessuale Aufklärungspflicht im Rechtsvergleich, Linzer Beiträge zum Zivilprozessrecht, Bd. V, 1995, p. 19.

information for civil proceedings or the discovery duties of parties. *Rolf Stürmer* has started such comparison with a monograph of 1976.⁶⁶⁾ In 1985 the Association of International Civil Procedure organised a meeting on “Die Informationsbeschaffung für den Zivilprozess”, where *Peter Hay* and *Abbo Junker* gave comparative reports on information gathering of written documents and objects of inspection and the possibilities to get information by witnesses and parties. *Johannes Lang* has again reviewed the duty of the parties in comparison with the English and the French law and the draft of the *Storrie* commission in 1999.⁶⁷⁾ In Japan there was much discussion whether to adopt the American discovery system, but finally a mid-pacific solution was adopted.⁶⁸⁾

VI. Harmonisation and unification

Quite often comparative studies are aimed to *harmonise or unify* the law in a particular field or in a particular region, for instance within the European Union, NAFTA or Mercosur.

1. Procedure as driving force for integration

Historically either in 1877 within the German Reich as well as 1968 within the European Community the law of civil procedure proved to be a driving force of integration.⁶⁹⁾ In Germany the national Code of Civil Procedure was enacted 1877, nearly 25 years earlier than the civil code. And the same is true within the European Community, now European Union. The Brussels Convention of 1968 by far preceded any harmonisation of civil law. The Rome Convention on the law applicable on contractual obligation is dated from 19 June 1980⁷⁰⁾ and a Rome II-(now)-Regulation on the law applicable to Non-contractual Obligations is being prepared just right now.⁷¹⁾ In both situations the early steps of procedural unification led to the need for unification or harmonisation of substantive law, too.

As a consequence of Art 6 sec. 1 European Convention of Human Rights and based upon comparative studies it is possible to create uniform principles of European Civil

66) “Die Aufklärungspflicht der Parteien im Zivilprozessrecht”, 1976.

67) *J. Lang*, Die Aufklärungspflicht der Parteien des Zivilprozesses vor dem Hintergrund der europäischen Rechtsvereinheitlichung, 1999.

68) See *Motoko Yoshida*, “Die Informationsbeschaffung im Zivilprozess” by comparing German, US-American and Japanese law (2001); *Y. Taniguchi*, Development of civil procedure in Japan: an experiment to fuse civil law and common law, *Studia in honorem Németh János*, 2003, 835.

69) Cf. *A. Junker*, Das internationale Privat- und Verfahrensrecht im Zugriff der Europäischen Union, *Festschrift für Sonnenberger*, 2004, p. 417, 424.

70) As to the conversion into a “Rom I”-Regulation see comments on the European Commission’s Green Paper, *RabelsZ* 68 (2004), 1-118.

71) COM (2003) 427 final of 22 July 2003.

Procedure.⁷²⁾

2. Drafting conventions or regulations

Hague conventions on matters of civil procedure or the European conventions or respectively now the *European regulations* on matters of international civil procedure are regularly based on comparative studies on the legal situation in the respective countries with the intent to crystallize the necessary new regulations or the points of necessary harmonisation or unification. And, of course, academics and practitioners may prepare such practical harmonisation by own preparatory studies or drafts for the harmonisation. Those projects for the future are only realistic and may have some chance of realisation if they are based on earnest comparative work⁷³⁾ and produce solutions which are convincing in the countries and in the relevant business world addressed. If this is not the case even earnest attempts of harmonisation after thorough studies as were done for a new Hague Draft Convention on Jurisdiction of 1999 (amended in 2001) must fail.⁷⁴⁾

There are also private studies which restrict themselves to more specific themes, for instance the harmonisation of the law of evidence⁷⁵⁾ or dealing with a European concept of cause of action.⁷⁶⁾

3. Drafting model codes

Whereas studies within the European Union regularly aim to create a unified law, on a world-wide basis mere harmonisation by developing model codes, model principles or rules is the main concern.

- a) Already in the 60ies the *Iberoamerican Institute of Procedural Law* developed a *Model Code of Civil Procedure*, which was finally adopted in 1988.⁷⁷⁾ In the last years the American Law Institute (now in collaboration with UNIDROIT Rome) has invested much effort to prepare "*Principles and Rules of Transnational Civil Procedure*" which should serve as model for the reform, modernisation and harmonisation of procedural rules, the latest version being the Proposed Final Draft of March 2004.⁷⁸⁾

72) See *Walter Habscheid*, Die Europäisierung des Zivilprozessrechts, in Sawczuk (ed.), *Unity of Civil Procedural Law*, 1994, 78, 81 et seq.

73) For the harmonisation of procedural law in Europe see in particular *Storme*, *Rapprochement du droit judiciaire de l'Union européenne*, 1994; *Storme*, *Procedural Laws in Europe — towards harmonization*, 2003.

74) See *Rolf Wagner*, Zum Stand der Vereinheitlichung des internationalen Zivilverfahrensrechts, in Gottwald, *Perspektiven der justiziellen Zusammenarbeit in Zivilsachen*, 2004, 249, 260 f.

75) See *Gerhard Wagner*, Europäisches Beweisrecht — Prozessharmonisierung durch Schiedsgerichte, *Zeitschrift für Europäisches Privatrecht*, 2001, 441-514.

76) See *P. Gottwald*, Streitgegenstand und Sinnzusammenhänge, *Symposium für Schwab*, 2000, p. 85-100.

77) See *E. Vescovi*, Improvement of civil litigation, in Wedekind, *Justice and Efficiency*, 1989, 282.

78) See *G. Hazard Jr.*, *Civil Litigation without Frontiers — Harmonization and Unification of Civil* ↗

b) Another broad field of comparative work is that of *international commercial arbitration*.

The UNCITRAL Model Law on International Commercial Arbitration of 1985 has become so successful as it was formulated in cooperation with lawyers of most interested countries resulting in a breakthrough and a solution which is regarded as both modern and practicable. Many legislators of the world shared this judgment and adopted the model law to create a harmonised field of dispute resolution.⁷⁹⁾

Again academics may review the status of harmonisation and the need for further improvements by comparative studies.⁸⁰⁾

VIII. Final remarks

Comparative jurisprudence and civil procedure in particular is working like a wonderful mirror: It opens your mind. The comparison increases your knowledge and wisdom.⁸¹⁾ And if you are lucky, it may help not just to improve your own national law but to find solutions for practical legal problems of trans-national relations in our world of globalisation.

↘Procedural Law, in XI. World Congress on Procedural Law: Procedural Law on the Threshold of a New Millenium, 2002, 53.

79) For Germany see *Peter Schlosser*, Die Rechtsvereinheitlichung auf dem Gebiet der Schiedsgerichtsbarkeit ?, in Sawczuk (ed.), Unity of Civil Procedural Law, 1994, 144-155.

80) See in particular *Gottwald*, International Arbitration, 1997, also in Andolina, Trans-national aspects of procedural law, Vol. I, 1998, 43; *J.-F. Poudret* and *S. Besson*, Droit comparé de l'arbitrage international, 2002.

81) See *B. Grossfeld*, Rechtsvergleichung, 2001, 67.