Introduction to Comparative Civil Procedure

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I. Practical Importance

As consequence of globalization, there is an increasing need for learning about foreign legal systems, not only in substantive law, but also in procedural law. Comparing the own national law with other national or transnational laws is the best way to discover the world and to improve the own knowledge about other and different solutions and approaches to specific problems.[1]

1. Better understanding of the own law

A first objective of comparison is better understanding the own law. The own law is quite often based on ideas from abroad or may even be a legal transplant. Looking to the understanding in the country of origin can help to decide what should be imported or not imported. Likewise, the understanding of law, which is unified or harmonized through supranational organizations, is facilitated by using the legal sources, which have contributed to the text of a convention or model law.

2. Finding solutions for new problems

In our world of transnational business, new problems of trade or commerce arise in many countries more or less at the same time. To avoid contradictory solutions scholars and courts should consider decisions abroad already made. This helps to find the own solution and improves the own reasoning.

Considering the interpretation of parallel rules or the decision of parallel cases in other countries may facilitate the interpretation of the own law and ease the work of courts.[2]

In areas with unified or law following some transnational model it is quite common that parties and courts are looking for precedents abroad and consider them carefully. A rich field of such comparison are international

[1] Th. Kadner Graziano, *Rechtsvergleichung vor Gericht*, RIW 2014, 473.
[2] Th. Kadner Graziano, RIW 2014, 473, 482.

commercial arbitration and in the European Union national case law with regard to European Procedural Regulations.

3. Forum shopping and preparation of claims abroad

In transnational cases, the lawyer should advise his or her client about a possible forum shopping. To provide the client with reasonable advice the lawyer must have knowledge about the different procedural systems and their pros and cons.

When the lawyer has to inform and to cooperate with a lawyer abroad where proceedings are pending he or she should have some understanding what kind of information is needed.

Already in the phase of drafting transnational contracts, in particular selecting a specific jurisdiction, the lawyer should have some knowledge about the procedural system of the possible options and of the finally selected court.

4. Application of foreign law

According to conflict of law rules, lawyers and courts may have to apply foreign law. This happens frequently with regard to the law applicable to the substance of a law and due to the lex fori principle less frequent with regard to procedural matters. Yet, foreign procedural rules have to be applied with regard to transnational service, transnational taking of evidence, and recognition and enforcement of foreign court decisions. The proper understanding and application of such foreign rules can be made easier by comparative studies.

A similar function may have comparative studies or foreign court decisions with regard to the interpretation and application of international instruments[3] or regional conventions, or in case of the European Union, of regulations and directions. Such instruments should not be interpreted with national eyes, but in an autonomous way, which may be prepared or facilitated by previous comparative studies. The same applies with regard to the interpretation of law more or less adopted from some transnational model law.

[3] Cf. Th. Kadner Graziano, RIW 2014, 473, 478.

5. Law reform

The legislator quite often is looking abroad for models to improve the own law.[4]

a) To give just one example: The development of electronic, even worldwide communication by modern information technology leads to the need to develop new rules with regard to the taking of evidence. At least sometimes, it can help in developing an own draft by looking abroad what solutions already exist and whether they are convincing or not. A foreign solution should be considered carefully, but at the end the national legislator is, of course, free to accept, to refuse, to modify or adapt it to the own legal system or the own political ideas.

b) Reform projects must not be national ones. New international or regional statutes, conventions or model laws cannot be successfully developed without comparative studies.[5] Those studies can show what is already common between the states, but also point out the differences and may help to develop possible compromises for a unification or at least harmonization.[6]

Leading institutions for developing new instruments are

- The Hague Conference on Private International Law, and

- The United Nation Commission on International Trade Law.

Both institutions compare existing national law as well as new proposals made by the participating states.

Successful examples of procedural conventions based on comparative studies, sometimes summarized in explanatory reports are

- The Hague Convention on Civil Procedure of 1 March 1954;

- The Hague Convention on the Service Abroad of Judicial and Extrajudicial

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[4] Cf. Stefan Huber, *Prozessrechtsvergleichung heute*, in Hess Europäisches Insolvenzrecht – Grundsätzliche Fragestellungen der Prozessrechtsvergleichung, 2019, p. 77, 100 ff.

[5] Cf. Fernando Gascón Inhausti, *Prozessrechtsvergleichung in der Europäischen Union*, in Hess Europäisches Insolvenzrecht – Grundsätzliche Fragestellungen der Prozessrechtsvergleichung, 2019, p. 111, 114 ff; .

[6] Cf. ALI/UNIDROIT, *Principles of Transnational Civil Procedure*, 2006. The European Law Institute is currently working on a project *„From Transnational Principles to European Rules of Civil Procedure“*; Gerhard Wagner, *Harmonization of Civil Procedure – Policy Perspectives*, SSRN Electronic Journal 2011, 1.

Documents of 15 November 1965;[7]
- The Hague Convention on the Taking of Evidence Abroad of 18 March 1970;[8]

. The Hague Convention on Choice of Court Agreements of 30 June 2005;[9]

- The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958;

- The UNCITRAL Model Law on International Commercial Arbitration of 1985 with amendments as adopted in 2006;

- The UNCITRAL Model Law on Cross-Border Insolvency of 30 May 1997,[10] accompanied by guides to interpretation, cross-border cooperation, treatment of enterprise groups;

- The UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments of 2 July 2018;

In family matters there are lots of Hague Conventions and respective studies on

- Maintenance (the latest) on International Recovery of Child Support of 23 November 2007;[11]

- Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in respect of parental responsibility and child protection (of 19 October 1996);

- Civil Aspects of International Child Abduction (of 25 October 1980);[12]

- International Protection of Adults (of 13 January 2000);[13]

- Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993;[14]

[7] Cf. V. Taborda Ferreira, *Explanatory Report on the 1965 Hague Service Convention*, 1965.
[8] Cf. Ph. W. Amram, *Explanatory Report on the 1970 Hague Evidence Convention*, 1970.
[9] Cf. T. Hartley/M. Dogauchi, *Explanatory Report on the 2005 Convention on Choice of Court Agreements*, 2013.
[10] Cf. J. L. Westbrook, *Interpretation Internationale*, Temple Law Review 87 (2015), 739.
[11] Cf. A. Borrás & J. Degeling, *Explanatory Report on the Convention on the International Recovery of Child Support*, 2013
[12] Cf. E. Pérez Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, 1982.
[13] Cf. P. Lagarde, *Erläuternder Bericht zu dem Übereinkommen über den internationalen Schutz von Erwachsenen*, 2017.
[14] Cf. G. Parra-Aranguren, *Explanatory Report on the 1993 Hague Intercountry Adoption Convention*, 1994.

II. Methods of Comparative Law

1. Comparison may be regarded as the fifth method for understanding and interpreting law. The classical four methods of interpretation are:

- Grammatical interpretation
- Historical interpretation
- Systematic interpretation, and
- Teleological interpretation.
- Comparative interpretation is the fifth way.[15] Between these methods there is no fixed ranking; they may be used in a pragmatic order as the concrete case may be.

The **methodology** of comparative law is to contrast specific objects of at least two jurisdictions with each other in order (1) to determine their similarities and differences, (2) to explain the causes of these similarities and differences and (3) to evaluate the solutions.

In the last years, opposition against comparative law was openly articulated, in particular in the USA. Critics hold that a view on foreign law is irrelevant and even dangerous as all law is national law, embedded in national traditions.[16]

Comparison does not mean that foreign law has to be taken over; at best, it leads to a persuasive authority. The foreign law should be used to broaden your knowledge and to deepen the reasoning of a judgment or of a draft for a new bill. As in any science, comparison is also necessary in law to decide after full information and to find the best solution. "*Science knows no borders, and legal science is no exception*."

As an English Supreme Court Judge wrote: *"Judicial reasoning …has long been thought sensible to consider how others, from Ancient Rome onwards, have solved similar problems. If judges are free to take account of the views of*

[15] Th. Kadner Graziano, RIW 2014, 473, 486.

[16] Cf. Margaret Woo, *Comparative Law in a Time of Nativism*, in Hess, Europäisches Insolvenzrecht – Grundsätzliche Fragestellungen der Prozessrechtsvergleichung, 2019, p. 141, 147 ff.

academic lawyers writing in law reviews… there would seem to be no reason why the opinion of foreign courts should be off-limits.” [17]

Using comparative interpretation is more burdensome than the other methods. It requires much energy in finding and using the right sources and understanding the texts in a foreign language. The danger of misunderstanding is higher than with national sources.[18]

2. Special features of comparative law

When using comparative sources special features should be taken in consideration.

(1) Foreign law should be **applied** and interpreted **as in the country of origin**, not according to the own understanding from abroad. This may be difficult as to sources, case law and language.

(2) Foreign law may have a different systematic order. Therefore, one should compare according to a **functional approach.** This means that one should not just compare specific statutes or dogmatic institutions, but should look how real problems are finally solved.[19]

To give two famous examples:

(1) The law of limitations. In civil law countries limitation is a question of substantive law, regulated in the civil code; in common law countries it is a procedural matter, regulated as limitation of action in the procedural codes.

(2) Gathering information. Mainly in common law countries discovery or disclosure applies as a procedural institute; in civil law countries there might be special substantive rights for receiving information, special injunction or some kind of facilitating the burden of proof.[20]

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[17] Lord Robert Leed, L.Q.R. 2008, 253, 261 f.

[18] Cf. Thomas Kadner Graziano, RIW 2014, 473, 475.

[19] Cf. Stefan Huber, *Prozessrechtsvergleichung heute*, in Hess (N 3), p. 77, 88 ff (who is in favour of a comparison of concepts – between micro- and macro-comparison)

[20] Cf. C. H. van Rhee/A. Uzelac, *Evidence in Contemporary Civil Procedure, Fundamental Issues in a Comparative Perspective*, Cambridge, 2015; H. Nagel/P. Gottwald, *Internationales Zivilprozessrecht*, 7. Aufl. 2013, § 10 N 17-35..

This functional approach is valid for **micro-comparison** as well as for **macro-comparison.**[21]

Micro-comparison is the most frequent way to do comparative studies. One compares specific similar dogmatic institutions or compares the solution of new practical problems. Many studies compare details of jurisdiction rules. Other studies are devoted to details of the law of evidence, the right to appeal or to res judicata-concepts.

Macro-comparison is more general. In the last century, scholars developed the distinction between **legal families** and examined whether a code of a particular country had the features of the one or the other legal family.[22]

Macro-comparison can be executed by comparing general characteristics of legal systems. For instance: What kind of legal sources are used? What types of written law are distinguished? What does the legislator legislate? What are the most important legal publications? How courts are organized? How to become a lawyer? How to become a judge? Do courts consider parliamentary documents? Do they deal with legal doctrine?

Macro-comparison can also be done more specific with regard to a broad specific theme. As to civil procedure there are, e.g. studies on

- The goals of civil justice[23]

- The divergence between adversarial and inquisitorial model of process[24]

- Purpose and conception of civil proceedings[25]

- The influence of the constitution on civil procedural law[26]

- The law of evidence[27]

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[21] Cf. Peter Gottwald, *Zum Stand der Prozessrechtsvergleichung*, Festschrift für Peter Schlosser, 2005, 227, 235 ff.

[22] Cf. Harald Koch, *Verfahrensrechtsvergleichung zur Kennzeichnung von Rechtskreisen*, Essays in Honour of Konstantinos D. Kerameus, Vol. I, 2009, 563.

[23] Cf. Alan Uzelac, Goals of Civil Justice and Civil Procedure in contemporary Judicial Systems, 2014.

[24] Cf.

[25] Cf. Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, AmJComL 53 (2005), 709; Adrian Zuckerman, *The civil court – A public service for the enforcement of rights requiring effective management*, Festschrift für Peter Gottwald, 2014, 715.

[26] Cf. Karl Heinz Schwab/Peter Gottwald, *Verfassung und Zivilprozess*, 1984.

- The means of recourse[28]

- Alternative Dispute Resolution (ADR) and Mass Claims[29]

- Access to justice for indigent people[30]

- Costs and funding of litigation as well as the influence of the cost system on the conduct of a case[31]

- The independence of judges[32]

- Education and organization of lawyers,[33] and

- The status of paraprofessionals.

These studies showed that today there are so many mixed jurisdictions that a classification, e.g. as a civil law or a common law system may be misleading.[34] Therefore, one could think about a new classification. Nevertheless, what should be the essential, style-defining elements? Anyway, as a means of first orientation the allocation to a legal family is still used.

Comparing rules, institutions, and branches of law or principles requires knowledge about content, objectives and impact of the objections of the compared jurisdictions. Having gathered the necessary information the comparison should be done without any pride and prejudices with regard to the own system. Legal systems should be treated as an equal when compared, in spite of even major differences in belief, circumstance and tradition.

III. Special features of comparative procedural law

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[27] Cf. J. A. Jolowicz, *Discovery of Documents in the Common Law and the Forced Production of Documents in Civil Law Systems*, Essays in honour of Konstantinos Kerameus, Vol I, 2009, 535; Peter L. Murray, *Hearsay Evidence in Civil Litigation at Common and Civil Law*, Festschrift für Peter Gottwald, 2014, 455; Richard Motsch, *Comparative and Analytical Remarks on Judicial Fact-finding*, Festschrift für Gerhard Käfer, 2009, 241.

[28] Cf. Alan Uzelac and C.H. van Rhee, *Nobody's Perfect. Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters*, 2014.

[29] Cf. Christopher Hodges and Astrid Stadler, *Resolving Mass Disputes*, 2013.

[30] Cf. Mauro Cappelletti, *Access to Justice*, Vol. 1-3, 1978/79

[31] Cf. Christopher Hodges/Stefan Vogenauer/Magdalena Tulibacka, *The Costs and Funding of Civil Litigation*, 2010.

[32] Cf. International Project of Judicial Independence…, *Mt. Scopus International Standards of Judicial Independence*, Approved March 19, 2008 (Consolidated 2018); *Die Kriterien und das Verfahren der Richterwahl für die ordentliche Gerichtsbarkeit in Europa im Rechtsvergleich*, 2020.

[33] E.g. „Akademische Karrierewege für Juristen", RabelsZ 84 (2020), 264-398.

[34] Cf. Stefan Huber (N 5), p. 77, 95 ff.

1. Lex fori principle[35]

Courts of all states just follow their own procedural rules. Therefore, in general national practitioners have no need to look to procedural rules of other states. There is only a small area in international proceedings where the national rules refer to foreign law. When a foreign court decision is recognized, the effects of this decision are extended to the domestic jurisdiction. Content and scope of these effects, therefore are primarily regulated by the law of the state of origin. Whether a service of process abroad was regular in the state of service is regulated by this law, not by the procedural rules of the forum. If a court orders a taking of evidence, abroad this evidence is taken according to the rules of the requested state and the requesting court has to control whether this kind of taking evidence meets its own standards.

2. Procedural system as a unit

Some scholars think that it makes no sense to compare details of the procedural law of different states as the court system and the procedural rules are an indivisible unit. I myself believe that there is certainly some interaction between procedural institutions, but every procedural system is the result of many sources and independent decisions. Otherwise, a state could not reform its procedural law step by step, all being independent from each other.

3. Procedural law as public law

The courts are part of the respective state power and they execute this state power. This state power can be friendly or hostile to parties.

The state judge may act as a mere arbiter in deciding the conflict between the parties. He may be disinterested in the problems of the parties, just watching out for the interests of the state. Alternatively, he may act in the interest of the parties, helping them to find a good solution, as a kind of (public) service.

4. Written law and practice may differ and it is not easy to get a correct impression from abroad. Factual investigations are not always available. Private

[35] Cf. Peter Gottwald (N 9), p. 227, 233; Stefan Huber, *Prozessrechtsvergleichung heute*, in Hess (N 2), p. 77, 85.

impressions from some visits in court and interviews with some judges and lawyers seem to give convincing results, but may be misleading.

5. Statistics

When comparing qualities of persons or goods in everyday life, we use a very subjective standard, but if we compare procedural systems, our answer should be more objective.

Since some years, procedural systems therefore are compared and rated by way of statistical figures. Prominent examples are the Lex mundi study of 2002, the yearly Doing Business Report of the World Bank and the yearly "EU Justice Scoreboard".[36] The aim of these reports is to get a basis for a credit engagement in a specific country, for forum shopping, or, in case of the EU, to show whether the court system of the member states meets minimum standards in doing justice. These statistics are a valuable aid; however, they just compare figures taken from national statistics. Those statistics may be brightened. Winston Churchill shall have said: The only statistic I believe in is the one I have falsified by myself. Such a cynical opinion is certainly not justified, but statistics may nevertheless fail the full truth, because certain relevant data cannot be gathered by a mere meter-board or they may just be misinterpreted.

IV. Results and Prospects

As result of globalization of trade, commerce and private life there is a growing need for better information about the justice system of other states and the pros and cons of litigating and the details of conduction a lawsuit there. Qualified answers are only possible after thorough information and this information is more reliable if it is founded on well-founded studies on comparative law.

[36] The latest: „The 2019 EU Justice Scoreboard“, Communication from the Commission to the European Parliament …., Com (2019) 198/2. As to the limited value of such data collection cf Stefan Huber (N 5), p. 77, 92 ff.

Beyond this, from an academic point of view comparative studies often show that there are various solutions to similar legal problems. These solutions might be a source of inspiration to improve or to rate one's own law. An open-minded evaluation may also have the result that the foreign solutions should not be followed. In any case, the world of comparative law is a fascinating one.