Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law 9

Loïc Cadiet/Burkhard Hess/Marta Requejo Isidro (eds.)

Approaches to Procedural Law

The Pluralism of Methods

Nomos

Max Planck Institute LUXEMBOURG for Procedural Law

Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law

edited by
Prof. Dr. Dres. h.c. Burkhard Hess
Prof. Dr. Hélène Ruiz Fabri

Volume 9

Loïc Cadiet/Burkhard Hess/Marta Requejo Isidro (eds.)

Approaches to Procedural Law

The Pluralism of Methods

Nomos

Max Planck Institute
LUXEMBOURG
for Procedural Law

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

ISBN 978-3-8487-4309-4 (Print)
978-3-8452-8512-2 (ePDF)

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-4309-4 (Print)
978-3-8452-8512-2 (ePDF)

Library of Congress Cataloging-in-Publication Data
Cadiet, Loïc / Hess, Burkhard / Requejo Isidro, Marta
Approaches to Procedural Law
The Pluralism of Methods
Loïc Cadiet / Burkhard Hess / Marta Requejo Isidro (eds.)
552 p.
Includes bibliographic references.

ISBN 978-3-8487-4309-4 (Print)
978-3-8452-8512-2 (ePDF)

1st Edition 2017

Table of Contents

Foreword

The first IAPL-MPI Summer School was held at the premises of the MPI in Luxembourg in July 2014. The success of the experience, crowned by the publication of the collective book *Procedural Science at the Crossroads of Different Generations* (B. Hess, M. Requejo Isidro, L. Cadiet eds, Nomos 2015), has encouraged the organization of a second edition. Two years after the first one, the second Post-doctoral Summer School in procedural law took place at the Max Planck Institute Luxembourg in July 2016. Organized by the International Association of Procedural Law and the Max Planck Institute for Procedural Law, the school offered to young researchers specializing in procedural law an opportunity to discuss their current research topics with fellow colleagues and law professors coming from different jurisdictions. In this way, the school implements the wish and the policy of the IAPL to diversify its activities towards young proceduralists.

The idea to organize the summer school was inspired by two complementary reflections that we explained in the aforementioned *Procedural Science at the Crossroads of Different Generations*. On the one hand, modern procedural law is characterized by its openness to comparative and international perspectives. On the other hand, the aperture of procedural science requires a new approach of research, which has to be based on a comparative methodology. Against this backdrop, the IAPL and the Max Planck Institute for Procedural Law decided to support contemporary research in procedural law by organizing the school, since immediate discussion with scholars coming from different jurisdictions is the best way to practice legal comparative research.

The general topic of this second summer school was: *Approaches to Procedural Law. The Pluralism of Methods.* "Pluralism" and "methods" are the key words.

Procedural law is no longer a purely domestic topic. The recent tendencies characterizing the field, such as Europeanization and harmonization, mark the evolution towards a new, cross-border dimension of this area of law. In addition, the growing importance of transnational legal relations in all spheres of civil and commercial dealings makes it unavoidable to face the new challenges of procedural law across national borders. The tradi-

tional approaches of national dogmatics, which have for a long time guided the reflections of scholars operating in the field of civil procedure, can no longer capture the increased complexity of the so-called postmodernity. Furthermore, the techniques and skills of comparative law are equally evolving due to the availability of statistical and empirical data which enable the assessment of the law in action, as opposed to the law in the books. Besides, it is still an open issue whether the methodological approach of traditional comparative law (i.e., distinguishing different legal families) corresponds to the evolution of procedural law, and whether and to what extent it can be applied to comparative procedural law. In light of this, it is particularly important for young researchers to reflect on the methods to be adopted in order to guarantee that research in the field of procedural law maintains its comprehensive explanatory power. Looking at the current landscape of research in the field of procedural law, a wide array of methods can potentially be used: comparison, inter-disciplinary approaches and quantitative and qualitative empirical analysis are only some of the lenses through which young scholars can scrutinize the reality of the process. The 2016 MPI-IAPL Summer School aimed at providing its participants with an enhanced awareness as to the methods to be chosen and applied when undertaking a research project in the field of procedural law. It is crucial to have a clear vision not only of the "what", but also and above all, of the "how" of legal research.

After the announcement of the school, forty four applications were filed to the Max Planck Institute; only fifteen of them could be admitted. The participants of the school came from different legal and academic backgrounds like Argentina, Belarus, Brazil, Germany, France, Greece, Italy, Lithuania, Norway, Spain, Switzerland and the United States of America. This book collects most of the papers which were presented at the conference. Reviewed and reworked in the light of the discussions of last summer, they address many different areas of procedural law; domestic, European, international and comparative. Its content ranges from the role of State systems challenged by the tendency of privatization of justice and process, to the impact of EU financial crisis on national procedural law, passing by the regionalization of courts, the various forms and norms of access to justice and especially, in this regard, the issues of collective redress and of the status of precedents in the development of the law.

Using again a proven method, the second edition of this summer school brought together different generations of researchers, allowing a fruitful dialogue between professors in the best age of their research careers and

many young proceduralists. This dialogue was framed by two key speeches provided by Margaret Woo and Fernando Gascon Inchausti. Different continents, different perspectives, different experiences and approaches form the ingredients of this successful second post-doctoral summer school in procedural law.

To conclude, we wish to express our utmost gratitude to the collaborators of the MPI whose help was crucial in the success of the meeting. Never two without three. The challenge is now to prepare a third IAPL/MPI Summer School in Procedural Law which shall take place in summer 2018. A call for applications will be launched in fall of this year.

Luxembourg and Paris May 2017

Loic Cadiet / Burkhard Hess / Marta Requejo Isidro

Inaugural Lecture

I. Comparative Perspectives in Procedural Law: Some Remarks and Proposals

*Fernando Gascón Inchausti**

(I) Introduction

This contribution was conceived as the opening lecture of the 2nd IAPL-MPI Post-Doctoral Summer S*chool on European and Comparative Procedural Law, on the topic of *Approaches to Procedural Law. The Pluralism of Methods*. Its main purpose therefore, was setting the scene for the subsequent sessions of intensive and fruitful academic discussion and, more specifically, sharing some thoughts and reflections on one of the possible methods to approach the study of procedural law, the comparative one. Obviously, only some topics were addressed and not as exhaustively as they might have deserved.

These pages start from a premise: I am in favour of applying a comparative methodology to the study of procedural law.[1] Nowadays this view seems to be commonly shared, at least officially, but it has not always

---

* Prof. Dr. Fernando Gascón Inchausti is Professor of Law at the Complutense University of Madrid. His main fields of interest are civil and criminal procedure, both from national, European and comparative perspective. fgascon@ucm.es

1 See, for instance, M. Cappelletti (ed.), *International Encyclopedia of Comparative Law, Vol. XVI, Civil Procedure* (Mohr Siebeck – Martinus Nijhoff, Tübingen- Leiden- Boston, 1987); Id., *The Judicial Process in Comparative Perspective* (Claredon Press, Oxford, 1989); A.A.S. Zuckerman, *Civil Justice in Crisis. Comparative Perspectives of Civil Procedure* (OUP, 1999); F. Carpi, M.A. Lupoi (eds.), *Essays on Transnational and Comparative Civil Procedure* (Giappichelli, Turin, 2001); N. Trocker, V. Varano (eds.), *The Reforms of Civil Procedure in Comparative Perspective* (Giappichelli, Turin, 2005); C.H. van Rhee (ed.), *European Traditions in Civil Procedure* (Antwerp, Intersentia, 2005); O.G. Chase, H. Hershkoff (eds.), *Civil Litigation in Comparative Context* (Thomson West, 2007); C.H. van Rhee, A. Uzelac (eds.), *Civil Justice between Efficiency and Quality: From Ius Commune to the CEPEJ* (Intersentia, Antwerp-Oxford-Portland, 2008); J. Walker, O.G. Chase (eds.), *Common Law, Civil Law and the Future of Categories* (Lexis Nexis, Canada, 2010); A. Dondi, V. Ansanelli, P. Comoglio, *Processi civili in evoluzione. Una prospettiva comparata* (Giuffré, Milan, 2015); C.B. Picker, G.I. Seidman (eds.),

been so obvious in the past and, unfortunately, a serious comparative approach to (procedural) law is still missing in many jurisdictions and at many levels.[2]

There are quite a few reasons to justify recourse to a comparative methodology for the study of procedural law. In general terms, comparing is something natural, almost inborn, belonging to human nature from the very beginning of life. Children tend to instinctively compare themselves to others, and so do many adults. Comparisons help make us aware of what is better and also of what is worse. Comparisons can, of course, be morbid and destructive; but, if they are correctly administered, they tend to foster personal or collective improvements and achievements. At a scientific and academic level, comparison appears, almost automatically, as a sign of curiosity and open-mindedness towards what happens around oneself, which also lies at the core of the ideas of research and of *universitas*. And when it comes to legal studies *lato sensu*, a comparative approach shows an awareness that legal systems –like the social life and economic activity they tend to regulate– cannot live and evolve isolated from each other.[3] Departing from this positive and virtuous value of comparative enquiries, this paper will address three main topics and some issues regarding each of them: firstly, the scope of comparison when we deal with procedural law; secondly, the aims and purposes of applying comparative methodology in procedural law; finally, how comparison shall be performed.

The Dynamism of Civil Procedure – Global Trends and Developments (Springer, Dordrecht-Heidelberg-New York-London, 2016).

2 Although for the more restricted field of conflict of laws, this is also the assertion of G. Rühl, "Rechtsvergleichung und europäisches Kollisionsrecht: Die vergessene Dimension", in R. Zimmermann (ed.), *Zukunftsperspektiven der Rechtsvergleichung* (Mohr Siebeck, Tübingen, 2016) 103-138.

3 See, among many others, K. Zweigert, H. Kötz, *Introduction to Comparative Law* (3rd ed., Clarendon, Oxford, 1998); R. Schlesinger, H. Baade, P. Herzog, E. Wise, *Comparative Law. Cases – Texts – Materials* (6th ed., Foundation Press, New York, 1998); R. David, C. Jauffret-Spinosi, *Les grands systèmes de droit contemporains* (11th ed., Dalloz, Paris, 2002); H.P. Glenn, *Legal Traditions of the World – Sustainable Diversity in Law* (5th ed., OUP, 2014); V. Varano, V. Barsotti, *La tradizione giuiridica occidentale. Volume I. Testo e materiali per un confronto civil law common law* (4th ed., Giappichelli, Turin, 2010).

(II) The Scope of Comparison in Procedural Law

Dealing with the scope of comparison in procedural law requires answering a simple question: what should be compared? Of course, when the discussion is focused on comparative procedural law the immediate reaction is thinking of comparing different procedural legal systems as such and, more commonly, civil proceedings. Within this "common ground", nevertheless, some challenges should be put under the focus that might lead to considering the possibility of enlarging the field.

(a) Comparing the Regulation of Civil Proceedings

Firstly, it is a current trend not to concentrate the comparison on the legal regulation of civil proceedings ("the law in the books"), but rather trying to analyse how the legal provisions operate in practice. *Macrocomparisons*[4] should focus on the performance of the courts, at the general level of efficiency of the procedural systems; and *microcomparisons* should also share this functional approach, which is basic in comparative law:[5] we are interested in determining the solutions offered by different legal systems to common problems or to problems that are new for the jurisdiction interested in the comparative analysis.

When dealing, for instance, with the issue of collective redress, it is possible to analyse how several legal systems have regulated this institution in regard to many possible items or elements such as the "classical" ones: Have they chosen an opt-in or an opt-out approach? In the case of opt-out systems, are there sufficient safeguards for absent class-members?[6] But, beyond this, the really interesting point will be determining if the legal regulation has been followed or not by successful practice; and, if not –which is the case in many jurisdictions–, then research should focus

4 On the distinction between *macrocomparisons* and *microcomparisons*, see Zweigert/Kötz, *supra* n. 3, at. 4-5.

5 Zweigert/Kötz, *supra* n. 3, at 34 et seq.; insisting in the paramount relevance of this approach, see recently C. Wendehorst, "Rechtssystemvergleichung", in R. Zimmermann (ed.), *Zukunftsperspektiven der Rechtsvergleichung* (Mohr Siebeck, Tübingen, 2016), 1-37, at 30-31.

6 See, for instance, the widespread comparative study in V. Harsági, C.H. van Rhee (eds.), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?* (Cambridge – Antwerp – Portland, Intersentia, 2014).

on the grounds for the failure and on the other means –if any– used in practice to cope with collective harm or similar situations, like joinder of claims or public enforcement tools. Comparison, therefore, should involve not only legal texts, as enacted, but legal practice and the real level of protection reached by the rights and interests whose redress is able to be envisaged in collective proceedings.

Secondly, it is important to assume that the notion of civil justice and civil proceedings shall, in many cases and for many purposes, include ADR mechanisms. These "many rooms of justice" and this "multi-door approach" are not at all new, but it is still necessary to insist on it: for the sake of macro-comparisons the impact of the use of arbitration, mediation, conciliation or similar devices is needed if the comparative research wants to be built on a real picture of the way disputes are resolved within a jurisdiction.[7]

As many Scandinavian lawyers indicate, commercial litigation in the Nordic jurisdictions, especially if there is a cross-border element, is usually solved in arbitration.[8] And we should also bear in mind that in the Far-East tradition mediation and conciliation schemes are preferred to court litigation.[9] Describing the performance of dispute resolution in some geographical areas, therefore, requires a more global vision –a holistic one.

In a similar vein, no serious comparative study on procedural protection of consumers' rights can be accomplished without taking account of the existence of alternatives to court proceedings: the situation in the United Kingdom, for instance, would be misrepresented if only court decisions

---

7 This idea was first –at least clearly– suggested by M. Cappelletti, "Alternative Dispute Resolution Processes within the Framework of the World-Wide Acces-to-Justice Movement", 56 *The Modern Law Review* 282 (1993-3). Much more recently, see also C. Hodges, I. Benöhr, N. Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, Oxford, 2012); R. Caponi, F. Gascón Inchausti, M. Stürner (eds.), *The Role of Consumer ADR in the Administration of Justice. New Trends in Access to Justice under EU Directive 2013/11* (Sellier, Munich, 2015); F. Steffek, H. Unberath (eds.), *Regulating Dispute Resolution - ADR and Access to Justice at the Crossroads* (Hart Publishing, Oxford, 2013); T. Sourdin, "The Role of the Courts in the New Justice System" (January 11, 2016). Available at SSRN: http://ssrn.com/abstract=2713576 or http://dx.doi.org/10.2139/ssrn.2713576 (Last visited 22 December 2016); P. Cortés (ed.), *The New Regulatory Framework for Consumer Dispute Resolution* (OUP, 2016).

8 Varano/Barsotti, *supra* n. 3, at 487-488.

9 David/Jauffret-Spinosi, *supra* n. 3, at 403 et seq.; Varano/Barsotti, *supra* n. 3, at 531-532.

were analysed, leaving aside, among others, the prominent role of the Financial Ombudsman Service. And, using again an example taken from the English experience, one should not neglect the so-called pre-action protocols that have emerged in many fields of law[10] and their practical implementation.[11]

(b) Comparing Court Proceedings and ADR Mechanisms

In close relation with this need to include ADR mechanisms within the picture of a country's system of civil justice, we should also add another view to the comparison. Apart from comparing different legal systems, in the sense that has just been mentioned, we could also consider a comparison between "traditional procedural law" and the methods for alternative dispute resolution. It is something that is already frequently done, for instance when addressing the question of the advantages and disadvantages of arbitration compared to court adjudication, and not only from an academic point of view, but rather with a very important consequence when it comes to deciding if a contract will include, or not, an arbitration agreement. This comparison can be seen, indeed, as a two-way road.

On the one hand, there are many lessons that court proceedings could learn from arbitration, especially in the field of cross-border litigation: arbitration has proved to bring great flexibility to issues that would amount

10 Construction and engineering disputes, defamation, personal injury claims, clinical disputes, professional negligence, disease and illness claims, housing disrepair cases, possession claims based on mortgage or claims for damages in relation to the physical state of commercial property at termination of a tenancy are some of the fields covered by pre-action protocols.

11 See the Practice Direction – Pre-Action Conduct and Protocols (https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct, ast visited 4 January 2017), according to which pre-action protocols explain the conduct and set out the steps a court would normally expect parties to take before commencing proceedings for particular types of civil claims, including trying to settle the issues without proceedings and considering a form of Alternative Dispute Resolution (ADR) to assist with settlement. Compliance with them is not a pre-requisite to engage court proceedings, but not doing so may have very important consequences in the field of costs (which might turn out to be very high) –especially, the court could reduce significantly the amount of the order to reimburse costs to the winning claimant.

to real hurdles in court cases, such as with the language of proceedings or with more flexible management of the case.

On the other hand, it is important to realize that we are experiencing times of intensive "dejudicialization",[12] which could have very dangerous side-effects. Some decades ago it was important to leave room for ADR mechanisms and to promote them as real alternatives to court proceedings, especially for litigants willing to find a different way to litigate. In recent years, however, in a scenario of economic downturn,[13] it looks as if ADR schemes, described as efficient, might be intended to replace the old-fashioned and non-efficient court systems, which are silently being dismantled by some governments. Apart from the prominent issue of costs,[14] more thorough studies should be carried out on that issue, including comparative research regarding court and ADR performance when it comes to the solutions given to some relevant factors, such as independence of the adjudicator or strict compliance with the rule of law when deciding a case. Litigants preferring recourse to judicial proceedings should not be deterred from seeking it –and somehow "forced" to (international commercial) arbitration– and, of course, national lawmakers should also make efforts to render judicial proceedings more attractive, especially in cross-border litigation contexts.[15]

---

12 See S. Amrani-Mekki, "L'économie procédurale", 6 *International Journal of Procedural Law* 7, 25-28 (2016-1).

13 See R. Marcus, "Procedure in a Time of Austerity", 3 *International Journal of Procedural Law* 133 (2013-1).

14 J. Nieva-Fenoll speaks of *an elitist certainty*, "Mediation and Arbitration: a Disappointing Hope", 6 *International Journal of Procedural Law* 350, 357-362 (2016-2).

15 A good example is the language issue, very flexible in the world of arbitration, where some interesting experiences start to appear. The most challenging is the Netherlands Commercial Court, very recently established in Amsterdam (1 January 2017), specialized in international trade disputes and where proceedings will be conducted in English (although by Dutch judges and according to Dutch procedural law). In France, the Tribunal de Commerce de Paris launched already in 2011 an international division (3ème chambre), with judges speaking and able to read documents written in foreign languages. Apart from overcoming language barriers, these experiences may foster the choice of those courts as appropriate fora for solving cross-border disputes and, at the same time, they may contribute to the development of those jurisdictions as appropriate places for international trade and financial activities.

(c) Comparing Civil Procedure and Criminal Procedure

Additionally, internal comparison should also be considered between civil and criminal proceedings. In many legal systems, sometimes due to academic reasons, civil procedure and criminal procedure "live" totally apart from each other. This is a regrettable situation, from many points of view, since civil and criminal procedures have much to learn from each other, and it is worth comparing their approaches and solutions to common issues. One cannot ignore the different principles and policies underlying to both procedures and it is important to be aware of them, in order to overcome the associated hurdles to comparison. Carnelutti clearly illustrated this risk with the powerful image of criminal proceedings being *Cenerentola,* or Cinderella, that civil proceduralists wanted to dress with the unfitting clothes of her step-sisters, that is, the categories of civil procedure (and of substantive criminal law).[16] The old ambition to build a common procedural model, encompassing all possible matters and objects (civil and criminal)[17] has proved to be both impossible and inconvenient. But it is again important to remember one of Zweigert and Kötz's basic statements on the functional approach of comparative law: we shall compare the pieces that serve the same purpose, that fulfil the same function.[18] And civil and criminal proceedings very frequently need to face similar problems, because they are linked to the function of procedure as the tool that allows a court to render the best decision to a dispute at the end of a fair chain of activities.[19]

The law of evidence is one of the fields where the comparison between civil and criminal proceedings could be more obviously fruitful. We should recall, for instance, that the US Federal Rules on Evidence are gen-

---

16 F. Carnelutti, "Cenerentola", 1 *Rivista di diritto processuale* 73 (1946).

17 For an overview (in Spanish), see V. Fairén-Guillén, "Perfiles en las relaciones entre proceso civil y penal: La teoría general del proceso", *Anuario de Derecho Civil* 51(1995-1) (available at: at http://www.boe.es/publicaciones/anuarios_derecho/anuario.php?id=C_2016_ANUARIO_DE_DERECHO_CIVIL).

18 Zweigert/Kötz, *supra* n. 3, at 10: "[…] only rules which perform the same function and address the same real problem or conflict of interests can profitably be compared"; and again at 34: "[…] in law the only things which are comparable are those which fulfil the same function".

19 In a similar vein, Christiane Wendehorst emphasizes the convenience of taking into account the civil procedure solution when facing the problem of forum shopping in criminal proceedings (*supra* n. 5, at 17).

erally applicable to all sorts of subject-matter. On the contrary, in continental systems there is a different regulation of evidence in the respective codes of civil and criminal procedure. Is this divide suitable or would some sort of harmonization or rapprochement be desirable or useful? It goes without saying that the topic appears recurrently in many jurisdictions where the borders are being progressively blurred, due to the trend to render criminal proceedings more "adversarial" (and thus depriving the courts of the power to order the taking of evidence on their own motion), on the one hand, and, on the other hand, the need to empower civil courts with *ex officio* evidentiary powers, as a procedural tool to foster the application of mandatory rules –such as those aimed at the protection of consumers, as the European Court of Justice recurrently reminds us lately. Comparative studies might be useful to cope with some of the involved questions, like the following:

- The problem of illegally obtained evidence in civil cases, where there is a struggle between the importation of the –criminal– strict exclusionary rule/fruit of the poisonous tree doctrine and the preference for more flexible solutions, involving a balance of all present interests. Would a common rule be desirable on both sides of the fence –and, if so, strongly exclusionary or more flexible?[20] Or, on the contrary, are the different rules on the burden of proof in civil and criminal matters an unsurmountable obstacle to deal with this issue in a uniform manner?[21]
- There are many empirical studies on witnesses' reliability, on memory, etc., which have displayed their main utility in the field of criminal proceedings, but that could also be valid for any evidentiary purpose, including civil cases. In fact, the admissibility of affidavits and written testimony which are more flexible in the civil proceedings of some ju-

---

20 Let us think, for instance, of a letter addressed to an ex-spouse sent by the bank to the old family domicile, where the other ex-spouse now lives and unduly opens the letter; let us think, further, that the bank information concerns an extraordinary income of money, which could serve as evidentiary basis for a civil claim to increase the amount of alimony granted to the children, but also for a criminal prosecution for money laundering. Should we really apply different standards?

21 See the suggesting contribution, from an Italian law perspective, of D. Dalfino, "Illegally Obtained Evidence and the Myth of Judicial Truth in the Italian System", in I. Díez-Picazo Giménez, J. Vegas Torres (eds.), *Derecho, Justicia, Universidad. Liber amicorum de Andrés de la Oliva Santos* (Ed. Universitaria Ramón Areces, Madrid, 2016) I, 897-913.

risdictions, tends to be banned from criminal ones. Is this a reasonable and justified division or should the practice change?

- What should be the case for privileges? Should the heads of privilege be the same in civil as in criminal procedural settings? Comparing legal provisions and practice in civil and criminal cases, and also in different jurisdictions, could lead to very interesting results as to the different techniques to define what should be confidential and what not, and as to the different ways to achieve this goal. The recent EU Directive on protection of commercial trade[22] is a very good proof of the raising importance of this topic.

Another area where comparative research between civil and criminal spheres could be pertinent is mediation, which has become the rising star of alternative dispute resolution. In the European Union, the 2008 Directive on Mediation dealt with civil and commercial cases;[23] at the same time, in the "parallel world" of criminal procedure, the 2001 Framework Decision[24] and the subsequent 2012 Directive on victims' rights[25] foster mediation as a tool of the so-called restorative justice, which could under certain conditions replace the development of a classical criminal procedure. Are we talking about the same thing when we address "mediation" in civil cases and "mediation" in criminal cases?[26] Are the same skills needed to be a mediator in both fields? It would be interesting to carry out some comparative research in this field, especially when the fear exists that national legislators in the European Union, under the pressure to im-

22 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ L 157, 15.6.2016, p. 1–18).

23 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136, 24.5.2008, p. 3-8).

24 Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ L 82, 22.3.2001, p. 1-4) [see recital 7 and Article 10].

25 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [see recital 46 and Articles 4.1(j) and 12].

26 The Council of Europe addresses now both issues separately: on the one hand, Recommendation No. R (99) 19 concerning mediation in penal matters (adopted on 15 September 1999); on the other, Recommendation (2002)10 on mediation in civil matters (adopted on 18 September 2002).

plement the provisions on mediation of the 2012 Directive on victim's rights, could fall into the temptation of simply expanding –maybe with a few amendments– the existing rules on civil mediation to the field of criminal prosecution.

(III) The Aims and Purposes of Applying Comparative Methodology in Procedural Law

Comparing legal systems is not an aim in itself, but rather a tool –a methodological tool– to achieve some goals. Scholarship on comparative law has attempted to define them, in connected but also different manners. David and Jauffret-Spinosi, for instance, highlight the importance of comparative law to build a good general theory of law, to know one's own legal system better, to improve one's own legal system, to better comprehend the international dimension of law, both from a public and a private perspective and, finally, to better harmonize legal systems.[27] Zweigert and Kötz, on their side, include some variations. According to them, the functions and aims of comparative law, apart from enlarging knowledge, cover four objectives: to serve as an aid for the legislator; to help when interpreting legal rules, especially those arising from uniform laws; to improve legal education; and to be a starting point for legal unification (especially in regional homogeneous contexts, like the European Union).[28] More recently, Varano and Barsotti indicate how comparison, and comparativists, seek relevant functions, like knowledge, the universality of legal science, understanding, communication, legal policy, interpretation of national law, globalization and harmonization of law.[29] Last, but not least, Basedow has brilliantly illustrated how comparative law has many possible "customers" (such as academics, legal professionals, national lawmakers, unification agencies): depending on the customer, the purpose, the approach and the methodology itself may differ, since those "clients" are the ones defining the objectives that the comparative research should serve.[30]

---

27 David/Jauffret-Spinosi, *supra* n. 3, at 3-8.
28 Zweigert/Kötz, *supra* n. 3, at 15-31.
29 Varano/Barsotti, *supra* n. 3, at 10-29.
30 J. Basedow, "Comparative Law and its Clients", 62 *American Journal of Comparative Law* 821 (2014).

In the limited context of these pages the focus will be on three of them: the improvement of national legislation, the harmonization of legislation and the action in a globalized world.

(a) Comparing to Improve National Legislation

One will not reinvent the wheel by saying that for a long time comparative approaches to procedural law were quickly neglected –or, at least, they were not given real practical utility– due to the strong liaison of proceedings to the legal culture of each nation: comparative approaches –it was argued– do not have much interest in the end, because it is impossible to "transplant" foreign procedural institutions;[31] it must be assumed, of course, that according to this restrictive view "transplants" were indeed the only possible useful outcome of comparative studies.

Scholarship –especially after Mauro Cappelletti– and law-making experience show that this vision was completely wrong and that comparative research can be a good basis when facing the endeavour to improve national legislation[32] –either considering a foreign solution as a model or as a contrast or a means for gaining perspective.[33] And, also, it is not just a question of "transplants" as a whole, but of identifying pieces and ideas that could help improve national legislations in a more diffuse way, taking always into account the legal culture.[34] In fact, really big procedural

---

31 On the notion of "legal transplant" see, of course, A. Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, Edinburgh, 1974). On the evolution of this notion, see E. Grande, "Legal Transplants and the Inoculation Effect: How American Criminal Procedure Has Affected Continental Europe", 64 *The American Journal of Comparative Law* 583, 585-586 (2016).

32 On the relevance of comparative studies from the perspective of the reforms, see A. Dondi, "L'esperienza di un comparatista processuale", in V. Bertorello (ed.), *Io comparo, tu compari, egli compara: che cosa, come, perché?* (Giuffré, Milan, 2003) 89-94, at 91.

33 This two-sided focus is emphasized by Schlesinger et al., *supra* n. 3, at 6-21 and 26-29.

34 As clearly expressed by Peter Gottwald: "[…] comparative law may help to develop new ideas for your own national law, but [that] even excellent ideas are not adopted if they are not in line with national legal culture, with respect to the ideas of the majority of judges, lawyers and so on of a particular country" (in his comment to Rolf Stürner's work on the parties' duty to disclose information in civil proceedings)", in L. Cadiet, B. Hess, M. Requejo Isidro (eds.), *Procedural Science*

changes have been achieved within many countries, and those changes, in turn, have entailed effects on legal –including procedural– culture whose acceptance and feasibility were not easy to predict. Although it is not at all the rule, sometimes experience shows that the attachment of societies to legal culture and tradition –or, at least, to some aspects thereof– is not as strong as affirmed. Anyway, it goes without saying that "context" and "culture" are basic parameters to accurate legal comparative research; and this, in turn, renders the task complicated, due to the intrinsic difficulties of identifying the very notion of legal culture and, more precisely, of procedural legal culture.[35]

The hallmark of comparative research and of the influence of foreign legislation can be traced in many recent procedural reforms. This, of course, requires a certain starting point: it is necessary to feel not only the need to improve the current status of the justice system, but also to adopt the open mind approach to look outside in search of solutions. And "looking outside" might include –as previously mentioned– not just analysing other legal systems, but, for some purposes, also ADR schemes and criminal proceedings.

Posner and Sunstein hypothesize that "young states are more likely to rely on foreign law than old states are",[36] and also that as states build up their own jurisprudences [or their own legal systems] there is a reduced need for comparative analysis.[37] Apart from "young states", the need for comparison is also felt strongly in jurisdictions where there is an awareness that the legal or practical situation is not satisfactory. And comparison becomes also a trend, in general terms, when states are facing global legal changes or codification phenomena.

Spain is a good example of a country that has never been on the very "top of the ranking" (nor at the bottom) and where very big efforts have been carried out in the last decades to improve the performance of civil and criminal justice. The reform of the Spanish civil procedure was

---

at the Crossroads of Different Generations (Nomos, Baden-Baden, 2015) 379-383, at 379.

35 See the classic work of O.G. Chase, *Law, Culture, and Ritual: Disputing Systems in Cross-cultural Context* (NYU Press, 2005); more recently, the impressive work of P. Mankowski, *Rechtskultur* (Mohr Siebeck, Tübingen, 2016) –see, for instance, the issue of the more or less active role of judges in proceedings at 320 et seq.

36 E. A. Posner and C. R. Sunstein, "The Law of Other States", 59 *Stanford Law Review* 131, 173 (2006).

37 Posner/Sunstein, *supra* n. 36, at 174.

achieved in 2000 and comparative experiences where taken into account at several points: this is the case of the order for payment, that did not exist previously and that has very quickly absorbed half of civil litigation; comparative research was done, in particular, to opt between the German model (non-documentary) and the Roman version (based on documents showing *prima facie* the existence of the debt), to finally choose the latter. There was also a serious attempt to introduce in the new Code something very similar to the *ordonnance de référé*, "*à la française"*, although unsuccessfully: it was argued that such an institution would have been too strange to function within the Spanish legal system. The reform of criminal proceedings is still pending, and comparative research has been the background of the opposing proposals as to the crucial point of keeping the figure of the examining magistrate (the Spanish version of the classical institution of the *juge d'instruction*) or of attributing the direction of the investigation phase to the public prosecutors.

The same comparative way to improve and to change, to an even greater extent, can be traced in most procedural reforms –both civil and criminal– that have been carried out or that are still ongoing in Central and South America. The struggle between importing categories belonging to the common law tradition and keeping loyal or remaining faithful to the historical legal tradition has been strong. In the field of criminal proceedings the leitmotiv of most reforms (one might think now, as clear examples, of Argentina, Chile, Mexico, Peru and Nicaragua) has been linked with transition to democracy and with compliance with human rights defence requirements set out in the Inter-American Convention of San José. Thus, the discourse has always been moving from the old inquisitorial systems (allegedly inherited from the old continental –namely Spanish– schemes) to adversarial proceedings: in this context, the notions of "orality" and of "oral proceedings" have been the flags under which the US model has prevailed, although adequately tailored –thanks, especially, to the work of the Iberoamerican Institute of Procedural Law and its 1989 Model Code of Criminal Procedure for Iberoamerica.[38]

38 The text of which can be found at the official webpage of the Institute http://iibdp.org/images/C%C3%B3digos%20Modelo/IIDP_C%C3%B3digo_Procesal_Penal_Modelo_Iberoam%C3%A9rica.pdf

Some jurisdictions might not feel the need to improve their national legislation by means of comparison.[39] In fact, in some countries a negative approach to comparative research prevails, which is independent from any assessment of the degree of satisfaction experienced with the functioning of their system. It would be probably unfair to put such a simple label to the United States; nevertheless, the so-called "American exceptionalism"[40] and the consequences of "originalism"[41] are clear symptoms of reluctance towards a comparative approach.[42]

There are also countries, like Germany, Switzerland or the Scandinavian, whose civil justice systems, according to most studies[43] and rankings and to common general perception, are to be counted amongst the very best performing ones:[44] they enjoy reasonable duration of proceedings, adequate numbers of judges and court officers, sufficient resources, good quality of judicial decisions. Of course, also those "wonderlands" need, from time to time, to reform legislation, in order to adapt to new necessities and social, legal and economic challenges. One might wonder, at least from the position of countries with a lower level of performance, what could comparative law provide to those "top" systems: and it is not a mat-

39 This reluctance can also be traced at a different level: how open or closed are judges to have recourse to comparative law and foreign experience when they face new or difficult issues: see Varano/Barsotti, *supra* n. 3, at 19-21.

40 See O.G. Chase, "American 'exceptionalism' and comparative procedure", 50 *American Journal of Comparative Law* 277 (2002-2) . Also S. Dodson, "The Challenge of Comparative Civil Procedure", 60 *Alabama Law Review* 133, 134, 140-142 (2008-1).

41 "On one understanding of originalism, for example, the practices of other nations are generally irrelevant, because the interpretive goal is to recover the original understanding of the relevant provision, and on the original understanding, the constitutional issue must be resolved without reference to those practices" (Posner/Sunstein, *supra* n. 36, at 150).

42 See also Varano/Barsotti, *supra* n. 3, at 21-23.

43 See the classical essay of J.H. Langbein, "The German Advantage in Civil Procedure", 52 *University of Chicago Law Review* 823 (1985-4).

44 See, for instance, the reports of the European Commission for the Efficiency of Justice (CEPEJ), within the Council of Europe (last edition of 2016, with the data of 2014, at http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp) or the 2016 EU Justice Scoreboard, sponsored by the European Commission (http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf).

ter of inferiority or superiority complex,[45] but of mere pragmatism. But, in fact, comparative studies are still the basis of the research underpinning many proposals for reform.[46] Why? Probably, because comparing is always a clever thing to do and "top" systems are "clever", in the sense that they never underestimate the possibility of learning good practices and good solutions from the experience of apparently "lower performing" systems. In fact, sometimes and in some fields certain jurisdictions are more *creative* or more *audacious* than others. Even if some ideas and/or regulations do not function properly in the system that has introduced and/or enacted them, they might be useful elsewhere, precisely because the peripheral conditions required for those ideas to be successful are met in the *borrower* jurisdiction, but were not present in the original one.[47]

The field of e-Justice is also a context in which many systems compete on an equal footing and where lessons can be learned and interesting ideas may be gathered from unexpected jurisdictions,[48] that have dared to establish efficient platforms for electronic communication and/or, for instance, the possibility of performing first service of the claim via electronic means, combined with the duty of legal persons of having a valid e-mail address available for such "official" purposes.

---

45 Obviously, measuring effectiveness and efficiency of legal systems is in itself a very controversial task, as clearly explained by N. Garoupa and C. Gómez Ligüerre, "The Syndrome of the Efficiency of the Common Law", 29 *Boston University International Law Journal* 287 (2011) (debunking the methodology of studies according to which common law based legal systems are economically more efficient than those based on French civil law).

46 See Basedow, *supra* n. 30, at. 844-846. As good proof, see the impressive study carried out by Profs. Micklitz and Stadler on collective redress on behalf of the German Federal Ministry for Consumer Protection in 2005: H.W. Micklitz, A. Stadler, *Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft* (Landwirtschaftsverlag, Münster, 2005).

47 Posner and Sunstein use a very clear phrase: "(…) relying on foreign legal materials is not meant to express approval of all aspects of the foreign country. Rather, it is simply a way of taking advantage of unexploited mines of information" (Posner/Sunstein, *supra* n. 36, at 159).

48 See M. Kengyel, Z. Nemessányi (eds.), *Electronic Technology and Civil Procedure. New Paths to Justice from Around the World* (Springer, Dordrecht-Heidelberg-New York-London, 2012).

(b) Comparing to Harmonize Legislation

The comparative method is a necessary element of any task of legal harmonization or approximation of legislation, in any legal field. Harmonization and/or approximation can be performed in different ways: hard law tools, like European Directives and Regulations, could appear as opposed to soft law tools, like Recommendations, used by the EU itself or the Council of Europe, and Model Laws. But, even within the EU experience of hard law harmonization, we are well aware that acceptance thereof is largely conditioned by the fact that the proposed regulation reflects some sort of consensus, and this can only be detected and analysed on the basis of previous comparative research.

The harmonization of procedural law is no longer a myth. The approval of the Federal Rules of Civil Procedure in the United States provides an excellent example of this, although at the peculiar level of a (complex) national playground. At an international level the way was opened in the field of arbitration by the 1985 UNCITRAL Model Law on International Commercial Arbitration, currently followed in 73 states.[49] The 2002 UNCITRAL Model Law on International Commercial Conciliation has been thus far a little less successful, with only 16 followers.[50]

But, in many ways, harmonizing arbitration and conciliation may be a much easier task than harmonizing the rules governing court proceedings: again, the argument of legal tradition and culture has been raised as an obstacle. In Europe it can be affirmed that the turning point was the presentation in the early 1990's of the so-called "Storme Project" on the approximation of judiciary law in the European Union, including the skeleton of a possible directive harmonizing crucial elements of civil procedural rules in order to facilitate legal understanding among jurisdictions and to foster the internal circulation of judicial decisions. This project was backed on thor-

49 According to the information provided by the institution itself at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (Last visited 23 December 2016).

50 Again, according to http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html (Last visited 23 December 2016).