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Comparative Law and its Clients

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Abstract

Comparative law is one method of legal research as an alternative to, or alongside, others. Its significance for the finding and evolution of the law has not always been undisputed (Part 1). In the present era of globalization it is, however, beyond doubt that the legal system of a country has to take into account the legal developments in other states. While the need for comparative legal research can therefore hardly be questioned any longer, such research may pursue very different objectives. They emerge from a closer look at the development of comparative law as an academic discipline (Part 2). The subsequent elaboration of different purposes of comparative investigations (Part 3) will finally take us to some reflections on what may be called the various "customers" of comparative law who determine these purposes (Parts 4-8). The message of this paper is twofold: First, we should accept that research in comparative law, like research in other fields, is conducted with a view to certain expectations from outside the discipline, and the results of this research serve objectives defined by those "clients" of comparative law. And second, let us realize the great variety of such objectives which determine the style and method of comparative law investigations. In fact, the embeddedness of comparative law enquiries in certain sectors of practice makes usefulness the primary yardstick for the evaluation of the methods applied.

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Comparative Law and its Clients*

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Comparative law is one method of legal research as an alternative to, or alongside, others. Its significance for the finding and evolution of the law has not always been undisputed, as will be explained below, infra 1. In the present era of globalization it is, however, beyond doubt that the legal system of a country has to take into account the legal developments in other states. While the need for comparative legal research can therefore hardly be questioned any longer, such research may pursue very different objectives. They emerge from a closer look at the development of comparative law as an academic discipline, infra 2. The subsequent elaboration of different purposes of comparative investigations, infra 3, will finally take us to some reflections on what may be called the various "customers" of comparative law who determine these purposes, infra 4 et seq.

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The message of this paper is twofold: First, we should distinguish foreign law studies designed to accentuate the peculiarity and uniqueness of specific legal systems from comparative law investigations proper which rather focus on the comparison of rules of law originating in two or more legal systems. And second, with regard to the latter, let us realize their embeddedness in certain sectors of practice, which makes usefulness the primary yardstick for their evaluation.

1. Comparative Law Competing with other Methods

a) The promised land of other methods. – When I worked as a law clerk at the District Court of Hamburg/Germany many years ago, a discussion in chambers about a pending case led to an unexpected debate about comparative law. Confronted with a novel issue arising from the case, the two judges present and myself argued about the proper approach for finding a solution. When I referred to a foreign court decision dealing with the matter, one of the judges questioned the use of comparative law. He doubted whether it was admissible, for a decision to be taken under German law, to infer consequences from foreign experience. In his view, the German court had to base its judgments exclusively upon values endorsed by German laws, regulations and principles. He considered this to follow from the need for a democratic legitimation of jurisprudence.

In more recent years, I attended a conference on the international sale of goods organized by the New York University School of Law at Fiesole/Italy. Most of the American speakers turned out to adhere to the economic analysis of law; their papers did not refer to any specific national sales law, but discussed the economic pros and cons of hypothetical solutions for hypothetical cases. Quite to the contrary, the European attendees struggled with various national rules of sales law and the conflicts they may bring about in cross-border cases. In the discussion following my own presentation, one of the American professors asked: “What can we learn from comparative law that we do not already know from economic theory?”

Both episodes give evidence of a fundamental criticism of comparative law advanced by scholars adhering to other legal methods. The criticism is voiced from divergent standpoints which appear, however, to have one thing in common: Both critics were rooted in closed, albeit different, systems of argumentation. The first was built on the assumption of a closed legal system relying on a priori principles and values which allow, by their conclusive character, the inferring of a solution for any new fact situation or legal issue that may arise under the sun. In continental countries, this method is usually designated as *doctrine*, *dottrina* or *Rechtsdogmatik* (legal dogmatics). It is convenient for the legal practitioner since it does not only declare time-consuming comparative law research redundant; it goes much further in prohibiting its use.

The second criticism was no less doctrinal. It was based on the notion of efficiency being the ultimate objective of law, and of profit maximization being the sole driving force of human action. In every conflict of interest and in every legal dispute, the appropriate solution could thus be inferred from an economic model reflecting as closely as possible the underlying fact situation. Once the model has been conceived the consequences follow from a correct application of mathematics, which unveils the efficient solution. Justice tends to become an equivalent of efficiency in terms of an overall maximization of wealth of all persons involved. In this world, the single steps of the analysis are basically independent from any empirical knowledge of domestic or foreign law. At best, a legal rule that is in line with the economic analysis can be said to be efficient. If the law turns out to deviate from the benchmark of efficiency – too bad for the law. The deviation will not give rise to further inquiries investigating, for example, the historical roots of the rule, competing values or political reasons for its adoption.

b) The imponderabilities of comparative law. – Compared with the closed doctrinal systems of legal dogmatics or economic analysis and their mono-dimensional methodology, comparative law provides much less certainty in its intellectual operations and conclusions. Which laws are suitable for comparison? How do we know the content of a foreign law with a sufficient degree of certainty? Has the knowledge of domestic law acquired by a foreign observer the same significance as the analysis, by a domestic lawyer, of this law? Is it possible to separate the foreign law from the framework of the foreign economy, society, political system and culture without losing sight of factors important for its understanding? What is the benchmark for the comparison, the *tertium comparationis*? What is the relative weight of arguments derived from comparison in relation to other types of argument? The difficulties start as soon as we tackle any specific subject and try to design comparative research. A broad discussion has tackled the questions above in recent years. Many contributions are of an epistemological nature or deal with other philosophical aspects of comparative law; some question the possibility of a comparison of laws altogether.[1] This debate will not be pursued here. It gives

[1] The authors who contributed to that debate include *Esin Örücü*, The Enigma of Comparative Law, Leiden 2004; *Peter De Cruz*, Comparative Law in a Changing World, 3rd ed. London 2007; *Mark van Hoecke*, Deep Level Comparative Law, in *id.*, ed., Epistemology and Methodology of Comparative Law, Oxford 2004, p. 165 – 196; see also *Legrand*, below, fn. 43; *Franz Werro*, Comparative Studies in Private Law – A European Point of View, in *Mauro Bussani/Ugo Mattei*, eds., The Cambridge Companion of Comparative Law, Cambridge 2012, p. 117 – 144 at 135 et seq. A very clear survey of the various arguments advanced in this debate is given by *Ralf Michaels*, The Functional Method of Comparative Law, in: *Mathias Reimann/Reinhard Zimmermann*, eds., The Oxford Handbook of Comparative Law, Oxford 2006, p. 339 – 382, who acknowledges much of the criticism voiced by others but ultimately refers to teleology as a driving force of legal development that may outweigh the epistemological objections to functional comparative law; quite to the contrary, the functional approach is defended by *Sarah Piek*, Die Kritik an der funktionalen Rechtsvergleichung, Zeitschrift für Europäisches Privatrecht

evidence of a growing alienation of the theory from the practice of comparative law since the arguments voiced in that discussion, if taken seriously, would bring to an end the practical use of comparative law which is however a must and a common occurrence in a number of fields.

A telling example for that practical need is provided by the mandate given to the German Deregulation Commission appointed by the Federal Government in 1988. It stipulated *inter alia* that the Commission "should take into consideration experience with deregulation in foreign countries and adapt it to the circumstances of the Federal Republic".[2] The language of that mandate is very familiar to comparative scholars, and it gives evidence of the openness of the comparative discourse: "To take into consideration" is much more ambiguous than drawing conclusions, and "to adapt to domestic circumstances" does not really tell whether and to what extent foreign rules are to be considered as a model. In fact, this instruction is far from unequivocal and leaves much discretion to the comparatist. It highlights both the expectations of the clients of comparative law and the difficulties that are common in making use of this method.

Yet, that mandate encompasses a reflection of the contribution which comparative law could make to the process of policy-making and to the evolution of the law in the modern world. That process is far from being straightforward or streamlined and has to be open to innumerable arguments of a diverse nature concerning what is and what should be. The imponderability of comparative investigations may discourage one from engaging in such enquiries. Why should legal scholars endeavour in time-consuming investigations into foreign law if they are later reprimanded for their lack of "methodological awareness"? They might rather feel tempted to take refuge in methods which promise straight lines of compelling arguments, such as economic analysis or legal dogmatics. While such methods may be intellectually appealing and, moreover, save time, they are of limited help in understanding an increasingly complex world and the intertwined courses of law-making under modern conditions.

c) The impact of globalization. – The present world is increasingly characterized by what is generally referred to as globalization: the interconnectedness of markets, societies, cultures and political systems.[3] It is the growing permeability of frontiers, the openness

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(ZEuP) 2013, 60 – 87. Both contributions feature many further references to the international debate.

2 See *Deregulierungskommission – Unabhängige Expertenkommission zum Abbau marktwidriger Regulierungen*, Marktöffnung und Wettbewerb, Stuttgart 1991, p. V. The passage cited above is taken from an – unpublished – English translation prepared by the German Federal Ministry of Economic Affairs that is on file with the author.

3 For this and similar characterizations of globalization see *John Baylis* and *Steve Smith*, eds., The Globalization of World Politics, Oxford 1997, p. 7, 15.

of national economies and societies, that has a deep impact on the evolution of the law. That evolution can no longer be understood as exclusively originating in the domestic political debate of a single country. Rather, it is to a large extent also influenced by developments occurring elsewhere and provoking reactions at home. What affects our national legal debate, frequently, is the positive existence of certain rules in other countries irrespective of whether we approve of them or not. Just like other ideas and cultural emanations, legal concepts and principles flow across borders and impact on policy discussions and the legal debate abroad.

Take the example noted above of the deregulation movement. It started in the USA in the 1970s; later on, it first spread to the United Kingdom, subsequently to further parts of Europe and to other English-speaking countries, then to Latin America and Asia. It may be endorsed or criticised; but nobody can seriously doubt the worldwide dissemination of legal reform meant to liberalize regulated markets. The mandate of the German Deregulation Commission cited above gives clear evidence of the cross-border flow of the pertinent ideas and of the resulting political interest in comparative investigations. What is often denounced as a wave of neo-liberalism that has flooded the world has in reality ensued from a mix of economic, political and comparative legal investigations.

Another and more recent example concerns the legal status of homosexual couples. The hostility toward homosexuals that has been widespread in Western culture and law began to fade away beginning in the 1980s, first in Europe, later in the Americas. Laws relating to their emancipation and, more recently, their equal treatment were first adopted in Scandinavian countries and were soon considered as model legislation in other parts of Europe and elsewhere.[4] It is currently discussed whether marriage – and not just a peculiar "registered partnership" – should be open to homosexual couples as it is in some European countries such as Sweden, Spain or the Netherlands. The debate has been carried to other states across the globe and recently led to spectacular protests in France and startling rulings of both the US Supreme Court[5] and the German Constitutional Court.[6] These events give evidence of a broad use of comparative law by legislators, courts of law and, last but not least, even by the population at large through the internet.

It is obvious that the cross-border flow of legal concepts and principles can no longer be stopped at national frontiers. Where such cross-border flow is hindered a permanent arbitrage is bound to take place in terms of migration and capital flows. In this perspective comparative law is the academic discipline that channels the inevitable cross-

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4 See *Jürgen Basedow, Klaus Hopt, Hein Kötz and Peter Dopffel*, eds., Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften, Tübingen 2000, with several national reports.

5 *Hollingsworth v. Perry*, nyr in U.S., judgment of 26 June 2013, no. 12-144.

6 Bundesverfassungsgericht 7 May 2013, 2 BvR 906/06, nyr in BverfGE, Neue Juristische Wochenschrift (NJW) 2013, 2257.

border flow of legal ideas. We shall now take a closer look at the gradual development of this discipline.

2. The Development of Comparative Law as an Academic Discipline

a) From Roman law to codification and reception. – Comparative law is a fairly young discipline, both in Europe where it emerged and in other parts of the world. It is true that laws of local and regional purview always differed in Europe. But those fragmentary rules did not arouse much scholarly interest.[7] Over centuries scholars dealt only with what at the time was considered the "true law", which was Roman law or Canon law, both of a comprehensive coverage and both being sanctified by history and the legitimacy of Emperor and Pope. Roman law, as well, was not construed and applied in a uniform way, but it was considered a single body of law, and the regional divergences were not made the object of academic investigations before the second half of the 19th century.[8] That occurred at a time when the idea of an integral polity called Europe had already succumbed to the rise of the nation-state and when, in the field of law, the decomposition of Europe had become apparent through progressive codification across several countries. The codes were designed to provide comprehensive coverage of a given area of the law, thereby replacing Roman law in its residual function for the legal system. It is unsurprising that these codes would attract scholarly interest, this having gradually surfaced at the same time.[9]

At the time codification was considered as an indispensable tool for the rationalization of commercial intercourse and for the modernization of society.[10] It was closely linked to

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7 See *Charles Donahue*, Comparative Law before the Code Napoléon, in *Mathias Reimann/Reinhard Zimmermann*, ed., The Oxford Handbook of Comparative Law, Oxford 2006, p. 3 – 32; while the author points out that lawyers in previous centuries were aware of legal differences, there is no evidence of any kind of systematic comparative research.

8 *Ludwig Mitteis*, an Austrian-German professor of Roman law born in 1859 is considered as the first scholar who focused his research on a comparison of the Roman law as practiced in the eastern part of the Roman empire, see *Reinhard Zimmermann,* "In der Schule von Ludwig Mitteis" – Ernst Rabels rechtshistorische Ursprünge, RabelsZ 65 (2001) 1 – 38 (13 ff.).

9 According to Jayme, the Italian professor Emerico Amari can be identified as one of the founders of the discipline; Amari published his "Critica di una scienza delle legislazioni comparate" in Genoa in 1857. See *Erik Jayme*, Emerico Amari (1810 – 1870) und die Begründung der Rechtsvergleichung als Wissenschaft, in *id.,* Rechtsvergleichung – Ideengeschichte und Grundlagen. Von Emerico Amari zur Postmoderne, Heidelberg 2000, p. 3 – 19. The first specialized comparative law journals were the Revue de droit international et de législation comparée, published since 1869 in France, and the Zeitschrift für vergleichende Rechtswissenschaft, published since 1878 in Germany.

10 See *Reinhard Zimmermann*, Codification: The Civilian Experience Reconsidered on the Eve of a

the existence, in a given country, of a machinery of dispute resolution, the judiciary, operating in a transparent way, independently and separate from other institutions such as religion or politics. Outside Europe both codification and institutional separation, often designated as the "rule of law", were put into effect only gradually. However, in the Eurocentric climate prevailing before World War I, scholars, magistrates and politicians across the globe felt inspired by the model of European countries such as France and Austria.

While the time was not yet ripe for a true comparison of laws, a stark receptionist movement took hold around the world. It has to be distinguished from the "creeping" reception of Roman law in medieval Germany. Now, in the 19th century, the deliberate transplant of legal institutions originating in foreign legal systems became fashionable. In Latin America, the writings by *Andrés Bello* from Chile[11] and the proposals made by the Brazilian jurist *Teixeira de Freitas*[12] acquainted governments with the French Civil Code in particular; many states followed that model. Similarly, in the Ottoman Empire the *Mejelle* of 1877 was heavily influenced by European codifications, although it simultaneously attempted to compile parts of Shari'a-based Islamic law.[13] After World War I and the *Kemalist* revolution in Turkey, the *Mejelle* was replaced by a laic civil code in 1927 which followed the Swiss codification.[14] Later on, the Arab successor states of the Empire more or less copied the Egyptian civil code of 1947 which had been drafted by the jurist *El-Sanhuri* and was heavily influenced by the French Civil Code.[15] In East Asia political pressure exerted by the USA and European powers aimed at achieving greater legal certainty in matters of business law. Japan took the lead and started to work on a codification after the *Meiji* restoration of 1868. *Minpó,* the Civil Code of 1896/98, combines French and German influences.[16] It inspired the law in Korea and in the

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Common European Sales Law, European Review of Private Law 2012, 367 – 399; *Jürgen Basedow*, Conclusions: Du Code Napoléon à la codification européenne – 200 ans de codification à la lumière de ses fonctions, in: *Jean-Philippe Dunand/Bénédict Winiger*, eds., Le Code civil français dans le droit européen, Bruxelles 2005, p. 303 – 328 (311 ff.).

11 See Andrés Bello y el Derecho Latinoamericano, Congreso Internacional, Roma 10/12 diciembre 1981, Caracas 1987.

12 See *Sandro Schipani*, ed., Augusto Teixeira de Freitas e il diritto latinoamericano, Padova 1988.

13 See *Nadjma Yassari*, Islamic Countries, Influence of European Private Law, in: *Jürgen Basedow/Klaus Hopt/Reinhard Zimmermann,* eds., Max Planck Encyclopedia of European Private Law, vol. 2, Oxford 2012, p. 1000 – 1004.

14 *Yeşim Atamer*, Turkish Civil Code and the Turkish Code of Obligations, in *Basedow/Hopt/ Zimmermann*, previous fn., p. 1701 – 1705.

15 *Yassari*, above at fn. 14.

16 *Harald Baum,* Japanese Law, Influence of European Private Law, in: *Basedow/Hopt/ Zimmermann*, above at fn. 14, p. 1010 – 1014.

Republic of China, where a Civil Code that is still in force in Taiwan took effect in 1931.[17]

b) Stages of comparative research. – Thus, it was not before the end of the 19th century that the subject matter of comparative law, namely the existence of clearly divergent comprehensive laws in the various states, could be ascertained. That co-existence became a new paradigm of legal scholarship, but some time went by before scholars became aware of it. It is therefore unsurprising that the first comparative law congress ever did not take place earlier than in the year 1900 as a side-event of the Paris World Exposition. While this congress was not the first occasion for lawyers to address foreign law, it heralded the emergence of the new academic discipline of comparative law. Its development gives evidence of several stages.

(1) At a first stage comparative legal research was considered as a kind of substitute for Roman law, or the *ius commune*, which through the codification movement had lost its role as a common anchor of the various legal systems. *Édouard Lambert*, one of the early classicists of the discipline, described the object of his research as the extraction, from the main legislation and case-law governing analogous civilizations, of a general background of concepts and legal principles, a *"droit commun législatif"*.[18] In the subsequent development a similar objective, one aiming at the elaboration of the "common core" of legal systems,[19] was pursued by *Rudolf Schlesinger*, founder of the Cornell School, and, more recently, by the Common Core Project on European private law.[20] This approach, while not equivalent to an aspiration towards uniform law, was a necessary first step and a forerunner of the latter.

(2) A simultaneous second stage of comparative enquiries was that of country-specific research and its systematization. The studies aimed at a better understanding of a specific foreign law. Under the impact of the dominant doctrine of the nation-state, the law of a country was considered as flowing from the national spirit, from the *"Volksgeist"* as the German jurist *Savigny* had put it in the early 19th century. Foreign law was perceived as a

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17 *Knut Pißler*, Chinese Law, Influence of European Private Law, in: *Basedow/Hopt/Zimmermann*, above at fn. 14, vol. 1, p. 182 – 185.

18 *Édourd Lambert*, Introduction. La fonction du droit civil comparé, vol. 1, Paris 1903, p. 1: "L'objet de mes études… sera d'extraire des principales législations ou jurisprudences régissant des civilisations analogues à la nôtre un fond général de conceptions et de maximes juridiques, un *droit commun législatif*…"

19 See *Rudolf B. Schlesinger*, The Common Core of Legal Systems, in: XXth Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema, Leyden 1961, p. 65 – 79, reprinted in *Konrad Zweigert/Hans-Jürgen Puttfarken*, eds., Rechtsvergleichung, Darmstadt 1978, p. 249 – 269.

20 For further information see the website of the Project on "The Common Core of European Private Law", now based in Torino, see *www.common-core.org*.

part of the foreign nation's culture. Understanding the foreign law would thus help to understand the culture of the foreign nation. As the laws of more and more countries became known scholars started to establish, at first mainly for didactical purposes, groups of jurisdictions, sometimes called "legal families", which could be said to share the same legal tradition. Legal systems subject to influences from several sides, in particular from civil law and common law, were designated as "mixed jurisdictions."[21] As this categorization is criticised as being "controlled by mainstream Western culture," the concept of "legal systems of interflow" has been conceived by the Chinese scholar *Mi Jian* to accommodate the interaction between the traditional legal cultures of Asian countries and the Western law adopted by way of reception.[22]

Enquiries belonging to this stage are still focused on entire legal systems, not on special problem areas or their regulation by law. They are therefore sometimes referred to as macro-comparison, but they are perhaps more adequately designated as enquiries into foreign law. Comparison is not their main objective. Examples are the three-volume treatise by *Arminjon, Nolde* and *Wolff* [23] or the famous French textbook on the "Major legal systems in the world today" initially authored by *René David*.[24] These texts classify various legal systems according to their inspiration by French law, by German law, by the common law, by Islamic law, by Soviet law etc. In more recent years the categorization of laws into legal traditions has been revitalized under the designation of "epistemic communities" in view of common history, cultural background and development.[25]

(3) A third stage of comparative law research has rather focused on particular areas of the law or even on specific subjects or issues such as products liability, the formation of contracts, the adoption of children, summary proceedings, the legislative process, public-private partnerships, internet crimes or plea bargaining in criminal procedure. This approach allows an actual comparison of the solutions given by various national laws. It has been designated as micro-comparison and originated in the interwar period, receiving much support from the activities of the International Academy of Comparative Law founded in 1923.[26] Down to the present day the Academy pursues *inter alia* the objective

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21 See *Vernon Valentine Palmer,* Mixed Jurisdictions, in: Jan Smits, ed., Elgar Encyclopedia of Comparative Law, Cheltenham 2006, p. 467 – 475.

22 *MI Jian*, On the Communication of Legal Culture and the Subjective Consciousness of Culture, China Legal Science 1 (2013) p. 30 – 54 at p. 49.

23 *Pierre Arminjon/Boris Nolde/Martin Wolff*, Traité de droit comparé, vol. I – III, Paris 1950 – 1951.

24 *René David/John Brierley*, Major Legal Systems in the World Today, 3rd English ed., London 1985.

25 *H. Patrick Glenn*, Legal Traditions of the World – Sustainable Diversity in Law, 3rd ed Oxford 2007; see also *Horatia Muir Watt*, Globalization and Comparative Law, in *Reimann/ Zimmermann*, above at fn. 2, p. 579 – 607 (584 ff.).

26 On the Academy, see the information compiled on its website *www.iuscomparatum.org*.

of increasing our knowledge of the different possible solutions for such more specific problems across all areas of the law. National reports from various countries provide information which a general reporter will then merge into a comprehensive report, tracing certain international developments and elaborating what the national laws have in common or not. The most comprehensive publication of this type was the *"Rechtsvergleichendes Handwörterbuch"* published in Germany from the late 1920s onward.[27]

(4) This kind of work favours what is called the functionalist approach to comparative law that is a characteristic of the fourth stage.[28] It compares the solutions provided by different laws for a given problem in view of the social or economic function of legal rules. As a result of a functional comparison, it can often be observed that the practical solutions are similar in different legal systems, although the legal instruments and constructions differ. Where the social problem in question is, for example, the protection of workers against unfair dismissal, the solution may in one state follow from the operation of administrative law and the need – for the validation of the dismissal – to have the approval of an agency (e.g. in the Netherlands) while it ensues from the jurisprudence of civil or labour law courts in another (e.g. in Germany).

It was in particular *Ernst Rabel*, the founding director of what is now the Max Planck Institute for Comparative and International Private Law in Hamburg, who intensified theoretical reflexions on the functionalist approach in the 1920s and the 1930s.[29] It is this approach which makes comparative law useful for various sectors of legal practice. *Rabel* himself highlighted this usefulness on the basis of his practical experience. He served on the Permanent Court of International Justice and on mixed arbitration panels established by the peace treaties after World War I, i.e. on judicial bodies instructed to apply rules of public international law which however often could not be ascertained. In these offices he understood the role comparative law may play in the finding of general principles which are needed to fill the gaps of international law.[30] He also demonstrated the usefulness of

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27 *Franz Schlegelberger et al.,* eds., Rechtsvergleichendes Handwörterbuch, vol. 1 – 7, Berlin 1929 – 1940; the encyclopedia remained unfinished, the last entry being "Vermächtnis".

28 The functionalist approach is widely shared today and even considered as equivalent to comparative law as such; its most influential description can be found in *Konrad Zweigert/Hein Kötz*, Introduction of Comparative Law, 3rd revised English ed., translated by *Tony Weir*, Oxford 1998, p. 34 et seq. For the criticism voiced against the functionalist approach see above at fn. 2.

29 *Ernst Rabel,* Aufgabe und Notwendigkeit der Rechtsvergleichung, in: *Hans G. Leser*, ed., Ernst Rabel – Gesammelte Aufsätze, vol. III, Tübingen 1967, p. 1 – 21 (first published in 1924) at p. 4: "From these sources we have to capture the life, the functions of legal ordering. Because law is ... a cultural phenomenon, it cannot be understood independently from its causes and its effects." (Author's translation).

30 *Ernst Rabel*, Rechtsvergleichung und internationale Rechtsprechung, in *Hans G. Leser*, ed., Ernst Rabel – Gesammelte Aufsätze, vol. II, Tübingen 1965, p. 1 – 49 (first published in 1927).

functionalist comparative research for the unification of laws. His Institute's research on comparative sales law[31] connected with the simultaneous efforts of UNIDROIT in Rome to unify the law of sales. These efforts ultimately led to the 1980 Vienna Convention on the International Sale of Goods which is now in force for about 80 countries worldwide.[32]

(5) While *Rabel* considered comparatists in this respect as servants of legal unification, it is characteristic of his approach that he limited himself to analytical conclusions, leaving normative suggestions to policymakers.[33] This changed from the 1960s onward at the fifth stage of comparative law studies. In some countries comparative law became an element or even the preceptor of national legal development. In the US conflict of laws field a strong current of opinion favoured the so-called better law approach: instead of looking for the local connections of a case with different jurisdictions in order to determine the applicable law, the courts inspired by this school of thought favoured a comparison of the various laws involved in order to determine the most modern and appropriate solution.[34] In Germany, *Konrad Zweigert*, one of *Rabel's* successors as a director of the Max Planck Institute, took the view that the selection of the best solution was the very objective of comparative law.[35] And the German government started to appreciate the contributions made by comparative enquiries to legal development; when starting a major legislative project it now often asks comparative law scholars for expert reports on the solutions provided by foreign legal systems. As a source of inspiration to legislatures around the globe, the International Encyclopedia of Comparative Law, founded by *Zweigert* and continued by *Drobnig*, is meant to outline model solutions for any given issue. The monumental work comprising 17 volumes is still unfinished.[36]

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31 *Ernst Rabel*, Das Recht des Warenkaufs, vol. 1, 2, Berlin 1936 and 1958.

32 United Nations Convention on Contracts for the International Sale of Goods, done at Vienna on 11 April 1980, 1489 UNTS 3.

33 *Rabel,* Aufgabe und Notwendigkeit, above at fn. 30, p. 3: "Valuation is not a part of comparison, but of legal critique rendered possible by it." (Author's translation).

34 The better law approach has been advocated in particular by *Robert A. Leflar*, The Law of Conflict of Laws, Indianapolis 1959, here cited after the revised edition entitled American Conflicts Law, Indianapolis 1968, p. 254 – 259; this approach has been upheld in later editions of the book. *Jayme,* above at fn. 10, p. 12, refers to statutory conflict rules such as art. 16 para. 2 of the German Introductory Law to the Civil Code, which require the court to apply, from an array of national laws, the one that is most "favourable" to a party.

35 *Zweigert/Kötz*, above at fn. 29, p. 47: "In fact the comparatist is in the best position to follow his comparative researches with a critical evaluation. If he does not, no one else will do it…" It is not quite clear whether the authors refer to the "best solution" as the single solution that fits best to all jurisdictions, or whether this superlative rather is intended to identify the solution that suits best the needs of the forum state. What matters is the authors' view that comparatists are better placed than others to draw normative conclusions from their comparative law enquiries.

36 *Konrad Zweigert and Ulrich Drobnig*, responsible eds., International Encyclopedia of Comparative Law, vol. 1 – 17, Dordrecht and Tübingen 1964 seq.

(6) Since the 1980s a sixth stage of comparative law research has become popular in Europe. Following the model of the Restatements of the law prepared by the American Law Institute, scholars from various European countries convene in expert groups to draft common principles, complemented by explanatory comments and comparative notes. The Commission on European Contract Law, chaired by the Danish professor *Ole Lando*, was the forerunner.[37] Other groups dealing with torts, insurance contract law, trust law and family law followed.[38] What is new at this sixth stage is not so much the content of the work, which highlights the service function of comparative law vis-à-vis the unification of law. New is the way of working: Comparative law research has become a collective undertaking. The proposals made by the said groups have had a considerable impact on legal development in Europe, particularly in the European Union.

The various stages of comparative law research cannot be ranked in a clear sequence. Previous and subsequent stages sometimes overlap in time, and former stages by no means become obsolete as a new stage is opened. Rather the various stages point to the divergent interests pursued by comparative law scholars and to the purposes of their investigations. They will now be discussed in greater detail.

3. Interests, Purposes and Methods of Comparative Enquiries

Comparatists are convinced that their enquiries can make significant contributions to our knowledge about foreign law and, thereby, to our knowledge of foreign cultures, foreign societies, foreign political systems and foreign economies. While this is generally accepted, the focus of interest varies considerably. Some comparatists are more interested in whole systems and traditions, others in single areas of the law or legal institutions. Some comparatists study the interaction of law, culture, politics and social or economic factors; others are more interested in single rules and their operation in legal practice. Some are looking at what is common to legal systems; others try to filter out the distinct features of a given legal order that resist any assimilation. And of course, there is a deep gap between those who conduct comparative research for the sole sake of understanding and those who pursue a given purpose, e.g. the improvement of their domestic law by case law on substance and/or procedure, the preparation of domestic or uniform legislation, or the application of foreign law in cross-border cases.

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37 *Ole Lando/Hugh Beale*, eds., Principles of European Contract Law – Parts I and II, The Hague 2000; *Ole Lando/Eric Clive/André Prüm/Reinhard Zimmermann*, eds., Principles of European Contract Law – Part III, The Hague 2003.

38 A good survey over the various activities is provided by *Wolfgang Wurmnest*, Common Core, Grundregeln, Kodifikationsentwürfe, Acquis-Grundsätze – Ansätze internationaler Wissenschaftlergruppen zur Privatrechtsvereinheitlichung in Europa, ZEuP 2003, p. 714 – 744.

The broad array of scholarly interests in comparative enquiries can be exemplified by a legal institution such as the *mahr* or *meher* of Islamic law which has been transposed in various forms into the state laws of many Islamic countries.[39] According to the Quran the *mahr* is a mandatory requirement of a marriage, an amount of money or other assets which the husband owes to his wife; while the *mahr* in itself is compulsory, the quantity, the manner and the time of payment are subject to the spouses' agreement. This institution has always fascinated comparatists from Western countries. But their interests are of great variety. The *mahr* may be studied as a symbol of the conception of the family and of the role of women in Islamic society, a conception that profoundly differs from that of the West. The research interest of such an investigation would be of a sociological and anthropological nature. From a more functional perspective, the relation between the *mahr* and the reduced succession rights of women or the lack of post-marital maintenance obligations of the husband may arouse particular interest. An enquiry of this type would look at the overall financial balance between husband and wife, sons and daughters, and men and women which may be achieved in Western and Islamic cultures in different ways, but with a similar outcome. A more focused legal approach would look at the *mahr* clauses of marriage agreements as a means of protecting women against unilateral repudiation and other abuses by their husbands. But comparative enquiries may also turn on legal issues which – in a different setting – can arise in the non-Islamic societies of Western countries as well, e.g. the conservation of the value of a deferred *mahr* against inflation or the use of a *mahr* agreement made subsequent to the celebration of marriage to the detriment of the husband's creditors. Finally, the – more practical – interest of some Western comparatists in the regulation of the *mahr* is increasingly motivated by the fact that courts in European countries have to deal with claims arising from this legal institution.

Against this backdrop it is possible to identify several schools of comparative scholarship depending on the preferences of their respective representatives. It is surprising that the scholarly debate between these schools is sometimes impregnated with mutual rejection, as if only one single of the various methods could prevail. In this author's view, the example of the *mahr* demonstrates that all the above-mentioned trends and purposes of comparative investigation are appropriate in certain contexts and are less so in others.[40]

A few examples may suffice to illustrate this proposition. The law-as-culture movement may stress the anthropological background of legal rules and institutions, in particular the

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39 The following discussion draws from *Nadjma Yassari*, Die Brautgabe im islamischen Recht, forthcoming, a comparative investigation into the implementation of the *mahr* in the legislation of various Islamic countries, in particular Egypt, Iran, Pakistan and Tunisia.

40 A "methodological pluralism" has rightly been advocated by *Martin Gebauer*, Rechtsvergleichung, in: *Hanno Kube et al.*, eds., Leitgedanken des Rechts, Paul Kirchhof zum 70. Geburtstag, Heidelberg 2013, p. 433 – 443 at p. 441.

cultural, social, economic and political framework. This is an important approach for the understanding of legal systems and rules particularly in countries where the rule of law has no firm underpinnings in the national tradition. Think of Africa: Law as an independent mechanism of dispute resolution was more or less imposed by the colonial powers in the course of the 20th century. Today, an independent legal discourse has developed in only a few countries, such as South Africa. In most sub-Saharan states the absence of published court decisions and legal literature does not even allow for a legal discourse that is independent from other social mechanisms on conflict resolution such as religious or political proceedings, which therefore by necessity have to be included in any meaningful enquiry into foreign law.[41] This is very different in Europe or North America, where the rule of law goes back to Enlightenment philosophers and has been firmly accepted over the last 200 or 300 years. As a consequence, the anthropological factors have less significance for intra-Western legal comparisons than for cross-African or universal comparison.

The second illustration relates to the so-called functional approach which uses the function of legal rules as the *tertium comparationis*, i.e. a yardstick for comparison. Critics maintain that this approach is too narrow since it does not take account of the intertwinement of legal rules with legal culture, i.e. other aspects of the social web of a community, in particular language, culture, religion, social habits etc. In light of the vagueness[42] and circularity[43] of the concept of legal culture, it is unclear what this criticism means, how it can be accommodated and what could be expected from comparisons that are immune from that criticism. But without going into the merits, it would again appear that the functional approach is appropriate in some contexts and too narrow in others. Where the legal order and the court system provide for separate mechanisms of conflict resolution, the intra-legal functional approach can often serve as a

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41 As has been done by *Rodolfo Sacco,* Le droit africain – Anthropologie et droit positif, Paris 2009 (translated by *Michel Cannarsa*); see in particular the first part of the book where the author outlines cultural characteristics as an element of the different functioning of law. In a more abstract way, Sacco has elaborated on the anthropological aspects in *Rodolfo Sacco*, Antropologia giuridica, Bologna 2007; see in particular p. 175 et seq. on the significance of a written language, of verbalization and similar cultural achievements for the rule of law. Admittedly Sacco's interest is not so much the comparison of one legal system or institution with that of another jurisdiction, but rather the understanding of the legal framework of a given culture. Similar views are espoused for Asian countries by *MI Jian*, above at fn. 23, China Legal Science 1 (2013) 39 – 40.

42 The vagueness of this concept can be inferred from the definition given by *Pierre Legrand,* Variations on the Main Theme, in: *id*., Fragments on Law-as-Culture, Deventer 1999, p. 27 – 34 at p. 27: "I understand the notion of 'culture' to mean the framework of intangibles within which an interpretive community operates, which has normative force for the community... and which, over the *longue durée*, determines the identity of a community as community."

43 The definition provided by *Legrand*, previous fn., considers the interpretive community as pre-existing its operation, but at the same time as being a result of that operation.

workable common basis of comparison; this applies to Western Europe, North America and East Asia, at least in the field of commercial law where the rationalization of legal relations has been particularly advanced.

Of course, even such research must transcend the scope of a purely legal comparison and take into account other factors such as business practices. E.g. in the sale of real property, the German land register and the US style title insurance perform the identical function of protecting a *bona fide* purchaser against a simultaneous loss of ownership and purchase price.[44] In respect of commercial contracts and corporate law, long experience shows that traders across the globe are amenable to similar incentives, even when their religion – as with *riba* in Islamic law – prohibits them from charging interest; other contractual arrangements such as accruals, discounts or premiums are allowed and functionally equivalent. Numerous other examples could be given and have been provided with regard to contracts, unjustified enrichment and torts by *Zweigert* and *Kötz*; the workability of the functional approach as demonstrated in their book is the main reason for its popularity.[45]

To sum up, any unrestricted approval or absolute rejection of a single method in comparative law must fail sooner or later. It is most important for every comparative investigation to find the approach or approaches which are best suited to the subject of the enquiry and which allow for an optimal understanding of the foreign law under scrutiny. In this sense, the methodological design of comparative research is the creative part of the scholar's task.

4. Clients of Comparative Law in Academia

What has been said until now boils down to three basic statements: First, comparative law is an empirical method that improves our knowledge about the law-related aspects of human societies and their more or less successful attempts to cope with social and economic conflicts. Second, globalization renders comparative enquiries not only necessary but inevitable: The opening of frontiers has the effect of a much broader cross-border flow of knowledge regarding foreign legal developments. Third, the specific approach (or approaches) to be used for a comparative enquiry depend(s) on its context, in particular on its geographical focus, on its subject-matter and on its purpose. The question on the future role of comparative law therefore turns into a question of the future need for comparative enquiries. Such a need and the various contexts in which it arises will determine the research design. We consequently have to ask ourselves: Who are the persons who voice this need or, casually speaking, who are the clients of comparative law and what are their expectations?

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44 *Bernd von Hoffmann*, Das Recht des Grundstückskaufs, Tübingen 1982, p. 39 et seq.

45 *Zweigert/Kötz*, above at fn. 29, Part II of the book, p. 323 et seq.

a) Scholarly demand. – There are of course expectations from many academics: ethnologists, economists and social scientists of all disciplines whose interest in law is part of their broader interest in the functioning of a given foreign economy or society, individuals who consider law as one out of several elements in the fabric of economic and social relations. It is obvious that they cannot be satisfied by the exclusive study of the black-letter law. They are compelled to include other aspects such as the framework of a given rule, enforcement practices, social mechanisms that suggest compliance or non-compliance, the litigious or non-litigious character of a society, the costs of legal enforcement as compared with other mechanisms of dispute resolution, the impact of religion, etc. Where the main interest focuses on the understanding of the societal and/or economic processes, law can only be one element of research alongside others. The holistic approach of such investigations may, however, sometimes be of a complexity that inhibits researchers from undertaking the first step. And although it is true that "more is better", the correct assessment of legal rules is an important and often initial part of their research as well.[46]

A further type of scholarly demand for comparative law is voiced by legal scholars. Where the law of their own jurisdiction is new, incomplete, intransparent or inconsistent, they will often look for inspiration from other legal systems. In pursuance of a comprehensive order and perfection of their own law, legal scholars have repeatedly borrowed ideas acknowledged in foreign legal systems, transplanting them into their own. Thus, the growing need for a full-fledged law of contract which emerged in the aftermath of the industrial revolution was satisfied in 19th century England by numerous translations and scholarly adaptations of doctrinal writings from the European continent, e.g. those of *Domat* and *Pothier;* many ideas going back to the Enlightenment thereby crept into the common law.[47] On a similar note, the establishment by the 1957 Treaty of Rome of the European Economic Community, with its primary objective being the creation of a common market in a quasi-federal setting, required the adaptation of ideas which had been developed in the United States for the effective implementation of the Interstate Commerce Clause of the US Constitution.[48] This demand for comparative law does not

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46 It is noteworthy that, despite his clear preference for legal anthropology, *Rodolfo Sacco*, in his book on African law, above at fn. 42, includes a number of national reports encompassing the positive law of the various states.

47 See the comprehensive treatment of this process by *Reinhard Zimmermann*, Der europäische Charakter des englischen Rechts, Zeitschrift für Europäisches Privatrecht (ZEuP) 1993, 4 – 51 at 43 et seq., 47.

48 See *Wulf-Henning Roth*, Freier Warenverkehr und staatliche Regelungsgewalt in einem gemeinsamen Markt – Europäische Probleme und amerikanische Erfahrungen, München 1977; more recently *Richard Buxbaum,* Is There a Place for a European Delaware in the Corporate Conflict of Laws? RabelsZ 74 (2010) 1 – 24 at 9 et seq.

relate to the social or economic embeddedness of the law, but to its consistency, completeness and adequate application.

b) Educational demand. – A different scholarly demand for comparative legal knowledge arises in law schools. Since legal education usually focuses on specific subjects such as constitutional law, contracts, torts or family relations, this demand is often of a very specific nature as well. It is the juxtaposition that helps the student understand the legal structure of his/her own national law; thus the contours of a domestic marital property regime, e.g. one of separation of assets, may become clearer when held up against the community of assets regime found in some foreign countries and the community of acquisitions in others. The divergent points of departure will then be confronted with certain issues which arise in all jurisdictions: How are the assets divided after a divorce? What is the position of the surviving spouse in the case of the other spouse's death? Are creditors protected against the fraudulent transfer of property from one spouse to the other? How is the marital property regime related to the maintenance regime? It is that kind of comparison, focusing on both rules and their functions in common social conflicts, which enables the student to pinpoint the advantages and inconveniences of his or her national law. But in academic education, time is usually scarce, and consequently such comparison is confined to the black-letter law and will hardly ever proceed to the cultural embeddedness of those rules. Misleading as it may appear, an incomplete comparison is nonetheless better than the exclusion of any information on foreign law, the latter most likely leading the student into a provincial view of the world.

5. Traditional Clients of Comparative Law in the Legal Professions

a) Practitioners' demand for black-letter law. – Comparative lawyers – just like lawyers in general – are usually action-oriented and conduct research in light of the demand for solutions to pressing problems. The most obvious example is provided by court proceedings which require the application of foreign law under the relevant conflict rules. While counsel and judges have been trained in the domestic legal system, they are nevertheless expected in such cases to find a solution under a foreign law that may use entirely different concepts and principles. Here, the application of foreign law to a specific case often turns into an exercise in comparative law. That experience is of course not limited to the courts; in the legal practice of law firms, notaries or legal departments of undertakings it is increasingly common as well.

The demand of the legal professions for information on foreign law is directed to the black-letter law as applied by the courts and authorities of its country of origin. The social and economic embeddedness of legal rules is significant in this context to the extent that it finds expression in judicial or administrative practice. But a domestic court

would not be entitled to disregard an applicable foreign rule of law unambiguously laid down in a statute for the sole reason that it is allegedly ignored by social practice in the country of origin, unless this can be proven by pertinent authority. Where such administrative or judicial authority exists, it may provide sufficient evidence of the foreign law even where it contradicts the underlying foreign statute. An example is provided by a dispute decided by German courts around 1990 concerning the existence of *prendas navales*, i.e. (non-possessory) maritime liens, under the law of Venezuela prior to the enactment of a new statute which officially acknowledged such liens in that country in 1983. While the previous act had not explicitly mentioned *prendas navales,* they had nevertheless been entered into the ship register, a practice demonstrating the observance of a rule of law lacking statutory foundation at the time. The case gives evidence of the uncertain significance of such practices for the proof of foreign law and also of the costs and lengthiness engendered by its ascertainment.[49]

b) The pleading of foreign law and its ex-officio application. – The potential contribution of cross-border litigation to the study of comparative law depends on a number of features of the legal framework which may be specific to a particular jurisdiction. Where, first, the choice-of-law rules invariably designate the law of the forum as applicable, as they do in most family matters in common law countries, private international law of course does not provide an incentive for enquiries into foreign family law. This is different in many continental European jurisdictions, where family relations are often governed, under the nationality principle, by the national law of the individuals involved; millions of immigrants, their children and grandchildren are therefore subject to the laws of their home countries as long as they remain foreign citizens.[50] This is a permanent

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49 Bundesgerichtshof (BGH) 21 January 1991, NJW 1991, 1418; in the proceedings not less than eight expert opinions were produced by experts from Venezuela and Germany; however, the BGH still considered this as providing insufficient evidence of the "law in action". For an account of the whole case from the perspective of an expert on foreign law see *Jürgen Samtleben*, Der unfähige Gutachter und die ausländische Rechtspraxis, NJW, 1992, 3037 – 3062.

50 The instruments codifying and unifying private international law in the European Union have turned to habitual residence as the primary connecting factor in family matters and succession, see art. 8 of Council Regulation (EU) no. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010 L 343/10; art. 21 of Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ 2012 L 2011/107. On the other hand, there are numerous areas of family law where continental jurisdictions still adhere to the nationality principle; even in the areas now unified by EU acts, bilateral and multilateral treaties of Member States with third States prevail, and many of them are faithful to the nationality principle, see *Max Planck Institute for Comparative and International Private Law*, Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on

source of encounters with foreign law and comparative investigations for lawyers and courts in the countries of residence where most of the relevant litigation takes place.[51]

A second important factor is the status of foreign law in a given jurisdiction: Where it is only applied upon application by one of the parties, as it is in common law jurisdictions, lawyers will study foreign law only in rare cases when the amount in dispute justifies the cost of ascertaining foreign law. In most jurisdictions of a continental tradition, foreign law has to be applied *ex officio.*[52] Consequently the court has to investigate the foreign law irrespective of the costs engendered and of the inconvenience this may cause to the parties. In some continental countries the *ex-officio* application has led to a particular organizational structure dealing with the ascertainment of foreign law: Special institutes affiliated to universities or, as the independent Max Planck Institutes, dedicated to basic research in comparative and international law draft expert opinions on foreign law as requested by the courts.[53] This practice has often brought about stimulating general insights into the operation of the foreign legal system in question and has triggered further comparative enquiries.

A third and related factor concerns the question of who has to procure information on foreign law. In the common law world the matter is left to the parties. In light of the considerable costs that may accrue they will have to decide whether their interest in the outcome of the case justifies commissioning an expert opinion on the foreign law; it is a cost-benefit analysis, similar to many business decisions. Engaging a foreign law expert

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jurisdiction, applicable, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 74 (2010) 522 – 720 at 532 – 535 referring especially to bilateral Consular Treaties of Germany of 1929 with Turkey and with the Persian Empire.

51 *Yassari*'s enquiry into the law of *mahr*, above fn. 40, has in fact been stimulated by a number of expert opinions on the matter requested by German courts.

52 The differences between national laws emerge from a number of national reports collected in *Carlos Esplugues/José Luís Iglesias/Guillermo Palao*, Application of Foreign Law, Munich 2011. The borderline drawn in the text between the pleading of foreign law and *ex-officio* application does not fall precisely between common law and civil law; there are civil law jurisdictions such as Spain where a court will apply foreign law only when its application is invoked by a party.

53 The Max Planck Institute for Comparative and International Private Law delivered 74 opinions on foreign law in 2012, see *Max-Planck-Institut für ausländisches und internationales Privatrecht/ Hamburg*, Tätigkeitsbericht 2012, Hamburg 2013, p. 157. Since 1965, selected opinions provided by the Max Planck Institute and German university institutes have been published under the authority of the German Council on Private International Law, see for the most recent volume, containing 51 such opinions: *Jürgen Basedow/Dagmar Coester-Waltjen/Heinz-Peter Mansel*, eds., Gutachten zum internationalen und ausländischen Privatrecht (IPG) 2007/2008, Bielefeld 2010.

is usually an expensive measure. By contrast, it is up to the court in continental jurisdictions to decide whether it needs expertise on foreign law for the decision of the pending case. The decision is driven by the law and its application by the courts, not by business considerations; at least in Germany, the resulting costs are lower due to their regulation by statute.[54]

c) The impact on the study of comparative law. – The differences between the party-driven system of common law countries and the court-driven system of most continental European jurisdictions generate practical differences which are mirrored by divergent approaches to comparative law. If a party decides in proceedings conducted in a common law jurisdiction to obtain an expert opinion, it will generally prefer an expert educated and practising in the foreign jurisdiction in question. Experts on foreign law working in the jurisdiction of the court seized, e.g. university professors teaching comparative law, will be recruited only if they have a particular expertise in the foreign legal system in question, for example as a graduate from a law school of that country. Many comparative law scholars working in common law countries will, consequently, seldom be involved in the practical application of their discipline by the courts. Their approach to the study of various legal systems is much more that of an abstract observer of foreign legal systems, taken as a whole and viewed in relation to other elements of the foreign society.

Their colleagues from continental European jurisdictions are in a very different position. They often receive requests for very precise information on foreign law from the courts of their own country; for example, German courts will generally prefer to ask a German expert to provide information on French or Chinese law irrespective of his or her country-specific expertise. The courts trust the expert's ability to enquire into foreign law on the basis of his/her general knowledge of comparative law, and they value the expert's familiarity with the way cases are argued in German proceedings. The expert will usually receive the whole file of the case and often act as a pseudo-judge preparing a decision under the foreign applicable law. S/he combines the knowledge of foreign and comparative law with that of private international law, a combination driven by the demand of the judiciary under the rule of *ex-officio* application of foreign law. As a result comparative law research conducted by these scholars is influenced by the practical demand for black-letter law and is usually closer to legal practice than the research of their colleagues from common law jurisdictions.

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54 In Germany the fee paid by a court to an expert on foreign law is calculated in accordance with a statute on the remuneration of experts, translators, etc. which does not specifically address experts on foreign law. It currently (2013) establishes a maximum fee per hour of 125 €, far below the market rate paid by private clients. See Gesetz über die Vergütung von Sachverständigen, Dolmetscherinnen, Dolmetschern, Übersetzerinnen und Übersetzern sowie über die Entschädigung von ehrenamtlichen Richterinnen, ehrenamtlichen Richtern, Zeuginnen, Zeugen und Dritten (Justizvergütungs- und -entschädigungsgesetz – JVEG) of 5 May 2004, BGBl. 2004-I, 718 at 776.

6. Legislatures as Clients of Comparative Law

A further type of client of comparative law has traditionally been legislatures. Legislative reforms are often unleashed by fundamental changes of a political system, such as the Meiji restoration in 19th century Japan, or by the emergence of new policy orientations in particular areas of the law, e.g. the gradual liberalization of views on homosexual relations mentioned above.[55] Sometimes the demand for new law is further boosted by information concerning pertinent reforms abroad. But that information is generally rather selective and does not cover the large number of follow-up problems that may arise after the implementation of the reform. Neither is the political process suited for making law-makers aware of such details. The political process has a tendency towards simplification and usually turns on the key issues and values exclusively: For example, compulsory health insurance, or the discharge of the insolvent debtor in bankruptcy proceedings, or the prohibition of any discrimination on grounds of age are considered as "good" by the public opinion, which hence demands political action to implement those objectives already pursued by foreign legislation. There is however little knowledge among law-makers of the technical aspects of such legislation, i.e. of the framework surrounding it in the country of origin and contributing to its overall effect. Depending on the particular features of the legislative process in a given constitutional system, there may be a strong demand for comparative legal studies explaining the environment and likely effects of a contemplated legislative reform.

a) Reliance on foreign experts. – Where a demand for foreign advice is perceived in a country inclined to import legal ideas, law-makers may avail themselves of various forms of potential input. They may ask foreign legal experts to draft the respective code or statute. For example, more than a hundred years ago Japan invited law professors from France and Germany to prepare what later became a Civil Code.[56] And the codes of Ethiopia enacted around 1960 originated from the proposals of French experts drafted upon request of the Ethiopian Emperor and government.[57] In some countries addressed by such requests, specialized government agencies have in more recent years been charged to provide financial and organizational assistance, in particular after the collapse of the socialist systems, circa 1990, when many eastern European countries wanted to adjust their legal systems so as to provide basic principles of freedom, the rule of law and support for a market economy.[58]

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55 See the text at fns. 5 – 7 above.

56 On the work of the French professor Gustave Emile Boissonade de Fontarabie and of the German professor Friedrich Herrmann Roesler, see *Baum,* above at fn. 17, p. 1011.

57 *René David*, Le code civil éthiopien de 1960, RabelsZ 26 (1961) 668 – 681. David himself authored the draft for the Civil Code.

58 In the US, the US Agency for International Development (USAID) has been charged with this

The emergence of professional advisers has given rise to new terminology addressing this sort of exchange as "legal export" and "legal import"[59] and, moreover, to a kind of competition between agencies of several "exporting" countries.[60] The experts working in this context often feel committed to their own law, the dissemination of which appears to be less costly or in the national interest of the "exporting" country, and they do not always proceed with a sensitivity for the environment of the "importing" jurisdiction, i.e. for the "customer" perspective.[61] As put by a former Minister of Justice of an "importing" country, advisers who succeed in cooperating with local experts and adjusting to their expectations are generally more successful than those who travel the world with boilerplate statutes in their luggage.[62] Thus it may be concluded that the recipient countries are not interested in matching the export ambitions of other states, they are rather clients of comparative law preferring advisers who, through their comparative expertise, can bridge the gap between jurisdictions and their legal cultures.

b) Comparative reports. – A second source of information on foreign law needed for domestic legislation is the commissioning of comparative reports. In Germany, where major legislative drafts are usually prepared not by members of the parliament but by departments of the government, special agencies or expert committees, it is not uncommon that comparative scholars or legal institutes are asked to conduct comparative research and to draft a comparative report before important legislative projects are tackled. Often the client entity will identify specific questions which arise in the context of the contemplated domestic reform.[63] It may also list the jurisdictions of particular

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type of work, in Germany the Gesellschaft für Internationale Zusammenarbeit (GIZ) and the Deutsche Stiftung für Internationale rechtliche Zusammenarbeit (IRZ); in France the Fondation pour le droit continental pursues similar targets.

59 See *Ingo von Münch*, Rechtsexport und Rechtsimport, NJW 1994, 3145 – 3147; for a broader survey see *Gebhard Rehm*, Rechtstransplantate als Instrument der Rechtsreform und –transformation, RabelsZ 72 (2008) 1 – 42, with many references to the work of the various agencies.

60 *Lado Chanturia,* Recht und Transformation – Rechtliche Zusammenarbeit aus der Sicht eines rezipierenden Landes, RabelsZ 72 (2008) 114 – 135 at 119; in the 1990s this author was a Minister of Justice of the Republic of Georgia.

61 See *Rolf Knieper*, Möglichkeiten und Grenzen der Verpflanzbarkeit von Recht – Juristische Zusammenarbeit aus der Sicht eines Beraters, RabelsZ 72 (2008) 88 – 113 at 98, referring to the "ability and willingness of an adviser to engage in intercultural dialogue" and citing the Russian author A.L.Makowsky's critique of some advisers lacking that ability and willingness.

62 *Chanturia*, above at fn. 60, RabelsZ 72 (2008) 119.

63 See for example the detailed questionnaire prepared by the Federal Ministry of Justice in the run-up to the reform of the law of obligations including the sale of goods of 2002: *Jürgen Basedow*, Die Reform des deutschen Kaufrechts – Rechtsvergleichendes Gutachten des Max-Planck-Instituts für ausländisches und internationales Privatrecht im Auftrag des Bundesministeriums der Justiz, Köln 1988, p. 88 – 90.

interest, which will usually be those of countries believed to be confronted with problems similar to those which the German legislator intends to tackle, and which generally will have a similar level of societal and economic development. The questionnaires that this author has become aware of have always focused on the black-letter law as implemented in the legal practice of foreign countries. While they never explicitly excluded reference to the extra-legal social and economic environment, the questionnaires were apparently based on the assumption that legal rules as applied in the foreign country designate a normative goal which, irrespective of its actual implementation in the foreign state, deserves to be taken seriously as such.

The topics dealt with by comparative investigations conducted by the Max Planck Institute on Comparative and International Private Law upon request of the Federal Ministry of Justice have included diverse subjects such as the legal status of children,[64] the law of contracts and sales,[65] same-sex partnerships,[66] the law of capital markets, in particular stock exchanges,[67] collective actions,[68] insurance contract law[69] and mediation.[70] The reports usually consist of a number of comprehensive national reports and a general report. This general report summarizes the findings of the national reports, elaborates on common developments emerging from them, explains divergences and adds information on countries not covered as well as on uniform law instruments dealing with the subject in question. Several reports, in view of the development of policy in Germany, have also drawn conclusions from the findings of comparative law; however, such conclusions were never requested by the respective government department.

The conduct of such comparative enquiries is a time-consuming endeavour often requiring a minimum period of several months that is not available in all legislative

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64 *Peter Dopffel*, ed., Kindschaftsrecht im Wandel, Tübingen 1994.

65 *Max-Planck-Institut für ausländisches und internationales Privatrecht*, Zur neueren Entwicklung des Vertragsrechts in Europa, in: *Bundesminister der Justiz,* ed., Gutachten und Vorschläge zur Überarbeitung des Schuldrechts, vol. I, Köln 1981, p. 1 – 76; see also the subsequent expert opinion on the law of sales, above at fn. 64.

66 *Jürgen Basedow/Klaus Hopt/Hein Kötz/Peter Dopffel*, eds., Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften, Tübingen 2000; see the text accompanying fns. 5 – 7 above.

67 *Klaus Hopt/Bernd Rudolph/Harald Baum,* eds., Börsenreform, Stuttgart 1997.

68 *Jürgen Basedow/Klaus Hopt/Hein Kötz/Dietmar Baetge,* eds., Die Bündelung gleichgerichteter Interessen im Prozess, Tübingen 1999.

69 *Jürgen Basedow/Till Fock,* eds., Europäisches Versicherungsvertragsrecht, vol. 1 – 3, Tübingen 2002 – 2003; see also on the particular issue of the use of genetic analyses and data in insurance: Genomanalyse und Privatversicherung – Stellungnahme des Max-Planck-Instituts für ausländisches und internationales Privatrecht, RabelsZ 16 (2002) 116 – 139.

70 *Klaus Hopt/Felix Steffek,* eds., Mediation – Rechtstatsachen, Rechtsvergleich, Regelungen, Tübingen 2008; an English version has been published by the same editors under the title Mediation – Principles and Regulation in Comparative Perspective, Oxford 2013.

processes. Where political pressure for immediate legislative action is strong, where legislative initiatives are mainly in the hands of members of the parliament expecting short-term results from their action or where decisions on legislative proposals have to be made within a short period of time for constitutional reasons, it will be difficult for the actors to obtain comparative reports in preparation of their political action. The examples given above for the use of comparative reports in Germany relate to a governmental system where major legislation is usually prepared with a long-term perspective by government bureaucracies which may even anticipate a need for information on comparative law that has not yet been voiced by politicians. Thus the Federal Ministry of Justice commissioned the comparative enquiry into the law of same-sex partnerships already at a time when the government in office still openly refused to deal with the matter. But it was clear for mindful observers of societal changes and political debates that legislation would have to tackle the issue sooner or later.

c) Comparative law in expert committees. – A further possible gateway for comparative law in the preparation of domestic law reforms is the instrumentality of an expert committee. Major law reform is often prepared by such committees, which may be permanent institutions or – in the alternative – may be convened *ad hoc* and for a limited period of time. Examples of permanent institutions include: in the United Kingdom the Law Commission,[71] which is endowed with general competence; in Germany the Monopolies Commission, for issues relating to competition,[72] or the German Council for Private International Law as regards that area;[73] in the USA, the American Law Institute, although a private institution and not primarily geared toward the preparation of legislation, sometimes performs a similar function with regard to law reform. *Ad hoc* committees are more frequent and are appointed in many countries when the legislature seeks advice in the preparation of a specific project; examples here include the German Deregulation Commission mentioned above,[74] the Japanese Civil Code (Law of Obligations) Commission appointed in 2009,[75] and several working groups preparing a reform of the French law of obligations subsequent to 2006.[76]

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71 See the website: *http://lawcommission.justice.gov.uk*. On the Law Commission see e.g. *Peter North*, Problems of Codification in a Common Law System, RabelsZ 46 (1982) 490 – 508.

72 See the website: *http://www.monopolkommission.de*; some content is also available in English.

73 Deutscher Rat für Internationales Privatrecht, a permanent advisory body of the Federal Ministry of Justice.

74 See the text above at fn. 3.

75 See *Takashi Uchida*, Contract Law Reform in Japan and the Unidroit Principles, Uniform Law Review 2011, 705 – 717; the work of this Commission is documented in English on the website of the Japanese Ministry of Justice *http://www.moj.go.jp/ENGLISH/ccr/CCR_00001.html*.

76 See *Guillaume Meunier*, The Reform of the French Law of Obligations – Methods and Prospects, in: Walter Doralt/Olivier Deshayes, eds., Reforming the Law of Obligations and Company Law – Studies in French and German Law, Paris 2013, p. 15 – 23 at 17 – 18.

Such expert committees are usually less exposed to political pressure; they work somewhere at the cross-roads of legal practice, interest groups and academia. And they are often expected to outline the legal development that has taken place in foreign countries in the area of inquiry; consequently, they are clients of comparative law. Their demand for comparative input can be satisfied in various ways: They are sometimes endowed with a budget allowing them to commission comparative reports from external scholars; thus, the German Deregulation Commission could build upon comparative enquiries specifically conducted for its purposes in the areas of insurance[77] and labour markets.[78] It is also not uncommon that comparative law experts are appointed as members of advisory committees. The commission advising the German Ministry of Justice on the law of contract in the 1990s had two prominent comparatists as members: *Hein Kötz* and *Peter Schlechtriem*.[79] And the American Law Institute has repeatedly appointed foreign experts as Counsellors, Advisers or Co-reporters to its project groups, in particular those dealing with international subjects.[80] A further method of generating comparative law input used by expert committees consists in hearings seeking out the opinions of comparative law experts, both domestic and foreign. In the United Kingdom, for example, the Law Commission often builds on comparative expertise furnished by scholars at its request.[81] And the legislative materials of the comprehensive German reform of insolvency law of 1994 equally give evidence of a broad comparative input achieved through a number of hearings.[82]

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77 *Ulrich Hübner*, Rechtliche Rahmenbedingungen des Wettbewerbs in der Versicherungswirtschaft, Eine vergleichende Untersuchung zu den Rechtsordnungen Grossbritanniens, Frankreichs, der Schweiz und der Vereinigten Staaten von Amerika, Baden-Baden 1988.

78 *Herbert Kronke*, Regulierungen auf dem Arbeitsmarkt – Kernbereiche des Arbeitsrechts im internationalen Vergleich, Baden-Baden 1990.

79 *Bundesminister der Justiz*, ed., Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts, Köln 1992, p. 14 – 15.

80 For example, the Swiss professor François Dessemontet was a co-reporter on the intellectual property project, see *American Law Institute*, Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes, St. Paul, Minn. 2008. In the current project on the law of consumer contracts the German professor Hans Schulte-Nölke and the Canadian professor Jacob Ziegel are on the list of advisers, see the website of the ALI: *http://www.ali.org*.→projects→Restatement Third, The Law of Consumer Contracts.

81 While the Law Commission is not under a statutory obligation to have recourse to comparative law, it has in fact done so repeatedly, see e.g. Consumer Insurance Law (Pre-Contract Disclosure and Misrepresentation), Working Paper no. 319 (2009) paras. 3.53 – 3.56; Marital Property Agreements, Consultation Paper no. 198 (2011) para. 1.50; available online at *http://lawcommission.justice.gov.uk*.

82 *Bundesministerium der Justiz*, ed., Erster Bericht der Kommission für Insolvenzrecht, Köln 1985, p. 8, 10 – 14.

The comparative legal information generated by such committees again focuses on black-letter law as applied in its country of origin. It generally includes the legal framework of that law which determines the conditions of its operation, but seldom the societal and economic environment. From my own experience on a number of those committees, it may be said that controversial points are unlikely to be debated in arguments questioning the transferability of foreign models; arguments will rather focus on the interests involved. To give but a single example: The rules on the direct claim of an aggrieved party against the liability insurer of the liable tortfeasor differ widely between European countries. When the matter was discussed in the expert committee on insurance contract law appointed by the German Ministry of Justice, I presented the comparative findings. The intense debate focused on the interests of the judiciary, of the insurers and of the injured parties; yet nobody ventured to suggest that the sweeping admission of direct claims by French law and Norwegian law was caused by national peculiarities of the French and Norwegians which would pose an obstacle to the transfer of these rules to Germany.[83]

d) On-site inspection. – Finally, legislators sometimes travel to foreign countries to collect information on the foreign law and to consider its operation on-site. In 1950 the German government sent a "study group" to the USA in order to explore the application of the antitrust laws and to ascertain how they were evaluated in that country. Subsequent to the Great Depression of 1929/1930, Germany and the other European nations had rather pursued a policy favouring or even compelling mergers and cartellization. Pro-competitive legislation was viewed rather sceptically as an attempt of the allied powers of World War II to weaken the German economy; it was also considered as something typically American that could not be transferred to Germany. The report of the study group[84] prepared the terrain for the Act against Restraints of Competition which was eventually adopted in 1957.[85] More recently delegations from the People's Republic of China travelled to Western Europe to gather information on modern developments in various areas of the law including contract law, antimonopoly law and private

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83 The background of the Commission's proposal concerning the direct claims against liability insurers emerges from the final report, see *Egon Lorenz*, ed., Abschlussbericht der Kommission zur Reform des Versicherungsvertragsrechts vom 19. April 2004, Karlsruhe 2004, p. 82 – 83.

84 Vorläufiger Bericht der deutschen Kommission zum Studium von Kartell- und Monopolfragen in den Vereinigten Staaten, Bundesanzeiger no. 250 of 29 December 1950, Beilage. Among the eight members of the "study group", there were two civil servants responsible for competition law in, respectively, the Ministry of Economic Affairs and the Ministry of Justice as well as two academics and four representatives of interest groups.

85 On the history of that law see *Jürgen Basedow*, Kartellrecht im Land der Kartelle, Wirtschaft und Wettbewerb 2008, 270 – 273 with further references; see also *Ulrich Drobnig/Peter Dopffel,* Die Nutzung der Rechtsvergleichung durch den deutschen Gesetzgeber, RabelsZ 46 (1982) 253 at 271 et seq.

international law. For example, in 2006, the Max Planck Institute for International and Comparative Private Law received a delegation of the Standing Committee of the National People's Congress of the People's Republic of China and organized a symposium with presentations by academics and practitioners dealing with the operation of private international law.[86]

The interest driving these kinds of activities appears to transcend merely knowing what the foreign black-letter law provides and how it is applied in practice. Governments engaging in on-site inspections usually lack any experience in the area of law in question. Thus, while there is certainly a dominant interest in identifying the substance of the law and considering its application and legal framework, government representatives also want to get an impression of what this law means for the foreign society and economy from a more holistic perspective. The report of the German antitrust study group on its journey to the US gives evidence of a general curiosity with regards to the operation of the antitrust laws in the US economy; it extends for example to the compatibility of antitrust with state planning of economic projects and processes, to the implementation by administrative authorities, civil courts and private damages actions, to the numerous exemptions of specific areas from the antitrust laws and several other aspects.[87] It consequently appears that the demand for comparative law voiced in this context comes very close to the holistic approach advocated by some macro-comparatists.[88]

7. Unification Agencies as Clients of Comparative Law

a) The institutionalization of uniform law production. – Ever since the late 19th century, the unification of laws has become a characteristic element of modern legal development, predominantly, but not exclusively in civil and commercial matters. In areas such as intellectual property, transport, maritime law and aviation, private international law, the sale of goods, international payments, security interests and commercial arbitration, the law can no longer be fully understood without taking into account this broad unification movement. Uniform law can be produced at the universal or regional level. A whole network of international organizations has been established in particular since World War II for the promotion of uniform law in many sectors:[89] UNCITRAL, Unidroit, the Hague Conference for Private International Law, the International Maritime Organization

86 *Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg,* Tätigkeitsbericht 2006, Hamburg 2007, p. 83 – 84.

87 See above fn. 85.

88 See above section 3.

89 A comprehensive, although partially outdated survey can be found in *René David*, The International Unification of Private Law, in: International Encyclopedia of Comparative Law (IECL), vol. II ch. 5, Tübingen, Paris and New York 1971, sect. 327 et seq.

(IMO), the International Civil Aviation Organization (ICAO), the World Intellectual Property Organization (WIPO), the International Labour Organization (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the World Trade Organization (WTO). Further organizations operating at a regional level have to be added: the Organization of American States (OAS) and MERCOSUR in Latin America or the Organization for the Harmonization of Business Law in Africa (OHADA); and the most powerful being the European Union (EU), which is even invested with supranational powers. These and a number of other bodies have woven a carpet of hundreds or even thousands of uniform law instruments. Various legal vehicles lend themselves to unification: international conventions, model laws, legal guides, and in the European Union regulations and directives, to mention just the most important ones.

b) The demand for comparative law. – What all these unification efforts have in common is the continuous need for a comparative perspective of the law. It is not sufficient to pursue the ideal of a uniform text drafted as if it were natural law. It must be possible to trace this text back to, and connect it with, the various national or subnational laws which are the point of intellectual departure for most people involved in, and affected by, the unification process. In this respect, in roughly 1970 the great comparatist *René David* postulated preliminary studies in comparative law as being the essential part of the first stage of a unification process; he deplored that – except for the unification of sales law[90] – "[m]ost of the attempts made to date have shown a complete lack of preparation", which he explained with reference to "the 19th century belief in the omnipotence of the [unifying] legislature" and the "underestimation of the weight of tradition and the importance of techniques."[91]

While many unification projects lack a sufficient preparation in the form of comparative legal studies, it is much more common that these projects are carried out by commissions composed of experts from a variety of jurisdictions influenced by different legal traditions – the second stage of unification. The purpose of such commissions is to generate the comparative knowledge within the commission and to find compromises acceptable for the major legal systems involved.[92] Experience shows, however, that the

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90 The United Nations Convention on contracts for the international sale of goods (CISG), done at Vienna on 11 April 1980, United Nations Treaty Series (UNTS) vol. 1489, p. 3, traces back to comparative research conducted in the Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht (which is now the Max Planck Institute for Comparative and International Law), see *Ernst Rabel,* Das Recht des Warenkaufs, vol. I, II, Berlin 1936 and 1958.

91 *David*, above fn. 90, IECL vol. II ch. 5 sect. 220. On a similar note*, Jan Kropholler*, Internationales Einheitsrecht, Tübingen 1975, p. 30.

92 *David*, above at fn. 90, IECL vol. II, ch. 5 sect. 222 and 225: "It must, insofar as possible, be ensured that every legal system which has any originality in the field to be covered by the draft, is represented."

comparative law basis generated in the discussions of such an expert group is often elusive unless based on prior comparative law studies. Such enquiries may also prove valuable at the third stage of a unification project when a common text needs to be adopted. As it is often the case that this stage is dominated by political considerations, in particular by the wish of all participants, e.g. of a diplomatic conference, to keep close to their respective national traditions and legislative techniques, such comparative groundwork can help to overcome objections and convince national representatives of the appropriateness of a proposed solution. This concern will definitely become prevalent at the fourth stage which – in the case of international conventions – is the ratification by the single signatory states.

c) The type of comparative law investigations. – Comparative law enquiries undertaken for the sake of the unification of laws are area-specific or issue-specific; they are mainly directed at the black-letter law of the countries involved as applied by the courts, but they may also extend to commercial practice. The example of the sale of goods has already been mentioned above; the preliminary comparative work included foreign trade usages as evidenced by standard contract terms.[93] In the European Union, one can add further examples such as the work on a Common European Sales Law[94] or a European insurance contract law regime[95]. Over the years these projects have generated a large amount of comparative enquiries in areas including general contract law,[96] the law of sales[97] and the law of insurance contracts,[98] these being a precondition for the intended harmonization.

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93 See the research conducted by *Rabel*, above at fn. 91.

94 See the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final of 11 October 2011; the proposal was prepared by an expert group composed of scholars from various Member States.

95 In 2013 the EU Commission appointed a group of experts, mainly practitioners and some academics originating in different Member States, to assess the significance of divergences of national insurance contract laws for the operation of the single insurance market, see Commission Decision of 17 January 2013, OJ 2013 C 16/6. I was a member of that expert group which finalized its report in January 2014; the report and the comparative tables of national law will be published on the website of the European Commission.

96 The pioneering initiative goes back to the Commission on European Contract Law set up in 1980, see *Ole Lando/Hugh Beale*, eds. Principles of European Contract Law, Parts I, II, The Hague 2000; *Ole Lando/Eric Clive/André Prüm/Reinhard Zimmermann*, eds., Principles of European Contract Law, Part III, The Hague 2003.

97 *Christian von Bar/Eric Clive*, eds., Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR), vol. 1 – 6, Munich 2009; on the law of sales see vol. 2, p. 1207 – 1426.

98 See *Jürgen Basedow/Till Fock*, eds., Europäisches Versicherungsvertragsrecht, vol. 1 – 3, Tübingen 2002 – 2003; *Jürgen Basedow/John Birds/Malcolm Clarke/Herman Cousy/Helmut Heiss,* eds., Principles of European Insurance Contract Law, München 2009.

Another example that is less driven by legislative ambitions relates to competition law. After the collapse of the socialist systems in 1990, dozens of states across the globe enacted antitrust laws which were held to be a guarantee of a successful market economy. While an international harmonization of such laws through legislation failed,[99] national competition authorities set up the International Competition Network (ICN), which now has more than 100 members worldwide.[100] At its annual meetings, issues of competition law and policy in view of a harmonization and/or a better coordination of administrative practices in the field are discussed. For the working parties established by the ICN, comparative investigations are their daily business. Through that work a *de facto* convergence of competition law is furthered, at least among the industrialized countries.

d) Continuous unification and revision of uniform law. – Once uniform or harmonized law is implemented, it is up to comparatists to carry out regular surveys and to determine the degree to which harmonization is actually achieved in legal practice. This type of investigation may be designated as comparative implementation research. Comparatists have to carry forward into legal practice the harmonization movement initiated by legislative unification. Where a divergent application is uncovered, there is a case for later revision of the uniform text.[101]

Such revision is cumbersome unless the states involved keep an interest in restoring uniformity. It has, however, occurred for more than 100 years in the law governing the international transport of goods by rail in Europe. In response to divergent interpretations, the pertinent convention, first concluded in 1890,[102] has been amended at regular intervals. In accordance with the early versions of that convention, the liability of the railroad for damage to, or loss of, goods was excluded in case of *force majeure/höhere Gewalt.* In the 1920s it turned out that this concept, despite its ancient origins in the *vis maior* of Roman law, was interpreted differently in France and Germany. In particular, French courts would accept internal occurrences of the railway undertaking, such as a strike of the railwaymen, as *force majeure*,[103] while German courts rejected this interpretation and recognized as *höhere Gewalt* only those events which were external to

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99 It had indeed been contemplated by a group of academics and proposed by members of the European Commission, see *International Antitrust Code Working Group*, Draft International Antitrust Code as a GATT-MTO-Plurilateral Agreement, Antitrust Trade & Regulation Report (BNA) 64 (1993), Special Supplement no. 1628 of August 19, 1993; for the political initiative see *Leon Brittan/Karel van Miert,* Towards an International Framework of Competition Rules, Int'l Bus. Lawyer 1996, 454 – 457; both authors were European Commissioners at the time.

100 See the website of the ICN: *http://www.internationalcompetitionnetwork.org*.

101 *David*, above at fn. 90, IECL vol. II ch. 5 sect. 317: "The periodic revision of uniform laws seeks to ensure their uniform application."

102 Internationales Übereinkommen über den Eisenbahn-Frachtverkehr of 14 October 1890, Reichs-gesetzblatt 1892, 793.

103 Cour de cassation 24 June 1925, Dalloz hebdomadaire 1925, 486.

the railway undertaking.[104] As a result the concept of *force majeure* was eliminated in 1952 in the first revision of the convention after World War II; it was replaced by a wording pointing to the unavoidable nature of the circumstances giving rise to the damage or loss, or of the further consequences.[105] While no subsequent decisions on the effect of strikes have been published it would appear that a railway company will have difficulty in demonstrating that a strike of its employees is unavoidable for the company.

International instruments intended to establish uniform legal rules often exhibit gaps which courts have to fill when applying those instruments. In accordance with Article 38 para. 1(c) of the Statute of the International Court of Justice[106] and Article 7 para. 2 CISG,[107] courts will primarily have recourse to general principles of law for that purpose; only in their absence will a gap have to be filled by the national law applicable in accordance with choice-of-law rules. The ascertainment and elaboration of general principles of law is essentially a matter of comparative law.[108] While national judges are by necessity trapped, to a certain extent, in the arguments flowing from the framework of their own legal system even when applying international conventions and other uniform law, it is the task of the comparatist to overcome path dependency by explaining foreign experience gathered with the application of international instruments.[109] In this context, comparative law loses its character as a pure empirical science. Comparative implementation enquiries become part of the normative analysis of international legal instruments to be applied by domestic and international courts.[110]

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104 Reichsgericht 4 March 1922, Entscheidungen des Reichsgerichts in Zivilsachen (RGZ) 104, p. 150.

105 See now art. 23 § 2 of the Uniform Rules Concerning the Contract of the International Carriage of Goods by Rail (CIM), Appendix B to the Convention Concerning International Carriage by Rail as last amended by the Vilnius Protocol of 3 June 1999, see the website of the Intergovernmental Organization for International Carriage by Rail: *http://www.otif.org*: "The carrier shall be relieved of ... liability to the extent that the loss or damage ... was caused ... by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent." The burden of proof lies on the carrier, see art. 25 § 1.

106 The Statute is available on the website of the ICJ: *http://www.icj-cij.org/homepage*.→Basic documents.

107 See above at fn. 91.

108 This was very clearly pointed out already in 1927 by *Ernst Rabel*, Rechtsvergleichung und internationale Rechtsprechung, above at fn. 31, p. 7, 15 and 17.

109 This task has been accepted by comparative law scholars as can be inferred from the national reports on the use of comparative law by courts, see *Ulrich Drobnig/Sjef van Erp,* eds., The Use of Comparative Law by Courts. Reports to the XIV[th] International Congress of Comparative Law Athens 1994, The Hague 1999; see the General Report by *Ulrich Drobnig*, p. 8 et seq., concerning uniform and harmonized law; see also *Guy Canivet/Mads Andenas/Duncan Fairgrieve*, eds., Comparative Law Before the Courts, London 2004.

110 On the use of comparative law for the ascertainment of general principles of law by the European

8. New Clients in the Age of Globalization: "Living Comparison"

What has been described in the previous section comes down to an unprecedented multiplication of entities[111] involved in the rule-making business. The global network created by those organizations is so dense that they compete in some areas of unification and cooperate in a kind of teamwork in others.[112] They are supported by an entourage of private consulting firms lobbying for – and sometimes against – harmonization or uniform laws. They are usually composed of experts and stakeholders representing a variety of diverse national regulatory systems.[113] All this can be understood as a massive institutional foundation for comparative law which forms a major part or even the essence of the activities of many of these organisations. Moreover, a similar increase in international institutions can be observed in the field of arbitration and in the judiciary: the International Court of Justice, the dispute settlement mechanisms of the World Trade Organization, the International Criminal Court, the International Center for the Settlement of Investment Disputes and the International Tribunal for the Law of the Sea, all surrounded by armies of legal experts – they demonstrate the growing significance of dispute adjudication by international bodies having a universal vocation, not to mention the enormous workload of regional institutions such as the European Court of Justice or the European Court of Human Rights. When one adds in the myriad international commercial arbitrations operating off the visible tracks of the legal system, the tremendous demand for information on foreign law across all fields becomes apparent.

All this can be summarized as the institutional side of globalization. While the public debate usually focuses on globalization as the opening of frontiers and the consequential

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Court of Justice see *Axel Metzger,* Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht, Tübingen 2009, p. 414 – 418, with numerous references to court practice; the author points out that the Court of Justice has usually underpinned key developments of European law by reference to general principles of law distilled from a comparative assessment.

111 See above section 7 (a).

112 Highlighted by Martin Stanford who served as an officer of Unidroit over many years, see *Martin Stanford,* Some Reflexions on Four Decades of Involvement in the International Unification of Private Law, Zeitschrift für Luft- und Weltraumrecht (ZLW) 62 (2013) 353 – 367 at 365 f.

113 As examples of such influential private organisations can be cited the Comité Maritime International (CMI) established by shipowners at the end of the 19th century, the International Air Transport Association set up by airlines across the globe, or Insurance Europe, formerly called Comité européen des assurances, the European association of insurance companies. For the European Union see the so-called Transparency Register of the organisations at *http://www.ec.europa.eu/transparencyregister/info/homePage.do?locale=en#en*. For a theoretical analysis see Peter Bouwen, Corporate lobbying in the European Union: The Logic of Access, Journal of European Public Policy 9 (2002) 365 – 390.

growth of cross-border movement,[114] the international community has reacted to the increased freedom by the gradual development of a universal institutional framework. What these bodies have in common is the multinational nature of their activities. Thousands of lawyers from very different national backgrounds are working in such a globalized environment at present. Their cooperation in working parties, units, committees, chambers, etc. comes down to a constant exchange of legal ideas originating in different legal traditions.

Similar observations can be made in banks, international law firms and multinational enterprises operating in the private sector. Where for example a major international insurance company from the United States, Italy or Switzerland conceives of a life insurance product to be sold to customers across the globe through its subsidiary in the Republic of Ireland, the success of such endeavour depends on a careful examination of a number of national laws in respect of taxation, contract law, anti-discrimination law, money laundering laws etc. The company's working group set up for that purpose will consist of persons knowledgeable of the various legal traditions involved. The commercial project will in itself be an exercise in comparative law.

The work environment in such private and public institutions has little to do with comparative law *research* as known from academia. While people working there will sometimes request or draft papers concerning specific legal questions arising under a specific national law, the multinational work ambience rather produces a kind of "living comparison" of laws. This living comparison occurs every day, emerging from the continuous communication between persons educated in different intellectual and legal contexts, a communication aiming at well-defined objectives, e.g. the business targets of a company or the resolution of a pending dispute. It is a communication driven by practical questions mostly directed at the black-letter law as applied in a given country, and it has an impact on thousands of decisions of individuals, businesses and public bodies. The obstacles to comparison alleged by some epistemological purists is thus continually rebutted by the reality of the living comparison.

9. Conclusion

(1) In contrast to other methods like legal dogmatics or economic theory, the comparative approach is not a characteristic of a closed intellectual system such as legal dogmatics or the economic theory of law. As an empirical science, comparative law contributes to our knowledge about foreign legal systems and the law-related aspects of society and

[114] See above section 1 c).

economy. It provides a basis for a meaningful social science theory of any kind. It neither excludes nor makes redundant arguments derived from other methods.

(2) The various methods discussed by comparative scholars, in particular the functional and epistemological approaches, are not mutually exclusive. It is rather the purpose and context of a comparative enquiry which determines the research design and therefore helps to establish which methodological approach or approaches is (or are) best suited to provide significant insights. Foreign law studies designed to improve the understanding of a specific legal system should be distinguished from issue-related comparative law enquiries aiming at a comparison proper.

(3) Like many other academic disciplines comparative law responds to certain expectations of the outside world. The arguments devised and the information provided by comparative legal studies serve the purposes of clients in all parts of modern society. This paper elaborates on those expectations and on the consequences concerning the methodological approaches of such studies.

(4) The present state of human society is characterized by an increasing inter-connectedness of markets, societies, cultures and political systems. Under the impact of this phenomenon which is usually referred to as globalization the cross-border flow of legal ideas has accelerated. As a consequence the demand lodged by the traditional clients of comparative law for information on foreign law – especially by courts and legislatures – has grown considerably.

(5) In response to globalization the international community has created an increasingly dense network of international institutions, both public and private, in order to work out common rules which require comprehensive comparative knowledge and analysis. Again this demand is area-specific and focuses on the black-letter law of countries as applied by their courts.

(6) Against the backdrop of such demand, the abstract and high-level debate on the appropriate methodological approach to comparative law is of doubtful significance. To put it bluntly: The customers of comparative law are not satisfied with the statement that comparison is too difficult because of the complex social, cultural and economic environment of the law; they expect answers concerning the black-letter law as applied in the courts of a country being aware of the non-legal factors which may reduce the significance of legal rules.

(7) When preparing harmonized rules for a globalized environment and when surveying their uniform application in the various legal systems, comparative law undergoes a mutation from a pure empirical science to a normative aspect of legal and policy analysis.

(8) Alongside comparative legal research conducted for such demand, the growing institutional framework of world affairs brings about a “living comparison” of law generated by the cooperation of lawyers from different national backgrounds within the same work environment.

Summary

Comparative law is one method of legal research as an alternative to, or alongside, others. Its significance for the finding and evolution of the law has not always been undisputed (Part 1). In the present era of globalization it is, however, beyond doubt that the legal system of a country has to take into account the legal developments in other states. While the need for comparative legal research can therefore hardly be questioned any longer, such research may pursue very different objectives. They emerge from a closer look at the development of comparative law as an academic discipline (Part 2). The subsequent elaboration of different purposes of comparative investigations (Part 3) will finally take us to some reflections on what may be called the various "customers" of comparative law who determine these purposes (Parts 4-8). The message of this paper is twofold: First, we should distinguish foreign law studies designed to accentuate the peculiarity and uniqueness of specific legal systems from comparative law investigations proper which rather focus on the comparison of rules of law originating in two or more legal systems. And second, with regard to the latter, let us realize their embeddedness in certain sectors of practice, which makes usefulness the primary yardstick for their evaluation.