

IX

COMPARATIVE PROCEDURE LAW¹

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I. PRELIMINARY REMARKS

For **comparative law** in general and for comparative private law in particular, there is a great wealth of literature on the market, both at home and abroad. Indeed, one can hardly keep a manageable oversight of all the literature. Within the plethora of literature, there are many studies which address fundamental issues of these disciplines, or at least which are regarded as such.

Much different, however, is the **state of literature** regarding **comparative procedure law**, especially comparative civil procedure law. Although there is an abundance of specific studies and projects about comparative procedure law which discuss many different procedure law and/or civil procedure law phenomena, there are only a few studies, both at home and abroad, which recognize in a more fundamental manner or, very specifically, which address the theoretical-methodological fundamental questions of this still relatively young branch of comparative law. As far as the older literature regarding the fundamental character or the uniqueness, the goals, and the meaning of comparative procedure law is concerned, one only

1. Translated from German to English by Christian Bernd, J.D. (American University of Washington D.C.),LLM. (Frankfurt a.M.)

finds a few reflections by *David*,² an open letter from *Cappelletti*³ to *Schima*, or a relatively modest introduction by *Habscheid*⁴ on various objects of comparison of civil procedure law (1985). In addition, *Gottwald*, in the Festschrift for *Schlosser* on comparative civil procedure law (2004), has more recently addressed concrete and specific projects. Among the more fundamental comments about the topic, one must certainly include the two general reports and a few of the national reports from the 10th world conference on procedure law in Taormina in 1995, as well as the book “Prozessrechtsvergleichung” [Comparative Procedure Law] of 1996.⁵ To my knowledge, this is the only book on the market which bears the explicit title of “comparative procedure law.” However, the book does not offer me any new insights, as I authored the book myself.

My book on comparative procedure law has its origin in one of the two general reports regarding the topic “Special Features of Comparative Procedural Law/Spécificés du Droit Judiciaire Comparé” for the world conference of the *International Association of Procedural Law* in Taormina (Sicily, Italy) in the year 1995,⁶ which, in turn, was based on 16 national reports. To my knowledge, this was the first time at a law conference in which a great number of authors discussed fundamental questions of comparative procedure law in a more thorough and comprehensive manner. A great audience of experts, consisting of hundreds of participants from approximately 50 nations, took part in the discussions.

Therefore, Taormina 1995 can quite rightly be considered the “**birth hour**” of **comparative procedure law as its own distinct field**.⁷ But, unfortunately, this very young (if not the youngest) offspring of comparative law has not developed much since then, and has hardly even been mentioned in studies about international procedure law⁸ or European civil procedure law.⁹

2. *David*, “De l’importance d’études comparatives relatives à la procédure” in: *Estudiso Jurídicos Memoria de Eduardo J. Couture* (Uruguay), 1957, pp. 929 ff.

3. *Cappelletti*, “An open letter to Hans Schima about the need, the difficulties and the purposes of comparative civil procedure” (Austria), 1969, pp. 125 ff.

4. *Habscheid*, *Introducción al Derecho Procesual Civil Comparado* (Italy), 1985.

5. *Gilles*, *Prozessrechtsvergleichung/Comparative Procedure Law* (Germany), 1996.

6. See Italo *Andolina* (ed.), *Transnational Aspects of Procedural Law, General Reports X. World Congress on Procedural Law in Taormina, 1995, Volumes I–III*, University of Catania, 1998; Peter *Gilles* (ed.), *Transnationales Prozessrecht, Deutsche Landesberichte zur Weltkonferenz fuer Prozessrecht in Taormina/Sizilien* (Germany), 1995.

7. See *Koch*, “Einfuehrung in das europaeische Zivilprozessrecht”, in: *JuS* 2003, pp. 105 ff. (p. 111 n. 50); *Andolina*, (FN 5); see also *Gilles*, (FN 5), p. 4.

8. Compare, e.g., *Schack*, *Internationales Zivilverfahrensrecht* (Germany), 3d ed. 2002, pp. 9f. Rz 28: “Die Prozessrechtsvergleichung ist erst in den letzten Jahren in Fahrt gekommen... Bis vor kurzem vorherrschendes Desinteresse an der Prozessrechtsvergleichung”.

9. *Koch* (FN 6): “Die Prozessrechtswissenschaft ... stellt sich der Rechtsvergleichung erst in neuerer Zeit”.

Whether this deplorable situation will improve as a result of the planned round table discussions in Catania (Sicily, Italy) in 2006 on the topic “International Aspects of Procedural Law: Ten Years after Taormina” remains to be seen.

In short: The **state of publications** on comparative procedure law is still **deficient** and, accordingly, an understanding of the topic is only possible along very thin lines, which do not even include either accepted or rejected theories in the literature.

In order to avoid any possible misconceptions, I would at this point like to emphasize, once again, the **title** and **contents** of this article: This article is not about presenting a certain comparative procedure law project or describing/outlining so-called “concrete” comparative procedure law studies, but rather this article is focused on **comparative procedure law** in its **theoretical-methodological context**.

II. COMPARATIVE PROCEDURE LAW AS A SEPARATE BRANCH OF GENERAL COMPARATIVE LAW

Of course, the independent and unique discipline of comparative procedure law – with regard to the topic of research, the methods of research, and also the purposes of research – does not differ at all (or perhaps only minimally) in its fundamental structure and fundamental function from the more comprehensive general **comparative law**.

Comparative law, in turn, is a **fundamental discipline of law**, a specialized branch of **comparative studies** as such. Or, to phrase it less theoretically, comparative law is quite simply a particular variety of human behavior and thought. Colloquially, one could plainly speak of “**comparison**.”

Such day-to-day comparison is by no means only controlled by reason, knowledge, and understanding, as the case may be when jurists undertake comparative law. To the contrary, all of the human senses (seeing, hearing, smelling, tasting, feeling, etc.) are taken into consideration as controlling factors in day-to-day life. Even machines and computers are nowadays certainly in the position to compare information or data (a few examples may include electronic dating or electronic processing of customer data for advertising purposes by way of specific customer characteristic comparisons).

If one ventures at a **definition**, then this comparison consists – very generally formulated – of comprehension or experience of two or more real or ideal phenomena in the sense of objects of comparison, which are then placed in a certain

relation to one another from an unconnected point of reference (so-called *tertium comparationis*) under a comparison of single or comprehensive characteristics of those phenomena. The goal is to determine if the objects of comparison are the same or at least similar. If it should then turn out from this operation that such compared phenomena are different or dissimilar or if they yield certain differences or variations, then this strictly speaking means a negative result. This is so because, at least according to the literal meaning of comparison, the goal of the operation is to determine the similarities and not the dissimilarities.

1. Comparison as Day-to-Day Thought and Action

It is of no interest here to look at what is compared in day-to-day life – the who, what, where, and when – such as shop prices, quality of products, promotional offers, television programs, transportation connections, beauty queens, tuition fees, or course offerings. However, there is an interesting aspect here for jurists, namely the “non-comparison” or rather the **incomparability**, which can be found in outright false common assumptions and expressions. It is said, for example, that “apples and oranges” cannot be compared to one another, and certainly not “elephants and flies,” and – similarly – civil and common law, or socialist and capitalist law, or North Korea and South Korea. Whoever assumes or says this has, after all, already undertaken a comparison or could at any rate only justify it on the basis of a comparison. This also applies to those who admire the “unequivocal beauty,” say, of Argentinean women, or the feminist saying from the German students’ movement in the 1960s: “A woman without a man is like a fish without a bicycle” (the saying seems at first wholly non-sensical, but upon closer examination it reveals a deeper meaning).

In the case of both of the latter examples, it is not the comparability as such which is questionable, but rather the meaning and usefulness of a comparison between these supposedly incomparable phenomena.

2. Comparison as Day-to-Day Business of Jurists

When one speaks of **comparison in a legal context**, that is, the comparison of “law” (whatever that may mean) by jurists or in a legal “way,” then one should be clear that even within **legal professions** such as judge, as lawyer, as law professor etc. this is something entirely in the realm of **day-to-day** routine. Constantly, there are comparisons being made between one article to another, one section or clause from a legal norm to another, opinions in scholarly literature to one another or to judicial opinions, complaints to replies, testimony of one witness to

another, legal guidelines both before and after modification, legal norms in various interpretations, the Korean translation of a legal text to the German translation, and much more.

But: All of that has nothing to do with “comparative law,” as it is generally defined and understood.

3. Comparative Law as a Field of Teaching and Research

For the guild of those who undertake comparative law, who like to view their field as the “secret world empire of jurisprudence” and who view themselves – however arrogant and elitist – as “global jurists” and “Crème de la Crème of legal scholars,” or who at least would like to convey the impression that in this guild the “great intellects of law” are assembled,¹⁰ the **field of comparative law** first begins then and there, and when and where the law of historical **epochs** (“**historical comparative law**”) is compared (such as comparing modern German law to previous general law and this in turn to Roman law), or first then and there, and when and where the comparison of law of various **nations** is concerned (“**bina-tional and multinational comparative law**”).

Typical for the latter are the countless international conferences by international organizations of comparative law, in particular the numerous world conferences of the *International Association of Procedural Law*, such as its last world conference in Mexico City in 2003 and its upcoming one in Bahia, San Salvador in 2007. At each of the conferences, a large number of national reporters have compiled (and will continue to compile) **national reports** about various legal topics. Then, it is up to the general reporters to compare these national reports to one another in whatever manner. The actual duty of the general reporters is not (or should not be) to deliver mere summaries, but rather to develop transnational or supranational insights.

In comparative studies of any topic in comparative procedure law, it is also usually customary to compare one’s own familiar **national procedure law** to that of another country or several other countries. Examples from my own area of concentration would include *Moon-Hyuck Ho’s*¹¹ *comparison of Korean civil*

10. See *Stuerner*, “Die Rezeption US-amerikanischen Rechts in der Bundesrepublik Deutschland”, in: *Festschrift fuer Rebmann*, 1989, pp. 839 ff. (840); see also *Gilles*, *Prozessrechtsvergleichung* (FN 5), p. 18 & n. 26.

11. *Moon-Hyuck Ho*, “Korea und das deutsche Zivilprozessrecht”, in: Habscheid (ed.), *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen*, 1991, pp. 448 ff; see also *Ho/Gilles* (ed.), *Studies in International Civil Procedure/Comparative Study of Civil Procedure*, Seoul

procedure law to German civil procedure law, or my very own comparison of German civil procedure law to Korean civil procedure law.

Furthermore, for binational and especially **multinational comparative law** it is still typical to group national laws, including procedure law, into various so-called **legal families**,¹² **legal circles**, and recently the somewhat more encompassing **legal cultures**.¹³ This traditional way of thinking, namely in legal circles, does not seem to fit in our modern-day world of progressive internationalization and globalization (even for law) any more. It is also difficult to recognize what advantages such a way of thinking might or ever did possess (considering the defining of one's own, or comparing one's own to one's own dissimilarities), and whether the usefulness of grouping national laws into legal families has ever outweighed the harm it may have caused.¹⁴

One thing in this connection is at least certain: An emphasized national view or even a superiority way of thinking, or espousing any excessive psychic, emotional, ideological, political, cultural, or historical ties to a certain (namely one's own) legal family proves to be more obstructive than conducive to an impartial comparison of procedure law.

4. The Upsurge of Comparative Procedure Law as its own Discipline

Although the path has – for the most part – been rocky for the partially tried methodological-theoretical permeation of comparative procedure law as an independent and relatively young branch of comparative law (the same also applies to general comparative law), there is nevertheless a realization that comparative procedure law as an independent discipline of law is on the rise. However, it will certainly take some time for this discipline to find the same scholarly, practical, and political recognition as, for example, comparative private law, which for quite some time has enjoyed the status of being at the core and being the original area of general comparative law.

National University, College of Law, 2004; *Ho/Gilles* (ed.), *Studies in Civil Procedure*, Seoul National University, College of Law, 2004.

12. More recently, see *Kojima*, *Legal families in procedural law, revisited/Recrupement des familles juridiques et en un droit judiciaire*" (General report), in: Andolina, (FN 6) ...; see also *Koch*, *Neuordnung der Rechtsfamilien im Prozessrecht. Die Lehr von den Rechtskreisen (Rechtsfamilien) und das deutsche Zivilprozessrecht*, in: Gilles (ed.), *Transnationales Prozessrecht. Deutsche Landesberichte zum X. Weltkongress fuer Prozessrecht in Taormina, Sizilien*, 1995, pp. 119 ff.
13. Of late, see *Stuerner*, "Eroeffnungsvortrag", in: Gilles/Pfeiffer (ed.), *Prozessrecht und Rechtskulturen, Eroeffnungsvortrag und Deutsche Landesberichte zur Weltkonferenz fuer Prozessrecht in Mexiko City, Mexiko 2003*, pp. 9ff.
14. Already expounded in: *Gilles* (FN 4), p. 112 & n. 164.

III. GENERAL COMPARATIVE LAW AS A BASIS FOR A FUNDAMENTAL UNDERSTANDING OF COMPARATIVE PROCEDURE LAW

Now to the fundamental understanding of comparative procedure law, as it is understood by its method through the so-described means of thought and practice, by its object (namely procedure law), by its functions, and by its value. The risks and deficiencies of comparative procedure law undertakings will also be addressed.

1. “Comparative Law” and “Comparative Procedure Law” as Embodiments of a Host of Multidisciplinary and Interdisciplinary Methods

If one searches for a fundamental understanding of comparative procedure law, just as the case is regarding comparative law in general as well, then, in my view, one must identify – for the specific views and comments regarding the reasons or causes of comparison of the specific comparative study (“approaches,” “starting points,” “catalysts,” “impulses,” “factors,” “determinants”) – the law in its entire or universal object including its individual features (objects of comparison) and its general goals including its intended results; the specific structures, the prototypical specific thought and working steps (operations) of comparison and its procedure; the achievement of the targeted results including the intended results and, accordingly, the connected or even unintended results (functions); and finally the ramifications (effects, consequences, achievements, value). In addition to those areas of fundamental comprehension belong all other relations too, i.e., all connections between definition, origin, description, justification, assessment, or utilization to the aforementioned elements which, admittedly, hardly exist. The answer to the crucial question of law would also have to belong to this fundamental comprehension, namely the question of how comparative law as a legal method or discipline corresponds to other areas of law, how it corresponds to legal history, legal theory, legal methodology, legal sociology, legal fact research, legal economics of legal politics, history, linguistics, anthropology, ethnology, statistics, demoscopics, prognostics, psychology etc., so-called partner disciplines, neighbor disciplines, or helpful disciplines, such as legal sociology or international law, and especially also to the so-called partner or neighbor disciplines of law, for example sociology, economics, and political science.¹⁵

15. Compare especially *Drobnig/Rehbinder* (ed.), *Rechtssoziologie und Rechtsvergleichung*, 1976; *Martiny*, “Rechtsvergleichung und vergleichende Rechtssoziologie”, *Zeitschrift fuer Rechtssoziologie*, 1980, pp. 65 ff.; *Koetz*, “Was erwartet die Rechtsvergleichung von der Rechtsgeschichte?”, *JZ* 1992, pp. 20 ff.; *Kroppholler*, “Die vergleichende Methode und das internationale Privatrecht”, in: *Madlener* (ed.), *Deutsche Nationalberichte zum X. Internationalen Kongress fuer Rechtsvergleichung*, Budapest, 1978, pp. 1 ff.; *von Bender-Beckmann*, “Einige Bemerkungen ueber die Beziehung zwischen Rechtssoziologie

The task of further researching all of this in detail would be wholly overwhelming for me in the limited scope of this article. Rather, I would like to highlight a particular viewpoint of my own, namely that all scholars of comparative law have failed to understand and to describe comparative law as a universal or comprehensive method, or as an autonomous, self-propelled, and self-contained area of research or discipline. Accordingly, one should finally abandon such completely unrealistic and illusionary notions and goals. For comparative law in general and for comparative procedure law in particular, it should finally be recognized that comparative law and, accordingly, also comparative procedure law are merely embodiments of a host of very differing monodisciplinary, interdisciplinary, or multidisciplinary methods, or – perhaps even without any scholarly ambitions – plain practices and techniques. Each of which should be recognized from one comparison project to another differently, alone, next to, or together. The quality of such comparative studies also depends, of course, on the knowledge and skills of the various individuals, working groups, organizations, institutions, legal scholars, legal practitioners, legal politicians etc. Even the so-called “functional method,” which is so highly regarded by many, is but one method – albeit an important one – among many others within the field comparative law.

At any rate, the most penurious or even most paltry form of comparative law – if one can even call it this – is a mere balancing of statutory formulations of norms of one’s own country to those of another country. In other words, a pure “comparison of texts”¹⁶ as a linguistic-semantic operation, or even a plain list of some normative or otherwise legal similarities or dissimilarities without any further thought-out consequences, as has unfortunately become common not only within comparative law, but meanwhile also in the growing fields of assimilation of law or unification of law.¹⁷

2. “Law” and “Procedure Law” as Embodiments of a Host of Normative, Operative, and Factual Objects of Comparison

As far as the object of comparative law (that is, “procedure law”) is concerned, *Stuerner/Stadler*¹⁸ have expressed not long ago that procedure law is a

und Rechtsvergleichung”, *Zeitschrift fuer vergleichende Rechtswissenschaft* 78 (1979), pp. 51 ff.; see the numerous proofs at *Gilles* (FN 4), pp. 17 ff.

16. Compare especially *Herbert Roth*, “Vorschlaege der Kommission fuer ein europaeisches Zivilprozessbuch“, in: *ZZP* 109 (1996), pp. 271 ff.

17. For further proofs see *Gilles*, “Vereinheitlichung und Angleichung unterschiedlicher nationaler Rechte– Die Europaeisierung des Zivilprozessrechts als Beispiel“, in: *ZZPInt* 7 (2003), pp. 3 ff (especially pp. 23 ff.).

18. *Stuerner/Stadler*; in: *Gilles* (ed.), *Transnationales Prozessrecht* (FN 5).

“comparatively small,” “relatively well-settled,” “defined and self-contained,” or “relatively limited” field of law, which thus lends itself to a so-called “macro-comparison,” whereas within the field of comparative procedure law it lends itself to a so-called “micro-comparison.” This view cannot be shared in the face of the immense dimensions, the great complexity, and the interdisciplinary and multidisciplinary connections and categories. Procedure law and its scholars have long since, far beyond actual trial procedure law, taken in broad areas of so-called “normative procedure law,” “operative procedure law,” as well as “factual procedure law” in terms of relevant procedure law legal facts. And that to a once unfathomable degree! Under the term of procedure law, one now also includes the entire judicial law or “Droit du Judiciaire,” and broad areas of at least the forensic legal professions, and much more. Furthermore, comparative procedure law has long ago taken in the broad field of so-called alternative justice or alternative dispute resolution (ADR) and all of its varieties (arbitration, mediation, consultation, negotiation). From now on, comparative procedure law will also have to pay attention, at least in Germany, to the newly introduced so-called “key qualifications” (“negotiation management,” “dialogue skills,” “rhetoric,” “dispute resolution,” “mediation,” “taking of evidence,” and “communication skills”).¹⁹ In the face of all of this, one surely cannot assume that procedure law is a narrow, limited, and closed area of law.

What all is included in comparative procedure law and what all is the object of comparative procedure law can only be incompletely listed here:

As far as the procedure law norm world²⁰ is concerned, procedure law consists – along with pure trial procedure law or the civil procedure laws of the most diverse jurisdictions – not only of judgment procedure law, but also of the law of interim legal protection and summary trials, due process and legal remedies, enforcement of judgments, ancillary rights and privileges of the most diverse nature, laws governing judicial personnel and the legal profession, and the various laws governing trial fees. Furthermore, procedure law consists not only of national law, but also of interlocal, interzonal, intranational or innernational procedure law, as well as the much more significant international procedure law (conflict of procedure laws) or even supranational procedure law (uniform procedure law, community procedure law), and customary procedure law and public international procedure law. Moreover, one should also mention the so-called judicial procedure

19. See Gilles, "Zur neuesten deutschen Juristenausbildungsreform und ihren Bezügen zum Universitätsunterricht im Zivilverfahrensrecht", *Seoul Law Journal* 2004; Gilles/Fischer, "Juristenausbildung 2003", in: *NJW* 2003, pp. 707ff.

20. Gilles (FN 4), pp. 27ff.

law (as mentioned above), the entire jurisdiction law, the so-called constitutional procedure law or jurisdiction law or the jurisdictional or procedure constitutional law as well as its procedure and jurisdiction fundamental rights and/or human rights. In addition, a plethora of unwritten procedure law, so-called customary law, bench law, or case law, as well as codified or written procedure law along with a further area of so-called private or alternative procedure law and judicial law, forensic and/or professional procedure customs, practices, rites, guidelines, standards, codices, rules, and ethics, and many others.

A legal scholar who does not just confine himself to statutory rules (or so-called code law, law in the books, paper law, or black letter law), but rather who also concerns himself with law in its full and true meaning and in all of its social, economic, political, cultural, and other contexts (in other words the so-called law in action, living law, or practice law), cannot avoid including the so-called operative procedure law in addition to normative procedure law in his comparative study. In other words, the law in his respective national or transnational scholarly treatments, law in practice, legislative implementation, and law in politics treatments. In addition, the broad field of so-called factual procedure law in the sense of legal facts, in other words with all those realities and ideals which constitute, impact, and influence fields of judicial and procedural norms. As far as the so-called operative procedure law is concerned, procedure law research, just as procedure law practice and procedure law legislation in various countries and cultural circles, sometimes reveals very different development phases and development situations, which can make it difficult for comparative procedure law studies. For example, I have already tried to show what phases the German civil procedure scholarship has gone through, starting with a purely descriptive, then moving to a definition-constructive, academic-dogmatic-formalistic, materialistic, multidisciplinary and interdisciplinary phase, then moving to a legitimation theoretical and universal phase.²¹

The aforementioned “realities of procedure law”²² as possible topics of comparative law studies might include the judiciary as “system of authority,” “power potential,” “service industry,” “welfare institution,” “bureaucracy,” or “civil servant organization.” Or a trial as a “form of conflict,” “field of interaction,” “information, communications, or data processing system,” as “speech situation” and “language enclave,” as “ritual” and “role-playing game,” as “theater” and

21. Compare Gilles (FN 4), pp. 46ff.; ders., "Bedeutungszuwachs und Funktionswandel des Prozessrechts", in: JuS 1981, pp. 402ff.

22. More thoroughly, see Gilles (FN 4), pp. 38f.

“drama,” “business organization,” and as “service provider.” Along with the “appreciation of the native and foreign,” “attitudes” and “habits,” “techniques” and “practices” of the players at trial and in the judiciary. The public’s opinion of the judiciary and the courts, legal awareness and judicial experiences, and everything associated with the keywords “identification,” “alienation,” “acceptance,” “distance,” “public proximity,” “trust,” “authority,” “comprehensibility,” “humaneness,” or “efficiency.”²³

However, concerning oneself with the aforementioned factual procedure law in view of the still underdeveloped empirical-legal sociological and legal economic research in Germany is extremely rare. In addition, the operative treatment of procedure law is often extremely inadequate when scholars of comparative law just consult, say, some commentaries or some textbooks regarding foreign law.

3. Tasks, Goals, and Purposes of Comparative Procedure Law

As far as the goals and purposes of comparative procedure law are concerned, they do not differ greatly from those of general comparative law, but nevertheless there are some differences.

In as much as comparative procedure law is conducted renouncing any form of “utilitarianism” either in fact or supposedly, and in as much as its immediate main goal lies in discovering similarities and dissimilarities between the various objects of comparison, then the thus conceivable consequential purposes are not of interest here, even though these could very well be latently present.

The purposes of comparative law, which scholars of comparative law have advanced, and which can also be recognized in certain comparative projects, span from “gaining insight,” “increasing understanding,” “expanding one’s horizons, arsenal of arguments, and alternative spectrum,” to “intellectual amusement,” “scholarly pleasure,” “legal self-gratification,” and “academic zestfulness,” to “borrowing foreign authorities to support one’s own arguments or to weaken adverse arguments of others,” or to the “development of legal circles, legal families, and legal styles” by placing various laws in these categories, all the way to “education of mutual acceptance and tolerance,” “promotion of international understanding,” “prosperity,” “world peace,” “world economy,” social justice, and democratic circumstances.²⁴

23. Gilles (FN 4), p. 23.

24. For further purposes in the literature, see Gilles (FN 21), pp. 23 f.

What definitely stands out today among the more “legal” purpose descriptions and task assignments is what I will call the servient function of comparative procedure law in the area of assimilation or unification of law in general and of procedure law in particular as a result of modern-day internationalization or even globalization movements, among which the Europeanization of law, including procedure law, currently represents the strongest movement. This is where comparative procedure law is currently fulfilling its greatest task in an indispensable prerequisite to preliminary work through procedure law assimilation of all kinds within the currently so-called “European law zone.” It is meanwhile the case in Europe, to be sure, that the so-called legal assimilation or also legal harmonization, legal approximation, and legal compatibility – according to the official language of European documents – has forced comparative procedure law as such to the background.²⁵

If the value of the contribution of comparative procedure law to legal assimilation projects is unquestionably great, then, on the other hand, its partially assumed and realized tasks and achievements to international procedure law and its development are certainly dubious and, as such, should not be valued especially high.²⁶

Finally, it is especially worth noting for the Korean-German relationship that comparative procedure law has played and still continues to play a large role for the treatment both of past procedure law projects and possible future procedure law projects, at least in Korea.²⁷

4. Achievements, Value, and Beneficial Effects of Comparative Procedure Law

Which of the aforementioned tasks of comparative procedure law have meanwhile been fulfilled, and to what extent, and which of its purposes have really been reached, or in other words, what achievements comparative procedure law has yielded, what value has been gained, and what beneficial effects it has shown, cannot be individually clarified here and certainly cannot be individually proven.

But, at the same time, it is on the whole safe to say that the achievements and positive effects have been, and continue to be, substantial in many other fields. Among other things, they have provided the impetus for many research projects and an entire series of so-called “model laws of procedure” or “model rules of

25. For numerous further proofs, see *Koch* (FN 5); see also *Gilles*, in: ZZP-Int (FN 16).

26. See, e.g., *Schuetze*, “Internationales Zivilprozessrecht und Rechtsvergleichung”, in: Institute of Comparative Law Waseda University (ed.), *Law in East and West*, Tokyo 1988, pp. 323 ff.; *Schack* (FN 7); *Stuerner/Stadler*, in: *Gilles* (ed.) *Transnationales Prozessrecht* (FN 5) and *Gilles* (FN 4), p. 7 n. 9, p. 18 n. 31.

27. See *Ho* (FN 10).

procedure,” such as the IBA Minimum Standards of Judicial Independence of 1982, the UNCITRAL model rules governing international commercial arbitration of 1985, the model draft of the Ibero-American rules of civil procedure of 1988, the *Storme* project (submitted to the European Commission in 1989) of a draft of a European rules of civil procedure, or *Hazard’s* and *Taruffo’s* “Code of Basic Principles for Civil Procedure in Transnational Litigation,” or a (since 1999 unified) ALI/UNIDROIT project “Principles of Transnational Litigation” with the substantial participation of *Stuerner*, and much more.²⁸

The very special strengths and value of comparative procedure law lie, indeed, in an entirely different area, an area which allows the branch of comparative procedure law to appear more important than the other branches of comparative law and which lends it its own and independent importance, namely the area of worldwide democratization of judicial systems with constitutional foundations, the humanization of judicial trials under the protection of so-called procedural and justicial human rights. Among the most important multipliers is the incredibly active and efficient *International Association of Procedural Law* (IAPL), which has played, and continues to play, a substantial role through its numerous world conferences. In addition, the IAPL has had, and continues to have, a great effect not only on research, but also on the practice and legislation of many countries.

Mauro Cappelletti,²⁹ the former long-time president of the IAPL, initiated the once-authoritative Access to Justice Movement as well as the world conferences of the IAPL, entitled “Justice with a Human Face,” “Effectiveness of Judicial Protection and Constitutional Order,” “Efficiency in the Pursuit of Justice,” “Role and Organisation of Judges and Lawyers in Contemporary Societies,” “Transnational Procedural Law,” “Procedural Law on the Threshold of a New Millennium,” and “Procedural Law and Legal Cultures.” Along with the general reports and national reports, they are of great significance for the fields of research, practice, and politics. They stand as but a few examples of many.³⁰

5. Barriers, Risks, and Deficiencies of Comparative Procedure Law

Finally, regarding the barriers and difficulties of comparative procedure law, certain dangers and certain actual and potential short-fallings of comparative procedure law should not go unmentioned.

28. See the proofs at *Gilles* (FN 4), p. 31 nn. 58 – 60, p. 123 nn. 181, 182.

29. *Cappelletti* (Gen.ed.), *Access to Justice*, Vol. I – IV (Italy), 1978/1979; *ders.*, *Access to Justice and the Welfare-State* (Italy), 1981.

30. The general reports and at least the German national reports have all been published in book form.....

These are by and large no different from those of general comparative procedure law, which generally speaking primarily consist of not fully and accurately grasping and understanding a foreign law, if one would like to undertake more than a mere comparison of statutory texts, which in itself is not exactly easy due to the foreign language barriers and translation problems. A successful comparative procedure law study requires not only firm foreign language competency, but also scholarly research competency, as well as, for larger projects, personnel, material, and financial research potential and resources, including obtaining materials, publication possibilities, information systems, access to sources, and informatics.

Hindrances to an “objective,” unbiased comparative procedure law study include national identity, superiority thinking, psychic and emotional, ideological and political, cultural and historical ties to certain legal circles such as the, as *Langbein*³¹ describes, “Cult of Common Law,” which can surely be contrasted to the not quite so unfolded “Cult of Civil Law.” Moreover, the danger should not be underestimated that the homeland or even personal view of procedure law and its comparison might be portrayed as common knowledge in the entire world, or the danger of looking at foreign phenomena and viewpoints – as far as one even knows or recognizes them – through one’s own glasses and then measuring them according to one’s own domestic standards. This applies to many scholars of comparative procedure law and of course to me too.

An even greater danger to an objective view is when certain phenomena or viewpoints of procedure law and its comparison – as is evident elsewhere – are not even taken into account because they might not fit into one’s own domestic world of procedure law definitions and notions and its comparison. In other words: If a scholar of comparative law is caught up in his own socialization and legal education, his tradition and his culture too much, then defects and wrong assessments can hardly be avoided. It has unfortunately become ever increasingly common at international conferences for the general reporters to give the national reporters very detailed and endlessly long questionnaires, which are usually oriented towards their own views. This practice dramatically increases this risk.

In summarizing this final chapter, I would like to emphasize that comparative procedure law proves to be an especially difficult undertaking, indeed, an undertaking that – in my view – is normally much more difficult than comparative law. This is due not only to the immense dimension, to the great complexity of the object of comparison (procedure law), and to the deficiency of theory, but

31. *Langbein*, „National Report USA: Comparative Procedural Law“, partially quoted in: *Gilles* (FN 4).

also especially to the strongly distinct interdisciplinarity and internationality of this branch of comparative studies.

IV. CLOSING REMARKS

In closing, I would like to say that I do not just assume the discipline of comparative procedure law will have a bright future, I firmly predict it. My prediction is entirely independent of *Cappelletti's*³² *assessment several decades ago that procedure law has become the "most important branch of law," an assessment for which much can be said nowadays, considering the latest trends in research regarding "procedural justice"*³³ or universal *"proceduralization in law."*³⁴

32. *Cappelletti*, cited by *Storme*, in: *Storme/Casman* (ed.), *Towards a Justice with a Human Face*, Gent (Belgium), 1977, p. 15.

33. Exemplary *Hoffmann*, *Verfahrensgerechtigkeit. Studien zu einer Theorie prozessualer Gerechtigkeit*, 1992; *Bodtke*, *Materielle und formelle Verfahrensgerechtigkeit im demokratischen Rechtsstaat*, 1991; *Neumann*, "Materiale und prozessuale Gerechtigkeit im Strafverfahren", in: *Zeitschrift fuer die gesamte Strafrechtswissenschaft* 101 (1989), pp. 52 ff.; also *Rawls*, *Eine Theorie der Gerechtigkeit*, 6th ed. 1991.

34. Exemplary *Wiethoelter*, "Materialization and proceduralization in modern law", in: *Teubner* (ed.), *Dilemmas of Law in the Welfarestate*", 1986, pp. 21 ff.; *ders.*, "Proceduralization of the Category of Law", in: *Joerges/Trubek* (ed.), *Critical Legal Thought, An American-German Debate*, 1989, pp. 501 ff; *ders.*, "Ist unserem Recht der Prozess zu machen?", in: *Honneth/McCarthy/Offer/Wellmer* (ed.), *Zwischenbetrachtung im Prozess der Aufklaerung, Juergen Habermas zum 60. Geburtstag*, 1989, pp. 794 ff.

