
1. Comparative studies of civil procedure

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I INTRODUCTION

Comparative civil procedure is a young discipline. While borrowing and imposing procedural structures of the great empires and colonial masters have been around for centuries, and early studies in ‘comparative legislation’ date back to the sixteenth century, this must be distinguished from comparative studies of civil procedure as a separate and distinct academic discipline. The systematic scholarly and academic study of various national civil justice systems is essentially the product of the late twentieth century, becoming prominent only in the twenty-first century.¹

The reasons for the late start lie in the dominant approach to the study of civil procedure. As civil procedure consists of rules designed for the use in national courts, the focus of the study and research was traditionally limited to the rules and practices of specific court jurisdictions. The underlying assumption was that differences in the judicial structures for which civil procedural rules are produced are too great, and their purpose too specific to be capable of comparing. The prevailing view was that every civil jurisdiction has a different tradition, different legal culture and a different court organization.²

Another, pragmatic reason for the lack of comparative research is the close link between the study of procedural law and its practical application. As national civil procedural rules used to be applied only in proceedings before national tribunals, there seemed to be no point in learning about foreign rules and practices. Insofar, comparative civil procedure is different from other branches of comparative legal research. Substantive foreign law may be agreed upon and may apply in domestic courts, and the principles of many substantive fields have been influenced by developments from other places. And, while the purpose of substantive rules is manifested in different outcomes, procedural rules are said to be value-neutral. The unification or harmonization of procedural rules is therefore harder to justify: Why bother changing the process, if the outcome will be the same?

For these reasons, until the beginning of the 2000s, even in federal states, or in complex organizations such as the European Union, the dominant position was that ‘as a rule, the law of civil procedure was and still is considered to be closely connected to the forum and the forum state with its own cultural and traditional specific aspects, and therefore not fit for harmonisation’.³

¹ For definition of comparative civil procedure see Peter Gottwald, *Comparative Civil Procedure*, 22 RITSUMEIKAN L. REV. 23 (2005); see also GUY SEIDMAN & COLIN PICKER (EDS.), *THE DYNAMISM OF CIVIL PROCEDURE – GLOBAL TRENDS AND DEVELOPMENTS* 3–44 (2016).

² Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 20 (1974).

³ Mirjam Freudental, *The Future of European Civil Procedure*, 7(5) ELECTRONIC JOURNAL OF COMPARATIVE LAW (2003), <https://dspace.library.uu.nl/handle/1874/10814> (accessed March 2024).

Many of these factors have changed today. Comparative study of civil procedure belongs among the youngest branches of comparative legal research, but its usefulness and importance are unquestionable. Methodologically, comparative civil procedure is also among the most diverse and most vibrant fields of legal research. In this introductory chapter, different approaches to comparative study of civil procedure will be presented, from singular attempts to describe a foreign civil justice system to contemporary systematic and synthetic works aimed at shaping model rules and minimal standards of civil procedure. Throughout this chapter, the emphasis will be on the revelation of forces which motivate – and will motivate – the study of comparative civil procedure.

II COMPARATIVE RESEARCH AS EXPLORATION OF FOREIGN SYSTEMS

Profound differences in national judicial structures have not been the only obstacle to comparative studies of civil procedure. Language barriers used to be equally dispositive in this highly technical field of law. Specific procedural rules and practices are regularly articulated in a specific legal jargon, often impenetrable even for proficient speakers of the native language of a specific jurisdiction. And a simple explanation of the meaning of individual words often does not suffice unless the context within which these concepts operate is thoroughly explained.

One of the basic approaches to the study of civil procedure in a multinational context therefore focuses on the description and the explanation of the features of a foreign civil justice system, i.e. in bringing unusual and hardly understandable rules from a different legal tradition closer to the targeted readership. This approach produces essentially only an implicit comparison, since the focus is on presenting and explaining the key elements in a way understandable to those from a rather different judicial environment.

The main role of such approach is often to compare the incomparable – to explore the strange landscape of foreign civil justice and discover its peculiar features, usually with no other purpose and intent but to inform a casual reader. As such, this approach is analogous to a safari expedition: a singular attempt to visit and observe the wild and unusual world of civil procedure of another country.

One of the first serious attempts to undertake such singular explorations of foreign civil procedure dates back to the 1960s.⁴ In 1965, Mauro Cappelletti and Joseph Perillo published a book dedicated to civil procedure in Italy.⁵ The study starts with ‘a summary of Italian history’, from ancient Rome to an outline of Italian political history, prior to providing a sketchy presentation of the development of Italian civil procedure, with an emphasis on the sources of Italian rules of civil procedure. Similarly structured studies on civil procedure in France and Sweden were also published as a result of the Columbia University School of Law project on international procedure under the directorship of Hans Smit.⁶

⁴ A motivation for this movement can be found in the rise of trans-national litigation in the late 1900s, sparked by greater international collaboration in postwar Europe and the relaxation of personal jurisdiction in the US after 1945, which opened US courts to the world.

⁵ MAURO CAPPELLETTI & JOSEPH M. PERILLO, *CIVIL PROCEDURE IN ITALY* (1965).

⁶ ANDERS BRUZELIUS & RUTH BADER GINSBURG, *CIVIL PROCEDURE IN SWEDEN* (1965); PETER HERZOG & MARTHA WESER, *CIVIL PROCEDURE IN FRANCE* (1967).

The singular explorations of national procedural laws – the ‘safari expeditions’ organized with a view to inform a foreign audience – have maintained their relevance until today. Many of the works describing individual national systems of civil procedure are serious studies by leading scholars in the field (often authored by a team of an ‘insider’ and an ‘outsider’ perspective).⁷ Experience of other national civil justice systems and their reforms (whether successful or not) can be a source of inspiration and may contribute to the success of reforms in other jurisdictions.⁸ In such a way, ‘safari expeditions’ can become roadmaps for change.

However, the focus of various publications entitled ‘civil procedure/justice/litigation in ...’ has shifted towards a more practical perspective. With a growth of multinational litigation and the accompanying internationalization of the legal profession, studies devoted to a presentation of national procedural rules and practices became an almost indispensable part of any national legal infrastructure. They are used by lawyers in multinational law firms to frame their arguments, by corporations to understand the legal risks of working in a particular jurisdiction, and also by the courts which wish to join the international market of judicial services and offer their venue for the settlement of international disputes. With this rise in pragmatic focus, comparative studies moved from understanding key features in a comparative context to simply translations of national procedural codes addressed to legal practitioners. The comparative element vanished in many contemporary studies of foreign national justice systems. After all, to ‘compare’ means to examine differences of two or more systems, and genuine comparative studies seek to address key features of at least two national systems, or groups of systems.⁹

By contrast, an organization that has contributed greatly to the development of the genuine comparative study of civil procedure is the International Association for Procedural Law (IAPL). The IAPL, established in 1950 in Florence as a professional organization of lawyers and academics, promotes the development of the study of procedural law and the exchange of information on sources, publications, practice and case-law. Its task was primarily to establish wider links between scholars of civil procedure by organizing congresses, conferences and seminars. The books produced as a result of these events were in a great part composed on the basis of national reports on specific issues of civil procedure, compiled and presented by general reporters. While the IAPL started with a focus on individual features of national

⁷ See for instance YASUHEI TANIGUCHI, TAKAAKI HATTORI & DAN FENNO HENDERSON, *CIVIL PROCEDURE IN JAPAN* (2000); PETER MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* (2004); GEOFFREY HAZARD & MICHELE TARUFFO, *AMERICAN CIVIL PROCEDURE* (1993); MILOŠ KENGYEL & VIKTORIA HARSAGI, *CIVIL JUSTICE IN HUNGARY* (2009); ROBERTO BERIZONCE & EDUARDO OTEIZA, *CIVIL PROCEDURE IN ARGENTINA* (2021); HUMBERTO DALLA, *CIVIL PROCEDURE IN BRAZIL* (2022); MAUREEN STANLEY-IDUM, *CIVIL LITIGATION IN NIGERIA* (2017); ALLAN LEUNG, *CIVIL LITIGATION IN HONG KONG* (2017).

⁸ See for instance NICOLÒ TROCKER & VINCENZO VARANO (EDS.), *THE REFORMS OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE* (2005).

⁹ Insofar, comparison of two or more systems is sometimes visible in the titles of comparative studies. See e.g. PETER GOTTWALD (ED.), *LITIGATION IN ENGLAND AND GERMANY. LEGAL PROFESSIONAL SERVICES, KEY FEATURES AND FUNDING* (2010) (papers from the joint conference of the IAPL and the German Association for International Procedural Law); for comparison between groups of systems, C.H. VAN RHEE & YULIN FU, *CIVIL LITIGATION IN CHINA AND EUROPE* (2014); ALAN UZELAC & C.H. VAN RHEE, *THE LANDSCAPE OF THE LEGAL PROFESSIONS IN EUROPE AND THE USA: CONTINUITY AND CHANGE* (2011).

systems, its work has gradually evolved towards the synthetic and genuinely comparative study of procedural law.

III THE EVOLUTIONIST APPROACH TO COMPARATIVE RESEARCH AND THE GREAT DIVIDE

Another approach in the studies of comparative civil procedure came from the historical research of legal developments of court systems in different legal traditions. These works relevant to the comparative research of civil procedure were not written with a specific intent to deal with procedure alone. However, in revealing how legal traditions and legal cultures were formed, they also set the grounds for understanding civil procedure in various groups of national justice systems.

Books such as *Law and Revolution*¹⁰ give an example of studies which, from a historical perspective, contributed to an understanding of the roots of procedural institutions and concepts, including those structures which evolved into contemporary civil justice systems. Other important historical studies focused on the actors which dominated the process in framing legal institutions.¹¹

In the 1980s, historical research was paired with the first encyclopedic efforts to present and explain the systems of civil procedure in a supra-national context. During that period, the *International Encyclopedia of Comparative Law* produced a synthetic volume dedicated to civil procedure.¹² Contributions to this volume grouped national civil procedure systems in various clusters. After a brief historical introduction, national civil procedure systems were grouped by their main features and connected by common features of legal systems. These 'regional procedures' were respectively those of England and the United States, the Romanist countries (France, Italy, Belgium), the Central European Countries (which included Germany, Austria and Switzerland), the Socialist Countries, the Scandinavian Countries, and the Iberian Peninsula and Latin America.

The 'great divide'¹³ of the historical and evolutionist research of civil procedure, of course, was and remains to be the divide between common law and civil law. This divide was and remained to be the center of comparative research of civil procedure, although its boundaries have steadily relativized due to divergences,¹⁴ as well as convergences between these two 'big

¹⁰ HAROLD J. BERMAN, *LAW AND REVOLUTION* (1983).

¹¹ See e.g. R.C. VAN CANEGEM, *JUDGES, LEGISLATORS AND PROFESSORS* (1987).

¹² MAURO CAPPELLETTI & BENJAMIN KAPLAN (EDS.), *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW*, VOL. XVI, *CIVIL PROCEDURE* (1984).

¹³ See NICOLETTA BERSIER ET AL. (EDS.), *COMMON LAW – CIVIL LAW: THE GREAT DIVIDE?* (2022).

¹⁴ The Romanic and Germanic traditions within the civil law 'bloc' are rather different; within the common law, one often refers to American 'exceptionalism', see Oscar Chase, *American 'Exceptionalism' and Comparative Procedure*, 50 AMER. J. COMP. L. 277 (2002); Richard Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AMER. J. COMP. L. 709 (2005).

legal families'.¹⁵ Despite all this, the distinction of common and civil law traditions remains to be an important element of comparative study of civil procedure. Many of the distinctive features remain to play an important role in the comparative research of civil justice. Therefore, studies which portray legal traditions, such as the seminal 1969 treatise of J.H. Merryman, which examined the civil law tradition from a common law perspective, still provide a useful starting point for comparative research of civil procedure.¹⁶

This binary approach to 'categories' should not disregard the fact that the common and civil law traditions do not cover the whole universe of civil procedure. A thousand shades of gray exist between these two extremes, and the comparative study of civil procedure should aim to look beyond the great divide. 'Mixed jurisdictions' such as countries whose historical origins combined various sources in a unique blend of features, present unique opportunities for study. Justice systems of countries like South Africa, Israel, Canada and many others,¹⁷ as well as the former socialist countries,¹⁸ form a special topic of comparative legal research. While civil and common law traditions did spread around the globe during the period of colonialism, comparative studies of civil justice systems should take into account native legal traditions which originate outside the sphere of Western expansionism. Finally, the 'Western legal tradition'¹⁹ is not the only legal tradition; in the East, there are distinctive elements in countries such as China²⁰ or India,²¹ and different historical origins framed the structures of Hindu, sharia, aboriginal, Talmudic, African and other legal traditions. While they have not been in the center of comparative study of civil procedure,²² they are garnering and deserving full attention.

Today, the historical and evolutionist approach has not lost its importance, especially in the context of the integration processes and formation of trans-national procedures, such as in the European Union, where the development of European civil procedural rules presupposes the study of 'the shared legal past of the various systems of civil procedure that exist

¹⁵ The 'great divide' in civil procedure was the main topic of the IAPL Conference held in Toronto in 2009, which resulted in a pivotal book on the relevance of the old categories for contemporary dispute resolution. See JANET WALKER & OSCAR G. CHASE (EDS.), *COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES* (2010).

¹⁶ JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (1969).

¹⁷ It is argued that there are 'at least 16 jurisdictions around the world ... where common law and civil law coexist and commingle', Seidman & Picker, *supra* note 1, at 31. See also VERNON VALENTINE PALMER (ED.), *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* (2012).

¹⁸ See Alan Uzelac, *Survival of the Third Legal Tradition*, 49 *SUPREME COURT LAW REVIEW* (2010); Rafal Manko, *Survival of the Socialist Legal Tradition? A Polish Perspective*, 4 *COMPARATIVE LAW REVIEW* 2 (2013).

¹⁹ See more in H. Patrick Glenn, *A Western Legal Tradition?*, in *COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES* 601–19 (Janet Walker & Oscar G. Chase eds., 2010).

²⁰ See for instance MARGARET WOO, *CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA* (2011).

²¹ Compare VASUDHA DHAGAMWAR, *ROLE AND IMAGE OF LAW IN INDIA: THE TRIBAL EXPERIENCE* (2006).

²² As a rare exception, the interaction between indigenous and colonial law was discussed at the IAPL conference in Bogota within the topic of 'judicial pluralism', see RAMIRO BAJARANO GUZMÁN ET AL. (EDS.), *RECONCILIACIÓN Y DERECHO PROCESAL* 223–88 (2016).

in present-day Europe'.²³ Similarly, the process of approximation of procedural rules in other regions requires an understanding of the origins and purposes of procedural institutions, which are themselves the result of same or similar historical developments. The study of common roots, but also of common differences, have been important for the recognition of best practices that have served as the basis for legal reforms on the national and regional level.²⁴

IV COMPARATIVE PROCEDURAL STUDIES AS THE BATTLE OF PRINCIPLES: FROM BINARY IDEOLOGIES TO SINGULAR OVERARCHING OBJECTIVES

Comparative studies of civil procedure have always needed a firm starting point in the form of minimum common denominators which help us understand each other. Without proper guidance, comparing rules and regulations applicable in different jurisdictions would be a Sisyphean task, as the procedural codes are usually highly technical. Procedural principles are the bridge between the procedural rules and their social and legal purpose.²⁵

Procedural principles are theoretical constructs which serve for a better understanding, interpretation and application of the norms and the corresponding routines and practices within a system of civil justice. In their essence, although they may be expressed in the language of procedural norms, and even be contained in the introductory parts of procedural codifications, procedural principles are not simple juridical provisions. They are meta-juridical tools which provide guidance, explain the role of and sometimes even serve as the ideological basis for the assessment of national justice systems and their institutions and practices.

In the study of civil procedure, some procedural principles are traditionally used to emphasize the common features of civil procedure that transcend national borders. Within the Western legal tradition, such fundamental principles were developed on the basis of Roman law from the late medieval period onwards, often with reference to Justinian's *Corpus Iuris Civilis*. One of them is the principle of party disposition, which states that civil litigation is instigated upon petition of a claimant party (*nemo iudex sine actore*), and that the court in civil procedure should not act on its own motion (*ne procedat iudex ex officio*). In modern times, the right of everyone in a civil dispute to have access to a court or tribunal competent to adjudicate the dispute is also recognized as a fundamental procedural principle. An arbitrary refusal of courts to decide in a civil case within their jurisdiction amounts to denial of justice (*déni de justice*).²⁶

²³ C.H. van Rhee, *Introduction*, in *EUROPEAN TRADITIONS IN CIVIL PROCEDURE* 5 (C.H. van Rhee ed., 2005).

²⁴ See more in Section VI.

²⁵ On procedural principles, see Neil Andrews, *Fundamental Principles of Civil Procedure: Order Out of Chaos*, in *CIVIL PROCEDURE IN A GLOBALIZING WORLD* 19–38 (Xandra Kramer & C.H. van Rhee eds., 2012).

²⁶ Denial of justice assumes a systemic deprivation of the individual right to have a case regarding contested rights and obligations decided by *any* court. It does not exclude the refusal of a court to accept a case based on the assessment that another court has jurisdiction, or – in the common law tradition – that another court would be a more convenient venue than the one to which the case was referred to (*forum non conveniens* doctrine).

There are, however, few such clearly expressed ideas on which a global consensus of civil procedural scholars can be reached. National systems of civil procedure differ, and the comparative study of civil procedure is more often focused on the apparently unique and inexplicable differences and their roots. As stated by Jolowicz, when faced with different features of foreign systems '[c]omparative legal study provides a tool for lawyers to gain some insight about the things they themselves take for granted about their legal system and which they do not articulate'.²⁷ The articulation of such fundamental understanding has historically taken place in the form of conflicting principles – those which characterize one or more civil justice systems and distinguish them from the others.

In such a way, one or more procedural principles may serve either as a legitimizing factor which favors one system over another, or as a vehicle of legal reform. For example, reforms in Austria and some other jurisdictions of continental Europe at the end of the nineteenth century emphasized the shift from a Romano-canonical written and deconcentrated civil procedure to the reformed civil procedure based on the principles of orality, publicity, immediacy and concentration of civil litigation.²⁸

The most notorious dichotomy in comparative studies of civil procedure is the one which distinguishes civil justice systems based on their adherence to the 'adversarial' and 'inquisitorial' principles.²⁹ The adversarial principle relates to a procedure which is dominated by the parties, and litigation as a process in which a passive judge moderates a contest in which two parties (or, rather, their lawyers) present all elements of their case. In contrast, the inquisitorial principle relates to a procedure in which the determination of all key elements of the dispute is left to the court, with little or no active participation by the parties.

The adversarial/inquisitorial dichotomy is often connected with the common/civil law dichotomy, where it was often regarded that common law civil procedure is adversarial, and the civil law system is more or less inquisitorial.³⁰ The comparative studies of civil procedure show, however, that pure adversarial and pure inquisitorial systems of civil procedure do not exist. While it is legitimate to argue that common law civil procedure is predominantly adversarial, in respect to civil litigation very few systems would describe themselves as inquisitorial or even predominantly inquisitorial.

Today, the elements associated to the 'adversarial' and 'inquisitorial' labels relate mainly to the responsibility for collection and presentation of evidence, and – to a lesser extent – the obligation to plead the law. The assumed superiority of the 'adversarial' common law procedure has eroded both from the perspective that adversarial practices are not necessarily more

²⁷ JOHN A. JOLOWICZ, *ON CIVIL PROCEDURE* 4 (2005).

²⁸ On the key principles of Franz Klein's 1898 reform of civil procedure in Austria and its significance for the developments in Europe see C.H. van Rhee, *Civil Litigation in Twentieth Century Europe*, *TJDSCHRIFT VOOR RECHTSGESCHIEDENIS-REVUE D'HISTOIRE DU DROIT – THE LEGAL HISTORY REVIEW* 307–19 (2007), <https://doi.org/10.1163/157181907783054978> (accessed March 2024).

²⁹ Compare Robert W. Millar, *The Formative Principles of Civil Procedure*, in *HISTORY OF CONTINENTAL CIVIL PROCEDURE* 11–21 (Arthur Engelmann et al. eds., 1928); John A. Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, 52 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 281–95 (2003); John A. Jolowicz, *Adversarial and Inquisitorial Approaches to Civil Litigation*, in *THE CAMBRIDGE LECTURES* 237–43 (Elizabeth G. Baldwin ed., 1983).

³⁰ Jolowicz, *supra* note 27, at 175.

advantageous,³¹ and from the growing active case management role of the court in common law jurisdictions. Contemporary attempts to find globally and regionally acceptable models of civil procedure are not built upon the unilateral praise of adversarialism either. Some of the old adages of procedural textbooks, such as the parties as *domines litis* ('masters of litigation') do not apply anymore, as contemporary comparative works emphasize the joint and shared responsibility of both the parties and the court for the good administration of justice.

This battlefield of mutually opposed procedural principles is neither a good prescriptive nor an adequate descriptive basis for comparative study of civil procedure. Nevertheless, the opposition of procedural principles remains to be useful for a mutual understanding of the comparativists, when used as abbreviations that indicate problems and current developments and in serving as catalyzers of comparative research, and as a basis for questioning our accustomed conceptual frameworks.³² Rephrasing and elaborating procedural principles became the basis for harmonization projects, most eminently the project that resulted in the formulation of the ALI-UNIDROIT Principles of Transnational Civil Procedure, discussed below.

Indeed, the pursuit of new guidance for procedural reforms has led to the formulation of a smaller number of directive principles, or even a singular, overarching procedural principle, over a focus on conflicting procedural principles. The Woolf reforms in England and Wales³³ are the best example of this approach to civil procedure that is based on singular teleological notions – on an overriding objective (or underlying rationale) which serves as the highest principle in the interpretation and application of procedural rules. This approach is also visible in model procedural legislation such as the European Rules of Civil Procedure, in which loyal cooperation and proportionality serve as key procedural principles. These principles establish a joint and shared obligation of all actors in civil procedure (judges, parties, lawyers, but also other procedural participants) to work together, contributing to a fair, efficient and speedy resolution of their dispute by means that are appropriate and proportionate, including the obligation to take reasonable and appropriate steps to settle the dispute amicably.³⁴

In this way, binary, instrumental principles formulated as mutually exclusive oppositions (adversarial/inquisitorial; orality/writing; immediacy/mediacy; publicity/privacy) have given way to a search for singular guiding principles and concepts, explained and elaborated in contemporary comparative studies as a tool for advancement and perfection of procedural law.

³¹ See for instance the discussions triggered after publication of John H. Langbein, *The German Advantage in Civil Procedure*, 52 UNIV. OF CHICAGO L.R. 823–66 (1985). See also JAMES R. MAXEINER, *FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE* (2012).

³² For instance, the conflicting procedural principles of orality and writing provided a framework topic of the 2007 IAPL Conference in Valencia, where the usefulness of this traditional dichotomy was also questioned from the perspective of new technologies. See FEDERICO CARPI & MANUEL ORTELLS RAMOS (EDS.), *ORALIDAD Y ESCRITURA EN UN PROCESO CIVIL EFICIENTE* (2008). Similarly, the rethinking of the principle of publicity stimulated research on 'open justice' (and its limits) – see BURKHARD HESS & ANA KOPRIVICA (EDS.), *OPEN JUSTICE. THE ROLE OF COURTS IN A DEMOCRATIC SOCIETY* (2019).

³³ See HARRY WOOLF, *ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES* (1996); JOHN SORABJI, *ENGLISH CIVIL JUSTICE AFTER THE WOOLF AND JACKSON REFORMS. A CRITICAL ANALYSIS* (2014).

³⁴ See Rules 2 to 8 of the ELI-UNIDROIT Model Rules of Civil Procedure.

V REFINING THE TYPOLOGY: THE FACES OF JUSTICE AND ITS AUTHORITIES

The simplistic presentation of justice systems through the opposition of adversarial and inquisitorial proceedings, as well as the simplistic divisions into common and civil law systems, proved to be inadequate for the needs of comparative study of civil procedure. To overcome their deficiencies, new – improved and more sophisticated – heuristic models for the analysis of justice systems were shaped.

One of the most prominent alternative typologies, designed by Mirjan Damaška, was his model of judicial proceedings and their purpose within particular state organizations. It is a Weberian *Idealtyp* (ideal-type) – a neutral synthesis of a great many diffuse phenomena into a simplified representation with considerable explanatory value. In his pivotal book,³⁵ *The Faces of Justice and State Authority*, Damaška's two-axes model shows that the purposes of the proceedings (resolution of conflicts or implementation of state policies) can be examined separately within the hierarchical or coordinate organization of the competent authorities. His analysis, equally relevant for comparative study of civil and criminal procedure, provided a new perspective on justice institutions both in common and civil law countries and explained in a fresh way the role of the judge, the parties and their counsel in different jurisdictions.

Methodologically, Damaška's model is among the first purely comparative studies which analyse organizational and functional elements of different judicial proceedings without a direct recourse to their location, history or tradition. Damaška's double matrix – combining the purpose of civil procedure with an analysis of the structures which are due to its implementation – sparked an interest in the study of issues related to the organization of justice, from the role of the courts and judges to the status of lawyers and other legal professionals ('the personnel of the law'),³⁶ and provoked a continuing interest for the exploration of the aims and purposes of civil justice and procedure.³⁷

VI INTERNATIONALIZATION OF CIVIL PROCEDURE, TRANS-NATIONAL APPROACH AND THE MODEL RULES

While the study of civil procedure has traditionally been associated with national civil justice systems, several trends in the second half of the twentieth century contributed to the internationalization of procedural law and the formation of supra-national and trans-national rules of civil procedure. Procedural scholarship began to deal with civil procedure in a trans-national

³⁵ MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

³⁶ For instance, the main topic of the IX World Congress of the IAPL held in Coimbra and Lisbon in 1991 was 'The Role and Organization of Judges and Lawyers in Contemporary Societies'. In 1999, another keystone IAPL event *inter alia* discussed the comparative tendencies in the legal profession – see WALTER RECHBERGER (ED.), *PROCEDURAL LAW ON THE THRESHOLD OF A NEW MILLENNIUM: XI WORLD CONGRESS ON PROCEDURAL LAW* (2002). Most recently, the XVII World Congress of the IAPL in Lima (2023) was devoted to judicial independence.

³⁷ See more in ALAN UZELAC (ED.), *GOALS OF CIVIL JUSTICE AND CIVIL PROCEDURE IN CONTEMPORARY JUDICIAL SYSTEMS* (2014).

arena to explore the possibility of approximation, harmonization and unification of the procedural systems.³⁸

The first point where national civil procedure intersects with international law is the constitutional foundation of procedural law. The right to a fair trial before an independent and impartial tribunal is embedded in almost all national constitutions, applicable to criminal cases and to adjudication of disputed civil rights and obligations. At an international level, the right to a fair trial is codified by the United Nations General Assembly in Art. 10 of the 1948 Universal Declaration of Human Rights. More importantly, the right to a fair trial became a part of the human rights documents and standards judicially protected by supra-national courts and tribunals. In Europe, it is proclaimed in Art. 6 of the 1950 European Convention on Human Rights, which allows individual applications to the European Court of Human Rights against the member states of the Council of Europe. Between 1959 and 2021, the Strasbourg court issued over 11,500 judgments in which violations of Art. 6 were found, either on account of fairness or the length of proceedings, accounting for nearly 40 percent of all violations found by the Court.³⁹ A similar regional instrument, the 1969 American Convention on Human Rights, guarantees the right to a fair trial in Art. 8, which can also be judicially protected before the Inter-American Court of Human Rights.⁴⁰ The 1981 African Charter on Human and People's Rights should be mentioned here as well (Art. 7). The availability of case-law, especially in Europe, greatly contributed to the comparative exploration of civil procedure, since the judgments of supra-national tribunals, irrespective of the respondent state, have a binding effect in all countries subject to the jurisdiction of such tribunals. The wave of 'constitutionalization' and 'internationalization' of civil procedure has consistently been addressed by the IAPL since the 1980s.⁴¹

A second point in the internationalization of civil procedure is the 'soft law' instruments aimed at improving national civil procedure systems. Based partly on regional and global efforts to secure effective and affordable processing of civil cases, and partly on globalization developments that raised the economic importance of international civil and commercial litigation, several harmonization initiatives were brought, resulting in recommendations, projects and model legislation which became fixed orientation points for further comparative studies of civil procedure. For example, in 1984 the Council of Europe issued its recommendations on

³⁸ For an extensive survey of harmonization trends see C.H. van Rhee, *Harmonisation of Civil Procedure: An Historical and Comparative Perspective*, in CIVIL PROCEDURE IN A GLOBALIZING WORLD 39–63 (Xandra Kramer & C.H. van Rhee eds., 2012); see also BURKHARD HESS & XANDRA KRAMER (EDS.), FROM COMMON RULES TO BEST PRACTICES IN EUROPEAN CIVIL PROCEDURE (2017).

³⁹ ECHR Overview 1959–2021, Strasbourg (2022), 6, https://echr.coe.int/Documents/Overview_19592021_ENG.pdf (accessed March 2024).

⁴⁰ The Inter-American Court, however, deals with a significantly smaller number of cases (altogether 40 new cases and 27 judgments were issued in 2021), with 4 judgments and 1 advisory opinion dealing with Art. 8. IACHR 2021 Annual Report, <https://www.corteidh.or.cr/docs/informe2021/ingles.pdf> (accessed March 2024).

⁴¹ See WALTHER J. HABSCHIED (ED.), EFFECTIVENESS OF JUDICIAL PROTECTION AND CONSTITUTIONAL ORDER (1985) (proceedings of the VII IAPL Congress, Wuerzburg 1983); ITALO ANDOLINA (ED.), TRANS-NATIONAL ASPECTS OF PROCEDURAL LAW (1998) (proceedings of the X IAPL Congress, Taormina 1995).

civil procedure⁴² followed by several similar instruments on issues such as access to justice, legal aid, enforcement and appeals.⁴³ A body of international instruments relevant for dispute resolution and civil justice emerged at other international institutions, such as the United Nations' Commission for International Trade Law (UNCITRAL) and the Hague Conference on Private International Law.

But efforts to harmonize different procedural systems also came from the academic circles. In Latin America, in 1988 the Ibero-American Institute of Procedural Law approved the Model Code of Civil Procedure for Latin America, shaped under the influence of the fundamental procedural principles advanced by Mauro Cappelletti.⁴⁴ In Europe, a first initiative was the project led by long-standing president of the IAPL Marcel Storme.⁴⁵ His idea of a single civil procedure for Europe, which he himself described as 'a cathedral builders' dream',⁴⁶ demonstrated that harmonization is possible in respect of certain basic issues, such as the formulation of claims, presentation of evidence and court decisions.

These pioneering works paved the way for further harmonization projects and influential global model instruments such as the ALI/UNIDROIT Principles of Transnational Civil Procedure.⁴⁷ Under the auspices of the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT), in the 2000–2005 period a group of scholars of civil procedure from different legal traditions led by Geoffrey Hazard, Rolf Stürner, Michele Taruffo and Antonio Gidi shaped the framework model rules ('principles') for adjudication of disputes arising from international commercial transactions whose purpose was to be equally acceptable for both civil and common law jurisdictions.

The ALI/UNIDROIT Principles were a considerable success. After the completion of the work, translations of the Transnational Principles in numerous languages were published, and the project became a topic of continuing academic debates and further procedural projects around the world. As the ALI/UNIDROIT principles were drafted at a relatively high level of generality, there was a need for more detailed and practical rules. Consequently, in 2013 the Vienna-based European Law Institute (ELI) partnered with UNIDROIT and started a project aimed at production of a comprehensive regional set of model rules for Europe entitled *From Transnational Principles to European Rules of Civil Procedure*. This project lasted seven years, gathering an even greater circle of about 50 experts of civil procedure (academics,

⁴² Principles of civil procedure designed to improve the functioning of justice, Recommendation no. R (84) 5, adopted by the Committee of Ministers of the Council of Europe on February 28, 1984.

⁴³ See <https://www.coe.int/en/web/cdcj/recommendations-resolutions-guidelines> (accessed March 2024).

⁴⁴ IADP, EL CODIGO PROCESAL CIVIL MODELO PARA IBEROAMERICA (1988), <http://www.politicaeprocesso.ufpr.br/wp-content/uploads/2017/02/cpcmodeloespanhol.pdf> (accessed March 2024). See Francisco Verbic, *An Overview of Civil Procedure in Argentina*, 10 CIVIL PROCEDURE REVIEW 121 (2019); see also Roberto O. Berizonce & Frédérique Ferrand, *Model laws and national traditions*, in PROCEDURAL JUSTICE, XIV IAPL CONGRESS, HEIDELBERG 69–196 (Peter Gottwald & Burkhard Hess eds., 2014).

⁴⁵ MARCEL STORME (ED.), APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION (1994).

⁴⁶ Marcel Storme, *A Single Civil Procedure for Europe: A Cathedral Builders' Dream*, 22 RITSUMEIKAN LAW REVIEW 87–100 (2005).

⁴⁷ ALI/UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2005).

judges and lawyers from different sides of Europe) who worked in ten working groups devoted to specific parts of the model legislation. Their work resulted in the publication in 2020 of a finished set of rules.⁴⁸ As the most elaborate project of its kind, the European Rules of Civil Procedure have already received a global echo, and will have a strong influence on future legislative projects in the field of civil procedure in Europe and elsewhere.

The influence of internationalization on the different approaches to the comparative study of civil procedure does not stop at the ‘soft law’ level. One should not disregard the emergence of cross-border procedures that have become mandatory and positive law in the context of international integration processes. The most far-reaching example is EU law. At the highest level, the European Union recognizes the right to a fair trial in Art. 47 of the EU Charter of Fundamental Rights. Through the case-law of the European Court of Justice (ECJ), fundamental procedural rights have gained constitutional significance in the EU member states, producing harmonization effects on the development and interpretation of civil procedure in EU member states and beyond.⁴⁹ The EU has also enacted numerous binding instruments in the form of regulations and directives that provide procedural rules relevant for dispute resolution in cross-border matters. Some of them are applicable to judicial cooperation in civil matters only (for instance, mutual recognition and enforcement of judgments),⁵⁰ but others provide self-standing, optional procedural rules for certain types of civil cases (for instance, small claims disputes)⁵¹ or summary proceedings for debt collection or securing of claims (such as payment orders⁵² or account preservation orders).⁵³ In some of its instruments, the EU has also sponsored alternative dispute resolution,⁵⁴ and in specific sectors – such as consumer protection – enacted rules which have triggered ECJ preliminary rulings which had a bearing on the jurisprudence of national courts.

While the study of civil procedure within the EU and similar supra-national and trans-national organizations is not necessarily comparative in nature, procedural mechanisms formed at a supra-national level inevitably draw their inspiration from best practices, laws and reforms from other countries. Any multi-disciplinary research which seeks to provide a deeper analysis of the purpose or legislative history of complex features of such amalgamated national law must have a comparative component. Furthermore, while in the past legal reforms were frequently based on ‘borrowing’ from big national jurisdictions such as France, Germany

⁴⁸ ELI-UNIDROIT MODEL EUROPEAN RULES OF CIVIL PROCEDURE (2021).

⁴⁹ See Dominik Dürsthaus, *Constitutionalisation of European Civil Procedure as a Starting Point for Harmonisation?*, in THE FUTURE OF THE EUROPEAN LAW OF CIVIL PROCEDURE. COORDINATION OR HARMONISATION? 69–88 (Fernando Gascon Inchausti & Burkhard Hess eds., 2020).

⁵⁰ The most notable example is Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ibis – recast).

⁵¹ Regulation (EC) No 861/2007 on European Small Claims Procedure.

⁵² Regulation (EC) No 1896/2006 creating a European order for payment procedure.

⁵³ Regulation (EU) No 655/2014 establishing a European Account Preservation Order Procedure to facilitate cross-border debt recovery in civil and commercial matters.

⁵⁴ See e.g. Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

or the USA, today's process looks more and more to international sources.⁵⁵ For reasons of principle – or policy – the work on procedural reforms within one jurisdiction increasingly gets inspired from the parallels with the rules and structures adopted at an international level.⁵⁶ Finally, after incorporation of apparently uniform supra-national procedural rules into national law, the interaction of 'local' and 'supra-national' rules may cause frictions, as the same rules may be implemented in rather different ways.⁵⁷ To prevent this from happening, adequate comparative analysis is needed before, during and after legislative changes. Exploration of the interaction of national, supra-national and international procedures and procedural rules thereby makes a whole new field for comparative research of civil procedure, with the great possibilities of practical application in legislative projects and legal practice.⁵⁸

VII OBJECTIVE EVALUATIONS BASED ON QUANTITATIVE INDICATORS

The majority of comparative studies devoted to civil procedure are based on qualitative assessments. The academic study of civil procedure pays most attention to principles, values and rules, often relying more on experience and common sense of the author than on quantitative indicators. In the past, reliable quantitative data was not easy to be found and the available sources were limited to national court services and ministries of justice. Such information was collected based on divergent methods and was often inadequate for the purpose of systematic comparative research.

Globalization, integration processes and technological development changed this situation. Quantitative data on justice systems and pending proceedings is much more available, and

⁵⁵ The influence of national and international sources has been the topic of many comparative studies. See e.g. C.H. VAN RHEE, DIRK HEIRBAUT & MARCEL STORME (EDS.), *THE FRENCH CODE OF CIVIL PROCEDURE (1806) AFTER 200 YEARS* (2008); MASAHISA DEGUCHI & MARCEL STORME, *THE RECEPTION AND TRANSMISSION OF CIVIL PROCEDURAL LAW IN THE GLOBAL SOCIETY* (2008); WALTHER HABSCHIED (ED.), *DAS DEUTSCHE ZIVILPROZESSRECHT UND SEINE AUSSTRAHLUNG AUF ANDERE RECHTSORDNUNGEN* (1991); Walter Rechberger, *Die Ideen Franz Kleins und Ihre Bedeutung für die Entwicklung des Zivilprozessrechtes in Europa*, 25 RITSUMEIKAN LAW REVIEW 101–10 (2008); MIKLÓS KENGYEL & VIKTÓRIA HARSÁGI (EDS.), *EINFLUSS DES EUROPÄISCHEN ZIVILVERFAHRENSRECHTS AUF DIE NATIONALEN RECHTSORDNUNGEN* (2009); MARTIN AHRENS, VOLKER LIPP & ISTVÁN VARGA (EDS.), *EUROPÄISCHE ZIVILPROZESSRECHT. EINFLUSS AUF DEUTSCHLAND UND UNGARN* (2011).

⁵⁶ An example of borrowing from such sources can be found in Western Balkans countries which are awaiting EU accession. There, almost every procedural reform is legitimized by the adoption of EU standards, which occasionally results in random copying of the rules and institutions from EU and other 'Western' instruments. Without proper comparative studies, this often results in inappropriate and undesirable consequences.

⁵⁷ A recently completed European project 'EFFORTS' assessed the interaction of the EU regulations on the recognition and enforcement of judgments with national legislation and practice in 7 member states. It was found that local implementation greatly differs in many aspects. See <https://efforts.unimi.it/> (accessed March 2024).

⁵⁸ See more on this, from a European perspective, in ANNA NYLUND & MAGNE STRANDBERG (EDS.), *CIVIL PROCEDURE AND HARMONISATION OF LAW* (2019).

internationalization has brought convergence in the methods of collection and interpretation of quantitative indicators. Some international organizations, like the World Bank, developed their own database and issue regular reports on the functioning of national justice systems as a part of a broader study of regulatory environments for international business.⁵⁹ International organizations such as the Council of Europe and the European Union also collect data on the functioning of national justice systems.

The most elaborate and comprehensive collection of comparable data was established within the European Commission for the Efficiency of Justice (CEPEJ). This body, set up in September 2002 by the Council of Europe, started bi-annual evaluation rounds in which the authorities and national correspondents of over 40 member states supply empirical data relevant for their justice systems. This data is collected under a uniform scheme and presented in the form of regular synthetic reports.⁶⁰ There is also a dynamic internet database with an abundance of information on court systems, budgets, judicial professionals, efficiency of judicial proceedings and other matters.⁶¹

Since 2013, the European Union also began its quantitative evaluations, using statistical data and indicators to assess performance of the judicial systems of its member states. The 'EU Justice Scoreboard' is produced annually with a view to provide a statistical comparative tool on the efficiency of justice systems in EU countries.⁶²

Comparative studies of civil procedure, objective indicators and quantifiable results of academic research offer new opportunities, but also bring new challenges. The availability of comparable datasets provides a unique resource on a regional (or even global) level, which offers both researchers and policymakers potentially invaluable information that cannot be ignored. But information collected on the basis of political goals, such as stimulation of policy reforms and identification of 'good' and 'bad' performers,⁶³ calls for an independent reassessment of methodology and a cautious interpretation of data. This shapes a new role for comparative studies of civil procedure, to critically evaluate the quantitative indicators, place them in a holistic context, and contribute to interpretation of the collected data using a mixture of quantitative and qualitative methods.⁶⁴

⁵⁹ Between 2004 and 2020, the World Bank regularly published its *Doing Business* reports on business regulations across 191 countries. The reports included quantitative indicators for each jurisdiction relevant inter alia for assessing how courts enforce contracts or resolve insolvency proceedings. See <https://archive.doingbusiness.org/en/doingbusiness> (accessed October 2023).

⁶⁰ Reports are published at <https://www.coe.int/en/web/cepej/cepej-work/evaluation-of-judicial-systems> (accessed October 2023).

⁶¹ See CEPEJ-STAT, <https://www.coe.int/en/web/cepej/cepej-stat> (accessed October 2023).

⁶² Cf. https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en (accessed October 2023).

⁶³ On the assessment of a 'bad' performer, see Remo Caponi, *The Performance of the Italian Civil Justice System: An Empirical Assessment*, 2 THE ITALIAN LAW JOURNAL 15–31 (2016).

⁶⁴ For some critical assessments see Adriani Dori, *In Data We Trust? Quantifying the Costs of Adjudication in the EU Justice Scoreboard*, 14 ERASMUS L. REV. 281 (2021); Alan Uzelac, *Harmonised Civil Procedure in a World of Structural Divergences? Lessons Learned from the CEPEJ Evaluations*, in CIVIL LITIGATION IN A GLOBALISING WORLD 175–205 (Xandra Kramer & C.H. van Rhee eds., 2012); Alan Uzelac, *Efficiency of European Justice Systems. The Strength and Weaknesses of the CEPEJ Evaluations*, 1 INTERNATIONAL JOURNAL OF PROCEDURAL LAW 106–46 (2011).

VIII COMPARATIVE STUDIES BEYOND CIVIL PROCEDURE: THE CHALLENGES, OLD AND NEW

Civil procedure is not a static field. Across national borders, particularly in the last 50 years, civil justice and civil procedure started to transform at an unprecedented pace.⁶⁵ Comparative research should therefore constantly be oriented towards the future and look beyond the traditional structures and dispute resolution methods which may soon get outdated. The most frequent topics in comparative studies of civil procedure are those provoked by the numerous challenges encountered by contemporary civil justice systems.

The challenges may be continually present – such as the challenge of insufficient speed and excessive costs of litigation. They may be of relatively recent origin – such as the challenge of processing of collective and diffuse claims in cases of mass damage, and infringement of consumer rights or environmental threats. They may also be fairly fresh – such as the challenge of technological development (for instance, digitization and the use of artificial intelligence in the adjudication process). Some of the challenges deal with the very identity of the discipline, questioning the borders and objectives of civil procedure in modern societies. Privatization tendencies challenge state justice services; alternative dispute resolution challenges formal decision-making processes. Comparative research of these challenges is increasingly future-oriented and looks beyond the customary borders of civil procedure. The following sub-sections provide a brief survey of the most frequent topics in contemporary comparative research.

A The Origin of Modern Studies: The Overarching Challenge of Access to Justice

In recent times, there is a growing awareness that the slowness and costs of litigation in state courts have become an obstacle to access to justice. One of the first significant worldwide comparative procedural projects is the ‘Florence Access-to-Justice Project’ of the 1970s.⁶⁶ Its multiple-volume series sorted access to justice into three waves: the first dealing with development of legal aid systems as a response to economic obstacles in access to justice; the second addressing the rise of collective litigation; and the third promoting alternatives to state litigation in the form of alternative dispute resolution (ADR) – arbitration and mediation.⁶⁷

These early studies from the 1970s raised issues which were much ahead of their time. The ‘waves’ diagnosed in the Florence project in fact became the object of intensive comparative

⁶⁵ See more in ALAN UZELAC (ED.), *TRANSFORMATION OF CIVIL JUSTICE. UNITY AND DIVERSITY* (2018).

⁶⁶ Bryant G. Garth & Mauro Cappelletti, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 *BUFFALO LAW REVIEW* 181 (1978); Mauro Cappelletti, Bryant Garth & Nicolò Trocker, *Access to Justice. Variations and Continuity of a World-Wide Movement*, 46 *THE RABEL JOURNAL OF COMPARATIVE AND INTERNATIONAL PRIVATE LAW* 664–707 (1982).

⁶⁷ MAURO CAPPELLETTI (ED.), *ACCESS TO JUSTICE*, 4 prts (1978–1979).

studies only several decades later,⁶⁸ fueled by the acute awareness of the crisis facing modern civil justice systems.⁶⁹

B How to Afford Justice: Legal Aid, Alternative Financing, Group Litigation, Mediation

Technological development and global austerity policies⁷⁰ augmented and slightly shifted the focus of the trends singled out in the Florence project. Legal aid in civil matters was judicially recognized as a human right⁷¹ but the lack of funds directed the efforts to overcome financial obstacles to surrogates – to mitigating measures, such as alternative funding for civil litigation (including contingency fees and third-party funding).⁷²

The study of collective litigation and ADR remained an important part of comparative research. However, global acceptance and practical importance of both collective redress mechanisms and mediation remain very diverse. In the USA and Latin America (within a different organizational setting), the development of class actions and other forms of collective litigation is undeniable, although it is not without controversies.⁷³ In Europe, however, the use of collective redress has been more limited despite the institutional efforts to promote it.⁷⁴

Similarly, the interest in mediation and other alternative methods of dispute resolution has grown and ADR has gained on its visibility, but it is still under-used and its contribution to securing better access to justice is still limited in most jurisdictions.⁷⁵ However, mediation has become an important topic of comparative legal research, and it is perceived as a propulsive domain for future development, in particular when combined with court litigation in the form

⁶⁸ For recent research revisiting the access to justice challenges, including ADR, collectivization and digitization of justice, as well as litigation funding, see XANDRA KRAMER ET AL. (EDS.), *FRONTIERS IN CIVIL JUSTICE: PRIVATISATION, MONETISATION AND DIGITISATION* (2022).

⁶⁹ For the ‘crisis’ label see ADRIAN ZUCKERMAN (ED.), *CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE* (1999).

⁷⁰ The impact of austerity policies was the main topic at the XVth World Congress of the International Association of Procedural Law (‘Effective judicial relief and remedies in an age of austerity’, Istanbul, May 2015).

⁷¹ In Europe, it happened after *Airey v. Ireland* 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305. For developments in America see Margaret Woo, *Access to Civil Justice*, 70 AMER. J. OF COMP. L. 89–117 (2022 Suppl.).

⁷² See CHRIS HODGES ET AL., *COSTS AND FUNDING OF CIVIL LITIGATION. A COMPARATIVE PERSPECTIVE* (2010); MATHIAS REIMANN (ED.), *COST AND FEE ALLOCATION IN CIVIL PROCEDURE* (2012).

⁷³ See DEBORAH HENSLER ET AL. (EDS.), *CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION* (2016).

⁷⁴ On recent developments in Europe see ASTRID STADLER, EMMANUEL JEULAND & VINCENT SMITH (EDS.), *COLLECTIVE AND MASS LITIGATION IN EUROPE* (2020); ALAN UZELAC & STEFAAN VOET, *CLASS ACTIONS IN EUROPE: HOLY GRAIL OR A WRONG TRAIL?* (2021). See also VIKTÓRIA HARSÁGI & C.H. VAN RHEE (EDS.), *MULTI-PARTY REDRESS MECHANISMS IN EUROPE: SQUEAKING MICE?* (2014).

⁷⁵ Compare NEIL ANDREWS, *THE THREE PATHS OF JUSTICE. COURT PROCEEDINGS, ARBITRATION AND MEDIATION IN ENGLAND* 306 (2012).

of court-annexed mediation.⁷⁶ Alternative forms of dispute resolution evolved from special sectors, such as consumer protection, developing special types of proceedings distinct from other manifestations of ADR. They became a special topic for regulation at the supra-national level⁷⁷ and form a separate field of comparative research.⁷⁸

C Outsourcing of Justice: Privatization and Automation of Judicial Services

The civil justice system is expensive for state budgets. The decay of the welfare state and the policies of austerity further contributed to the pursuit of alternatives to conventional civil justice, treating civil litigation as *ultimum remedium*, the last refuge available only if nothing else works. On the one hand, engagement of the costly and slow judicial apparatus of the state seems to be disproportionate for handling small and repetitive cases; while on the other hand, the tools of state judiciaries may be inadequate for big and complex cases with international elements. Therefore, by introduction of mandatory alternatives or by an increase in court fees,⁷⁹ many types of disputes are today being steered away from the public justice system and directed to various private or semi-private dispute resolution services. This wave of ‘privatization’ of judicial services became in recent times an increasingly interesting topic for comparative studies.⁸⁰

For small cases, ‘ADRs are often seen as an integral part of the policies aimed at improving access to justice’,⁸¹ which paved the way for a movement towards mandatory schemes of pre-trial communication or even mandatory mediation attempts.⁸² Seeking to decrease expenses, litigants are encouraged to deal with their disputes directly, without a costly engage-

⁷⁶ For such views, see LAURA ERVO & ANNA NYLUND (EDS.), *THE FUTURE OF CIVIL LITIGATION. ACCESS TO COURTS AND COURT-ANNEXED MEDIATION IN THE NORDIC COUNTRIES* (2014).

⁷⁷ See for instance EU legislation in this field (Directive 2013/11/EU on Consumer ADR and Regulation 524/2013 on Consumer ODR).

⁷⁸ See CHRISTOPHER HODGES ET AL., *CONSUMER ADR IN EUROPE. CIVIL JUSTICE SYSTEMS* (2012); ROLF STÜRNER ET AL. (EDS.), *THE ROLE OF CONSUMER ADR IN THE ADMINISTRATION OF JUSTICE: NEW TRENDS IN ACCESS TO JUSTICE UNDER EU DIRECTIVE 2013/11* (2015); PABLO CORTÉS, *THE NEW REGULATORY FRAMEWORK FOR CONSUMER DISPUTE RESOLUTION* (2017).

⁷⁹ Increase in court fees is noted both in civil and common law jurisdictions. See JUDITH RESNIK ET AL., *WHO PAYS? FINES, FEES, BAIL, AND THE COST OF COURTS* (2018), https://law.yale.edu/sites/default/files/area/center/liman/document/liman_colloquium_book_04.20.18.pdf (accessed March 2024).

⁸⁰ Compare for recent discussions of the issue LOIC CADDET, BURKHARD HESS & MARTA REQUEJO ISIDRO (EDS.), *PRIVATIZING DISPUTE RESOLUTION: TRENDS AND LIMITS. IAPL-MPI POST-DOCTORAL SUMMER SCHOOL* (3rd edn. 2019). Since 2006, the relationship between mechanisms established and controlled by the state and private mechanisms of dispute resolution has been the focus of a series of international conferences at the Inter-University Centre Dubrovnik under the common title ‘Public and Private Justice – Dispute Resolution in Modern Societies’.

⁸¹ EU Commission (2002) Green Paper on Alternative Dispute Resolution in Civil and Commercial Law COM/2002/0196 final, para 9.

⁸² For experiences with mandatory mediation in Italy, compare Elisabetta Silvestri, *Too Much of a Good Thing: Alternative Dispute Resolution in Italy*, 21 *NEDERLANDS-VLAAMS TIJDSCHRIFT VOOR MEDIATION EN CONFLICTMANAGEMENT* 4 (2017), <https://doi.org/10.5553/tmd/138638782017021004007> (accessed March 2024).

ment of lawyers (a ‘do-it-yourself justice’).⁸³ Especially in regard to consumer disputes, a great number of dispute resolution bodies outside of state judiciaries emerged, from the ombudsmen⁸⁴ (acting either as a public or private body) to various consumer mediation bodies and services.

The handling of consumer disputes is often assisted by new technologies. Dispute resolution is also being brought online, especially for consumer disputes and the automation of the ADR process.⁸⁵ For online commerce, claims are rarely adjudicated, with many of them resolved by automated processes, often assisted by the use of artificial intelligence (AI). In the context of social media platforms, almost no disputes reach an open court process, as they are internally resolved by techniques of ‘content moderation’.⁸⁶ Assessments of these trends range from very positive (‘providing informal, accessible, fast and cost-effective access to justice’) to very negative (‘development of a second-class and opaque process’, ‘justice behind closed doors’).⁸⁷

For complex and voluminous international commercial disputes, the outsourcing of dispute resolution to private providers happened much earlier. Supported by successful international instruments such as the 1958 New York Convention,⁸⁸ in the post-Cold War period international commercial arbitration grew progressively to become the most important dispute resolution method for international investment and large, politically sensitive commercial disputes. International arbitration also provided a testbed for innovative and flexible procedural techniques, adaptable to the needs of state justice, prompting the research of civil procedure to regularly revisit developments in arbitration practice and litigation.⁸⁹

Privatization of civil justice can also be seen in various non-contentious matters that used to be within the jurisdiction of the civil courts, such as enforcement of court judgments, the

⁸³ A. Biard et al., *Introduction: The Future of Access to Justice – Beyond Science Fiction*, in *NEW PATHWAYS TO CIVIL JUSTICE IN EUROPE. CHALLENGES TO ACCESS TO JUSTICE* (Xandra Kramer et al. eds., 2021).

⁸⁴ On the ombudsmen, see Christopher Hodges, *Consumer Ombudsmen: Better Regulation and Dispute Resolution*, 15 *ERA FORUM* 593–608 (2014), <https://doi.org/10.1007/s12027-014-0366-8> (accessed March 2024).

⁸⁵ See Martin Ebers, *Automating Due Process – The Promise and Challenges of AI-based Techniques in Consumer Online Dispute Resolution*, in *FRONTIERS IN CIVIL JUSTICE: PRIVATISATION, MONETISATION AND DIGITISATION* (Xandra Kramer et al. eds., 2022).

⁸⁶ See Catalina Goanta & Pietro Ortolani, *Unpacking Content Moderation: The Rise of Social Media Platforms as Online Civil Courts*, in *FRONTIERS IN CIVIL JUSTICE: PRIVATISATION, MONETISATION AND DIGITISATION* (Xandra Kramer et al. eds., 2022).

⁸⁷ Biard et al., *supra* note 83, at 6–7.

⁸⁸ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted on June 10, 1958, see <https://www.newyorkconvention.org/english> (accessed March 2024).

⁸⁹ For example, international arbitration was one of the main topics of the X IAPL World Congress (Taormina 1995) where Peter Gottwald submitted a general report on the topic. See Peter Gottwald, in Andolina (ed.), *supra* note 41, 43–180. The 2005 conference in Warsaw was devoted to comparative research in the efficiency of litigation and arbitration, see PETER GOTTLWALD (ED.), *EFFEKTIVITÄT DES RECHTSSCHUTZES VOR STAATLICHEN UND PRIVATEN GERICHTEN* (2006). In July 2021, the first IAPL Taruffo lecture was delivered by Janet Walker on the topic ‘Going Virtual for Good: Lessons from International Arbitration’, discussing arbitration practice in video-conferencing and virtual hearings.

keeping of registries of immovables or commercial companies, or the collection of uncontested debt. In the past few decades, some legal systems have transferred such non-contentious and extra-contentious work to private professions (bailiffs and notaries) and commercial providers (e.g. debt collection agencies), following the example of some Western European jurisdictions that have known such private agencies for centuries. As a general matter, civil enforcement became an important and frequent topic of comparative research in Europe,⁹⁰ since, in 1997, effective enforcement was judicially declared to be an integral part of the right to a fair trial.⁹¹ Various forms of provisional relief pending final determination of the dispute are also becoming an increasingly interesting and important topic of comparative evaluations.⁹²

Finally, in some countries, a forceful ‘ebb of litigation’⁹³ and ‘demise of trial’,⁹⁴ have directed the researchers’ attention to those other areas as well. Similarly, a general global trend of privatizing procedure or ‘contractualization of civil procedure’ which takes the form of parties negotiating and agreeing on procedure before state civil courts, is also seen in contemporary comparative studies.⁹⁵

D Judicial Efficiency Revisited: The Case Management Movement

Despite privatization and outsourcing tendencies, state-run civil justice systems still have an essential function in dispute resolution that cannot be outsourced to external agents without major harm for democracy and the rule of law. The best response to slow and ineffective civil justice is not to transfer court work to external actors, but in the profound reform of the state

⁹⁰ See inter alia MASAHISA DEGUCHI (ED.), *EFFECTIVE ENFORCEMENT OF CREDITORS’ RIGHTS* (2021); WENDY A. KENNETT, *ENFORCEMENT OF JUDGMENTS IN EUROPE* (2000); C.H. VAN RHEE & ALAN UZELAC (EDS.), *ENFORCEMENT AND ENFORCEABILITY. TRADITION AND REFORM* (2010); MADS ANDENAS & BURKHARD HESS (EDS.), *ENFORCEMENT AGENCY PRACTICE IN EUROPE* (2005).

⁹¹ *Hornsby v. Greece*, 18357/91, ECtHR Judgment of March 19, 1997, 40.

⁹² See Xandra Kramer, *Harmonisation of Provisional and Protective Measures in Europe*, in *PROCEDURAL LAWS IN EUROPE. TOWARDS HARMONISATION* 305–19 (Marcel Storme ed., 2003); ROLF STÜRNER & MASANORI KAWANO (EDS.), *COMPARATIVE STUDIES ON ENFORCEMENT AND PROVISIONAL MEASURES* (2011); GILLES CUNIBERTI, *LES MESURES CONSERVATOIRES PORTANT SUR DES BIENS SITUÉS À L’ÉTRANGER* (2000); CAMERON MILES, *PROVISIONAL MEASURES BEFORE INTERNATIONAL COURTS AND TRIBUNALS* (2017).

⁹³ On *Prozessebbe* in Germany, see ARMIN HÖLAND & CAROLINE MELLER-HANNICH (EDS.), *NICHTS ZU KLAGEN? DER RÜCKGANG DER KLAGEEINGANGSZAHLN IN DER JUSTIZ. MÖGLICHE URSACHEN UND FOLGEN* (2016); for the same trend in Austria, see 07–08 *ÖSTERREICHISCHES ANWALTSBLATT*, 440–84 (2019).

⁹⁴ For the USA, see John H. Langbein, *The Demise of Trial in American Civil Procedure: How it Happened, Is It Convergence with European Civil Procedure?*, in *TRUTH AND EFFICIENCY IN CIVIL LITIGATION* 119–64 (C.H. van Rhee & Alan Uzelac eds., 2012); also John H. Langbein, *The Disappearance of Civil Trial in the United States*, *YALE LAW JOURNAL* 522–72 (2012).

⁹⁵ See Antonio Cabral, *Designing Procedure by Contract: Litigation Agreements in Contemporary Civil Procedure*, 9 *INTERNATIONAL JOURNAL OF PROCEDURAL LAW* 363–80 (2019). See also ANNA NYLUND & ANTONIO CABRAL (EDS.), *CONTRACTUALISATION OF CIVIL LITIGATION* (2023). This topic was also covered at the 2022 general congress of the International Academy of Comparative Law, see <https://aidc-iacl.org/asuncion-general-congress/> (accessed October 2023).

justice system and the reshaping of civil litigation to the needs of modern societies.⁹⁶ The central notion of this research (at least in Europe and in Latin America) is the notion of case management.⁹⁷

Case management became the emblem of the new philosophy of litigation based on procedural proportionality and efficiency – on reduction of excess litigation costs and undue delays.⁹⁸ At the core of the case management movement in comparative civil procedure is the concept of a joint and shared obligation of parties and the court to contribute to a just, speedy and inexpensive process with an active monitoring role for the judge.⁹⁹

These comparative studies deal with the efficiency of proceedings at the trial court level, i.e. litigation in first instance proceedings. In this stage, particularly important is proper planning of the proceedings, typically achieved through a division of proceedings in a preparatory stage and a main hearing stage, the setting of procedural timetables and calendars and preparing the pleadings and evidence for a concentrated presentation at the oral hearing.¹⁰⁰ Efficiency and better monitoring of litigation are also aided by the use of new technologies. In particular, the COVID-19 pandemic contributed to a quicker introduction of digital means of communication, such as video-conferencing and online hearings.¹⁰¹

The trial stage is not the only part of litigation which is targeted by new procedural research. Appeals and other means of recourse against court judgments are also reviewed in the light of the new movement.¹⁰² An especially important role in procedural reform is played by the highest courts in the civil justice system who can either lead or hamper procedural reforms. Therefore, in the recent period several conferences and studies have been devoted to the com-

⁹⁶ Global reforms aimed at accelerating civil justice were one of the topics of the First IAPL Congress, see Jack Jacob, *Accelerating the Process of Law*, in *TOWARDS A JUSTICE WITH A HUMAN FACE* 303–42 (Marcel Storme & Hélène Casman eds., 1978); for regional aspects see also PAUL OBERHAMMER (ED.), *BESCHLEUNIGUNG DES ZIVILGERICHTLICHEN VERFAHRENS IN MITTEL- UND OSTEUROPA* (2004).

⁹⁷ On this term and how it became ‘fashionable’ in comparative legal studies in Europe, see C.H. van Rhee, *Case Management in Europe: A Modern Approach to Civil Litigation*, 8 *INTERNATIONAL JOURNAL OF PROCEDURAL LAW* 68 (2018).

⁹⁸ See more in C.H. VAN RHEE (ED.), *JUDICIAL CASE MANAGEMENT AND EFFICIENCY IN CIVIL LITIGATION* (2007); RAMÓN GARCÍA ODGERS, *EL CASE MANAGEMENT IN PERSPECTIVA COMPARADA* (2020).

⁹⁹ On obligations of the parties, their lawyers and the court in the UNIDROIT model rules and principles see C.H. van Rhee, *Obligations of the Parties and their Lawyers in Civil Litigation: The ALI/UNIDROIT Principles of Transnational Civil Procedure*, in *FESTSCHRIFT FÜR PETER GOTTWALD ZUM 70. GEBURTSTAG* 689–99 (Jens Adolphsen et al. eds., 2014); Alan Uzelac, *Towards European Rules of Civil Procedure: Rethinking Procedural Obligations*, 58(1) *HUNGARIAN JOURNAL OF LEGAL STUDIES* 3–18 (2017).

¹⁰⁰ See more in LAURA ERVO & ANNA NYLUND (EDS.), *CURRENT TRENDS IN PREPARATORY PROCEEDINGS* (2016).

¹⁰¹ See BART KRANS & ANNA NYLUND (EDS.), *CIVIL COURTS COPING WITH COVID-19* (2021).

¹⁰² ALAN UZELAC & C.H. VAN RHEE (EDS.), *NOBODY’S PERFECT. COMPARATIVE ESSAYS ON APPEALS AND OTHER MEANS OF RECOURSE AGAINST JUDICIAL DECISIONS IN CIVIL MATTERS* (2014).

parative study of the position and changing functions of supreme courts,¹⁰³ as well as to the general impact of court structures on effective judicial management of civil cases.¹⁰⁴

In the pursuit of efficiency and competitiveness, some court structures started to emulate the features of private dispute bodies. A new worldwide phenomenon is the rise of international commercial and business courts (sometimes also called ‘arbitral courts’).¹⁰⁵ Such courts operate within the auspices of a national system of state justice but open their doors to interested users on an optional basis, just like arbitration courts. An important element in this new trend is the openness to the needs of the parties and the flexibility of the proceedings, including the possibility to litigate in a foreign language (usually in English) with less restrictions regarding legal representation.¹⁰⁶ International commercial courts are one of the forms of diversification and specialization of civil courts, although their ‘specialty’ is not clearly determined.¹⁰⁷ Assessing specialization of the courts and judges in the context of new approaches to case management and court administration is another interesting topic of comparative procedural research.¹⁰⁸

¹⁰³ The IAPL devoted several of its colloquia to this topic. See PELAYIA YESSIOU-FALTSI (ED.), *THE ROLE OF THE SUPREME COURTS AT THE NATIONAL AND INTERNATIONAL LEVEL, REPORTS FROM IAPL INTERNATIONAL COLLOQUIUM* (1997). Reports from the IAPL Gandia and Valencia Colloquium on this topic were published in MANUEL ORTELLS RAMOS (ED.), *LOS RECURSOS ANTE LOS TRIBUNALES SUPREMOS EN EUROPA. APPEALS TO SUPREME COURTS IN EUROPE* (2008). In 2014, the Warsaw IAPL colloquium dealt with the functions of the Supreme Court – see TADEUSZ ERECINSKI, PIOTR RYLSKI & KAROL WEITZ (EDS.), *THE FUNCTIONS OF THE SUPREME COURT – ISSUES OF PROCESS AND ADMINISTRATION OF JUSTICE* (2019). See also PABLO BRAVO-HURTADO & C.H. VAN RHEE (EDS.), *SUPREME COURTS UNDER PRESSURE. CONTROLLING CASELOAD IN THE ADMINISTRATION OF CIVIL JUSTICE* (2021); ELAINE MAK, *JUDICIAL DECISION-MAKING IN A GLOBALISED WORLD. A COMPARATIVE ANALYSIS OF THE CHANGING PRACTICES OF WESTERN HIGHEST COURTS* (2013).

¹⁰⁴ See PETER CHAN & C.H. VAN RHEE (EDS.), *CIVIL CASE MANAGEMENT IN THE TWENTY-FIRST CENTURY: COURT STRUCTURES STILL MATTER* (2021).

¹⁰⁵ See Bookman, Chapter 19 in this volume.

¹⁰⁶ See STAVROS BREKOULAKIS & GEORGIOS DIMITROPOULOS (EDS.), *INTERNATIONAL COMMERCIAL COURTS: THE FUTURE OF TRANSNATIONAL ADJUDICATION* (2022); XANDRA E. KRAMER & JOHN SORABJI (EDS.), *INTERNATIONAL BUSINESS COURTS: A EUROPEAN AND GLOBAL PERSPECTIVE* (2019), also published as *International Business Courts in Europe and Beyond*, 1 ERASMUS LAW REVIEW (2019).

¹⁰⁷ Marta Requejo Isidro, *International Commercial Courts: Specialised Courts?*, in *NEW PATHWAYS*, *supra* note 83, 257–75.

¹⁰⁸ See Elisabetta Silvestri, *Pros and Cons of Judicial Specialization*, *NEW PATHWAYS*, *supra* note 83, 245–55; Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE LAW J 1667 (2009); LAWRENCE BAUM, *SPECIALIZING THE COURTS* (2010); Alan Uzelac, *Mixed Blessing of Judicial Specialization: The Devil is in the Detail*, 2 RUSSIAN LAW J. 146–63 (2014).

IX CONCLUSIONS: COMPARATIVE CIVIL PROCEDURE AND THE INTEGRAL DIGITAL FUTURE OF DISPUTE RESOLUTION

In this chapter, comparative studies of civil procedure were presented through different perspectives and different topics that contributed to the development of this discipline. The presentation is not exhaustive, since new topics and new challenges to civil justice systems arise almost on a daily basis.

What will the civil justice of the future look like? Comparative studies of civil procedure can help find an answer to this question, and they can also help in shaping the civil procedure of the future by policymakers and legislators. ‘Truly fundamental’ reforms are rare, but they are also the product of similar forces and motives. Challenges to civil litigation in the nineteenth and twentieth century were comparable, and therefore the solutions drawn from comparative research could work in various environments – as shown by the broad receptions of reforms of Franz Klein or Lord Woolf. Challenges of the present time are also similar or the same for most countries, and therefore universal solutions are not unimaginable. They will certainly include, amongst others, a digital component as the most recent global trend presupposes ‘an integrated online structure that allows anyone, whether represented or not, to follow a clearly signposted online path towards the effective, affordable and speedy resolution of their dispute’.¹⁰⁹

Will this be a formula that will a quarter-century after Woolf’s Access to Justice, become a new paradigm for the transformation of civil justice systems? Or will it fail, paving the way for the further atomization and privatization of dispute resolution that will make conventional structures of civil justice largely irrelevant? These questions will be answered by comparative studies of civil procedure that will need to provide – once again – a bridge between the past and the future of civil litigation.

¹⁰⁹ Geoffrey Vos & John Sorabji, *Digital Technology and Holistic Dispute Resolution*, in *DELIVERING JUSTICE. A HOLISTIC AND MULTIDISCIPLINARY APPROACH* 248–49 (Xandra Kramer, Stefaan Voet, Lorenz Kodderitzsch, Magdalena Tulibacka & Burkhard Hess eds., 2022).