

CIVIL JUSTICE SYSTEMS AND CIVIL PROCEDURES IN A CHANGING WORLD: MAIN PROBLEMS, FUNDAMENTAL REFORMS AND PERSPECTIVES – A EUROPEAN VIEW

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Whilst the article will address the problems and reforms of civil procedure and the law relating thereto, its principle consideration focuses on issues surrounding reform problems among present and future 'civil justice systems' in Eastern and Western Europe as a whole. This consideration will not simply concentrate on mere single 'tendencies,' trends or shifts of civil procedural developments, but on the reform processes of justice systems. These processes have transpired to be strong, actual, and occasionally observable globally. They are in part similar and in part different, and are really fundamental movements towards reform of civil justice systems in Eastern and Western European nations. Although this report concentrates on the present situation in Europe, similar and even the same situations can also be found in other parts of the world.

Key words: reform movements of civil justice systems; electronic civil justice; international civil justice; civil justice systems of the future.

1. General characteristics of civil justice systems as criteria for comparison

To enable the critical analysis and comparison of Eastern and Western, mainly European, civil justice systems, four aspects or criteria will be highlighted which act as main sources of problems and even crisis, as well as indicators for reform movements addressed later in this paper. These four criteria are:

- 1) *power* (including authority, autonomy, independence, influence, acceptance, trust, etc.);
- 2) *volume* (including size, resources, personnel, units, facilities, etc.);
- 3) *structure* (including organization, construction, diversification, specialization, etc.);

4) *efficiency* (including management of workload, work-rates, disposal of cases, duration, expenditure, costs, etc.).

When we look at the entire scope of different present-day justice systems, particularly in Eastern and Western Europe, we generally find, in accordance with these four characteristics, on one end of the spectrum a number of very strong, large, diversified and efficient systems, whilst at the other end a number of very weak, small, simple and inefficient ones; meanwhile, many systems are also located between these two poles. Among the group or block of nations with, in short, rich justice systems belong, in the opinion of the author, the majority of Western European nations – those being so called ‘developed countries’ or capitalist countries. To the group or block of countries with justice systems that remain impoverished belong a series of Eastern European nations which are so called ‘developing countries,’ ‘countries in transition’ or ‘countries in conversion.’ Among these states are particularly those still struggling to overcome a communist or socialist past, one-party regimes, and dictatorships or military juntas – nations that will not be named by the author so as not to embarrass. Nevertheless, I may remark, that at least some Eastern European newcomers to the EU, as well as some of those states on the waiting list, continue to suffer from comparatively very poor justice systems.

Regardless, we also have to recognize that at the extreme of the spectrum on the side at which developed countries are located, we can find some justice systems that are not only powerful but overpowered, not only voluminous but oversized, not only well structured but over-complex, and last but not least, not only heavily loaded with cases but overloaded – though they remain nevertheless efficient.

For such a ‘*hypertroph*’ justice system, my own country, the *Federal Republic of Germany*, is a good example of bad development. To illustrate this, just some figures have been taken from the official statistics.

State organization: A federal republic consisting of 16 States.

Population: c. 83 million.

Courts: A Federal Constitutional Court with 2 senates, a Federal Court of Justice (Ordinary Jurisdiction with 10 senates for civil cases, 12 senates for criminal cases and more senates for other cases), as well as a Federal Labor Court, a Federal Administration Court, a Federal Social Court, a Federal Financial Court and other federal courts. Furthermore, there are 15 State Constitutional Courts, including ordinary courts; 675 local courts with numerous departments; 116 district courts with 1,521 chambers for civil cases and 1,618 for criminal cases; 25 higher district courts with 485 senates for civil cases and 94 senates for criminal cases; as well as many labor, administration, social, and financial courts, in addition to more courts on different levels and with different instances.

Jurisdictions: Federal Constitutional Jurisdiction, State Constitutional Jurisdiction, Ordinary Jurisdictions divided into civil, criminal, family,

and voluntary jurisdictions, as well as a labor jurisdiction, administration jurisdiction, financial jurisdiction, social jurisdiction and many others.

Officials and Professionals: 20,395 federal and state judges, 5,106 prosecutors, nearly 9,000 notaries and other judicial personnel, and about 140,000 lawyers.

Workload: The annual filing of civil cases with civil courts (excluding family cases before the family courts) is composed of the following: first instance cases before local courts number about 1.5 million, with about the same number of disposals; incoming first instance civil cases before district courts number around 42,600 cases, with nearly the same number of disposals; numerous appellate proceedings for civil cases are initiated before district courts, higher district courts, and the Federal Court of Justice; about 12 million payment-order proceedings at local courts and millions of cases in the realm of voluntary jurisdiction, provisional legal protection, execution procedures and others are also filed.

Having such enormous justice machinery and a large and mighty judiciary, at the top of which sits an immensely powerful Federal Constitutional Court, it is understandable that some scholars look at the German Judicial system (normally called the 'third power,' though nowadays the 'first power') as stronger than the Executive and the Legislature for many reasons and in many respects. No wonder therefore that Germany, known throughout the world as a 'rule-of-law-state' ('Rechtsstaat'), is nowadays criticized for being a 'justice-;' 'judges-;' or 'judicial-state' ('Justizstaat,' 'Richterstaat,' 'Rechtsprechungsstaat').

On the opposite edge of the range of justice systems, with all their similarities and divergences, there remain a few systems that can only hardly, if at all, be called a 'System of Justice' or a real 'third power' in the true sense of these words and/or from a democratic understanding. This mainly holds true for those systems that are not only small in respect of personal resources and office facilities, not only simple in their organization and diversification, not only ineffective in the number of incoming and disposed cases or the duration of proceedings. This holds true also for those systems that are – and this is their most severe deficit – extremely weak because they are not esteemed nor accepted, are scarcely used by the people, and in particular because these so called 'third powers' are dependent on the government/ executive or authoritarian rulers and because in the worst cases their judges and courts are corrupt.

2. Main reform movements

Such a situation of judicial poverty on one side and of judicial richness or even luxury on the other has led and still leads to just opposite reform movements.

2.1. (Re-)Construction vs. destruction of civil justice systems

Among one block of nations we can observe more or less evident reform intentions and efforts expressly directed at revising the existing justice system or, more simply, to the totally new *construction* or *re-construction* of national justice administration and court establishments which strive to be more powerful and independent, larger, more diversified in respect of jurisdictions, courts and competences and, as a result, more effective judiciaries. The concrete results of such developments can be seen in enrichments among traditional ordinary jurisdictions (containing sometimes only a civil and criminal branch) by voluntary, family, labor, administrative and/or constitutional jurisdictions and courts, newly equipped with an increasing number of scientifically educated, practically trained, legally qualified and upright judges, lawyers or other legal professionals, those nations have been lacking of before.

Whilst we can observe here a so-called '*set-up*' of judicative, procedural and professional facilities we can see in the other block of nations an opposite move, a so called '*cut-down*' in judicial installations and procedural establishments, marked by catch words and goals like 'lean justice,' 'lean procedure,' and the 'rationing,' 'rationalization' or 'economization' of legal services, or its 'reduction,' 'centralization,' 'concentration' or 'simplification.' In short: in these countries the overwhelming tendency is respectively towards retrenchment, which occasions a *destruction* of civil justice systems.

For this development my own country, Germany, is again an illustrative example. Here, this quite fundamental, destructive and consequently constitutionally questionable reform movement is not only still heavily debated and the subject of much contest, but has partly already been realized. Under discussion or already in force are, for example, replacements for fully-fledged procedures for speedy, petty, mini or small claims trials; the promotion of simplified, summarized or concentrated procedures; the abolition or combination of jurisdictions, judicial branches, courts and competences; the cut-off or limitation of appeal-instances; the replacement of panels by judges sitting alone; and – most importantly – an aggravation of constitutionally guaranteed open access to state justice by new mandatory non-state and out-of-court pre-trials, as well as by further official demands for using so-called 'alternatives' to traditional state conflict resolution facilities. This leads to the next obvious reform movement.

2.2. Nationalization vs. privatization of civil justice systems

In some nations among the above-mentioned judicially poor countries state powers are trying hard to get control over an uncontrolled 'wild growth' of dubious, even criminal, types of private justice and self-help or private, professional help to self-help (including tribal justice, folk justice, mafia justice, gang justice, *etc.*). Moreover, such states have started to legalize, regulate and control certain forms of the so-called Alternative Dispute Resolution (ADR), whilst simultaneously offering 'better justice' via an increased state judiciary. All these phenomena are indications

for a *nationalization*, including the legalization and legal control of what were formerly private – whether permitted or not – forms of conflict resolution.

Again we can find a just opposite development among judicially rich countries, *i.e.* a presently strong movement towards *privatization* of parts of former purely state civil justice services, particularly in those nations where the state judiciary suffers heavily from an overload of work.

In the view of most government officials, justice reformers, ministries of justice and high ranking judges, responsible for court administration and management, the 'main evil' of the state judiciary and court procedures is to be found in the aforementioned *overload* of the courts. This has turned out to be the main reforming impulse, the motor and rotor of all new and recent legislative reforms the area of judicative law and procedure law. This overload raises the question of how to manage it, leading to the consideration of best strategies. There are four such strategies under discussion: maximizing, optimizing or minimizing the state offer of legal services on one side or steering, damping down, diverting or absorbing the immense public demand for legal services on the other. About the substitution or complementing of a state's judiciary and court procedures using so-called ADR, *e.g.*, through non-state or out of court conflict resolution instruments, like conciliation, negotiation, mediation and arbitration; we are all well informed. There is therefore no need for further explanation in this regard about the initiation and legitimation, roles, functions, advantages and disadvantages, *etc.* of such an approach.

This ADR-movement has already existed for some decades in Europe and continues to increase, being certainly the most important, though not the only, indicator of the privatization of state justice.

Forms of 'outsourcing' what have formerly been state duties and fields of work is also under discussion or has already been realized, not only in the area of state administration, such as the executive, but also in adjudicative areas, like private pre-trials or post-trials preceding or following a main state trial, as well as private police, private prisons, intra-trial and extra-trial private facts-discovery and proof-taking, the private execution and enforcement of court decisions by private bailiffs and marshals or private debt-collection companies, inkasso bureaus and, in some cases, even by criminal gangs and so called 'black sheriffs,' specialized in money-collection using criminal methods.

Nevertheless, there is insufficient time to discuss this obvious withdrawal of the state from the exercise of state powers *vis-a-vis* its traditional duties and responsibilities.

2.3. Electronification as formalization of civil justice systems

Caused by the above-described miseries of justice systems in East and West and boosted by the turn of the millennium and an upcoming atmosphere of a totally 'new era in the history of mankind,' there is another tendency worth mentioning. This

tendency can be referred to by the term '*modernization*'. It is a term most likely to be used by ministries of justice, legislators and politicians and is also found as slogan or goal used in many justice reform projects, being a declaration about how to make judicial administration more effective and court proceedings 'speedier, cheaper, and better' or more attractive for the people. However, when we look behind this term, there is mostly not much more to detect than the mere recently planned or already practiced introduction of so-called 'modern media' or tele-techniques, like tele-information and telecommunication, to improve only the bureaucratic and organizational side of justice administration and the technical, operational or processing side of court management and court procedures.

This tendency, which I will call '*electronification*' in accordance with often used abbreviations like 'e-justice,'e-procedure,'e-law,' etc., is also named 'technicalization,' 'virtualization,' 'digitalization' or 'computerization.' These terms are used to denote an ongoing permeation or infiltration of the antiquated judicial administration, old fashioned court office equipment and outdated procedural operations by the installment of new media and its possibilities.

When one looks particularly at new 'e-procedural law' or 'e-justice administration law' (like, for example, the new German Judiciary Modernization Act of 2003 or the German Judiciary Communication Act of 2003) or at new splinters of scattered single 'e-norms,' that have just been slipped over certain provisions in old Codes of Procedural Law (like, for example, the German Code of Civil Procedure of 1877), one gains the impression, that all these legislative novelties offer little more than a new format. This is, in the first place, the '*electronic form*,' replacing or augmenting the traditional mainly '*paper form*' – respectively, the '*written form*' or '*text form*'. Meanwhile, the substantive content, action, reactions and interactions or working processes behind these laws remain unchanged.

As with all formats, the electronic format has the function of preserving and conserving its content. This means that exactly that reform movement that sounds like it is the most progressive, is in reality an utmost *conservative* one as long as so called modernization is concerned with little more than a purely new format. It is to this extent a mere '*reform of the form*,' and not a '*reform of the content*'.

This substitution or enrichment of the mainly traditional written form by the new electronic form, particularly in the field of information and communication, finds its expression for example in e-registers, e-files, e-documents, e-signatures, e-databanks or e-mails. This allows us to describe this as an 'exchange' of one 'data storage media' by another.

In other words: the official and almost euphorically and emphatically praised so-called 'modernization of justice' by new media often means little more than replacing or augmenting the conventional form of actions, reactions and interactions of procedural or administrative working processes, which all over Europe remains the '*paper form*'. This form finds, for example, its expression in procedural law vocabulary

using words like 'register,' 'catalogue,' 'list,' 'document,' 'signature,' 'booklet,' 'docket,' 'writs,' 'file,' 'paper,' 'binder,' 'index,' 'certificate,' 'transcription,' 'copy,' 'protocol,' 'record,' etc. Compared with this traditional paper form the electronic form presents itself in part as a 'step-up' from the conventional paper form or as a 'hybrid.'

Moreover, in some countries also another electronic form is being prospected or under construction. This is namely the – up to now still imperfect – supplementation of in-court 'live' oral communications and negotiations with 'virtual' audio-visual transmissions of motion-pictures and sounds into a courtroom (*video conferences*).

All this allows 'modernizers' to appear simply to be 'formalizers,' concerned almost only with forms and not with content, which itself urgently needs to be reformed. To briefly illustrate the indisputable need for such 'material' or 'substantive' justice-modernization it must suffice to highlight that business-accountants and management-consultants chartered by the German Ministry of Justice to analyze the present judicial realities, have been extremely shocked by the circumstantiality, intricateness, formality, heaviness, slowness, costliness and complicatedness of traditional court management and court proceedings, as well as the immense waste of time, manpower and money incurred.

These factual deficiencies are mainly occasioned by widely inflexible and obsolete legal over-regulation in contemporary judicature acts and procedure codes, which – at least in Western Europe – often stem from the 19th century. Moreover, if later emended, enacted or imported by one nation from another, such acts remain pedominatly deeply rooted in their own or in a foreign legal history, gluing on old patterns. In sum, such codes are, perhaps with the rare exception of faintly modernized newer codes, outdated, retrospective and past-orientated. Truly 'modern,' i.e. updated, prospective and future-orientated justice administration codes, court acts or procedural orders, are, as far as I am informed, until now nowhere in existence.

Returning to the so-called electronification of justice systems and court procedures, it is essential to highlight the presumption that this will be ongoing (with ultimate aims like totally '*virtual court procedures*' or pure '*tele-courts*' already being uttered here and there), a trend that will be – regardless of the extent to which it is achieved – *irresistible*, regardless of the questions it raises, how necessary it is and how useful its outcomes will be.

Already now this just started development has created for us, as proceduralists, severe theoretical and practical problems. For example, the rapidly ongoing electronification of court procedures, accompanied by more and more so called 'e-procedure-law,' forces us to reconsider nearly all of our trusted *procedural principles*, like the principle of accessibility, the principle of submission (in modern terminology: 'principle of information'), the principle of factual negotiation (in modern terminology: 'principle of communication'), the principle of directness, the principle of presence, the principle of publicity, the principle of effectiveness,

and others. Additionally, we have to recognize that our court proceedings, despite the (though not universally) accepted principle of orality (*i.e.* formlessness), are in their most important respects a '*file process*' or '*paper process*,' characterized and described as a '*data processing system*,' an '*information system*' and a '*communication system*. As such, our old-styled court procedures on one side and the new world of tele-techniques with their, '*electronic data processing*,' '*tele-information*' and '*tele-communication*' on the other side show a great deal of reciprocal attractions, affinities and compatibilities. This makes it apparent, that court proceedings in particular, and judicial administrative systems in general, are fields lying fallow or open flanks, which will sooner or later be, to a greater or lesser extent, conquered by new media. It holds true, even it will no doubt be proven, that fully electronic or partly electronically supported court procedures will be not always be 'faster, cheaper and better' than the old fashioned system. Here, we have to keep in mind the high costs of buying, installing, maintaining and up-dating hard- and software, as well as the fact that, for example, whilst using E-mails only means that *information-transfer-speed* can be reduced to splits of a second, this does not at all mean that proceeding as a whole (including hearings, proof-taking, negotiation, decision-making, *etc.*) will become faster. Last but not least, we should consider the opinion of experts who state that a 'court procedure without any paper' could never exist. This opinion raises the option of a future 'double-track' model, which would certainly not be cheaper or faster than a one-track procedure using the old or the new style.

One more remark to finish this chapter: the ongoing legalization of judicial or procedural phenomena by the creation of e-justice or e-procedural norms also represents a strong move towards what is here called '*formalization*' or even *hyperformalization*, to an extent never before seen in history. It is a move towards a new quantity or quality of '*formalism*' in our procedural law, which is anyway still characterized as a 'formal' or even formalistic field of law, neglecting all its 'material,' 'substantial' and even 'constitutional' impacts and values.

In this regard, formalization, particularly of procedural law, is to a certain extent unavoidable. As a centuries old development it seems nothing more than a newer or more recent tendency, which we are looking at in this conference. But with regard to this latest developmental step, electronification, it is a new tendency that runs contrary to a very large movement, which will be addressed next: the movement of 'materialization.'

2.4. Constitutionalization as materialization of civil procedural law

Picking up the just mentioned catch-word of '*materialization*' of judicial and procedural law, such materialization can be of a social (socialization), economic (economization) and, amongst others, political nature (politicalization). Of these, political materialization is quite often seen to encompass the key-words of '*humanization*' or '*democratization*,' which are mostly synonymous in the broad sense

that they mean carrying out democratic and/or human ideas and ideals, values and goals, including within the field of judiciaries and procedures.

Today, we can find such shifts – whether weak or strong, recent or longstanding – in nearly all nations regardless of their present political, governmental or constitutional systems. As such, we can find such shifts even in nations that continue to struggle to overcome dictatorship, juntas or one-party governments as well as in more democratic systems based in the first place on the separation of state powers and on a truly independent ‘third power’ in accordance with the idea of a rule-of-law state (*‘Rechtsstaat’*) and respect for *‘fundamental’* and *‘human rights’*, with rulers and oppositions still fighting for more or less success.

Particularly in so-called ‘countries in transition’ referred to above, transformations or conversions are mostly initiated, accompanied by or based upon *national constitutions* – whether old, revised or totally new – as well as on international conventions, treaties or proclamations. These mostly contain (like, for example, the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union) quite a number of fundamental, basic or constitutional guarantees and principles as well as fundamental or human rights, which also relate to the third power.

In most western European nations we had already for decades had, and continue to have, broad discussions on topics such as *‘constitution and civil procedure’* and/or *‘constitutional law and civil procedure law’*. These discussions are often occasioned by leading and binding decisions issued by constitutional or supreme courts concerned to ensure the conformity of certain judicial or procedural regulations and official actions, in particular court decisions, with the constitution. This has led to a steady increase in the penetration of simple procedural law by constitutional law and furthermore to the (re-)discovery of the so-called ‘substantive values’ of procedural norms, including the specific field of ‘substantive procedure law’. This development was followed by more and more questions about the *‘legitimacy’* behind the legality of procedural provisions, by the idea and theory of so-called *‘procedural justice’* and by the growing importance of the already well-established and oft used ‘constitutional method’ of interpretation and the application of legal rules in general and procedural rules specifically. As a result, it finally became the widely accepted view that many parts of procedural law had to be seen as ‘applied’ or ‘concretized’ constitutional law. This development as a whole is nowadays called *‘constitutionalization’*.

These developments have also been accompanied by a change in the public’s basic understanding of justice systems, procedures, courts, judges and lawyers; what they are, what they should be and what they are good for. For instance, the justice system is no longer understood as a purely unknown, strange and distant machinery, demonstrating its authority and power by a coercive pacification of litigants or by a coercive suppression of conflicts for the sake of law and order. It is now also or only seen as a state institution that serves the people through the supply of legal protection as a ‘legal services provider.’

This constitutionalization movement, as just outlined, has up until now remained quite weak in Eastern Europe, and in some eastern nations it does not yet even exist, whilst in western Europe there is, or at least seems to be, nothing new about this phenomenon. As such, one may ask why this move could or should represent a recent or new tendency of civil procedure within the formulation of the general topic with which we are dealing at this international conference.

There are two points worth mentioning in this context to answer this question. The first is related to the situation in Eastern Europe, and the second relates to the situation in Western Europe.

Firstly, looking at the impressive mass of new codifications, constitutions, acts, codes or drafts in Eastern European EU member states or member states to be, we have to bear in mind – and this is conceded also by our Eastern European colleagues – that many of the new norms promulgated are, up to now, merely '*paper law*,' '*letter law*' or '*law in the books*,' which must be, as the next step, established in a new thinking and way to behave. This means implementing the newly formulated ideas and requirements into legal opinions, legal practice, society's mentality and into the people's legal consciousness as an attempt to transform this paper law into so-called '*living law*,' '*law in practice*' or '*law in action*.'

In the *implementation* of new laws and particularly new constitutions in the face of old attitudes, routines and habits among the people, the legal professions and judicial officials of some Eastern European nations still have quite a long way to go. But there is warrant for hope that a new generation of well-educated young jurists will improve this situation within a reasonable time.

Secondly, looking at the constitutionalization movement in Western Europe, most of us will agree with its positive outcomes. This constitutionalization of simple judicative law and procedural law, also described as '*legitimation*' and '*materialization*,' has greatly helped to overcome the centuries old discrimination among these fields of law, seen as merely formal, practical, technical or organizational, bare of values, morals or politics and having only a '*serving function*' in respect of substantive law, being therefore the opposite to real, true, material or substantive law. Although it is common among the proceduralists to look at the norms of CPOs as an '*applied*' or '*concretized*' constitutional law, which mirrors contemporary political systems, the leading opinion among highly academic, dogmatic and positivistic traditional jurisprudence in Western Europe nevertheless looks at CPOs as something akin to a set of tools to put conflicts about real substantive law into an orderly '*canalized*' form, or else as akin to a mere manual for judicial craftsmen, or a compendium of instructions and directives for trial lawyers.

However, supported by the new theory of '*proceduralization*' and other theoretical considerations, such as legitimation by procedure in all the categories of '*procedural justice*,' we should not give up the hope, expressed already in the early 1970s by Mauro Cappelletti, that the sentiment that '*procedure law today has become the*

most important branch of law' will become a common understanding. Moreover, whilst there is nothing new about this phenomena in Western Europe, we can nevertheless discover in some Western European nations at least, a new shift in the big constitutionalization movement. This is a shift worth mentioning, and one of which Germany is again a good example of a bad development.

Here, an opinion is gaining ground that Germany suffers from the so-called '*hyper-constitutionalization*' of procedure law through an overexpansion of its constitutional relevance. This view criticizes a certain inclination among German scholars and judges to make a heavy constitutional affair out of even petty procedural questions, as well as out of those of an undoubtedly purely formal nature. For example, in Germany it is quite usual among professors, judges, lawyers and politicians to attack legal provisions, legislative drafts or court decisions simply by using an argument that is both popular and trivial: 'It's against constitution' or 'It's against the *Rechtsstaat*.' The critical observers of this trend complain also that our *Federal Constitutional Court* has increasingly exceeded the boundaries of its specific constitutional role and function by interfering in the competences and responsibilities of the ordinary courts and by meddling with broad fields of simple law. This had and still has many *negative consequences* for the Federal Constitutional Court itself (catch-words: mutation to a super-appeal instance or an all-round remedy institution), as well as for constitutional law (catch-words: inflation, disqualification, dilution), the ordinary courts (catch-words: overload, overstrain, lacking and failing capacities and abilities), ordinary procedure law (catch-words: destabilization, fractions of systematic, canonization, cementation) and, last but not least, also for the legal professions. The latter are affected for the following reason: our Federal Constitutional Court has rendered a number of decisions containing the expressive as well as excessive demand, addressed to all official functionaries of the judiciary – to judges, judicial officers and even bailiffs – to consider and control everywhere and always the constitutional conformity of their professional activities by themselves functioning as 'mini-constitutional courts' all over the country. This dubious delegation of these specific responsibilities by our highest German court is based on the hope that this will lower the self-generated heavy workload of Germany's Federal Constitutional Court – a workload that is one of the signs of its present day '*crisis*.'

2.5. Internationalization and transnationalization, unification and harmonization of civil procedural law

In carrying out law and justice reforms, it is quite common, particularly in so-called developing countries, not only to stick to that country's own factual and legal situations and conditions, its own national resources or home-made reform ideas, following its own legal history, but also to look for '*models*' or '*patterns*' to borrow and imitate from foreign law; namely, from that of neighbor or partner nations belonging to the same '*legal circle*,' '*legal family*' or '*legal culture*,' or else the same

association, federation, community or union. This operation may be described as a bi- or multinational comparison, followed – should the occasion arise – by a punctual and partial or total ‘reception’ (also called ‘import’ ‘*implantation*’ or ‘*transplantation*’) of foreign legal concepts and texts.

Here, we can observe all over a so-called ‘*internationalization*,’ ‘*transnationalization*,’ or even the rare ‘*globalization*’ of certain fields of law, which has reached and seized the judicative and procedural services and their respective regulations in many parts of the world. Although these movements are no longer really new they will be briefly touched upon in the fifth and last chapters concerning the main developments in the area of civil justice systems. Their principle target (to overcome national legal and judicial divergences) encompasses the aim of creating unified, identical or at least similar national laws, and, in more advanced cases, an unique transnational law mainly for groups of nations that are member states to certain unions, associations, federations or communities. Examples include the Association of South-East Asian Nations (ASEAN), the British Commonwealth, the Organization of Ibero-American States (OEI), the Community of Independent States (CIS) formed by former member states of the collapsed Soviet Union, the *Organisation pour L’Harmonisation des Affaires du Droits en Afrique* (OHADA), and, last but not least, the European Union (EU).

Of all these regional or geo-political movements of ‘*unification*’ or ‘*similarization*,’ Europe’s movement towards the ‘*europeanization*’ of different national laws, has nowadays turned out to be the strongest. However, to date such endeavors remain much more concentrated on the final or provisional results of ensuring similarity, proximity, harmony or compatibility than on securing unity or uniformity. No wonder, therefore, that to this extent the terms most used to describe these processes are ‘*equalization*,’ ‘*similization*,’ ‘*approximation*’ and (especially) ‘*harmonization*’ (besides an more rarely used ‘*compatibilization*’ and ‘*coordination*’). These are words that are widely used in many EU documents, proclamations and especially treaties, as well as in academic publications.

There is no need to address all this in detail and nor, particularly, to talk about the ‘*Europeanization of Civil Procedural Law*’ to the here assembled well informed proceduralists and experienced comparatists. I would therefore like only to point out that, as a result of these afore mentioned movements of internationalization and transnationalization, including the unification and harmonization of European law in general, and European civil procedural law in particular, the disciplines or methods of ‘*comparative law*’ as well as of ‘*comparative procedural law*’ as their own and perhaps one of the most actual branches of comparative law, have gained immense importance. This importance places them not only in the ranks of different specific legal fields of law, but also among the fundamental legal subjects that form the foundation of legal education and legal science. This holds true in spite of the fact that in the legal education systems of many countries comparative law still plays a minor or totally insignificant role.

Analyzing this method of – according to German terminology – ‘*comparison of law*’ (‘*Rechtsvergleichung*’), we have to recognize the growth of a new branch or sub-method, which we may call – again, according to the German terminology – the ‘*similization of law*’ (‘*Rechtsangleichung*’). We had a chance to work on the substantial and theoretical problems involved in this field at the famous colloquium ‘The Coming Together of Procedural Laws in Europe’ in Brussels in 2001, where we intensively discussed the difficult questions of ‘why?’, ‘what?’ and ‘how?’ to harmonize the different existing national European civil procedural laws.

As I had been at that time involved in the questions, ‘how’ to harmonize, what the expression ‘harmonization’ could theoretically mean in which context, how such harmonization could be practically realized and what the declared pursued goal named ‘harmony’ between different laws in respect of civil procedural law, and indeed in respect of law at all, could or should mean, please allow a last remark to this chapter sketching my own standpoint.

Answers to the above raised questions are rare, not very precise and not fully convincing. Moreover, they are quite different. Nevertheless, one can get the impression that the majority of scholars understand ‘harmonization’ – as long and as far as unique commune laws, like a European Civil Procedure Code, do not yet exist – as a process to produce similar, unified or identical national laws by striving for ‘harmony’ between the hereto quite different national laws (in quantity and quality – especially in the field of civil procedural law) of all 28 (!) member states of the EU, all of whom belong to different ‘legal families’ and are embedded in different ‘legal cultures’. Where such europeanization leads to the intended ‘laws in harmony’ or ‘harmony of laws’, it seems that such an outcome is understood to be the result of compromise, compilation, the multi-mix or medley of all these up until now different national regulations, being later at the same average level. Furthermore, we can find many opinions that characterize in advance the perhaps at least harmonized laws as a result, with which all European nations can identify themselves, in which their own legal concepts and understandings are somehow incorporated and represented and with which they are all content. This is because harmonized laws will – as is intended – provide a feeling of closeness, familiarity, togetherness and even happiness, while carrying out EU dictated ‘harmony’. Regarding the harmonization of civil procedural laws in Europe, such ideas had already been criticized as illusionary and spoofed as a ‘love parade’ of European laws that would for some Europeans be a dream, though for others a nightmare.

Instead of such a questionable and still substantially unclear concept for the harmonization of presently existing legal orders, I would personally therefore plead for a future orientated so-called ‘*optimal law approach*’. This would mean to strive for and work out a common European Civil Procedural Code as a totally new and unique construct, for which the best or better parts and points of presently existing national regulations might be (but not must be) mere single bricks and patterns, in addition to newly invented building materials.

3. Speculations about civil justice systems of the future

To conclude this paper with some *speculations* about the '*civil justice systems of the future*' it is worth remembering that our International Association of Procedural Law (IAPL) had for the first time picked up a challenging topic in a round table discussion about 'Procedure Law for the Third Millennium.' It did so at the splendid colloquium on the general topic 'A Procedure Law for all Seasons – from Charles V. to the Third Millennium,' organized in Gent in 2000 and encompassing about 2,500 years of past, present and future procedural law. It is a difficult task to deal with a topic like '*the future of justice systems*,' i.e. of systems that are present, about which we know and in regard to which we may be able to prognosticate their evolutionary reform-steps in the upcoming decades. However, it is an even more difficult task to speculate about '*justice systems of the future*,' i.e. about systems that do not yet exist, about which we do not yet, but which we will have to face perhaps in a near or far future and which will perhaps be created by truly fundamental, radical or revolutionary, not even 're-forms' of the old forms, but formations of something new.

To dare such a look into the future of justice systems as well as to justice systems of the future we as jurists are not well prepared and not well accustomed because we are all past-orientated, present-orientated, but not at all future-orientated persons – if not by inclination then by legal education, professional training and practical routine. To this extent, we are all to a certain degree historians, conservatives and even reactionaries, when and while dealing with cases that have already happened, laws that have already been enacted, judgments that have already been pronounced, literature that has already been already written, and ideas that have already been thought. No wonder, then, that disciplines like 'legal prognosis,' 'legal politics,' 'future law' or – most advanced – 'legal futurology' are nearly unknown. Moreover, our European national legislations are mostly – in the words of legal sociologists – just 'reactive impulse legislations.'

Although a scientific foundation or theory for the following look at 'Civil Justice Systems of the Future' is therefore missing, some mere speculations, pure visions or thinkable as well as unthinkable science fictions will be allowed, limited to some sketchy *sceneries of future civil justice systems*, related to the *five movements* considered above and described now only by catchwords:

Ad 2.1. (Re-)Construction vs. destruction of civil justice systems:

The reduction of a variety of jurisdictions to a civil and a public jurisdiction only, next to a constitutional one strictly restricted to constitutional affairs / the total revision of the court hierarchy, denying the stereotype 'the higher the court, the better the judgment' / the limitation of instances to one entrance instance and one appeal instance only / decision control by a court of the same instance and not by a higher court: decision control by a highest courts only in public interest cases and only in cases with a significant public importance / the substitution of

panels of judges for judges sitting alone in the first instance and the second instance as well, denying the stereotype that 'the more judges, the better the judgment' / employment of the best qualified judges and best paid judges in the first instance to make appellate procedures unattractive / cutting down the number of judges and increasing the number of auxiliaries / centering judges' work on judging only / transformation of the legal professions from nowadays mass-professions to elite professions / cutting down court units to a minimum whilst widening their competences / making mini-, speedy- or pre-trials for petty cases and small claims, as well as simplified, concentrated or summarized proceedings the norm and fully fledged procedures the exception.

Ad 2.2. Nationalization vs. privatization of civil justice systems:

Private justice respectively non-state or out-of-court conflict resolution as the norm and state justice as an exception reserved for cases of high importance to the state or society / the outsourcing of nowadays state duties and official responsibilities in the realm of justice administration and procedural work to a significant extent / fact-finding and the gathering of factual as well as legal information in pre-trials, dominated by private parties or their lawyers, only exceptionally followed by a state main trial, dominated by judges / the merging of state court procedures and ADR-activities like conciliation, mediation, negotiation and arbitration / the construction of a so called 'planetary system' or an 'optimal model' as a new type of conflict resolution system, combining the nowadays two basic contrarian conceptions of the advisory, contradictory, confrontation or litigation concept, typical of Western 'conflict-promotion culture,' on one side, and the communicative, cooperative and compensative concept, typical of Far-Eastern 'conflict reconciliation culture,' on the other side / the reactivation of still underdeveloped and underestimated 'negotiation' in its true sense as a principle of real communication and not of mere information as the missing link for the composition of a new justice system.

Ad 2.3. Electronification as formalization of civil justice systems:

The substitution or combination of traditional forms of administration and proceedings by so called 'electronic forms' or by a totally or partly 'virtual justice administration' and by 'virtual court proceedings' / the introduction of so-called 'tele-courts' / the enactment of own 'tele-court-acts,' or 'tele-procedure-acts,' of own chapters for 'e-proceedings' in the traditional procedure codes, or of 'e-justice law' / the expansion of already punctually or partly existing 'e-civil procedure law' and 'e-civil justice law' / new and more regulations of 'e-ADR law' regarding already existing 'e-conciliation,' 'e-mediation' and 'e-arbitration' / the substitution or complementation of traditional hearings with audio-video conferences.

Ad 2.4. Constitutionalization as materialisation of civil procedure law:

The acceptance of a 'hyper-constitutionalization' of plain procedural law and of overpowered constitutional courts and chambers for constitutional law in Supreme Courts / the disempowerment of the nation's highest courts through a concentration

of their responsibilities and by restricting the extent of their control strictly to constitutional issues.

Ad 2.5. Internationalization and transnationalization, unification and harmonization of civil procedure law:

The creation of a European Civil Procedure Code on the basis of 'model-laws,' worked out by individuals, institutions, organizations, working groups or academic associations, accepted and enacted by whichever body of the EU, the Council, the Commission or an empowered European Parliament / the expansion of European jurisdiction and European Courts / the dominance of more and more European courts and their jurisdictions over national judiciaries and their jurisdictions / the abolition, reduction or disempowerment of national courts and their jurisdictions / the development of a 'unified Europe in all its national variety,' also in respect of justice systems, whatever this paradox could or should mean.

The 'new age,' the rapidly changing world and the beginning of the Third Millennium in which we live, imply a mass of challenges for us as both proceduralists and comparatists.

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