

PART I

INTRODUCTION TO THE PROJECT

CHAPTER 2

WHY COMPARATIVE CIVIL PROCEDURE?

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<https://www.cplj.org/publications/1-2-why-comparative-civil-procedure>

‘much if not all depends on what is compared and how it is compared’

Rosco Pound

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1 THE PROMISE OF COMPARATIVE LAW

- 1 Early twenty-first century saw the dawn of the war on terrorism, economic woes with the Great Recession, and the COVID-19 pandemic. Rather than globalization as it was in the latter part of the twentieth century, the world is cleaving into blocs—not only geopolitically but culturally too. According to some, what we are seeing is a trend of deglobalization.¹ Worse still, along with divisive blocs, we may be seeing the rise of authoritarianism and the decline of democratic institutions. With such changes, what is our role as comparativists? As civil proceduralists?
- 2 More than ever, we need the knowledge of comparative law. Despite the growing political blocs, economy remains global, transactions still cross borders, and communications and legal practice remain international in scope. Between 2018 and 2022, the value of cross-border payments grew by over USD 25 trillion to reach over USD 150 trillion—nearly 30 times the size of the entire global technology industry in 2023.² Even with the proliferation of international treaties and regional agreements, businesses are still required to follow certain national and local laws. This can make cross border deals quite complicated. At a practical level, then, knowledge of other legal systems is necessary as such understanding facilitates transactions.
- 3 But on a more important level, knowledge of other legal systems helps us to better understand ourselves. Our core assumptions are challenged by differing ways of doing things and different choices made by different legal systems. We learn to reconsider and think a little deeper about what underlies our own system. Our reforms benefit from comparative studies.³ Looking back decades later, US Supreme Court Justice Ruth Bader Ginsburg credited her comparative law experience with ‘influencing my perspective on legal issues ever after’. The value of looking at international and comparative law is at the heart of Justice Ginsburg’s twenty years jurisprudence on issues relating to equality.⁴ Justice Ginsburg understood the need to add to our store of knowledge relevant to the solution of trying questions. Knowledge of foreign legal systems is essential to understanding our own legal system. We compare legal systems not to find the most beautiful or the most exotic, but in reality, to better our own.
- 4 Finally, and perhaps most importantly, comparative studies are needed today not only for the knowledge they generate but for the perspective and the mindset they cultivate. To counter today’s

¹ B Setser, ‘The Dangerous Myth of Deglobalization’ (2024) Foreign Affairs <https://www.foreignaffairs.com/china/globalization-dangerous-myth-economy-brad-setser> accessed 2 September 2024. In 2020, the economist Douglas Irwin wrote that ‘the COVID-19 pandemic is driving the world economy to retreat from global economic integration’.

² See also, Statista, ‘Value of total cross-border payments market worldwide in 2023, with a forecast for 2030’ <https://www.statista.com/statistics/1385187/cross-border-payments-value-worldwide-by-segment/> accessed 2 September 2024.

³ The four Americans most important in the development of the federal rules of civil procedure, Joseph Story, David Dudley Field Jr., Edson R Sunderland, and Charles E Clark, appreciated foreign civil justice systems. See M Reiman (ed), *The Reception of Continental Ideas in the Common Law World 1820-1920* (Duncker & Humblot 1993).

⁴ S H Farbstain, ‘Justice Ginsburg’s International Perspective’ (2013) 127(1) Harvard Law Review 429.

growing divisions, we need to open our minds and understand differences. It is not only information and knowledge that comparative studies compile, but a frame of mind. Comparative studies promote a mindset that respects differences, a perspective that is sorely missing today. It is perhaps not a coincidence that comparative studies rose in the late nineteenth century⁵, and comparative civil procedure in the middle of the twentieth century after the second world war, two periods of great instability. Clearly, comparative studies can be a good tonic against division and isolationism.

2 THE IMPORTANCE OF CIVIL PROCEDURE

- 5 But then, why procedure law and civil procedure? The purpose of procedure is often said to implement substantive law, rendering procedure subservient to substantive law. But we, as proceduralists, know civil procedure can be so much more.

2.1 Civil Procedure as Social and Cultural Norm

- 6 Every society has disputes and so, there is always a need for civil dispute resolution. Foundational to resolving disputes are the rules delineating how to decide such disputes. Civil procedure allows private individuals to enforce civil laws that protect their rights and liberties through bringing lawsuits. It allows individuals to participate in the public realm of dispute resolution.
- 7 But legal procedure is not simply the practical way of ensuring the enforcement of substantive rights. Disputing and the process of dispute resolution unveil ‘the meaning participants attach to going to court, [as well as] social practices that indicate when and how to escalate disputes to a public forum’.⁶ Legal procedure reflects the collective sense of justice in society.⁷ Theories of justice are embedded in legal procedure ranging from notions of contractual justice to conciliatory justice to adjudicatory justice.
- 8 As C J Hamson observed so long ago, legal procedure is

a [...] ritual of extreme social significance. If we can appreciate the meaning of this ritual in the case of our own and even one other community, we obtain a remarkable insight into the fundamental and largely unformulated beliefs accepted by, and acceptable to, these societies; we begin to understand their collective and perhaps contrasted social sense of what is just and fair.⁸

⁵ D Griffiths, ‘The Comparative Method and the History of the Modern Humanities’ (2017) 2(2) History of Humanities 473 <https://www.journals.uchicago.edu/doi/epdf/10.1086/693325> accessed 2 September 2024.

⁶ S E Merry, ‘Disputing Without Culture’ (1987) 100(8) Harvard Law Review 2057, 2063.

⁷ L Cadet, J Normand and S Amrani Mekki, *Théorie générale du procès* (2nd edn, Presses Universitaires de France 2013) esp Part I, 45 ff: ‘Les sens de la justice’.

⁸ C J Hamson, ‘In Court in Two Countries: Civil Procedure in England and France’ (1949) The Times of London.

- 9 Societies that place a high premium on peace and harmony might provide procedural rules that focus more on mediation and conciliation. Societies that value individual rights might promote a more adversary process by which each side is represented to battle it out in the court process with the judge deciding for one or the other interest. Societies that believe more in objective truths might place greater confidence in the judiciary as the objective investigator of the truth underlying the dispute. By contrast, societies that believe in a 'legal truth' might place greater confidence in individual litigants in unearthing information that can support a truth that meets a legal burden of proof. How a legal system decides may reveal underlying social values.

2.2 Procedure's Political Role

- 10 Notably, civil procedure rules have universalist aspirations as well as political, social and cultural particularities. By turning disputes over to a neutral third party for resolution, the litigating parties give up their control of the dispute in exchange for peace and resolution. And it is as much in the process of resolution as in the resolution itself that legitimizes the outcome. Fair procedure is important for the acceptance of the resolution. People's perception of fairness is strongly impacted by the quality of their experiences in the dispute resolution process, and not only the results.
- 11 As social psychologist Tom Tyler has found, litigants abide by even adverse outcomes if they perceive the process as being fair.⁹ And perceptions of procedurally just encounters, according to Tyler, depend on four central features of their interactions with legal authorities: whether they were treated with dignity and respect; whether they were given voice; whether the decision makers were neutral and transparent, and whether the decision maker convey trustworthy motives. Procedures that protect these four features tend to foster greater acceptance of the dispute resolution system.
- 12 Where the dispute resolution mechanism is the courts, civil procedure plays an even greater public role. Courts are a part of any state's political regime. Routing disputes through the courts is one way by which central political regimes consolidate their control over society. Courts and in particular, the appeals process, route and funnel disputes up the political ladder to the attention of the central authority.¹⁰ Acceptance of the judicial decision by citizens is not simply acceptance of a particular resolution or the validity of the process. When it involves the courts, it is also an acceptance of a state's governmental legitimacy. Hence, even authoritarian regimes can and would have a thriving and vibrant court system.
- 13 While court procedure can bolster state legitimacy, procedure in turn has the potential to check state authority and protect individuals against arbitrary governmental actions. Rule of law dictates that a state cannot act without limits. And as creations of the state, courts in their adjudications are

⁹ T Tyler, *Justice Concerns in the Management of Civil Disputes*, in *Comparative Civil Procedure* (Margaret Woo and Cornelius Van Rhee (eds), Edward Elgar Publishing, forthcoming).

¹⁰ M Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981).

asserting state power but at the same time, civil procedure rules delineate and check when a state may act. For example, requirements of notice and service protect the individual from arbitrary state infringement. Jurisdictional rules protect individual defendants from assertive state powers. In mandating that the state cannot act without following certain requirements, procedure rules are fundamental to rule of law in democratic regimes.

- 14 And when the civil litigation involves public questions such as those involved in environmental, labor, or constitutional litigation, we are not simply asking for judicial resolution of an individual dispute, but we are also seeking to be participants in the shaping of community norms. Not only are litigants asking courts to enforce legal norms passed by the government, but they are also asking courts to interpret and apply such norms in a specific context. Even critics of civil litigation such as Robert A Kagan acknowledge that ‘adversarial legalism’ filled in a void in American government.¹¹
- 15 In the US, the ascendancy of civil rights and liberties in the 1960s and 70s rested on the democratization of access to the courts. It was liberal civil procedure rules that opened the doors of the courthouse to civil litigation challenging existing inequality within social groups as well as by state actors. Liberal standing rules and pleading rules enabled ordinary citizens to participate and reinterpret policies and rules in the courthouse. Joinder rules that enable group litigation as well as the creation of representative actions, such as class actions, further extend the impact of courts beyond the individual parties before them. In other words, civil litigation and its procedure became a form of ‘bottom-up’ participation in decision making and norm setting through the courts.¹²
- 16 As such, civil procedure rules can have distributional consequences. At a most basic level, civil procedure rules determine who gets to do what and when in a lawsuit. In so doing, civil procedure rules are distributing power among the actors – be they judges, parties, and their lawyers – in any litigation. For example, the rules and procedure that enable parties to gather information in a litigation may equalize any imbalance in access to information between the parties, and at the same time, protect the privacy rights of litigants. Rules that define how specific a litigant must be in setting out his/her claims can place greater or lesser power on judges to dismiss complaints at an early stage.
- 17 On a systemic level, establishing who gets to make these rules, who gets to enforce them and under what circumstances, involves a delicate allocation of powers among different branches or different levels of government. For example, jurisdictional rules that define the reach of a court’s authority not only circumscribe the power of the court vis à vis the litigants, but also, vis à vis different governments and branches within the government. Consequently, the rules delineating the authority of courts to issue nationwide injunctive relief, as those in the US, have often been

¹¹ R A Kagan, ‘On Surveying the Whole Legal Forest’ (2003) 28(3) *Law and Social Inquiry* (Cambridge University Press) 833, 859.

¹² C R Epps, *The Rights Revolution: Lawyers, Activists, and the Supreme Court in Comparative Perspective* (University of Chicago Press 1999).

criticized as an infringement of the executive power to enforce law. Clearly, in some instances, civil procedure rules restore power disparities; in others, they preserve existing power hierarchies.¹³ How the control of the dispute is allocated amongst the players tells volumes about whom the system trusts, and the purposes litigation may serve.

- 18 To sum up, civil procedure is not simply the rules to enforce substantive rights. They are not simply an adjunct to substantive rules. They are rules that can have political, social and cultural significance. Procedure legitimates state authority and at the same time, can circumscribe state authority. In regulating how a dispute is brought in court, how it is investigated, how it is argued, how it is decided and how the decision is enforced, civil procedure rules also distribute power amongst the parties, the judges, the lawyers, and the political authorities that house the courts.¹⁴ As a driving force behind the civil justice system, procedure can act as a lever of power.

2.3 Civil Procedure as a Fundamental Right

- 19 Under an outcome-based theory of civil procedure, procedure rules are said to exist to ensure efficiency and accuracy of the outcome at the least cost for the greatest number of people. For law and economics scholars like Judge Richard Posner, proposed procedural reforms may even be reduced to a mathematical formula that measures the error costs with and without the new procedure as against the additional direct cost of the procedure. ($EC1 - EC2 > \text{additional direct cost of a hearing}$).¹⁵ The idea being that procedure reforms are necessary only if the error cost without the additional procedure is greater than the additional cost of the new procedure.
- 20 Under this analysis, then, accuracy and efficiency are what counts as fundamental principles for procedure. An outcome-based theory behind civil procedure rules would be all that is needed to justify the reform of these rules. Indeed, in recent years, many countries have tempered their civil procedure with considerations of cost and efficiency. The frequent adoption of the proportionality principle – that is, courts should deal with cases justly and at proportional cost¹⁶ – is an apt example of such an orientation.
- 21 If, indeed, civil procedure rules are only to ensure an accurate outcome and enforce the substantive law, then reforms that would maximize accuracy using the least amount of costs would always carry the day. Taken out of the decision-making consideration are the ‘soft’ values that cannot be quantified. But as Ronald Dworkin has argued, procedure itself is related to the foundational values

¹³ One can see this in joint litigation rules such as class actions, which allowed plaintiffs to join forces in a single litigation against big corporations.

¹⁴ P Oberhammer (ed), *Richterbild und Rechtsreform in Mitteleuropa* (Manz 2001).

¹⁵ R Posner, ‘An Economic Approach to Legal Procedure and Judicial Administration’ (1973) 2(2) *Journal of Legal Studies* 399, 441-442.

¹⁶ See Rule 1.1 (1) UK Rules of Civil Procedure: ‘These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.’

of human dignity, liberty and equality. If true, then we would have to consider under what circumstances could these fundamental procedural rights of an individual trump utilitarian principles of the greatest good for the greatest number.¹⁷

- 22 Some scholars have argued that a right to participate is itself fundamental, and the right to participate requires procedures that respect the dignity of those who are bound or otherwise seriously affected by a decision. Human dignity as participation is said to be protected by appropriate procedure. Scholars have also argued that participation is essential to the legitimacy of adjudication, just as participation is essential to the legitimacy of legislation and other government action in a liberal democracy.¹⁸ It is in civil justice, unlike in criminal justice, that the private individuals can participate as willing actors in the public realm to seek protection, interpretation, and enforcement of their legal rights. And fair procedure as well as principle adjudication are at the heart of such participation.¹⁹
- 23 Several international human rights treaties, starting with the Universal Declaration of Human Rights, have enshrined an individual's right to participate in political and public life.²⁰ Consequently, principles of civil procedure have also been enshrined as a fundamental right. For example, access to justice (to dispute resolution) is a human right recognized in many international instruments. A right to a fair trial is embedded in almost all national constitutions as well as codified in, amongst others, Art 10 of the 1948 Universal Declaration of Human Rights, Art 14 of the International Covenant on Civil and Political Rights, and Art 6 of the European Convention of Human Rights. In the US, the right to due process procedure is even incorporated in its constitution under the 5th and 14th Amendment. Other countries, meanwhile, as for example some European countries, have incorporated the concept of fair procedures in their constitutions, often as a part of a right to access to justice.²¹
- 24 If indeed, there is an inherent fundamental right to procedure, then some aspects of procedure cannot be short-changed in the name of efficiency and social wellbeing. To the extent that procedure is viewed as a fundamental right, procedure will have greater authority to contest reforms based primarily on utilitarian principles, and continue to serve as a staunch method in redistributing authority and power. High costs of procedure would not always be sufficient for limiting procedure. Rather, the question would be what are the parameters of this procedural right and how should such rights be guaranteed? Through a country's constitution and/or by reference

¹⁷ R Dworkin, *A Matter of Principle* (Harvard University Press 1982) 84-86.

¹⁸ J Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 Boston University Law Review 885.

¹⁹ C J Peters, 'Participation, Representation, and Principled Adjudication' (2002) 8(2) Legal Theory 185.

²⁰ A M Cius, 'Dignifying Participation' (2018) 42(1) New York University Review of Law and Social Change 45.

²¹ See, eg, Art 47 of the European Charter of Fundamental Rights.

to international norms? Or is it strictly a statutory norm granted by the state? Are these rules overriding principles or merely directives?²²

- 25 Carrying such importance, civil procedure rules have been adopted by almost all legal systems governing how a dispute is to be litigated and resolved. Civil procedure rules may be broad or narrow in deciding who can sue, what can be sued, and where the suit can be brought. Such choices will reflect what role civil litigation may serve in that society – to resolve individual disputes, protect human rights, ensure rule of law, and/or promote democracy. The legal philosopher Ronald Dworkin said it well at the beginning of *Principle, Policy, Procedure*: ‘Nothing is of more immediate practical importance to a lawyer than the rules that govern his own strategies and maneuvers; and nothing is more productive of deep and philosophical puzzles than the question of what those rules should be’.
- 26 Consequently, the idea of fair procedure has been recognized in many state constitutions. While the specifics of fair procedure may vary from nation to nation, some features have garnered consensus as elemental to fair procedure. These include a right to be heard, to be given due notice of a dispute, the human dignity to be treated with respect in the hearing process, an impartial decision maker, and that the decision be based on a record.²³ The details of these rights are then defined by civil procedure rules that are often subconstitutional. Yet, it is in the details of these rights that most often reflect social, cultural and political differences.

3 WHERE ARE WE IN THE STUDY OF COMPARATIVE CIVIL PROCEDURE?

- 27 Considering the importance of civil procedure, a comparative study of even just one system’s civil procedure rules other than our own would add vastly to our understanding of how legal systems work, and of the role of courts and legal systems in society. As we marry these two disciplines

²² In Europe, the case law of the European Court of Human Rights to Art 6 ECHR has shaped the constitutionalisation of civil procedure, cf A Uzelac and C H Van Rhee (ed), *Revisiting Procedural Human Rights* (Intersentia 2017).

²³ In ‘Some Kind of Hearing’ Judge Henry Friendly identified the following list as elements of due process elements of a fair hearing:

- a neutral and unbiased tribunal
- notice of the government’s intended action and the asserted grounds for it
- the opportunity for the individual to present the reasons why the government should not move forward with the intended action
- the right for the individual to present evidence, including the right to call a witness
- the right for the individual to see the opposing side’s evidence
- the right to cross-examination of the opposition’s witnesses
- a decision based exclusively on the evidence presented
- the opportunity to representation by counsel
- the requirement that the tribunal prepare a record of the evidence presented
- requirement that the tribunal prepare written findings of fact and reasons for its decision.

together: comparative law and civil procedure, the question then is where are we now in the study of comparative civil procedure?

- 28 I need not remind this august group of experienced legal scholars, that comparative civil procedure is a relatively new discipline. As underscored by legal comparativists Konrad Zweigert and Hein Koetz in their seminal work *An Introduction to Comparative Law*, comparative law is a relatively young field, beginning only with the Paris Conference in 1900.²⁴ Comparative civil procedure all the more so with its recent pedigree. Even the prestigious, International Association of Procedural Law, was only established in 1950.
- 29 The early years saw scholarly debates as to what constitutes comparative civil procedure. As in the debates in comparative law generally, there were long considerations about the nature of the comparative methodology. Is it functionalism that is important for the comparison? Or is the methodology more focused on legal history? What about the study of legal transplantation? What is to be compared? Without necessarily resolving these debates, comparative law and comparative civil procedure have forged forward.
- 30 Today, we have an impressive stock of treatises and casebooks known to every member of the academy. Comparativists pointed out comparative law has moved beyond simply a methodology and has become a discipline.²⁵ It is a substantial body of materials and a field of substantive knowledge covering different subject matter areas, including civil procedure, and enormous geographic areas (although Africa and Latin America are understudied). Blackletter rule comparisons still dominate but there are now rich contextualized studies of historical development, social context, and cultural characteristic.
- 31 There have been efforts to map legal systems into legal families, legal origin, traditions or culture. There have also been coordinated projects to harmonize laws and rules -- be it the ALI/UNIDROIT 'Principles of Transnational Procedure' or the ELI-UNIDROIT Model Rules of European Procedure,²⁶ or the European Union's efforts to harmonize member states' civil procedure²⁷. Comparativists debated about the nature of the interaction between legal systems -- is it borrowing as in export/import or is it converging or diverging? Is it legal transplantation or is it more a matter of legal translation?

²⁴ K Zweigert and H Koetz, *An Introduction to Comparative Law* (transl by Tony Weir, 3rd edn, Oxford University Press 1998) 2.

²⁵ M Reiman, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50(4) *American Journal of Comparative Law* 671 <https://doi.org/10.1093/ajcl/50.4.671> accessed 2 September 2024.

²⁶ G C Hazard, 'Developing Civil Procedure Rules for European Courts' (2016) 100(2) *Judicature* 58 <https://judicature.duke.edu/articles/developing-civil-procedure-rules-for-european-courts/> accessed 2 September 2024.

²⁷ Z Vernadaki, 'Civil Procedure Harmonization in the EU: Unraveling the Policy Considerations' (2013) 9(2) *Journal of Contemporary European Research* 297 <https://jcer.net/index.php/jcer/article/download/425/407> accessed 2 September 2024.

- 32 Today, we even have critiques of the discipline ranging from its alleged failure to go beyond mere descriptions to its excessive emphasis on rules to a lack of coherent canon. Comparative law, and in turn, comparative civil procedure, has also been criticized for its persistent focus on Europe and a lack of attention to other parts of the world and international regimes. Finally, comparative law has been criticized for its undue attention on finding universal principles, similarities and its efforts to harmonize rather than recognizing and celebrating the diversity in foreign legal systems and cultures.²⁸
- 33 Specific to civil procedure, meanwhile, challengers have argued that procedural law may be so interconnected to a legal system's fundamental organizing principle that it is impossible to understand one aspect without the others, and hence, impossible to compare. Thus, the Anglo-German comparativist Otto Kahn-Freund once complained that 'comparative law has far greater utility in substantive law than in the law of process', and that 'the attempt to use foreign models of judicial organization and procedure may lead to frustration and may be a misuse of the comparative method'.²⁹ Finally, post-modern comparativists in embracing legal pluralism even question whether linguistic and cultural barriers can ever be really overcome,³⁰ rendering comparisons even more difficult when it comes to comparing procedural law.

4 FUTURE OF COMPARATIVE CIVIL PROCEDURE

- 34 So what more must be done? What are we to do with all this information, this data? As the comparativist Mathias Reiman so correctly states: The most urgent agenda for comparative law today is to integrate the accumulated information into a whole which is more than the sum of its parts.³¹
- 35 Most recent technological advances have attempted to meet this challenge to comparative law. There are now big data sets, such as the Lex Mundi or the Rule of Law index by the World Justice Project, that seeks to make sense of all this data by measurements and rankings. But as Christoph A Kern rightly warned us³², numbers and calculations cannot substitute for deep understanding of

²⁸ R Munday, 'Accounting for an Encounter' in P Legrand and R Munday (ed), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 3; see also V G Curran, 'Cultural Immersion: Differences and Categories in U.S. Comparative Law' (1996) 46(4) *American Journal of Comparative Law* 43; J S Parker, 'Comparative Civil Procedure and Transnational "Harmonization": A Law and Economic Perspective' (2009) George Mason University School of Law.

²⁹ O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) *Modern Law Review* 1, 20.

³⁰ D Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance' (1997) *Utah Law Review* 545; see also Symposium 'New Approaches to Comparative Law', held at Utah Law School in October 1996, papers published in 1997 *Utah Law Review* 259; J Ainsworth, 'Categories and Culture: On the Rectification of Names in Comparative Law' (1996) 82(1) *Cornell Law Review* 19, 24.

³¹ M Reiman, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50(4) *American Journal of Comparative Law* 671 <https://doi.org/10.1093/ajcl/50.4.671> accessed 2 September 2024.

³² C A Kern, 'Perception, Performance and Politics: Recent Approaches to the Qualitative Comparison of Civil Justice Systems' (2009) 14 *ZZPInt* 445.

comparative studies of complexity or the ‘real world’ aspects of legal systems. What should be measured cannot be reasonably expressed in numbers. Meeting the challenge posed by comparative civil procedure requires us to consider real world functional equivalents and their contexts.

- 36 Today, we understand that when we compare rules, we must take a functional and contextual approach, that is, analyze not only what rules say but also what problems they solve in their respective legal systems. We realize that we need to consider rules in context, within their procedural and institutional frameworks and, if we want to grasp their deeper meanings, also within their socio-economic and cultural environments. And we know that we must observe not only the law on paper but also the law in action. In sum, the opposite of Big Data.

5 THE COMPARATIVE PROCEDURE LAW AND JUSTICE PROJECT

- 37 The Comparative Procedure Law and Justice (CPLJ) project seeks to meet just such an agenda. First, the choice of the project’s title ‘Comparative Procedure Law and Justice’ is intentional. Its focus is on civil justice and the promises of accuracy, fairness, access, and efficiency that drive every modern system of civil justice. We want just decisions that are accurate according to law and reached speedily by fair and efficient process that is accessible to all.³³ We care about procedure but only if it can secure justice. Civil justice is important because it involves ordinary citizens as willing participants in the public process of dispute resolution.
- 38 As Burkhard Hess shared in his Introduction³⁴, CPLJ seeks true comparisons rather than country reports on individual legal systems. This project has matched scholars from different regions and encouraged comparisons by experts of these systems. CPLJ has a diversity of 37 jurisdictions represented from all five continents: Austria, Belgium, Brazil, Cameroun, Canada, China, Congo (DR), Croatia, Czech Republic, France, Germany, Greece, Hungary, India, Iran, Israel, Italy, Japan, Korea, Luxembourg, The Netherlands, New Zealand, Norway, Peru, Poland, Russia, Singapore, Slovenia, South Africa, Spain, Sudan, Switzerland, Taiwan, Togo, Ukraine, United Kingdom and United States of America.
- 39 Of course, recognizing that all civil justice systems do share similar tasks, the organization of CPLJ parts focuses on core functions accordingly. The general course of litigation is roughly the same: a plaintiff commences action with a complaint (varying degrees of standing and sufficiency of the complaint), filed in the appropriate jurisdiction (varying degrees of assertions of state power), notice given to the defendant, reviewed by the judge (varying degrees of review), evidence is unearthed (parties with varying degrees of guidance of the court or the court); all parties must be heard on the issues in dispute (varying degrees of orality); before an impartial judge (different

³³ J R Maxeiner, *Failures of American Civil Justice in International Perspective* (Cambridge University Press 2011) 4.

³⁴ Pt I ch 1.

selection and training). Courts are expected to base their decisions by applying law to facts (varying degrees of responsibility of who is to find the law) with some finality of the judgment (varying methods of enforcement and preclusion) with appeals to higher level courts for conformity with law and procedure.

- 40 CPLJ acknowledges that varying degrees lie with how responsibilities are allocated, who gets to do what, and the role that civil litigation serves (whether primarily to resolve disputes, or as an assertion of rights, or to change public norms or all three). CPLJ also brings attention on special subject matters and thereby questions the transsubstantive assumption of civil procedure. And CPLJ recognizes the challenges to procedure posed by technology and the need for alternative dispute resolution methods.
- 41 The work has not been easy. 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 explored and explained. Hence, the fact that each segment is composed of members with legal expertise in a specific jurisdiction was invaluable.
- 42 CPLJ now has an abundance of data. This group of scholars, as a collective, have produced unprecedented quantities of information. But this is the beginning, not the end. This body of data can serve as a foundation for additional inquiry, for the development of additional questions and theories, for the further integration of the data and the contribution to a larger theme. As an open access project, the data is available for other scholars to continue to build on each other's work in a systematic fashion, and in short, to assemble the multitude of pieces in other meaningful way. This project will expand the discipline of comparative law, challenge our preconceptions and instill additional questions for exploration.
- 43 There are still important research questions that will continue to plague us. Additional work can be done to further test different hypothesis, pursue further explanations of the data, or seek to understand discrepancies. Explorations can be undertaken as to how countries can change procedural rules to restore power disparities among different kinds of litigants,³⁵ or pursue broader inquiries into the basic structure of legal systems (different branches of the government), the relationship between these systems (e.g., the extent to which they follow similar paths), or the method of transplantation of reforms across systems.³⁶

³⁵ This is particularly true in litigation involving the small claims consumer against a much bigger and economically powerful corporations.

³⁶ For example, in some legal systems, the judiciary have greater responsibility to oversee the litigation than the parties. A Uzelac and C H Van Rhee (ed), *Public and Private Justice – Dispute Resolution in Modern Societies* (Intersentia 2007).

- 44 Additional inquiry can be conducted to explore the interrelationship between civil justice and democracy. According to Hayek, the rule of law means that ‘the government in all its actions are bound by rules announced and fixed before hand – rules that make it possible with fair certainty to foresee how the state will use its coercive powers in a given circumstance’.³⁷ How have different legal systems limited the power of its courts vis à vis litigants? And if indeed, participation is essential to the legitimacy of adjudication and other government action in a liberal democracy, how have such rights been enshrined in civil procedure rules?
- 45 And if civil procedure stands as a right on its own, when and how might such a right be compromised.³⁸ This is a particularly vital question considering the recent growth in arbitration clauses and the privatization of justice systems. In the U.S., arbitration clauses can be found in most consumer and employment agreements without the signer having a chance to bargain against the terms, but which requires grievances be submitted to a private, binding system of arbitration and forfeit access to the legal system. By contrast, other nations, such as Germany have tempered such have tempered the application of such clauses.³⁹
- 46 The extent to which procedure is a fundamental right is a vital question to ask also in light of the latest developments in artificial intelligence and the incursions of such technology in dispute resolution. As contributors in this project has highlighted⁴⁰, artificial intelligence and online platform have rendered virtual justice a preferred platform for resolving consumer disputes in many jurisdictions.
- 47 Finally, more detailed inquiry can also be conducted within consideration of procedure as a fundamental right -- what are the minimum requirements of such elements as notice and an opportunity to be heard? How early and how specific a notice must be to satisfy concepts of due process in particular societies? Additional inquiry can also explore the kinds of rules that would support access to information from an adverse party such that it meets access to justice concerns? What roles do pleading rules play and how specific pleadings must be in different societies?⁴¹ What kinds of joinder rules have been adopted, such as the proliferating class actions, that would encourage interest-based litigation?
- 48 As US Supreme Court Justice Felix Frankfurter acknowledged, ‘due process’ unlike some legal rules is not a technical concept with a fixed content unrelated to time, place and circumstances.⁴² Rather, it is as Justice William Brennan explained in the famous case of *Goldberg v Kelly*, due process means

³⁷ F A Hayek, *Road to Serfdom* (University of Chicago Press 1944) 74.

³⁸ R G Bone, ‘Procedure, Participation, Rights’ (2009) 90 Boston University Law Review 1011.

³⁹ B Hess and L M Kahl (ed), *Jura Novit Arbiter in International Arbitration* (Juris 2018).

⁴⁰ See pt IX on the Digital Revolution and Procedural Law.

⁴¹ See M Y K Woo, ‘Manning the Courthouse Gates: Pleadings, Jurisdiction, and the Nation-State’ (2015) 15(3) Nevada Law Journal 1261 <https://scholars.law.unlv.edu/nlj/vol15/iss3/9> accessed on 3 September 2024.

⁴² *Joint Anti-Fascist Refugee Committee v McGrath*, No 8 (Supreme Court, US) [341 US 123 (1951)], 162-163.

the right to be heard in a meaningful place, in a meaningful manner.⁴³ The specifics of procedure can evolve and change shape over time, depending on the social context. It is this blend of particularity along with its universal values that renders civil procedure an ideal topic for comparative studies.

- 49 In sum, civil procedure presents innumerable opportunities for comparative studies. It uniquely combines the universal with the cultural. It is driven by universal norms of efficiency, predictability but intricately tied to legal actors and institutions and their history. It is part and parcel of nation-building but facing pressures from globalization and transnational conflicts. CPLJ, this project that you are all involved in, will unearth the future of comparative civil procedure.

⁴³ *Goldberg v Kelly*, No 62 (Supreme Court, US) [397 US 254 (1970)].

ABBREVIATIONS AND ACRONYMS

ALI	American Law Institute
Art	Article/Articles
cf	<i>confer</i> (compare)
ch	chapter
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
esp	especially
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
ibid	<i>ibidem</i> (in the same place)
ie	<i>id est</i> (that is)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
pt	part
Sec	Section/Sections
transl	translated
UK	United Kingdom
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
US / USA	United States of America
USD	United States Dollar
v	versus
vol	volume/volumes
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CASES

Joint Anti-Fascist Refugee Committee v McGrath, No 8 (Supreme Court, US) [341 US 123 (1951)].

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