

2.1 General Education

In the same way as, for example, legal history and general legal theory do contribute to the quality of a jurist's all-round education, so does comparative law. It increases his knowledge and understanding of the culture and way of life of other peoples, makes possible meaningful communication with foreign colleagues, is an interesting and useful intellectual exercise, stimulates knowledge and use of foreign languages, and as a result of all this contributes to an increased understanding between people in general.¹

Comparative legal research increases our knowledge of the legal system as a social phenomenon. One interesting example of a possible generally instructive research project would be to study how resource-weak legal systems in countries having very few trained jurists, precedent-setting courts, experts on legislating, and lacking own law schools and juridical research, can adequately deal with situations that arise in today's modern society. Another example worth mentioning is the comparative study of those numerous legal systems, whose legal heritage consists of a mixture of legal rules and institutes originating from different families of law, for example the mixture of English and Islamic legal traditions in Pakistan or of French and English legal traditions in the Canadian province of Québec.

2.2 Obtaining a Better Understanding of One's Own Legal System

Even if it would be an exaggeration to say that the study limited to a single legal system is meaningless,² comparative studies are undoubtedly useful also for a jurist who is interested merely in learning more about and achieving a better understanding of his own law.³ They may demonstrate that many legal rules and legal institutions, which one previously took for granted and unavoidable in every civilized society, actually have arisen in one's own legal system more or less accidentally or because of special historical or geographical

¹ See e.g. Ancel, *Mélanges Malmström*, pp. 4 and 12; Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 367-370; David, *Rev.int.dr.comp.* 1950, pp. 682-685; David & Brierley, *Major Legal Systems*, pp. 4-6 and 8; Glendon, Gordon & Carozza, *Comparative Legal Traditions*, pp. 4-5; Glenn in Smits, ed., *Elgar Encyclopedia*, pp. 57-59; Graveson, *Rev.int.dr.comp.* 1958, pp. 501-509; Kamba, 23 *I.C.L.Q.* 504-505 (1974); Schmitthoff, 7 *Cambridge L.J.* 100-101 (1941); Sola Cañizares, *Iniciación*, pp. 122-123; Tunc, *Essays Yntema*, pp. 80-90 and in *Rev.int.dr.comp.* 1964, pp. 46-67; Winterton, 23 *A.J.C.L.* 111-112 (1975).

² See Gordley, *De lege* 1995, p. 37.

³ See e.g. Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 335-337; David & Brierley, *Major Legal Systems*, pp. 6-8; Glendon, Gordon & Carozza, *Comparative Legal Traditions*, pp. 5-7; Gordley, 46 *A.J.C.L.* 607-615 (1998); Hazard, 79 *Harvard L.R.* 281 (1965-1966); Kahn-Freund, 82 *L.Q.R.* 59-60 (1966); Rheinstejn, *Einführung*, pp. 191 and in 1 *A.J.C.L.* 104 (1952); Rodière, *Introduction*, pp. 47-48; Schnitzer, *Vergleichende Rechtslehre*, vol. 1, p. 42; Sola Cañizares, *Iniciación*, p. 110-111.

factors and that many, possibly most, other legal systems survive quite well without such rules. Foreign legal systems may in fact resolve similar problems in a quite different way, perhaps even simpler and better.⁴ Other legal rules and legal institutions, which one previously regarded as being original to one's own legal system, are shown in fact to have foreign roots.

Comparative law thus makes it possible for a jurist to see his own legal system from a new point of view and from a certain distance.⁵ In this new perspective one can obtain a better and more critical⁶ understanding of the function and value of old and well-known legal phenomena in one's own law.

2.3 Working *de lege ferenda*

This increased understanding of one's own legal system also means that the jurist can look at this system without consciously or instinctively being bound by certain legal solutions which for other jurists, who do not have the benefit of comparative knowledge, seem obvious and irreplaceable, since they have never seen or heard of other methods used to resolve the same problem.⁷ This is especially important in connection with the work on new legislation, but also in other cases where jurists work *de lege ferenda*, for example in the case of judges creating precedents or legal scholars recommending a law reform.

The importance of learning from the experience of other countries is obvious within the fields of natural science, medicine, and technology. The same compelling need to make use of the experience of others should also be recognized within the legal field.⁸ In many countries, reports of legislative committees and doctoral dissertations usually contain at least a few pages consisting of a brief overview of the relevant legal rules in some of the most important foreign legal systems.⁹ The problem is that this is seldom followed by profiting from the foreign solutions and experience; the reader often gets the impression that the excursion into foreign law was done more for the purpose of complying with a formality, or a traditional obligation, than to actually take into consideration

⁴ Many years ago, a committee within the Association of American Law Schools expressed this in the following way: "Every law student should be introduced to a legal system other than his own. He should understand that there is nothing 'God-given' in the solutions of the common law [...]". See A.A.L.S. Proceedings 178 (1960).

⁵ See e.g. Peters & Schwenke, 49 *I.C.L.Q.* 830 (2000).

⁶ See e.g. Muir Watt, *Rev.int.dr.comp.* 2000, pp. 503-527

⁷ See e.g. Zwarenstein, 10 *American Business L.J.* 20 (1972-1973).

⁸ See e.g. Arminjon, Nolde & Wolff, *Traité*, vol. 1, pp. 18-20; David, *Traité*, pp. 113-140; Kamba, 23 *I.C.L.Q.* 495-498 (1974); Marsh, *Rebels* 1977, pp. 649-668; Schmitthoff, 7 *Cambridge L.J.* 103-107 (1941); Siesby, *TJR* 1967, pp. 493-495; Zajtay, 7 *The Comparative and International L.J. of Southern Africa* 324-325 (1974); *NU* 17/70, p. 9.

⁹ About the situation in Sweden, see Lögdberg, *Mélanges Malmström*, pp. 163-167; Strömholm, *SvJT* 1971, pp. 251-263.

foreign experiences by means of evaluating and attempting to learn from them. The review of foreign law is, besides, usually limited to a few of the most important legal systems, such as English, American, French and German law, even though other, smaller but equally accessible, legal systems, such as Australian or Austrian law, may be more interesting due to original modern solutions found there.

Foreign experience should, naturally, not be studied uncritically. Legal rules and institutions, which function well under certain conditions specific for one country, can be entirely inappropriate or perhaps even harmful if “transplanted” into another country with other traditions, another type of society, etc.¹⁰ Especially great care should be taken when taking over in bulk a significant part of a foreign legal system (reception of law).¹¹ It is a fact, however, that large-scale legal transplants are commonplace and have been used for centuries, often with considerable success, for various reasons: they may save time and costs that would otherwise have to be spent on elaborating “own” rules, may give prestige and legitimacy to the new order or simply be dictated by political or economic necessity.¹²

In recent years many developing countries and the former socialist countries have been receiving extensive expert assistance in the field of law from the developed industrialized countries in the West, regarding first but foremost the law which is needed for the market economy and the development of political democracy. This assistance, provided by Western legal experts, is not without problems and gives rise to many interesting questions of comparative law,¹³ including the issue of competition between various foreign models.¹⁴

¹⁰ See Chapter 6 below and e.g. Arvind, 59 *I.C.L.Q.* 65-88 (2010); de Cruz, *Comparative Law*, pp. 510-513; Henrÿ, *ZfRV* 1997, pp. 45-55; Fedtke in Smits, ed., *Elgar Encyclopedia*, pp. 434-437; Graziadei in Reimann & Zimmermann, eds, *The Oxford Handbook*, pp. 441-475; Kahn-Freund, 37 *M.L.R.* 1-27 (1974); Legrand, *Maastricht Journal of European and Comparative Law* 1997, pp. 111-124; Markesinis, *RabelsZ* 1993, p. 445; Shen, *Rev.int.dr.comp.* 1999, pp. 853-857; Nelken in Legrand & Munday, eds, *Comparative Legal Studies*, pp. 437-466; Smits in Reimann & Zimmermann, eds, *The Oxford Handbook*, pp. 513-538; Watson, 92 *L.Q.R.* 79-84 (1976); Örüü, 51 *I.C.L.Q.* 205-223 (2002); Xanthaki, 57 *I.C.L.Q.* 659-673 (2008).

¹¹ See e.g. Doucet & Vanderlinden, eds, *La réception*; Eörsi, *Comparative Civil Law*, pp. 562-569.

¹² See e.g. Miller, 51 *A.J.C.L.* 839-885 (2003); Watson, *E.J.C.L.*, vol. 4.4 (December 2000).

¹³ See e.g. Ajani, *Rev.int.dr.comp.* 1994, pp. 1087-1105 and in 43 *A.J.C.L.* 93-117 (1995); Bogdan, *SvJT* 1991, pp. 784-792, in *Essays Štěpán*, pp. 7-15 and in *Festschrift Lando*, pp. 69-81; Burg, 25 *A.J.C.L.* 492-530 (1977); Chanturia, *RabelsZ* 2008, pp. 114-135; de Cruz in Harding & Örüü, eds, *Comparative Law*, pp. 102-119; Fuchs, *ZvglRW* 1981, pp. 355-372; Merryman, 25 *A.J.C.L.* 457-491 (1977) and in 48 *A.J.C.L.* 713-727 (2000); Nelken in Harding & Örüü, eds, *Comparative Law*, pp. 19-34; Smits in Harding & Örüü, eds, *Comparative Law*, pp. 137-154; Teubner, 61 *M.L.R.* 11-32 (1998); Waelde & Gunderson, 43 *I.C.L.Q.* 347-378 (1994); a number of papers in Sevastik, ed., *Legal Assistance*.

¹⁴ See e.g. Chanturia, *RabelsZ* 2008, pp. 116-120; Ogus, 48 *I.C.L.Q.* 405-418 (1999).

2.4 Harmonization and Unification of Laws

Comparative law is of central importance in connection with the harmonization of law, i.e. with intentionally making the legal rules of two or more legal systems more alike, as well as with the unification of law, i.e. the intentional introduction of identical legal rules into two or more legal systems.¹⁵ Such harmonization or unification is desirable primarily where it facilitates trade and other contacts between the countries involved. Harmonization or unification of law should not be done for its own sake, without bringing about any significant practical advantages. Law is one of the aspects of the culture of a given society, like music or food. Just as we want to preserve and do not want to harmonize or unify the culinary traditions or the musical tastes of the peoples of the world, we should not merely tolerate but also support the preservation of their national legal heritage to the extent this does not undermine the efforts to achieve aims that democratically have been agreed to carry more weight.¹⁶

The harmonization and unification of law is often a difficult process, where not only the differences between the various opinions but also the lack of understanding of each other's way of legal thinking and legal concepts may frequently constitute the greatest difficulty.¹⁷ Comparative law can therefore be of great value here. Despite all the difficulties arising in connection with harmonization and unification, there have been some important successes, primarily within related countries that cooperate closely with each other, such as the Nordic countries, the Benelux countries and the Member States of the European Union, and within certain fields of law such as international sales law, transportation law, intellectual property law and the law of negotiable instruments. Selected parts of private law of the Member States of the EU, for example provisions on product liability, self-employed commercial agents and consumer protection, consist today of rules that have to a significant degree been unified or harmo-

¹⁵ See e.g. Ancel, *Utilité*, pp. 70-86; Banakas in Harding & Öricü, eds, *Comparative Law*, pp. 179-191; Bartels, *RabelsZ* 1981, pp. 106-123; Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 421-431; David, *Traité*, pp. 141-185; David & Brierley, *Major Legal Systems*, pp. 10-11; Engström & Wesslau, *Anteckningar*, pp. 13-19 and 45-98; Ferid, *ZfRV* 1962, pp. 193-213; Gutteridge, *Comparative Law*, pp. 145-184; Kamba, 23 *J.C.L.Q.* 501-504 (1974); Kropholler, *Internationales Einheitsrecht*, pp. 30-32 and 254-258; Kötz, *De lege* 1995, pp. 21-36; Lando, 25 *A.J.C.L.* 641-657 (1977); Malmström, *Festskrift Sundberg*, pp. 287-288; Matteucci, *Rev.int.dr.comp.* 1973, pp. 865-872; Möller, *NordTIR* 1974-1975, pp. 229-263; Neuhaus & Kropholler, *RabelsZ* 1981, pp. 73-90; Philipps, *Erscheinungsformen*; Rodière, *Introduction*, pp. 82-136; Sandrock, *Sinn und Methode*, p. 28; Schmitthoff, 7 *Cambridge L.J.* 108-110 (1941); Schnitzer, *Vergleichende Rechtslehre*, vol. 1, pp. 74-97; Schwarz-Liebermann von Wahlendorf, *Droit*, pp. 225-250; Siesby, *TJR* 1967, p. 494; Tokarczyk, *Wprowadzenie*, pp. 137-138 and 142-167; Vallindas, *Festgabe Gutzwiller*, pp. 189-199; Vicente, *Direito*, pp. 567-601; Winterton, 23 *A.J.C.L.* 103-104 (1975); Zweigert, *RabelsZ* 1951, pp. 387-397; Zweigert & Kötz, *Einführung*, vol. 1, pp. 23-27; *NU* 17/70, p. 9. See further a number of papers in *RabelsZ* 1986, pp. 1-250.

¹⁶ About law as a cultural phenomenon, see e.g. Jayme, *RabelsZ* 2003, pp. 211-230.

¹⁷ These difficulties have, in a humorous manner, been described by Eörsi, 25 *A.J.C.L.* 658-662 (1977).

nized by means of EU directives; in the pipeline there are several other projects in this ongoing process of “Europeanization” of law,¹⁸ including a proposal for a common European sales law¹⁹.

While some harmonization or unification efforts have merely regional ambitions, other aspire to produce world-wide effects. A relatively significant unification achievement is the United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980.²⁰ There is also a specialized international organization called Unidroit (International Institute for the Unification of Private Law) with its seat in Rome.²¹

Of course, it is much easier to harmonize or unify rules dealing with a particular issue or detail of substantive law than to achieve convergence of different legal cultures as a whole, characterized e.g. by their different fundamental approaches to law as such. This has made one scholar to pronounce emphatically that in spite of the ongoing European integration process European legal systems have so different “mentalities” that they “have not been converging, are not converging and will not be converging”.²² Whether this statement is right or wrong depends on what is meant by “converging” and “legal systems”. For legal theoreticians who are interested merely in phenomena of legal culture, the impact of European integration may indeed seem to be limited. A judge or legal practitioner dealing with commercial matters may be of a different view and the same is true about a businessman doing business or a legally untrained European citizen visiting, shopping or working in another Member State, who notes there that in more and more areas his legal rights and obligations as a businessman, consumer or employee are identical or similar to those in his home country.

Unfortunately it happens that the adopted uniform or harmonized rules are not interpreted in the same manner by the courts in the various countries, so that the whole effort fails to produce the desired effect. The European Union has avoided or rather limited this risk by entrusting the final interpretation of EU law to a single institution, the Court of Justice of the EU in Luxemburg. The above-mentioned CISG Convention is, on the other hand, satisfied with providing in Article 7 that when interpreting its provisions, regard shall be had to the Convention’s international character and “the need to promote uniformity in its application”. Such a need exists, of course, even when it is not explicitly stated in the text of a treaty. For example, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by almost all countries, has given rise to an extensive body of judicial decisions

¹⁸ See e.g. Niglia, *Maastricht Journal of European and Comparative Law* 2010, pp. 116-136.

¹⁹ COM(2011)635 final. The enactment of a complete “European Civil Code” is, on the other hand, hardly realistic, but it has some supporters, see e.g. Schmid, *Maastricht Journal of European and Comparative Law* 2001, pp. 277-298.

²⁰ See Kreuzer, *Festschrift 600 Jahre Würzburger Juristenfakultät*, pp. 247-295.

²¹ See <www.unidroit.org>.

²² See Legrand, 45 *I.C.L.Q.* 61-62 (1996).

from many national courts concerning its interpretation. Considering that the national rules, which are based on this Convention, to the greatest possible extent should be interpreted and applied in the same way in all countries, it can be of value for national courts to know how the Convention is interpreted in other countries and by means of a comparison arrive at the currently prevailing interpretation.²³

2.5 Working *de lege lata*

Comparative law can be of value even when courts and other authorities interpret and apply the legal rules of their own legal system.²⁴ This is of course especially true when one interprets and applies rules, which are the result of international unification or harmonization or rules transplanted from another legal system. In the countries that have more or less literally taken over legal rules from the law of other states (as for instance the Swiss Civil Code was adopted by Turkey²⁵), the comparison between how the imported legal rules are applied by the courts of the receiving country and the courts in their country of origin may be of great practical significance.²⁶

Courts in certain countries seem to make use of the comparative method even when they interpret and apply legal rules which are entirely autonomous and lack any direct international background or connection.²⁷ It may also be appropriate that when filling in a gap in the domestic legal system, the courts seek the assistance of comparative law. It is certainly not unusual that courts in such cases examine the solutions used in foreign countries and evaluate the foreign experiences, even if this is not always apparent in the judicial reasoning of the judgments.²⁸ Such filling-in of gaps may be considered to be on the borderline between exploits *de lege lata* and *de lege ferenda*.

2.6 Public International Law and EU Law

Article 38 of the Statute of the International Court of Justice (ICJ) in The Hague lists the sources of law that this Court may use. Among the

²³ Cf. Bernhardt, *ZaöRV* 1964, p. 448; Kropholler, *Internationales Einheitsrecht*, pp. 278-285; Sundberg, 10 *Sc.St.L.* 221-238 (1966).

²⁴ See Zweigert, *RebelsZ* 1949-1950, pp. 5-21.

²⁵ This reception is discussed and evaluated by Hirsch, *ZvglRW* 1968, pp. 182-223.

²⁶ Cf. Kamba, 23 *I.C.L.Q.* 499 (1974).

²⁷ See Aubin, *RebelsZ* 1970, pp. 458-480; Glenn, *Rev.int.dr.comp.* 1999, pp. 844-848; Koopmans, 45 *I.C.L.Q.* 545-556 (1996); Lando, *Kort indføring*, pp. 196-199; Lögdberg, *Mélanges Malmström*, pp. 161-163; Marquesinis, 61 *Cambridge L.J.* 386-404 (2002); Schulze, *ZfRV* 1997, pp. 192-195.

²⁸ See e.g. Kamba, 23 *I.C.L.Q.* 499 (1974); Sandrock, *Sinn und Methode*, pp. 75-78; Zajtay, 7 *The Comparative and International L.J. of Southern Africa* 325-326 (1974).

sources are “general principles of law recognized by civilized nations”. What is primarily meant by this are the legal principles in the domestic, national law of the nations of the world and the only scientifically acceptable manner to determine such legal principles is to compare existing legal systems.²⁹ Until now judges and legal scholars have however, for the most part, merely guessed at what should be regarded as a universally accepted general legal principle, not infrequently be pinning this label on such rules which for them appeared to be necessary and natural. There has never been a large-scale comparative investigation of which legal principles are truly universally accepted.

In certain cases, the contribution of comparative law may be necessary to determine a point of customary public international law, consisting of legal rules which have arisen in the practice of the states. For instance, customary public international law obligates states to treat foreign citizens in accordance with “the international minimum standard”, which can be determined only with the assistance of comparative investigations of existing legal systems.³⁰ The same applies to the customary rule of public international law according to which states are obligated to pay “appropriate compensation” for expropriation of foreign-owned property.³¹

Comparative law can be of significant value for public international law in many other connections. It is sufficient here to mention that in the drafting and interpretation of agreements (conventions, treaties) between states, difficulties with terminology and concepts often arise because the negotiators have their roots in various legal systems and bring their legal terms and concepts to the negotiating table. Comparative studies of the legal systems of the countries involved make it possible, when drafting the agreement, to be aware of the risk of different interpretations and misunderstandings. Furthermore, such studies help one, at the subsequent interpretation of the agreement, to arrive at the result that as far as possible is in accord with the intentions and expectations of the parties at the time the agreement was entered into.³²

Comparative law plays an important role for “European Law” consisting of both the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (as amended) and the law of the EU. For example,

²⁹ See e.g. Banakas, *Revue hellénique de droit international* 1982-1983, pp. 121-129; Bogdan, *NordTIR* 1977, pp. 49-51; Bothe, *ZaöRV* 1976, pp. 281-299; Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 396-399; de Cruz, *Comparative Law*, pp. 25-26; David, *Traité*, pp. 100-104; Eustathiades, *Festschrift Zepos*, vol. 2, pp. 139-143; Gutteridge, 21 *B.Y.I.L.* 1-10 (1944) and in *Comparative Law*, pp. 61-71; Hailbronner, *ZaöRV* 1976, pp. 190-215; Kamba, 23 *I.C.L.Q.* 504 (1974); Kiss, *Rev.int.dr.comp.* 1972, pp. 6-10; Lando, *Kort indføring*, pp. 212-213; Rabel, *RabelsZ* 1927, pp. 17-20; Ress, *ZaöRV* 1976, pp. 253-279; Sandrock, *Sinn und Methode*, pp. 26-28; Serick, *Festschrift Heidelberg*, pp. 228-229; Zemanek, *ZaöRV* 1964, pp. 457-458; Zweigert & Kötz, *Introduction*, pp. 7-8.

³⁰ See e.g. Eustathiades, *Festschrift Zepos*, vol. 2, pp. 133-139; Serick, *Festschrift Heidelberg*, pp. 229-230.

³¹ See e.g. Bring, *Det folkrättsliga investeringskyddet*, Stockholm 1979.

³² See e.g. Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 380-396; Eustathiades, *Festschrift Zepos*, vol. 2, pp. 143-147; Hailbronner, *ZaöRV* 1976, pp. 222-225; Rabel, *RabelsZ* 1927, pp. 10-17.

Article 7(2) of the European Human Rights Convention speaks of an act or omission that was criminal "according to the general principles of law recognised by civilised nations" and a number of other articles, for instance Article 9(2), permit certain limitations of human rights provided the limitation fulfils certain specific conditions, among them the condition of being "necessary in a democratic society". Whether a certain restriction is necessary in a democratic society can only be established by checking and comparing the laws of countries that are considered to be democratic. Concerning EU law, reference can be made to Article 340 of the Treaty on the Functioning of the European Union, stipulating that in the case of non-contractual liability, the Union shall make good any damage caused by its institutions or by its servants in the performance of their duties "in accordance with the general principles common to the laws of the Member States".³³ Comparisons between the legal systems of the Member States play an important role also in the everyday work of the institutions of the EU, such as the development of secondary legislation (Regulations and Directives) and in the decisions of the Court of Justice of the EU.³⁴ When interpreting EU instruments, this Court tends to give their words an autonomous meaning, independent of national legal terminology and based on the objectives of the instrument in question as well as on "the general principles which stem from the corpus of the national legal systems".³⁵

2.7 Private International Law and International Penal Law

Private international law rules (rules on conflict of laws) result at times in the application of foreign law by courts and other authorities. Such application presupposes, of course, that the court or authority possesses or will obtain information on the contents of the applicable foreign legal system. To acquire this information and to apply foreign law does not in itself amount to comparative work, but the application of foreign law requires, all the same, in an indirect way certain comparisons between the foreign law and the *lex fori* (the law of the country of the forum, i.e. of the adjudicating court), even though these comparisons are not always discussed explicitly in the judgment or decision.³⁶

³³ See e.g. Germer, *Juristen* 1967, pp. 449-463; Lando, *Kort indføring*, p. 214.

³⁴ See Bogdan, *Festschrift Lassen*, pp. 207-208; Grossfeld & Bilda, *ZfRV* 1992, pp. 421-433; Kakouris, *Revue hellénique de droit international* 1994, pp. 331-345; Koopmans, 45 *I.C.L.Q.* 546-548 (1996); Lando, *Kort indføring*, pp. 213-214; Lenaerts, 52 *I.C.L.Q.* 873-906 (2003); Pescatore, *Rev.int.dr.comp.* 1980, pp. 337-359; Schulze, *ZfRV* 1997, pp. 188-192; Schwarz-Liebermann von Wahlendorf, *Droit*, pp. 87-89.

³⁵ See e.g. *LTU v. Eurocontrol*, case 29/76, [1976] ECR 1541.

³⁶ See e.g. Arminjon, Nolde & Wolf, *Traité*, vol. 1, pp. 20-22; Battifol, *Livre du Centenaire*, vol. 1, pp. 131-142 and in *Rev.int.dr.comp.* 1970, pp. 661-674; Bendermacher-Geroussis, *Revue hellénique de droit international* 1979, pp. 54-61; Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 407-411; David, *Traité*, pp. 107-111; Fauvarque-Cosson, *Rev.int.dr.comp.* 2000, pp. 797-818 and in 49 *A.J.C.L.* 407-427 (2001); van

In this context one can mention the notorious characterization problem. Suppose that a court has to decide whether a will made by a foreign citizen is invalid due to the alleged lack of capacity of the testator and that the conflict rules of the forum designate the law of the testator's country as applicable. It thus becomes necessary to turn to the applicable foreign legal system in order to find the substantive rules on the capacity to make a will. One cannot blindly rely upon the terminology and concepts in the foreign law in question; it may for instance occur that a foreign requirement concerning the validity of a will relates, in view of the country of the court, to the capacity of the testator whereas in the foreign country in question it is regarded as pertaining to the form of the will.

Similar questions may arise in connection with the recognition and enforcement of foreign judgments and decisions. For example, the forum country may have enacted a provision on the recognition of foreign adoptions. For a foreign decision to be recognized in accordance with this provision, it is naturally required that the decision is a decision on adoption and not on something else. One must therefore investigate whether the decision concerns such legal phenomenon in the foreign legal system that corresponds to adoption existing in the law of the forum country. To fulfil this requirement, the foreign legal institution does not have to be termed "adoption" and its contents can be different on various points from the legal effects of adoption in the *lex fori*, but if the differences exceed a certain degree, one can no longer speak about adoption and the provision on the recognition of foreign adoptions ceases to be applicable, for example if the foreign decision makes an orphan into an "adopted" child of a whole village.

The application of foreign law and the recognition and enforcement of foreign judgments and decisions requires, consequently, conscious or instinctive comparisons between foreign and domestic legal rules and institutions. Such a comparison must also be made in another respect. Normally, foreign legal rules cannot be applied and foreign judgments and decisions cannot be recognized or enforced if it would be manifestly incompatible with the fundamental legal principles in the forum country, i.e. if it would be against the forum's public policy (*ordre public*). This can hardly be determined without comparing the foreign law with the principles of the *lex fori*.

Certain comparisons between foreign and domestic law may be necessary also within the framework of international penal law. Even though the courts in most countries can only apply their own penal law, a person normally cannot be punished for acts committed abroad if the act is not punishable according to the

Ginsbergen, *ZfRV* 1970, pp. 1-9; Grossfeld, *The strength*, pp. 19-23; Kamba, 23 *I.C.L.Q.* 500-501 (1974); Kropholler, *ZuglRW* 1978, pp. 1-20; Lando, *Kort indføring*, pp. 214-215; Loussouarn, *Revue critique de droit international privé* 1979, pp. 307-339; Makarov in Rotondi, ed., *Inchieste*, pp. 467-480; von Mehren, 23 *A.J.C.L.* 751-758 (1975) and in *Rev.int.dr.comp.* 1977, pp. 493-500; Sandrock, *Sinn und Methode*, pp. 23-26; Schnitzer, *Vergleichende Rechtslehre*, vol. 1, pp. 32-35; Schwarz-Liebermann von Wahlendorf, *Droit*, pp. 90-93; Vicente, *Direito*, pp. 25-27; Zweigert & Kötz, *Introduction*, pp. 6-7.

law in the place where it was committed, and the punishment imposed normally must not be more severe than the most severe penalty which is provided for in the place of commission. Furthermore, extradition to a foreign state may usually only take place if the act for which the extradition is sought corresponds to a crime of a certain gravity according to the law of the requested country. What is meant by a more severe punishment or a corresponding crime cannot, of course, be ascertained without a comparison between the domestic law and the law of the foreign country in each individual case.

2.8 Use for Pedagogical Purposes

It has previously been mentioned that comparative legal studies contribute to the jurist's general education and to an increased understanding of his own legal system. This illustrates the pedagogical value of comparative law and recommends the introduction of comparative elements into the curriculum of the law schools.³⁷ For obvious reasons, however, comparative law is of even greater value for those who intend to study or work with foreign law.

For a jurist who, for one reason or another, needs to become acquainted with certain rules in foreign law, it is of great value if there is no need to start the study from the beginning. It is often possible to start out with making use of the knowledge of one's own legal system and concentrate on the differences.³⁸ This presupposes, however, that someone has previously investigated both legal systems and ascertained their similarities and differences by means of comparative studies.

Of great pedagogical value in this connection is that numerous comparatists have reviewed and compared the most important legal systems and grouped them into "families of law" (see Chapter 7 below). Legal systems that are related to each other show great fundamental similarities and it is therefore often possible to save much effort by means of using knowledge of one legal system when studying other legal systems belonging to the same family. If one has for instance become acquainted with English law, and the need arises for knowledge of New Zealand law, one can avoid having to study New Zealand law from the scratch. As the New Zealand legal system is based upon English law, it is often sufficient to concentrate on the relatively few significant differences between the two legal systems.

³⁷ See e.g. Bogdan, 55 *Journal of Legal Education* 484-487 (2005); Blanc-Jouvan, *Rev.int.dr.comp.* 1996, pp. 347-367; Bullier, *Rev.dr.int.dr.comp.* 2008, pp. 163-172; Fauvarque-Cosson, *Rev.int.dr.comp.* 2002, pp. 293-309; Grosswald Curran, 46 *A.J.C.L.* 659-663 (1998); Gutteridge, *Comparative Law*, pp. 127-144; Kamba, 23 *I.C.L.Q.* 490-494 (1974); Lando, *Kort indføring*, pp. 220-225; Tokarczyk, *Wprowadzenie*, pp. 129-132; Winterton, 23 *A.J.C.L.* 69-118 (1975).

³⁸ See e.g. Zweigert & Kötz, *Act.Jur.Hung.* 1973, p. III.

2.9 Other Areas of Use

It is not possible to discuss in an exhaustive manner all the fields in which comparative legal work can be of value. In addition to the areas discussed previously, one may mention its use within legal history research, where one can by means of comparisons between different present-day legal systems attempt to trace the development of certain legal institutions (the so-called “legal archeology”).³⁹ There are comparatists who believe that the primary task of comparative law is to study and work with the historical ties between legal systems.⁴⁰ Additionally, most questions and problems that arise in connection with comparisons between currently existing legal systems can even arise in connection with time-related comparisons within one single legal system, for instance a comparison between English law in the fifteenth century and today. Some authors think that comparative law should also include this type of comparison.⁴¹

Comparative law is a rich and necessary source of knowledge needed in connection with translations of legal texts and the production of bi-lingual or multi-lingual law dictionaries.⁴²

Finally it can be mentioned that comparative legal studies should be of great value for sociologists of law, as these studies show how different alternative legal solutions interact with the society. In this manner, comparative law can to a certain extent replace sociological experiments, which for obvious reasons are almost impossible to carry out in the field of law. On the other hand, sociologists of law can in many connections help the comparatists, for instance concerning the question of how the formally valid legal rules function in reality in their respective countries (cf. sections 3.6 and 3.7 below), the question of whether certain legal rules are comparable at all (cf. section 4.2 below), the explanation of similarities and differences between the compared legal systems (cf. Chapter 5 below), and the comparative evaluation of the different national legal solutions (cf. Chapter 6 below).⁴³

³⁹ See e.g. Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 350-354; Genzmer in Rotondi, ed., *Inchieste*, pp. 235-254; Gilissen in Rotondi, ed., *Inchieste*, pp. 257-297; Gordley in Reimann & Zimmermann, eds., *The Oxford Handbook*, pp. 753-Lando, *Kort indføring*, pp. 219-220; Schmitthoff, 7 *Cambridge L.J.* 101-102 (1941).

⁴⁰ See e.g. Watson, [1978] *Cambridge L.J.* 321.

⁴¹ See e.g. Del Vecchio, *Rev.int.dr.comp.* 1960, p. 493; Schnitzer, *ZfRV* 1973, pp. 187-188. See also a number of papers on the relationship between legal history and comparative law in *ZEuP* 1999, pp. 494-582.

⁴² See e.g. Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 357-366; de Groot in Smits, ed., *Elgar Encyclopedia*, pp. 423-433; Gutteridge, *Comparative Law*, pp. 124-126; Reynolds, 34 *A.J.C.L.* 551-558 (1986).

⁴³ About the relationship between comparative law and the sociology of law and about how they can assist each other, see e.g. Constantinesco, *Rechtsvergleichung*, vol. 2, pp. 261-276; Cotterrell in Legrand & Munday, eds., *Comparative Legal Studies*, pp. 131-153; David & Brierley, *Major Legal Systems*, pp. 13-14; Drobnič, *RabelsZ* 1953, pp. 295-309 and 1971, pp. 496-504; Feldbrugge in Rotondi, ed., *Inchieste*, pp. 213-224; Gessner, *RabelsZ* 1972, pp. 229-260; Heldrich, *RabelsZ* 1970, pp. 427-442; Lando, *Kort*

indføring, pp. 216-218; Lukic in Rotondi, ed., *Inchieste*, pp. 455-463; Recaséns-Siches in Rotondi, ed., *Inchieste*, pp. 525-544; Rheinstejn, *Einführung*, pp. 143-186; Rotter, *Osteuropa-Recht* 1970, pp. 81-97; Sacco, 39 *A.J.C.L.* 388-389 (1991); Schwarz-Liebermann von Wahlendorf, *Droit*, pp. 44-62; Tokarczyk, *Wprowadzenie*, pp. 107-109; Vicente, *Direito*, pp. 37-41; Ziegert, *RebelsZ* 1981, pp. 51-72; Zweigert, *RebelsZ* 1974, pp. 299-316 and in *Recueil Ancel*, vol. 1, pp. 81-93; Zweigert & Kötz, *Introduction*, pp. 10-12. Some of these and several additional papers have been published by Drobniç & Rehbinder, eds, *Rechtssoziologie und Rechtsvergleichung*.