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Methods of Comparative Law

Lecture at Irkutsk State University
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Basic questions

- What is comparative law?
- For which purposes can comparative law be used?
- Which capabilities are needed for doing work in comparative law?
- How can such capabilities be acquired?
- Which organizations (institutions) are particularly important for comparative law?
- How do I get information on comparative law?
- Which are the methods of comparative law?

What is comparative law?

- Branch of legal science dedicated to the comparison of national and assimilated legal orders
- Background: differences between legal order (e.g. legal families)
- Comparison relates basically to the same time period. But see also comparison of law in different periods of time (legal history)
- Object: **law** of all legal disciplines (e.g. civil law)

What do we compare when we compare „law“?

- Comparison of legal norms (including soft law) – comparison of legal practice
- Macrocomparison - microcomparison: „Legal families (Rechtskreise)“

For which purposes can comparative law be used?

- **Practical function:** *consultancy, courts and arbitral tribunals, legislators, international organizations*
- **Scientific function**

Example for a comparative law task

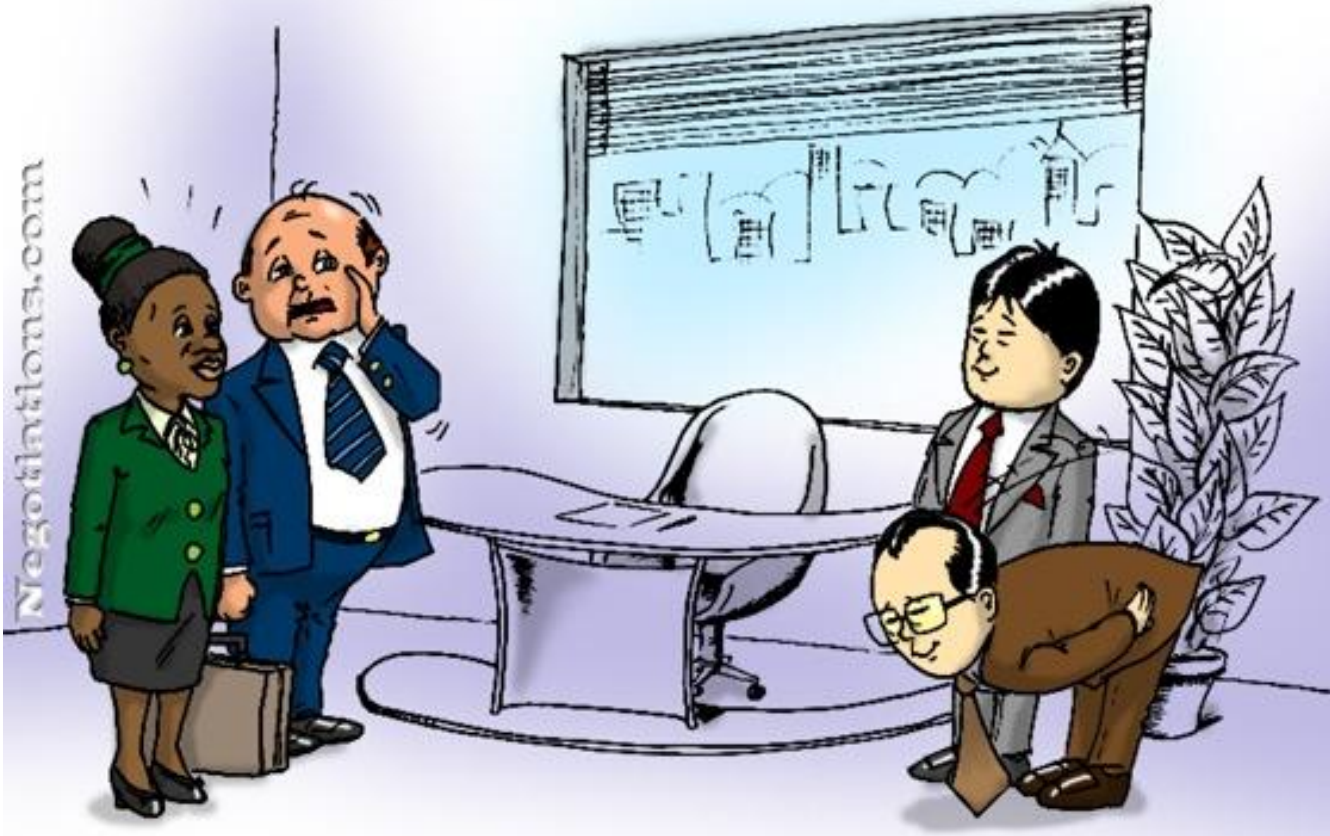
You work in a German enterprise, which intends to set-up an establishment in Russia. The enterprise would like to use its German-based general contract terms also in its relations to Russian customers and asks whether this is possible. You have to check the German terms on the basis of Russian law, in particular art.428 of the Russian Civil Code.

Problems and possible abuse of comparative law

- Weaknesses of the use of comparative method?
- Guiding interests? E.g. expected outcomes may be „given“. Interests may be hidden. Underlying values may not be clear or even be kept unclear.

Which capabilities are needed for doing work in comparative law?

- Good language skills, at least in English (apart from one's own mother language)
- Experience + time, e.g. study abroad
- Understanding for social and cultural background of different legal orders
- Readiness to take account of other fields of science, in particular social sciences



"Lets win the respect stakes by bowing lower."

How can such capabilities be acquired?

- University teaching (classes, seminars, moot courts, bachelor or master theses, ...). Study abroad
- Internships, e.g. in international organizations
- Writing publications, e.g. contribution to blogs
- Discussions with friends ...
- ...

Which organizations are particularly important for comparative law?

- Universities
- Research institutes, e.g. Max-Planck-Institutes for comparative law in Germany, Swiss Institute of Comparative Law, ...
- International organizations, e.g. UNCITRAL, Unidroit, Council of Europe, European Union, ...
- Associations of comparative law, e.g. International Academy of Comparative Law



Max-Planck-Institut für
ausländisches und internationales
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How do I get information on comparative law?

- Basic necessity: getting reliable information on foreign law (Internet and databases, lawbooks, jurisprudence, legal literature). **Cautious with translations**
- Specific information sources on comparative issues
- Journals: *Rabels Zeitschrift*, *American Journal of Comparative Law*. Also international law journals or some journals on specific areas of the law
- Books: introductions, handbooks, specific topics
- Internet, e.g. blogs
- Conferences, direct enquiry



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Legislative Text:	<input type="text"/>	
Article :	<input type="text"/>	
Court \ Arbitral Tribunal:	<input type="text"/>	
Court Reference:	<input type="text"/>	Decision Date: from: <input type="text"/> 
		to: <input type="text"/> 
Parties:	<input type="text"/>	
Country:	<input type="text"/>	
Case Number:	<input type="text"/>	CLOUT Number: <input type="text"/>

Example for comparative research

Please compare **sec.823** of the **German BGB** with **art.1240** [*since 2016*; former **1382**] of the **French Civil Code**.

BGB (Germany) Title 27 Torts - Section 823 BGB Liability in damages

(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

Code Civil (France) - BOOK III: OF THE VARIOUS WAYS HOW OWNERSHIP IS ACQUIRED (arts.711 to 2278)

TITLE II: ON SOURCES OF OBLIGATIONS (arts.1100 – 1303-4) SUBTITLE II: EXTRACONTRACTUAL LIABILITY (arts.1240 to 1252)

Article 1240

Every act whatever of man that causes damage to another, obliges him by whose fault it occurred to repair it.

Method(s) of comparative law

- **Basic approach: „functional“ analysis** (*not only wording*)
- Preconditions:
- Knowledge of one's own law. Caution with use of seemingly well-known „own“ legal terms or legal structures.
- Cognizance of the foreign law. If possible work in original languages. Make use of legislative materials, Internet. *Use neighbouring disciplines.*
- **Specific aspects:** steps of comparison

Steps of comparison

- 1) Formulate/interpret the research question
- 2) Find the applicable legal norms or jurisprudence. *Quote exactly!*
- 3) **Common elements**
- 4) **Differences**
- 5) Which are the **underlying** (possibly diverging) **values**?
- 6) Make your **own evaluation**
- 7) **Consequences**, e.g. proposal de lege ferenda

Some aspects relating to research question

- The research question should be formulated as exactly possible. It determines the content of the research (no under-research, no over-research; but limitation may be acceptable and even necessary)
- Which legal systems should be compared?
- Which specific aspects should be compared?
- Terms may have to be interpreted, e.g. term „German law“ usually includes international treaties and EU law (if not: German „autonomous“ law). European law may include EU law, Council of Europe law or even national legal orders in Europe.
- Is the research question limited to legal norms or does it also include jurisprudence?

Citation technique

- 1. Principle:** quote everything which you have not imagined yourself. Even in „introduction“.
- 2. Sources of your own country:** quote as usual. When publishing in foreign language, follow quotation style of target country.
- 3. Foreign sources:** in principle according to the standards of the source country,
 - **Laws/treaties etc.** in original title with date of adoption and entering into force, last amendment, official bulletin, auxiliary: Internet (last consulted on ...).
 - **Example literature:** *Collins, L., Some Aspects of Service out of the Jurisdiction, (1972) 21 ICLQ 656 (658 f.)*
 - **Example jurisprudence:** Cass Civ, 4.3.1980, Bull Civ I Nr. 72

List of citations and abbreviations

- Distinguish between legal literature, sources of law and jurisprudence. Numbering not necessary. Sources of law and jurisprudence are in some countries not mentioned in the list of citations, but only in the main text
- Literature should be quoted as exactly as usual and necessary. It may be usual or required to include Internet sources in the list of citations or only in the main text (ask!). Sub-structure of literature list may differ, e.g. source in different languages or on different countries.
- Abbreviations: all uncommon abbreviations and abbreviations for terms under foreign law are necessary. General language abbreviations need not be included in the list of abbreviations.

Example for comparative research (cont'd)

Please compare **sec.823** of the **German BGB** with **art.1240** [*since 2016*; former **1382**] of the **French Civil Code**.

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Comparative tort(s) law

- What is a tort? (notion)
- Where are torts regulated? (sources, system)
- What are the prerequisites of tortious liability?
- Which are the legal consequences of a tort?

Comparison of legal provisions

§ 823 BGB

- **Parallels**

codification; system issue 1, relevance of fault

- **Differences**

System issue 2; limited abstract-ness, two (three) general clauses

- **Underlying values?**

- Differentiated approach, legal security, balancing interests

- **Proposals?**

- Partial improvements, radical change, DCFR?

Art. 1240 C.civ. (France)

- **Parallels**

- Codification, system 1, relevance of fault

- **Differences**

- System 2; abstract, „simple“, one general clause

- **Underlying values?**

- Clear and simple, democratic, flexible

- **Proposals?**

- Partial improvements, radical change, DCFR?

Comparative analysis of case law

- Finding the case or cases
- Understanding the case
- Interpreting the case from a comparative perspective

Comparison of 2 cases on tort law

1) France: Cass. Civ. 8.5.1970, Bull.Civ. II Nr.122, Allamigeon Frères c Lafarge

Construction firm Lafarge damages during works a gas pipe, which interrupts the production Allamigeon Frères.

□ C.cass awards damages, as damages are „conséquence directe“ of the detrimental act.

2) England: Spartan Steel and Alloy Ltd v Martin and Co. (Contractors) Ltd. [1973] Q.B. 27 (C.A.).

Elements of comparison of these cases?

Cour de Cassation, Chambre civile 2, du 8 mai 1970, 69-11.446, Publié au bulletin des arrêts de la Cour de Cassation Chambre civile 2 N. 160 P. 122

SUR LE MOYEN UNIQUE : ATTENDU QUE, SELON L'ARRET INFIRMATIF ATTAQUE, UNE CANALISATION DE LA COMPAGNIE FRANCAISE DU METHANE, ALIMENTANT L'USINE DE LA **SOCIETE ALLAMIGEON DE GAZON FRERES ET LACROIX**, FUT ROMPUE PAR UN BULL-DOZER, AU COURS DE TRAVAUX EFFECTUES **PAR LAFARGE, ENTREPRENEUR**;

QU'IL EN RESULTA UN **PREJUDICE** POUR CETTE SOCIETE, CONTRAINTE **D'INTERROMPRE SON ACTIVITE**;

QU'ELLE A ASSIGNE LAFARGE EN REPARATION DE SES DOMMAGES;

ATTENDU QU'IL EST FAIT GRIEF A LA COUR D'APPEL, QUI A DECLARE LAFARGE RESPONSABLE, DE N'AVOIR PAS TIRE LES CONSEQUENCES JURIDIQUES DE SES CONSTATATIONS, DESQUELLES RESULTAIT UN **PREJUDICE INDIRECT** NE POUVANT DONNER LIEU A REPARATION;

MAIS ATTENDU QU'APRES AVOIR RELEVE QUE LES FAITS NE FAISAIENT L'OBJET D'AUCUNE CONTESTATION ET QUE L'ACTION TROUVAIT SON FONDEMENT DANS LES DISPOSITIONS DES **ARTICLES 1382 ET 1384 DU CODE CIVIL**, L'ARRET ENONCE QUE LE PREJUDICE SUBI, PAR LA SOCIETE ALLEMIGEON FRERES ET LACROIX, APPARAISSAIT COMME UNE **CONSEQUENCE DIRECTE** DE LA RUPTURE DE LA CANALISATION PUISQUE CE PREJUDICE AVAIT ENTRAINE L'INTERRUPTION DE L'ACTIVITE DE L'USINE, QU'IL S'AGISSAIT BIEN LA D'UN DOMMAGE EN RELATION DIRECTE AVEC LE FAIT DOMMAGEABLE;

ATTENDU QU'EN STATUANT COMME ELLE L'A FAIT LA COUR D'APPEL A, SANS ENCOURIR LES CRITIQUES DU POURVOI, DONNE UNE BASE LEGALE A SA DECISION;

PAR CES MOTIFS : REJETTE LE POURVOI FORME CONTRE L'ARRET RENDU LE 15 JANVIER 1969 PAR LA COUR D'APPEL DE BORDEAUX

Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] QB 27 (from Wikipedia)

Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] QB 27 is a well-known English [Court of Appeal](#) [1973] QB 27 is a well-known English Court of Appeal case concerning the recovery of [pure economic loss](#) [1973] QB 27 is a well-known English Court of Appeal case concerning the recovery of pure economic loss in [negligence](#).

Facts: Spartan Steel and Alloys Ltd had a stainless steel factory in Birmingham, which obtained its electricity by a direct cable from the power station. Martin & Co Ltd were doing work on the ground with an excavator and negligently damaged that cable (Spartan Steel did not own the cable). As a consequence, the factory was deprived of electricity for 15 hours which caused physical damage to the factory's furnaces and metal, loss of profit on the damaged metal and loss of profit on the metal that was not melted during

Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] (cont'd)

The Court of Appeal, consisting of Lord Denning MR, Edmund-Davies LJ and Lawton LJ delivered a majority judgment (Edmund-Davies LJ dissenting), that the Spartan Steel could only recover the damages to their furnaces, the metal they had to discard and the profit lost on the discarded metal. They could not recover the profits lost due to the factory not being operational for 15 hours. Their main reasoning for this was that while the damage to the metal was "physical damage" and the lost profits on the metal was "directly consequential" upon it, the profits lost due to the blackout constituted "pure economic loss".

Although the majority seemed to agree that Martin & Co Ltd owed the Spartan Steel a duty of care Although the majority seemed to agree that Martin & Co Ltd owed the Spartan Steel a duty of care and the damage was not too remote since it was foreseeable, they declined to allow the recovery of pure economic loss for policy

reasons outlined by Lord Denning in his leading judgment.

Case law analysis, e.g. foreign court, several courts, international court

- The problem
- The facts
- The decision: contents, structure, procedure (e.g. preceding decisions), argumentation.
- The issues in context of the relevant legal norms and other jurisprudence: *logical structure!*
- Critique
- Possibly comparison
- Conclusions, e.g. evaluation of the decisions, legislative proposals

Additional remarks on structuring a comparative analysis

- Analysis must answer the research question fully
- Logical and clear structure, e.g. separated according to different legal systems + final comparison or separation of topics + separate comparison + general summary/outlook
- Clear wording
- Clear analysis
- Good balancing
- Do not forget jurisprudence. Explain relevance or selection of jurisprudence. Depth of analysis depends on relevance of the respective case law.

Link between Comparative Law and Unification of Law

Example: The Draft Common Frame of Reference for European Private Law (2008)

Principles, Definitions and Model Rules of European Private Law

Draft Common Frame of Reference (DCFR)

Outline Edition

Prepared by the
Study Group on a European Civil Code
and the
Research Group on EC Private Law (Acquis Group)

Based in part on a revised version of the Principles of
European Contract Law

Edited by
Christian von Bar, Eric Clive and Hans Schulte-Nölke
and
Hugh Beale, Johnny Herre, Jérôme Huet, Matthias Storme,
Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll

DCFR

Book VI: Non-contractual liability arising out of damage caused to another

Chapter 1: Fundamental provisions

VI. – 1:101: Basic rule

(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage.

(2) Where a person has not caused legally relevant damage intentionally or negligently that person is accountable for the causation of legally relevant damage only if Chapter 3 so provides.

Chapter 2: Legally relevant damage

Section 1: General

Section 2: Particular instances of legally relevant damage

VI. – 2:201: Personal injury and consequential loss

(1) Loss caused to a natural person as a result of injury to his or her body or health and the injury as such are legally relevant damage.

Thank you for your attention!

<http://www.eastlaw.uni-kiel.de>