Einführung in die Rechtsvergleichung – Konrad Zweigert und Hein Kötz
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Comparative Civil Procedure and Comparative Legal Thought

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I. A Comparative Textbook for Proceduralists?

The textbook *Zweigert/Kötz* is very well-known as a masterpiece of comparative law. Translations into English (*Tony Weir*) and Italian (*Barbara Pozzo* and *Estella Cigna*) as well as Chinese, Japanese and Russian editions document its worldwide reputation as a highly esteemed scholarly work. Does it really make sense to give a report on this book to an audience of distinguished young academics who are already specialized experts in comparative civil procedure: isn't it like carrying coals to Newcastle? I do not think so, because in my experience there is always some danger that academic research in the field of civil procedure ends in discussions of a more or less technical character and does not often enough take into consideration the close connection between procedural forms of national law and the individual national legal culture as a whole. Therefore, the recommendation to go back to a broad understanding of a legal system's character before analyzing special problems of civil procedure should be always close to the heart of old and young academics. In this sense, the textbook of *Zweigert* and *Kötz* is still an excellent starting point for procedural research on a sufficiently broad basis.

II. Major Characteristic Features of the Recommended Book with Significance for Procedural Research

The recommended book describes the traditional legal families and their cultural foundations, and it contains chapters on courts and the style of their judgments, on the education and professional ethics of judges and lawyers and on other special

features of the individual legal cultures' administrations of justice. In this context civil procedure is no longer perceived as a matter of craftsmanship only but as a cultural phenomenon which is deeply embedded within the political and social development and history of a society as a whole.

The discussion of many topics of civil procedure and its harmonization should take into account aspects of the affected national cultures which cannot be changed by the enactment of revised, or even completely changed, rules of civil procedure. Long-standing contradicting traditions may create insurmountable obstacles. This is, for example, true for the educational traditions of legal professions which influence strongly the distribution of roles and responsibilities between judges and lawyers, the structure of civil procedure or the law of evidence. These traditions influence also the understanding of the role of judges in the promotion of settlements and the practice and scope of judicial mediatory activities thereby determining the varying social significance of out-of-court mediation or court annexed mediation for the individual legal culture. In insolvency law, or especially the law of insolvency of banks or insurances, the structure of reorganization procedures and the distribution of reorganizational responsibilities depends on the existence of a sufficient number of law firms, which have sufficient successful practice in the field of restructuring of enterprises, or on the skill and know-how of bank and insurance authorities which supervise these entities and determine their survival. It would be easy to give many examples which document the strong influence of non-procedural preconditions on the law of civil procedure and insolvency procedures in the strict sense.

After all, successful scholarly research in the field of civil procedure needs a full understanding not only of our own legal culture but also of other legal cultures when we do comparative research. The textbook of *Zweigert* and *Kötz* gives an overview of the administration of justice in other legal cultures and it explains why each developed as they are now during long histories embedded in a wide range of various cultural factors.

III. Understanding Different Legal Thought

The book describes how differently the history of legal professions and their education developed, and it explains a lot about the reasons for these differences which are, in the end, expressions of different understandings of law and its social

function and of differing forms of legal thought. There are societies where the enforcement of law is a measure of last resort, whereas other legal cultures understand law much more as a form of continuous regulation of social life and living together of citizens. This book analyses many details of the variety of different kinds of legal thought and their origins, and it pays full attention to the close interdependence between the development of law and culture on the one hand, and substantive and procedural law on the other.

IV. Analysing the Change of the Understanding of a Lawyer's Role

There is another interesting result of reading this book. The last edition of this book was published in 1996. For today's vigilant readers it documents impressively the deep break between the past and the last two decades in the field of the professional regulation of lawyers and in the understanding of their professional role. Although the necessity to make money and profits has always been a characteristic feature of the liberal professions, all Western cultures had in common that - in serving the administration of justice - lawyers owe loyalty, not only to their clients, but also to the courts and society as a whole. The book describes in detail how in English and Romance legal cultures the differentiation between solicitor and barrister or avoué and avocat developed, among other reasons with the clear intention to put emphasis on lawyers' social responsiblity and independence, especially when acting in courts, and it analyses how the last decades have brought a destruction of this differentiation with the consequence, according to today's experiences, of an increasing interest and profit orientated practice of all kinds of lawyers and a decrease of well-established duties to society as a whole. It is not the intention of this contribution to give a judgement on this development and to discuss details and consequences. The only intention is to recommend this book as a source of real scholarship and a good starting point for procedural legal thought which furthers a deeper understanding of the development and present status of civil procedure and permits a view behind the curtain of pure procedural craftmanship and techniques – a necessary precondition of truly academic scholarly culture.