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Comparing Procedural Systems: Toward an Analytical Framework

David J. Gerber, *Chicago-Kent College of Law*

COMPARING PROCEDURAL SYSTEMS: TOWARD AN ANALYTICAL FRAMEWORK

David J. Gerber*

I. INTRODUCTION

The need to develop intellectual tools for analyzing and comprehending the operations of foreign procedural systems is growing. Not only is litigation involving more than one jurisdiction becoming more common, but it is also increasingly common for individuals, firms and organizations to have contact with foreign litigation as parties or witnesses or because they may be affected by the outcome of such litigation. As yet, however, little attention has been paid to developing such tools.

Professor Arthur von Mehren is one of a small number of U.S. scholars who have made outstanding contributions to the comparative analysis of jurisdiction and procedure, and thus in this *Festschrift* in his honor it seems appropriate to offer some thoughts on how such tools might be developed. I first mentioned some of these ideas in an article published more than a decade ago, and numerous colleagues and students have urged me to develop them further.[1]

The potential value of an analytical framework for comparing procedural systems should be obvious, but for many it is not, largely because commonly held views of procedure tend to obscure it. Procedure is often seen merely as practical knowledge, far removed from theory or conceptual structure. Similarly, it is claimed to be too detailed and specific to lend itself to abstraction-based analysis.

These claims miss the point. They confuse the actual characteristics of the data with the desired characteristics of knowledge about such data. In order to analyze effectively the operations of foreign legal systems, it is necessary to organize knowledge effectively, and it is precisely the density and detail of procedural knowledge that makes structuring tools particularly valuable. Such tools provide a means of penetrating the detail and specificity of foreign procedural systems and comprehending information from and about them.

My objective here then is to sketch a framework for analyzing and comparing procedural systems. I dissect procedure, identifying the elements that are necessary, that is, that must be performed by any civil litigation system. I then comment on those elements, indicate some of the ways in which they are related to each other and speculate about the potential value of the distinctions made and identifications drawn. This essay is exploratory and preliminary. It invites further development, discussion and criticism.

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* Distinguished Professor of Law, Chicago-Kent College of Law, Chicago, IL.

1 *See* David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745 (1986).

This process of development and refinement can only be effective if scholars and practitioners from many systems participate in it, and thus my comments here address a transnational audience.

The scope of the essay is limited. First, I treat only civil procedure: the resolution of private conflicts in public courts, omitting criminal, administrative and other forms of procedure. Second, I deal only with procedure in the narrow sense: the conduct of litigation, excluding issues such as the jurisdictional reach of procedural norms and arrangements. Third, I do not include appellate procedure. Fourth, I refer only to civil litigation in developed, democratic societies. Finally, when referring to U.S. law, I refer only to federal law and do not include state procedural law. Most of my examples are drawn from the U.S. and Germany, although the differences between German and U.S. procedure are frequently representative of differences between the U.S. procedural system and procedural systems of the civil law tradition.[2]

II. ANALYZING AND COMPARING PROCEDURAL SYSTEMS

The framework I sketch is both analytical and systemic. It is analytical in the sense that it takes apart civil litigation, identifying the elements that comprise it. It is systemic, because it images these elements as parts of a functioning whole. It views procedure as a set of interrelated functions designed to foster the public purpose of resolving private disputes. The framework is also abstract, because abstraction is necessary to organize knowledge for the kinds of purposes we are here pursuing.

The unit of analysis is function. The framework identifies the functions that are performed within procedural systems. These are the components of procedure, and thus effective analysis requires that they be accurately and clearly identified. The analysis of function also has a specifically comparative role. "Functional analysis" has long been an influential analytical technique for legal comparison, at least in the U.S. and most of Europe.[3] The basic idea is that meaningful comparison requires analysis of the social functions that legal systems perform. Isolating specific social functions and asking how the systems being compared perform those functions provides uniquely valuable comparative knowledge because it penetrates behind the language in which each legal system codes its operations.

Functional methodology is typically applied on an ad hoc basis to compare specific problems or issues. For example, a U.S. scholar or practitioner interested in identifying how a foreign system handles what is called "products liability" in the U.S. (harm caused by product defects) is directed to structure her search for information not by reference to the language and concepts of a particular system, but rather by reference to the social functions to which language and concepts relate. This form of comparative analysis is effective and valuable precisely because it starts with something that can be compared, that is, the functions that legal institutions perform.

In this essay, however, I use this basic insight an expanded way and for a different purpose. I fuse it with the idea of an analytical framework and thereby create an integrated set of intellectual tools for procedural comparison.

This involves two moves. First, the framework idea relates specific procedural functions to each other. This allows the user to perceive the dynamics of a system—the ways in which its components interact in the system's operations. It also guides analysis, showing the user where to look for particular kinds of information. Conventional

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2 Many of the examples I use here are discussed in greater detail in Gerber, *supra* note 1.

3 The classic statement is KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 2d ed. 1993).

ad hoc analysis does not have these capabilities.

Second, the framework identifies functions that are *necessarily* performed in the civil procedure systems with which we are here concerned. The objective is to develop a conceptualization scheme that specifies the functions that the analyst can expect to find in each system and that therefore provides guidance as to the kinds of questions that should be posed and the kinds of information that should be sought. This scheme represents a kind of template that can be used across the boundaries of systems, and, in that sense it makes possible richer and more insightful comparisons. This kind of conceptualization is necessarily abstract, and its abstractions can and should be the object of detailed examination.

The potential value of creating this type of framework is particularly high in the area of procedure, not only because of the growing importance of procedural knowledge noted above, but also because so little functional comparative analysis of procedure has been done.[4] Unfortunately, however, this paucity of experience in applying functional analysis to procedure also means that there is relatively little material available for use in developing such a framework.[5]

III. FRAMING THE COMPARATIVE ANALYSIS OF CIVIL PROCEDURE

The framework I offer here identifies specific components of civil litigation that, I submit, any civil litigation system (of the kind we are here discussing) must perform. For each function, the user can then ask a series of questions: who can and does perform the function, how is it performed, with what objectives, subject to what kinds of influences, and how does this function relate to other functions that are part of the civil litigation system. Taken together, the answers to these questions represent a highly valuable and comprehensive analytical description of a procedural system's operations. More importantly for our purposes, the answers from one system can be compared with those from other systems, because the questions to which they respond are the same, and this then provides an accessible framework of insights into the differences between systems.

I look at the commencement and termination of litigation and seven components of the process of litigation in courts of first instance (that is, trial court level), leaving complex issues such as appeals and forms of relief for another occasion. Note that these functions are often closely interwoven in practice, and they often overlap in time. Moreover, they need not be performed in any particular sequence.

A. Commencing Litigation

Litigation must begin at a particular point and in a particular way, but this seemingly simple step is conceptualized in a variety of ways, and the legal consequences of commencing litigation often vary significantly. The effectiveness of one of the major modern treaties involving civil litigation, the so-called Hague Evidence Convention,

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4 Scholars in the field of comparative law have focused primarily on substantive law, and thus their have been few incentives to develop tools for use in the area of procedure. For discussion of this bias, see David J. Gerber, *System Dynamics: Toward a Language of Comparative Law*, 46 AM. J. COMP. L. 719, 720–6 (1998). For discussion of the need for this type of understanding in relation to international civil procedure, see, e.g., Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT'L & COMP. L. 111 (1999).

5 There are, of course, notable exceptions. *See, e.g.*, MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986).

has, for example, been seriously undermined by the apparent lack of understanding of those differences by some of its drafters.[6]

Civil litigation in civil law countries such as Germany typically commences when a government judicial officer (usually a judge) accepts the plaintiff's claims as sufficient to justify setting in motion the judicial machinery. The plaintiff often must identify the specific theories on which her claim rests, and she may be required to describe the probatory material she possesses and articulate its relationship to her claims. She must, in any event, convince the judge that the procedure should be commenced.

The situation in the U.S. differs markedly. From the standpoint of U.S. federal procedure rules, litigation commences when a complaint is filed, because legal and procedural consequences flow from this filing. This document need only contain a relatively simple statement of the claim for which relief is sought, together with a request for a particular remedy. From a civil law perspective, this hardly looks like the commencement of litigation, because there has been no official judicial activity. These steps appear to be merely preliminary to litigation—preparatory, but not litigation itself.

The procedural consequences that follow from commencement also differ greatly, and they highlight the importance of recognizing differences in the way litigation commencement is understood. In civil law systems, commencement typically has few immediate and direct consequences for the parties. The judicial machinery begins to move: a dossier is created, and a judge begins to consider the claims and the probative material offered in support of them.

As a result, those familiar only with such systems are often quite unprepared for the consequences that flow from what in the U.S. is considered the commencement of litigation. Once litigation commences, U.S. rules authorize attorneys for the parties to request information from each other and sometimes from others who have information about the litigation. Failure to provide properly requested information can lead to significant penalties and procedural sanctions. This is pre-trial discovery, and in the U.S. it is understood to be very much part of the litigation process.

B. Acquiring Data

Any procedural system must have a means of investigating, acquiring and assembling data that might be relevant to specific litigation. It must make a set of data available to the decision maker from which she can reach informed conclusions about "what happened." There are important differences among systems regarding the scope of the acquisition process, the means by which this data set is created, the agents authorized to use those means, and the timing and circumstances of acquiring data. Note that this process is conceptually distinct from and prior to the issue of deciding what actually happened, although the two functions may be intertwined on various cognitive levels.

Differences between the U.S. and most, if not all, civil law countries are particularly significant. Take, for example, the scope of the process and the rationales that define it. In the U.S., its scope is very broad. During pre-trial discovery, attorneys for the parties may request virtually any data that can reasonably be anticipated to lead to evidence that will be admissible in the litigation, provided only that compliance with the request would not violate specific privacy spheres such as those defined by attorney-client, doctor-patient or other privileges.[7] This breadth of scope derives from a par-

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[6] For discussion, see Gerber, *Extraterritorial Discovery, supra* note 1, at 779–84, and David J. Gerber, *International Discovery after Aerospatiale: The Quest for an Analytical Framework*, 82 AM. J. INT'L L. 521 (1988).

[7] In some (usually larger) cases, judges and magistrates may "manage" this process to a degree, but it is driven primarily by the attorneys for the parties.

ticular concept of procedural justice in which justice is seen to correlate directly with the density and scope of the information that is available to the decision maker. The general theme is "the more information, the better."[8]

In most non-U.S. procedural systems, the acquisition process is far more narrowly constrained. In civil law systems, for example, the central operating assumption is that the litigants "bring their own evidence." The state will use its resources to adjudicate the claim, but only where and to the extent that the claimants already have enough data to show that such an expenditure is justified. A judge may be persuaded to acquire additional data, but usually the requesting party bears the burden of persuading her to do so, and often this burden is high. It is typically necessary to demonstrate, for example, that the data requested is "directly" probative of issues the judge has identified as relevant to the litigation. In addition, in countries such as Germany a party may have to "substantiate" a witness whom it requests the judge to call, that is, it may have to specify to the judge what the witness is likely to know and how that information relates to the issues in the litigation.

Not only does the scope of the process differ, but so also does its agency—the issue of "who" acquires the data. In Germany and most other civil law countries, data can only be acquired by the judge. Data acquisition is a quintessentially judicial function. In the U.S., it is not. As noted above, attorneys for the parties are authorized by procedural law to investigate and acquire information. The judge may also acquire data, but it is the dominance of private attorneys in this role that so sharply distinguishes the U.S. system from most other systems.

Note also that the temporal location of this function may differ in important ways. In the U.S., attorneys acquire data during the pre-trial procedure—before the trial begins. The court may also request that data be produced at the trial, as when witnesses testify, but in general the data acquisition function is "frontloaded": it occurs prior to the adjudicatory function.[9] In civil law countries, on the other hand, the acquisition process often occurs in piecemeal fashion and in conjunction with the judge's examination and evaluation of the case dossier or file. The judge may decide to seek particular information at virtually any time during the litigation process.

C. Shaping the Facts

Acquiring data is distinct from shaping "facts," that is, making authoritative determinations of what happened. A civil litigation system must provide a process by which the former is transformed into the latter. It must provide a mechanism for interpreting the available data to create a narrative of events. There must be a final decisionmaker, but there must also be a process by which those decisions are influenced and shaped.

Differences in these mechanisms revolve around the issue of who plays what roles in them. The identity of the final decision maker shapes these roles. In civil law systems, the decision maker is the judge, which means that the shaping function takes place primarily in a dialogue between the attorneys and the judge. In the U.S. system, the jury (when there is one) makes the final decisions with regard to the facts. This focuses attention and importance on the capacity of the attorneys to influence the jury members, and it creates a three-part interaction in which judge, jury and attorneys interact in complex and often opaque ways.

There are also important differences with regard to the agents who have the opportunity to influence factual decisions as well as the extent of their influence. In the U.S.,

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8 The legal fees involved in these discovery practices provide incentives that may also influence the scope of discovery.

9 *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

for example, as John Langbein has noted, attorneys are "fact advocates" as well as "law advocates."[10] To a large extent, they control the presentation of factual data to the final decision maker. For example, they call their own witnesses (whom they have often prepared at great length) and they ask the questions which structure the information that witnesses provide to the decision maker. In most civil law systems, however, attorneys are restricted to the role of "law advocates." Their role in influencing decisions about facts is generally limited to discussions with the judge regarding the interpretation of data that has been presented.

Fundamental differences in conceptions and images of the litigation process are often the underlying cause of such variations in roles. In Germany, for example, litigation is conceived as a state function to be exercised by a judge who is an expert in the relevant substantive law. She is provided with the authority to ask outside experts for assistance in interpreting data, and she may allow attorneys for the parties to submit suggestions about how to interpret the data, but it is her job to transform the facts into a narrative. She may ask for outside assistance, for example, in the form of expert testimony, but such decisions are in her discretion.

In the U.S., in contrast, the process is understood as semi-private and conflictual. It is semi-private, because it is largely controlled by the attorneys in the interests of the parties they represent. It is conflictual in the sense that the attorneys for each side are given wide latitude to present materials and arguments with the aim of convincing the decision maker of the correctness of their position. Justice is understood to be a product of the conflict of these opposing narratives, arguments and data presentations.

D. Establishing the Facts

At some point in the proceeding "the facts" must be finally established. The process of shaping the facts must lead to authoritative final decisions about the material; arguments must give way to factual conclusions. Here the central issues are who makes those decisions, when and in what contexts.

The "who" issue influences the entire procedural system. In the U.S., a jury of laypersons often performs this function.[11] This encourages, for example, extensive and detailed regulation of the process of submitting evidentiary data. In the typical civil law litigation, in contrast, such factual decisions are made only by professional judges, and thus there is little reason to employ extensive and detailed evidence law. The judge is generally permitted to evaluate and interpret the available data with few constraints.

The issue of when these decisions are made is similarly important. In the U.S., factual determinations are generally not made until the end of the process, when the jury (if there is one) or the judge pronounces on the presentations made at trial. The underlying image is that in general all the evidence must be presented before factual conclusions can be drawn. In civil law jurisdictions, on the other hand, these decisions are often made at numerous points during the proceeding. The judge is entitled to make factual determinations as she analyzes the case file, deciding, for example, whether there is a sufficient factual basis to call and listen to a particular witness. U.S. lawyers often criticize this feature of civil law systems on the ground that decisions should be made only after attorneys have had an opportunity to present their cases and evidence in full.

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10 *Id.*

11 Parties have a right to jury trial in many categories of civil actions. They frequently do not exercise that right, but to a large extent the rules established for jury trials are also applicable in bench trials (those before a judge alone).

E. Law Knowing: The Background Knowledge Set

These fact-related functions have roughly analogous functions that relate to the law to be applied in the litigation. The first of these I call "law knowing." Just as potentially relevant data must be made available to the decision maker so that a narrative can be constructed, so also must there be a mechanism for providing to the decision maker a background or framing set of legal concepts, principles and rules. The decision maker must "know" the contents of such a set before she can make choices about how law applies to the facts being presented.

This knowledge works at both the deliberative and the perceptual levels. It involves conscious decisions about the principles to be applied and the ways in which they should be applied. Equally important, however, is its perceptual role. Knowledge of legal concepts and principles shapes the way the decision maker perceives the data presented in the litigation and thus structures interpretation of that data.

The continental European and U.S. legal systems differ dramatically in the ways in which they create this knowledge set. In Europe, concepts of judicial responsibility and specialization are typically prominent. By "judicial responsibility" I mean the requirement that a judge "know" the potentially relevant substantive law in the area. The judge's obligation to know is supported and implemented by judicial specialization, the idea that the judicial system should be designed so as to develop the substantive knowledge of the judges within it. Judging is typically a life-long career chosen immediately after completion of the basic university legal education, and this allows development of extensive substantive knowledge. The structure of the court system and of the courts themselves reinforces this impact. Courts are often specialized by subject matter, and judges often spend their entire careers on one type of court. Moreover, in many systems there are specialized sections or groups of judges ("*chambres*" or "*Kammer*") within court. These deal with even more narrowly defined categories of cases. As a result, a judge may for many years encounter only the particular kinds of cases handled by the section on which she has been sitting, thereby further developing and concentrating her substantive law knowledge.

In sharp contrast, the procedural system of the U.S. (and common law countries generally) does not obligate the judge to know the substantive law in the area of the litigation. Here the operating assumption is that in each case the judge will be instructed on the potentially applicable law by the lawyers for the parties. Together, the opposing legal presentations of the attorneys will provide the relevant knowledge set for that litigation. This means that the lawyers will, in essence, construct the background information set for each litigation. One or more judicial clerks may supply research results that supplement these presentations, but the attorneys generally structure the background knowledge set. The judge is understood as a generalist with regard to substantive law. Her primary skill is to be able to make effective and appropriate choices on the basis of the presentations of the attorneys.

F. Structuring Law for the Case

A procedural system must also provide a means of structuring the law to be applied in the litigation, that is, there must be a mechanism for relating the background legal knowledge to the case at hand. Choices must be made about which principles are relevant and how they should be interpreted and applied in the particular case. The judge generally makes the final decisions, but a separate procedural function structures or shapes those decisions. The issues here are similar to those noted above regarding the shaping of the facts: who participates in the process, under what circumstances, and what kinds of factors affect their capacity to influence the final decisions.

In the U.S., the attorneys can often exercise much influence on this structuring process, not least because they are primarily responsible for creating the background knowledge set from which the concepts and principles to be applied are derived. As noted above, the judge makes choices from a background knowledge set that is primarily constructed by the lawyers for the parties.[12] In civil law systems, on the other hand, the judge's control over the litigation process and her responsibility for knowing the relevant substantive law tend to reduce the extent to which the lawyers can influence these determinations. This does not mean that lawyers have no role in this structuring process. Lawyers may express their views about the interpretation of the law, and judges often give their comments much weight. U.S. lawyers frequently claim that attorneys in civil law countries play little or no role in the law structuring process, but this image is often highly misleading.

The characteristics of the process also vary in important ways. In U.S. procedure, it tends to be relatively formal and structured. Evidence rules and the rights of the parties create interchanges in which formal, often written moves (such as specific requests or "motions" to the court) predominate. Moreover, since judges typically are not specialists in the substantive law involved in the case and the lawyers often have more time, resources and incentives to do research into it, substantive law exchanges typically take the form of presentations by the lawyers and questions regarding them by the judges.

In Continental European procedural systems such as Germany, the structuring process tends to be less formal and more interactive. The judge must make the final decisions, but she takes advice from the attorneys at her discretion. She controls the agenda and determines the influence the attorneys will have. Informal discussions are relatively frequent, with formal written statements typically less important than in U.S. procedure. The discussion format is also fostered by the relative knowledge levels of judges and attorneys. The judge is likely to be experienced and frequently expert in the substantive law area of the dispute, and thus the interactions tend to resemble dialogues or conversations among specialists with similar knowledge bases.

G. Law Determination: Deciding on Law for the Case

This law structuring process must lead at some point to final decisions about what the law is for purposes of the particular litigation; choices must be made. On one level, this function is the same in virtually all systems. The judge arrives at conclusions of law and formally announces them. There are, however, differences in factors such as the timing and the form of such determinations.

In the U.S., these determinations are generally made at the conclusion of the trial. Requests to dismiss the case for lack of an adequate legal basis may be made at earlier points in the proceeding, but the normal process requires that the attorneys be allowed to develop and present their arguments fully before the judge makes her decision. In civil law systems, the process is imaged differently. The judge is seen as a specialized professional who is entitled to make final legal decisions at virtually any point in the proceedings, and it is in her discretion whether to consider further arguments of the attorneys.

In those cases in which litigation in the U.S. includes a jury, the law determination function takes on highly specific characteristics that result from the fact that factual and legal determinations are made by different decisionmakers. For example, although decisions about the substantive law to be applied are made by the judge, they

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12 For a recent discussion of the cognitive aspects of this process, *see* Chris Guthrie, Jeffrey Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777(2001).

take the form of questions (or instructions) to the jury. "If you find X (proposition of fact), then Y (conclusion of law)." The legal conclusions contained in these instructions may later be explained in a written opinion, but they are essentially fixed at the time the instructions are given to the jury.

H. Deciding on the Outcome: Fact—Law Interaction

Decisions about facts and decisions about law must be related in a final decisional function that determines the outcome of the litigation. There are significant differences in the way this function is performed. The key issues are: who relates the two categories of decisions and by what means.

In Germany, these two functions are closely interwoven in the cognitive process of the judge and in the deliberative processes of a group of judges. From the commencement of the litigation, the judge makes factual and legal determinations that are intertwined. She considers, approves and rejects legal theories in relation to the facts that have been alleged and the data that has been acquired, and she acquires factual data on the basis of her perceptions of and decisions about the background universe of legal data and its relation to the case. In that sense, law-related and fact-related decision making are inextricable.

In the U.S., factual and legal decision making are segregated to a far greater extent. Regardless of whether the trial is by judge alone or by judge and jury, factual and legal decisions are temporally segregated. The law is generally applied to the facts after the attorneys have had a full opportunity to present their cases, either by the judge alone or in the judge's instructions to the jury. Where there is a jury, the functions are segregated not only temporally, but also institutionally. The judge makes the legal decisions, while the jury makes the factual decisions. This then creates a precise point of interaction between the two functions—when the jury answers the questions posed by the judge.

I. Termination Issues: Appeals etc.

There must also be a point at which litigation terminates—when it is no longer possible to challenge the decisions that have been made by the first instance (trial) court. Space limitations preclude analysis here of issues such as types of remedies and forms of preclusion, but it is important to note that the relationship between first instance proceedings and the appeals process varies greatly.

In some systems, the appeals process is clearly and sharply distinguished from first instance litigation by factors such as the types of issues that may be considered, the procedures to be followed, and the relations among the respective judges. In the U.S., for example, an appeals court is not generally entitled to revise the factual determinations of the trial court. Its function relates solely to the law. There is, therefore, a sharp differentiation in function with regard to issues and the types of materials involved. The appeals court is related to the lower court's proceedings primarily by means of a written, verbatim transcript. The appeals court judges are in the position of outside observers of the proceedings; they do not share the internal perspectives of the first instance judge or judges.

In other systems, the appeals procedure is often far less distinct and different from the first instance procedure. In Germany, for example, the appeal is in many ways not a radically different and distinct process at all, but rather resembles a continuation of the first instance proceeding with some changes in emphasis, scope and rules. The appeals court may, for instance, take new evidence and revise factual determinations of the court of first instance. It thus performs the same functions that are performed by

the first instance court, albeit with differences in emphasis. Moreover, the appeals court judges are related to the first instance proceedings by the case dossier that has been prepared prior to and during that proceeding. This file is simply transmitted to the appeals judges, who perform essentially the same kinds of operations with respect to it that the first-instance judges performed. That dossier typically includes the judge's notes on testimony as well as on other events and presentations during the proceedings. The perspective of the appeals court judges on the earlier proceedings is thus internal. They are invited through the dossier to share the cognitive world of the judge or judges in the initial proceeding.

IV. CONCLUDING COMMENTS

The framework I have sketched here is designed as an analytical tool for structuring knowledge. It identifies the functional components of civil litigation systems, thereby allowing the user to "recognize" the components of any such system and perceive their interrelationships. Moreover, by identifying functions that are necessarily performed in any civil litigation, it enables more effective, comprehensive and conceptually precise comparison. It can thus help to penetrate the density of data about procedural systems, sharpen thought about them, and reveal differences and similarities that might not otherwise be perceived or perceived less clearly.

This framework is only a starting point. Its concepts and categories will have to be further developed and refined, and experience will be needed to reveal the most effective ways of using it. There is, however, growing awareness of the importance of developing knowledge in this area, and this suggests that the effort may be worthwhile. The joint ALI-Unidroit project on principles and rules of procedure for transnational litigation may be the most prominent example of this growing awareness.[13]

If this form of analysis proves useful in analyzing procedural systems, it may also prove valuable in other areas, and it may be possible to develop similar analytical constructs in other areas of law. By linking them together, comparative law scholars could begin to develop a comprehensive language for analyzing and understanding the operations of foreign legal systems.[14] My hope is that this brief essay stimulates thought along those lines and thus provides a contribution to comparative law of which Arthur von Mehren might approve.

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13 Am. L. Inst., ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure, Discussion Draft No. 2 (April 12, 2001). For discussion, *see* Geoffrey C. Hazard, Jr., *Transnational Rules of Civil Procedure: Preliminary Draft No. 1*, 33 TEX. INT'L. L.J. 499 (1998).

14 I comment on how this process might look in Gerber, *System Dynamics*, *supra* note 4, at 726–37.