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**Legal Methods
as a Point of Reference for
Comparative Studies of Procedural Law**

Paper Accepted for
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By

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Interest in comparative procedure and transnational transplants of procedure is at an acme. The point of my paper today is that comparative study of legal methods has much to contribute to comparative study of procedural law.

Comparative study of procedural law is a relatively new phenomenon. While for more than a century comparativists have met to address issues of law comparatively, their focus long was on rules of substantive law rather than on procedural law. Insofar as they gave procedure attention, they did so largely in the context of more global comparisons of legal systems as such.

But now comparativists, with law reform in mind, are giving greater attention directly to comparative procedure. The difficulties their efforts encounter demonstrate why such efforts have been late in coming. It is harder to examine procedural law comparatively than substantive law. Procedural law is less susceptible to traditional tools of comparative analysis than is substantive law. Isolating elements of procedural law is more difficult, while changing elements can be more politically controversial. Procedure is a system. As a system, each element is interrelated; one cannot satisfactorily examine any single element in isolation without taking into account other elements.¹

¹ See Jorge A. Sánchez-Cordero Dávila, *Preface*, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE xxix (Cambridge University Press 2006).

To be sure, rules of substantive law are also parts of a system. Comparativists address this problem, among other ways, by what is known as a *functionalist* approach.² A functionalist comparison focuses not on rules, but on functions rules serve. Functionalism thus seeks to assure that we compare like with like. Professor David Gerber recently called for applying functionalism to comparative study of procedural law and offered up a framework for such studies.³ Meanwhile Professors Peter Murray and Rolf Stürner published their treatise on German civil justice in which they include a comparison of functions of American and German civil procedure.⁴ Professor Oscar Chase, on the other hand, cautions us about the difficulties of comparative studies of procedural law. “[C]ourt procedures,” he comments, “reflect the fundamental values, sensibilities and beliefs (the “culture”) of the collectivity that employs them.”⁵ For convenience sake, I refer to his point of view as *culturalism*.

In some respects functionalism and culturalism are two sides of the same coin: *functionalism* emphasizes similarities among systems of procedure, while *culturalism* emphasizes differences. More broadly this contrast reflects a long-standing difference of opinion among jurists between those who see law as principally a technical tool for organizing society and those who see it as an historical development of the peoples’ consciousness. In the 19th century, that difference took the form of debates over codification. In the 21st century, it is taking the form of debates over possibilities for transplanting and harmonizing law.

Today I do not wish to debate the merits and demerits of either functionalism or culturalism. My talk has a more modest goal: to show that comparative study of procedural law would benefit from closer examination of legal methods. It is my—not very startling—contention that a legal system’s legal methods re-

² A leading proponent is KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW chap. 3 (Tony Weir, trans., 3rd ed. 1998).

³ David J. Gerber, *Comparing Procedural Systems: Toward and Analytical Framework*, in LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 665 (Arthur Taylor Von Mehren and Symeon Symeonides, eds., 2002).

⁴ PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE (2004).

⁵ Oscar G. Chase, American “Exceptionalism” and Comparative Procedure, 50 Am. J. Comp. L. 277, 278 (2002). See also OSCAR G. CHASE, LAW, CULTURE AND RITUAL (2005),

veal much about the purposes and goals of its procedure and the relationship of procedure to culture. In this belief I follow Max Rheinstein, who wrote:

The essential difference between common law and civil law lies in the technical structure of court procedure, in the different conceptual framework within which legal thought moves, and in the underlying cause of these differences: the diversity of the personnel by which the machinery of the administration of justice is handled and guided.⁶

Comparative study of legal methods can inform discussion of both functionalism and culturalism. I would like to suggest how it can do that. I take as my departure point German and American legal methods. While I am limiting my remarks to the German and American systems, I believe that study of legal methods would inform almost any comparison of procedural law.

I plan to address three points: I. what I mean by legal methods and what I see to be the principal difference in legal methods between the German and the American legal systems; II. how appreciation of these differences might inform functional studies of procedural law; and III. how appreciation of these differences might inform cultural studies of procedural law.

I.

Legal Methods and Procedural Law

First, let me spell out what I mean by legal methods. In common parlance legal methods are identified with interpretation of statutes and of precedents.⁷ Certainly these are legal methods. I define legal methods more broadly. In my wider sense legal methods are devices used to apply abstract legal rules to fac-

⁶ Max Rheinstein, *Comparative Law and Legal Systems*, in 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 204-210 (1968), *reprinted in* 1 Max Rheinstein, 1 GESAMMELTE SCHRIFTEN 239, 246-47 (Hans G. Leser, ed., 1979).

⁷ *See, e.g.*, INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil MacCormick and Robert S. Summers eds., 1991); INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997).

tual situations in order to decide concrete cases.⁸ In this sense, legal methods include methods for creating as well as for implementing legal rules.⁹ Elsewhere I have described legal methods under three rubrics: *lawmaking*, *law-finding*, and *law-applying*.¹⁰ Lawmaking is legislation. Law-finding encompasses interpretation of statutes and precedents. Law-applying is taking those found rules and using them to decide concrete cases where facts have been found. Law-applying presupposes a system of fact-finding. My focus today is on what I see as the heart of legal methods, bringing norms and facts together.

When one compares American and German legal methods in this sense, a difference arises that is inescapable. German legal methods are more norm-oriented than are American methods. In German legal methods norms, *i.e.*, legal rules, are applied to the case at hand through subsuming facts under rules.¹¹ While American legal methods pursue this function too,¹² they do not do so with anywhere near the same attention as do the German.

A brief sketch of German legal methods suffices to establish German devotion to norms. German lawmaking is careful and precise. We think first, of course, of the German Civil Code: the preeminent exemplar of German statutory law. While Germans complain that today's statutes and code revisions fall short of the standards of their beloved BGB, German statutes are models of clarity and consistency with other statutes, at least as compared to their American counterparts. German statutes are subject to significant quality controls that are not present in the U.S. system. German laws originate largely within responsible ministries of government. They are drafted by professionals. They are vetted by ministries of justice responsible for proofing them for consistency with constitution and legal order. They are approved by

⁸ See 1 WOLFGANG FIKENTSCHER, *DIE METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG* 13-15 (1975-1977).

⁹ Cf. JAN SCHAPP, *HAUPTPROBLEME DER JURISTISCHEN METHODENLEHRE* (1983).

¹⁰ See James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, forthcoming in 41 VALPARAISO U.L. REV. (2006); James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, forthcoming in 16 TULANE J. OF INT'L & COMP. L. (2007).

¹¹ 3 FIKENTSCHER, *supra* note 8, at 638.

¹² See, e.g., OSCAR G. CHASE, *LAW, CULTURE AND RITUAL* 30, 43 (2005); Stephen N. Subrin, *On Thinking About a Description of a Country's Civil Procedure*, 7 TUL. J. INT'L & COMP. L. 139, 140 (1999).

government cabinets and then by legislatures with a minimum of tinkering. It's not just codification that makes a difference between American and German law: it's that greater attention is given to drafting norms that are clear and consistent with other norms, easily found and readily applied.

German statutes usually are designed well to be applied easily. Well-ordered, German norms are easily found. Responsibility for their finding rests in the hands of the law appliers. *Iura novit curia*—the court knows the law—is the German maxim; it is unknown in American law.

Judges not only find law, they apply it. Judges coax parties to agree on elements of norms to avoid taking evidence. They determine whether the elements of the norm are fulfilled. They are responsible for writing judgments that demonstrate that norms are or are not fulfilled. German judgment-writing technique demonstrates German devotion to norms: it validates norm application. Reinhard Zimmermann writes: "A German judgment is supposed to appear as an act of an impartial as well as impersonal public authority furnishing the official and objective interpretation rather than being based on the personal opinions of the deciding justices. ... The typical German judgment, like its French counterpart, strives after the ideal of deductive reasoning."¹³

Compared to the German system, the contemporary American legal system shows norms relative indifference. Professor Stephen Subrin observes that in American procedure "the highest goal is for courts *not* to apply law to facts."¹⁴ American lawmaking is often hapless, disorganized or worse. American law-finding is anything other than simple and efficient: it is a cacophony of competing and frequently inconsistent statutes and precedents. American law-applying frequently is unpredictable and unaccountable: juries decide without giving reasons and sometimes contrary to law.

Small wonder it is that in the United States the role of rules in procedure has been questioned and alternative models proposed. A generation ago, Professor Lon Fuller asked, which comes

¹³ Reinhard Zimmermann, *An Introduction to German Legal Culture*, in INTRODUCTION TO GERMAN LAW Ebke/Finkin (eds.), 1, 21 (1996).

¹⁴ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 989 (1987).

first, courts or rules?¹⁵ Professor Lawrence B. Solum recently discussed competing models of procedure in America. The traditional model he calls “the accuracy model.” It “assumes that the aim of civil dispute resolution is a correct application of the law to the facts.”¹⁶ This is reasonably close to the models discussed by Murray, Stürner and Gerber. But that model has been under attack in the United States for a half-century.¹⁷ A more contemporary model Professor Solum calls: the “participation model.” It assumes, that “the very idea of a correct outcome must be understood as a function of a process that guarantees fair and equal participation.” According to Professor Solum, “[t]he key notion is that the process itself and not the outcome that defines procedural justice.”¹⁸

II. Functionalism and Legal Methods

So how can a better understanding of legal methods assist comparative studies of procedural law? It can provide a reference point for future discussions. It can suggest limits to what procedural systems can do without changing their methods.

Functional studies of law seek to compare like with like. To do that, they identify a specific function to compare. In the case of procedural law, however, we have seen that it is more difficult to isolate specific functions for comparison. Because of the system nature of procedural law, comparison requires that we deal with multiple functions. It is necessary to identify these different functions; it may even be necessary to weigh them against each other. Study of legal methods can help in these tasks and not just as analytical tools. The legal methods that a legal system employs limit and channel its procedural law. Procedural law can only accomplish those tasks of which the legal methods are capable. Methods and procedures that are ill-matched can operate along-

¹⁵ Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Although Professor Fuller stated this as an historical question, it is fair to regard it as an issue of which takes priority.

¹⁶ Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 191 (2004)

¹⁷ See, e.g., EDWARD LEVI, *LEGAL REASONING* (1949).

¹⁸ Solum, *supra* note 16, at 243.

side each other only briefly until one or the other or both must change.

A.

Two General Questions

I would like to raise two general questions about functionalism and comparative procedural law. One is: have we identified a primary function for procedural law? The other is: how might we best characterize functions of procedural law?

1. My first question is, have we identified a primary function for procedural law? I think the answer so far is no. Study of comparative legal methods makes this clear.

Our colleagues already see significant agreement among “modern” procedural systems. Professor Chase points out such systems share “reliance on formal rules of law as applicable norms and reliance on sensory evidence as a source of fact.”¹⁹ Professors Murray and Stürner observe that German and American systems of civil procedure both seek “the fair, accurate and efficient vindication of private rights and interests based on the existing legal, political and social order”²⁰ Professor Gerber would probably agree with all of them.

Yet awareness of legal methods suggests significant differences among our colleagues. For Professors Murray and Stürner, the “primary purpose” of civil justice is “vindication of private rights.”²¹ For Professor Gerber, on the other hand, procedure is “a set of interrelated functions designed to foster the public purpose of resolving private disputes.”²² The difference is not merely semantic.

The differing statements implicate Lon Fuller’s question, which comes first, courts or rules? Where rules come first, courts are handmaidens of norms. Justice is defined as legal truth. That is a long-standing view of German view of legal methods; it prevails today. Where courts come first, norms recede and procedure achieves primacy. Justice is defined as procedural justice. This view is well-represented in the United States; it may even be dominant. Emphasis on rules emphasizes the existing legal order,

¹⁹ Chase, *supra* note 5, at 279.

²⁰ MURRAY & STÜRNER, *supra* note 4, at 575.

²¹ *Id.* Cf. LEO ROSENBERG, KARL-HEINZ SCHWAB & PETER GOTTWALD, ZIVILPROZESSRECHT (16th ed., 2004).

²² Gerber, *supra* note 3, at 666.

while emphasis on process emphasizes the concrete relations of two parties. The former looks more to implementation of a particular order, while the latter is more concerned with dispute resolution.

2. My second general question is how we might best talk about the different types of functions that we are examining. Although Professor Gerber, on the one hand, and Professors Murray and Stürner, on the other hand, all speak in terms of function, they have in mind different types of functions. I might characterize the functions that Murray and Stürner consider as **external** functions of procedural law, while the functions that Professor Gerber considers are **internal**. Professors Murray and Stürner are concerned with those functions that procedural law fulfills within the legal system as a whole. They discuss the different goals procedural law is designed to achieve. Professor Gerber, on other hand, assumes a single, primary external purpose. He then identifies “components” that contribute to attaining that goal.

While both approaches offer insights into comparative procedure, I think that we need to be clear as to which we are taking at any one time. I believe that comparative legal methods can contribute to better achieving both. I would like to sketch briefly ways I think that they can do that looking both at external and internal functions. The theme common to both is that, whether functions examined are internal or external, their presence and their relative importance vary from system-to-system. Thus, what works in one system may not work in another, or may have unintended consequences. Or what is used in one system may be valued for serving a function that is not as important in an adopting system.

B.

External Functions

Professors Murray and Stürner make their departure point the 31 principles of the Rules of Transnational Procedure. These they distil down to five “functions” for comparing between the German and the American systems of civil justice. They are: “1. Maintaining independence and credibility of the judicial institution; 2. Providing litigants with high quality determinations of fact and law; 3. Guaranteeing litigants procedural and systematic fairness; 4. Producing final enforceable decisions without undue de-

lay and at reasonable cost; [and] 5. Affording litigants reasonably free access to justice.”²³ In addition, they add two of their own: “6. Contributing positively to the development and explication of the law; [and] 7. Generating among litigants and the overall population confidence and satisfaction in civil justice and the rule of law.”²⁴ They identify two other functions described as peculiar to the American system: “public regulation of economic and social actors” and “public education.”²⁵ Their list of functions is similar to that of Professor Subrin’s non-exhaustive list of ten “values or goals American procedure serves.”²⁶ Comparative legal methods tell us a lot about these functions, their evaluation and their respective weightings.

Four of the functions identified by Professors Murray and Stürner are litigant-focused: “2. Providing litigants with high quality determinations of fact and law; 3. Guaranteeing litigants procedural and systematic fairness; 4. Producing final enforceable decisions without undue delay and at reasonable cost; [and] 5. Affording litigants reasonably free access to justice.” How well these functions may be fulfilled is dependent on how well the respective legal methods are able to achieve them. Norm-oriented methods may be better suited for carrying out some of these functions whereas process-oriented methods may be better at others.

The other three functions of Professors Murray and Stürner are legal-system-focused: 1. Maintaining independence and credibility of the judicial institution; 6. Contributing positively to the development and explication of the law; [and] 7. Generating among litigants and the overall population confidence and satisfaction in civil justice and the rule of law.” Again, the influence of choice of legal methods necessarily affects the evaluation and weighting of these three functions. Most obvious, perhaps, is “6. Contributing positively to the development and explication of

²³ MURRAY & STÜRNER, *supra* note 4, at 574.

²⁴ *Id.*

²⁵ *Id.* at 575-81.

²⁶ Subrin, *supra* note 12, at 140 (“(1) resolving and ending disputes peacefully; (2) efficiency; (3) fulfilling societal norms through law-application; (4) accurate ascertainment of facts; (5) predictability; (6) enhancing human dignity; (7) adding legitimacy and stability to government and society; (8) permitting citizens to partake in governance; (9) aiding the growth and improvement of law; (10) restraining or enhancing power.”)

the law.” Where legislative norms are the basis of decision, the importance of norm-development in procedure should be less than where legislative norms are less important. Similarly the choice of legal methods may determine how to promote independence and credibility of the judiciary and how to generate overall population confidence and satisfaction in civil justice and the rule of law. What those mean will largely be measured by whether the population’s conceptions are more norm- or process-oriented.

C.

Internal Functions

Professor Gerber is concerned with procedural law as “a set of interrelated functions designed to foster the public purpose of resolving private disputes.”²⁷ He takes this as the primary purpose of procedural law and then identifies its components: a) commencing litigation; b) acquiring data; c) shaping the facts; d) establishing the facts; e) law knowing: the background knowledge set; f) structuring law for the case; g) law determination: deciding on law for the case; h) deciding on the outcome: fact—law interaction; and i) termination issues: appeals etc.

Here too, studies of comparative legal methods have an important contribution to make. Understanding of comparative legal methods suggests that in the German norm-based system, the preeminent goal is a judgment stating legal truth, while in the American process-based system, the preeminent goal is the iconic “day-in-court.” The German system is focused on establishing whether a norm is or is not fulfilled by found facts. The contemporary American system is more concerned with providing parties opportunities to discover facts and argue law. German judges are on the outlook to fill out the elements of norms, while American judges are concerned with refereeing a contest between parties. These are not new revelations, but they are made starkly apparent through study of comparative legal methods.

III.

Legal Methods and Culturalism

²⁷ Gerber, *supra* note 3, at 666.

Culturalism asserts that culture determines the forms of the legal system. In a stronger version espoused by Professor Chase, general culture itself—and not just a specifically legal culture—is determinative. How can study of legal methods help us address the issues of culturalism?

At first blush my brief comparative sketch of German and American legal methods tends to confirm the historic stereotype of Germans as rule-oriented and Americans as free individuals less-constrained by rules. Did I not, after all, just assert that German methods are norm-oriented while American methods are not? This would seem to support Professor Chase's thesis that general culture determines procedure.

On closer examination, I am not so sure. I have a causation issue. Why should we assume that culture determines or even reflects procedure. Might not procedure be determined by unrelated factors? Is present-day American civil procedure a product of our culture or a product of something else—say American legal methods? The right answer may be that it is a bit of both.

Professor Chase identifies four features of American procedure that he considers responsible for "American procedural exceptionalism." These are: "(i) the civil jury; (ii) the use of party-controlled pre-trial investigation; (iii) the relatively passive role of the judge at the trial or hearing; and (iv) the method of obtaining and using expert opinions on technical matters."²⁸

These four features are not static. They have changed substantially over the past 160 years. I do not plan to venture here even a guess whether in this time period there has been a corresponding change in American culture that might account for these changes. I will venture, however, that there have been changes in legal methods that could account for some of those changes in procedure and which could account for exceptionalism.

In the last 160 years American legal methods have become progressively less norm-oriented even as American society has introduced many more norms. While Americans live in an age of statutes, their legal methods are less-oriented toward applying norms now than before. I think there is a case to be made that the forms of American exceptionalism that Professor Chase identifies followed, rather than preceded, a failure of more norm-oriented legal methods. American exceptionalism might be seen less as a

²⁸ Chase, *supra* note 5, at 287.

product of particular cultural values, and more as a mundane failure of political and legal systems to develop effective legal methods. Let's look at the first two examples that Professor Chase gives: the civil jury and discovery.²⁹

The contemporary American jury is considerably different from the jury of 160 years ago. The jury of that day was, thanks to special pleading, restricted to deciding a single factual point in issue. Legal historians are still researching the extent to which those controls were effective. Nevertheless, the legal system clearly anticipated close control over the law-finding and law-applying role of the jury. The special pleading of the common law kept the civil jury on a short leash. Party-directed discovery was practically unknown. As late as when my father graduated from law school in 1936, it still was exceptional. It started to become the norm only with the adoption of the Federal Rules of Civil Procedure in 1938.

I would like to suggest that the modern-day civil jury and free discovery are products of failures of legal methods in the 19th century. In the middle of century law reformers challenged common law pleading. Common law pleading was very norm oriented. It called for syllogistic application of law and allowed juries only a narrow role in law application. Discovery was unknown. The reformers who challenged common law pleading were not, however, adverse to legal norms. In fact, they believed in them. The same reformers who sought abolition of special pleading, also sought codification of substantive law. But while they succeeded in abolishing special pleading and replacing it with "code pleading," they were not successful in codifying substantive law. They did not replace it with a limited number of rationalized causes of action. Their attempts at codification failed repeatedly in the 19th century. Did the triumphs of anti-code forces reflect American culture or the political clout of the professional bar? A case can be made for the latter. The New York legislature passed codes only to see the governor veto them. Similar attempts to rationalize

²⁹ The question may be less relevant of the other two aspects he identifies: the passive judge at trial and to the role of the expert witness. Still, just how passive the common law judge has been is debated. *See, e.g.*, JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2005) (limited to criminal trials, arguing for an active judge). The expert witness would seem to be a product of the modern economy.

substantive law failed at the turn of the century in the form of the Uniform Law movement and failed again in the 20th century in the form of restatements. The story is a complicated one and there are no easy answers. My point is, however, that culture's role, if it has one, might better be seen in the defeat of alternatives than in a positive selection of today's institutions. The legal methods themselves may be responsible for today's procedural institutions.

IV. Closing

Today I have only been able to suggest the value of study of legal methods for comparative. I hope in the future to be able to address these issues in greater detail. Thank you for your attention.