ISSN 2281-5147

Opinio Juris in Comparatione

Studies in Comparative and National Law

Vol. 1, n. 1/2021

# Comparative Law in Germany: Yesterday's Hobby or Tomorrow's Science?

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Online First ISSN 2281-5147

# Comparative Law in Germany: Yesterday's Hobby or Tomorrow's Science?

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## Abstract

This article focusses on the significance of comparative law for the German private law landscape in the 21st century. Is comparative law in 21st century Germany just a hobby, a game of thought, an "*intellectual adventure*" tackled by a few bored specialists, or is it perhaps more? It is maybe even tomorrow's science? In order to answer these research questions this contribution starts out with an outline of the emergence of comparative law in Germany in general, followed by an examination of its current significance in *legal education*, *legal research*, *legal practice* and in particular in *legislation* and in the *interpretation of private law by the courts*. The article comes to the conclusion that there is no "one size fits all answer" but that the value of comparative law in Germany varies depending on the field examined.

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## Keywords

Comparative law, German private law, value of comparative law in Germany, contrasting function of comparative law, control or confirmation function of comparative law, cognitive function of comparative law, comparative law interpretation as "fifth method of interpretation"

## Introduction

The former member of the English House of Lords, *Lord Goff of Chieveley*, noted several years ago: "*Comparative law may have been the hobby of yesterday, but it is destined to become the science of tomorrow*".[1] If this almost prophetic sentence echoes in the ears of a German lawyer, several questions arise: Is comparative law in 21st century Germany really just a hobby, a game of thought, an "*intellectual adventure*"[2] tackled by a few bored specialists, or is it perhaps more? And if one agrees with *Lord Goff*'s basic assumption, has the importance of comparative law actually increased in the meantime, and if it has, what are the underlying reasons? And to what extent can his statement, made in 1997 with English common law in mind, (still) be applied to the German law in 2021? Let us try to shed some light on the darkness of comparative law in the German legal world.

This article, which should be understood as a little "comparative law appetizer", will focus on the significance of classical comparative law for the current German *private law* landscape.[3] Some developments at international level, beyond the comparison of

[1] R. Goff, 'The Future of Common Law' (1997) 46 *International and Comparative Law Quarterly (ICLQ)* 745, 748.

[2] B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (Tübingen: Mohr Siebeck 1983), p. 14.

[3] For the use of comparative law in German public law (especially German constitutional law) see S. Haberl, 'Comparative Reasoning in Constitutional Litigation: Functions, Methods and Selected Case Law of the German Federal Constitutional Court', in G. F. Ferrari (eds.) *Judicial Cosmopolitanism*

national private law systems, cannot be completely ignored. This applies in particular to the internationalisation of German private law through international uniform law and comparative law-based principles, which will thus also be discussed. At this point, however, the Europeanisation of German private law through the law of the European Union and in particular through directives and regulations relevant to private law shall be set aside: on the one hand, this would go beyond the scope of this contribution, and on the other, the influence of the *acquis communautaire* on German (private) law has been extensively examined elsewhere.[4]

This contribution starts out with an outline of the emergence of comparative law in Germany (II.), in order to then examine its current significance in legal education (III.), legal research (IV.), legal practice (V.), legislation (VI.) and in the interpretation of private law by the courts (VII.). The article concludes with a short summary of the insights gained (VIII.).

## 1. Emergence of comparative law

The development of modern comparative law as an independent discipline, above all comparative legislative law ("*legislatorische Rechtsvergleichung*"), has its origins in the early 19th century. It was at this time that the first modern national codifications of private law in Europe were created, beginning in 1804 with the French Code Civil *("Code civil")* and in 1811 with the Austrian General Civil Code ("*Allgemeines bürgerliches Gesetzbuch*" or "*ABGB*"). Gradually, a multitude of codifications for comparative law emerged and with them the age of comparison began. This development was further accelerated by the increasing emancipation of national jurisprudence from the formerly dominant Roman law.[5]

Regarding Germany, it must also be held in mind that before 1871 there was no German state as such, only numerous individual states with their own (private law) legislation. A glance at the map of that time, displaying the various laws in place, reveals a colourful patchwork of diverging legal systems (the French Code civil, for

(Leiden: Brill, 2019) 295; S. Martini, 'Lifting the constitutional curtain? The Use of foreign precedent by the German Federal Constitutional Court', in T. Groppi, M. C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Oxford: Hart, 2013) 229.

[4] See e.g. A. Janssen, R. Schulze, 'Legal Cultures and Legal Transplants in Germany' (2011) 19 *European Review of Private Law (ERPL)* 225. On the influence of European Union Law on German law in its entirety see R. Schulze, A. Janssen, S. Kadelbach (eds.), *Europarecht: Handbuch für die deutsche Rechtspraxis* (4th edition, Baden-Baden: Nomos, 2020). For more specific information on the influence of European law on German private and commercial law see K. Langenbucher (ed.), *Europäisches Privat-und Wirtschaftsrecht* (4th edition, Baden-Baden: Nomos, 2017).

[5] Cf. in more detail A. Janssen, R. Schulze, 'Legal Cultures and Legal Transplants in Germany' (n. 4) 228.

example, was still in force in parts of Germany until 1900), which only came to an end when the *Bürgerliches Gesetzbuch* ("*BGB*") came into force on 1 January 1900.[6] This was an additional reason why comparative law fall on such fertile ground, especially in Germany. In the last third of the 19th century, comparative law became largely institutionalised: comparative law societies and comparative law journals were founded, such as the *Zeitschrift für vergleichende Rechtswissenschaft* (1878), which still exists today.[7] The climax of the rise of comparative law was reached when the first international congress of comparative law was held in Paris in 1900, which is now known as "*the cradle of modern comparative law*".[8] With this congress at the latest, comparative law was anchored in European and German legal science and recognised as an independent discipline, even though the discussion about its actual meaning, which is still ongoing today, was only just beginning.[9]

## 2. Significance of comparative law in legal education

After this outline of the evolution of comparative law in Germany, let us now turn to its importance in German legal education at a university level.[10] The specific content of legal education is basically a matter for the German *Länder*. It is for them, and not the universities themselves, to conduct the final examinations in law, i.e. the first and second state law examinations ("*erstes und zweites juristisches Staatsexamen*"). Strictly speaking, therefore, there are 16 different legal studies in Germany, while the universities are also granted a certain degree of leeway. Nevertheless, it holds true for almost all universities that lectures on comparative law are offered (only) as an *optional* subject, although they are generally quite well received among students. In my personal experience, students attend these lectures primarily out of curiosity for other legal solutions and models, though they usually attend without preconceptions of what exactly comparative law involves, why it exists and how it is distinguished from other disciplines.

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[6] Cf. in more detail A. Janssen, R. Schulze, 'Legal Cultures and Legal Transplants in Germany' (n. 4) 232.

[7] The first comparative law journal was even founded as early as 1829, namely the *Kritische Zeitschrift für Gesetzgebung und Rechtssetzung des Auslandes*. However, it was discontinued in 1850.

[8] For example, I. Schwenzer, 'Development of Comparative Law in Germany, Switzerland, and Austria' in M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 77.

[9] See I. Schwenzer, 'Development of Comparative Law in Germany, Switzerland, and Austria' (n. 8) 70, on the then following development of comparative law in Germany (and in Austria and Switzerland) in the 20th century.

[10] Cf. in more detail see B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (n. 2) 15.

In terms of content, the lectures are regularly limited to comparative *private* law. The history, objectives and methodology of comparative law (e.g. "*Makro- und Mikrovergleichung*", "*funktionale Rechtsvergleichung*") are taught, followed by the doctrine of legal systems ("*Rechtskreislehre*", here the European legal systems and the USA clearly take priority)[11] and certain selective comparisons taken from the fields of contract and tort law. To a lesser extent, unjust enrichment and property law are also given some consideration. Within the selective comparisons, questions concerning "specific performance", the meaning of "good faith" or the necessity of "consideration" in common law and civil law are classic items on the agenda. In the other subjects of legal education, comparative law usually receives little or no attention. There is generally no mention of it in the traditional lectures on the BGB, the desirable link to comparative law is regularly not established.[12] Comparative law does not form part of the two state law examinations, although the university grade is sometimes included in the final results of the first state examination.

Both the possibility of spending a semester abroad in another European country within the framework of the Erasmus programme and the acquisition of an LL.M. degree in a mostly English-speaking country are very popular among German law students. They contribute at least to dealing with foreign legal concepts and improving language skills. Admittedly, this does not replace a genuine comparative law education and we need to see what impact COVID-19 is going to have here.

All in all, the importance of comparative law in legal education can be considered rather low, as it is not a compulsory subject and is often irrelevant in lectures on other subjects.[13] Both of these observations are regrettable, especially since, in my experience, there exist a fundamental curiosity among students in comparative law. The minor role that comparative law takes on is in part a consequence of the political intent of seeing students through their studies as quickly as possible and making them available to the job market rather sooner than later. With legal education following these goals, comparative law appears to many more as a redundant exercise than a genuine enrichment.

## 3. Significance of comparative law in legal research

[11] The doctrine of legal systems is clearly recognisble in K. Zweigert, H. Kötz, *Einführung in die Rechtsvergleichung* (3rd edition, Tübingen: Mohr Siebeck, 1996) 62.

[12] Merely the influence of certain EU directives implemented in the BGB is addressed in private law lectures.

[13] Interesting on the internationalization of German legal education M. Stürner, 'How International Should the German Einheitsjurist be?' in C. Jamin, W. van Caenegem (eds.), *The Internationalisation of Legal Education* (Vienna: Springer, 2016)) 115.

It is undisputed that Germany has a long tradition of comparative law research.[14] The *Max-Planck-Institut für ausländisches und internationales Recht* in Hamburg is world-renowned as a comparative law institution and welcomes many foreign guests every year.[15] There is hardly a German university that does not have at least one chair of comparative law, although these chairs almost always include other areas such as private law, European private law or private international law. But regardless of the exact designation of the chair, many German colleagues, by their own initiative, work on and with comparative law. A strict separation between private law researchers and comparative law researchers and their research, as is e.g. known in Italy between "*civilisti*" and "*comparatisti*", is unknown in Germany.

Some of the most important publications worldwide in the field of comparative law have been written in German or at least by Germans, most notably "*Einführung in die Rechtsvergleichung*" by *Konrad Zweigert* and *Hein Kötz,* which has been translated into many languages.[16] This work, although unfortunately no longer updated (the last edition dates back to 1996), is regularly consulted even by the German legislator and exemplifies the connection between legal research and legislation, which is important in Germany and seems to be less pronounced in many other countries. More recent examples are found in the impressive work (comprising more than 1000 pages) by *Uwe Kischel* entitled "*Rechtsvergleichung*",[17] the somewhat more compact (500 pages) "*Comparative Law*" by *Mathias Siems*[18] and the short textbook "*Rechtsvergleichung*" by *Karl August Prinz von Sachen Gessaphe.*[19] The works of *Thomas Kadner Graziano,* including "*Comparative Contract Law - Cases, Materials and Exercises*",[20] "*Europäisches Vertragsrecht – Übungen zur Rechtsvergleichung und Harmonisierung des Rechts*"[21] and "*Comparative Tort Law – Cases, Materials and Exercises*",[22] are thematically narrower, but nevertheless very much worth reading.

Many doctoral students take a comparative law approach, meaning that the number of comparative law doctoral theses is quite high, although there are clear distinctions

[14] See also B. Markesinis, J. Fedtke, *Engaging with Foreign Law* (Oxford: Hart, 2009) 185.
[15] See https://www.mpipriv.de/de/pub/aktuelles.cfm for more details.
[16] K. Zweigert, H. Kötz, *Einführung in die Rechtsvergleichung* (n. 11).
[17] U. Kischel, *Rechtsvergleichung* (Munich: Beck, 2015).
[18] M. Siems, *Comparative Law* (2nd edition, Cambridge: Cambridge University Press, 2018).
[19] K. A. Prinz zu Sachen Gessaphe, *Rechtsvergleichung* (Munich: Beck, 2011). The book *Macht und Ohnmacht der Rechtsvergleichung* by Großfeld, which has already been quoted here (see n. 2), is also worth reading, although it does not deal systematically with comparative law.
[20] T. Kadner-Graziano, *Comparative Contract Law - Cases, Materials and Exercises* (2nd edition, Cheltenham: Edward Elgar, 2019).
[21] T. Kadner-Graziano, *Europäisches Vertragsrecht - Übungen zur Rechtsvergleichung und Harmonisierung des Rechts* (Baden-Baden: Nomos, 2008).
[22] T. Kadner-Graziano, *Comparative Tort Law – Cases, Materials and Exercises* (Abingdon: Routledge, 2018).

in quality. Several leading comparative law journals, but especially the *Rabel Zeitschrift für ausländisches und internationales Privatrecht,* founded in 1927, and the even older *Zeitschrift für vergleichende Rechtswissenschaften* mentioned above, originate from Germany and enjoy great popularity at home and abroad. A publication in the first-mentioned journal still carries particular weight in German academia. The *Zeitschrift für Europäisches Privatrecht*, although not a comparative law journal in the strict sense, also frequently publishes high-quality comparative law articles and enjoys an excellent reputation in the academic world.

Traditionally, the focus in Germany has been on comparative *private* law, applying the functional method of comparative law.[23] The comparison of criminal law or public law is not unknown, but falls behind comparative private law in importance. The national legal systems continue to be the main points of reference for comparative private law. For a long time, this interest was very clearly focused on European legal systems and the USA. In the meantime, however, the increased importance of Islamic law and, even more so, of Asian legal systems has become apparent and is increasingly reflected in comparative law in Germany academia.[24] Chinese and Japanese private law are particularly noteworthy in this respect; both legal systems have even become the subject of independent German journals.[25]

In addition to the classic comparison of national legal systems, a further development within comparative private law is emerging as a result of the continuing Europeanisation and internationalisation of law, namely the increasing analysis of international uniform law (above all with the *United Nations Convention on Contracts for the International Sale of Goods* or also known as the "*CISG*"), model laws and principles or legislative drafts based on comparative law. With regard to the latter, the *Principles of European Contract Law ("PECL")*,[26] the *Principles of European Tort Law ("PETL")*,[27] the *Unidroit Principles of International Commercial Contracts ("PICC")*,[28] the draft for a *Common European Sales Law ("CESL")*[29] and the *Draft Common Frame of Reference ("DCFR")*[30] should be mentioned in particular.

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[23] See U. Kischel, *Rechtsvergleichung* (n. 17) 93. on the concept of the functional comparative method.
[24] See for example U. Kischel, *Rechtsvergleichung* (n. 17) 729 (for Asian law), 856 (for Islamic law).
[25] See the *Zeitschrift für Chinesisches Recht* and the *Zeitschrift für Japanisches Recht*.
[26] For the PECL see O. Lando, H. Beale (eds.), *Principles of European Contract Law, Part I and II*, (Alphen aan den Rijn: Kluwer, 2000); O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.), *Principles of European Contract Law, Part III* (Alphen aan den Rijn: Kluwer, 2003).
[27] For the PETL see European Group on Tort Law (ed.), *Principles of European Tort Law: Text and Commentary* (Vienna: Springer, 2005).
[28] For the PICC see S. Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edition, Oxford: Oxford University Press, 2015).
[29] For the CESL see R. Schulze (ed.), *Common European Sales Law* (Munich: Beck, 2012).
[30] For the DCFR see C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) - Outline Edition* (Munich: Beck, 2009).

Methodologically, there have been some interesting developments in German academia with regard to comparative law in recent times. For example, research on the European Union's acquis communautaire has largely developed into an independent branch of research within comparative law. Based on this approach, *Acquis Principles* have been published by the *Aquis-Group.*[31] The idea of legal transplants, which originates in the Anglo-American legal field, has also gained in importance within German comparative law research, although it remains to be seen to what extent it will emerge as an independent approach within comparative law.[32]

## 4. Significance of comparative law in legal practice

Comparative law can play an important role in German legal practice in at least two distinctive situations. First, comparative law is of use if, due to the applicable private international law, the possibility of applying at least two different legal systems arises. Here, it is part of the lawyer's duty towards his client to compare the possible applicable legal systems with each other and, the concept of forum shopping in mind, to decide on the legal system promising the best result for the client. Second, comparative legal considerations in legal practice may also prove useful where German law is applicable that has clearly been influenced by foreign legal concepts (within the framework of the so-called historic interpretation of a national provision) or in the event (which will be substantiated below) that the German courts are generally open to comparative legal considerations and attach enhanced importance to them.

However, it can certainly be said that comparative law arguments produced by legal practitioners are the very rare exception in legal practice – be it due to a lack of time or a lack knowledge of foreign legal systems. For German legal practitioners, comparative law is therefore, if at all, an intellectual hobby and not very conducive to the exercise of their profession, perhaps even a hindrance in that it is difficult to communicate to clients. It is only when the interpretation of international uniform law[33] or of "Europeanised" national law is on the agenda that legal practitioners are

[31] H. Schulte-Nölke, 'European Research Group on Existing Community Private Law ("Acquis Group") established' (2002) 10 *Zeitschrift für Europäisches Privatrecht (ZEuP)* 893; R. Schulze, 'Die Acquis-Grundregeln und der gemeinsamen Referenzrahmen' (2007) 15 *Zeitschrift für Europäisches Privatrecht (ZEuP)* 731.

[32] The "father" of legal transplants is *Alan Watson*. See for example his works *Legal Origins and Legal Change* (London: The Hambledon Press, 1991) and *Legal Transplants: An Approach to Comparative Law* (2nd edition, Athens/London: The University of Georgia Press, 1993); see also A. Janssen, R. Schulze, 'Legal Cultures and Legal Transplants in Germany' (n. 4) 225; M. Siems, *Comparative Law* (n. 18) 231.

[33] The same applies at least in part to private international law. Cf. B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (n. 2) 55.

regularly forced to deal with foreign sources and judgments and use them to support their own position.[34]

Beyond the forms of application of comparative law in legal practice, it may also be interesting for the foreign reader to understand how the German culture of legal practice is changing in times of globalisation.[35] Hence, a few brief remark on this topic: At least among the large law firms based in Germany, English is gaining increasing acceptance not only as the language of negotiations but also as the language contracts are drafted in, even if the agreed place of litigation or arbitration is located in Germany and German law is to be applied.[36] The choice of English as the language of the contract has far-reaching consequences, as it not only makes the Anglo-American terminology available, but also, consciously or unconsciously, the underlying concepts (such as the use of "breach of warranty" or "breach of condition").[37]

In addition, in certain, particularly globalised areas of law, German terms for English expressions are difficult to determine or are generally on the decline. This is true, for example, in the field of mergers and acquisitions, where the German word "*Unternehmenskauf*" is rarely used anymore.[38] Often, the German legal terminology does not provide any equivalents to Anglo-American terms at all (such as "due diligence", "leasing", "franchising" or "e-commerce"), so that only the English term together with the underlying concept can be adopted.

Under the impression of Anglo-American law, however, not only terms and legal concepts are adopted, but German contract drafting practice itself is also changing. Contracts from the common law world are mostly worded more precisely, but are also much longer and, from a German point of view, more confusing than the traditional German form of contract drafting.[39] However, due to the increasing

[34] The mere use of foreign sources and judgments in these cases is of course not comparative law in the strict sense.

[35] See in general A. Janssen, R. Schulze, 'Legal Cultures and Legal Transplants in Germany' (n. 4) 225.

[36] Cf. in more detail G. *Maier-Reimer*, 'Englische Vertragssprache bei Geltung deutschen Rechts' (2010) 60 *Anwaltsblatt (AnwBl)* 13.

[37] Cf. in more detail K.-P. *Berger*, 'Die Anglisierung des Wirtschaftsrechts', in B. Grunewald/H. P. Westermann (eds.), *Festschrift für Georg Maier-Reimer zum 70. Geburtstag* (Munich: Beck, 2010) 17.

[38] See on this topic M. Hentzen, 'Hegemonie oder Symbiose: Zur Rezeption des US-amerikanischen Rechts in der Vertragspraxis des M&A-Geschäfts', in W. Ebke, S. Elsing, B. Großfeld, G. Kühne (eds.), *Das deutsche Wirtschaftsrecht unter dem Einfluss des US-amerikanischen Rechts* (Frankfurt: Verlag Recht und Wirtschaft, 2011) 101; V. Treibel, 'Anglo-amerikanischer Einfluss auf Unternehmenskaufverträge in Deutschland - eine Gefahr für die Rechtsklarheit?' (1998) 43 *Recht der Internationalen Wirtschaft (RIW)* 1.

[39] For the underlying reasons see P. Mankowski, 'Rechtskultur - Eine rechtsvergleiche-anekdotische Annäherung an einem schwierigen und vielgesichtigen Begriff' (2009) 64 *Juristenzeitung (JZ)* 329; V. Treibel (n. 38) 4.

Americanisation, there is a recognisable tendency in Germany to formulate contractual texts in ever greater detail, at least for international matters.[40]

## 5. Significance of comparative law in legislation

Let us now turn to the significance of comparative law for German legislation in the field of private law.[41] There is no doubt that the German legislator regularly makes use of comparative law in major private law legislative projects. However, he uses comparative law to different ends: Sometimes a *contrasting function* ("*Kontrastfunktion*") is used, i.e. the legislator points to foreign models in order to reject them and take a different path for Germany. This often applies to certain elements of the US legal system that are considered incompatible with German legal culture. One example is found in the retention of the requirement of fault ("*Verschulden*") for contractual liability. During the reform of the law of obligations ("*Schuldrechtsreform*") in 2002 the legislator pointed to the common law strict liability-approach, just to then advocate the preservation of the requirement of fault.[42]

Even if there is no supporting statistical data, it seems likely that the *control or confirmation function* ("*Kontroll- oder Bestätigungsfunktion*") is used more often. The legislator then refers to identical or similar solutions within other legal systems in support of his own position, in order to emphasise the element of decisional harmony. Almost never, or at least very rarely, does the legislator, when creating new law, rely exclusively on another legal system in the sense of a genuine and sole *cognitive function* ("*Erkenntnisfunktion*").

Such a separation of functions, although it may seem useful in theory, is of course not always feasible in practice because the motives and weighting of the legislator's comparative law considerations are not always precisely discernible. This is why it is sometimes difficult to determine the exact value of comparative law when deciding on a solution model.

The fact that the German legislator relies on comparative law has practical reasons as well. These reasons can be found in the following maxim expressed by the famous *Rudolph Ihering:*

> "*The question of the reception of foreign legal institutions is not a question of nationality, but a simple question of expediency, of need. No one will fetch from afar*

[40] For more details on this subject see M. *Hentzen* (n. 38) 108.

[41] See also U. Drobnig, P. Dopffel, 'Die Nutzung der Rechtsvergleichung durch den deutschen Gesetzgeber' (1982) 46 *Rabel Zeitung für ausländisches und internationales Privatrecht (RabelsZ)* 253; B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (n. 2) 38; B. Markesinis, J. Fedtke (n. 14) 177.

[42] Bundestag-Drucksache 14/6040, 131.

> *what he can find at home just as well or better, but only a fool will reject the cinchona bark for the reason that it has not grown on his cabbage patch"* [43]

The legislator can therefore save time and resources in the preparation of legal texts if he uses existing solutions.[44] Furthermore, the experience that has been gained abroad in the context of the adopted foreign solution represents an important practical source of information, which is all the more important the more the other country is economically and culturally comparable with Germany. The legislator is relieved of the necessity of testing the practical effectiveness of the new law through the use of a foreign "laboratory", at least if the parameters of the two countries are comparable.

Concerning the reference points used by the legislator (which are taken mostly from German comparative law publications), a clear change has taken place.[45] For earlier legislative projects, reference was made almost exclusively to the law of foreign legal systems, and the closer Germany was legally, economically and socially comparable with the other state, the more intensively so. This means that the legislator has particularly drawn on the law of other European legal systems (and here above all Switzerland and Austria), and somewhat less dominant the USA, and continues to do so intensively. Comparative legal considerations with other national legal systems (e.g. from Africa, Asia or South America) were and are still rare, but not completely unheard-of.

In the last two decades, however, the German legislator has also made increasing use of two other sources of law in the field of private law, namely international uniform law (here above all the CISG) and principles developed on the basis of comparative law, in particular the PECL and the PICC. The influence of foreign legal systems (1.), of international uniform law (2.) and of soft law instruments (3.) on German legislation will be discussed below by way of example.

### 5.1. Foreign legal systems

If one looks at the beginnings of Germany as a state, it becomes apparent that the German legislator has always made use of comparative law with reference to foreign

[43] R. Ihering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* 3, 1 (Leipzig: Breitkopf und Härtel, 1865) 8. The German original reads as follows: "*Die Frage von der Rezeption fremder Rechtseinrichtungen ist nicht eine Frage der Nationalität, sondern eine einfache Frage der Zweckmäßigkeit, des Bedürfnisses. Niemand wird von der Ferne holen, was er daheim ebenso gut oder besser hat, aber nur ein Narr wird die Chinarinde aus dem Grund zurückweisen, weil sie nicht auf seinem Krautacker gewachsen ist.*"

[44] This is an important reason for the reception of foreign law, especially in smaller countries.

[45] For the referenced sources used see B. Markesinis, J. Fedtke (n. 14) 178.

legal systems. Even the General German Exchange Code ("*Allgemeine Deutsche Wechselordnung*") of 1848 and the General German Commercial Code ("*Allgemeines Deutsche Handelsgesetzbuch*") of 1861, which were the first uniform laws in the field of private law due to their implementation in all German states of the German Federation, are based on comparative law considerations. The same applies to the Bankruptcy Code ("*Konkursordnung*") of 1877, as is clear from the explanatory memorandum to the draft.[46] And even when the BGB of 1900 was created, reference was repeatedly made to numerous foreign legal systems (including France, Switzerland or Austria).[47]

Traditional comparative law has retained its importance for current German legislation. It is possible to identify at least three situations, although not always clearly distinguishable from one another, in which the legislator continues to resort to other legal systems. Intensive comparative law considerations are often conducted to solve new legal questions which arise due to technical or social changes. An example of this is the earlier creation of registered civil partnerships ("*eingetragende Lebenspartnerschaften*") for homosexual couples. At the time, the Ministry of Justice had commissioned a detailed study with a scientific institution that served to prepare the drafting of the provisions in German family law within this area.[48] The experience that other states had gained with their legislation then formed one of the bases for the decision of the German legislator to introduce registered civil partnerships.[49] In the meantime, however, the Civil Partnership Act ("*Lebenspartnerschaftsgesetz*") has been rendered redundant due to the admission of same-sex marriage by the Act on the Introduction of the Right to Marry for Persons of the Same Sex ("*Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts*") of 2017.[50] However, comparative legal references to numerous legal systems can also be found in the materials for this Act. To name just one example:

> "*Finally, the legal systems of other countries offer further evidence that the concept of the gender difference of the spouses is outdated. Recently, the Republic of Ireland has opened up marriage to same-sex couples. Civil marriage for persons of the same sex has been introduced in Belgium, the Netherlands, France, Luxembourg, Finland, Canada, South Africa, Spain, Norway, Sweden, Portugal, Iceland, Denmark,*

[46] B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (n. 2) 41.

[47] B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (n. 2) 43 particularly emphasises the influence of the Swiss Code of Obligations of 1881, which in turn is based on comparative law studies.

[48] Cf. the comprehensive expert opinions in J. Basedow, K. J. Hopt, H. Kötz, P. Dopffel (eds.), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften* (Tübingen: Mohr Siebeck, 2000).

[49] See in this respect the comparative legal considerations in the draft Law Supplementing the Civil Partnership Act and Other Laws in the Area of Adoption Law, Bundestag-Drucksache 17/1429, 3.

[50] Bundesgesetzblatt I 2017, 2787.

> *Argentina, Brazil, Uruguay, New Zealand, as well as in Scotland, England and Wales, in 41 states of the USA and the District of Columbia, as well as in two states and in the capital of Mexico. In addition, same-sex marriages are recognised in Israel."* [51]

In addition, the legislator falls back on foreign experience in static legal questions, i.e. questions that are relatively independent of technical and social innovations, when it comes to fundamental and yet unsatisfactorily solved classical problems of private law.[52] Examples of this are the reform of the law of obligations and the reform of the law of damages ("*Schadensersatzrechtsreform*") of 2002, which have both significantly redesigned the BGB.[53] For instance, when reforming the law of damages with regard to the introduction of immaterial damages in the case of contractual liability and strict liability,[54] the legislator referred to the legal situation in several other European countries and then codified in § 253 BGB[55] a highly controversial dispute in German tort law which is more than a hundred years old.[56] The reform of the law of obligations, the actual occasion for which was mainly the implementation of the Consumer Sales Directive 1999/44/EC, represents the largest reform of German private law ever. For this reform, the German legislator used not only the CISG, the PECL and the PICC but also numerous foreign legal systems.[57] This applies, for example, to the culpa in contrahendo, i.e. the pre-contractual liability ("*Verschulden bei Vertragsschluss*"), which was previously not codified and is now enshrined in § 311 BGB.[58] The legislator relied on French, Swiss, Italian and US American law to this

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[51] Bundesrat-Drucksache 273/15, 5, followed by further comparative legal considerations. The original German version reads as follows: "*Schließlich bieten die Rechtsordnungen anderer Länder weitere Anhaltspunkte dafür, dass das Konzept der Geschlechtsverschiedenheit der Ehegatten überholt ist. Jüngst hat die Republik Irland die Ehe für gleichgeschlechtliche Paare geöffnet. In den Ländern Belgien, Niederlande, Frankreich, Luxemburg, Finnland, Kanada, Südafrika, Spanien, Norwegen, Schweden, Portugal, Island, Dänemark, Argentinien, Brasilien, Uruguay, Neuseeland sowie in Schottland, England und Wales, in 41 Bundesstaaten der USA und dem District of Columbia, sowie in zwei Bundesstaaten und in der Hauptstadt Mexikos wurde die Zivilehe für Personen gleichen Geschlechts eingeführt. Darüber hinaus werden gleichgeschlechtliche Ehen in Israel anerkannt.*"

[52] It is precisely for this group of cases, however, that the legislator is increasingly resorting to international uniform law and principles, as will be explained in more detail below.

[53] See Bundestag-Drucksache 14/6040 and Bundestag-Drucksache 14/7752.

[54] Previously, compensation for immaterial damages under § 847 BGB old version was only possible in tort law and only in the case of culpable conduct.

[55] § 253 BGB reads: "*(1) Money may be demanded in compensation for any damage that is not pecuniary loss only in the cases stipulated by law. (2) If damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss.*"

[56] Bundestag-Drucksache 14/6040, 15.

[57] Soon more on the influence of the CISG, the PECL and the PICC on German law.

[58] § 311 BGB reads: "*(1) In order to create an obligation by legal transaction and to alter the contents of an obligation, a contract between the parties is necessary, unless otherwise provided by statute. (2) An obligation with duties under section 241(2) also comes into existence by 1. the commencement of contract negotiations, 2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of*

end.[59] With regard to the codification of the doctrine of change of circumstances ("*Wegfall der Geschäftsgrundlage*") in the current § 313 BGB,[60] the legislator referred to the legal situation in England, France, Italy, Greece, the Netherlands, Switzerland, the USA and even the German Democratic Republic.[61] When introducing § 314 BGB,[62] which deals with continuing obligations ("*Dauerschuldverhältnissen*"), in addition to art.

*affecting his rights, legal interests and other interests, or entrusts these to him, or 3. similar business contacts. (3) An obligation with duties under section 241(2) may also come into existence in relation to persons who are not themselves intended to be parties to the contract. Such an obligation comes into existence in particular if the third party, by laying claim to being given a particularly high degree of trust, substantially influences the pre-contract negotiations or the entering into of the contract."*

[59] Bundestag-Drucksache 14/6040, 161.

[60] § 313 BGB reads: "*(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke."*

[61] Bundestag-Drucksache 14/6040, 174ff. Incidentally, it is noticeable that the German legislator seems to have relatively little direct recourse to foreign literature or foreign law in general. Rather, the classical comparative law works such as Zweigert/Kötz, 'Einführung in die Rechtsvergleichung' (see, for example, with regard to the reform of the law of obligations, Bundestag-Drucksache 14/6040, 131, 175) or C. von Bar, *Gemeineuropäisches Deliktsrecht*, 1 (Munich: Beck, 1996) and 2 (Munich: Beck, 1999) are usually consulted and quoted (see, for example, with regard to the reform of the law of damages, Bundestag-Drucksache 14/7752, 15, 17, 31). In some cases, however, considerations of foreign law are also made without any indication of the source (see, for example, Bundestag-Drucksache 14/6040, 177).

[62] § 314 BGB reads: "*(1) Each party may terminate a contract for the performance of a continuing obligation for a compelling reason without a notice period. There is a compelling reason if the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period. (2) If the compelling reason consists in the breach of a duty under the contract, the contract may be terminated only after the expiry without result of a period specified for relief or after a warning notice without result. Section 323 (2) number 1 und 2 applies, with the necessary modifications, as regards the dispensability of specifying a period for such relief and as regards the dispensability of a warning notice. Specifying a period for relief and issuing a warning notice can also be dispensed with if special circumstances are given which, when the interests of both parties are weighed, justify immediate termination. (3) The person entitled may give notice only within a reasonable period after obtaining knowledge of the reason for termination. (4) The right to demand damages is not excluded by the termination.*"

73 CISG,[63] reference was made especially to arts. 1559-1570 of the Italian Civil Code ("*codice civile*"), which were then even used as a model.[64]

Finally, comparative law is used by the legislator rather incidentally and sometimes even without disclosure to solve certain, factually limited individual problems. As an example, § 661a BGB,[65] introduced in 2000, can be cited, with which the legislator wanted to counteract the inadmissible practice of businesses sending consumers notifications of alleged winnings, but never paying out these winnings. When this provision was created, the Austrian regulation, more precisely § 5j of the now defunct Austrian Consumer Protection Act ("*Konsumentenschutzgesetz*"), was adopted almost verbatim, without however mentioning this adoption in the legislative materials. Such covert comparative law is regrettable, since the adoption of the Austrian provision is obvious and undisputed both in the legal literature and at the Federal Court of Justice ("*Bundesgerichtshof*").[66] The legislator is called upon to disclose his comparative law considerations, especially with view to a subsequent historical interpretation by the courts.

### 5.2. International uniform law

The German legislator makes use not only of foreign legal systems but also, as mentioned above, increasingly relies on international uniform law, mainly for the solution of fundamental and so far unsatisfactorily regulated classical problems of private law. An example of this development is the influence of the CISG, which despite its weaknesses is considered a successful mixture of common law and civil law, on the German Civil Code.[67] In reforming the law of obligations, the legislature has drawn considerable inspiration from the CISG and reformed the German law of

[63] Art. 73 CISG reads: "*(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment. (2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time. (3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.*"

[64] Bundestag-Drucksache 14/6040, 177.

[65] § 661a BGB reads: "*An entrepreneur who sends promises of prizes or comparable announcements to consumers and creates the impression through the design of such mailings that the consumer has won a prize must give the consumer that prize.*"

[66] Bundesgerichtshof, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 153, 82, 90.

[67] See on the question of the CISG as a successful legal "melange" between common law and civil law A. Janssen, N. Ahuja, 'Legal Laboratory CISG: A Successful Hybrid between Common Law and Civil Law?' (2017) 21 *Vindobona Journal of International Commercial Law and Arbitration (VJICLA)* 129.

obligations on the basis of some of the fundamental decisions of the Convention.[68] The CISG has left clear traces in the German law of obligations, for example in the remedy system, in the concept of breach of duty ("*Pflichtverletzung*") according to § 280 BGB,[69] the introduction of the anticipatory breach according to § 323(4) BGB,[70] and in the determination of the defects as to quality ("*Sachmangel*") according to § 434 BGB.[71] In part, however, the influence of the CISG on today's BGB is not immediately visible since many elements of the Convention were already taken up by the Consumer Sales Directive 1999/44/EC. Implementing the directive did not necessitate an explicit reference to the CISG itself. Thus, for example, art. 35 CISG[72] was the inspiration for the creation of art. 2 of the Directive,[73] which was subsequently

[68] As already mentioned, art. 73 CISG was one of the guiding principles in the creation of § 314 BGB, which deals with continuing obligations.

[69] § 280 BGB reads: "*(1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty. (2) Damages for delay in performance may be demanded by the obligee only subject to the additional requirement of section 286. (3) Damages in lieu of performance may be demanded by the obligee only subject to the additional requirements of sections 281, 282 or 283.*"

[70] § 323(4) BGB reads: "*The obligee may revoke the contract before performance is due if it is obvious that the requirements for revocation will be met.*"

[71] § 434 BGB (in the version before the implementation of the Directive (EU) 2019/771 on Certain Aspects Concerning Contracts for the Sale of Goods) reads: "*(1) The thing is free from material defects if, upon the passing of the risk, the thing has the agreed quality. To the extent that the quality has not been agreed, the thing is free of material defects 1. if it is suitable for the use intended under the contract, 2. if it is suitable for the customary use and its quality is usual in things of the same kind and the buyer may expect this quality in view of the type of the thing. Quality under sentence 2 no. 2 above includes characteristics which the buyer can expect from the public statements on specific characteristics of the thing that are made by the seller, the producer (section 4 (1) and (2) of the Product Liability Act [Produkthaftungsgesetz]) or his assistant, including without limitation in advertising or in identification, unless the seller was not aware of the statement and also had no duty to be aware of it, or at the time when the contract was entered into it had been corrected in a manner of equal value, or it did not influence the decision to purchase the thing. (2) It is also a material defect if the agreed assembly by the seller or persons whom he used to perform his obligation has been carried out improperly. In addition, there is a material defect in a thing intended for assembly if the assembly instructions are defective, unless the thing has been assembled without any error. (3) Supply by the seller of a different thing or of a lesser amount of the thing is equivalent to a material defect.*"

[72] Art. 35 CISG reads: "*(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.*"

[73] Art. 2(1-2) Consumer Sales Directive 1999/44/EC reads: "*(1) The seller must deliver goods to the consumer which are in conformity with the contract of sale. (2) Consumer goods are presumed to be in conformity with the contract if they: (a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model; (b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted; (c) are*

transposed into § 434 BGB. The system of legal remedies laid down in arts. 45ff. CISG served as the model for art. 3 of the Directive,[74] which played an important role in restructuring the legal remedy system in German Law in 2002. In these instances, the CISG influences the German Code via EU law. This development will continue with Directive (EU) 2019/771 on Certain Aspects Concerning Contracts for the Sale of Goods, which is to be implemented by 1 January 2022 and which will repeal the Consumer Sales Directive 1999/44/EC. This new Directive also incorporates numerous elements taken from the CISG. The same applies to the accompanying Directive (EU) 2019/770 on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services.

### 5.3. Soft law instruments

Similarly, the influence of soft law instruments, understood here as non-binding sets of rules drawn up by scholars on the basis of comparative law, on German legislation has increased considerably over the last two decades. As already briefly mentioned, both the PECL[75] and the PICC[76] have been intensively used for the reform of the law of obligations, although the solutions found there, unlike in other legal systems and the CISG, are not, or at least only very rarely, applied in practice. In addressing the question of impossibility, both these sets of rules were mentioned and examined in

*fit for the purposes for which goods of the same type are normally used; (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.*"

[74] Art. 3 Consumer Sales Directive 1999/44/EC reads: "*(1) The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered. (2) In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6. (3) In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate. A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account: - the value the goods would have if there were no lack of conformity, - the significance of the lack of conformity, and - whether the alternative remedy could be completed without significant inconvenience to the consumer. Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods. (4) The terms "free of charge" in paragraphs 2 and 3 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials. (5) The consumer may require an appropriate reduction of the price or have the contract rescinded: - if the consumer is entitled to neither repair nor replacement, or - if the seller has not completed the remedy within a reasonable time, or - if the seller has not completed the remedy without significant inconvenience to the consumer. (6) The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.*"

[75] The first part of the PECL dates from 1995, the second part from 1999 and the third from 2002.

[76] The PICC were first published in 1994 and have since been amended and extended several times.

detail.[77] In addition, the PECL played an important role in the question of the incorporation of consumer law in the German Civil Code, in the liability of the debtor under § 276 BGB[78] and in particular in the reorganisation of the limitations rules under §§ 194ff. BGB.[79] The draft of the CESL (2011) and the DCFR (2009), on the other hand, have only played a minor role in reform efforts in Germany so far due to their considerably later date of origin compared to the PICC and PECL. Nevertheless, art. VI.-2:202(1) DCFR[80] was the inspiration for the creation of § 844(3) BGB,[81] which regulates the newly introduced survivorship claim ("*Angehörigenschmerzensgeld*").[82] However, a corresponding reference to the regulation of the DCFR cannot be found in the legislative materials, so that it can only be assumed that this is a case of covert comparative law.[83] In addition to the legal principles mentioned above, the German legislator is increasingly guided by model laws in drafting legislation which are at least in part based on comparative law. For example, in 1998, the tenth book of the Code of Civil Procedure ("*Zivilprozessordnung*" or "*ZPO")*) on arbitration proceedings (§§ 1025ff. ZPO) was largely based on the UNCITRAL Model Law on International Commercial Arbitration of 1985.

Let us then recapitulate: For the German legislator, comparative law has never been just a hobby, it has always been an integral part of contriving legislation. However, the points of reference for comparative law have changed. Attention is no longer focused only on foreign legal systems. It is increasingly turning to international uniform law and soft law instruments, which give comparative law as a whole greater weight and place it on a more solid foundation. This development can be observed particularly well with view to the reform of the law of obligations.

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[77] Bundestag-Drucksache 14/6040, 129.

[78] § 276 BGB reads: "*(1) The obligor is responsible for intention and negligence, if a higher or lower degree of liability is neither laid down nor to be inferred from the other subject matter of the obligation, including but not limited to the giving of a guarantee or the assumption of a procurement risk. The provisions of sections 827 and 828 apply with the necessary modifications. (2) A person acts negligently if he fails to exercise reasonable care. (3) The obligor may not be released in advance from liability for intention.*"

[79] Bundestag-Drucksache 14/6040, 92, 96, 131.

[80] Art. VI - 2:202(1) DCFR reads: "*Non-economic loss caused to a natural person as a result of another's personal injury or death is legally relevant damage if at the time of injury that person is in a particularly close personal relationship to the injured person.*"

[81] § 844(3) BGB reads: "*The person liable in damages must provide reasonable monetary compensation to a survivor, who at the time of the injury was in a particularly close personal relationship to the deceased, for the emotional distress caused to the survivor. A particularly close personal relationship is presumed if the survivor was the spouse, the civil partner, a parent or a child of the deceased.*"

[82] However, § 844(3) BGB is narrower, as a claim is only possible in the event of death, whereas under the DCFR, bodily injury may also suffice.

[83] See also C. von Bar, 'Review of the work Nils Jansen/Reinhard Zimmermann (eds.), Commentaries on European Contract Laws, Oxford: Oxford University Press, 2018' (2019) 219 *Archiv für die civilistische Praxis (AcP)* 594.

The numerous references to the above-mentioned sources are intended to achieve as much "international decisional harmony" as possible. By means of comparative law, German law thus becomes a "bridging law" to other legal systems and is intended to place "*Law made in Germany*" at the forefront of international legal development.[84] And, carefully glancing at the distance future, one can even speculate that the newly designed BGB could be regarded a "transitional law" with a view to the creation of a possible future European Civil Code.[85]

## 6. Significance of comparative law for the interpretation of law by courts

The interpretation of the law is the sole responsibility of the courts.[86] In order to answer the question as to whether German courts are allowed to engage in comparative law analyses and whether such considerations actually take place, a distinction must be made between purely national cases (1.) and cases with references to international uniform law (2.).

### 6.1. Interpretation of national law

Let us first turn to the interpretation of purely national law. Traditionally, national private law in Germany is interpreted using four methods: grammatical, historical, systematic and finally objective-teleological interpretation, i.e. interpretation according to the spirit and purpose of the norm.[87] If then the legislator has worked in a comparative manner as described above, courts can fall back on referenced legal systems within the purview of a historical interpretation. This means, in turn, that the more the legislator uses comparative law and is outright about it, as for example in the reform of the law of obligations, the easier it is for courts to include comparative law arguments in their legal reasoning. The legislator's comparative law approach thus makes it easier for the courts to utilise comparative law arguments themselves; in this respect, the legislator "opens the door" for the courts, so to speak.

[84] The German legislator also wanted to create a modern and competitive law of obligations. For a general description of this basic idea for German private and commercial law see the brochure "*Law: Made in Germany*" by the Federal Ministry of Justice and Consumer Protection, available at https://www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf.

[85] On the idea of a European Civil Code see already D. Martiny, N. Witzleb (eds.), *Auf dem Weg zu einem Europäischen Gesetzbuch* (Berlin: Springer, 1999).

[86] See in more detail for example B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (n. 2) 69.

[87] See F. K. von Savigny, *System des heutigen römischen Rechts*, volume 1 (Berlin: Veit, 1840) 212.

Since *Konrad Zweigert*'s 1949 fundamental essay entitled "*Rechtsvergleichung als universelle Interpretationsmethode*" ("*Comparative law as a universal method of interpretation*"),[88] the crucial question for legal interpretation has become whether comparative law interpretation should be recognised as the "*fünfte Auslegungsmethode*") ("*fifth method of interpretation*") in addition to the four traditional methods mentioned above. This would allow general recourse to findings of comparative law, i.e. even if the legislative history does *not* contain any comparative law references.[89] To this end, it must first be clarified whether a comparative law interpretation is at all permissible under German law, and, second, to what extent the courts already make actual use of comparative law (in the sense of a fifth method of interpretation?) when interpreting German law.

### 6.1.1. Admissibility of comparative law for the interpretation of national law

The Federal Constitutional Court ("*Bundesverfassungsgericht"*) has repeatedly stated that German law does not prescribe *how* the courts arrive at their decisions. Referring to article 20(3) of the Basic Law ("*Grundgesetz"*),[90] the Court states that judges are held to decide only in accordance with the law, without prescribing a particular method of interpretation.[91] It expressly considers the use of the comparative law method to be permissible. To this end, it has stated in one of its very first decisions:

> "*Moreover, the courts have made use of tried and tested tools, namely interpretation and gap-filling, and have also applied the comparative law method.*" [92]

Despite these clear words, there is reluctance or maybe even profound scepticism among the other German Federal Courts with regard to the use of foreign legal materials for the interpretation of national law. For example, the Federal Court of Justice has stated that[93] comparative law can only have a limited value in the interpretation of national law and the Federal Administrative Court

[88] K. Zweigert, 'Rechtsvergleichung als universale Interpretationsmethode' (1949/50) 15 *Rabel Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 1, 8.
[89] If foreign law is applicable as a result of the conflict of laws, the judge can of course, according to § 293 ZPO, easily refer to foreign sources and judgments.
[90] Art. 20(3) Basic Law reads: "*The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.*"
[91] Bundesverfassungsgericht, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 88, 145.
[92] Bundesverfassungsgericht, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 3, 225, 244. In German it reads as follows: "*Im Übrigen haben die Gerichte sich der erprobten Hilfsmittel, nämlich der Interpretation und Lückenfüllung, unter Verwertung auch der rechtsvergleichenden Methode bedient.*"
[93] Bundesgerichtshof, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 86, 240, 250.

("*Bundesverwaltungsgericht*") equally emphasised that jurisprudence is a "*nationally influenced science*".[94]

### 6.1.2. Status quo of comparative law in the interpretation of national private law

However, the above-mentioned does not mean that comparative law considerations are completely unknown to the courts when interpreting German private law. For the period from 1909 to 1928, no less than 17 judgments of the German Imperial Court ("*Reichsgericht*") can be found that contain comparative law references.[95] Most of the decisions concerned legal aspects of company law. *Hein Kötz* counts at least 14 judgments with comparative law considerations by the Federal Court of Justice before the year 2000.[96] For example, in interpreting § 616 BGB (temporary prevention from performing services),[97] the Federal Court of Justice used the Swiss Code of Obligations ("*Obligationenrecht*") to assess whether the injuring party must pay damages for loss of earnings even if the injured party continues to receive a renumeration.[98] For the interpretation of § 89b(1) of the German Commercial Code ("*Handelsgesetzbuch*")[99] the court referred to provisions of Italian, French and especially Swiss law with regard to the transfer of a compensation claim of a commercial agent to his widow.[100]

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[94] Bundesverwaltungsgericht, Neue Juristische Wochenschrift (NJW) 1993, 276. In German it reads as follows: "*national geprägte Wissenschaft*".

[95] B. Aubin, 'Die rechtsvergleichende Interpretation autonom-internen Rechts in der deutschen Rechtsprechung', (1970) 34 *Rabel Zeitschrift für ausländisches und internationales Privatrecht* (RabelsZ) 458.

[96] H. Kötz, 'Der Bundesgerichtshof und die Rechtsvergleichung' in C. W. Canaris, A. Heldrich, K. Schmidt, C. Roxin, G. Widmaier (eds.), *50 Jahre Bundesgerichtshof* (Munich: Beck, 1999) 825, 832. As far as can be seen, further investigations in this area, which cover the period thereafter, are unfortunately not available.

[97] § 616 BGB reads: "*The person obliged to perform services is not deprived of his claim to remuneration by the fact that he is prevented from performing services for a relatively trivial period of time for a reason in his person without fault on his part. However, he must allow to be credited against him the amount he receives for the period when he is prevented under a health or accident insurance policy that exists on the basis of a statutory duty.*"

[98] Bundesgerichtshof, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 21, 112, 119.

[99] § 89b(1) German Commercial Code reads: "*The commercial agent shall be entitled to demand a reasonable indemnity from the principal, after termination of the agency contract, if and to the extent that 1. the principal continues to derive substantial benefits, even after termination of the agency contract, from business relations with new customers brought by the commercial agent, and 2. the payment of an indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. If the commercial agent has so significantly increased the volume of business with a customer that it is economically equivalent to the acquisition of a new customer, it shall be deemed equal to the acquisition of a new customer.*"

[100] Bundesgerichtshof, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 24, 214, 218. See also B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (n. 2) 70.

Tort law is an important focus of the courts' usage of comparative law.[101] The significant case law on compensation for immaterial damage in the case of violations of personality rights is based (in part) on comparative law considerations. As early as 1961, in the famous *ginseng root case,* the Federal Court of Justice used Swiss law, more precisely art. 49(1) of the Swiss Code of Obligations (which has since been revised), to emphasise the satisfaction function ("*Genugtuungsfunktion*") of immaterial damages in the case of violations of personality rights.[102] In the equally well-known *tv announcer's case* that was rendered a few years later, the Court based the same result on more far-reaching and general comparative considerations. It argued that "*in almost all legal systems in which (…) the personal value of the individual is of central importance, immaterial damages are recognised as the sanction under private law adequate to the violation of the right of personality*".[103] Further, in the *wrongful life case*[104] of 1983, the Federal Court of Justice referred extensively to relevant U.S. case law as well as, in particular, to the English case *McKay v. Essex Health Authority*[105] and finally dismissed the complaint of a severely disabled child against a physician, refusing to apply the categories of "*wrongful life*" or "*wrongful birth*".

In evaluating the judgments of the Federal Court of Justice, the conclusion can be drawn that the Court resorts to comparative law considerations only very selectively.[106] This, in turn, illustrates that the idea of using comparative law as a genuine fifth interpretative method has not (yet) been able to assert itself. The brief explanations also show, albeit not on an empirical basis, how rarely comparative law comes into play at the Federal Court of Justice for the purpose of interpreting national law. Furthermore, it becomes apparent that even where comparative law considerations are relied on, they usually take on a secondary role for the specific decision. In most of the examined judgments, it appears that the judges had already come to a decision by other means and only added references to foreign law afterwards in order to increase the persuasiveness of the judgment. Consequently, the Federal Court of Justice makes use of comparative law, above all, with view to its

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[101] One of the reasons for this is that there is a relative lack of norms in German tort law, and in particular § 823(1) BGB and §§ 249ff. BGB are particularly suitable as gateways for comparative law considerations.

[102] Bundesgerichtshof, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 35, 363, 369.

[103] Bundesgerichtshof, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 39, 124, 132. In German it reads as follows: „*In fast allen Rechtsordnungen, in denen entsprechend unserer Auffassung dem Personenwert des Einzelnen eine zentrale Bedeutung im Rechtssystem zukommt, der immaterielle Schadensersatz als die der Persönlichkeitsrechtsverletzung adäquate privatrechtliche Sanktion anerkannt.*"

[104] Bundesgerichtshof, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 86, 240ff.

[105] *McKay v. Essex Health Authority* [1982] 2 WLR 890.

[106] Likewise with this judgment B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (n. 2) 46.

control and confirmation function and, less frequently, its contrasting function[107] - if it makes use of comparative law considerations at all.[108] Hence, comparative law does not generally play a decisive role in the interpretation of national law. The use of comparative law is regarded by judges as a possible expedient, but also a purely optional venture. Further, and this is not intended to be a general scolding of judges, a comparative analysis will often prove unfeasible in practice due to a judicial lack of time, language skills and access to trustworthy sources of law.[109]

However, and this factor should not be underestimated, the "flow" of comparative law is not simply linear.[110] German jurisprudence, for instance, relies heavily on German legal literature, which in turn has thoroughly processed and absorbed foreign legal concepts.[111] In this way, foreign law influences the interpretation of national law, even though the courts themselves do not make use of a comparative method.[112] *Bernhard Großfeld*, who finds it difficult to accept comparative law as a fifth method of interpretation in the sense of *Konrad Zweigert*, considers this to be the preferable path to head down:

> "*It is generally better to run comparative law through the filter of legal literature. As part of a creative jurisprudence, science thus fulfils its most beautiful task: to think ahead of practice and show the way to the future.*" [113]

## 6.2. International uniform law

In his fundamental habilitation thesis "*Internationales Einheitlichrecht*" ("*International Uniform Law*"),[114] *Jan Kropholler* adresses the question of interpretation in the context of international uniform law:

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[107] Examples of the use of this contrast function of comparative law can be found in Bundesgerichtshof, Neue Juristische Wochenschrift (NJW) 1981, 1206ff. (unethicality of instalment loans) and Bundesgerichtshof, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 86, 240ff. (damages for wrongful life and wrongful birth respectively).

[108] B. Markesinis, J. Fedtke (n. 14) 173.

[109] A similar assessment is made by B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (n. 2) 35.

[110] For further details see B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (n. 2) 71; B. Markesinis, J. Fedtke (n. 14) 170.

[111] On the question which authors or which works the Federal Court of Justice cites see B. Markesinis, J. Fedtke (n. 14) 175.

[112] It goes without saying, however, that direct proof is difficult to provide to this end.

[113] B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (n. 2) 36. In German, it reads as follows: "*Es ist im Allgemeinen besser, die Rechtsvergleichung durch den Filter der Literatur laufen zu lassen. Die Wissenschaft erfüllt damit als Teil einer schöpferischen Jurisprudenz ihre schönste Aufgabe: Der Praxis vorzudenken und den Weg in die Zukunft zu weisen.*"

[114] J. Kropholler, *Internationales Einheitsrecht* (Tübingen: Mohr Siebeck, 1975) 280.

> "*The foreign case law and literature on the text of the uniform law subject to interpretation must be observed without fail, because without this cross-border perspective the desired uniformity in international legal development cannot be achieved.*" [115]

The German courts take this demand into account, at least to a large extent, when interpreting international uniform law.[116] This applies, for example, to the interpretation of international transport and maritime law, where the Federal Court of Justice regularly refers to foreign judgments and literature.[117] Also, in the area of international sales law, i.e. the CISG, the Court refers to foreign literature and case law, as for example a decision from 2004 reveals.[118] In this case, several Dutch and Canadian arbitral decisions were explicitly referred to in order to solve questions regarding the burden of proof. The questions concerned the seller's knowledge or grossly negligent ignorance of the lack of conformity of the delivered goods within the scope of art. 40 CISG.[119] In a decision of 2014, the Federal Court of Justice[120] referred to case law of the Swiss and Austrian Federal Court of Justice to determine a fundamental breach of contract under art. 25 CISG[121] and to answer the related question of contract avoidance under art. 49 CISG.[122] This much greater

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115 In German, it reads as follows: "*Die ausländische Rechtsprechung und Lehre zum auszulegenden Text des Einheitsrechts ist unbedingt zu beachten, weil ohne diesen Blick über die Grenzen die gewünschte international einheitliche Rechtsentwicklung nicht möglich ist.*"

116 See also and with some statistics B. Markesinis, J. Fedtke (n. 14) 165.

117 Bundesgerichtshof, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 88, 157, 160; Bundesgerichtshof, Neue Juristische Wochenschrift (NJW) 1976, 1583, 1584. In the area of conflict of laws German case law traditionally refers relatively often to foreign judgments and literature anyway.

118 Bundesgerichtshof, Neue Juristische Wochenschrift (NJW) 2004, 3181.

119 Art. 40 CISG reads: *"The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer."*

120 Bundesgerichtshof, Neue Juristische Wochenschrift (NJW) 2015, 867.

121 Art. 25 CISG reads: "*A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.*"

122 Art. 49 CISG reads: "*(1) The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed. (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made; (b) in respect of any breach other than late delivery, within a reasonable time: (i) after he knew or ought to have known of the breach; (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.*"

consideration of foreign judgments and literature compared to the interpretation of national law is understandable, among other things, because the conventions of international uniform law contain standards such as art. 7(1) CISG[123] which require a uniform international application and thus the use of foreign case law and literature.[124] Nevertheless, this conclusion must not obscure the fact that there is no room for a comparative legal interpretation in international uniform law by reference to national law, since this approach would downright contradict the required uniform and international application.[125] A limited possibility of referring to foreign legal systems may only arise where the drafting history of the international uniform law expressly refers to them as a model.

## Conclusion

So what is the significance of comparative law in 21st century Germany? Is it just a hobby taken on by a few bored academics, merely a "*collection of building blocks in a heap on which they are left lying unused*",[126] or is it one of the supporting pillars of the German private law landscape? The result varies depending on the field examined. Comparative law is of very little importance in the area of legal practice, at least as long as the specific case does not exhibit any international connection. Its importance within legal education can be considered somewhat higher, although there is a clear need for improvement here. Points of criticism are, in particular, the failure to schedule comparative law as a compulsory subject as well as the inadequate systematic integration into lectures on other parts of private law. Comparative law remains more of a foreign body than an integral component in legal education.

On the other hand, the importance of comparative law within legal research and legislation in Germany is significant. Here, comparative law is certainly not a leisurely exercise, but rather takes on a central position. Especially in the field of legislation, the importance of comparative law seems to have increased significantly in the last two decades, in line with *Lord Goff's* predictions. In part, this is due to the numerous references to international uniform law, in particular the CISG, and to comparative

[123] Art. 7(1) CISG reads: "*In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*"

[124] The German-language commentaries on the CISG are regularly used instead or in addition, all of which have deal extensively with foreign case law and literature. See e.g. I. Schwenzer, P. Schlechtriem, U. Schroeter (eds.), *Kommentar zum einheitlichen UN-Kaufrecht – CISG,* (7th edition, Munich: Beck, 2019).

[125] Similar F. Ferrari, 'Art. 7 CISG', in I. Schwenzer, P. Schlechtriem, U. Schroeter (eds.), *Kommentar zum einheitlichen UN-Kaufrecht – CISG* (n. 124) 40.

[126] B. Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (n. 2) 18. In the original German version it reads as follows: "*Ansammlung von Bausteinen auf einem Haufen, auf den sie ungenutzt liegenbleiben*".

legal principles such as PECL and PICC. These references seem to go beyond the mere update of national law, they indicate an attempt to create an even stronger decisional harmony with the rest of the world. This can be seen for example in the reform of the law of obligations. Here, among other objectives, the legislator is attempting to bridge the gap to other legal systems, maybe even with a possible European Civil Code in mind in the very long run.

The most difficult endeavour is certainly determining the true significance of comparative law for the interpretation of national law by the courts.[127] The Federal Court of Justice itself, despite expressing some scepticism, relies on comparative law considerations from time to time. However, it does not do so systematically and, ultimately, the use of comparative law seems somewhat arbitrary. The Federal Court of Justice has never been able to bring itself to recognise comparative law as a genuine fifth method of interpretation. However, since the legislator is making use of comparative law more and more, the courts will be provided with increasing opportunities to resort to comparative law arguments within the framework of the historical interpretation.[128] It should also be borne in mind that German courts make intensive use of literature in their decisions, which in turn has often incorporated comparative law considerations. In the longer term, however, and in order to clarify the significance of comparative law for the interpretation of the law, a fundamental clarification by the Federal Court of Justice appears desirable. Despite the understandable difficulties in taking comparative law into account, the German courts, and ultimately all German lawyers, should lend an ear to *Lord Goff* when he reflects on the general role of comparative law: "*We must welcome rather than fear its influence.*"[129]

[127] This applies only in part to the interpretation of international uniform law, as shown above.

[128] A good example for this development is the decision of the Federal Court of Justice from 2012 (see Bundesgerichtshof, Neue Juristische Wochenschrift (NJW) 2012, 3714). For the interpretation of the German provision dealing with the anticipatory breach (§ 324(4) BGB) the judges used literature and case law on the CISG, as art. 72 CISG was the model after which the German provision was drafted.

[129] R. Goff (n. 1) 745, 748.