International Association of Procedural Law

XI. World Congress on Procedural Law

11. Weltkongreß für Prozeßrecht

„Procedural Law on the Threshold of a New Millennium“

„Das Prozeßrecht an der Schwelle eines neuen Jahrtausends“

23rd - 28th of August 1999

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UNIVERSITÄT WIEN

GENERAL REPORTS

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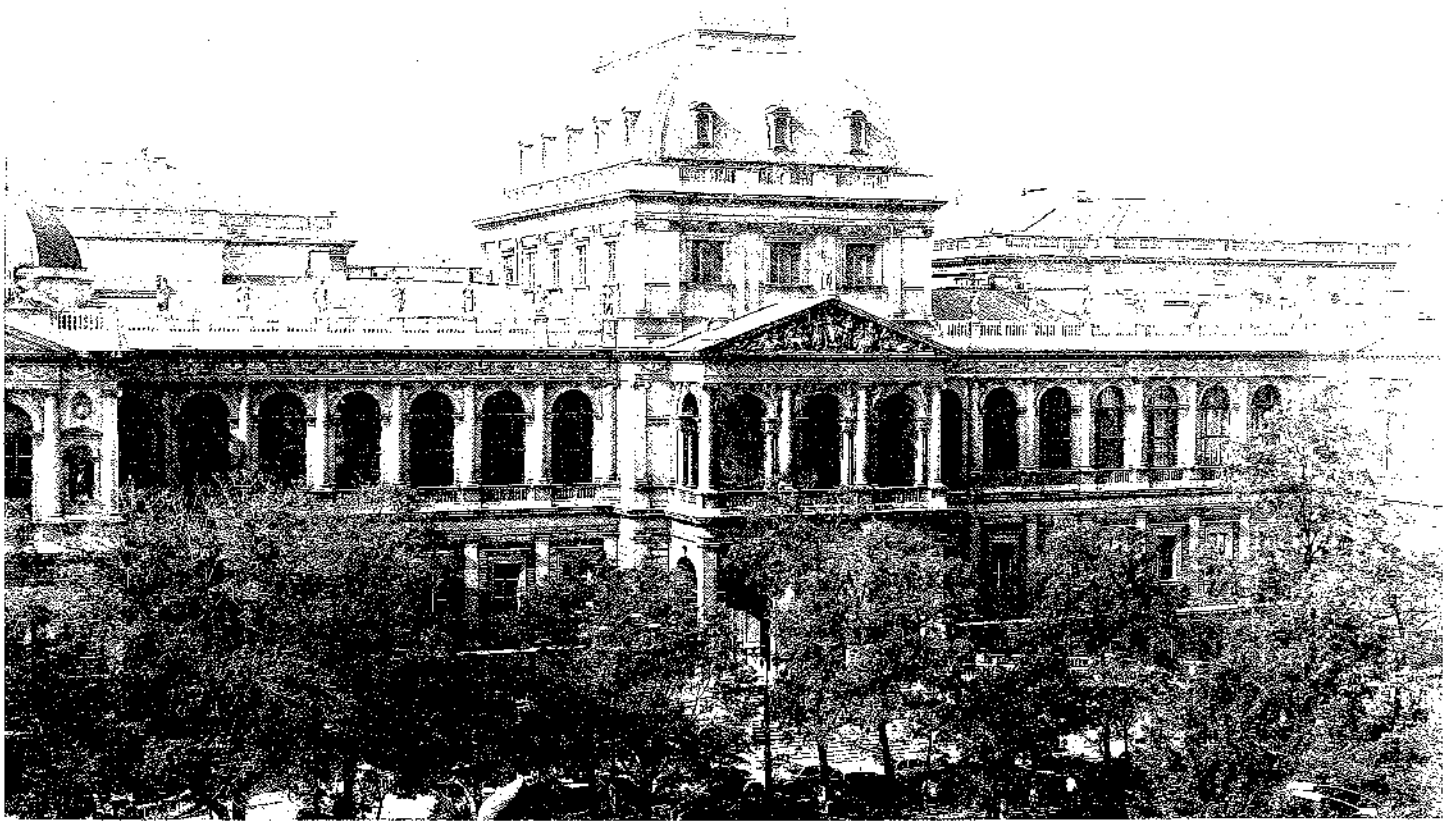

GENERAL REPORTS
GENERALBERICHTE

LINDE

Die Drucklegung dieser Generalberichte wurde durch den Linde Verlag gefördert.
The publishing of these general reports was supported by Linde Verlag, Vienna.

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CIVIL LITIGATION WITHOUT FRONTIERS: HARMONISATION AND UNIFICATION OF PROCEDURAL LAW

Prof. Geoffrey C. HAZARD jr., USA

CIVIL LIGITATION WITHOUT FRONTIERS: HARMONISATION AND UNIFICATION OF PROCEDURAL LAW

by

Prof. Geoffrey C. Hazard jr., USA

(General Reporter for the Common Law Countries)

I. INTRODUCTION

This report is in somewhat unorthodox form. The principal component of my report is the Transnational Rules of Civil Procedure, a proposed "code" of civil procedure for adjudication of transnational civil disputes. In concept the rules in this code could be adopted by any national state, whether civil law or common law or a "mixed" system, for adjudication of the defined classes of cases. The proposed code is in the tradition pioneered in the Model Code for Ibero America and furthered by Professor Storme in the project for Approximation of Judiciary Law in the European Union.[1] The text has evolved through several prior drafts and reflects consultation with colleagues in other countries, both common law and civil law.

The text of the Transnational Rules of Civil Procedure initially was a project of the American Law Institute, of which I have been Director. UNIDROIT, the International Institute for the Unification of Private Law, has joined as a cosponsor of the project, following an expert report by Professor Rölf Stürner. It is expected that UNIDROIT will organize a complementary set of advisory conferences for discussion of the proposal. UNIDROIT's sponsorship will affirm the truly international character of the project and thus, we trust, improve the possibilities of acceptance of the concept in the years ahead.

The present draft in similar form as presented herewith has been designated Discussion Draft No. 1 of the American Law Institute project. It is presented to the World Congress and colleagues in the field of civil procedure for discussion and criticism. At an earlier stage in drafting, suggestions and criticisms of colleagues from common law countries were obtained through a questionnaire. The questionnaire and the responses will be published after the Congress.

1 See Marcel Storme (ed.) Approximation of Judiciary Law in the European Union, Kluwer, 1994, See also Anteproyecto del Codigo Procesal Civil Modelo para Iberoamerica, Revista de Processo, Vols. 52 and 53, 1988 and 1989.

II. INTERNATIONAL "HARMONIZATION" OF PROCEDURAL LAW

The human community of the world lives at closer quarters today than in ancient days. International trade is at an all time high and steadily increasing; international investment and monetary flows increase apace; businesses from the developed countries establish themselves all over the globe directly or through subsidiaries; business people travel abroad as a matter of routine; ordinary citizens in increasing numbers live temporarily or permanently outside their native countries. As a consequence there are positive and productive interactions among citizens of different nations in the form of increased commerce and wider possibilities for personal experience and development. There are also inevitable negative interactions, however, including increased social friction, legal controversy and litigation.

In dealing with these negative consequences, the costs and distress resulting from legal conflict can be mitigated by reducing differences in legal systems, whereby the same or similar "rules of the game" apply no matter where the participants may find themselves. The effort to reduce differences between national legal systems is commonly referred to as "harmonization." Another term is "approximation," meaning that the rules of various legal systems should be reformed in the direction of approximating each other. Most endeavors at harmonization have addressed substantive law, particularly the law governing commercial and financial transactions.[2]

Harmonization of the law of procedure has made much less progress. It has been impeded by the assumption that national procedural systems are too deeply embedded in local political history and cultural tradition to permit reduction or reconciliation of differences between legal systems. There are, to be sure, some international conventions dealing with procedural law, notably The Hague Convention on the Taking of Evidence Abroad and European conventions on recognition of judgments. Effort continues on a more general convention on personal jurisdiction and recognition of judgments.[3]

The need for harmonization of procedural law is evident. The pioneering work of Professor Marcel Storme has demonstrated that harmonization can be approximated. All practicing lawyers know that resolution of legal disputes often depends on the identity of the forum that assumes jurisdiction of the dispute. All judges and lawyers recognize that the procedure for adjudication of disputes employed by a forum can be influential in determination of the merits - that is, the actual outcome of the litigation.

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2 See, e.g., Convention on the Rights of the Child, November 20, 1989, 28 I.L.M. 1448; United States - Egypt Treaty Concerning the Reciprocal Encouragement and Protection of Investments, September 29, 1982, 21 I.L.M. 927; Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, 19 I.L.M. 33; International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 16, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

3 See Catherine Kessedjian, Hague Conference on Private International Law, International Jurisdiction and Foreign Judgments in Civil and Commercial Matters (transl.) (April 1997).

From the viewpoint of clients, assuming that general principles of fairness have been observed, the outcomes are of salient importance. The fundamental objective of harmonization therefore is reduction of the risk of different outcome in adjudication that results from difference in forum and difference in procedure. Complete elimination of such differences is an impossibility, even within national systems, but their reduction is an eternal goal in administration of justice. Establishing the same rules of procedure, regardless of forum, is a means to that end.

III. FUNDAMENTAL SIMILARITIES IN PROCEDURAL SYSTEMS

In undertaking international harmonization of procedural law Professor Taruffo, Dr. Elisabetta Silvestri (the Associate Reporter) and I have identified both fundamental similarities among procedural systems and fundamental differences between them. Obviously, it is the fundamental differences that present the difficulties. However, it is important to keep in mind that all modern civil procedural systems have fundamental similarities. The similarities among procedural systems can be summarized as follows:

- Standards governing assertion of personal jurisdiction and subject matter jurisdiction
- Specifications for a neutral adjudicator
- Procedure for notice to defendant
- Rules for formulation of claims
- Provision for expert testimony
- Rules for reception of evidence
- Rules governing deliberation and decision leading to judgment by the tribunal and for appellate review
- Rules of finality of judgments.

Of these, the rules of personal jurisdiction, notice and recognition of judgments are sufficiently similar from one country to another that they have been susceptible to substantial resolution through international conventions. Concerning personal jurisdiction, the United States is aberrant in having an expansive concept of "longarm" jurisdiction, although this difference is one of degree rather than one of kind. Specification of a neutral adjudicator begins with realization that all legal systems have rules to assure that a judge or other adjudicator should be disinterested as between the parties. Accordingly, in transnational litigation reliance generally can be placed on the local rules expressing that principle. Similarly, an adjudicative system by definition requires a principle of finality. The concept of "final" judgment therefore is also generally recognized, although some legal systems permit reopening a determination more liberally than other systems. The corollary concept of mutual recognition of judgments is also generally accepted.

IV. DIFFERENCES BETWEEN PROCEDURAL SYSTEMS

The differences in civil procedural systems can be considered along two divisions. Along one division there are differences between the common law systems and the civil law systems. The common law systems all derive from England and include Canada, Australia, New Zealand, South Africa, India, and the United States, as well as Israel, Singapore and Bermuda. The civil law systems originated on the European continent and include those derived from Roman law (the law of the Roman Empire codified in the Justinian Code) and canon law (the law of the Roman Catholic Church, itself substantially derived from Roman law). The civil law systems include those of France, Germany, Italy, and Spain and virtually all other European countries and, in a borrowing or migration of legal systems, those of Latin America and Japan.

The significant differences between common law and civil law systems are as follows:

- The judge in civil law systems, rather than the advocates in common law systems, has responsibility for development of the evidence and articulation of the legal concepts that should govern decision. However, there is great variance among civil law
- systems in the manner and degree to which this responsibility is exercised, and no doubt variance among the judges in any given system.
- Civil law litigation in many systems proceeds through a series of short hearing sessions - sometimes less than an hour each - for reception of evidence, which is then consigned to the case file until an eventual final stage of analysis and decision. In contrast, common law litigation has a preliminary or pretrial stage, sometimes more than one, and then a trial at which all the evidence is received consecutively.
- A civil law judgment in the court of first instance (i.e., trial court) is generally subject to more searching reexamination in the court of second instance (i.e., appellate court) than a common law judgment. Reexamination in the civil law systems extends to facts as well as law.
- The judges in civil law systems serve a professional lifetime as judge, whereas the judges in common law systems are almost entirely selected from the ranks of the bar. Thus, civil law judges lack the experience of having been a lawyer, for whatever effects that may have.

These are important differences, but not worlds of difference.
The other division is between the American version of the common law system and other common law systems, and is of at least equal significance. The American system is unique in the following respects:

- Jury trial is broadly available of right in the American federal courts and in the state court systems. No other country routinely uses juries in civil cases.
- American rules of discovery give wide latitude for exploration of potentially relevant evidence.
- The American adversary system generally affords the advocates far greater latitude in presentation of a case than is customary in other common law systems. In part this is because of the use of juries.

- The American system operates through a unique cost rule. Each party, including a winning party, ordinarily pays that party's own lawyer and cannot recover that expense from a losing opponent. In most all other countries the winning party, whether plaintiff or defendant, recovers at least a substantial portion of his litigation costs.[4]
- American judges are selected by a variety of ways in which political affiliation plays an important part. In most other common law countries judges are selected on the basis of professional standards.

However, it should also be recognized that there are many types of American procedures that much more closely resemble the counterparts in other countries. These are the procedures in American administrative adjudications, which are conducted by professional judges without juries.

V. PHILOSOPHY OF THE TRANSNATIONAL RULES PROJECT

The philosophy of the project for the Transnational Rules of Civil Procedure reflects two basic principles, one substantive and the other of technique or process. The substantive principle is that all systems for adjudication of civil controversies in modern constitutional regimes are similar if not identical in certain basic respects. This thought was expressed colloquially but vividly by Professor Storme in his guidance of the Approximation project. As stated in his Introduction to the report of that project, "[n]ot only do I find, when it comes down to the nitty-gritty, that the distinction between the two legal families is less than is believed, but also, as my experience in our Working-Group showed, that in the final analysis the differences are more of a formal and/or terminological nature".[5]
The other principle, that of technique or process, can be simply stated: Exposition and criticism of legal concepts is most efficient and penetrating when it is conducted by means of draft texts of proposed rules. Correlatively, legal concepts of a higher level of abstraction - jurisprudence - are an important aid in formulation and comprehension of legal rules. Of course, the close analysis of legal rules can stimulate jurisprudential reflection and appreciation of jurisprudence is an indispensable method of legal analysis. The revised project in cooperation with UNIDROIT will commence with a formulation of general principles. However, when all is said and done, law must be expressed in rules. Hence, the project for Transnational Rules of Civil Procedure will thereafter proceed through the mechanism of successive drafts of a code of rules. The Discussion Draft presented is indicative of a format that may eventually be proposed.

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4 See generally A. Tomkins and T. Willing, Taxation of Attorney's Fees: Practices in English, Alaskan and Federal Courts (1986). See also, e.g., A. Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L.Rev. 792 (1963); T. Rowe, The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L. Rev. 651.
5 See Marcel Storme (ed.), Approximation of Judiciary Law in the European Union, 55.

VI. REVISIONS FROM PRIOR DRAFTS AND FUTURE WORK

Prior drafts of the Rules have been published.[6] These drafts have elicited valuable criticism and comments from legal scholars and lawyers from both civil and common law systems.[7]

Comparison will demonstrate that many modifications have been adopted as a result of discussions and deliberations following those publications. The changes include, among others, of the provisions on scope and on composition of the tribunal, the incorporation of "principles of interpretation," the sequence and scope of discovery, and specification of a settlement offer procedure. These revisions emerged from discussions at several locations with advisers from various countries, including meetings in Bologna, Italy, Vancouver, Canada, and Philadelphia, USA and also conducted through correspondence. The net effect can be described as a new text but the present draft is still a "work in progress."

The participation of UNIDROIT marks a new phase of the project. We will reconsider the basic premises and will formulate general principles, to be elaborated through a new text. Criticism and suggestions addressed to this draft will provide useful guidance in that endeavor.

The Reporters therefore welcome suggestions and criticisms. Our address is as follows:

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6 The first draft is published in 30 Cornell International Law Journal 89 (1995). The second draft is published in 33 Texas Int'l L. J. 499 (1998).

7 Cf. Gary Born, Critical Observations on the Draft Transnational Rules of Civil Procedure, 30 Tex. Int'l L.J. 387 (1998), Russell J. Weintraub, Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure, 30 Tex. Int'l L.J. 413 (1998), Jacob Dolinger and Carmen Tiburcio, The Forum Law Rule in International Litigation – Which Procedural Law Governs Proceedings to be Performed in Foreign Jurisdictions: Lex Fori or lex Diligentiae?, 30 Tex. Int'l L.J. 425 (1998), Gerhard Walter and Samuel P. Baumgartner, Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project, 30 Tex. Int'l L.J. 463 (1998), Catherine Kessedjian, First Impression of the Transnational Rules of Civil Procedure from Paris and The Hague, 30 Tex. Int'l L.J. 477 (1998), Geoffrey C. Hazard, Jr., Transnational Rules of Civil Procedure: Preliminary Draft No. 1, 30 Tex. Int'l L.J. 499 (1998), Michele Taruffo, Drafting Rules for Transnational Litigation, ZZPInt'l L.J. 449 (1997). We also received written contributions from Mathew Applebaum, Steven Burbank, Antonio Gidi, Stephen Goldstein, Richard Hulbert, J. A. Jolowicz, Dianna Kempe, Mary Kay Kane, Ramon Mullerat, Hans Rudolf Steiner, Rolf Sturner, Louise Teitz, Janet Walker, Garry Watson, Des Williams and others:

We are pleased to say that, effective January 1999, Dr. Antonio Gidi has been designated as Assistant Reporter.

VII. RULES

Scope and Personal Jurisdiction

I. Disputes to Which These Rules Apply

(a) Subject to domestic constitutional provisions and statutory provisions not superseded by these Rules, the courts of a state that has recognized these Rules shall apply them in disputes arising from a sale, lease, loan, investment, or any other business transaction:

(1) In which a plaintiff and a defendant are habitual residents of different states; or

(2) Concerning property, either fixed or movable, that is located in one state but concerning which a claimant who is a habitual resident of another state makes a claim of ownership or of a security interest.

(b) A corporation, société anonyme, unincorporated association, partnership, or other organizational entity is considered a habitual resident both of the state from which it has received its charter of organization and of the state where it maintains its administrative headquarters.

(c) Participation by additional parties, whether as claimant, defendant, or third party, is determined according to Rule 2.

(d) Upon demand of all parties who are not habitual residents of the state, the litigation shall proceed according to the ordinary procedural law of the forum.

(e) Forum law may include other civil matters in the scope of these Rules.

II. Personal Jurisdiction and Joinder

(a) A proceeding under these Rules may be maintained in the courts of a state:

(1) Designated by prior mutual agreement of the parties;

(2) In which a defendant is subject to the compulsory judicial authority of that state, as determined by that state's law governing personal jurisdiction or by international convention to which the state is a party;

(3) Where fixed property is located when competence is based on Rule 1(a)(2).

(b) Jurisdiction may be exercised over another person who:

(1) Has a legal interest in the dispute or its subject matter and who petitions to intervene in the proceeding; or

(2) Should participate in the interest of fair and efficient adjudication if:

(A) The person in question is subject to the compulsory judicial authority of the state; and

(B) The court determines that a decision cannot be effective if that person is not present or that the participation of that person is useful in the interest of justice.

(c) When another person ought to be made a party to the proceeding:

(1) If the court has jurisdiction over that person, the person should be summoned as provided in Rule 7;

(2) If the person is not subject to the jurisdiction of the Court, the person should be notified with a copy of the complaint and other pleadings and invited to intervene.

(d) Application of these Rules is not affected by participation of additional parties, except as provided in Rule 1(d). If, prior to plenary hearing, there is joinder of an additional party whose presence as a party would render Rule 1 applicable, these Rules shall apply, unless the court orders otherwise in the interest of orderly administration of justice.

(e) Any person, private or public, may file an *amicus curiae* brief containing data, information, remarks, and considerations that may be useful for a fair and just decision of the case.

III. Venue

The proceeding shall be brought in the court of first instance in the locality determined according to the state's rules of venue.

IV. Composition of the Court

The court shall be composed as ordinarily provided by the law of the forum, except that:

(a) The court shall consist of three judges if forum law so permits;

(b) With the consent of all parties the court may appoint not more than two neutral assessors, who may be experts in the subject matter of the dispute. In choosing the assessors, the court shall consider recommendations from the parties. The assessors have no vote but in its deliberations the court may confer with the assessors *in camera*. The fees and expenses of the assessors shall be paid by the parties or otherwise as directed by the court.

V. Principles of Interpretation

(a) These Rules shall be construed to advance substantive and procedural fairness, having regard for the legal and cultural traditions of the litigants.

(b) Each party must be granted the right to properly present its case and to receive equal treatment.

(c) The proceedings must fulfill reasonable expectations regarding fairness, and must be time and cost efficient.

(d) The court must assure proper and professional conduct of all persons involved in the proceedings.

(e) Procedural restrictions and penalties against parties and nonparties should be used only in reasonable proportion to their purpose.

VI. Forum Procedure and General Authority of the Court

Subject to the provisions of Rule 5, the procedural law of the forum shall be applied in matters not addressed in these Rules, including the time limits imposed on procedural matters. In addition to authority expressly conferred by these Rules, the court has authority to give direction to the proceedings and to make decisions in furtherance of justice.

Proceedings

7. Commencement of Suit

(a) A proceeding shall be deemed commenced in accordance with the rules of the forum. The proceeding shall be designated Transnational Proceeding.
(b) Concurrently with filing the suit, notice shall be given to the defendant, or defendants if more than one, in accordance with an applicable international convention or, if no such convention is applicable, by transmitting a copy of the statement of claim and a notice that plaintiff elects to proceed under these Rules. The notice shall state that judgment by default may be entered if defendant does not respond. Notice of the suit shall be in the language of the forum and in the language of the state of which the defendant is a habitual resident.

8. Statements of Claim

(a) The plaintiff shall state the facts on which the claim is based, the legal grounds that support the claim, and the basis upon which the claim is brought under these Rules. The statement of facts shall, so far as reasonably practicable, set forth detail as to time, place, participants, and events. The plaintiff may subsequently amend the statement of claim upon such terms as the court may permit, and reasonable permission to amend shall be afforded.
(b) The plaintiff shall attach copies of all documents, such as contracts, on which plaintiff intends to rely in supporting the claim. The plaintiff shall also list all witnesses, including parties and nonparties, plaintiff proposes in supporting the claim. The list shall identify such persons by name, address, and telephone number.
(c) The plaintiff shall state the judgment demanded, including the amount of damages claimed and any requested injunctive relief.

9. Statements of Defense; Counterclaims

(a) The defendant shall within 60 days answer the claim by admissions and denials of the allegations and may assert an alternative statement of facts and affirmative defenses. The time for answer may be extended for a reasonable interval by agreement of the parties or by court order. The answer shall:

(1) Deny such parts of the statement of claim as defendant wishes to dispute;

(2) Admit with explanation such statements as defendant does not wish to dispute as thus explained;

(3) State the facts of any affirmative defenses and the legal grounds upon which defendant relies for such a defense.

(b) The provisions of Rule 8 concerning the statements of claims are applicable to the statements of defense.
(c) The defendant may state a counterclaim seeking relief from a claimant and a claim against a co-defendant or third party, for example in a claim for indemnity or contribution, as is permitted by the procedure of the forum. The plaintiff and such additional parties shall submit an answer to a counterclaim or cross-claim.

(d) In accordance with the procedure of the forum, any party may join additional parties who are subject to the jurisdiction of the court.
(e) Allegations in a pleading to which a response is not required are deemed denied. Allegations in a pleading to which a response is required are deemed admitted if not denied. Facts admitted or deemed admitted need no proof, except as provided in Rule 10(b) with respect to a default judgment.
(f) Any party may request of the court, or the court may order, more specific allegations or answers. If a party fails to give the specifications required, the court may strike the party's claims or defenses as to those matters.
(g) Defendant may in the answer present objections referred to in Rule 13(a). Submitting an answer or asserting a counterclaim does not waive such objections.

10. Default Judgment

(a) Default judgment shall be entered against a defendant who does not answer, fails to offer a substantial answer, or fails to proceed after having answered.
(b) Before entering a default judgment, the court shall:

(1) Assure that the procedure for giving notice has been properly followed. If the complaint has been amended, notice must be given of the amended complaint.

(2) Determine that the claim is well founded concerning liability and remedy, including the amount of damages.

(c) The remedy awarded in the default judgment shall not be in excess of the judgment demanded in the statement of claim.
(d) A party who has responded after the time provided in these Rules, but before judgment, shall be permitted to appear upon offering justifiable excuse.

11. Transnational Dispute Settlement Offer

(a) A party may deliver to another party a written offer to settle one or more claims and the related costs. The offer shall remain open for 60 days, unless withdrawn by a writing delivered to the offeree prior to delivery of an acceptance.
(b) The offeree may deliver a counter-offer, which shall remain open for at least 30 days. If the counter-offer is not accepted, the party may accept the original offer, if still open.
(c) An offer neither withdrawn nor accepted before its expiration is rejected.
(d) An offer shall not be made public or revealed to the court before entry of judgment, under penalty of sanctions or dismissal with prejudice or default.
(e) Within 10 days after entry of judgment, a party may reveal the offer to the court. If the court finds that the offer or its rejection was unreasonable, it shall impose an appropriate sanction, considering all the relevant circumstances of the case.
(f) Unless the court finds that special circumstances justify a different sanction, the sanction shall be the reasonable costs incurred by the offeror from the date of delivery of the offer. That sanction may be in addition to the costs determined in accordance with Rule 27.
(g) If an accepted offer is not complied with in a reasonable time, the offeree may choose to enforce it or continue with the proceeding.

12. Provisional Measures

(a) The court has authority to issue injunctions to restrain or require conduct of any person who is subject to the court's authority, where necessary to preserve the status quo or to prevent irreparable injury pending the litigation.

(1) A court may issue an injunction, before the opposing party has opportunity to respond, only upon proof showing urgent necessity and a preponderance of considerations of fairness in support of such relief. The party or person to whom it is directed shall have reasonable opportunity to respond concerning the appropriateness of the injunction.

(2) The court may, after hearing those interested, issue or renew or modify an injunction, upon such terms as are required to maintain the status quo or prevent irreparable injury.

(3) The court may require the posting of bond or other provision for indemnification of the person against whom an injunction is entered.

(b) An injunction may restrain a person over whom the court has jurisdiction from transferring property, wherever located, pending the conclusion of the litigation and require a party to promptly reveal the whereabouts of its assets, including assets under its control, and of persons whose identity or location is relevant. This authority does not preclude a party from obtaining an attachment or similar remedy permitted under the law of the forum, but the court may issue an injunction, in accordance with the procedure in Subsection (a), to terminate, suspend, or limit such an attachment.

(c) When the property or assets are located abroad, enforcement of such an injunction is governed by the law of the country where the property or assets are located, and by means of an injunction by the competent court of that country.

13. Preliminary Determinations and First Conference

(a) On motion of a party or upon its own initiative, the court may as soon as practicable determine:

(1) That the dispute is not governed by these Rules, that the court lacks competence to adjudicate the dispute, or that the court lacks jurisdiction over a party;

(2) That a statement of claim or defense or other procedure employed by a party fails to comply with these Rules or is otherwise irregular;

(3) That a party's statement of claim or defense is invalid as a matter of substantive law or cannot be supported by evidence sufficient to permit a judgment in favor of that party, but the court shall have regard for that party's opportunity for discovery under these Rules before making such a determination;

(4) Other matters of substantive law or procedure necessary to advance the proper adjudication of the merits.

(b) Upon having made a determination as provided in Subsection (a), the court may allow the party against whom the determination is made a reasonable opportunity to amend its statement of claims or defense when it appears that the deficiency could be remedied by amendment.

(c) The court shall order each party to reveal information as described in Rule 14.

(d) The advocates for the parties shall attend all conferences ordered by the court and the court may order that the parties attend or, in the case of an organization, a responsible officer thereof.

14. Disclosure and Discovery

(a) Before demanding disclosure or discovery from another party, a party shall disclose all documents which it intends to present as proof and shall supply a summary of the testimony of each witness it intends to present. For these purposes, an advocate for a party may interview potential witnesses.

(b) A party may demand production by any person, including third persons as provided in Rule 24, of any information, not privileged, that is relevant to the case and which may be admissible in the dispute, as follows:

(1) Documents and other records of information that are relevant to controverted issues and which are specifically identified or within specifically defined categories.

(2) The identity and whereabouts of persons having personal knowledge of matters in issue.

(3) The identity of any expert that another party intends to present and a statement expressing the opinion of the expert concerning controverted issues.

(c) Any person may invoke a protection against self-incrimination recognized under the law of the forum, but it is not a valid objection that the information is adverse to the party required to provide the information.

(d) Where the physical or mental condition of a person subject to the court's jurisdiction is in issue, the court may order a reasonable medical examination.

(e) The court may order additional discovery relevant to any matter, not privileged, whose production appears necessary in the interest of justice, including the deposition of a party or other witness. Such a deposition shall be taken as provided in Rule 15.

(f) Discovery demands may be made as follows:

(1) Initial demands by plaintiff shall be made in the complaint or within 60 days after defendant has answered. Initial demands by defendants shall be made in the answer or within 15 days after plaintiff's demands.

(2) A second demand may be made within 30 days after the opposing party has complied with initial demands.

(3) A further demand may be made for evidence the necessity for which could not reasonably have been anticipated in the previous demands.

(4) Further demands may be authorized by the court.

(5) Unless otherwise agreed or ordered by the court, a response to a demand shall be made within 30 days.

(g) On request of a party, the court may appoint a special officer to preside at a deposition or to supervise document production or to otherwise assist in supervising compliance with this Rule.

(h) To give effect to a proper discovery demand, the court may:

(1) Draw adverse inferences concerning facts in issue against a party that failed to comply with the discovery demand;

(2) Employ the measures authorized by Rules 23 and 24;

(3) Dismiss claims, defenses, or allegations to which the discovery is relevant;

(4) Enter judgment of dismissal with prejudice against a plaintiff or judgment by default against a defendant.

15. Deposition and Testimony by Affidavit

(a) A deposition may be taken when the court so orders in the interest of justice as provided in Rule 14(e).
(b) The testimony shall be upon affirmation as provided in Rule 22(b)(2) and shall be transcribed verbatim or by audio or video recording, as the parties may agree or as the court orders. The cost of the transcription shall be paid by the party that requested the deposition, unless the court orders otherwise.
(c) The deposition shall be taken at such time and place as the parties may agree or as the court orders. All parties and the court shall be given written notice, at least 30 days in advance, of the time and place of the deposition. The examination shall be conducted as provided in Rule 22. Prior to the deposition the court may submit supplemental questions to be answered by the person deposed.
(d) A deposition may be presented as testimony in the record by agreement of the parties or by order of the court.
(e) A party may present an affidavit signed by a nonparty who makes an affirmation to tell the truth, containing statements about relevant facts of the case. The court, in its discretion, may consider such statements as if they were made by oral testimony. If another party denies the truth of the statements made by affidavit, that party may move for an order of the court requiring the personal appearance of the affidavit's author at the plenary hearing.

16. Protective Orders Concerning Discovery and Disclosure

(a) The court, on its own initiative or on motion of a party or third person who is subject to a disclosure or discovery obligation under Rule 14 or Rule 24, may limit or prohibit disclosure or discovery when it appears that compliance with the request would be onerous or is unlikely to produce admissible evidence or requires production of evidence protected by a privilege.
(b) When the information sought to be revealed is a trade or business secret, or where its public disclosure would otherwise cause injury or embarrassment that could be avoided or mitigated by a protective order, the court should grant such protection.
(c) When it would assist the court in exercising its authority under this Rule, the evidence that is sought may be examined by the court in camera.

17. Subsequent Conferences

(a) The court may order one or more subsequent conferences. The court may:

(1) Order the addition, elimination, or revision of claims, defenses, and issues in light of the parties' contentions at that stage.

(2) Order the isolation for separate hearing and decision of one or more issues in the case. The court shall enter an interlocutory judgment addressing that issue and its relation to the remainder of the case.

(3) Order the consolidation of cases pending before itself, whether under these Rules or those of the forum, when they deal with the same or related transactions, and when consolidation may facilitate the proceeding and decision. The judgment shall address all the cases.

(4) Make rulings on the admissibility of evidence.

(5) Prescribe the sequence for hearing witnesses and experts.
(6) Fix the date for the plenary hearing.
(7) Enter other orders to expedite the proceeding.

(b) The court may suggest that the parties consider settlement, mediation, or arbitration.

18. Languages

(a) The proceedings, including documents, oral proceedings, and evidence, shall be conducted in the language of the court, except to the extent that the court, with the agreement of the parties, otherwise permits.
(b) Translation shall be limited to relevant portions of documents that are lengthy or voluminous, as selected by the parties or determined by the court.
(c) The cost of translations shall be paid by the party presenting the person or document unless the court orders otherwise.

19. Relevance and Admissibility of Evidence

(a) All evidence relevant to matters in issue is admissible, including circumstantial evidence.
(b) Any person having mental capacity is competent to give evidence, including parties.
(c) A party may call any person whose testimony is relevant and admissible, including that party. The court may call any person on its own motion under the same conditions.
(d) The parties may offer in evidence any relevant document or real or demonstrative evidence. The court may order any party or nonparty to present any relevant document or real or demonstrative evidence in that person's possession.

20. Expert Evidence

(a) The court may appoint a neutral expert or panel of experts whenever, in the court's discretion, expert evidence may be helpful in resolving issues in the case. Expert testimony may address the rules of foreign law and international law. The court determines the issues that are to be addressed by the expert and such tests, evaluations, or other procedures as are to be employed by the expert. The court may issue orders necessary to facilitate the inquiry and report by the expert and may specify the form in which the expert shall make its report.
(b) A party may designate its own expert or panel of experts on an issue. The parties' experts are entitled to participate in or observe the tests, evaluations, or other procedures conducted by the court's expert. The court may order all the experts to confer with each other before presenting their opinions. The parties' experts may submit their own opinions to the court in the same form as the report made by the court's expert.
Unless the court orders otherwise, the fees and expenses of the court's expert will be provisionally compensated by the party requesting the investigation, or by the plaintiff when the investigation is required by the court. Each party pays for an expert whom that party has retained.

21. Evidentiary Privileges

(a) Evidence cannot be admitted of information covered by the following privileges:

(1) Legal profession privilege.

(2) Communications in settlement negotiation.

(b) Evidence cannot be admitted of information covered by other privileges recognized by the law of the place where the communication occurred, unless the court determines that the need for the evidence to establish truth is of greater significance than the need to maintain confidentiality of the information. Such evidence shall be produced in closed session of the court but in the presence of the parties and their lawyers. The court shall order protection of the secrecy concerning the privileged material.

(c) A claim of privilege made with respect to a document shall describe the document in detail sufficient to enable another party to challenge the claim of privilege.

(d) A privilege may be waived by or on behalf of the person who is entitled to take advantage of it. A party waives a privilege by omitting to make a timely objection to a question or discovery demand seeking a privileged communication. The court in the interest of justice may relieve a party of waiver of a privilege.

22. Plenary Hearing

(a) Receipt of evidence shall be concentrated in a single hearing, or hearings on consecutive judicial days, except when the court orders otherwise for the convenience of the parties or persons giving evidence or the administration of justice.

(b) Evidence at plenary hearing will be received according to the following rules:

(1) A person giving evidence must affirm to tell the truth. The court will determine the terms of the affirmation.

(2) A person giving evidence is directly questioned by the lawyer of the party who called the person. The lawyers of the other parties are then permitted to ask supplemental questions. Further direct and supplemental questioning may be permitted by the court. The court shall exclude, on objection or on its own motion, irrelevant evidence and improperly leading questions. The court shall prevent embarrassment and harassment of persons giving evidence.

(3) The court may at any time conduct questioning in order to clarify the testimony, including supplemental questions after the questioning by the parties.

(4) A person called to give evidence by the court may be examined by the court first. The person then may be questioned by the lawyers for the parties.

(5) Direct questions may deal with any relevant issue in the case. Supplemental questioning may deal with any issue addressed in the direct questioning, unless the court permits a more extensive scope.

(6) Statements made by a person outside of the record against that party's own interest are admissible as evidence.

(7) The credibility of a witness or an expert can be disputed by means of questioning by a party or consideration of prior inconsistent statements or other evidence that may affect the credibility of the witness. Any party may impeach any witness. The court may ask questions that affect the person's credibility. Impeachment is allowed only concerning material issues and only if it tends to cast serious doubt about the reliability of testimony.

(8) The court may permit similar contest of the authenticity or accuracy of a document or an item of real and demonstrative evidence.

(9) The court may control the reliability of scientific and technical evidence and may determine the procedure and techniques for such purposes.

(10) The court shall determine whether testimony of an expert is sufficiently reliable to be admitted in evidence.

23. Powers and Remedies Concerning Evidence

The court may on its own motion or motion of a party:

(a) Exclude irrelevant or redundant evidence, or evidence whose presentation involves excessive cost, burden, or delay.

(b) Draw adverse inferences from a party's failure to give testimony, or to present a witness, or to produce a document or other item of evidence that the party was in a position to present.

(c) Impose a fine on or hold in contempt of court any person who without justification, on being lawfully ordered to do so, fails to attend to give evidence, fails to answer proper questions, fails to produce a document or other item of evidence, or who otherwise obstructs the administration of justice.

(d) In the interest of justice, relieve a party from a failure to comply with the rules concerning evidence.

24. Orders Directed to a Third Person

(a) The court may order persons subject to its jurisdiction who are not parties to the proceeding:

(1) To comply with an injunction issued in accordance with Rule 12(a);

(2) To retain funds or other property the right to which is in dispute in the proceeding, and to disburse the same only in accordance with an order of the court;

(3) To give testimony in discovery or at the hearing;

(4) To produce documents or other things as evidence.

(b) The court may require a party seeking an order directed to a third person to provide indemnification for the costs of compliance.

(c) An order directed to a third person may be enforced by imposition of a monetary penalty for noncompliance and by other legal compulsion authorized by the court, such as contempt of court or direct seizure of evidentiary material or other things. See also Rule 32.

25. Record of the Evidence

(a) A summary record of the proceeding shall be kept by the court's clerk under the court's direction.

(b) A verbatim transcript of the proceeding or an audio or video recording shall be kept upon the demand of any party, who shall pay the expense thereof.

(c) A party may arrange for a verbatim transcript at its own expense.

26. Final Discussion and Judgment

(a) After the presentation of all evidence, each party is entitled to present a written submission of its contentions. With permission of the court all parties may present an oral closing statement. The court may allow the parties' lawyers to engage with each other and with the court in a brief oral discussion concerning the main issues of the case.
(b) The court shall state its judgment orally or in writing at the end of the final hearing. Issues of fact shall be determined according to the applicable law governing burden of proof. When necessary the court may retire in chambers to deliberate prior to stating its judgment. When necessary because of the complexity of the case, the court may adjourn and schedule a new hearing to state its judgment.
(c) The court will then publish, without undue delay, a written justificatory opinion including the findings of fact based upon the relevant evidence and the supporting inferences, and the principal legal propositions supporting the decision.

27. Costs

(a) Each party initially pays its own costs and expenses, including court fees, attorney's fees, and incidental expenses.
(b) The prevailing party shall be reimbursed of its costs and expenses from the losing party, but determination of costs may be stayed with a stay of enforcement as provided in Rule 32(c). The prevailing party shall within 30 days after rendition of the judgment submit a statement, certified by the party or its attorney, of its costs and expenses. The losing party shall promptly pay the amount requested except for such items as it disputes. Disputed items shall be determined by the court or by such other procedure as the parties may agree upon.
(c) The court may limit recovery of costs and expenses against a losing party who had reasonable factual or legal basis for its position. The court may impose a penalty not to exceed twice the amount provided by Subsection (b) against a party whose disputation the court determines was not conducted in good faith.
(d) If there is appellate review, the rules and procedure stated above shall apply to costs and expenses incurred in connection with the appeal.
(e) If it is authorized by the law of the forum, the court may require a nonresident party to give a security for costs and expenses.

Subsequent Proceedings

28. Appellate Review

(a) Except as stated in Subsection (b), an appeal may be taken only from a final judgment of the court of first instance.
(b) An order of a court of first instance granting or denying an injunction sought under Rule 12 is subject to immediate review. The injunction remains in effect during the pendency of the review, unless the reviewing court orders otherwise.
(c) Orders of the court other than a final judgment and an order appealable under Subsection (b) are subject to immediate review only upon permission of the court of first instance or upon

order of the appellate court. Such permission may be granted when an immediate appeal will resolve an issue of general legal importance or of special importance in the immediate proceeding.
(d) Appellate review is limited to the claims, defenses, and counterclaims asserted in the court of first instance. No additional previously available evidence should be admitted except to prevent manifest miscarriage of justice.

29. Further Appellate Review

An appeal or other form of review may be taken from the decision of a court of second instance in accordance with the law of the forum. The review performed by the court of second appeal will deal only with issues of substantive or procedural law. The facts in issue will not be reconsidered. No evidence or additional claims or defenses will be admitted.

30. Challenge of Judgment in Subsequent Proceedings

A judgment may be nullified only through a new proceeding and only upon showing that the applicant acted with due diligence and that:
(a) The judgment was procured without competence over the subject matter or without jurisdiction over the party seeking relief; or
(b) The judgment was procured through fraud on the court; or
(c) There is evidence available which was not previously available that would lead to a different outcome; or
(d) The judgment constitutes a manifest miscarriage of justice.

31. Finality

Except as stated in Rule 30, a judgment is not subject to reexamination for procedural regularity or substantive propriety upon expiration of the time for appellate review of such a judgment.

32. Enforcement of Judgment

(a) A final judgment, including judgment for a provisional remedy, is immediately enforceable, unless it has been stayed as provided in Subsection (c). In particular, a final judgment may be enforced through attachment of property owned by or an obligation owed to the judgment obligor.
(b) If a person against whom a judgment has been entered does not comply within the time specified, or within 30 days after the judgment becomes final if no time is specified, the court may impose enforcement measures on the obligor. These measures may include compulsory revelation of assets and a monetary penalty on the obligor, payable to the opposing party or to whom the court may direct.

(1) Application for such a sanction may be made by a person entitled to enforce the judgment.

(2) The penalty for noncompliance will include the cost and expense incurred by the party seeking enforcement of the judgment, including attorney's fees, and may also include a penalty for defiance of the court, not to exceed twice the amount of the judgment.

(3) If the person against whom the judgment is rendered persists in refusal to comply, the court may impose additional penalties.

(4) No penalty shall be imposed on a person who demonstrates to the court financial or other inability to comply with the judgment.

(5) The court may order third parties to reveal information relating to the assets of the debtor.

(c) The trial court or the appellate court, on motion of the party against whom the judgment was rendered, may grant a stay of enforcement of the judgment pending appeal when necessary in the interest of justice.

(d) The court may require a suitable bond or other security from appellant as a condition of granting a stay or from respondents as a condition of denying a stay.

33. Judicial Assistance

The courts of a state that has recognized these Rules shall, and courts of other states may, enforce orders in aid of proceedings in another state.

VIII. ZUSAMMENFASSUNG

von
Teri Y. Broadnax
(Assistant to G. Hazard)

Der Generalbericht besteht aus einem Entwurf der Vorschriften des Zivilverfahrens für die Konkursverhängung von Geschäfts- und Finanzstreitfällen, die im Rahmen von internationalen Rechtsgeschäften entstehen. Diese Auslegungsmethode richtet das Hauptaugenmerk auf grundlegende Fragen des Zivilverfahrens anhand zweier Linien. Erstens wird dadurch anerkannt, daß das Zivilverfahren ein System von zusammenhängenden Vorschriften ist und keine eigenständigen Vorschriften von getrennten Gegenständen, wie etwa der Berufung, dem Plädoyer oder dem Beweismittel darstellt. Zweitens werden dadurch die fundamentalen Ähnlichkeiten zwischen verfahrensrechtlichen Systemen, inklusive jene des Gewohnheits- und Zivilrechts, fast vollständig anerkannt, die kürzlich in Professor Stormes Projekt über die Harmonisierung des Prozeßrechts in der europäischen Rechtsgemeinschaft festgestellt worden waren. Der Diskussionsentwurf lädt daher zu weiteren Überlegungen und Diskussionen über die Möglichkeiten einer generellen Harmonisierung ein.

CIVIL LITIGATION WITHOUT FRONTIERS: HARMONISATION AND UNIFICATION OF PROCEDURAL LAW

Prof. Guiseppe Tarzia, Italy

UNE PROCÉDURE CIVILE SANS FRONTIÈRES: HARMONISATION ET UNIFICATION DU DROIT PROCÉDURAL

par

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I. REMARQUES PRÉLIMINAIRES

Il serait inutile de souligner l'actualité, et en même temps la complexité, du sujet, que notre Association International de Droit Procédural nous a invité à débattre, sous le titre suggestif d'une "*procédure civile sans frontières*".

L'exigence d'une unification, ou tout au moins d'un rapprochement des règles du procès civil (ou d'une partie de celles-ci), paraît s'imposer comme évidente dans la Communauté internationale - et plus encore dans les Communautes régionales, telles que, par exemple, l'Union Européenne ou le Mercosud - comme l'un des éléments essentiels pour le bon fonctionnament du marché, dans une époque qui a été dénommé à juste titre "*l'époque de la globalisation*". Il suffit de penser à l'intensité des échanges commerciaux, au niveau mondial et plus encore au niveau des grandes régions politiques, ou à la mondialisation du marché financier et au retentissement global de ses vicissitudes et à la connexité étroite entre le règlement substantiel de ces opérations et les exigences de protection judiciaire des droits qui en découlent. Il est facile de se persuader qu'une certaine unification ou harmonisation du droit est nécessaire pour le droit procédural non moins que pour le droit privé. Mais - il faut l'ajouter tout de suite - cette exigence ne touche pas nécessairement tous les aspects de ces droits, mais seulement ceux qui sont influencés par le marché ou encore, dans les Communautés régionales, par la définition de leurs buts et par l'organisation qui a été installée.

Voilà donc un premier sujet de réflexion, sur lequel je reviendrai, à la lumière des indications précieuses fournies par les rapporteurs nationaux des Pays de *civil law*, auxquels ma tâche a été limitée, dans la répartition amiable des charges avec l'autre rapporteur général, le Prof. Geoffrey Hazard jr.([8])

([8]) Mon rapport à été formé sur la base des rapports nationaux fournis par les Professeurs Hanns PRÜTTING (ALLEMAGNE), Osvaldo Alfredo GOZAINI (ARGENTINE), Norbert A. SCHOIBL (AUTRICHE), Georges de LEVAL (BELGIQUE), Ada PELLEGRINI GRINOVER - Flávio Luiz YARSHELL (BRÉSIL), Eleodoro ORTIZ - Carlos PECCHI (CHILI), Jairo PARRA QUIJANO (COLOMBIE), José Luis VÁZQUEZ SOTELO (ESPAGNE), Jacques NORMAND (FRANCE), Konstantinos KERAMEUS (GRÈCE), Juan Luis AGUILAR SALGUERO (GUATEMALA), Lazlo GASPARDY (HONGRIE), Yasuhei TANIGUCHI (JAPON), Cipriano GÓMEZ LARA (MEXIQUE), Carlos PARODI REMON (PEROU), Kazimierz LUBIŃSKI (POLOGNE), José LEBRE DE FREITAS (PORTUGAL), Angel LANDONI SOSA (URUGUAY). On a aussi convenu avec le Prof. Per Henrik LINBLOM de considérer comme rapport pour la SUÈDE son écrit *Harmony of the legal spheres*, en *European Review of Private Law*, 1997, qui consiste notamment dans un examen critique du

II. LA DISTINCTION ENTRE UNIFICATION ET HARMONISATION

Un premier point mérite d'être remarqué.
Il ne semble pas qu'il y ai eu des hésitations à admettre, en principe, la distinction entre unification et harmonisation: deux notions, d'ailleurs, qui avaient été maintes fois évoquées dans le débat doctrinal international et dans les travaux qui ont précédé notre Congrès ([9]).
On peut résumé l'opinion dominante en remarquant que "*l'unification du droit procédural supposerait l'édification d'un corps de règles commun, qui serait suivi à l'identique dans chacun des pays concernés*", tandis que "*l'harmonisation (ou le rapprochement) consiste à définir les objectifs ou à dègager les principes communs, en laissant à chaque droit national le choix des techniques juridiques qu'il estime appropriées afin qu'il soit satisfait aux objectifs ou que soient observés les principes ainsi posés*"([10]).
L'élaboration d'un Code modèle, d'une "*model law*" aurait le but fondamental de l'unification de l'ensemble du droit procédural: bien qu'il faille ajouter que le "*modèle*" pourrait être reçu totalement ou partiellement, et donc donner lieu à une unification totale ou partielle. De l'autre côté "*les* directives *qu'arrêtent, dans le cadre de l'Union Européenne, les autorités communautaires, s'insèrent par exemple dans un processus d'harmonisation*"([11]).
Il y a quand même des nuances théoriques qui ne sont pas dépourvues d'importance. Parfois on a inclus, dans la notion d'harmonisation, une référence à son contenu, en soutenant "*que l'harmonisation implique un rapprochement des législations sur l'essentiel*"([12]), qu'elle "*ne porte que sur les principes généraux du droit de la procédure*"([13]). Elle se présenterait comme une étape de l'unification. La même observation est accomplie par les rapporteurs de l'Amérique Latine([14]).
D'un autre point de vue, on a remarqué que "*la distinction entre les deux notions est principalement quantitative*", attendu que "*l'harmonisation est une unification à mi-chemin*"

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projet de Directive élaboré par le Groupe d'experts présidé par le Prof. Marcel STORME et publié sous le titre *Rapprochement du Droit Judiciaire de l'Union européenne*, M. Storme éd., Kluwer 1997. Attendu les limites imposées à cet écrit, je dois quand même m'abstenir ici d'un examen de ce projet et de la doctrine favorable et contraire à celui-ci.
En dressant le questionnaire pour les rapporteurs nationaux, j'ai cru qu'il fallait procéder, si l'on peut ainsi dire, "*à cascade*": poser avant tout les questions sur la distinction entre unification et harmonisation (n. 1) et sur la possibilité que ce phènomène se developpe au niveau mondial (n. 2) et, sur la supposition d'une réponse positive, demander si cela devait toucher au règlement complet du procès ou seulement à certaines procédures et matières à individuer (n. 3), quels principes devaient inspirer cette ouvre (n. 4) et si elle devait concerner aussi le procès pour les litiges interieurs à chaque Pays ou seulement le procès pour les litiges transnationaux (n. 5). Une deuxième série de questions - sur laquelle je reviendrai après - concerne évidement l'hypothèse contraire, d'une unification ou harmonisation partielle.
Je veux donner acte immédiatement aux rapporteurs nationaux, avec reconnaissance, d'avoir bien voulu se tenir en principe à l'ordre du questionnaire, de façon à faciliter la tâche du rapporteur général.
Je regrette que les limites sévères de pages, forcément imposés par l'éditeur, ne me permettront de donner acte ici, comme il serait convenable, de la richesse des apports que j'ai reçu et dont je profite dans cet écrit.
([9]) Voy. notamment le rapport introductif au projet de Directive de la Commission présidée par le Prof. Storme, déjà cité, et les Motifs du *Codigo modelo procesal civil para Iberoamerica*. Mais la littérature internationale à ce sujet est désormais si riche qu'il est impossible d'en donner ici un compte-rendu acceptable.
([10]) Ainsi, à la lettre et pour tous, le rapport NORMAND.
([11]) Ainsi encore et pour tous NORMAND.
([12]) Ainsi DE LEVAL.
([13]) Ainsi LEBRE DE FREITAS.
([14]) Ainsi par ex. LANDONI SOSA.

et l'on a distingué une approximation théorique et une approximation pratique([15]).
On a défini aussi le rapprochement (ou approximation) du droit procédural comme un processus plus intensifié que celui de l'harmonisation([16]) et encore on a distingué, à l'égard des instruments utilisables, et notamment à l'intérieur de l'Union Européenne, une harmonisation verticale, opérée par les organes communautaires , et une harmonisation horizontale, laissée à l'initiative des Etats membres, notamment à la lumiere du principe de subsidiarité énoncé par le Traité de Maastricht([17]).
Vis-à-vis de ces observations précieuses il faut effectuer ici un choix qui prétend seulement d'être opérationnel, au but de ce travail.
Dans cet esprit je crois de devoir placer hors de mes réflexions l'harmonisation horizontale, en tant que laissée à l'initiative souvraine des Etats. Qu'il me soit permis d'exprimer mon scepticisme vis-à-vis de l'applicabilité spontanée de ce modèle, comme il à été souligné même par le rapporteur qui l'a largement illustré. L'histoire des droits procéduraux des années '90 montre une prolifération de réformes des codes de procédure qui ne semblent avoir subi aucune influence - tout au moins en Europe - par la comparaison avec les droits judiciaires des autres Pays de l'Union. Cette harmonisation horizontale s'avère possible, en effet, seulement par l'instrument des Conventions internationales, dont il faut donner acte que l'on a fait usage aussi récemment en matières determinées (significations des actes à l'étranger, Convention "Bruxelles II" sur la compétence en matiere matrimoniale, convention europeenne sur la procédure de faillite)([18]).
D'autre part, je crois également hors de question, dans ce débat, l'approximation théorique, visant à réaliser le meilleur système procédural. Elle susciterait d'ailleurs un esprit de concurrence et des aspirations à la priorité, qui ne sont certainement pas favorables au résultat auquel on veut parvenir.
Les termes, qu'il faut prendre en considération, me semblent donc ceux de l'unification et de l'harmonisation ou approximation pratique et verticale. Et sur le plan des notions il paraît que l'on peut être d'accord sur la portée de la distinction.
L'unification, totale ou sectorielle, suppose un système unique de création, interprétation et application des normes et donc des autorités compétentes aussi pour surveiller sur cette application. Cela vaut, à mon avis, même si l'on poursuit l'objectif plus limité d'une procédure uniforme pour les seuls conflits transnationaux([19]).
L'harmonisation au contraire vise à assurer l'equivalence des arsénaux judiciaires des Pays concernés quant aux garanties de la défense et de l'effectivité de la protection judiciaire, dans le respect des particularités des législations nationales.

([15]) La première aurait comme obiectif "*l'amélioration de la qualité des règles juridiques*", en bénéficiant "*de la comparaison des approches juridiques disponibles*"; dans cette oeuvre, "*des élements du droit natural entreront inevitablement en jeu en offrant souvent un moyen subtil de tertium comparationis*". Par contre la deuxieme vise simplement à "*éliminer ou réduire les disparités entre les systémes nationaux à cause essentiellement de leurs conséquences fâcheuses en matiere, p. ex, d'affaires internationales*": ainsi KERAMEUS.
([16]) Ainsi LUBINSKI.
([17]) Ainsi VAZQUEZ SOTELO.
([18]) Cfr. particulièrement le rapport SCHOIBL.
([19]) Voy. M. TARUFFO, *Drafting Rules for Transnational Litigation*, en ZZP International 1997, p. 449.

III. L'UTOPIE DE L'UNIFICATION GLOBALE DU DROIT PROCÉDURAL

Les notions acquises d'unification et d'harmonisation, le problème se pose de savoir si l'unification du droit procédural au niveau mondial est possible, pour le règlement complet du procès ou bien pour des litiges et des procédures spécifiques.
Plusieurs rapporteurs signalent la nature utopique de l'aspiration à l'unification complète du droit procédural, même dans des Communautés supra-nationales formées sur la base d'une culture commune([20]), ou tout au moins la nécessité d'un processus graduel, qui passe de la coopération à l'harmonisation et se termine par l'unification([21]). Même ceux qui n'ont pas exclu la perspective d'une unification générale, ont souligné justement le caractère purement idéale de cette aspiration, soit au niveau mondial soit dans un milieu politique plus restreint([22]).
On ne peut pas ignorer, en effet, que le droit procédural est servant à une organisation politique et ne peut pas s'imposer sinon à l'intérieur d'un système politique et économique unifié, comme un des éléments qui le composent. En plus, l'unification est bien difficile au dehors d'un cadre institutionnel qui en assure le caractère contraignant. Je dis difficile et non impossible, car on ne peut pas exclure que la *vis persuasiva* d'un modèle soit à même de le faire recevoir dans d'autres Pays souverains, comme il est arrivé, dans quelques Pays de l'Amérique Latine, au delà de l'Uruguay où il est né, pour le *Codigo modelo procesal civil* que j'ai déjà mentionné. Il s'agira toutefois d'une unification législative par assimilation, qui n'empêchera pas des évolutions différentes dans la jurisprudence des Pays intéressés.
Mais si nous rentrons idéalement en Europe nous ne pouvons pas rêver une espèce de nouvelle Rezeption, telle qu'elle s'est réalisée à la fin du quinzième siècle en Allemagne vis-à-vis du droit romain et, pour le droit procédural, pendant le siècle passé et le nôtre en d'autres Pays, comme le Japon face à l'Allemagne en 1890 et la Turquie face à la Suisse, et précisément au c.p.c. du Canton Neuchâtel, en 1925([23]). On ne peut pas imaginer, aujourd'hui, une unification, totale ou partielle, du droit procédural par la voie de l'accueil même d'un des Codes le plus prestigieux, et qui ont eu la plus grande influence dans beaucoup de Pays européens et extra-européens, tel que le Code de procédure civile français promulgué par Napoléon ou la *Zivilprozessordnung* allemande, dont la *Ausstrahlung*, l'irradiation a été justement illustrée([24]).

([20]) Ainsi p. ex. PELLEGRINI GRINOVER - YARSHELL, LEBRE DE FREITAS.
([21]) Ainsi p. ex. ORTIZ - PECCHI.
([22]) Ainsi NORMAND: "*l'ambition d'établir un code de procédure unique, de construire un droit procédural qui serait commun à l'ensemble des pays couverts et viendrait se substituer chez eux aux codes existants ... serait irréaliste et démesurée*". Mais l'observation semble être partagée par la plupart des rapporteurs nationaux.
([23]) Cfr. particulièrement les considérations de LUBINSKI et de PRÜTTING.
([24]) Cfr. *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andera Rechtsordnungen*, éd. W.J. Habscheid, Bielefeld 1991.

IV. L'UNIFICATION ET L'HARMONISATION PARTIELLE: ALTERNATIVE OU COMPLEMENTARITÉ?

Il faut donc passer à une perspective subordonnée: qui toutefois ne doit pas se fonder, a mon avis, sur une alternative entre unification et harmonisation. Comme il a été remarqué très efficacement, il n'y a pas un *Königsweg*, un chemin royal pour parvenir à un droit processuel unitaire([25]). En effet on ne peut pas affirmer, d'une façon générale, que l'harmonisation doit précèder l'unification. On pourrait être d'accord si l'on pensait au but d'une unification complète du droit procédural. Mais, cela exclu, rien n'empêche que dans certains secteurs des procédures soient formées, destinées à s'appliquer identiquement dans tous les Etats, ou vraisemblement dans tous les Etats membres d'une certaine Communauté économique et politique.

Il ne semble pas, d'ailleurs, que l'harmonisation doit forcément être restreinte aux principes généraux de la procédure. Le risque est ici évident de se limiter à la dimension constitutionnelle du droit procédural: une dimension sur laquelle , dans nos Pays, l'accord subsiste déjà, par l'effet d'une civilisation et d'une culture commune comme de Conventions internationales bien connues. L'harmonisation doit passer outre, à règler des aspects particuliers du droit procédural, qui soient jugés importants pour le fonctionnement d'un marché ou plus largement d'une Communauté politique et economique. On donnera d'ici peu quelques exemples. Mais je veux me déclarer tout de suite d'accord avec les nombreux rapporteurs nationaux qui ont remarqué la complémentarité des deux méthodes, qui doivent concourir, dans les limites du possible, à la réalisation de l'idéal d'une "*procédure civile sans frontières*".

Il est vrai plutôt que l'harmonisation semble posséder une dose de fléxibilité suffisante à contenter les politiciens et les juristes les plus jaloux de l'autonomie et de l'indépendance de leurs Etats. Et il est vrai également que, si l'unification est une solution très nette, l'harmonisation pourrait se présenter comme une perspective suffisamment vague pour tranquilliser ces esprits. Mais tout cela cesse d'avoir aucun sense si l'on fait référence aux instruments qui, sur le plan international, s'avèrent nécessaires pour que l'une ou l'autre de ces ouvres soit accomplie.

Il suffit de penser aux nombreuses Conventions internationales (multilatérales ou bilatérales) qui touchent au domaine du droit judiciaire et de l'arbitrage ou aux Règlements émis par les Autorités de l'Union Européenne, d'un côté, et aux Directives émises par les mêmes Autorités, de l'autre, pour conclure que l'unification et l'harmonisation sont des solutions alternatives mais coexistantes dans des secteurs de plus en plus nombreux du droit. Le problème est de savoir donc dans quelle extension géopolitique, dans quels domaines, pour répondre à quelles exigences et en application de quels principes cette double oeuvre peut et doit être poursuivie, à l'aube du troisième millénnaire de notre époque.

([25]) Cfr. PRÜTTING.

V. L'EXTENSION GÉOPOLITIQUE DE L'OEUVRE D'UNIFICATION OU D'HARMONISATION

La première de ces questions vise à prendre en considération, d'une part, la prévalence de la tradition juridique des différénts Pays ou, au contraire, de l'appartenance à une même Institution supranationale et, d'autre part, les obstacles qui peuvent dériver de l'origine des droits procéduraux des Pays concernés. Il faut penser, sous ce dernier angle visuel, non seulement aux caractères divergentes des systèmes procéduraux de *common law* et de *civil law*, mais aussi, à l'intérieur des derniers, aux groupes formés par la dérivation du droit français ou du droit allemand ou encore du droit espagnol ou du droit portugais.
Les rapporteurs nationaux ont reconnu qu'il ne faut pas sousestimer les difficultés liés à ces facteurs, qui ne sont pas exclusivement culturels([26]). Ils ont souligné pourtant que la perspective d'une unification ou harmonisation sur la base des familles juridiques est insatisfaisante, car elle aboutirait, par exemple, à créer des sous-groupes au sein de l'Union européenne([27]). On a même remarqué l'existance de points de convergence, de bases communes entre ordres juridiques qui n'appartiennent pas à la même "*famille*"([28]) et, d'autre part, que l'origine commune pourrait faciliter l'oeuvre, mais que "*le sense de l'histoire va à l'envers d'un simple retour à ces points d'origine*"([29]). On a rappelé les mots de LIEBMAN sur l'apport remarquable de la doctrine à la formation d'une "multinationale" du procès.
Si l'on veut tracer un programme, à la fois, réaliste et utile, la différence entre l'unification et l'harmonisation est destinée à jouer ici un rôle de premier plan. L'unification impose des choix sans alternatives. L'harmonisation, au contraire, est un instrument souple, qui permet de réunir, à la fois, les bénéfices de l'introduction de principes communs avec le respect de la diversité d'expression et des spécificités de chaque Etat: dans un souci d'équilibre entre conservation et innovation, entre unité et diversité, qui n'est peut être pas facile à réaliser, mais qui exprime le caractère dynamique, progressif, graduel de cette oeuvre de rapprochement entre les systèmes procéduraux.

VI. LES EXIGENCES À SATISFAIRE ET LES LIMITES CONSÉQUENTES DE L'OEUVRE ENVISAGÉE

Si l'unification ou l'harmonisation trouve sa justification, au plan général, dans la mondialisation progressive de la vie économique et, au plan régional, dans l'institution et le souci du bon fonctionnement d'un Marché unique surnational il s'en suit qu'une oeuvre, liée à ces exigences de la libre circulation des personnes, des marchandises, des services et des capitaux laisse necessairement hors de son champ (comme il est arrivé dans le projet de la Commission Storme), avant tout, l'organisation judiciaire et des professions judiciaires, ainsi que la répartition des compétences entre le juridictions et aussi toutes les dispositions qui se trouvent les plus profondément ancrées dans les traditions juridiques, comme la répartition des pouvoirs entre le juge et les parties, qu'elle ait trait à la direction de l'instance ou qu'elle concerne le fond du litige, ou encore le caractère oral ou écrit de la procédure([30]).

([26]) Ainsi p. ex. NORMAND.
([27]) Ainsi DE LEVAL.
([28]) Ainsi PELLEGRINI GRINOVER - YARSHELL.
([29]) Ainsi pour tous LEBRE DE FREITAS.
([30]) Ainsi NORMAND, d'accord avec l'opinion la plus répandue parmi les rapporteurs nationaux.

En d'autres termes, on a indiqué le domaine de l'unification ou de l'harmonisation dans les règles procédurales qui présentent un caractère purement technique, quoique cette délimitation soit difficile([31]).
Ce n'est pas seulement un souci de réalisme ou de gradualité qui suggère ces limites. C'est aussi la considération qu'une solution uniforme des autres questions mentionnées ne paraît pas nécessaire pour l'équivalence de la protection judiciaire des intèrêts en litige.
Je n'ignore pas le poids que, dans un souci d'innovation, la doctrine moderne du droit procédural a attribué au rôle actif du juge, à un activisme judiciaire normalement opposé à une attitude de passivité du juge de l'époque libérale. Mais je ne veux pas entrer ici dans l'analyse du bien fondé de cette reconstruction historique et moins encore exprimer un jugement sur l'opportunité du nouveau dogme([32]). Il suffit de constater que ces aspects de la structure du procès ne sont pas déterminants pour réaliser les exigences envisagées. Je ne crois pas que le rôle différent, attribué au juge anglais vis-à-vis du juge français ou du juge allemand, ou vice versa, conduit à la conséquence d'une protection judiciaire moins efficace dans l'un ou dans l'autre de ces Pays. Mais cette constatation est précisément celle qui suffit pour exclure de notre tableau et à nos buts une définition uniforme de leurs pouvoirs dans le procès civil.

VII. LE DOMAINE DE L'UNIFICATION

Il faut donc tenter d'individuer, avant tout, le domaine, actuel ou prévisible, de l'unification du droit procédural.
Il serait inutile de répertorier ici les conventions en vigeur à l'échelle mondiale, qui touchent à la procédure civile, à la notification et signification des actes judiciaires à l'étranger, à l'assistance judiciaire internationale, au recouvrement des créances alimentaires, à l'arbitrage, etc. Les rapports nationaux ont donné des indications précieuses pour une extension de ce domaine, encore à l'échelle mondiale, à la compétence internationale - limitée, comme le sont les Conventions de Bruxelles et de Lugano, à la partie patrimoniale du contentieux - à la circulation des actes qui doivent être signifiés ou notifiés à l'étranger, à la reconnaissance et l'exécution des jugements; ils ont prospecté la possibilité d'un accord sur des critères de connexité tels que le domicile, la localisation des biens ou le lieu où certains faits se sont produits ou auraient dû se produire([33]).
Mais il ne faut pas se cacher les difficultés liées à une oeuvre ulterieure de telle sorte: des difficultés qui relèvent soit des règles ou notions générales divergentes dans les systèmes juridiques appartenant à des familles différentes, soit de la nécessité d'un "*abandon plus on moins sensible de souveraineté*" et d'un "*degré de confiance suffisant*" entre les Etats, que l'on ne prévoit pas aisément à une échelle mondiale.
L'oeuvre d'unification dans les secteurs mentionnés est bien plus facilement concevable, comme elle a été déjà partiellement réalisée, à l'intérieur d'une institution supranationale,

([31]) Cfr. KERAMEUS.
([32]) L'expérience de comparatiste ainsi que celle de l'avocat m'emmenerait à relativiser fortément cette opposition entre activité et passivité; et le même est à dire sur le caractère oral ou écrit de la procédure, attendu le sens différent que l'ou trouve attribué à ces principes dans les systémes procéduraux même de l'Europe continentale et les divergences fréquentes de la pratique judiciaire vis-à-vis des principes consacrés dans les codes de procédure. Je dois laisser quand même l'approfondissement du sujet au rapport général des Prof. Andrcej OKLEJAK et Roberto BERIZONCE sur *Recent tendencies in the position of the judge*.
([33]) Cfr. particulieriement NORMAND, DE LEVAL, LEBRE DE FREITAS.

telle que l'Union Européenne.
Ici on a justement remarqué que l'on peut procéder dès maintenant vers l'unification, avec des exemples à la fois précieux et actuels, comme ils sont à l'examen de la Commission Européenne: l'unification des catégories du titre exécutoire et l'introduction d'une procédure d'injonction uniforme; une réglementation unique des espèces et des effets des mesures conservatoires; l'adoption de règles communes concernant l'articulation entre la saisie des dépôts et le secret bancaire, particulièrement nécessaire vis-à-vis de la mobilité des capitaux. Il s'agit de questions de réalisation du droit, relevant surtout du domaine de l'exécution, mais aussi de celui de la garantie de l'effectivité de la décision rendue dans la procédure déclaratoire.
Toutefois je ne crois pas qu'il faut se limiter à ce domaine. Il faudrait prendre en considération aussi la matière du droit des preuves, sous un double angle visuel. La formation d'un droit européen des contrats, ou de certains contrats, devrait entraîner un règlement uniforme de la preuve et de ses limitations, contournant l'opposition traditionnelle entre les systèmes de *civil law* et de *common law* en cette matière. D'autre part, l'évolution technologique impose la fixation de règles communes pour l'admissibilité des nouveaux moyens de preuve (le télex, le téléfax, le document informatique) qui en dérivent. On est là dans un secteur technique, où la diversité de la tradition historique n'est pas heureusement à même d'entraver la formation d'un droit commun([34]).
Autre problème est celui de la création d'une procédure civile uniforme, mais limitée à la solution des litiges transfrontaliers. Qu'il me soit permis de partager les perplexités de plusieurs rapporteurs nationaux à ce sujet. On a remarqué, en effet, que l'introduction de règles, de droit substantiel ou processuel, applicables seulement à des affaires internationales "*introduirait un élément supplémentaire d'incertitude pour la distinction mouvante entre relations juridiques nationales et internationales*"([35]) et que "*le droit gagnera en clarté et en sûreté s'il évite, comme question préalable à l'application des règles de procédure, celle de savoir si l'on a trait à un conflit transfrontalier ou à un conflit se déroulant tout à l'intérieur des frontières*"([36]).
Ces doutes paraîssent renforcés par la foule de questions à laquelle a donné lieu, dans un territoire limitrophe, la distinction entre l'arbitrage interne et international, là où elle a emmené à une règlementation differente (p. ex. en France et en Italie, mais non en Allemagne).

VIII. LE DOMAINE DE L'HARMONISATION

Bien plus large est, naturellement, le domaine possible de l'harmonisation, notamment dans les Institutions supranationales. Il serait inutile de s'arrêter ici sur ce qui a été déjà fait, à l'égard des principes fondamentaux de la procédure. Le problème ne se pose pas pour les garanties fondamentales, mais pour les règles plus spécifiques de procédure. Là une selection de matières s'impose, à la lumière des considérations que je viens de developper.

([34]) Pour un approfondissement de ce sujet je fais renvoi au rapport général des Prof. Helmut RÜSSMANN et Wouter DE VOS sur *The challenge of information society: application of advanced technologies in civil litigation and other procedures*.
([35]) Cfr. KERAMEUS.
([36]) Cfr. LEBRE DE FREITAS.

On revient ainsi aux deux élements de la nature "technique" des règles procédurales à harmoniser et de la nécessité d'éliminer les disparités quant'à l'efficacité de la protection judiciaire, qui empêchent le bon fonctionnement du marché international. Mais l'oeuvre d'harmonisation, au niveau des procédures, ne peut faire face également à tous les inconvénients qui ont été dénoncés.

Quand on pense au coût inégal du procès, on ne peut pas ignorer que cela dépend de choix qui touchent à l'organisation judiciaire et à son mode de fonctionnement, au statut et aux règles tarifaires des professions légales, au régime fiscal des actes de procédure et des pièces produites dans le dossier. L'appel de la Commission Européenne pour l'introduction de procédures non seulement simples et rapides, mais aussi peut coûteuses, demande un effort des Etats dans des domaines où leur souveraineté ne pourrait pas, à l'heure actuelle tout au moins, être restreinte par des interventions supranationales([37]).

Mais l'indication fournie paraît précieuse vis-à-vis des autres inconvénients qui ont été signalés. En effet, quand on parle de défaut de transparence, on pense surtout à la difficulté et à la complexité des règles de procédure, au haut degré de leurs technicisme, à la divergence sensible sur des points fondamentaux pour la protection effective du droit en contestation: par exemple (il s'agit d'exemples tirés des travaux de la Commission Storme) au mode de computation des délais, au régime des nullités ou aux conséquences du défaut de comparution et encore à l'effet interruptif de prescription des actes introductifs d'instance et aux effets de l'appel (effet suspensif, en particulier).

Il se peut que ces exemples montrent une attitude trop hardie, au moment actuel. On a remarqué, p. ex., que les differences sensibles du régime du défaut, en Allemagne, en France, au Royaume Uni (et j'ajouterais en Italie) rends très difficile une oeuvre d'harmonisation à cet égard([38]). Mais il ne faudrait pas sousestimer l'effet pervers de règles divergentes, p. ex., sur l'effet interruptif de la prescription ou sur le moment où le jugement devient exécutoire, vis-à-vis des art. 25 et 31 de la Convention de Bruxelles.

Il faut donc individuer des secteurs prioritaires d'intervention, visant à l'objectif déjà indiqué. On devrait penser surtout à des institutions telles que le référé provision, l'astreinte ou l'injonction de payer([39]), à l'efficacité des mesures conservatoires et provisoires([40]), à la formation et à la valeur du titre exécutoire, mais aussi à toute la matière de l'exécution forcée. Là ou l'unification s'avère impossible, on ne doit pas négliger l'alternative plus souple de l'harmonisation.

Et encore, l'harmonisation déjà réalisée, à l'intérieur de la Communauté Européenne, dans la matière des clauses abusives rappelle l'attention sur la nécessité d'une intervention plus large, au niveau supranational, dans le domaine de la protection du consommateur comme de l'environnement.

Plusieurs rapporteurs ont indiqué un champ d'application plus étendu, en s'inspirant des

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([37]) Pour tout approfondissement de ce sujet je dois quand même faire renvoi au rapport général des Prof. Adrian ZUCKERMAN et Sergio CHIARLONI: *Towards procedural economy: reduction of duration and costs of civil litigation*.

([38]) Cfr. KERAMEUS.

([39]) Ainsi p. ex. NORMAND remarque qu'elles "*devraient se retrouver partout, sinon à l'identique, du moins sous la forme de techniques procédurales aux effets équivalents*".

([40]) Pour le caracterè prioritaire des interventions sur les mesures provisoires et l'injonction de payer v. aussi KERAMEUS et PELLEGRINI GRINOVER - YARSHELL (avec d'autres exemples). Pour une référence plus variée aux procédures touchant au commerce international voir GASPARDY.

choix de la Commission Storme([41]) ou du *Codigo modelo*([42]). Mais je crois que au dehors de conditions particulièrment favorables, comme peut-être dans certains Pays de l'Amérique Latine, le réalisme impose de proceder *step by step, con juicio* (ou, en latin, *pedetentim*) et que cette attitude est confirmée par les suggestions de la Commission européenne dans sa communication du janvier 1998([43]).

IX. LES CRITÈRES INSPIRATEURS ET LES INSTRUMENTS À EMPLOYER

A part le respect nécessaire des principes qui sont à la base de toute procédure on a justement souligné qu'il faut s'inspirer à des critères d'urgence et de simplicité, pour aboutir à une procédure simple, rapide, peu onéreuse.
Mais ce n'est pas tout. Quand on parle, p. ex., de "*fairness, efficiency and compromise*"([44]) on introduit aussi un critère supranational de loyauté et de compatibilité, qui devrait illuminer une oeuvre fondée sur l'appréciation paritaire des ordres juridiques des Pays concernés.

([41]) Ainsi surtout LEBRE DE FREITAS, LUBINSKI, PRÜTTING.
([42]) Ainsi surtout les rapports pour les Pays hispano-américains, mais avec beaucoup de divergences. Il y en a qui font référence aux exigences prioritaires du commerce international et donc aux titres exécutoires et aux procédures conservatoires et d'exécution (ORTIZ - PECCHI pour le CHILI; GOMEZ LARA pour le MEXIQUE), ou aux procédures prévisibles pour des contrats nouveaux, tels que le *leasing* et le *factoring* ou le *joint venture* (PARODI REMON pour le PEROU). Mais plusieurs parmi ces rapporteurs ont au contraire signalé l'exigence prioritaire d'une harmonisation qui concerne les principes et la structure de la procédure ordinaire (oralité, pouvoirs d'office du juge en matiere de preuves, fonction assistentielle du juge, principe de bonne fois processuelle, charge de la preuve, conciliation, principes touchant à l'appréciation des preuves: PARRA QUEIRANO pour la COLOMBIE); abandon du formalisme et règles visant à rendre effective l'obligation du témoin (AGUILAR SALGUERO pour le GUATEMALA); structuration de la procédure ordinaire en s'inspirant au *Codigo Modelo* (GOZAINI pour l'ARGENTINE), ou bien la nécessité d'un accord sur les structures processuelles fondamentales (procès ordinaire, procès extraordinaire, procédure monitoire ou d'injonction, procédure de juridiction gracieuse, procédures fallimentaires et analogues: LANDONI SOSA pour l'URUGUAY).
([43]) Publiée dans le J.O.C.E. du 31 janvier 1998.
Au delà des propositions visées à faciliter la circulation des jugements en Europe par le biais d'une révision des dispositions contenues à cet égard dans la Convention de Bruxelles et de Lugano - propositions fondées, avant tout, sur la technique de l'inversion du contentieux - la Commission propose une série de normes, à inclure dans les dites conventions, pour établir des notions européennes, et donc de droit uniforme, en matière de saisine du juge et de litispendance ainsi que des mesures provisoires.
Elle rappelle aussi l'attention sur l'opportunité d'introduire un "*titre exécutoire européen*", comme il a été proposé depuis quelques années, qui puisse bénéficier d'un *exequatur* presque automatique et établir une nouvelle règle de compétence (art. 18 *bis*) pour les mesures conservatoires et provisoires au profit de l'État membre sur le territoire duquel ces mesures peuvent effectivement être mises en oeuvre, au lieu du renvoi actuel aux législations nationales en cette matière (art. 24 Conv. en vigueur). Elle propose de favoriser l'execution des décisions (même avant l'*exequatur*) en liant à une décision de condamnation rendue dans un État contractant l'autorisation à prendre des mesures provisoires et conservatoires selon la législation de l'État requis. Une reflexion approfondie est ensuite souhaitée pour l'adoption de mesures au but d'assurer la transparence des patrimoines - comme la généralisation de l'obligation de déclaration de patrimoine en tant que moyen d'en localiser les éléments actifs et passifs - et l'échange d'information entre les autorités d'exécution, et encore sur la mise en pied d'une procédure rapide tendant au paiement de créances de sommes d'argent et sur la saisie-arrêt des comptes bancaires.
Qu'il me soit permis de relever qu'il s'agit ici de priorités absolues dans une action directe à renforcer l'efficacité dans l'obtention et l'exécution des décisions: une action qui devrait d'ailleurs dépasser les frontières de l'Union Européenne et se réaliser sur échelle mondiale.
([44]) Ainsi TANIGUCHI.

On ne peut pas, au contraire, suggérer une réponse unique à la dernière question. À l'intérieur de l'Union européenne, de la Convention à la Directive à la loi modèle, il y a un catalogue d'instruments qu'il faut laisser aux Autorités compétentes de manier da la façon la plus opportune pour atteindre le but. Tout cela sans négliger l'apport de la jurisprudence de la Cour de Justice des Communautes européennes. Mais au dehors d'Institutions supranationales, on ne peut pas penser à des instruments différents des Conventions internationales([45]).

X. LES OBSTACLES À FRANCHIR ET LE RESPONSABILITÉ DE LA DOCTRINE

Les obstacles dérivent ou peuvent dériver soit de la jalousie des Etats, soit des réticences des Institutions supranationales, soit encore de l'attitude des juges et des avocats.
Comme il à été observé, ce sont les exigences du commerce international qui poussent vers l'harmonisation et l'unification; mais cette oeuvre ne peut pas être menée à son terme si elle n'est pas soutenue par une volonté politique extrêmement énergique. L'insuffisance de cette volonté, au niveau communautaire comme au celui des Etats, paraît aujourd'hui un des obstacles les plus graves. De plus, une véritable harmonisation ne pourrait pas négliger l'organisation judiciaire et devrait faire face au risque des interprétations divergentes, par les Cours nationales, du droit uniformisé on harmonisé. On a relevé encore que l'effort de persuasion doit s'orienter en direction des milieux professionnels, habituellement peu enclins à souhaiter le bouleversement de leur pratique quotidienne.
Cela suffit, paraît-il, à tracer le chemin à parcourir par la doctrine. Mais il faut avant tout résoudre la question de la méthode, qui devrait inspirer son oeuvre, dans les propositions d'unification ou d'harmonisation. À cet égard, la comparaison avec tel ou tel système national, pour relever les convergences ou les divergences, devrait être seulement un instrument préliminaire du travail; elle ne peut pas être le terme pour le jugement sur la bonté ou l'inacceptabilité des règles proposées, à la lumière du système domestic ou, de toute fois, préféré par chacun des juristes engagés dans cette oeuvre. La supranationalité de la doctrine est une condition essentielle pour la réussite de ce travail.
Après cela, il faut une oeuvre de diffusion de connaissance et de persuasion. Il faut sortir, non seulement des salles de ce Congrès, mais aussi de nos Universités pour se mêler au monde des professions judiciaires, pour en recueillir les requêtes et les observations. Il faut donc prevoquer un dialogue supranational entre les processualistes et les professionnels du procès: condition indispensable soit pour l'évaluation critique des modèles proposés, soit pour l'acquisition de ce consensus, sans lequel on ne peut pas espérer de convaincre les détenteurs du pouvoir législatif, supranational ou national que ce soit.

([45]) v. *de lege ferenda* le rapport brésilien de PELLEGRINI GRINOVER - YARSHELL.

XI. SUMMARY

Partial or total unification of the rules of civil procedure supposes a unique system of creation, interpretation and application of the rules and hence also of the competent authorities which supervise this application. Harmonisation on the contrary, aims at assuring the equivalence of the judicial bodies of the States concerning the guarantees of defence and the effectiveness of judicial protection respecting the particularities of national legislation. The Author signals the ideal character of the desire to reach global unification of procedural law and the opportunity to consider unification and harmonisation as complementary and not as alternative instruments which are to be used in different domains. The Author points out that the harmonisation is not to be restricted to general principles of civil procedure but that it should pass to its particular aspects which are judged to be important for the functioning of a supranational market or political and economical Community.

Further the Author attempts to answer the most important questions in this matter: in which areas, under which conditions, in application to which principles and with the help of which instruments can this double objective be realised? The Author then treats the difficulties due to insufficient political determination, on a European as well as on a national level, the obstacles that evolve from the diversity of judicial organisations and the risk of divergent interpretations of the unified or harmonised rules by the national courts. Finally the Author recalls the necessity to obtain assent from ? the professional entities and the responsibilities of the doctrine itself in this direction.

[translated into English by Cécile M. Bervoets]

XII. ZUSAMMENFASSUNG

ZIVILPROZESS OHNE GRENZEN
(Die Harmonisierung und Vereinheitlichung des Prozeßrechts)

Die Gesamt- oder Teilvereinheitlichung des Zivilprozesses setzt ein einheitliches Schaffungs-, Auslegungs- und Anwendungssystem der Normen und somit der für die Überprüfung der Anwendung befugten Autoritäten voraus. Demgegenüber beabsichtigt die Angleichung die Versicherung der Gleichwertigkeit des gerichtlichen Gesamtgefüges der betreffenden Staaten bezüglich der Garantien der prozessualen Verteidigung und der Effizienz des gerichtlichen Schutzes unter Gewährung der Eigenheiten der jeweiligen Gesetze. Der Verfasser dieses Berichts möchte auf das Bedürfnis nach einer globalen Vereinheitlichung des Zivilprozeßrechtes und auf die Möglichkeit, die Vereinheitlichung und die Angleichung als komplementäre und nicht als alternative Instrumente, welche in verschiedenen Bereichen anzuwenden sind, zu betrachten, aufmerksam machen. Der Autor betont unter anderem, daß die Angleichung nicht auf die allgemeinen Grundprinzipien des Zivilprozeßrechtes beschränkt werden soll, sondern vielmehr zu bestimmten Aspekten des Verfahrensrechtes, die für das Funktionieren eines supranationalen Marktes oder einer politischen und wirtschaftlichen Gemeinschaft von Bedeutung sind, übergehen soll.

Der Verfasser versucht die wichtigsten Fragen in dieser Hinsicht zu beantworten: In welchen Bereichen, unter welchen Voraussetzungen, unter Anwendung welcher Prinzipien und mit welchen Instrumenten kann diese doppelte Aufgabe verwirklicht werden? Anschließend werden die Schwierigkeiten in Zusammenhang mit der mangelnden politischen Bereitwilligkeit – sowohl auf gemeinschaftlicher als auch auf staatlicher Ebene – behandelt, die Schwierigkeiten, die durch die Unterschiede der Gerichtsorganisation hervorgerufen werden und die Gefahren der unterschiedlichen Auslegungen der angeglichenen oder vereinheitlichten Normen durch die nationale Gerichte. Schließlich erinnert der Autor an die Notwendigkeit einer Einigung der Berufskreise und an die dahingehende Verantwortlichkeit der Lehre.

[Übersetzung Cécile M. Bervoets]

TOWARDS PROCEDURAL ECONOMY: REDUCTION OF DURATION AND COSTS OF CIVIL LITIGATION

Prof. Adrian Zuckerman, UK

ASSESSMENT OF COST AND DELAY – A MULTI-NATIONAL PERSPECTIVE

by

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I. INTRODUCTION

All systems of procedure seek to do justice, but different systems employ different methods for achieving this goal. To some extent this variety of methods reflects different cultural preferences. But, more importantly, it also represents different compromises between three major factors that influence the administration of justice and its structure.

The first, and the most obvious one, is the search for the truth, or rectitude of decision. In all systems of procedure doing justice means arriving at decisions which give the parties before the court what is legally due to them. In order to do justice the court has to determine the true facts and then correctly apply the law to them. We may refer to this dimension as the dimension of truth or rectitude of decision.

The second factor is the dimension of time. Delay may induce error by allowing evidence to disappear or deteriorate. More important still, delay may erode the utility of a judgment regardless of its correctness. A judgment may be factually and legally correct and yet come too late to remedy the wrong that was committed. This is the time dimension of justice.

The third dimension is concerned with cost. Cost may influence the administration of justice in a number of ways. The performance of the system of justice depends to some extent on the amount of money that the state is prepared to invest in the administration of justice. A system starved of resources may be incapable of achieving a high standard of rectitude of decision or of delivering timely justice. Equally important is the factor of the cost that individual litigants have to pay in order to obtain court adjudication. For, the higher the cost of going to court, the more difficult access to justice becomes. A system which requires litigants to pay costs that they cannot afford denies such litigants justice.

It is clear that there is a tension between these three factors or dimensions of justice. The more money the state invests in the administration of justice, the higher the standard of rectitude of decision is likely to be. Similarly, the more resources the courts have, the faster they can deliver judgments. However, the state does not have unlimited resources to invest in the administration of justice. Compromises have to be made. We may have to accept slower justice, or we may decide that we do not wish to sacrifice speed and we are prepared to sacrifice the level of correctness in judgments instead.

All procedures involve compromises of this kind. Accordingly, when we look at different systems of justice we should remember that different preferences may be adopted in terms of truth, cost and delay and that compromises or sacrifices are always involved in the dispensation of civil justice.

II. ENGLAND (NATIONAL REPORTER – PAUL MICHALIK, UNIVERSITY COLLEGE, OXFORD)

The cost of litigation in England is amongst the highest in the world, considerably higher than in most European countries. This is in large measure due to the fact that clients have to pay their lawyers by the hour, without an upper limit and regardless of outcome. In England even a simple dispute which proceeds with uncommon speed can absorb vast sums of money.[46] Since the legal fees are not subject to an upper limit, litigants must be prepared for unlimited expenditure when they embark on litigation. As a result, serious litigation is open only to the very rich and to the very poor, who are supported by publicly funded legal aid. The urgency of the situation may be inferred from the attempts that the British government is currently making to reform the administration of civil justice in order to reduce costs.

England used to provide generous legal aid for citizens with no income or with low income. Indeed, the system aimed to give the poor legal services similar to those that affluent litigants would employ in their own litigation. Since lawyers are paid by the hour, without an upper limit, the legal aid system involved an open-ended commitment of funds. As is only to be expected, the upward pressure on the legal aid budget reached a point where the sums demanded by legal aid services became unaffordable. The government is therefore proposing radical changes to the legal aid scheme, involving a serious scaling down in the provision of legal aid.

A party who commences proceedings must pay court fees. Recently, court fees were restructured, so that the scale of fees payable depends on the size of the claim. For example, High Court commencement fees range from £100 on a claim of up to £10,000, to £500 on a claim for more than £100,000 or where no monetary limit is specified. Still, fees are lower than in many continental countries.

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[46] *Symphony Group plc* v *Hodgson* [1993] 4 All ER 143. An action to enforce a covenant in restraint of trade against an employee whose annual salary was about £10,000, in which the plaintiffs issued a writ, secured an interlocutory injunction, and obtained final judgment, all in just nine weeks, cost the winning plaintiffs in excess of £100,000. The procedure which consumed these sums involved the following steps. The writ was issued on 11 May 1992 in the High Court and on the same day the plaintiffs obtained an ex parte injunction. A statement of claim was served the following day. The interlocutory injunction was considered inter partes on 15 May, when it was continued until trial and speedy trial was directed. Pleadings were closed and discovery completed by the time trial started on 22 June. The hearings lasted eight days, culminating in a 31 page judgment delivered on 6 July 1992.

The recent changes were designed to ensure that the users of the Court Service paid a greater proportion of the real cost of this service. The scheme has had the effect of increasing the revenues raised from court fees. Provisional results for the 1997-1998 financial year suggest that civil court fees collected totalled 102.1% of the total cost of running the civil courts.

As already observed, the cost of litigation in England is high, impossible to predict in advance and, not infrequently, out of all proportion to the value of the subject matter in dispute. Three features of the system of litigation contribute to this state of affairs.

The first is the fact that, traditionally, the litigation process was controlled by the litigants and their lawyers, not by the courts. Parties to English litigation have had considerable freedom in determining the intensity and duration of the litigious activity, especially during the pre-trial preparations. Accordingly, where it is in the interest of one or other of the parties or, indeed, their lawyers, to complicate and protract the process, there has been considerable scope for doing so.

Second, the loser in litigation has to pay the winner's costs. Given that success brings with it not only the sum claimed but also the expenses laid out in securing judgment, a litigant, who believes that an increase in the amount spent on litigation will increase his chances of success, has a very good reason for progressively raising his stakes. Once one party has increased the stakes, the opponent will feel compelled to follow suit for fear that by using inferior procedural devices – be it a less celebrated lawyer or a less qualified expert – he will compromise his chances of success and run a greater risk of having to pay the other party's costs as well on losing the subject matter in dispute. Indeed, a point may come where the parties have reason to persist with investment in litigation, not so much for the sake of obtaining a favourable judgment on the merits as for the purpose of recovering the money already expended in the dispute, which may well outstrip the value of the subject matter in issue.

The third factor is connected with the method of paying for legal services. Generally speaking, lawyers are paid by the hour, regardless of outcome and without an upper limit. The hourly fees vary considerably and can range between £80 and £300 per hour or even more. Inevitably, this system of remuneration provides lawyers with a powerful economic incentive to protract and complicate litigation.

Professor Hazel Genn carried out a survey of costs in the High Court for the Lord Woolf Inquiry.[47] She found a lack of proportionality between the value of claims and the costs incurred in prosecuting them, especially at the lower end of the scale. Amongst cases with a value of less than £12,500, in 31% the costs to the successful party alone were between £10,000 and £20,000, with a further 9% incurring costs in excess of £20,000. These figures look even worse if one remembers that about half of the cases surveyed were concluded with a consent order and only one quarter by judgment after trial. Amongst claims with a value of between £12,500 and £25,000, costs as a percentage of the value of the claim

[47] Access to Justice, Final Report, HMSO, 1996, Annex III. See also costs statistics in the Annual reports of the Legal Aid Board.

ranged from 41% for personal injury cases to 96% in disputes concerning building contracts. This level of expenditure means that the legal system is simply too expensive and too inefficient to provide a meaningful forum for dispute resolution in commonplace litigation.

The duration of proceedings in England is considerable. The average time from commencement of proceedings to judgment in the High Court is 161 weeks in London and 195 weeks outside of London. The comparable data for the County Court are 70 and 90 weeks respectively.

A serious attempt is being made to reform the system. A new set of Civil Procedure Rules has come into effect in April 1999. While the changes made to the basic structure of procedure are modest, the changes in the philosophy of procedure and the approach to its operation are far-reaching.

Two such changes deserve special notice. The first concerns the control over the litigation process; the second is concerned with the philosophy of procedure. The main defect of English civil procedure is thought to be an excess of litigation activity. To reduce this activity the new rules place the control of litigation in the hands of the courts. This is a radical departure from the previous system, under which the parties and their lawyers were free to control the duration and intensity of the pre-trial process and, to some extent, of the trial itself. From now on the courts will decide these matters. There will be strict timetables and economical processes for simple disputes. For the more complex disputes the courts will determine the procedural steps that parties will be required or permitted to take and their timetables.

In exercising this control over litigation the courts will be guided by a new philosophy of procedure. Under the old philosophy, the main function of the courts was to do justice on the merits; that is, to decide cases on the basis of the true facts and the correct law, and not on procedural grounds. This is of course true of all procedures. But, in England, the "justice on the merits" approach was taken to override all other procedural arrangements. It was considered inappropriate to dismiss a claim or a defence on the ground of non-compliance with the procedural rules. Thus, no matter how long a party neglected the procedural requirements, the court would forgive the defect in order not to decide the case on a procedural basis. The result was that conformity with the rules of procedure became largely optional, and parties and their lawyers could protract and complicate the litigation process virtually at will.

The justice on the merits philosophy assumes that, as long as the court reaches a decision which is in accordance with the facts and the law, justice has been done; nothing else matters. But other things do matter. Delay may be so extensive as to rob the eventual judgment of any practical usefulness. More important still, high and unpredictable costs deter aggrieved persons from prosecuting their rights in the courts. Even those who are able to start proceedings are at times compelled to withdraw with an unfavourable settlement. For, the high cost of litigation enables rich litigants to force poorer opponents to accept compromises which are not dictated so much by the merits as by the inability of the poorer litigants to finance expensive litigation.

Whereas the justice on the merits philosophy gives precedence to rectitude of decision over considerations of timely justice and reasonable costs, a new balance between the three dimensions of justice is adopted by the new English Civil Procedure Rules. For the first time the rules spell out the overriding objectives of the civil process (in Part 1.1):

" (a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate -
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that the case is dealt with expeditiously and fairly;
(e) allotting to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

As this rule makes clear, the courts are concerned not only with the parties before them. In dealing with individual cases, judges must bear in mind that the resources of the administration of justice are limited. As with other public resources, the resources of justice must be distributed justly. This means that litigants will receive only such attention as is justified by the importance, value and complexity of their disputes. Further, it means that waste of court resources will not be allowed or condoned.

Conditional fees are now allowed. Under a conditional fee agreement, the lawyer will receive no fees if the client loses. But, if the client wins, the lawyer will be entitled to the normal hourly fee plus an uplift, or premium, of up to 100% of the normal hourly fee. It is, however, doubtful whether this system will lower the cost of litigation.

III. AUSTRALIA (NATIONAL REPORTER: THE HON. JUSTICE GEOFFREY DAVIES, COURT OF APPEAL, QUEENSLAND)

The Australian system of civil justice is similar to that in England, and so are the problems faced by the Australians. In many cases the costs of going to trial are disproportionate to the amount in dispute. For parties of average means the prospect of losing, and having to pay their opponent's costs, are so serious that they cannot afford to take the risk. The total costs payable by the losing party often exceed the judgment sum. In all except very large cases, costs are unacceptably high in proportion to the amount involved, and more than most citizens can afford to pay. The duration of Australian proceedings is roughly similar to that of English proceedings, but there are considerable variations between different states.

Litigation often involves excessive litigious activity on the part of the parties' lawyers. This is often influenced by economic considerations. As in England, one of the more influential factors is the system by which lawyers receive an hourly remuneration; the more protracted the case, the more the lawyers earn.

To reverse these factors, Justice Davies points out, lawyers and judges must accept a new concept of a just dispute resolution. This concept involves greater frankness between disputants, is less adversarial, and accepts that costs, the rights of others and the public interest are relevant considerations. Justice Davies' analysis spells out much that is implicit already in the new English rules. More disputes should be resolved earlier by processes other than court proceedings. Reforms have been made and proposed to encourage more summary adjudication of specific issues, leaving only the more complex issues to be dealt with by the full trial process. It is proposed to allow only the courts, not parties, to obtain expert evidence.

As in England, Australia is moving towards judicial control over litigation. There too we can see the emergence of a new culture of adjudication. Judges are far more proactive in the conduct of proceedings before them. They are far more ready to dictate to the parties which procedural steps need to be taken and the time limits for performing them.

Both in England and Australia there is now less emphasis on orality than in the past. Justice Davies is of the view that it should be possible in all cases for pre-trial procedural questions to be determined entirely in writing. He believes that each party should have the right to elect, in any such proceeding, to give evidence and to make submissions entirely in writing.

IV. USA (NATIONAL REPORTER: PROFESSOR RICHARD MARCUS, HORACE O. COIL ('57) CHAIR OF LITIGATION, UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW)

Although litigation costs in the USA can be as high as in England and Australia, the position there is somewhat different because there is no general rule that the winner in litigation pays the loser's costs. By and large, there is no cost-shifting rule in the USA. The winning litigant is not entitled to recover its attorneys' fees from the loser.

The absence of customary recovery of attorneys' fees stands as a high barrier to litigants of limited means, who cannot afford to spend the very considerable amounts of money needed to fund litigation. The position is, however, somewhat ameliorated by the possibility of contingency fee agreements. Under this system, if the plaintiff's case fails, the lawyer is paid nothing. But, if the plaintiff's case succeeds, the lawyer is entitled to take a substantial proportion of any award recovered by the plaintiff. It should be stressed that contingency fee representation is virtually non-existent outside of personal injury litigation. It should also be borne in mind that defendants must always pay for their legal representation. Like their counterparts in England and Australia, American lawyers charge by the hour.

American legislatures are fully aware that this state of affairs impedes access to justice. Accordingly, to facilitate access in some categories of litigation, special statutory cost-shifting provisions have been introduced, for example in the areas of employment discrimination and environmental litigation.

There are many reasons why American litigation costs are high. Discovery, interrogatories and other document requests can require very large expenditure, perhaps even more than in England and Australia.

In the USA delays vary greatly from state to state and even between different courts within the same state. The American Bar Association adopted goals for reducing civil litigation delay in 1984. It recommended that 90% of all cases should be completed within one year, and that all should be cleared within two. However, these goals have not been met. A 1991 study of 39 urban state trial courts, for example, found very considerable differences in the degree to which the courts approached satisfying the ABA standards regarding delay. None had met either standard, but some were close. In twelve of the courts, at least 90% of cases were concluded within two years of filing, and in one of those only 1% of cases were two years old. On the other hand, in three courts more than 50% of cases lasted over two years, and in one of those 96% of cases lasted more than one year.

A reassessment of the philosophy of litigation and of the function of the judiciary has been taking place in the Unites States. The liberal ethos underlying much of the procedural superstructure has not gone unchallenged or unmodified. The main ingredient for civil justice reform is shifting of the control of litigation from the parties to the judiciary. However, on the evidence so far it is difficult to assess the success of the new strategy of judicial case management with confidence. There are indications that early case management shortens the duration of litigation, but does not necessarily reduce overall costs. It also seems that discovery time limits reduce both delays and costs.

V. SCOTLAND (NATIONAL REPORTER: SHERIFF A B WILKONSON QC)

Although part of the United Kingdom, Scotland has a separate and distinctive system of law. Indeed, as from July 1999, the Scottish Parliament will have the power to regulate the systems of civil and criminal justice.

Scotland has a relatively small practising legal profession (375 advocates and 8,275 solicitors; the Scottish population is about 5m). In the last couple of years there has been a decrease in the number of cases initiated in the courts. In 1997 4,230 cases were initiated in the Outer House of Court of Sessions (the higher level first instance court) and 134,364 cases in the Sheriff Courts (the lower first instance courts). It would appear that the rate of litigation in Scotland is on the low side, compared with England and some other European countries. The rate of appeal is also low. In 1997 there were 64 appeals from the Outer House of the Court of Sessions to the Inner House of the Court of Sessions (the first level appeal court). There were some 700 appeals against first instance decisions by the Sheriff Courts (the lower court of first instance).
There is limited data about the duration of proceedings between commencement of actions and their final resolution. However, it is known that the waiting period between allowance of proof (ie the conclusion of the process of identifying issues) and trial is 19 weeks in the Court of Sessions. The comparable figures for the Sheriff Courts are between 5 and 12 weeks. Unfortunately, these figures tell only part of the story, because considerable time may pass between the commencement of a case and the allowance for proof and, indeed, there may be delays caused by subsequent adjournments for proof. Some studies show that the period from commencement to final resolution in the court of Sessions could be about a year, whereas in the Sheriff Courts 76% of actions were concluded in 41 weeks. The waiting time for appeal is 18 weeks.

It would appear that the Scottish courts are far less willing than the English courts to condone or excuse delay. A late amendment may well be disallowed and failure to lodge a pleading in time could result in a default judgment. Nonetheless, it is difficult to arrive at firm conclusions about the duration of proceedings as there are no reliable statistics about adjournments generally and, in particular, adjournments for lack of court time.

As a general rule, the winner in litigation recovers the costs from the loser. However, where a party has been only partially successful, this may be reflected in a restricted award of costs. Lawyers are free to negotiate the fees with their clients. However, the successful litigant can recover only reasonable costs from the unsuccessful opponent. The reasonableness of costs is determined by the court according to a fixed table of fees which specifies the charges that may be made for various types of work. Solicitors' fees are calculated on an hourly basis whereas barristers' fees are calculated on a daily basis. Lawyers may enter into conditional fee agreements, whereby they are paid only if their client is successful.

Court fees are payable in respect of commencing proceedings and in respect of most procedural steps thereafter. Interestingly, court fees in Scotland cover almost all the cost of the administration of civil justice.

Due to the hourly rate system, the cost of litigation is unpredictable and varies greatly from case to case. The only statistics available concern legal aid cases. These indicate that the average cost in the Sheriff Court varies between £1,536 in respect of family cases and £2,699 in respect of actions for tort. In the Court of Sessions the average corresponding figures are £6,764 and £9,251. However, these statistics are largely meaningless since the averages are calculated across all cases, including cases decided by default or by settlement, which form the large majority of cases. In contested cases, the national reporter writes, 'the cost of litigation is likely to be prohibitive or involve unacceptable risks except for the legally aided person or persons of substantial means.'

The cost and delays of civil proceedings have been a subject of concern for a long time. There have been periodic attempts to improve the civil process. The trend in recent years has been to place the control and management of cases firmly in the hands of the courts and to limit the freedom of parties to litigate at their own pace. The Sheriff Courts have been given the power to hold an "Options Hearing" within a fixed period after the commencement of the action and, at such a hearing, to obtain information from the parties concerning the issues and to order the steps to be taken thereafter and their timing. However, it seems that this strategy has had only partial success, because delays are still frequent after the Options Hearing. There has been little progress towards judicial case management in the Court of Sessions (the higher of the two first instance courts).

VI. FRANCE (NATIONAL REPORTER: PROF. LOÏC CADIET, PROFESSOR OF LAW AT THE UNIVERSITY OF PANTHÉON-SORBONNE, PARIS)

It is not easy to assess the situation of the French system. For a long time now there has been an upward increase in the volume of litigation. This trend has accelerated considerably in the last twenty years. The resources of the system have not, however, increased at the same pace. In the middle of the last century, France had about 6,000 judges for a population of 37 million. The size of the judiciary is approximately the same today, although the population is now 58 million. Yet, as we shall shortly see, as far as the duration of proceedings is concerned, the situation is not that bad.

Not only is the duration of proceedings in France fairly reasonable, but in the *Tribunaux de Grande Instance* the average case duration has even diminished from 10 months in 1991 to 8.8 months in 1996. The average duration of cases before the *Tribunaux d'instance* has increased. Average duration has gone from 4.5 months in 1991 to 5 months in 1995 for ordinary proceedings. However, these figures conceal great variations, because they include cases adjudicated in summary proceedings. In contested ordinary proceedings adjournments are common and may greatly delay the resolution of a dispute, so that the path to a first instance judgment may be considerably longer than the average figures suggest. Statistics indicate an increase in the average time taken between a full hearing on the merits and delivery of judgment across the first instance jurisdictions. The backlog of appeals has been growing, with the average appeal duration increasing from 13.9 months in 1991 to 15.6 months in 1996. Recent forecasts suggest that the appeal system will probably be paralysed by the year 2000.

Recovery of litigation costs in France is, at best, partial. The winner has a right to recover court fees, witness fees and the like (all of which are fixed by law) from the loser. By contrast, lawyers' fees, which normally represent the bulk of litigation costs, are not recoverable as of right. Lawyers are free to negotiate their fees with clients. Hourly billing is fairly common, and lawyers may even charge part of their fees as contingency fees. The court has a discretion to order the loser to pay the winner's legal fees. However, French courts are reluctant to order full recovery of these costs. Although the general level of lawyers' fees is not as high as in common law countries, many French citizens regard the cost of litigation as excessive, and see this as an obstacle to access to the court.

Over the years there have been numerous attempts to reform the system of civil procedure, especially in 1958 and in 1977. Two particular trends are notable in the reform movement. The first is a tendency to move more and more types of proceedings to specialised courts or judges. Some specialist courts provide a fairly good service to the community, while others are less successful. The second tendency is one of moving from party freedom in the conduct of litigation towards court control. Traditionally, French procedure was very liberal, giving the parties a large measure of control over the pace and depth of the process. Recent reforms have been directed at curbing this freedom. The trial is still considered to "belong to" the parties, but the judge is given extended powers: including powers to control the progress of litigation; power to order investigative measures and the production of documents; and the power to take into account matters not raised by the parties. The new regime is aimed at promoting co-operation between the judge and the parties in the litigation process.

At the same time, efforts have been made to simplify the procedure and remove unnecessary complications. The emphasis is on flexibility designed to facilitate better management of judicial time, so that the time invested in individual cases is in proportion to their real need. Summary procedures are employed wherever possible. Different tracks have been designed to cater for cases with different needs, with different timetables. Judges of varying degrees of specialisation *(Juge de la mise en état, juge-rapporteur, conseiller rapporteur, conseiller de la mise en état)*, operate these tracks. The use of single judges is on the increase.

VII. ITALY (NATIONAL REPORTER: SERGIO CHIARLONI, PROFESSOR OF LAW AT THE UNIVERSITY OF TURIN)

The duration of civil proceedings in Italy is measured in years rather than months. Although, the average duration of first instance proceedings is 3.3 years, the appeal process can stretch the final resolution of disputes by several more years. Sadly, it is not uncommon for plaintiffs to be forced to wait 10 years for final judgment.

Only a small proportion of actions end in a judgment on the merits. Most are abandoned. Thus, in 1994, of 1,080,933 concluded cases, only 376,546 proceedings (about 35%) ended in a decision on the merits. This is chiefly due to the excessive delays. Many litigants would rather accept a disadvantageous settlement, however unfair, than wait for years to have their claims heard.

Procedural complexity is a major problem; yet the majority of those who operate the justice system favour the slow bureaucratic stages of ordinary proceedings.

Car accident litigation makes up nearly one third of the civil cases which are dealt with in ordinary proceedings. But it often serves the interests of insurance companies to drag out litigation. A situation in which proceedings to enforce even small claims are disproportionately costly and lengthy serves the interests of insurers. The knowledge that it will be expensive to fight the insurance claim all the way through the court system can deter individual plaintiffs, who often prefer to settle on unfair terms rather than wait for years, and spend large sums of money, to get their full awards.

This situation prompted the legislature, in 1969, to empower the courts to award interim payments to road accident victims, on account of a final judgment in their favour. But the conditions for applications for interim payments are too strict: the victim must be shown to be in financial need, and serious fault must be shown on the part of the driver. As a result, few interim payment orders are made, and the situation has hardly improved as a result of this legislation.

Not all litigants are obstructed by delays. Some areas of procedure function well. While normal proceedings can last for years, there is a fast and efficient procedure for recovering debt. Further, rich litigants, such as companies, can refer their cases to arbitration and thus obtain swift resolution, at a price.

On a more hopeful note, there is an increasing willingness on the part of the judiciary to acknowledge the problems. The *Consiglio Superiore della Magistratura* (the body which

governs the judiciary) has recently denounced the poor service given by the courts. Further, there is an increasing number of groups of local judges who club together to improve their case management so that they can offer a more effective and efficient service.

VIII. SPAIN (NATIONAL REPORTER: PROF. IGNACIO DÍEZ-PICAZO GIMÉNEZ, UNIVERSIDAD SAN PABLO CEU, MADRID)

Spain seems to suffer from several ills. Civil procedure is still dominated by the antiquated code of 1881, with the result that civil litigation is cumbersome, complex and liable to be hampered by procedural technicalities. Furthermore, the process is largely written and largely dominated by the lawyers. The judges, who have limited powers to control the progress of litigation, are bombarded by motions and interlocutory applications, which delay and sometimes frustrate altogether a fair determination of disputes.

Although it has been apparent for a long time that the multitude of procedural laws and their complexity impede the efficient operation of the administration of civil juice, little has been done to rectify this. Indeed, such changes that have been introduced have made matters worse because of their piecemeal nature.

Court fees were abolished in 1986 as a measure against corruption. Previously, the payment of court fees seems to have provided an opportunity for the payment of bribes to court officials. This phenomenon has now disappeared.

Representation in the courts requires the employment of two kinds of lawyers - the *abogado* and the *procurador* - each of whom has to be paid by the client. Lawyers are free to charge what they choose; though there are minimum scales to prevent competition at too low a level. As in most other European countries, contingency fees are outlawed.

A new Civil Procedure Bill (December 1997) is being proposed. It represents an attempt to simplify the Spanish civil procedure. The Bill is clearly inspired by the adversarial principle. The Bill endeavours to reduce the number of judgments given on the basis of procedural rather than substantive points. The courts will be given powers to exercise control over the litigation process. Judges will be able to give directions to ensure that the majority of procedural prerequisites are complied with. A general rule is to be introduced allowing procedural defects to be rectified. A sustained effort is to be made to limit appeals. First instance interlocutory decisions will not be able to be appealed. Final judgments will be liable to appeal only upon establishing good cause. In an attempt to remove some of the temptation to appeal, the new rules will allow for first instance judgments to be enforced pending an appeal.

IX. PORTUGAL (NATIONAL REPORTERS: MARIA MANUEL LEITÃO MARQUES, CONCEIÇÃO GOMES, JOÃO PEDROSO, CENTRE FOR SOCIAL STUDIES – UNIVERSITY OF COIMBRA)

In Portugal the volume of litigation more than doubled between 1986 and 1996. Until 1986 the number of pending cases increased far faster than the number of new actions commenced. But, since 1986, there has been an improvement in disposal rates.

In Portugal 65% of first instance actions are disposed of within one year and a further 22% within a further year. However, one should bear in mind that the vast majority of actions are disposed of without full trial on the merits. Indeed, only 17% of actions go all the way to trial. We may assume that the 11.7% of actions that last longer than 2 years are those that go to trial. Of these, 7.7% are determined within a further year and the rest take longer. These figures do not take into account the period of appeal. The majority of appeals are disposed of within one year. It follows that the period from commencement to final disposal after appeal could take 3 years or more in contested actions.

In the public view, the Portuguese system of justice is incapable of responding, in reasonable time, to the demand for protection of rights. Excessive and unnecessary formalism in the law of procedure is responsible for delay in many types of action. But delay is also caused through the failings of those involved in the administration of justice (judges, lawyers, administrators) and by the intentional procrastination of interested parties.

In Portugal court fees are fixed as a proportion of the value of the dispute and relate to the stage that the dispute has reached. A minimum scale governs lawyers' fees, but lawyers are free to charge higher amounts, though it is unethical for their fees to exceed the value of subject matter in dispute. Charging by the hour is uncommon and contingency fees are altogether forbidden. The costs of litigation are recoverable from the loser, but in practice only a small proportion of lawyers' fees is recovered. If we take into account all the litigation costs, resort to the courts is very expensive indeed. For individuals, or one-time players, the cost of litigation presents a powerful obstacle to access to the court.

In 1997, the new Code of Civil Procedure came into effect, considerably altering the relationship between litigants and the courts through the establishment of the co-operation principle. Judges now have the duty to compensate for the omissions of the litigants, in furtherance of the principle of the discovery of the truth. The judges protested against this reform because it meant a substantial increase in their work and responsibility.

X. BRAZIL (NATIONAL REPORTER: SERGIO BERMUDES, PROFESSOR OF CIVIL PROCEDURAL LAW AT THE PONTIFICAL CATHOLIC UNIVERSITY OF RIO DE JANEIRO)

In Brazil there is an enormous variation in the duration of first instance and appeal proceedings between different parts of the system. In some regions the average duration of first instance proceedings is between 2 and 3 years, but in others it can take very much longer. Most courts experience huge backlogs. At least 25% of actions filed are not

processed at all, but simply sit in the courts. In Northeastern and Northern States actions may crawl for years and years and not be tried.

Although appeal is normally only by leave, the volume of applications for leave is enormous. Most losing parties try to appeal as a means of putting off the enforcement of the judgment. As a result, much of the time of the appellate courts is taken by applications for leave, even though the great majority of them are denied.

The loser in litigation must pay the winner's costs. Lawyers are free to charge whatever they can persuade their clients to agree to pay. Generally, lawyers calculate their fees on the basis of a number of factors: the amount of work that they are required to do; the value of the subject matter; the professional status and prestige of their law firm. They may charge up to 20% of the value of the subject matter. For instance, in a lawsuit for the collection of a debt of US$1 million, a lawyer might charge an initial fee of US$30,000, plus a contingent fee of 10% of what the client recovers, reduced by any costs recovered from the losing party. In a simple lawsuit for the collection of a debt, about 50% of the fees are likely to be recovered from the losing debtor. In other types of cases, the percentage will vary between 5% and 20%. Lawyers' fees will, generally speaking, end up amounting to 10% of the value of the subject matter.

In recent years attempts have been made to improve the civil process, with some limited success. The procedure has been somewhat simplified. Summary judgment is now easier to obtain. Indeed, efforts have been made to ensure that litigation is conducted in a speedy and effective manner. However, litigation costs remain so high that a large proportion of the population has no access to justice at all, and cannot therefore benefit from such improvements as have been achieved.

XI. ARGENTINA (NATIONAL REPORTER: PROFESSOR AGUSTO MORELLO, FACULTY OF LAW, NATIONAL UNIVERSITY OF LA PLATA, BUENOS AIRES)

The Argentine system of justice suffers from excessive cost and unacceptable delays.

The cost of litigation is amongst the highest in the region. The cost of litigation all the way to appeal may be as much as 40% to 60% of the value of the subject matter in dispute. A legislative attempt has been made to place a ceiling of 25% on professional fees.

Proceedings are much delayed by the extended written processes and by the multiplicity of motions for special rulings before the case is ready for trial. Furthermore, since appeal stops execution, there is a tendency for litigants to employ the appeal process in order to put off the enforcement of judgments.

XII. GREECE (NATIONAL REPORTERS: PROF. DR K.D. KERAMEUS, PROFESSOR OF CIVIL PROCEDURE AT THE LAW SCHOOL, UNIVERSITY OF ATHENS; DIRECTOR, HELLENIC INSTITUTE OF INTERNATIONAL AND FOREIGN LAW, AND PROF. S. KOUSSOULIS, ASSOCIATE PROFESSOR IN CIVIL PROCEDURE AT THE LAW SCHOOL, UNIVERSITY OF ATHENS)

In Greece, 63% of final decisions given by courts of first instance are delivered within one year from the commencement of proceedings. However, this figure conceals great variations. For instance, the time from the initial hearing of a case, before the three-member district court, until the final decision is rendered may be 2 or 3 years. Furthermore, since first instance judgments are not final and may not be enforced before the appeal procedures have been exhausted, the great majority of first instance decisions are appealed so that the final disposition is considerably longer.

As elsewhere, lawyers have considerable influence over the length of litigation. Lawyers are known to employ delaying tactics by requesting postponements. Parties are entitled to seek postponements in certain circumstances, but only for up to two months, or to the earliest possible trial date thereafter. Although the reason for seeking a postponement should be scrutinised by the court before postponement is granted, in practice first time requests are usually granted virtually automatically. In this way, the progress of the trial may be significantly delayed, particularly since courts tend to grant postponements longer than two months because they are overloaded with cases.

Generally speaking, the cost of litigation in Greece is low and courts rarely order full payment of the expenditure incurred. Fees for legal representation in litigation are charged as a small percentage of the value of the subject matter. The system is similar to the German system of fees. Lawyers are allowed to negotiate higher fees, and even contingency fees are allowed. But a contingency fee may not exceed 20% of the value of the subject matter in dispute. The legal profession benefits from effective procedures to recover fees due to lawyers from their clients. The Attorneys Code even contains a provision whereby clients must pay 10% of the fee due in advance. However, this provision has been recently held to be unconstitutional.

As a rule, the winner in litigation is entitled to recover costs from the loser. But the court may depart from this rule in certain situations. For instance, where the winner unreasonably commenced proceedings, or was guilty of falsehood, the court may order the winner to pay the loser's costs. Interestingly, the court has discretion to make no order of costs where there is some doubt about the correctness of the judgment, thus letting each party bear its own costs.

XIII. JAPAN (NATIONAL REPORTER: YUKIKO HASEBE, PROFESSOR OF LAW, GAKUSHUIN UNIVERSITY, TOKYO)

Three countries stand out as being relatively well served by their systems of civil justice. Japan is one of them. However, a word of caveat is called for when one looks at the Japanese system. Litigation volumes in Japan are much lower than in other developed countries. Indeed, there is considerable cultural hostility to litigation and a strong preference for keeping disputes out of the public arena.

Japanese civil procedure is strongly influenced by the German system. However, as far as litigation costs are concerned, the Japanese system has also seen American influence. Court fees are recoverable, but not the cost of legal representation. Time charging is permitted, but lawyers are normally paid a fixed fee, representing a percentage of the value of the claim, as in Germany. The fixed fee is in two parts. One is payable regardless of outcome; the other is contingent on winning the action.

On the face of it, the Japanese system is impressively efficient. In the great majority of actions, judgments are given at first instance within a year. Appeals from the senior first instance court, the District Court, run at a rate of between 20 and 25%. Appeals from judgments of the junior first instance court, the Summary Court, are rare. The rate of second appeals is higher.

Even though an appeal suspends the execution of judgment, the rate of appeals against first instance decisions of the District Court is moderate by comparison to some other countries. Furthermore, even where such appeals take place, a final resolution is reached in less than 20 months from the commencement of proceedings. Appeals to the Supreme Court, the highest authority in the land, are considered to be too numerous and measures have been taken to limit the right of appeal to this court.

It would appear that, although the volume of cases entering the system every year has been showing a steady increase, the number of cases disposed of within the year has increased in tandem. Thus, the number of actions started every year tends to be almost the same as the number of actions disposed of within the year. In a substantial proportion of cases litigants represent themselves (in 58% of District Court cases at least one litigant is a litigant in person; the rate goes up to 99% in summary proceedings).

Behind these encouraging data lurk some problems concerning access to justice. The number of attorneys, Professor Hasebe suggests, is too small. In 1997, there were approximately 13 attorneys for every 100,000 people. It is extremely difficult to qualify as a practising lawyer.

A new Code of Civil Procedure came into effect in January 1998. The aim of the reforms was to offer ordinary citizens plain and accessible civil justice. The main changes are: the establishment of pre-trial procedures for identifying genuine issues; the improvement of the devices for obtaining evidence; the introduction of a small claims procedure; and the restriction of appeals to the Supreme Court.

XIV. GERMANY[48]

By comparison to most other European countries, whether having common law or civil law systems, the German system performs very well. In Germany both court fees and lawyers' litigation fees are fixed by law. Both types of fees are calculated as a small proportion of the value of the subject matter in dispute (the percentage fee decreases with the increase in the value of the dispute). The cost of litigation in Germany appears cheap indeed by comparison to common law countries and, equally important, it is predictable. This predictability of costs has fostered a thriving market in litigation cost insurance. It is therefore not surprising that, unlike in most other countries reviewed, there is a high degree of public confidence in, and satisfaction with, the administration of civil justice.

In all courts litigation is concluded within a reasonable time. In 1996, before the regional courts of first instance 38.9% of proceedings were dealt with within three months; 26.5 % within six months; 21.7 % within twelve months; and a further 9.6 % within twenty-four months. The average duration of all regional court proceedings, from filing to final settlement or final decision, was 6.5 months. In the local courts in 1996: 48.2 % of cases were dealt with within three months; 28.5 % within six months; and 17.5 % within twelve months. The average duration of all local court proceedings, from filing to final settlement or final decision, was 4.6 months. But 4% lasted more then three years. These figures are impressive, in the light of the very high volumes of litigation in German.

The system suffers from some weaknesses. Foremost amongst them is the high volume of litigation, which places strains on the court system. In some areas of Germany backlogs are building up and the progress of cases may be held up unnecessarily, despite efforts to improve the administration of the courts.

Within the European Union, Germany has by far the highest number of judges per capita of population. However, the total number of judges has been constant for years. Court fees cover scarcely 50% of system costs. There is an ongoing debate about raising costs in order to discourage unmeritorious litigation. But, so far, no method has been worked out for achieving this goal without, at the same time, reducing access to justice.

XV. SWITZERLAND (NATIONAL REPORTER: PROF. DR. ISAAK MEIER, FACULTY OF LAW, UNIVERSITY OF ZURICH)

One of the more interesting features of Swiss civil procedure is that the majority of judges, whether justices of the peace or district court judges, are lay judges, ie persons without legal qualifications. Only the presiding judges in the district court and the judges of the higher courts have legal qualifications. Furthermore, judges are elected for limited periods of office.

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[48] The information for this section is derived from Professor Dr Peter Gottwald's essay on the German administration of civil justice in *Civil Justice in Crisis – Comparative Perspective of Civil Procedure*, AAS Zuckerman (ed), Oxford University Press, 1999 (forthcoming).

Going to court in Switzerland is very expensive. The losing party, who also has to pay the winner's legal costs, can face large bills. For instance, a party who loses a case worth 100,000 sfr. (going all the way to the Federal Court) has to pay more than 90,000 sfr (this represents both his own costs and those of the winning opponent).

Case loads have remained generally stable over the last few years (except for non-family litigation in the district court, where the volume of litigation halved between 1994 and 1997, but there was an increase in litigation before a single judge).

Litigation seems to be fairly expeditiously concluded. In proceedings before a single judge the vast majority of cases are concluded within 3 months (83%) and only 2% last more than a year. In the district court (a three-judge court) about 75% of cases are concluded within 6 months. Ordinary appeals are concluded within 6 months in 60% of the cases and 13% last more than a year.

In general, civil proceedings cannot be commenced without first having attended a settlement hearing before a justice of the peace. Accordingly, the rate of settlement is quite high, ranging between 44% and 72% in the district court, depending on the type of case. Very few cases take more than one year. But the proportion of appeals lasting more than one year has increased. In 1997, 26% of all judgments were appealed to the cantonal high court in Zurich. In the same year 33% of the judgments were attacked by an appeal to the Federal Court. Court fees cover about 50% of the cost of the system of civil justice.

As the above account suggests, proceedings are expedited within a reasonable time. But this mainly only true of the canton of Zurich. In some cantons the position is less satisfactory. There are problems, however, inside the judicial organisation, in that the quality is not even. Some judges find it difficult to handle complex cases, and judges who are promoted tend to leave behind a backlog of unfinished cases. However, the judiciary is increasingly aware of the importance of case management. Fort instance, as a rule, in ordinary proceedings judges organise well-prepared settlement conferences after the defendant's answer. Furthermore, judges nowadays are much more reluctant than they used to be to grant extensions of time in written proceedings.

The main problem facing the Swiss system of civil justice is the very high cost of litigation. There is also an excess of complexity in the remedy system. There are too many remedies and their scope is often extremely difficult to distinguish. Professor Meier observes that it would be better to create a new and simplified remedy system within a new federal code for procedural law.

XVI. HOLLAND (NATIONAL REPORTER: PROFESSOR ERHARD BLANKENBURG, PROFESSOR, VRIJE UNIVERSITY, AMSTERDAM)

The Dutch system operates well. When litigants have to refer their disputes to court, they find the courts accessible in the sense that they can obtain a resolution within a reasonable time and at a reasonable cost. Equally importantly, the Dutch citizens are offered other effective ways of resolving their disputes so that court proceedings are really reserved for disputes that are either important or intractable.

A single judge, before whom legal representation is mandatory, hears first instance cases. As far as the duration of proceedings is concerned, there is a big difference between Local Courts (*kantongerecht*), with an average duration of 133 days for an opposed case to reach final judgment, and District Courts (*rechtbank*), where the corresponding average is 626 days. On appeal, an average of only 25% of cases are determined within 9 months, and only two-thirds are terminated within 2 years. Summary procedures (*Kort geding*) count their average duration in terms of weeks. *Kort geding* make up 12% of the civil caseload.

Some interesting experiments to reduce delays are under way. Some District Courts, in co-operation with local lawyers, offer parties the possibility of choosing an abbreviated procedure. If the plaintiff and the defendant are prepared to put forward their case in full at the outset, the court will undertake either to get the parties to agree on an early settlement or, failing that, to arrive at a final judgment within 6 to 8 months. Initial evaluation of this procedure indicates that 89% of the cases adopting this procedure produce a final judgment within 8 months.

Court fees are related to the value of the dispute. On their part, lawyers charge an hourly fee. The hourly fee is moderate by the standards of the common law countries. An appropriate two-hourly fee for an attorney might be Dfl 360. The winner in litigation is entitled to recover the court fees from the loser and also his or her lawyers' fees, unless the court orders otherwise. For small claims, the costs can easily exceed the value of the dispute, a fact that leads many litigants to seek alternative methods of dispute resolution.

About 15% of all Dutch households hold policies for legal expenses insurance. Dutch legal insurance companies handle the legal problems of their clients in-house first. When they get involved in a dispute, insured persons first contact their insurance companies, not their lawyers. As the legal profession does not have a monopoly on the giving of legal advice, Dutch insurance companies can advise their policyholders on their disputes. Indeed, they manage to negotiate a settlement in 96% of disputes.

The Dutch system has developed a number of processes for expediting court proceedings or for avoiding them altogether. Recent changes in divorce proceedings, as well as the innovative use of the preliminary injunction procedure, *kort geding*, provide prominent examples of the ways in which the Dutch system has managed to avoid an overwhelming caseload.

When one looks at the variety of dispute resolution facilities available in Holland one can see why the Dutch have been successful in keeping their judiciary small and the court system so efficient.

XVII. THE EMERGENCE OF A NEW LANDSCAPE

A. Symptoms and trends

This survey of different national systems shows why the dissatisfaction with the administration of justice is so widespread. The usefulness of going to court to claim or defend one's rights is impaired, to a greater or lesser extent, by long delays and high costs. The survey suggests that, in virtually all the countries represented here, efforts have been made to improve matters.

In virtually all the countries there has been a steady, sometime sharp, increase in the volume of litigation entering the courts. The rising volume of litigation has created in some countries great backlogs of cases and has caused protracted delays. In some systems it has also been accompanied by a substantial increase in the cost of litigation.

In all the reviewed systems efforts have been made periodically to improve the administration of civil justice. These efforts have been directed at different aspects of litigation. Measures have been adopted to simplify the rules and the structure of civil proceedings. Attempts have been made to persuade litigants to resolve their disputes otherwise than by court proceedings. In many countries improvements were introduced in court administration, and in most the number of judges and of support staff was increased. Yet, notwithstanding the persistent reform efforts, the problems of delay and cost have proved intractable in most systems. Indeed, on occasion reform has made matters worse.

However, there are also encouraging signs which give some reason for optimism. First, there are three notable exceptions to the general picture of inefficiency: Japan, Germany and, above all, Holland. We can hope to derive some beneficial lessons from the operation of these systems. Second, when we look at the variety of the causes of the problems, we discover certain persistent contributory factors which may be capable of being reversed. Lastly, we can observe in certain systems a willingness to address these factors in an innovative and determined way.

While the cost of litigation is a source of complaint in most countries, it is clear that cost levels are far higher in common law countries. The possibility that the cost to each party may not just exceed the value of the subject matter in dispute, but even surpass it by a large margin, is virtually unknown in civil law countries, except perhaps in very low value disputes. At the same time, delays of the magnitude experienced in a few civil law countries are alien to the common law countries.
There is a far greater diversity of efficiency and performance amongst civil law systems than amongst common law systems. Amongst civil law systems we have at one extreme Holland, Germany and Japan, which provide their citizens with a reasonable service and, at the other extreme, systems such as Italy with an abysmal record. This diversity is particularly striking when we compare countries which share similar procedural arrangements. Holland's procedural code is derived from the French code, yet the Dutch administration of justice seems to cater better for the needs of its citizens. Similarly, the Greek procedural arrangements are derived from the German system, yet the latter inspires far greater confidence in the community.

B. The universal assertion of judicial control

One of the most persistent beliefs is the view that, as a whole, civil law procedures are inquisitorial or judge-controlled, whereas common law procedures are adversarial and party-controlled. This view is certainly wrong at the level of theory. Continental procedures are largely oral and judges are meant to leave the initiative over the civil process to the parties. Civil law procedures, as the contributors to this volume explain, are dominated by a liberal philosophy of party autonomy. However, as Professor Blankenburg observes, the practice is not as absolute as the theory suggests. Both orality and party control are more limited in civil law systems. Judges lead the hearings on the basis of a file that contains all the documents submitted by the parties. This offers judges the opportunity to control the process and to encourage the parties to settle. Even so, there is a widespread perception in civil law countries that parties have too great a scope to protract and complicate the civil process, to the detriment of the efficient operation of the administration of justice.

The clearest trend emerging from the different national accounts is a general tendency towards judicial control of the civil process. Both common law countries and civil law countries display a shift towards the imposition of a stronger control by judges over the progress of civil litigation. In virtually all the systems reviewed here there is a perception that, when the process of litigation is left to the parties and their lawyers, its progress is impeded by narrow self-interest. Such self-interest may be that of recalcitrant defendants bent on exhausting and tormenting their plaintiffs, or that of lawyers determined to enhance their own incomes.

The contemporary dominant view is that the disruptive self-interest of parties and their lawyers can only be kept at bay by an active judiciary that directs the litigation process and is able to prevent disruptive tactics. The USA has been leading the trend amongst common law countries. A culture of managerial judges is now well established there. In England and Australia the move towards judicial control is more recent, but it is equally dramatic. New arrangements give judges unprecedented powers over the litigation process, its intensity and its pace. Not only are the common law systems adopting a more interventionist judicial approach, they also display a marked move away from orality. This is to be expected, for control cannot be exercised without a prior understanding by judges of the dispute and its ramifications. Such advance understanding can only be gained from written materials.

A similar trend is reported from the great majority of civil law countries. In France, Spain, Portugal, Italy and even in Japan and in Germany, moves are on foot to strengthen the judicial supervision of the litigation process.

XVIII. SUMMARY

This survey shows why the dissatisfaction with the administration of justice is so widespread. The usefulness of going to court is often impaired by long delays and high costs. In virtually all the countries represented here, efforts have been made to improve matters. Yet, notwithstanding the persistent reform efforts, the problems of delay and cost have proved intractable in most systems. Indeed, on occasion reform has made matters worse.

However, there are also encouraging signs which give some reason for optimism. First, there are three notable exceptions to the general picture of inefficiency: Japan, Germany and, above all, Holland. We can hope to derive some beneficial lessons from the operation of these systems. Second, when we look at the variety of the causes of the problems, we discover certain persistent contributory factors, which may be capable of being reversed. These include: the vested interests of the legal profession to maintain systems of complex, protracted and expensive litigation; and, inefficiencies in the administration of the courts. Lastly, we can observe in certain systems a willingness to address these factors in an innovative and determined way.

The contemporary dominant view is that the disruptive self-interest of parties and their lawyers can only be kept at bay by an active judiciary that directs the litigation process and is able to prevent disruptive tactics. The USA has been leading the trend amongst common law countries. In England and Australia the move towards judicial control is more recent, but it is equally dramatic. New arrangements give judges unprecedented powers over the litigation process, its intensity and its pace. Not only are the common law systems adopting a more interventionist judicial approach, they also display a marked move away from orality. This is to be expected, for control cannot be exercised without a prior understanding by judges of the dispute and its ramifications.

A similar trend is reported from the great majority of civil law countries. In France, Spain, Portugal, Italy and even in Japan and in Germany, moves are on foot to strengthen the judicial supervision of the litigation process.

XIX. ZUSAMMENFASSUNG

BEWERTUNG VON KOSTEN UND VERZÖGERUNGEN - EINE MULTI-NATIONALE PERSPECTIVE

Dieser Überblick zeigt, warum die Unzufriedenheit in der Verwaltung und der Justiz weit verbreitet ist. Der Nutzen von Gerichtsverfahren wird oft durch lange Verzögerungen und hohe Kosten beeinträchtigt. In praktisch allen Staaten die hier vertreten sind wurden Maßnahmen zur Verbesserung der Rahmenbedingungen ergriffen Trotz ausdauernder Reformversuche erwiesen sich bisher die durch Verzögerungen und Kosten entstandenen Probleme in den meisten Rechtssystemen als schwierig zu handhaben, und in einigen Fällen wurden durch Reformierungen die Bedingungen verschlechtert.

Dennoch sind einige ermunternde Ansätze zu erkennen, die Grund für Optimismus geben. Erstens gibt es drei nennenswerte Ausnahmen zum allgemeinen Bild der Ineffizienz: Japan, Deutschland und vor allem Holland. Wir hoffen, von der Arbeitsweise dieser Systeme einige nützliche Erfahrungen ableiten zu können. Zweitens betrachtet man die Verschiedenartigkeit der Gründe für Probleme, entdeckt man gewisse beharrlich mitwirkende Faktoren, die auch ins Gegenteil umschlagen können. Dazu gehören: das wohlerworbene Interesse der juristischen Berufsgruppen, die Praktiken der komplexen, langwierigen und teuren Prozesse sowie die Ineffizienz in der Verwaltung der Gerichtshöfe zu erhalten. Zuletzt kann in einigen Systemen die Bereitschaft beobachtet werden, sich mit diesen Aspekten in einer innovativen und bestimmten Weise zu befassen.

Die gegenwärtig vorherrschende Meinung ist, daß das sich auflösende Eigeninteresse von Parteien sowie den Juristen nur durch ein aktives Gerichtswesen ferngehalten werden kann, das den Prozeßverlauf vorgibt und fähigt ist, störende Praktiken zu verhindern. Die USA ist unter jenen Staaten die der Tradition des „Common Law" folgten trendführend. In England und Australien ist die Tendenz zu gerichtlicher Kontrolle noch jung, jedoch ebenso spannend. Durch neue Vereinbarungen erhalten Richter eine außergewöhnliche Macht über den Prozeßverlauf sowie dessen Intensität und zeitlichen Ablauf. Rechtssysteme, die auf „Common Law" basieren, nehmen nicht nur einem eher befürwortenden gerichtlichen Ansatz an, sondern zeigen ein deutliches Abgehen von der Mündlichkeit. Dies ist zu erwarten, weil eine Kontrolle ohne vorherige Kenntnisse des Richters über den Streitfall und dessen Verstrickungen nicht ausgeübt werden kann.

Ein ähnlicher Trend wird von einer großen Mehrheit jener Staaten berichtet, die der Tradition des „Civil Law" folgen. In Frankreich, Spanien, Portugal, Italien und sogar in Japan und Deutschland ist eine Bewegung im Gange, die gerichtliche Aufsicht des Prozeßverlaufs zu verstärken.

TOWARDS PROCEDURAL ECONOMY: REDUCTION OF DURATION AND COSTS OF CIVIL LITIGATION

Prof. Sergio Chiarloni, Italy

A COMPARATIVE PERSPECTIVE ON THE CRISIS OF CIVIL JUSTICE AND ON ITS POSSIBLE REMEDIES

by
Prof. Sergio Chiarloni, Italy

I. THE GENERAL CRISIS SITUATION AND THE FEW EXCEPTIONS

The many national reports concerning proceedings' costs and duration reveal, with very few exceptions, a very poor situation.

Obviously, the tones are manifold, sometimes reflecting the different economical and social situations of the examined jurisdictions.

Therefore, the reporter from a developing giant like Brazil deplores the basic organisational defects which cause, especially in Northern and North-western states, a substantial negation of justice, as cases lie for years on judges' books [49].

But even in the so-called developed countries, civil justice suffers severe problems of inefficiency, regarding both costs and the duration of proceedings. The two extreme situations are England for costs and Italy for delays.

In England, the costs of litigation are truly unbearable for the middle classes, which cannot afford the cost nor have access to legal aid. Except in small claims, the losing party has to pay both its own and the other party's costs. It may happen that the loser has to pay five times the value of the claim. That is due to two main factors. In first place, the traditional division of roles between solicitors and barristers obliges the parties to pay two different professionals in front of the High Court. Secondly, lawyers calculate their fees on an hourly basis (in the City, £300 or more per hour). Very conveniently, the English reporter highlights the correlation between the use of hourly fees and the inevitable disposition of lawyers to complicate proceedings, above all in the pre-trial stage, with pernicious effects on duration and costs [50].

In Italy, the duration of ordinary proceedings is unacceptable. The average duration of first instance proceedings has gone over 1,200 days, with an increasing progression in the last twenty years. If a case goes to appeal, the parties may wait for ten years in order to obtain a final decision. That has caused the birth of a new professional role. Some lawyers have specialised in appeals to the European Court of Human Rights, in order to obtain a condemnation of the Italian Government for failing to ensure a reasonable duration of

[49] See BERMUDES S., Administration of Civil Justice in Brasil, p. 17.
[50] See MICHALIK P., Justice in Crisis, a Comparative Perspective on Civil Justice. England and Wales, p. 27 ff.

proceedings according to Art. 6 of the Convention. Already several thousand Italian citizens have applied to the Court. Consequently, there is the possibility of a paradoxical result: the congestion of the European Court, which will be no more able to end its own proceedings in reasonable time[51].

Though not universal, the cries concerning the present state of civil justice constitute the *fil rouge* that runs through almost every national report. It is significant that the quality of the jurisdictional product itself is never criticised. Nobody has expressed any doubt about the skill of judges to apply correctly the law. In relation to the civil justice crisis, criticism is directed exclusively towards the above-mentioned correlated factors in their extreme manifestations: excessive costs and duration. We have to remember, though, that the long delays can rob judgments of their usefulness and amount to a denial of justice. Only Germany, Japan and the Netherlands escape from the *cahier de doléances*. We should note that Germany allocates over 7% of its national budget to justice, that is more than four times than the average of other countries; that the Netherlands, a small, wealthy and well-organised country, has a low litigation rate and a good alternative dispute resolution system; that Japan has an extremely low litigation rate (less than one-third of the European average) due to a traditional rejection of courts.

II. THE DIFFICULTY OF ANALYTICAL COMPARISONS DUE TO THE HETEROGENEITY OF DATA

At this point, the attempt to undertake a comparison between quantitative data contained in the national reports faces one first obstacle. I do not need to underline the fact that data are seldom the result of field-based researches. Data usually derive from central statistical institutes. Their reliability as a basis for a scientific inference is often weak due to several reasons. Firstly, data are collected by judicial offices' employees who are directly interested in the ensuing evaluations; furthermore, they are sometimes subject to the pressure of office chiefs, who tend to inflate backlog numbers. Data are then processed by statistical sociology experts, who ignore civil procedure. Furthermore, comparison is bound to be distorted by differences between the methodologies adopted to collect data in different countries and from the differences between the various procedures. Often, different data are collected under the same label.

Let us examine the problem of proceedings' duration. It is true that in Italy the duration of proceedings is so long that the subject is frequently the object of public inquiry. However, the gap between different countries is so huge as to raise suggest that there are some errors in the comparison. The Spanish report, for example, informs us that the average duration of first instance proceedings is slightly less than one year[52]. We could infer that the duration of ordinary proceedings in Spain is about one-third of the Italian average duration. This

[51] As I did not yet get the Italian report, I will refer to CHIARLONI S. La giustizia civile e i suoi paradossi, in Annali della Storia d'Italia Einaudi, Torino, 1998, s. 407 ff.
[52] See DIEZ-PICAZO GIMENEZ I., Civil Justice in Spain: Present and Future- Access, Cost & Duration, p. 19

conclusion is both true and false. It is formally true if we just consider the terminological appearance. It is false if we realise that the comparison being drawn is between non-comparable entities, due to a basic difference between the two procedural disciplines. In Spain there is no summary judgment for the protection of money credits, which is therefore addressed through ordinary proceedings. As experience tells us, in most cases the debtor does not raise an opposition, so that the judge's work is greatly simplified. Unopposed credit cases are of great statistical relevance in that they reduce the average duration of ordinary proceedings. In Italy, instead, such cases are covered by a special procedure (which lasts a few days in case of default of opposition) and therefore treated separately. The correctness of this conclusion is indirectly supported by the huge number of decisions by default, as described by the Spanish report.

Another distortion stems from the fact that in some countries, like Italy, the proceedings' average duration is calculated only for those cases ending with a judgment, while in others, like France, the Netherlands and Germany, the average duration is calculated considering all initiated cases. Evidently, it is difficult to compare the duration of proceedings if the terms of comparison are not homogeneous. In fact, the average duration of abandoned or settled cases is much shorter than in cases which end with a decision. Consequently, if the average duration is calculated for all cases, independently from their conclusions, the result is lower (but it is not possible to know how much lower) than if calculated only for cases ending with a judgment. The correctness of this conclusion is backed by the data contained in Prof. *Blankenburg's* report, referring to field research performed in the Netherlands. Such data, regarding several *Rechtbank* (district Courts), tell us that the average duration of settled proceedings is about one-half of the duration of proceeding ending with a judgement[53].

III. THE DIFFICULTY OF DATA EVALUATION DUE TO DIFFERENT APPROACHES BY THE NATIONAL REPORTERS

The national reports regarding France and Germany, without a comparative analysis of the data, give the impression of opposite civil justice situations. The French reporter tells about a crisis of justice, pointing out three different aspects: citizens' trust crisis; growth crisis; system crisis. According to the data given by research conducted in 1991, 97% of interviewed people complained about the excessive slowness of proceedings; 85% difficulties and complications; 84% costs; 83% the inability to grant equality of treatment[54]. The general mood of the report is very pessimistic. The German reporter, instead, and correctly, in my opinion, seems to be very optimistic, though expressing worries about the increasing trend in the litigation rate, which could, in the future, endanger the whole system[55].

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[53] See BLANKENBURG E. Civil Justice. Access, Cost and Expedition – a Multinational Perspective: the Netherlands, p. 17 ff.

[54] See CADIET L. Civil Justice Reform: Access, Cost and Delay. The French Perspective, p. 24 ff.

[55] GOTTWALD P. Civil Justice Reform- Access, Cost and Expedition, the German Perspective, p. 8 ss. To be precise I am not quoting a German national report which has not arrived, but the essay given by prof. Gottwald to

However, when we examine the data, the actual situation of these two great European countries does not justify such extreme positions in the respective evaluations. It is true that the duration of proceedings (which is here comparable because it refers to the same kinds of proceedings) is rather longer in France. In 1996, the average duration of proceedings in front of the *tribunaux de grande instance* was 8.9 months, while that of the corresponding German *Landgerichte* was 6.5 months. But the gap becomes irrelevant if we consider local courts: 5.0 months for the *tribunaux d'instance* and 4.6 months for the *Amtsgerichte*. It is plain, however, that a difference of barely 2.5 months regarding a generally acceptable average duration in both countries cannot justify two opposite evaluations. Moreover, we must consider the wide diffusion (almost 20% of *inter partes* proceedings), in France, of the proceeding of *référé*, which is a summary procedure whose average duration varies from 1.1 months in front of the *tribunaux de grande instance* to 1.7 months in front of the *tribunaux d'instance*[56]. The motivation for such sharp differences between the French and German reports may be found within the diversity of cultural approach of the two reporters, one influenced by apocalyptic perspectives, the other by integrated points of view[57].

IV. THE CAUSES OF EXCESSIVE DURATION OF CIVIL PROCEEDINGS THE SO-CALLED LITIGATION EXPLOSION

"Justice delayed is justice denied" warned J. Bentham more than one century ago. But what are the causes, who is responsible for such a creeping negation of justice that nowadays affects the activity of so many tribunals?

Certainly, the most significant cause of the present difficulties of civil justice is the enormous increase in the litigation rate, which has affected many jurisdictions in the last twenty years and has been metaphorically defined by some North-American jurists as a 'litigation explosion'.

However, we cannot avoid noticing a paradox: the most impressive litigation increases have involved the countries that have better faced them without any particular structural intervention. Concerning the civil law jurisdictions, for example, the litigation increase has been much sharper in Germany and France than in Italy. On the contrary, proceedings' duration has grown much more in Italy than in those countries: in France, between 1992 and 1996, the average duration of the proceedings in front of the *Tribuneaux de grande instance* decreased from 9.5 to 8.9 months, while the number of new proceedings increased from 523,026 to 676,282. In Italy, between 1973 and 1994, the controversies in front of Tribunals increased from 257,454 to 388,539 (less than a 5% increase every year), but the average duration more than doubled, passing from 708 to 1341 days.

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the book which will be edited by AAS Zuckerman, Justice in Crisis. Comparative Aspects of Civil procedure, Oxford, 1999

[56] Ministère de la Justice, Annuaire statistique de la justice, Edition 1998.

[57] See ECO U., Apocalittici e integrati, Milano, 1979.

In my opinion, the explanation for this enigma is rather simple: Italian judges possess a lesser skill to resolve disputes than their French and German colleagues. Statistics tell us that, from the 1950s, apart from a few exceptions due to value jurisdiction reforms, the number of concluded proceedings has become constantly smaller, even if only slightly, than the number of new actions commenced. Such a phenomenon is tightly correlated to the progressive increasing of the judges' backlog, which is the primary cause of the present disastrous situation of Italian civil justice. If we suppose a judicial office, with a 'virgin' role, that enters 1,000 proceedings a year and resolves 90% of them. After ten years, the office backlog will be equal to the total of new proceedings. After thirty years, the backlog will be three times bigger. This state of affairs can be empirically demonstrated thanks to my own research about appeals in labour proceedings at the Tribunal of Turin. I have found that, in only six years, between 1974 to 1980, proceedings' duration rose from 75 to 304 days. Meanwhile, the backlog had increased from zero to 167 cases[58]. Today, after more than twenty years, the backlog is 2,000 cases and the average duration has reached three years.

The correct description of the Italian situation, compared to other countries that have managed to face the growing demand of justice, should be "backlog explosion" rather than "litigation explosion".
It is important to underline that, probably, it is the very increase in duration that discourages the demand for justice. As a matter of fact, in Italy there are only 1640 ordinary proceedings for every 100,000 citizens, while in Austria there are 5,020, in Belgium 4,008, in West Germany 3,561 and in France1,950[59].

Not all national reports have furnished historical accounts of litigation trends in their respective countries. However, we can imagine that in those countries in which an excessive duration is complained of, without complaining of a corresponding increase in litigation (England, Brazil, Spain), the main problem is the incapacity of the system to absorb the demand for justice without aggravating the courts' backlog.

V. PROBLEMS OF JUSTICE, PROCEEDINGS' STRUCTURES AND PROCEEDINGS' PARTIES

The quantity of litigation and its increasing trend over the years certainly represent an important factor in assessing the situation of ordinary proceedings. But it's not the only one. Other equally important factors are procedural disciplines, organisation structures, behaviours and interests of judges and lawyers. These factors are tightly connected. We will see, for example, that within the so-called 'co-ordinated jurisdictional systems', that is, common law jurisdictions, where the pre-trial stage is left in the parties' (or more correctly to their lawyers) domain, there is a tendency to submit this stage to the management of the judge. The basic idea is that excessive costs (such as those concerning discovery), delays

[58] See L'appello nel processo del lavoro. Profili dall'esperienza, Milano, 1988.
[59] See BLANKENBURG E. , Cultures juridiques comparées.

and complications are due to the interest of lawyers in increasing their earnings, as their fees are proportional to the expense of time rather than to the value of the case. We will see, instead, that in the so-called 'subordinated jurisdictional systems', that is, civil law jurisdictions, in which the judges ideally manage the whole proceedings and the lawyers' fees, usually regulated by law, are not calculated on an hourly basis, the criticisms focus (though not completely sparing lawyers) on the complexity of the judicial apparatus and on the excessive complications of ordinary proceedings.

VI. THE REMEDIES TO RECOVER EFFICIENCY

As it is obvious, the remedies described in the various national reports differ according to the perceived crisis factor.
As far as costs are concerned, there are two kinds of proposals. On one hand, there are proposals to abate costs, which are deemed to be excessive, through changes in the organisation of the legal profession and in the system used for paying lawyer's fees. On the other hand, there are proposals to change legal aid to the poor, if it turns out to be insufficient or not cost-effective.
As far as duration is concerned, the efforts at improvement are made in different directions. There are proposals to introduce mechanisms which would reduce the volume of litigation; to simplify procedures, adapting them better to the different kinds of disputes; to rationalise the administration of justice by improving its structures in order to increase judges' productivity.
But let us proceed with each proposal in turn.

6.1. Rationalisation of procedural costs and legal aid.

As far as rationalisation of procedural costs is concerned, which is aimed at making them more affordable and to counteract lawyers' interest in procedural complications, the most interesting initiatives come from England and Germany.
In England, as we have already said, costs are unbearable and distort the whole system of justice, particularly in low value claims. Many proposals, advanced by the "Woolf Report on Access to Justice", are directed to these kinds of disputes. They recommend a standardisation of the process and of the costs recoverable by the winner from the loser in litigation. The costs payable by the client to his own lawyer will also be similarly calculated, unless the client expressly agrees to pay more. In order to help poor litigants, conditional fees are being introduced. Under a conditional fee agreement the lawyers gets nothing if the plaintiff wins. But if he wins, the lawyer will get the normal hourly fee, plus a premium of up to 100% of this fee.
In Germany, the cost of litigation is not so high as in England, because, as generally happens in civil law systems, the lawyers' fees are fixed by law as a percentage of the value of the claim. Such percentage decreases as the value increases. Nevertheless the German legislature, in an attempt to avoid Courts' congestion, found it necessary to provide lawyers with an incentive to settle, by providing that when a case is settled before judgement the lawyers are entitled to receive an extra fee unit.
Regarding State interventions to sustain citizens who cannot afford to pay legal costs, again Italy and England represent two extreme cases.

In England, legal aid costs, which are the highest in the world, have greatly increased in the last few years and could have gone out of control. The English reporter informs us that the total expenditure (both for civil cases and for criminal cases) has been equal to £ 682 million in 1992 and £ 1,478 millions in 1996-97, while is expected to reach 1602 millions in 1998-99. The reason for such a state of things is not the particularly large number of citizens that get legal aid. The reason is, instead, the excessiveness of lawyers' fees, paid on hourly basis. The suggested remedies, which are beginning to be applied, overhaul the system under which legal aid is provided. The Access to Justice Bill 1998 creates a new Legal Services Commission. The Commission will ensure that legal aid services are provided on an economical basis by franchising legal firms on a competitive basis and paying a fixed cost for legal services. Further, legal aid will be withdrawn from money claims, leaving plaintiff with such claims to find lawyers willing to represent them on a conditional fee basis.
In Italy, legal aid is simply a disaster. Article 24 of the Italian Constitution (*Costituzione*) requires the state to provide legal aid to those who cannot otherwise afford legal proceedings. Yet, the reality is quite different from these declamations. Formerly, in Piedmont, a so-called "poor persons' lawyer" existed, structured as a civil servant like the public prosecutor. This office was introduced in the unified territories, but suppressed shortly after Italian unification during the 1860s, due to claimed budgetary constraints. From unification until 1973, poor people wishing to litigate had to rely solely on the good will of lawyers, all of whom had a duty to represent them for free. Needless to say, the quality of the representation they received was typically very poor. In 1973 and 1990, laws were enacted providing for legal aid in the form of state payment of lawyers' fees. But the criteria for eligibility to receive legal aid are so stringent that very few indeed have been able to benefit. Legal aid today is available only to those who earn less than £ 3,500 a year and typically only for criminal cases. It is accordingly not surprising that the public expenditure on legal aid in Italy is less than one hundredth of that in England. Up until now, possible remedies have been discussed theoretically, but current budgetary difficulties restrain an effective legal aid system for the poor.
Legal aid in the other countries finds it place between these just considered extreme cases. The situation in the US is similar to the Italian one. The available funding for impoverished litigants is very limited[60]. The only hope for poor plaintiffs with money claims is to find a lawyer willing to take on their cases on a contingency fee basis. Spain has a system of free legal assistance, but lawyers are poorly paid. As a result, the standard of services provided under the legal aid scheme is very poor, as the Spanish lecturer complains. The same happens in Portugal, mainly due to the fact that the appointed lawyers are either trainees or lawyers embarking on their careers[61]. In Brazil, there is a system of public defenders, still very inefficient. In many states it does not operate at all, or it exists only by way of token public legal assistance to persons most in need. In Greece, the legal aid system is not really effective, due to the unwillingness of counsel to accept *pro bono* work. In Germany, there is an effective system of legal aid, mainly as far as family disputes are concerned. Such legal aid system costs a lot (DM 500 millions per year), even if much less than the English system. The French legal aid system, after a recent reform, turns out to be good. In 1997, the expenditure has been about Fr. 1072 millions.

[60] See MARCUS R.L. Malaise of the Litigation Superpower, p. 43 ff.
[61] MARQUES M.M. The Portuguese System of Civil procedure, p. 35 ff.

6.2. The attempts to "deflate" the demand for justice. Increasing of the price of state justice and Alternative Dispute Resolution systems.

The litigation explosion, particularly relevant in North American and German systems, has triggered, among the necessary remedies, devices meant to abate or even to invert such trend.
It is important to make distinctions. A decrease in the workload of courts may happen in two ways. Access can be discouraged by increasing judicial taxes, in order to make clients pay, in a free market perspective, for the cost of the service they receive. Along this direction we may place the introduction (or the increasing) of minimum value limits for appeals[62]. Through this method, we might open new ways to disputes' solution.
Making access to justice more expensive or binding the possibility of appeals to the value of the claim may give rise to difficulty. In Italy for instance such proposal would run into constitutional problems. The Greek lecturer reports that in 1995 over 85% of cases brought before first instance courts resulted in decisions in favour of the plaintiff. The reporter infers that, in that country, litigation depends on a true need for protection and therefore that "one should look elsewhere for the 'root of evil'"[63]. I am certain that this remark expresses in important idea: that efforts aimed to discourage citizens from asking the state for justice without offering an alternative are politically unacceptable.

It is instead better to attempt to lighten the judges' work by encouraging citizens to use alternative dispute resolution methods. The complex modern society cannot be satisfied by traditional justice, either with civil law or case law systems[64], by traditional judges in a highly formalised procedure, which requires expensive legal representation . It is necessary to explore new ways, faster, cheaper, simpler and nearer to the needs and, why not, to the moods of those categories of citizens who are involved in a controversy.
All systems are now seeking, with more or less determination, a new "co-existence" justice system, more inclined to parties' conciliation.
Alternative dispute resolution systems are more diffused in common law countries, particularly in the US, where the relative cultural background dates back to the 1980s, than in civil law systems.
In Europe[65], apart from arbitration[66], the development of 'informal justice' systems is rather slow.
There are many restraining factors. First, there is the weight of a long tradition of ritual justice. Secondly, there is a long-standing myth of jurisdictional unity, which generates great suspicion of any attempt to lessen the judges' dominance. Lastly, in civil law countries, ordinary proceedings do not generate the enormous costs and difficulties that they do under

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[62] There is currently a discussion about this in Germany. See GOTTWALD, p. 29.
[63] KERAMEUS K.D. and KOUSSOULIS S., Civil Justice Reform: Access, Costs and Delay. A Greek perspective p. 13 ff.
[64] Even in Common Law countries, the debate between these opposite conceptions is still alive. See FALLON R.H. and MELTZER D.J., New Law, Non-Retroactivity and Constitutional Remedies, in Harvard Law Review, 1991 (104), p. 1733 ff., especially at p. 1758 ff.
[65] See COULSON R., Will the Growth of Alternative Dispute Resolution (Adr) in America Be Replicated in Europe?, in Journal of International Arbitration, 1992 (9), pp. 211 ff.
[66] The Centre for Dispute Resolution, London, separates arbitration from Adr institutions. See ADR Route Map, London 1992, p. 3.

the common law adversarial system[67].
The protection of workers and consumers appears to be the fastest growing sector of ADR in Europe. In Italy, experimental conciliation and arbitration services are provided by Telecom Italia, the banking ombudsmen, conciliation and arbitration chambers established by the chambers of commerce, and conciliation offered by labour and employment offices[68].

6.3. Interventions to simplify and rationalise procedural disciplines

As far as proceedings discipline is concerned, we can see a great difference of approach between common and civil law countries.
In common law countries, we see a short slogan on the flag of procedural reforms: *case management*. Briefly, it is about placing even the pre-trial stage under the control of the judge, especially regarding discovery, which now is left, in adversarial systems, to the complete control of the parties' lawyers.
Case management has been discussed in the US for a long time. Many legislative interventions have concerned particularly the so-called complex litigation; that is that kind of controversy (like environmental and consumers protection cases, civil rights cases, antitrust cases, mass tort cases) for which traditional adversarialness is no longer sufficient.
Even in England, as we are told , the newly introduced (26th April 1999) procedural rules are united under a new "philosophy of procedure" which represents a U-turn from the traditional rules of the adversary system. The excess of adversarialness involves an excess of litigious activity. To reduce this activity the new rules place the control of litigation in the hands of the courts.
Obviously, in civil law countries, where proceedings are already under the strict control of the courts, such theory does not find much consideration.
The attention is focused rather on the problem of reducing the complexity and formalism of ordinary procedure and on the introduction of simplified summary procedures or the rationalisation of the existing ones.
An important simplification is going on in the discipline of evidence examination. Slowly, there is a growing awareness that the judge can make a decision without oral hearings and cross-examinations, but by simply reading the written affidavits of parties and tests. No doubt, there is a great saving of money and time, without great losses in fact-reconstruction reliability. This is certainly an important exception to the principle of oral discussion, but it should not worry us, as the judge retains the power to order an oral hearing of the tests.
In Spain, the draft new code of civil procedure, which is now being discussed in the Parliament, apart from providing some procedural simplifications to the ordinary proceedings, introduce the "monitoring procedure", aligning the judicial protection of money credits to the German, French and Italian systems.

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[67] See BLANKENBURG E., TANIGUCHI Y., Informal Alternatives to and within Formal Procedures, in Justice and Efficiency, Proceedings of the VIII World Congress of Procedural Law, Anversa 1989, pp. 335 ff.
[68] See F. CARPI, Settlement of Disputes Out of Court in Italy, relation at the International Symposium on Civil Procedure in the Globalisation Era, Waseda University, Tokyo, 25-27 August 1992.

Regarding existing summary procedures, a new draft law developed by the Italian Government provides for a rationalisation of interlocutory procedures, transferring the burden of starting the judgement on the merit from the plaintiff to the defendant. Such suggestion is particularly important for urgent procedures, which would be made more similar to the French *référé* procedure. The result would be a great relief for ordinary proceedings, as has happened in France.

6.4. Interventions into judicial organisation.

The existence of several types of first instance ordinary judges can be justified in many ways, above all by historical analysis. Certainly, it is a source of problems. For example, judicial statistics show that changing competence rules may cause sudden irrational leaps in work loads[69].

For that reason, in continental Europe, the leitmotif of the past few years has been the idea of only one type of judge for all first instance proceedings. In Germany, this hypothesis has been widely discussed. In 1996, though, a ministerial working group came to the conclusion that the proposal to merge the local court and regional court together to form a unified court of first instance was not feasible in the near future[70]. In France, too, the idea of a merger between *juge d'instance* and *juge de grande instance* has been considered, but a redistribution of competence was preferred, by increasing the value competence of the *juge d'instance*. In Italy, instead, this idea has been brought to complete realisation. In 1989, the districts of *pretore* and *tribunale* has been unified, leaving just a part of the old *preture mandamentali* as detached sections of the central offices of the *preture*. The law which establishes the single judge of first instance will become effective in June 1999. The process had some obstacles to overcome, including the abolition of the managerial positions of some hundred 'directors' (judges and public prosecutors who hold directive functions) who presently work in the *preture*. Hopefully, now that the process is complete, some characteristics of the *preture*, such as pragmatism, swiftness and informality, will not be lost.

A common organisational feature in many civil law systems is the growing diffusion of the single judge in first instance proceedings. The abandonment of collegiality is urged for obvious reasons of economy and efficiency. In France and Germany, even if two different types of first instance judges are maintained, the single judge institution has been extended to 'superior' judges, who were traditionally collegial. The collegial decision is exceptionally kept for some sorts of controversies, as in Italy for the *Tribunale unificato*.

Together with harmonising trends, some relevant organisational differences still survive within the judicial systems of the different countries.

Specialist courts for distinct types of private litigation constitute a fundamental feature of many European systems, including France and England[71].

However, there are no specialist courts in Germany and Italy. In Italy, there is a

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[69] For example, with reference to Switzerland, MEIER I, Swiss Procedural Law p. 12 of the typed report, notes "the big increase of cases of the single judges and the decline of cases in district courts in 1996 result of a shift competence"

[70] See GOTTWALD P., p. 20 of the typed report.

[71] See CRANSTON R., Legal Foundations of the Welfare State, London 1985, pp. 189 ff.

constitutional disposition that forbids the creation of such courts.
Obviously, I support the idea of new special judges who would not be, as in the past, instruments of privilege for certain social classes or for public administration. They should be a true expression of the strong energies that society reveals in solidarity and voluntary activities. Special judges coming from the so called third sector could make valuable contributions, for many reasons, towards accomplishing the tasks of the state, particularly in the justice system.
In conclusion, these special judges could lighten the workload of ordinary judges and allow the judicial protection of needs that are now submerged because of the excessive costs, formalism and distance of ordinary justice.
The idea, which has been already supported by Italian jurists[72] (but which needs the amendment of the Constitution, implies the introduction of a wide range of special jurisdictions, covering those fields of the community life where jurisdictional protection may be needed. Such jurisdictions, in most cases, could be made up of representatives of the opposing interests, like the French *Conseil de prud'hommes*, which has jurisdiction over labour disputes and has progressively adapted to the spreading of the equality principle in the industrial relationships.
The special jurisdictions, however, should not be limited to labour disputes only, but should be spread to the fields of housing, health, essential services, consumer protection and civil liability. An easily accessible and low cost jurisdiction, together with the right to self-representation, could speed up the resolution of controversies and bring to light repressed conflicts which do not receive otherwise protection.

[72] See for example DENTI V., Tre interventi sul disegno di legge governativo di provvedimenti urgenti per l'accelerazione dei tempi della giustizia civile: una difesa d'ufficio", in Foro Italiano, 1987, V, c. 172, and if you like, CHIARLONI S., Nuovi modelli processuali, in Rivista di diritto civile, 1993, and now in Formalismi e garanzie, Turin, 1995, p. 12 ff.

THE CHALLENGE OF INFORMATION SOCIETY: APPLICATION OF ADVANCED TECHNOLOGIES IN CIVIL LITIGATION AND OTHER PROCEDURES

Prof. Helmut Rüßmann, Germany

HERAUSFORDERUNG INFORMATIONSGESELLSCHAFT: DIE ANWENDUNG MODERNER TECHNOLOGIEN IM ZIVILPROZEß UND ANDEREN VERFAHREN

von

Prof. Helmut Rüßmann (Deutschland)[73]

Generalbericht[74]

I. EINLEITUNG

Die Durchdringung der Rechts- und Gerichtssysteme mit den Mitteln elektronischer Datenverarbeitung beschäftigt Juristen und Techniker auf der gesamten Welt. Wir haben uns zur Vorbereitung des 11. Weltkongresses für Prozeßrecht der Internationalen Vereinigung für Prozeßrecht auf den Fragenkreis der möglichen Innovationen im Erkenntnisverfahren und in den Registerverfahren beschränkt. Zu diesem Zweck haben wir Länderberichte erbeten, in denen anhand eines näher ausdifferenzierten Fragenkataloges[75] zu den Entwicklungen und Aussichten in dem betreffenden Land Stellung genommen werden sollte. In 24 Ländern wurde unsere Bitte erfüllt.[76] Nachfolgend soll versucht werden, einen Überblick über die unterschiedlichen Entwicklungen zu geben. Naturgemäß sind mit den

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[73] ***Der zweite Generalberichterstatter Wouter de Vos*** *konnte an der Erstattung dieses Berichts aus persönlichen Gründen nicht mitwirken.*
Er hatte sich bei der Suche nach und der Ansprache von Nationalberichterstattern mit Erfolg engagiert, mußte dann aber nach einer Rückenoperation seiner Frau die Last der Pflege und Versorgung seiner Familie tragen.
Mir stand ***mein Mitarbeiter Kay Diedrich*** *helfend zur Seite, als ein Bandscheibenvorfall meine Arbeitsfähigkeit stark beeinträchtigte. Ohne meinen Mitarbeiter wäre der Bericht nicht rechtzeitig fertig geworden. Ihm gilt deshalb mein besonderer Dank.*

[74] **Dieser Bericht findet sich ebenso wie alle den Weltkongress betreffenden Informationen und Unterlagen auf meinem Server im World Wide Web unter der Adresse**
http://ruessmann.jura.uni-sb.de/Wien1999/.

[75] Die zugrunde liegenden Fragen sind im Anschluß an den Bericht in deutscher (Anlage 1) und englischer (Anlage 2) Sprache angefügt.

[76] Im Anschluß an den Generalbericht findet sich eine Liste der Länderberichte (Anlage 3) mit den Namen der jeweiligen Berichterstatter.

verschiedenen Ausgangspositionen, bezogen auf technologische Entwicklungen und die gesellschaftliche Erwartungshaltung an die Rechtsordnung, unterschiedliche Schwerpunkte bei der Bewertung rechtlicher Probleme aufgetreten. Dennoch soll zu den einzelnen Fragenkreisen ein Überblick über das Spektrum möglicher Probleme und Lösungsansätze gegeben werden.

Die Einzelberichte gehen in unterschiedlichem Ausmaß auf technische und rechtliche Einzelheiten ein, die hier nur funktionell von Bedeutung sein können. Wiedergegeben werden sollen der Stand der Entwicklungen, sowie markante Positionen, die beispielhaft für Entwicklungsalternativen leitend für die Diskussion wirken oder zur Nachahmung empfohlen werden können.

II. DAS VIRTUELLE GERICHTSVERFAHREN

Ein komplett digitalisiertes Gerichtsverfahren in dem Sinne, daß unter Verzicht auf Gerichtsgebäude die Parteien mit dem Gericht und untereinander nur über moderne Telekommunikationsmittel in Verbindung treten, ist noch nirgends konkret ins Auge gefaßt worden. Als besonders weitgehend ist in diesem Zusammenhang auf die Einrichtung einer Projektgruppe in Finnland hinzuweisen, die sich unter anderem mit Konzepten für die Einrichtung virtueller Gerichtsverfahren beschäftigen soll. Die Vision eines Gerichtsverfahrens, in dem, angefangen bei den einleitenden Schriftsätzen, über die Verhandlung bis hin zur Urteilsverkündung und Zustellung, Schriftsätze nur über elektronischen Datenaustausch und Verhandlungen nur durch Videokonferenztechnik oder telefonische Konferenzschaltungen abgewickelt werden, sind zum großen Teil noch technisch nicht durchführbar. Es fehlt bereits an der notwendigen Ausstattung, wie Computern, Videokonferenztechnik, Netzwerkkapazitäten und nicht zuletzt hinreichend geschultem Personal. Aber auch dort, wo die notwendige Infrastruktur zur Verfügung stünde bzw. mittelfristig zur Verfügung gestellt werden könnte, werden keine greifbaren Anstrengungen unternommen, um ein solches Verfahren ins Leben zu rufen. Wo, wie beispielsweise in Australien, der Verzicht auf Gerichtsgebäude zu Gunsten einer hinreichend ausgeformten Multimedia-Akte angedacht wird, bezieht man auch die Nachteile in die Überlegungen ein, die sich durch das Fehlen des sozialen Kontaktes ergeben können. Diese Nachteile lassen sich nicht auf die soziale Vereinsamung beschränken, wie sie gemeinhin im Zusammenhang mit Telearbeitsplätzen angesprochen ist. Vielmehr kommen spezifisch juristische Gesichtspunkte zum Tragen. Es entspricht üblichen Erfahrungen aus der Praxis, daß Vergleiche häufig nur in Gegenwart aller Entscheidungsträger erreicht werden können. Insoweit sieht man den persönlichen Kontakt der Parteien in Gegenwart des Gerichts als streitschlichtendes Moment, das im virtuellen Verfahren verloren ginge. Hinzu kommen Probleme bei Würdigung von Zeugenbeweisen, auf die wir später noch zurückkommen werden.

III. VERFAHRENSEINLEITUNG

Die Möglichkeit einer elektronischen Verfahrenseinleitung besteht in den meisten Ländern nicht. Hier herrscht die schriftliche Form der Einreichung verfahrenseinleitender Schriftstücke vor. Zum Teil genügen auch Telefaxübermittlungen. Probleme werden jedenfalls in den meisten Fällen dadurch verursacht, daß man an den alten Kommunikationswegen festhält. Elektronische Dokumente werden als Ersatz der

Papierdokumente gesehen und entsprechend verwendet. Im Gegensatz dazu versucht man zum Teil, die Aufgaben, die von der in Schriftform eingereichten Klage übernommen werden, mit Konzepten zu lösen, die spezifisch auf die neuen elektronischen Werkzeuge zugeschnitten sind. Dabei steht die Übermittlung authentischer Informationen, wie sie üblicherweise in Form des Klageschriftsatzes und der Anlagen übermittelt werden und die Einzahlungen des Gerichtskostenvorschusses im Vordergrund.

Ein Beispiel für eine funktionelle Umsetzung rechtlicher Anforderungen mit modernen Mitteln bieten Projekte in den USA, bei denen die Möglichkeit besteht, Klageschriftsätze nebst Anlagen in digitalisierter Form über das Internet auf dem Computer des zuständigen Gerichts abzulegen. Der Gerichtskostenvorschuß wird mittels Belastung einer Kreditkartennummer eingezahlt. Nachteile, die dadurch entstehen, daß möglicherweise nicht autorisierte Klageschriften eingereicht werden, nimmt man zur Zeit noch hin. Diese Risiken sieht man im Verhältnis zu dem mit dem elektronischen System verbundenen enormen Wirtschaftlichkeitsgewinn als vergleichsweise gering an. Jedenfalls betrachtet man diese Sicherheitsnachteile als sehr vorübergehenden Faktor. Man rechnet in einem Zeitraum von maximal fünf Jahren damit, daß digitale Signaturen hinreichend verbreitet sein werden, um eine über dem derzeitigen Unterschriftssystem liegende Sicherung der Authentizität zu erreichen. Hinzu kommen Überlegungen, bereits während des Studiums bzw. mit Zulassung zur Rechtsanwaltschaft digitale Signaturen an die betreffenden Personen auszugeben. Derart könnten unproblematisch flächendeckende Systeme erreicht werden.

Einen gleichfalls weitreichenden Ansatz verfolgt man in Österreich. Dort wird die elektronische Verfahrenseinleitung über den Zugang zu einem geschlossenen System ermöglicht. In einem zentral eingerichteten und gesetzlich verankerten Gerichtsverwaltungssystem wird der elektronische Kontakt mit den Gerichten organisiert. Verfahrenseinleitende Schriftsätze können, soweit sie den Formanforderungen genügen bzw. kein Hinderungsgrund – zum Beispiel elektronische nichtübertragbare Anlagen - im Wege steht, in elektronischer Form abgegeben werden. Durch gesetzliche Vorschriften ist die Form der Datenübergabe an die zentrale Schnittstelle geregelt. Teilnehmer an diesem System, wie zum Beispiel Rechtsanwälte, müssen eine bestimmte Ausstattung unterhalten. Die Daten werden von den Teilnehmern an die Schnittstelle überspielt. Sind die Daten in der richtigen Form angekommen, wird ihr Zugang bestätigt. Von dort erfolgt eine Weiterverarbeitung und Verteilung an die zuständigen Gerichte.

Die elektronische Vorgehensweise führt insbesondere im Mahnverfahren zu erheblich kürzeren Reaktionszeiten. So kann ein am Montag einer Woche gestellter Mahnantrag bereits am Donnerstag derselben Woche eine Zustellung des Mahnbescheides zur Folge haben. Die Identifikation der Teilnehmer erfolgt über Kennungen und entsprechende Kennworte. Die Gerichtskosten werden im Lastschriftverfahren eingezogen. Gleichwohl können anstelle oder parallel zu elektronischen Übermittlungen auch schriftliche Dokumente für die Verfahrensführung gebraucht werden.

Eine sehr konsequente Umsetzung elektronischer Konzepte ist in Finnland erfolgt. Dort sind in umfangreichen Gesetzesänderungen die Hindernisse beseitigt worden, die einer elektronischen Verfahrenseinleitung und Führung im Wege standen. Zudem hat man durch Abstimmung mit wesentlichen professionell mit der Einleitung von Gerichtsverfahren befaßten Personen erreicht, daß sehr erhebliche Anteile der neuen Verfahren in elektronischer Form eingehen.

Diese Vorstöße sind jedoch keinesfalls repräsentativ für den allgemeinen Stand der Entwicklungen. Eine Vielzahl der berichtenden Länder sieht keine elektronische Verfahrenseinleitung vor bzw. plant auch nicht, eine solche zu ermöglichen. Hindernisse bilden vor allem die Ausrichtung der jeweiligen Prozeßordnungen auf den schriftlichen Vortrag der Parteien. Häufig knüpfen die Prozeßordnungen an die herkömmliche Unterschrift an. Zudem fehlen in der Regel die technischen Voraussetzungen, die ein solches Verfahren erst ermöglichen könnten.

Als Grundproblem für jede Form der Neuerung werden wiederholt zwei Gesichtspunkte in den Vordergrund gestellt: zum einen die bereits angesprochene materielle Ausstattung als notwendige Voraussetzung jeder technischen Innovation. Zum anderen die konservative Personalstruktur der Justiz. Vor allem anhand des Berichts aus England und Wales wird deutlich, daß jede Reform, und sei sie mit noch so ehrgeizigen Investitionen unterstützt, nur mit eigenverantwortlicher Bereitschaft der mit der täglichen Arbeit an den Sachproblemen befaßten Mitarbeitern gelingen kann. Nur soweit die Richter selbst die Einbindung neuer Technologien als ihre Aufgabe begreifen, kann mit einer produktiven Umsetzung neuer Strukturen gerechnet werden.

Aber auch auf der planerischen Ebene bestehen erhebliche Unterschiede bezüglich der Notwendigkeit, elektronische Hilfsmittel in den Justizbetrieb zu integrieren. Vorherrschend werden die Möglichkeiten elektronischer Effektivierung von Verfahrensabläufen als sehr positiv und wesentlich angesehen, um den ständig steigenden Anforderungen an die Justiz zukünftig gerecht zu werden. Besonders anschaulich ist in diesem Zusammenhang der Bericht aus Peru, aus dem hervorgeht, daß der bedingt durch mangelnde Ausstattung niedrigen Einbindung elektronischer Werkzeuge in den Zivilprozeß ein sehr starkes Bestreben gegenüber steht, nach Möglichkeit eine Umstellung auf moderne Arbeitsmittel zu erreichen. Im Gegensatz hält man in Russland eher an den bekannten Systemen fest.

Allgemein wird als Lösung für Authentizitätsprobleme die Einführung digitaler Signaturen im Sinne asynchroner Verschlüsselungsverfahren angesehen. Vor allem in Griechenland geht man davon aus, daß von der gesetzlichen Regelung dieser digitalen Signaturtechnik die weitere Entwicklung entscheidend abhängt. Authentizität wird insoweit als notwendige Voraussetzungen angesehen, die nicht im Zusammenhang mit Wirtschaftlichkeitserwägungen zurückgestellt werden könne.
Schließlich werden teilweise Möglichkeiten eingeräumt, klageeinleitende Schriftsätze auf Datenträgern entsprechend dem Verfahren bei Nutzung der Papierform einzureichen. Insoweit bedeutet die digitale Form lediglich eine Transporterleichterung. Teilweise soll auch die Abfassung späterer Entscheidungen erleichtert werden, indem die Vorarbeiten der Rechtsanwälte dem Richter in elektronischer Form zur Verfügung gestellt werden. Von diesen Möglichkeiten wird allerdings nur in sehr beschränktem Ausmaße Gebrauch gemacht. Schließlich wird die Aufrechterhaltung des parallel laufenden herkömmlichen Systems im Sinne technisch nicht entsprechend ausgerüsteter Parteien allgemein weiter für notwendig erachtet. Mit Blick auf professionell am Rechtsverkehr teilnehmende Personen ist hier der österreichische Ansatz beachtlich, der eine obligatorische Teilnahme am elektronischen System inklusive der notwendigen Ausstattung vorschreibt.

IV. AKTENFÜHRUNG UND ORGANISATION

Allgemein spielt die elektronische Aktenführung noch keine erhebliche Rolle. Größtenteils stehen Systeme zur Verfügung, die die Justizverwaltung bei der Aufnahme der Akten sowie der Geschäftsstellentätigkeit unterstützen sollen. Zum Teil liefern diese Unterstützungssysteme den Richtern Anhaltspunkte für die Weiterführung des Verfahrens. Typische Verfahrensschritte werden vorgeschlagen, bzw. entsprechende Schreiben vorgefertigt. So werden beispielsweise in einem belgischen System die Richter durch Textverarbeitung und ergänzende Individualsoftware mit der Möglichkeit ausgestattet, standardmäßig im Verfahren anfallende Aufgaben automatisiert abrufen zu können. Solche Systeme sind auch in Deutschland und Finnland verbreitet. Zudem werden Funktionen angeboten, die Transparenz über die Verfahrensabläufe verschaffen und statistische Auswertungen automatisieren.

Von diesen unterstützenden Funktionen abgesehen wird bislang zumeist nur punktuell versucht, ein Äquivalent für die in Papierform geführte Akten zu schaffen. Das erfolgt meistenteils als Zusatz zu den weiterhin gepflegten Papierakten. Das Spektrum reicht von der Möglichkeit zur Weiterverarbeitung elektronischer Schriftsätze, die von den Parteien auf Diskette zur Verfügung gestellt werden - so zum Beispiel in Japan - über die Möglichkeit zur parallelen Aktenführung durch Aufnahme elektronischer Dokumente und Digitalisierung in Papierform eingereichter Dokumente, wie es zum Teil in England und Wales bzw. Australien passiert, bis hin zu in den USA praktizierten Systemen vollständig elektronisch geführter Akten, die gleichfalls durch die Übernahme elektronisch eingereichter Dokumente und das Einscannen der schriftlichen Dokumente umgesetzt werden.

Das Problem der Authentizität der elektronisch vorgehaltenen Akten kann wiederum auf den angesprochenen Wegen gelöst werden. Soweit die Datenverwaltung, wie in Österreich, in einem geschlossenen justizintern geführten System erfolgt, können dort Sicherheitsstrategien entwickelt werden, die nur in beschränktem Maße auf Fremdzugriffe ausgerichtet sein müssen. Soll demgegenüber der Datenaustausch über ein öffentliches Netz wie das Internet erfolgen, so werden weitergehende Sicherheitsmechanismen für erforderlich gehalten. Als Lösung wird in diesem Zusammenhang die digitale Signaturtechnik gesehen. Auf Grundlage dieser Technik werden vor allem in den USA Alternativlösungen angedacht: die Dokumente könnten von den Anwälten digital signiert werden. Andererseits könnte das angesprochene Gericht zentral die übergebenen Dokumente signieren und so den unveränderten Bestand absichern.

Rechtliche Probleme ergeben sich aus besonderen Verfahrensschritten, die in entsprechende elektronische Dokumentation übersetzt werden müßten. So ist beispielsweise in Neuseeland die Eidesleistung mit einem speziellen Gegenzeichnungsverfahren verbunden, das erst in die elektronische Aktenform eingepaßt werden müßte. Im Rahmen dieses Umsetzungsprozesses bleibt die angesprochene Problematik zu bedenken, daß bei einer 1 : 1 Übersetzung herkömmlicher Systeme in die elektronische Form möglicherweise Vorteile ungenutzt bleiben, die das elektronische Medium gegenüber der überkommenen Papierform ausspielen könnte. So kann eine elektronische Zugangsmöglichkeit bei Gericht weit mehr, als nur einen herkömmlichen Postkasten zu simulieren. Standardfunktionen wie die innergerichtliche Zuteilung der Akte oder die Vorbereitung der im Zusammenhang mit der Zustellung erforderlichen Verfügungen könnten unmittelbar mit Eingang der Akten im elektronischen

System automatisiert übernommen werden. Generell könnten alle Funktionen, für die eine richterliche Entscheidung nicht erforderlich ist, automatisiert oder zumindest vorbereitet werden.

Auch die Möglichkeiten außerhalb der Justiz stehender Personen zur Einsichtnahme in die bei den Gerichten gespeicherten Daten differieren grundlegend. Hier werden vor allem Probleme des Datenschutzes und der Systemabsicherung als entscheidend angesehen. In Österreich gewährt die zentrale Datenschnittstelle legitimierten Anwälten Einblick in die ihre Verfahren betreffenden Datenbestände. Vergleichbar können sich zum Beispiel in Korea Personen über ein Telefonsystem und über Computer, die in den Gerichtsgebäuden aufgestellt sind, über den Stand ihres Verfahrens informieren. Jedoch handelt es sich zumeist um justizintern abgeschlossene Systeme. Die Daten liegen teilweise in codierter Form, in der eine allgemeinverständliche Übergabe nicht erfolgen könnte. So handelt es sich in Belgien und Taiwan um Systeme, die keine Informationen außerhalb der Justiz abgeben. Auch in England und Wales denkt man erst darüber nach, ob bzw. auf welchem Weg der Öffentlichkeit solche Daten zugänglich gemacht werden könnten. In Australien hält man insoweit Leitentscheidungen für erforderlich, die abklären müßten, in welchem Umfang Informationen veröffentlicht werden dürfen. Zwar gelten dort prinzipiell die Gerichtsakten als öffentlich zugänglich. Dies wurde bislang jedoch aus Kapazitätsproblemen nie zu einem ernsthaften Problem, weil eine Veröffentlichung aus technischen bzw. praktischen Gründen nicht möglich erschien. Die Lösung der Sicherheitsprobleme, d. h. den Schutz des Gerichtssystems, sieht man im Einsatz von eigenständigen Computern, die nur die Bereitstellung der Informationen zur Aufgabe haben.

Insgesamt liegen die Probleme elektronischer Aktenführung in erster Linie bei der praktischen Umsetzung. Neben der technischen Ausstattung ist die Bereitschaft aller an der Rechtspflege beteiligten Personen erforderlich, das neue System anzunehmen und auf die herkömmlichen Papiersysteme zu verzichten. In diesem Zusammenhang ist das Beispiel Finnlands interessant, wo Systeme für die elektronische Klageeinreichung im Dialog mit wesentlichen potentiellen Kommunikationspartnern entwickelt wurden. Daneben muß die Authentizität der Daten sichergestellt werden. Digitale Signatursysteme müssen umgesetzt, bzw. rechtlich anerkannt werden. Die am Gerichtssystem beteiligten Personengruppen müssen jeweils einen einheitlichen Standard erreichen. Die Gerichtssysteme müssen gegen Fremdzugriffe abgesichert werden. Für die Nutzung der Daten muß ein Ausgleich zwischen den Interessen der Informationssuchenden und den Datenschutzinteressen der im Datenbestand erfaßten Personen gefunden werden. Wesentlich ist zudem die Frage nach dem geeigneten Informationsmedium. Neben Telefon und Gerichtscomputern kommen vor allem Netzwerke in Betracht. Möglich erscheint, ein justizeigenes Netzwerk zu betreiben oder sich an die Kommunikationsmöglichkeiten des Internet anzugliedern. Für diese Entscheidungen scheint relevant, inwieweit man Kostenvorteile durch die Angliederung an fremdfinanzierte Investitionen im Internet erzielen kann und durch die Kompatibilität sonstige Informationsquellen erschließt.

V. ZUSTELLUNG

Die Zustellung als besondere Form der Bekanntgabe rechtlich relevanter Dokumente gegenüber den Parteien eines Gerichtsverfahrens bietet besondere Probleme für die Umsetzung in die elektronischen Systeme. In der Regel bestehen gesetzliche Sondervorschriften, die beispielsweise die persönliche Übergabe der betreffenden Dokumente durch einen Gerichtsvollzieher vorsehen können. Ein wichtiges Element der Zustellung ist meistenteils die konkrete und hinreichend beweisbare Information über den Zeitpunkt, in dem die Zustellung erfolgt ist. Regelmäßig werden mit diesem Zeitpunkt Fristen in Lauf gesetzt. Die Probleme elektronischer Zustellung sind in den meisten Staaten noch nicht gelöst. Allgemein hält man an der Notwendigkeit der Zustellung schriftlicher Dokumente fest. Elektronische Zustellung ist in dieser rechtlichen Situation erst möglich, wenn die Aufgaben der Zustellung durch das elektronische System übernommen und die maßgeblichen gesetzlichen Regelungen angepaßt worden sind. Veränderungen sind nur zum Teil in Ansätzen schon heute möglich, wie zum Beispiel in Neuseeland, wo zwar nach wie vor eine persönliche Zustellung, d. h. die Übergabe der entsprechenden Dokumente, erforderlich ist. Diese Übergabe kann jedoch auch in der Aushändigung eines Datenträgers bestehen, auf dem die fraglichen Dokumente gespeichert sind.

Als ersten Schritt auf dem Weg zu vereinfachten Zustellungsmöglichkeiten haben einige Nationen eine Zustellung via Telefax zugelassen. Diese Möglichkeit wird teils - so zum Beispiel in Korea - auf Rechtsanwälte beschränkt. Ausgehend von diesen Möglichkeiten wird diskutiert, inwieweit die Informationsübermittlung via E-Mail nicht einen vergleichbaren Sicherheitsstandard gewährleisten könnte.

Vielversprechende Systeme finden sich in den USA und in Österreich. In den USA wird die Zustellung als eines der Hauptprobleme im Zusammenhang mit der elektronischen Verfahrensführung aufgefaßt. Dort ist die Software derzeit nicht in der Lage, hinreichend Auskunft darüber zu geben, wann ein Beklagter Einsicht in die Klageschrift genommen hat. Möglichkeiten der Ersatzzustellung, beispielsweise durch Hinterlegung einer entsprechenden Benachrichtigung, sind nicht vorgesehen. Als Lösung des Problems wird erwogen, zumindest für Rechtssubjekte, die professionell am Rechtsverkehr teilnehmen, die Notwendigkeit von Zustellungsbevollmächtigten für elektronische Sendungen einzuführen. Gleichwohl besteht bereits die Möglichkeit, Klageschriften auf elektronischem Wege einzureichen und dem Beklagten entsprechende Nachricht zukommen zu lassen.

Eine weitgehend „lauffähige" Alternative bietet das österreichische System. Bei der bereits vorgestellten Zentralstelle sind für alle Teilnehmer Postkästen eingerichtet. Protokolldateien geben Auskunft über den Zeitpunkt, ab dem ein zuzustellendes Dokument in einem Postkasten einsehbar war und wann der Adressat Einblick genommen hat. Die Möglichkeiten elektronischer Zustellungen sind jedoch auf dieses System begrenzt. Parallel besteht die Möglichkeit, herkömmlicher Zustellungen, die zum Teil durch die Parteien erzwungen werden können, wenn diese einer elektronischen Zustellung widersprechen.

Für die Frage der Authentizität der zugestellten elektronischen Dokumente steht wiederum die Verschlüsselung mittels digitaler Signaturen im Mittelpunkt der Betrachtungen. Die Problematik steht nur für Systeme in der Diskussion, die auf öffentliche Übermittlungswege zurückgreifen. Soweit ersichtlich werden die im Rahmen des in Österreich bestehenden justizinternen Systems getroffenen Sicherheitsvorkehrungen nicht problematisiert. Insoweit läßt man die Verantwortlichkeit des Betreibers im haftungsrechtlichen Sinne ausreichen.

Im Rahmen der Diskussion um die Gefahren bei der Benutzung öffentlicher Netze wie dem Internet wird zum Teil auf die Alternativlösungen im herkömmlichen System verwiesen. Auch dort sind Sicherheitsrisiken nicht auszuschließen. Diesen Sicherheitsrisiken stehen im elektronischen System jedoch ganz erhebliche Gewinne an Wirtschaftlichkeit und vor allem Leistungssteigerung in Form von kürzeren Verarbeitungszeiten gegenüber. Plastisch wird diese Vergleichsbetrachtung insbesondere anhand der wirtschaftlich geprägten us-amerikanischen Sichtweise.

Ein weiteres gutes Beispiel für die Möglichkeit, im herkömmlichen System definierte Aufgaben mit neu entwickelten elektronischen Werkzeugen zu lösen, bietet die öffentliche Zustellung von Schriftstücken. Allgemein besteht Einigkeit dahingehend, daß durch eine Veröffentlichung im World Wide Web eine bislang nicht dagewesene Form von Zugriffsmöglichkeit und damit Öffentlichkeit im rechtstechnische Sinne erreicht werden kann. Dem stehen die herkömmlichen Systeme gegenüber, in denen häufig der Aushang am schwarzen Brett des betreffenden Gerichts und/oder die Veröffentlichung in bestimmten Tageszeitungen bzw. Veröffentlichungsblättern über einen bestimmten Zeitraum erfolgen muß. Im Zusammenhang mit diesen Systemen herrscht das Bewußtsein vor, daß solche Veröffentlichungsmechanismen eher fiktiven Charakter haben. Besonders deutlich kommt in dem Schweizer Bericht der besondere Wert zusätzlicher Möglichkeiten der Kenntnisnahme zum Ausdruck. Dementsprechend wird die Veröffentlichung im World Wide Web zumeist positiv beurteilt. Einer Ersetzung herkömmlicher Veröffentlichungsmechanismen durch eine Veröffentlichung im Internet stehen jedoch allgemein die konkret gefaßten Rechtsvorschriften über die Bewirkung öffentliche Zustellungen entgegen.

Den besseren und vor allem über den Bereich der Publikationen bestimmter Printmedien hinausgehenden Zugriffsmöglichkeiten des World Wide Web ist entgegenzuhalten, daß die Internettechnologie eine Informationsmöglichkeit bedeutet, an der bei weitem noch nicht alle betroffenen Rechtsobjekte teilnehmen bzw. teilnehmen können. Geht man in technologisch hochentwickelten Staaten wie beispielsweise den USA davon aus, daß in einem professionellen Bereich wie der Rechtsanwaltschaft ca. 60% mit einem Internetanschluß ausgerüstet sind, so ist im Bevölkerungsdurchschnitt von einem (noch) geringeren Grad auszugehen. Gesetzliche Vorschriften, und seien sie auch im empirischen Befund eher fiktiv, die auf einer Möglichkeit zur Kenntnisnahme gründen, müssen sicherstellen, daß tatsächlich hinreichende Kenntnisnahmemöglichkeiten bestehen. Hier wäre jeweils ein Vergleich zwischen den mit dem elektronischen System verbundenen und den mit dem anerkannten System verbundenen Hindernissen zu bedenken.

VI. VORBEREITUNG DER VERHANDLUNG

Zur Vorbereitung der Verhandlung findet in aller Regel ein Austausch zwischen den Parteien und dem Gericht statt. Zu diesem Zweck bedient man sich über alle Ländern hinweg heute zumeist noch der Papierform. Teilweise sind auch Telefax-Übermittlungen zugelassen. Vereinzelt, zum Beispiel in Australien, greift man schon zur Vorbereitung einer Verhandlung auf Telefon- bzw. Videokonferenzen zurück. Dort besteht auch die Möglichkeit, einzelne Kommunikationssysteme zwischen Parteien und Gericht für den betreffenden Prozeß zu vereinbaren.

Demgegenüber wird die Kommunikation via E-Mail in den USA inzwischen umfänglicher genutzt. Gründe dafür sieht man in der verhältnismäßig weitreichenden Ausstattung der Gerichte und der Rechtsanwaltschaft mit Internetanschlüssen ebenso wie der Qualität des Mediums als einer preiswerten, schnellen und zuverlässigen Alternative zu schriftlichen Nachrichten. Vergleichbar progressiv steht man auch in Finnland der Kommunikation via E-Mail gegenüber. Nach entsprechenden Gesetzesänderungen kann der Schriftverkehr zwischen Gericht und Parteien elektronisch über das Internet abgewickelt werden, wovon die Praxis umfänglich Gebrauch macht. Im Gegensatz dazu wird in Österreich von der rechtlich und technisch realisierten Möglichkeit, viele das Verfahren betreffende Schriftsätze und Nachrichten über das Justizverwaltungssystem elektronisch zu versenden, kein Gebrauch gemacht. Die Anwälte versenden in der Praxis ihre Schriftsätze nach wie vor in schriftlicher Form.

Ein Hauptproblem bei der Nutzung elektronischer Kommunikationsmöglichkeiten in der Vorbereitung der Hauptverhandlung liegt in vielen Staaten bereits in der fehlenden Infrastruktur. Auch wo, wie beispielsweise in der Schweiz, eine hinreichende Ausstattung mit Computern gewährleistet ist, fristen die Netzwerkanschlüsse noch ein Schattendasein, weil sie von der Richterschaft nicht benutzt werden. Entsprechendes gilt für die Rechtsanwaltschaft.

Die Umstellung auf elektronische Kommunikationssysteme scheint zunächst notwendig hinreichende Verbreitung der technischen Möglichkeiten vorauszusetzen. Hinzu kommen muß die Anpassung der rechtlichen Rahmenbedingungen. Zum Teil bestehen hier Probleme, weil von schriftlichen Eingaben die Rede ist und die Schriftform durch elektronische Dokumente nicht erfüllt werden kann. Diese Problematik sucht man durch die gesetzliche Ausgestaltung der digitalen Signatur in den Griff zu bekommen.

Aber auch die Lösung dieser technischen und rechtlichen Probleme gewährleistet noch nicht die effektive Nutzung der elektronischen Kommunikationsmöglichkeiten. Das zeigt sich eindrucksvoll am österreichischen Beispiel. Auch hier kommt es wiederum – im Sinne des Berichts aus England und Wales - entscheidend auf die Bereitschaft der Richter an, durch Nutzung neuer Arbeitstechniken Produktivitätsgewinne zu erzielen.

Im Zusammenhang mit der Diskussion über die Bereitschaft, elektronische Neuerungen in den Arbeitsablauf aufzunehmen, geht man davon aus, daß zum erheblichen Teil im konservativ geprägten juristischen Lager erhebliches Mißtrauen gegenüber modernen Technologien und Umstellungsvorhaben herrscht. So wird zum Beispiel von russischer Seite insgesamt in Zweifel gezogen, ob die moderne Technologie als hinreichend verläßlich

beurteilt werden könne. Dem wird von anderer Seite sehr anschaulich entgegengehalten, daß wir bereits seit längeren Zeiträumen alltäglich elektronischen Systemen unser Leben anvertrauen, ohne die weder Telekommunikation noch Flugverkehr noch industrielle Großanlagen funktionieren würden.

Neben dem Problem, die Authentizität der übermittelten Nachrichten sicherzustellen, müßte die technische Übergabe und die Vertraulichkeit der Information sichergestellt werden. Zur Lösung des Authentizitätsproblems wird wiederum die Technik der digitalen Signatur für notwendig gehalten. Zur Sicherung der Vertraulichkeit wird teils eine Verschlüsselung gefordert. Dem halten Stimmen in den USA entgegen, daß bereits die ungeheueren Datenmengen, die ständig durch das Internet transportiert werden, ausreichenden Schutz der Vertraulichkeit bieten könnten. Die einzelne Nachricht ginge in den allgemeinen Informationsfluten schlicht unter.

Bedingt durch die einfachen Verbreitungsmöglichkeiten stellen sich zusätzliche Datenschutzprobleme beim Verkehr mit elektronischen Dokumenten. Zudem muß die Frage der Haftung für nachträgliche Änderungen an Dokumenten geklärt werden. Dies wird beispielsweise in der Schweiz überlegt, wo jedoch gleichermaßen darauf hingewiesen wird, daß es sich um Probleme handelt, die im Zusammenhang mit Fotokopien längst akzeptiert sind.

Schließlich ist auf Kompatibilitätsprobleme hinzuweisen, die sich notwendig bei der Übergabe elektronischer Information zwischen unterschiedlich konfigurierten Systemen stellen. Insoweit ist man in Österreich einen sehr konsequenten Weg gegangen, indem man qua lege Datenformate standardisiert hat. Schließlich werden Probleme der Unparteilichkeit des Gerichts im Zusammenhang mit den neuen Kommunikationsmöglichkeiten für den Fall diskutiert, daß nur einseitige Korrespondenz geführt wird. In diesem Zusammenhang wären auch die Möglichkeiten elektronisch versandter Nachrichtenkopien einzubeziehen, mit denen ohne erheblichen Aufwand die Offenheit gegenüber allen Parteien gewahrt werden könnte.

Die zusätzlichen Informationsmöglichkeiten einer Recherche im World Wide Web bieten nur in eingeschränktem Maße rechtliche Probleme für den Richter, der diese Möglichkeiten nutzt. Für die Mehrzahl der angesprochenen Länder stellt sich diese Problematik nicht, weil sie für die Richterschaft keine hinreichenden Zugriffsmöglichkeiten eingerichtet haben oder es an der Nutzung eingerichteter Nutzungsmöglichkeiten fehlt. Von diesen Grundproblemen abgesehen, greifen die allgemeinen prozessualen Grundsätze ein. Je nach Ausgestaltung der nationalen Prozeßordnungen hängt der Tatsachenstoff in mehr oder minder großem Umfang von dem ab, was die Parteien selbst vortragen. So darf der Richter beispielsweise in Lesotho ausschließlich den von den Parteien vorgetragenen Prozeßstoff in seine Entscheidung einbeziehen. Aber auch vor dem Hintergrund solcher Systeme stellen sich weitergehende Fragen. So hat sich der Richter in der Regel eigenständig über das geltende Recht und die damit zusammenhängenden Quellen in Literatur und Rechtsprechung zu informieren. Darüber hinaus hat er regelmäßig tatsächliche Umstände einzubeziehen, die zum allgemein oder als gerichtsbekannt vorausgesetzten Wissen gerechnet werden müssen. Vor diesem Hintergrund stellt sich die Frage, ob bzw. welche Informationen, die ein Richter übermitteln könnte, er als gerichtsbekannt voraussetzen kann und muß. Bezieht man ein, daß derzeit wohl kaum eine Fragestellung im Internet nicht behandelt wird, so läge der Schritt zu einer obligatorischen WWW-Recherche nahe.

VII. MÜNDLICHE VERHANDLUNG UND BEWEISAUFNAHME

Für mündliche Verhandlungen und insbesondere die Beweisaufnahme durch Zeugen bietet sich als Alternative zur allseitigen physischen Anwesenheit im Gerichtssaal eine Konferenzschaltung durch Videokonferenztechniken bzw. durch telefonische Konferenzschaltungen an. Möglichkeiten zur Nutzung dieser Technik stehen in den meisten Staaten zur Verfügung. Nur vereinzelt, wie zum Beispiel in Ungarn und Griechenland, werden diese Möglichkeiten schon mangels technischer Ausstattung nicht diskutiert. Insgesamt zeigen sich jedoch große Unterschiede bei der Beurteilung der Brauchbarkeit dieser Hilfsmittel für den Zivilprozeß.

Eine Vorreiterrolle übernimmt insoweit Australien. Dort werden Videokonferenztechniken, die die ehemals herrschenden Telefonkonferenzen abgelöst haben, in sehr erheblichem Umfange genutzt. Im Vordergrund stehen dabei praktische Vorteile, die sich daraus ergeben, daß Zeugen nicht über weite Distanzen anreisen bzw. im Rechtshilfeverfahren vernommen werden müssen. Diese Vorteile sucht man auch in den USA in größerem Umfange zu nutzen. Dort werden häufig Zeugenaussagen als Videoaufnahmen in den Prozeß eingeführt. Videokonferenztechnik wird ebenso wie Telefonkonferenztechnik nach Bedarf, insbesondere in Prozessen, die in hohen Maße tatsächliche Umstände einbeziehen (Unterhaltsprozesse), eingesetzt.

Als rechtlich problematisch wird diese Technologie allgemein mit Blick auf die Unmittelbarkeit des Verfahrens bzw. der Beweisaufnahme angesehen. Beispielsweise hält man in Griechenland für zwingend erforderlich, daß der Zeuge dem Richter im persönlichen Gespräch gegenüber steht. Entsprechend wird die Videoübertragung des Zeugen in den Gerichtssaal für nicht äquivalent gehalten. Insoweit hält man zum Beispiel in einigen Kantonen der Schweiz, in Ungarn und in Lesotho eine Gesetzesänderung für erforderlich.

Als wesentlicher Schwachpunkt der Videokonferenztechnik wird häufig bezweifelt, ob die Glaubwürdigkeit des Zeugen in einem zur herkömmlichen Vernehmung vergleichbaren Maße hergestellt bzw. beurteilt werden kann. Das psychologische Moment des Erscheinens im Gerichtssaal und des persönlichen Kontakts wird als Erschwernis gesehen, die Unwahrheit zu vertreten. Deshalb werden Zweifel an einer vergleichbaren Berücksichtigung mittels Videokonferenztechnik erhobener Zeugenaussagen im Rahmen der Beweiswürdigung vorgetragen. Dieses Problem wird als unbeachtlich angesehen, soweit es um schlichte Informationserhebung, wie zum Beispiel in den bereits genannten us-amerikanischen Unterhaltsprozessen geht.

Zweifel an den Wirtschaftlichkeitsgewinnen, die sich im Rahmen einer Gesamtbetrachtung ergeben könnten, werden in Australien angemeldet. Man sieht die Gefahr, in der Verfahrenspraxis könne durch die Vereinfachung von Zeugenaussagen eine Häufung zusätzlicher und unnötiger Zeugenvernehmungen auftreten. Dieser Gedanke kehrt auch im Zusammenhang mit den modernen Recherchemöglichkeiten wieder, die auf einen Schlag unvorstellbare Mengen von Material verfügbar machen. Man begreift insoweit die Notwendigkeit einer Begrenzung der Informationsflut auf das Wesentliche als Kehrseite der erweiterten Möglichkeiten.

Die Probleme beim Einsatz von Videokonferenztechniken im Rahmen der Hauptverhandlung liegen primär auf tatsächlicher Ebene. Zwar werden teilweise Gesetzesänderungen für erforderlich gehalten, jedoch beschränken sich diese für notwendig gehaltenen Ergänzungen auf Probleme der Beweiswürdigung bzw. auf die Beachtung allgemeiner Prozeßrechtsgrundsätze. Probleme mit Blick auf die Chancengleichheit der Parteien im Prozeß werden beispielsweise in Neuseeland gesehen. Zusätzlich läßt sich die Frage der Öffentlichkeit des Verfahrens aufwerfen. Die Vorschläge gehen allgemein dahin, daß sowohl die Aufnahme als auch die Wiedergabe in einem offiziellen Gerichtsgebäude stattzufinden hat. Dem steht der Effektivitätsverlust gegenüber, der sich im Vergleich zu der Möglichkeit ergäbe, beispielsweise vom Arbeitsplatz aus eine Videoübertragung in den Gerichtssaal herzustellen.

Die beweisrechtliche Behandlung elektronischer Urkunden geht allgemein von dem Hintergrund der schriftlichen Urkunden aus. Insoweit ist ein Konsens dahin feststellbar, daß den schriftlichen Urkunden ein besonderer Beweiswert beigemessen wird. Demgegenüber sehen sich elektronische Urkunden erheblichem Mißtrauen gegenüber. Die nationalen Diskussionen kreisen häufig darum, ob elektronische Dokumente unter spezielle Beweisregeln für schriftliche Urkunden gefaßt werden können. Dies wird zumeist abgelehnt, solange keine gesetzliche Gleichstellung von Schriftform und digitaler Signatur erfolgt ist. In diesem Zusammenhang stellt man wiederum die digitale Signaturtechnik in asynchronen Verfahren in den Mittelpunkt. In den Ländern, die beispielsweise wie die Schweiz eine nähere Ausgestaltung des Rechts der Beweismittel kennen, wird weitergehend diskutiert, ob es sich bei elektronischen Urkunden um Augenscheinsobjekte handelt. Die Einordnungsdiskussionen zielen darauf ab, bestehende gesetzliche Vermutungen auch für elektronische Urkunden zur Anwendung zu bringen.

Probleme bringt zudem die Frage mit sich, was überhaupt Gegenstand der richterlichen Betrachtung sein soll. Keinesfalls können die elektronischen Informationen selbst vom Richter wahrgenommen werden. Stets ist es erforderlich, elektronische Informationen mittels weiterer Hilfsmittel wahrnehmbar zu machen. Insoweit stellt sich zum einen die Frage, in welchen Formaten elektronische Informationen in das gerichtliche Verfahren eingebracht werden können. Ein Lösungsansatz könnte in den existierenden Regeln über die unterstützenden Leistungen von Sachverständigen liegen. Weitergehend müßte sichergestellt werden, daß die wahrnehmbar gemachte Information tatsächlich der elektronischen entspricht. Insoweit werden beispielsweise in den Vereinigten Staaten eidesstattliche Versicherungen geleistet.

Häufig, vgl. nur die japanischen und niederländischen Beispiele, werden elektronische Dokumente nach allgemeinen Regeln des Beweisrechts gewürdigt. Regelmäßig begegnet man elektronischen Informationen wegen ihrer unproblematischen Veränderbarkeit mit erheblichem Mißtrauen. Zusätzlich spielt die fehlende Vertrautheit der Richterschaft mit den elektronischen Medien eine Rolle bei der allzu vorsichtigen Wertung dieser Beweismittel. Um elektronische Dokumente als Beweismittel in den Prozeß einzuführen, hält man vielfach gesetzliche Vorschriften über digitale Signaturen für erforderlich. Ausgangspunkt ist das Bedürfnis, ein Schriftstück einem bestimmten Autor mit hinreichender Sicherheit zuzuordnen. Insoweit greift man in den USA schon auf erhebliche Erfahrungen bei Prozessen zurück, in denen es vor allem darum ging, zu beweisen, daß eine durch einen Sachverständigen auf einem Datenträger wiederhergestellte Datei vormals von einer bestimmten Person erstellt und anschließend gelöscht wurde (zum Beispiel sexuelle

Belästigungen durch E-Mail). In solchen Fällen muß im Rahmen üblicher Beweisführung dargestellt werden, daß die betreffende Person, beispielsweise wegen hinreichender Vorkehrungen im System, als einzige für die Erstellung der Datei in Frage kommt. Entsprechende Sicherheiten können auch über digitale Signaturen geleistet werden. Ein gesetzliche Regelung zu Gunsten der Beweiskraft elektronischer Urkunden wird in Ungarn zusätzlich deshalb für erforderlich gehalten, um die vorherrschenden psychologisch bedingten Vorbehalte gegen die elektronischen Medien zu durchbrechen. Zudem könnten gesetzliche Regelungen Rechtsklarheit schaffen. In Italien wird auch die Möglichkeit des Mißbrauchs digitaler Signaturen problematisiert.

VIII. RECHTSINFORMATIONEN

Die zunehmenden elektronischen Möglichkeiten haben für die Rechtssysteme in den unterschiedlichen Staaten weitestgehend revolutionäre Informationsmöglichkeiten bereitgestellt. Wiederum kommt es zunächst entscheidend auf den Grad der technischen Ausstattung an. Fehlt es insoweit an den notwendigsten Mitteln, so kann wie in Lesotho kein Zugriff auf nationale juristische Informationen gewährleistet werden.

Besteht die nötige Infrastruktur, so besteht allgemein die Möglichkeit, umfangreiche juristische Informationssammlungen entweder auf CD-ROM oder mittels eines Netzwerkes, in der Regel des Internet, bei verschiedenen Anbietern abzufragen. Als Informationsquellen treten staatliche Stellen, vor allem Ministerien, Gerichte sowie besondere staatliche Einrichtungen und daneben in vielen Ländern kommerzielle Anbieter auf. In erster Linie sieht man die Notwendigkeit, die nationalen Gesetze elektronisch verfügbar zu machen. Insoweit stehen in fast allen Staaten Sammlungen der aktuellen und der zwischenzeitlich geänderten gesetzlichen Vorschriften zur Verfügung. Zum Teil werden diese Angebote auch schon hyptertextfähig, d. h. mit Verknüpfungen zwischen Gesetzestexten und sonstigen Informationen ausgestattet. Hinzu kommen häufig Sammlungen gerichtlicher Entscheidungen. Häufig sind solche Gesetzessammlungen, wie in Korea, bei den obersten Gerichtshöfen angesiedelt. Dort stehen Materialien im Volltext für die Justiz und dritte Personen meist über das Internet zur Verfügung. Weitere Entscheidungssammlungen finden sich häufig bei den Instanzgerichten, die dezentral ihre Entscheidungen zur Verfügung stellen. Zusätzlich werden Verzeichnisse großer Bibliotheken, Veröffentlichungen rechtlicher Institute sowie aus der rechtswissenschaftlichen Literatur in Datenbanken angeboten, die über CD-ROM vertrieben oder über das Internet erreicht werden können. So finden sich beispielsweise in Taiwan und Argentinien weitreichende Angebote zur Recherche juristischer Informationen. In Neuseeland geht man davon aus, daß 90% aller rechtlichen Recherchen elektronisch durchgeführt werden könnten. Ein Großteil der rechtlichen Informationen steht zur Verfügung. Zudem findet sich eine Vielzahl von Diskussionsgruppen rechtlich interessierter Personen, die über bestimmte Fragen weltweit durch das Internet kommunizieren. Die Nutzung dieser umfänglichen Informationsmöglichkeiten findet nach wie vor nur in sehr eingeschränktem Maße statt. Das hat einerseits wiederum rein tatsächliche Gründe in fehlender Ausstattung und Ausbildung des Justizpersonals. Zum anderen, wie in der Schweiz, wo die Gerichtsbibliotheken regelmäßig über Internet-Anschlüsse verfügen, hält man dennoch an den bekannten Möglichkeiten der papierbasierten Informationen in den Bibliotheken fest.

In Australien wird die Gefahr der Informationsflut diskutiert, die sich aus der unbegrenzten Verfügbarkeit immer umfangreicherer Entscheidungssammlungen ergeben kann. Betrachtet man die Möglichkeit, mit geringem Aufwand beispielsweise die Entscheidungssammlungen sämtlicher australischer Ober- und Instanzgerichte mit Blick auf eine bestimmte rechtliche Fragestellung zu durchsuchen, so kommt dabei notwendigerweise eine Unmenge Material zum Vorschein. Das wirft die Frage auf, wie man den Vortrag auf maßgebliche Literaturangaben und relevante Sekundärinformationen beschränken kann.

In der Regel werden die Informationsangebote der Justiz kostenlos oder gegen geringes Entgelt bis auf die parteibezogenen bzw. für den interenen Gebrauch der Justizverwaltungen bestimmten Daten öffentlich zugänglich gemacht.

Die Möglichkeit von elektronischen Informationsangeboten zu profitieren, hängt größtenteils von der individuellen Ausstattung ab. Steht wie bei den ungarischen Untergerichten ca. 10 bis 15 Personen ein Computer zur Verfügung, so sind die Recherchemöglichkeiten naturgemäß beschränkt. Zugriffsprobleme können sich zudem aus mangelhaft ausgebauten Telekommunikationssystemen ergeben, wie dies in Argentinien der Fall ist. Auch hängt die Verfügbarkeit kommerzieller Angebote naturgemäß vom Budget des Informationssuchenden ab.

IX. ENTSCHEIDUNG

In der Regel stehen den Gerichten Computer mit Textverarbeitsprogrammen zur Verfügung. Wiederum fehlt es zum Teil an der erforderlichen Ausstattung. Ein Beispiel bietet in diesem Zusammenhang Griechenland, wo ein Computer in der Regel nur dann verfügbar ist, wenn der Richter diesen privat anschafft. Demgegenüber ist den meisten anderen Ländern bereits die Umstellung auf computergestützter Textverarbeitung erfolgt. In unterschiedlichem Maße kommt dabei zusätzlich unterstützende Software zur Anwendung. Das Spektrum reicht von der einfachen Umsetzung sonstiger Entwürfe, wie dies vor allem in Ungarn erfolgt, über die Unterstützung durch Datenübernahme aus Aktenverwaltungssystemen, wodurch erneute Datenerfassung von Anschriften, Namen, Adressen usw. erspart wird, bis hin zu Systemen, die mit typischen Textbausteinen Hilfestellungen bei der Abfassung der rechtlichen Entscheidungen leisten. Hinzu kommen in Taiwan Systeme zum Einsatz, die Standardentscheidungen im Zusammenwirken mit den Richter generieren können.

Zu erwähnen ist hier auch das österreichische System, das vor und nach einer formalisierten Datenerfassung entsprechende Vorschläge für Standardschreiben und Entscheidungen automatisch zur Verfügung stellt. Gesetzlich vorgesehene Rechtsbehelfsbelehrungen werden automatisch angefügt. Das System nimmt Konsistenzprüfungen, zum Beispiel bezüglich der Zuständigkeit, vor. Zur Unterstützung des Richters werden entsprechende Hinweise durch das System gegeben. Fertige Urteile werden zentral ausgefertigt und zugestellt.

In der Regel hat der Richter selbst Zugang zu den seine Verfahren betreffenden Daten. Soweit ein justizinternes Aktenverwaltungssystem besteht, wird ihm die Möglichkeit eingeräumt, von der Ausstattung, die ihm zur Verfügung steht, selbst oder unter Zuhilfenahme der Geschäftsstellenmitarbeiter mit den vorhandenen Datenbeständen zu arbeiten. Essentiell für die Möglichkeit, selbständig tätig zu werden, wirkt sich wiederum

die zur Verfügung stehende Infrastruktur und die Bereitschaft zur Benutzung derselben aus. Insoweit bestehen große Unterschiede zwischen den technisch sehr weit fortgeschrittenen Ländern, wie den USA und Österreich und anderen Staaten, die wie Lesotho nur über sehr eingeschränkte Mittel verfügen. Vorherrschend ist zur Zeit jedoch noch der mittelbare Kontakt des Richters mit der modernen Technologien über weitere Mitarbeiter.

Um die verfahrensnotwendigen Berechnungen durchführen zu können, stehen den Richtern, soweit sie mit Computern ausgestattet sind, in der Regel auch die notwendigen Berechnungsprogramme zur Verfügung. Dabei handelt es sich zum einen um Standardtabellenkalkulationssoftware, wie sie beispielsweise in der Microsoft Produktpalette enthalten ist.

In dieser Art sind zum Beispiel in den Niederlanden die Richter umfassend ausgestattet. Hinzu kommt Individualsoftware, die die Unterhaltsberechnung erleichtern soll. Für solche Aufgaben werden häufig zusätzliche Programme zur Verfügung gestellt. So bietet beispielsweise auch das österreichische System zusätzliche Hilfsstellungen für Standardberechnungen. Jedoch scheitert die Nutzung derartiger Möglichkeiten, wie sich am Beispiel der Schweiz zeigt, häufig an fehlender Schulung des Personals. Zudem erfordert die Vielschichtigkeit juristischer Aufgabenstellungen gewisse Fertigkeiten des Richters, zu erkennen, wann Hilfsmittel eingesetzt werden können. Zusätzliche Berechnungsprogramme helfen schließlich bei der Lösung spezieller Probleme. So erleichtern Kostenberechnungsprogramme in Argentinien die Berücksichtigung der erheblichen Inflationsrate.

Regelmäßig besteht nicht die Möglichkeit für die Parteien oder Anwälte, an den gerichtsinternen Berechnungsmöglichkeiten zu partizipieren. So sind zum Beispiel in Belgien und den USA die Netzwerke zur internen Justizverwaltung von denjenigen zur Informationsabgabe an Dritte schon physisch getrennt. Vorherrschend sind Vorbehalte, die entsprechenden Netzwerke zu öffnen, weil man Sicherheitsrisiken befürchtet.

Für die Frage der Zustellung gerichtlicher Entscheidungen stellen sich die gleichen Fragen, die bereits für die Zustellung verfahrenseinleitender Schriftsätze diskutiert worden sind. Insoweit bieten bislang nur das us-amerikanische und das österreichische System Lösungen. Demgegenüber wird die Veröffentlichung der Entscheidungen in Entscheidungssammlungen wesentlich großzügiger diskutiert. So denkt man in größtenteils darüber nach, die kostengünstigen und komfortablen Veröffentlichungsmöglichkeiten des World Wide Web zu nutzen. Beispielsweise überlegt das Verfassungsgericht in Ungarn, in nächster Zeit seine Entscheidungen im World Wide Web zugänglich zu machen.

Probleme bei der Veröffentlichung stellen sich in erster Linie mit Blick auf den notwendigen Datenschutz. Dabei stellen einzelne Rechtsordnungen Anforderungen, die mit Blick auf Veröffentlichungen in sonstigen Entscheidungssammlungen unterlaufen werden. So findet zum Beispiel bei Veröffentlichungen von Entscheidungen des Europäischen Gerichtshofs keine Anonymisierung der Urteile statt.
Probleme bei der Veröffentlichung im World Wide Web werden teils, wie in Belgien, nur mit Blick auf Fragen der technischen Umsetzung gesehen. So muß sichergestellt werden, daß die Entscheidungen authentisch übertragen werden und auch nach einer möglichen elektronischen Weiterbenutzung brauchbar bleiben. Insoweit wird vor allem in Australien das Problem unkomplizierter Nutzung und Übergabe von Informationen diskutiert. Man

erarbeitet Richtlinien, die eine Vereinheitlichung ermöglichen sollen. Beispielsweise sollen Umformatierungen, die notwendig beim Umgang mit einem elektronischen Dokument auftreten, für Zitate keine Rolle mehr spielen, weil Randzeichen an den einzelnen Abschnitten einer Entscheidung eingeführt werden sollen.

X. VERFAHREN MIT KOMPLETTEN BEZIEHUNGEN VON VIELFÄLTIG BETEILIGTEN

Komplizierte Verfahren mit einer Vielzahl von Beteiligten werfen für die Gerichtspraxis zusätzliche Probleme auf. Diese Probleme werden häufig mittels neuer Technologien angegangen.

In die entgegengesetzte Richtung wirkt das italienische Beispiel, wo unter Verweis auf die ohnehin enormen Koordinationsschwierigkeiten, die ein komplexes Verfahren mit sich bringt, damit gerechnet wird, daß in nächster Zeit keine zusätzlichen Anstrengungen in dieser Hinsicht unternommen werden. Diese eher als Kapitulation aufzufassende Aussage bildet allerdings die Ausnahme.

Davon abgesehen scheinen sich die komplexeren Verfahren als Wegbereiter für den Einsatz moderner Technologien im Zivilprozeß zu bewähren. So haben sich die Möglichkeiten elektronischer Aktenführung in diesen Verfahren entwickelt. Dies zeigt sich besonders am Beispiel der USA, Australiens sowie Englands und Wales. Komplexeres Datenmanagement, insbesondere vielfach genutzter umfangreicher Aktensammlungen, bedeuten für alle Beteiligten erhebliche logistische und kapazitätsbedingte Probleme. Mittels moderner Datenverarbeitungs- bzw. Aktenverwaltungswerkzeuge konnte man erhebliche Transparenzgewinne und dadurch bedingt bessere Bearbeitungszeiten erreichen. Die in diesem Zusammenhang entwickelten Techniken, wie das Einscannen von großen Dokumentenmengen und die optische Texterkennung, eignen sich inzwischen hinreichend auch zur Weiterverarbeitung der Volltextprotokolle, wie dies in Neuseeland in der Praxis erprobt wird. Probleme bereiten in diesem Zusammenhang nur die ohnehin mit den komplexen Verfahrensabläufen verbundenen Anforderungen an Arbeitskraft und Material.

XI. RECHTSMITTELVERFAHREN

Für den Einsatz von modernen elektronischen Hilfsmitteln in Rechtsmittelverfahren gelten größtenteils die Ausführungen über Ausstattung und rechtliche Probleme beim Vortrag in erster Instanz entsprechend. In der Regel ist jedoch die Ausstattung bei den Rechtsmittelgerichten besser als bei den Untergerichten.

Zumeist wird die Möglichkeit eines Zugriffs auf Daten, die während des erstinstanzlichen Verfahrens in elektronischer Form angesammelt wurden, als für das Rechtsmittelverfahren positiv bewertet. Insoweit bestehen in der Schweiz bereits Möglichkeiten für die Obergerichte, diese Datenbestände nutzbar zu machen. Als Medien für die Datenübergabe dienen sowohl normale Datenträger als auch Netzwerke. Die vielfach ins Auge gefaßten Planungen, entsprechende Zugriffe der Obergerichte zu ermöglichen, müssen zunächst die technischen Probleme der Datenübergabe (Konvertierungen etc.) lösen.

Als weiterer Gesichtspunkt wird in der schweizerischen Diskussion angesprochen, daß die elektronische Verfügbarkeit der erstinstanzlichen Entscheidung sich vor dem Hintergrund üblicher menschlicher Schwächen negativ auf die Qualität der rechtlichen Überprüfung auswirken könnte. Man sieht die Gefahr, daß ein Rechtsmittelgericht geneigt sein wird, schon aus Gründen der Arbeitsersparnis die ausgearbeitete Vorlage zu verwerten. Andererseits ließe sich dem entgegenwirken, indem zumindest auf Datenträgern wie Disketten Alternativlösungen der Parteien in den elektronischen Bestand des Rechtsmittelgerichts aufgenommen würden.

Im übrigen stellen sich die üblichen Probleme der Datensicherheit, des Datenschutzes und der Gewährleistung der Authentizität der im System befindlichen Dokumente entsprechend.

XII. REGISTER ALS ELEKTRONISCHE DATEI

In den meisten Ländern gibt es Register, die Immobiliarrechte und handels- bzw. gesellschaftsrechtliche Beziehungen betreffen. Zusätzlich hat Ungarn kürzlich ein besonderes Register für Pfandrechte eingeführt, das vor allem eine Publizität besitzloser Pfandrechte bewirken soll. Regelmäßig werden diese Register in Papierform geführt. Zunehmend baut man parallel zu den papierbasierten Registern Datenbanken auf, die deren Aufgaben sukzessiv übernehmen sollen. Parallel zu den herkömmlichen Registern geführt, sollen diese Datenbanken zunächst den Verwaltungsablauf vereinfachen. Allerdings gibt es auch schon komplett durchgeführte Umstellungen auf elektronisch geführte Register. In Österreich sind das allgemeine Grundbuch seit Ende 1992 und das Firmenbuch seit Ende 1994 vollständig elektronisch erfaßt. In vielen Kantonen der Schweiz und in mehreren Ländern der Bundesrepublik Deutschland werden Grundbücher elektronisch geführt. Auch die Einführung des elektronischen Handelsregisters ist in der Schweiz schon weit fortgeschritten. In Deutschland sind die gesetzgeberischen Vorarbeiten geleistet.

Bemerkenswert ist auch die weitgehend vervollständigte Entwicklung in Ungarn. Dort wurden zentral bei den Landesnotarkammern die entsprechenden Datenbanken für das Immobilien-, Firmen- und Pfandregister eingerichtet. Der Zugriff auf die Datenbestände wurde den Notaren über Netzwerkverbindungen ermöglicht.

Als grundsätzliches Problem stellen sich die gewaltigen Datenmengen dar, die durch Digitalisieren der zur Zeit in Papierform vorliegenden Register aufgenommen werden müssen. Zum Teil verfolgt man deshalb ein gemischtes Konzept, indem wesentliche Teile der Daten in elektronischer Form vorgehalten werden, wohingegen vor allem Landkarten und vergleichbare optische Informationen durch Bezugnahme auf einen in Papierform gehaltenen Aktenbestand einbezogen werden.

Häufig wird im Zusammenhang mit der elektronischen Registerführung die Datenschutzproblematik angesprochen. Der Zugriff auf die Datenbanken wird regelmäßig öffentlich rechtlichen Körperschaften, Notaren und sonstigen am Rechtsverkehr beteiligten Personen eröffnet, soweit für sie ein schutzwürdiges Interesse an der Einsichtnahme besteht. Aus Gründen des Datenschutzes wird häufig gefordert, daß im Wege entsprechender Recherchen umfassende Informationssammlungen über eine Person aus dem gesamten Datenbestand nicht durchgeführt werden können. Die Notwendigkeit restringierterer Recherchemöglichkeiten wird besonders deutlich, wenn man einbezieht, daß beispielsweise in den USA über eine vergleichbare Führung der Melderegister nachgedacht wird.

Ein weiteres grundlegendes Problem bei der Führung der Register stellt wiederum die Sicherung der Authentizität der gespeicherten Daten dar. Als Lösungen werden auch in diesem Zusammenhang Verfahren der digitalen Signatur diskutiert. Zusätzlich sind zum Beispiel in Deutschland hardware-basierte Lösungen im Gespräch, wie das Speichern der Datenbestände auf nur einmal beschreibbaren Datenträgern.
Auch für die Frage, ob Eintragungs- und Löschungsanträge den Registerverwaltungsstellen elektronisch übermittelt werden können, stellt man entscheidend auf die Funktionstüchtigkeit eines digitalen Signatursystems ab. Die gesetzlichen Vorschriften gehen insoweit in der Regel von schriftlichen Erklärungen aus. Notwendig wäre wiederum eine Gleichstellung herkömmlicher Unterschriften mit digitalen Signaturen. Für die Registerverfahren wird mehr noch als in den kontradiktorischen Verfahren die Notwendigkeit zu einer strengen Authentizitätsprüfung gesehen.

XIII. ZUSAMMENFASSENDER ÜBERBLICK

Die eingegangenen Länderberichte zeigen ein weites Spektrum in allen das gerichtliche Verfahren und die Nutzung elektronischer Hilfsmittel betreffenden Bereichen. Bereits die technischen Möglichkeiten und die Ausbildung des Gerichtspersonals setzen den Modernisierungsmöglichkeiten national sehr unterschiedliche, enge Grenzen. Als entscheidendes Problem stellt sich die Bereitschaft dar, von überkommenen Gewohnheiten abzurücken und die neuerlichen Möglichkeiten sinnvoll in den Geschäftsbetrieb aufzunehmen. Allzu leicht werden Modernisierungsbestrebungen in einem Teufelskreis zwischen der Notwendigkeit, die gesetzlichen Rahmenbedingungen zu schaffen, und der Bereitschaft, Neuerungen aufzunehmen und in Gesetzgebungsvorhaben umzusetzen, gefangen. Ein Schlüsselproblem in diesem Zusammenhang stellt die Frage nach der Authentizität übermittelter bzw. gespeicherter Daten dar. In diesem Zusammenhang wird zumeist auf Verfahren zur digitalen Signatur, d.h. zur Absicherung bestehender Datenbestände verwiesen. In den meisten Ländern ist eine entsprechende Regelung entweder schon erfolgt oder für die nächsten Jahre zu erwarten. Insofern ist die rechtliche Infrastruktur in den nächsten Jahren herstellbar, um rechtlich vertrauenswürdige und vor allem von den an der Rechtspflege beteiligten Personen akzeptierter elektronischer Verfahrensweisen zu entwickeln.

Unabhängig von diesen Einzelproblemen haben sich bereits beachtliche Entwicklungen in der Praxis bewährt. So werden sowohl in den USA als auch in Österreich in erheblichem Maße gerichtliche Verfahren auf elektronischem Wege geführt. Von entscheidender Bedeutung sind zwischenzeitlich elektronische Unterstützungssysteme, mit deren Hilfe die Gerichtsverwaltung und teilweise auch das Aktenmanagement entscheidend entlastet werden. Vor allem im Rahmen komplexer Gerichtsverfahren, die sich auf eine Vielzahl von Parteien bzw. einen schwierig zu überschauenden Tatsachenstoff bezieht, hat die Verwendung moderner elektronischer Hilfsmittel erneut dazu geführt, solche Verfahren justitiabel zu machen. In Fragen der Sicherheitsbeurteilung elektronischer Systeme setzt sich zunehmend eine Betrachtung durch, die vorhandene Sicherheitsmängel elektronischer Systeme mit ihrem Nutzen sowie den bestehenden Sicherheitsmängeln in den anerkannten Systemen vergleicht.

Insgesamt ist festzuhalten, daß die Einbindung elektronischer Hilfsmittel in gerichtlichen Verfahren allgemein als wichtige Aufgabe begriffen wird. Insoweit sind in den meisten Ländern ehrgeizige Planungen für die nächsten Jahre ins Auge gefaßt. Auch wenn sich das virtuelle Gerichtsverfahren bislang nirgends konkret abzeichnet, so können wir für die nächsten Jahre doch mit tiefgreifenden Entwicklungen rechnen.

XIV. ANLAGE 1

HERAUSFORDERUNG INFORMATIONSGESELLSCHAFT: DIE ANWENDUNG MODERNER TECHNOLOGIEN IM ZIVILPROZEß UND ANDEREN VERFAHREN

von

Prof. Helmut Rüßmann (Deutschland) /
Prof. Wouter de Vos (Südafrika)

A. Einführung und Problemstellung

Das von uns zu behandelnde Thema wirft die Frage nach dem Einsatz moderner Technologien im Zivilprozeß und anderen gerichtlichen Verfahren auf. Der Blick ist auf Gegenwart und Zukunft zugleich gerichtet. Es geht um schon vorhandene, erst noch geplante oder unter Umständen gerade erst einmal angedachte Einsatzmöglichkeiten moderner Technologien. Unter modernen Technologien werden im weitesten Sinne die Möglichkeiten der digitalisierten, elektronischen Kommunikation, der elektronischen Informationsbeschaffung, des elektronischen Informationsaustauschs und der elektronischen Informationsspeicherung verstanden. Es geht um den Einsatz von Intranet- und Internettechniken im Dienste gerichtlicher Verfahren. Die Kommunikation im Faxverkehr hat demgegenüber allenfalls eine Randbedeutung.

Das Einsatzfeld wird durch den Zivilprozeß und andere gerichtliche Verfahren bestimmt, in denen bürgerlichrechtliche, handelsrechtliche und wirtschaftsrechtliche Fragen behandelt werden. Die anderen Verfahren sind in Deutschland etwa die Verfahren der sogenannten freiwilligen Gerichtsbarkeit. Dabei stehen die Angelegenheiten im Brennpunkt des Interesses, in denen es um die Führung öffentlicher Register wie namentlich des Grundbuchs und des Handelsregisters und deren Umstellung von der Buchform auf elektronische Dateien geht. Neben den technischen Einsatzmöglichkeiten und ihrer Realisierung sind vor allem die Rechtsfragen von Bedeutung, die durch den Einsatz ausgelöst und unter Umständen schon vor dem Einsatz (auch durch Änderungen der vorhandenen Gesetze) beantwortet werden müssen. Hier ist etwa an Schriftformerfordernisse, Anwesenheitsnotwendigkeiten und Einsichtsmöglichkeiten zu denken. Auch dürften datenschutzrechtliche Fragen von nicht zu unterschätzender Bedeutung sein.

B. Zivilprozeß

Für den Zivilprozeß haben wir schon vor geraumer Zeit ein Szenario entworfen, das die Möglichkeiten des Einsatzes moderner Technologien umreißt:

Der Kläger betreibt am Unternehmenssitz in Saarhauptstadt eine elektronische Datenbank. Der in Saarheim ansässige Beklagte nimmt regelmäßig die Dienste des Klägers in Anspruch. Am 01.04.01 ermittelt die EDV-Anlage des Klägers, daß der Beklagte die Rechnung für den Monat Januar 01 trotz zweimaliger Mahnung nicht bezahlt hat. Der Kläger sendet daraufhin per Telekommunikation über das öffentliche Telefonnetz einen mit seiner elektronischen Unterschrift versehenen Antrag auf Erlaß eines Mahnbescheides an das Amtsgericht in Saarhauptstadt.
Der Geschäftsstellenrechner des Amtsgerichts überprüft die elektronische Unterschrift, teilt dem Antrag ein Aktenzeichen zu, legt eine elektronische Akte auf der Speichereinheit an und veranlaßt die elektronische Übermittlung eines Mahnbescheides an die e-mail-Adresse des Beklagten. Der Beklagte überprüft seine Telebanking-Datei und kommt zu dem Ergebnis, daß für den Zeitraum Januar 01 eine Zahlung unter dem 17.02.01 verbucht ist. Er übermittelt daraufhin auf elektronischem Wege einen Widerspruch gegen den Mahnbescheid an das Amtsgericht.
Der Computer des Amtsgerichts Saarhauptstadt läßt dem Kläger automatisch eine Benachrichtigung vom Widerspruch zugehen. Nach Eingang eines klägerischen Antrags auf Durchführung des streitigen Verfahrens veranlaßt die Gerichts-EDV die Abgabe des Verfahrens an das Amtsgericht Saarheim. Der zuständige Amtsrichter in Saarheim legt an seinem Richterarbeitsplatz unter einem neuen Aktenzeichen eine elektronische Akte an und wählt aus der Formulardatei die Aufforderung zur Klagebegründung aus. Der Computer ergänzt das Formular um die Individualisierungsmerkmale des Mahnbescheides und sendet es telekommunikativ an den Kläger.
Der Kläger kopiert daraufhin die für den Abrechnungsmonat Januar 01 gespeicherten Informationen mittels eines Makros in ein Klageschriftformular, in dem als Beweis die elektronische Kundendatei angeboten wird. Die so erstellte Klageschrift sendet er per Faxmodem an das Amtsgericht. Der Richter kopiert die Klageschrift in seine elektronische Akte und leitet sie an den Beklagten telekommunikativ weiter. Auf dem gleichen Wege übermittelt der Beklagte eine Klageerwiderung, in der er sich auf seine Zahlung beruft und der er als Beweis eine elektronische Kopie seines Internet-Überweisungsauftrags und -Kontoauszugs seiner Hausbankverbindung beifügt. Die Klageerwiderung nebst beigefügtem Beweismittel wird in Kopie an den Kläger weitergeleitet.
In der mündlichen Verhandlung, die der Amtsrichter im Sitzungssaal an einem allgemein einzusehenden Bildschirmtelefon in einer Konferenzschaltung mit den Parteien durchführt, stellen diese die angekündigten Anträge. Der Amtsrichter vergewissert sich mittels einer aktuellen Gesetzes-CD-ROM einiger Vorschriften des Erfüllungs- und des Beweisrechts, konsultiert zudem eine online-Datenbank, die gerichtliche Entscheidungen und Literaturbeiträge vorhält, und unterzieht daraufhin die als Beweis angebotenen Dateien des Beklagten einer Sicherheitskontrolle. Das Ergebnis wird mit den Parteien verhandelt, die erneut ihre Anträge stellen.
Das Urteil wird den Parteien nach Verkündung elektronisch übermittelt. Auf Antrag wird dem Kläger eine vollstreckbare Ausfertigung erteilt. Die elektronische Akte wird in ein Archivverzeichnis übertragen und zusätzlich auf einem externen Datenträger gespeichert, der im Gerichtsarchiv inventarisiert wird.
So könnte in der Tat einmal der Prozeß der Zukunft aussehen. Von dieser Zukunft sind wir

in Deutschland und in Südafrika noch ein gutes Stück entfernt. Doch einige Schritte wurden schon gegangen. Man denke für Deutschland nur an das automatisierte Mahnverfahren und die Führung des Grundbuchs als automatisierte Datei. Überdies gibt es etwa für die Vereinigten Staaten von Amerika schon sehr konkrete Vorstellungen darüber, wie ein komplett digitalisiertes Gerichtsverfahren vor den Bundesgerichten aussehen könnte.
Für die Zwecke einer einheitlichen Gestaltung der Nationalberichte empfiehlt es sich, zunächst die Frage nach den Plänen und Aussichten für ein komplett digitalisiertes Gerichtsverfahren zu beantworten und sich alsdann für den Einsatz moderner Technologien in Teilbereichen am Verfahrensablauf eines normalen Zivilprozesses von der Verfahrenseinleitung, der gerichtsinternen Aktenführung und Organisation, über die Vorbereitung der Verhandlung, die Stoffsammlung, die Verhandlung und Beweisaufnahme, die Beschaffung der Rechtsinformationen (Normen, Entscheidungen und Literatur) bis hin zur Entscheidung und zu ihrem Ingeltungsetzen zu orientieren.

I. Pläne und Aussichten für ein komplett digitalisiertes Gerichtsverfahren

Wie ein komplett digitalisiertes Gerichtsverfahren aussehen könnte, kann man dem vom Administrative Office of the United States Courts herausgegebenen Diskussionspapier "ELECTRONIC CASE FILES IN THE FEDERAL COURTS: A Preliminary Examination of Goals, Issues, and the Road Ahead" entnehmen. Dieses Dokument steht im Internet zum Abruf bereit (http://www.uscourts.gov/casefiles/toc.htm). Auf Anforderung stelle ich für die Nationalberichterstatter gern eine Diskette mit der elektronischen Fassung oder auch einen Ausdruck (the old fashioned way) zur Verfügung.

II. Einsatz moderner Technologien nach Verfahrensabschnitten des normalen Verfahrensablaufs

Wenn es kein komplett digitalisiertes Gerichtsverfahren und auch keine Pläne zur Einführung eines solchen Verfahrens gibt, so stellt sich die Frage, welche modernen Technologien in den einzelnen Verfahrensstadien eingesetzt werden. Die Verfahrensstadien sind dem Ablauf eines deutschen Zivilprozesses nachgebildet.

1. Verfahrenseinleitung

Das verfahrenseinleitende Dokument eines normalen Streitverfahrens ist in Deutschland eine Klage oder ein Antrag auf Erlaß eines Mahnbescheides. Die Frage ist, ob und unter welchen Voraussetzungen die Verfahrenseinleitung auf elektronischem Wege erfolgen kann. Dabei mag man an die Übermittlung via Telekommunikation ebenso denken wie an die Einreichung einer Diskette. Die deutsche Rechtspraxis gestattet die Einleitung über Telefax. Eine Einleitung über elektronische Post oder einen elektronischen Dateitransfer ist nicht vorgesehen und mangels entsprechender Ausstattung der Gerichte bisher auch nicht praktisch geworden.
Wie wird in Ihrem Land die Verfahrenseinleitung auf elektronischem Wege gesehen? Wird sie zugelassen? Gibt es Pläne für die zukünftige Zulassung? Wie soll technisch sichergestellt werden, daß das elektronische Dokument von dem stammt, von dem zu stammen es vorgibt, und daß das Dokument nicht auf dem Übertragungswege verfälscht werden ist? Welche rechtlichen Hindernisse stehen der Zulassung elektronischer Verfahrenseinleitungen im Wege? Welche rechtlichen Probleme müssen gelöst werden?

2. Aktenführung und Organisation

Werden die Akten (nur) schriftlich oder auch elektronisch geführt? Wie ist der gerichtsinterne Organisationsablauf (Terminverwaltung, Raumverwaltung, Aktenregister, Kommunikation mit den Verfahrensbeteiligten, Verfahrensdokumentation) geregelt und dokumentiert: in Schriftstücken und Büchern oder auch in elektronischen Dateien?
Wenn die Aktenführung elektronisch erfolgen soll, wie wird die Authentizität und Unverfälschtheit der Dokumente gewährleistet? Auf welchem Wege soll die Übereinstimmung der schriftlichen mit der elektronischen Dokumentation gewährleistet werden? Wer hat Zugang zu den in elektronischer Form gespeicherten Informationen? Gibt es Einsichtsmöglichkeiten der Parteien oder gar der interessierten Öffentlichkeit?

3. Zustellung

Kann die Zustellung verfahrenseinleitender und anderer Dokumente nur durch die Übergabe (oder Hinterlegung) von Schriftstücken oder auch auf elektronischem Wege (Email oder Dateitransfer) erfolgen? Wie wird sichergestellt, daß die zuzustellenden Schriftstücke den Zustellungsadressaten unverfälscht erreichen? Ist etwa bei der öffentlichen Zustellung daran gedacht, parallel zur Anheftung an die Gerichtstafel eine Veröffentlichung im World Wide Web vorzusehen, die eine größere Chance zur Kenntnisnahme bietet als die Information an der Gerichtstafel?

4. Vorbereitung der Verhandlung

Mit der Vorbereitung der Verhandlung ist die Kommunikation des Gerichts mit den Parteien, den Parteivertretern und möglichen Beweispersonen (Zeugen und Sachverständigen) angesprochen. Inwieweit ist hier der Einsatz moderner Kommunikationsmittel (Email) vorgesehen? Welche rechtlichen Hindernisse stehen dem Einsatz entgegen? Welche Rechtsprobleme müßten vor dem Einsatz gelöst werden? Ist es dem Gericht gestattet, ergänzende Informationen zum Sachverhalt durch Nutzung etwa der Informationsangebote des World Wide Web in das Verfahren einzuführen?

5. Mündliche Verhandlung und Beweisaufnahme

Gibt es mündliche Verhandlungen ohne körperliche Anwesenheit der betroffenen Personen (Parteien und Beweispersonen) durch Einsatz von Videokonferenztechniken oder wird über entsprechende Einrichtungen nachgedacht? Welche rechtlichen Hindernisse stehen dem Einsatz entgegen? Welche Rechtsprobleme müßten vor dem Einsatz gelöst werden?
Wie werden elektronische Dokumente beweisrechtlich behandelt?

6. Rechtsinformationen

Welche elektronischen Informationsmöglichkeiten über Rechtsnormen, Gerichtsentscheidungen und Literaturmeinungen stehen den Gerichten zur Verfügung? Können die Parteien und ihre Anwälte an diesen Informationsmöglichkeiten partizipieren?

7. Entscheidung

Gibt es elektronische Hilfen für die Absetzung, das Verfassen und die Korrektur der gerichtlichen Entscheidungen? Hat der Richter selbst Zugang zu den elektronischen Dateien seiner Entscheidungen? Oder muß er sich unter Inkaufnahme eines Medienbruchs mit dem Schreibdienst oder der Verwaltung ins Benehmen setzen, um Änderungen an der noch nicht in Geltung gesetzten Entscheidung zu erreichen?

Manche Entscheidungen erfordern einen hohen Rechenaufwand. Stehen dem Richter für die Bewältigung des Rechenaufwandes elektronische Hilfen in Form von Standardprogrammen oder Spezialprogrammen zur Verfügung? Können Parteien und Anwälte an den Berechnungsmöglichkeiten partizipieren?
Wie wird die Entscheidung den Beteiligten bekanntgemacht? Kann die Entscheidung auch elektronisch zugestellt werden?
Ist eine Veröffentlichung von Entscheidungen in einem allgemein zugänglichen elektronischem Medium (etwa dem Internet) möglich, üblich oder vorgesehen? Welche rechtlichen Hindernisse stehen dem Einsatz der elektronischen Publikation entgegen? Welche Rechtsprobleme müßten vor dem Einsatz gelöst werden?

8. Verfahren mit komplexen Beziehungen und vielfältigen Beteiligten

Gibt es in ihrem Land Sonderregeln für Verfahren mit komplexen Beziehungen und vielfältigen Beteiligten (complex litigation), und sind für diese Verfahren Einsätze moderner Technologien vorgesehen?

9. Rechtsmittelverfahren

Im Rechtsmittelverfahren stellen sich die Fragen aus dem erstinstanzlichen Verfahren in analoger Weise. Hinzu tritt die Frage, ob und inwieweit das Rechtsmittelgericht auf elektronische Informationen des Erstgerichts zugreifen kann.

10. Vollstreckung

Die Vollstreckung ist ein eigenständiger Verfahrensabschnitt, soweit es um die Anwendung von Zwangsmaßnahmen gegen den Schuldner geht. Seine Behandlung ist im Interesse der Überschaubarkeit der Berichte und des Rahmens des Generalthemas nicht angezeigt.

C. Andere Verfahren (Außerstreitverfahren und freiwillige Gerichtsbarkeit)

In dem Bereich der Außerstreitverfahren oder freiwilligen Gerichtsbarkeit liegt das besondere Augenmerk auf den Registerverfahren, wofür für den Bereich der Bundesrepublik Deutschland beispielhaft das Grundbuch und das Handelsregister angeführt werden können. Es liegt auf der Hand, daß Registereinträge, an deren Existenz oder Nichtexistenz materiellrechtliche Vertrauensschutztatbestände geknüpft sind, in einem Medium, daß orts- und zeitunabhängigen Zugang eröffnet, eine in der Papier- und Buchform nicht bekannte praktische Bedeutung bekommen können. Positive Nebenwirkungen der Führung der Register als elektronische Datei sind neben den bequemeren, ja praktisch erstmals dem Informationsanspruch gerecht werden Informationsmöglichkeiten im weiteren die erleichterte Führung elektronischer Register und der Raumgewinn in den Registergerichten. Dem steht eventuell eine neue Dimension datenschutzrechtlicher Fragen gegenüber. Mit der Effektivierung der Informationsmöglichkeiten muß man sich verschärft die Frage stellen, ob die Informationen jedermann ohne weiteres zur Verfügung zu stellen sind. Schließlich stellen sich auch in den Registerverfahren die schon in den streitigen Gerichtsverfahren angesprochenen Perspektiven einer vollständigen Digitalisierung des Verfahrens von der Antragstellung über die Stoffsammlung und das Beweisverfahren bis hin zur Eintragungsverfügung und -entscheidung.

I. Register als elektronische Datei

Werden in Ihrem Land Register, deren Inhalt Vertrauensschutz genießt wie das Grundbuch oder das Handelsregister in der Bundesrepublik Deutschland, statt in Papierform in elektronischer Form geführt?
Gibt es, wenn das eigentliche Register die Papierdokumentation ist, auch eine elektronische Dokumentation der Register?
Wer hat Zugang zu den Registerinformationen?

II. Das Registerverfahren

Gibt es eine Möglichkeit, das Registerverfahren elektronisch zu betreiben?
Können dem Registergericht Eintragungs- oder Löschungsanträge elektronisch übermittelt werden?
Führt das Registergericht seine Akten und die Kommunikation mit den Beteiligten auf elektronischem Wege?
Welche rechtlichen Hindernisse stehen dem Einsatz moderner Technologien entgegen?
Welche Rechtsprobleme müßten vor dem Einsatz gelöst werden?

XV. ANLAGE 2

THE CHALLENGE OF INFORMATION SOCIETY: APPLICATION OF ADVANCED TECHNOLOGIES IN CIVIL LITIGATION AND OTHER PROCEDURES

by

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Prof. Wouter de Vos (South Africa)

A. Introduction and Issues

The topic in question concerns the application of advanced technologies in civil litigation and other court proceedings. We will consider the current use of advanced technologies as well as plans and ideas for future applications. Under advanced technologies we understand digitised, electronic communication and information retrieval, exchange and storage. We are concerned with the use of intranet and internet techniques within judicial proceedings, however, facsimile communication does not lie within the focus of our interest.

The scope is defined by civil litigation and other court procedures in which civil and commercial matters arise. In Germany these other court procedures may be court procedures on non-contentious matters for example. In the main we are interested in public registers for real estate or company information and the respective shift from paper to electronic format. Aside from such questions of technical realisation we have to deal with the legal issues arising out of the application of advanced technologies before they are actually introduced into civil litigation and other processes. Form requirements, requirements to appear in court, and access to electronic files should be examined and the significance of data protection issues (data privacy) should not to be underestimated.

B. Civil Litigation

Some time ago we developed a Scenario for civil litigation applying advanced technologies:

The plaintiff operates an electronic databank at the company offices in Saarbrucken. The defendant in Saarheim regularly makes use of the plaintiffs electronic services. On 1 April 2001 the electronic data processing system informs the plaintiff that the defendant has not paid his bill for January despite two reminders. Therefore the plaintiff applies via a telecommunication over the public telephone network for a formal demand to be made by the Regional Court in Saarbrucken. He signs this application with an electronic signature. The Regional Court's Administrative Office checks the electronic signature on its computer, gives the application a reference, creates an electronic file and electronically transmits a demand to the defendants email address. The defendant checks his online banking system and discovers that payment for the services he made use of in January was made on 17 February 2001. The defendant therefore sends an objection to the Regional Court.

The Regional Court automatically sends out news of the defendant's objection to the demand for payment to the plaintiff. After the plaintiff's application for judicial proceedings has been processed by the Regional Court's computer, the case is handed over to the County Court in Saarheim. The judge responsible in Saarheim creates a new electronic file under a new reference on his computer and selects a standard form for the plaintiffs grounds of complaint. The computer completes the form with the relevant information and transmits it to the plaintiff.
The plaintiff then copies the information regarding his January accounts stored on his computer onto the special ground for complaint form, on which the customer information is available as evidence. The plaintiff then sends this completed form via modem to the County Court. The judge copies the ground for complaint form into his electronic file and telecommunicates the document to the defendant as well. In the same way the defendant sends a retort to the complaint regarding his payment and submits an electronic copy of his transferral order and bank statement from his online banking system as evidence. This report and annexed evidence of payment is forwarded to the plaintiff.
The oral negotiations are conducted in a conference room by the County Court judge with the plaintiff and defendant via a teleconferencing telephone system and monitor. The parties reiterate their claims and the judge makes sure of the laws of performance and evidence with a modern Legal CD Rom package and consults an online databank of previous decisions and literature on the subject. The result is discussed with the parties who place their claims again.
After the decision is announced it is transmitted to the parties electronically. If requested, the plaintiff may receive a full justification for the judges decision. The electronic file is transferred into an archive index and is also saved onto an external databank with its own inventory.

This is what civil litigation could look like in the future, however Germany and South Africa still have some way to go. Some steps have already been taken in Germany, for example regarding automated summary proceedings for an order to pay debts or the electronic land and real estate register. Furthermore, in the United States of America very specific and detailed plans exist outlining how litigation in the federal courts could be completely digitised.

For the purpose of a unified presentation of the national reports we suggest that primarily the question should be raised as to whether or not there are plans for completely digitising proceedings. Secondly the application of advanced technologies in parts of a civil litigation following the path of a common litigation should be considered. This would encompass the initiation of the proceedings, the internal case and file management, the preparation of the hearing of the case by judges and attorneys, the establishment of the factual basis, the trial and evidentiary procedures, the research in norms, statutes, precedents, and other authorities, up to the final decision and its effects.

I. Completely Digitised Procedures: Electronic Case Files

What completely digitised civil proceedings could look like may be seen in the discussion draft submitted by the Administrative Office of the United States Courts "ELECTRONIC CASE FILES IN THE FEDERAL COURTS: A Preliminary Examination of Goals, Issues, and the Road Ahead". This document can be accessed and downloaded through the internet

(http://www.uscourts.gov/casefiles/toc.htm). On request, I can provide you with a disk with all files in pdf-format or even send you a printout of the main document.

II. Use of Advanced Technologies in Parts of the Proceedings Following the Path of a Common Litigation

If there are neither completely digitised proceedings nor plans for the introduction of such proceedings then we will have to address the question whether advanced technologies are at least applicable or thought to be applicable and relevant in the future in parts of the civil proceedings. The possible areas where the technology could be applied within the German system of civil litigation are outlined below.

1. Initiating the Proceedings

In Germany the document which initiates the civil litigation process is a complaint or a motion for summary proceedings for an order to pay debts. The question is whether, and if so under which conditions and provisions, the filing of the complaint or motion can be done using electronic media be it telecommunication or the handing over of a disk to be copied into the file to be handled by the court. German legal practice allows the filing via telecopier. There is no provision for electronic filing via email, ftp, or disk. Such filing has not yet taken place due to the lack of suitable equipment in our courts.

How does one consider and go about filing the initiating document in your country electronically? Has this method been adopted and set up already? Are there plans for such a system in the future? How is the issue of authenticity of the document dealt with, i.e. how can you tell whether the document genuinely stems from the person it says it is from and has not been altered on the way to the court? Are there any legal obstacles to the admittance of electronic filing? What kind of legal issues have to be solved before the implementation of such an electronic system of initiation?

2. File Management and Case Management

Does the file and case management rely on (only) written material or on electronic material as well? In which manner is the internal organisation (handling of hearings and rooms, dockets, communication with parties, attorneys and witnesses) constructed and documented: in written files and books or in electronic files and timetables as well?

If the file management is done electronically in which way is the authenticity of the electronic case file assured? How can it be guaranteed that the written and electronic files contain exactly the same information? Who is granted access to the electronic files (judges, attorneys, parties, the public?)?

3. Delivering the Initiation Document (Service)

Can the initiating document (and other documents) only be delivered by handing over or putting down a written document or is it possible that the same can be achieved by email or electronic file transfer? How is it assured that in the case of electronic serving the document is delivered without alteration?

Could the public service provided by the internet (World Wide Web) be utilised in order to improve the process of giving notice compared to the traditional public service on the courts bulletin board?

4. Preparation of the Hearing

By preparation of the hearing we mean the communication between the court and the parties, their attorneys and possible witnesses. To what extent does one think about applying advanced technologies (email) to handle the communicative needs? Are there legal obstacles to the use of modern telecommunication? Which legal issues have to be solved before introducing and allowing modern telecommunication between judges, parties, attorneys and witnesses? May the judge use information from the internet to supplement the facts of the case at hand?

5. Hearing and Evidence

Do you allow or think about hearings and testimony without physical presence of the persons involved using video conferencing techniques? What kind of legal obstacles have to be faced before introducing such proceedings? Which legal issues have to be solved?
How does your law of evidence treat electronic documents?

6. Legal Information (Information on Legal Authorities)

Do your courts and judges have access to legal authorities as norms, statutes, precedents, and other authorities contained in electronic media (online or offline)? Do the parties and their attorneys have a chance to participate in the use of such information media?

7. Final Decision

Do you provide for electronic help in drafting and reviewing the final decision? Do judges use word processing programs and do they have access to the electronic files of their opinions? Or is a judge forced to make arrangements with the court administration or the typing personnel if he wants to make changes to a decision not yet rendered?

Some decisions require immense calculations. Do you provide for standard (spreadsheet) or specialised programs to manage these calculations? If so, may parties and their attorneys participate in using the calculation tools?

In which way are the parties notified of the final decision? May the decision be handed down serviced by electronic means?

Is the publication of the final decision in a generally accessible media (like the internet) possible, usual, or provided for? Which legal obstacles are to be taken into account before publishing the decision electronically? Which issues have to be solved for future use of electronic publishing?

8. Complex Litigation Proceedings

Are there special rules in your country governing complex litigation, i.e. litigation with complex relations and many participants?

9. Appeal

In appeal proceedings we are confronted with the same issues as in proceedings of first instance. In addition we will have to ask whether and to what extent the court of appeals may use the electronic files of the court of first instance.

10. Execution

Execution is a proceeding on its own as far as executing force against a debtor is concerned. To keep our reports manageable, we should not deal with execution of judgements.

C. Other Judicial Proceedings (Non-contentious Matters)

As regards other judicial proceedings we should concentrate, for instance, on public registers handled by courts as in Germany with respect to the real estate register (Grundbuch) and the commercial register (Handelsregister). The practical importance of electronic registration entries, whose existence or non existence is furnished with public and good faith notions, increases in an environment that can be accessed anywhere and at any time. Positive side effects of the maintenance of public records and registers in electronic form also include the ability to handle data efficiently and effectively and the huge reduction of space needed to store records. These positive effects are possibly met by new dimensions of data protection issues. Effectuating information retrieval poses the question as to who may be granted access to the information. Finally, we will be confronted with the same issues of digitising the entire proceedings from the motion to make an entry, the decision making process to finally having the entry performed.

I. Electronic Record and Register

Does your country provide for public records and registers, whose contents are furnished with public and good faith, to be held and managed in electronic instead of printed or written format?
Is there an electronic form of the register even if the official register is still kept in writing?
Who is granted access to the registered information?

II. The Registration Proceedings

Is it provided for that the registration proceedings are performed electronically?
Is it possible to apply for an entry into the register or the deletion of an existing entry by electronic filing?
Does the registering court manage its files and communication with the participants electronically?
Which legal obstacles have to be considered before applying advanced technologies? Which legal issues have to be solved?

XVI. ANLAGE 3

Landesberichte

Landesbericht:	**Berichterstatter:**
Argentinien	Dr Pelayo Ariel Labrada
Armenien	Dr. Ani Dawtjan
Australien	Prof. Greg J. Reinhardt Anne Wallace
Belgien	Prof. Jos Dumortier Caroline Goemans
Deutschland	Prof. Dr. Maximilian Herberger
England und Wales	Prof. Richard Susskind
Finnland	Dr. Sakari Laukkanen
Griechenland	Prof. Dr. Athanassios Kaissis
Indien	Prof. K. B. Agrawal Dr. B. K. Sharma
Italien	Prof. Andrea Giussani
Japan	Prof. Koichi Miki
Korea	Prof. Dr. Sunju Jeong
Lesotho	Nam Fanana
Neuseeland	Graham D. S. Taylor
Niederlande	Prof. R. V. de Mulder
Österreich	Dr. Martin Schneider
Peru	Dr. Carlos Parodi Remon
Russland	Dr. Alexander Verschinin
Schweiz	Dr. Alexander Brunner
Spanien	Dr. Guillermo Ormazabal
Südafrika	Prof. H. J. Erasmus
Taiwan	Amt für Informationsverwaltung, Judicial Yuan
Ungarn	Dr. Istvan Varga
Vereinigte Staaten von Amerika	Bradley J. Hillis, MA, JD

XVII. SUMMARY

Die eingegangenen Länderberichte zeigen ein weites Spektrum in allen das gerichtliche Verfahren und die Nutzung elektronischer Hilfsmittel betreffenden Bereichen. Bereits die technischen Möglichkeiten und die Ausbildung des Gerichtspersonals setzen den Modernisierungsmöglichkeiten national sehr unterschiedliche, enge Grenzen. Als entscheidendes Problem stellt sich die Bereitschaft dar, von überkommenen Gewohnheiten abzurücken und die neuerlichen Möglichkeiten sinnvoll in den Geschäftsbetrieb aufzunehmen. Allzu leicht werden Modernisierungsbestrebungen in einem Teufelskreis zwischen der Notwendigkeit, die gesetzlichen Rahmenbedingungen zu schaffen, und der Bereitschaft, Neuerungen aufzunehmen und in Gesetzgebungsvorhaben umzusetzen, gefangen. Ein Schlüsselproblem in diesem Zusammenhang stellt die Frage nach der Authentizität übermittelter bzw. gespeicherter Daten dar. In diesem Zusammenhang wird zumeist auf Verfahren zur digitalen Signatur, d.h. zur Absicherung bestehender Datenbestände verwiesen. In den meisten Ländern ist eine entsprechende Regelung entweder schon erfolgt oder für die nächsten Jahre zu erwarten. Insofern ist die rechtliche Infrastruktur in den nächsten Jahren herstellbar, um rechtlich vertrauenswürdige und vor allem von den an der Rechtspflege beteiligten Personen akzeptierter elektronischer Verfahrensweisen zu entwickeln.

Unabhängig von diesen Einzelproblemen haben sich bereits beachtliche Entwicklungen in der Praxis bewährt. So werden sowohl in den USA als auch in Österreich in erheblichem Maße gerichtliche Verfahren auf elektronischem Wege geführt. Von entscheidender Bedeutung sind zwischenzeitlich elektronische Unterstützungssysteme, mit deren Hilfe die Gerichtsverwaltung und teilweise auch das Aktenmanagement entscheidend entlastet werden. Vor allem im Rahmen komplexer Gerichtsverfahren, die sich auf eine Vielzahl von Parteien bzw. einen schwierig zu überschauenden Tatsachenstoff bezieht, hat die Verwendung moderner elektronischer Hilfsmittel erneut dazu geführt, solche Verfahren justitiabel zu machen. In Fragen der Sicherheitsbeurteilung elektronischer Systeme setzt sich zunehmend eine Betrachtung durch, die vorhandene Sicherheitsmängel elektronischer Systeme mit ihrem Nutzen sowie den bestehenden Sicherheitsmängeln in den anerkannten Systemen vergleicht.

Insgesamt ist festzuhalten, daß die Einbindung elektronischer Hilfsmittel in gerichtlichen Verfahren allgemein als wichtige Aufgabe begriffen wird. Insoweit sind in den meisten Ländern ehrgeizige Planungen für die nächsten Jahre ins Auge gefaßt. Auch wenn sich das virtuelle Gerichtsverfahren bislang nirgends konkret abzeichnet, so können wir für die nächsten Jahre doch mit tiefgreifenden Entwicklungen rechnen.

RECENT TENDENCIES IN THE POSITION OF THE JUDGE

Prof. Gustaf Möller, Finland

RECENT TENDENCIES IN THE POSITION OF THE JUDGE

by
Justice Prof. Gustaf Möller, Finland
(Judge at the Supreme Court)

I. INTRODUCTION

This part of the General Report is built on 12 national reports from: Austria (Professor Dr. Paul Oberhammer), Denmark (Judge Marianne Levy), Finland Dr. Sakari Laukkanen), Germany (Professor Dr. Ulrich Haas), Greece (Professor Pelayia Yessiou-Faltsi and PhD. Aristotle E. Tamamidis), Hungary (Professor Miklos Kengyel and Dr. Nora Chronowski) Japan (Judge Hajima Nishiguchi), Latvia (Judge A. Lepse), Lithuania (Judge, Professor Valentinas Mikelénas) the Netherlands (Professor Dr. Erhard Blankenburg), Norway (Judge Tore Schei), Sweden (Professor Gunnar Bergholtz and Judge Per Eriksson) and Switzerland (Professor Dr. Oscar Vogel). The national reports were written against the background of a document drawn up by my co-reporter professor Roberto O. Berizonce and circulated to the national reporters but each report is, of course, the original work of its individual author. This part of the General report draws largely on those national reports. It can, however, not cover all of the several discrete topics there mentioned. Its intention is simply to provide in the light of the national reports an overview of recent tendencies in the position of the judge and of the principal differences and similarities which are to be found.

The question of the position of the judge seems to be of everlasting interest and has also largely been dealt with at previous conferences of the International Association of Procedural Law especially at the *IX World Conference on Procedural Law in Coimbra and Lisbon 1991*.

The expression "the position of the judge" is, however, a broad one and may perhaps be regarded as slightly ambiguous. It therefore seems to give the General Reporters a certain liberty to chose which aspects of the topic they in particular want to deal with. This part of the General Report will in particular treat the independence of the judge from the executive and the legislature, powerful economic organisations, trade unions, other pressure groups and mass media. Furthermore it will briefly deal with what is nowadays referred to as "judicial activism" and so-called private justice. Also the influence of international law will be briefly treated. Finally the community's assessment of the functioning of the judicial system will be dealt with.

II. INDEPENDENCE OF JUDGES

Independence in general

It can be regarded as self-evident that judicial independence is necessary in order to guarantee the impartiality of the courts when they are handling and deciding a case brought before them. There seems also to be a consensus that a judge or at least a court shall be able to make the judgement free from external pressure or undue influence of any kind e.g. from the executive, legislature, economic organizations, trade unions and from other pressure groups. This so-called functional independence means in other words that the judge shall be directed solely by the law (including secondary legislation issued by the administration under statutory authority) and his own conscience. It is also guaranteed in several constitutions[77], other national statutes and international instruments. It is, however, a well known fact that formal guarantees of judicial independence do not always mean real independence.

The national reports reveal that the meaning and content of the independence of the judge may differ from one country to another. This is often due to different political systems and various traditions.

Independence of the executive and the legislature

The Danish National Reporter points out:"The core of the judiciary's independence is the absence of any interference from the executive and the legislature in the judicial decisions". This is certainly true even though it has especially during the last decades more and more been emphasized that there are other aspects of judicial independence as well, e.g. independence from political parties, the public opinion, mass media, administrative authorities and any interested parties. The absence of interference from the executive and the legislature in the judicial decision making may, however, still be regarded as the most essential aspect of judicial independence.

A functional judicial independence is hardly possible without personal independence of judges. The personal independence aims to guarantee the freeing of judicial action from any influence due to political interventions and the rendition of judgments in accordance with the law and the judge's own conscience. The personal independence is related to the selection, method of appointment and promotion of judges and the tenure of their office as well as their supervision, including the disciplinary control of judges.

[77] In this context especially the Greek Constitution of 1975 deserves to be mentioned, This Constitution not only explicitly declares the independence of the judiciary, but also contains guaranties of its realization. " judges enjoy functional and personal independence. Judges shall in the discharge of their duties be subject only to the Constitution and the laws."

Selection, appointment and promotion of judges

In many states representatives of the judiciary are in one way or another involved in the procedure for appointment of professional judges, often in a manner prescribed by law. This is often the case even if the appointment is eventually made by the Head of State, the Government or the Minister of Justice and may even be the case when judges are elected by a political body e.g. the Parliament.

In Greece only the appointments to the post of the President and the Vice President of Areios Pagos, Council of State and Comptroller's Council are carried out by the Government. All other promotions and transfers of judges are made by the Supreme Judicial Council. Judges are promoted from the inferior courts to the superior courts until they reach the age of retirement. The Council is composed of the President and judges of the Supreme Courts of each branch. Thus judges are not subject to the risk of unfavourable transfer by the Executive.

Also in Austria, where judges are appointed by the Federal Minister of Justice or in some rare cases by the President of the Republic, the judiciary has a considerable influence on the selection and appointment. The appointments are made after a proposal by the so-called staff senate of the court concerned. All the members of the staff senate are professional judges. When making the appointment the Minister of Justice is, however, not bound by the proposal of the staff senate.

In Finland the Supreme Court and the Supreme Administrative Court in practice have a decisive influence on the appointment of judges, even though the appointments are made by the President of the Republic on the recommendation of either of these two courts.

The new Finnish Constitution which is envisaged to enter into force on 1 March 2000 provides, however, that the President shall appoint the judges on the Government's advice and not - as under the old Constitution - on the recommendation of the respective Supreme Court. A governmental committee has proposed a new body - **The Judicial Appointments Board** - to be established, which would give its recommendation before the Government gives its advice to the President of the Republic. The recommendation is in no way binding for the Government, which has the right to propose any of the applicants who fulfils the formal requirements for the post in question. The body is proposed to consist of the President of the Supreme Court as chairman and the President of the Supreme Administrative Court as Vice Chairman . The other members of the board i.e. six judges, one prosecutor and one advocate are proposed to be chosen by the Government. According to the proposal of the Governmental Committee the Board shall not make any recommendation as to the appointment of the judges of the Supreme Courts. Before the Government proposes somebody to be appointed a judge at one of the two Supreme Courts, the respective Supreme Court shall make its recommendation. This does, however, not apply to the appointment of the President of the respective Supreme Court.[78]

[78] It is, however, likely that it will eventually be for the Board and not for the respective Supreme Court to make a recommendation as to the appointment of judges of the Supreme courts. According to the opinion expressed by

Also in Denmark the judiciary had in practice until 1 july 1999 a decisive influence on the appointment of judges. This was so even though the appointments were made by the Queen on the recommendation of the Minister of Justice. A need for a broader recruitment was, however, felt which was emphasized by the current development in the task to be honoured by the judiciary, one of which was that the courts must be expected in the future to assume an independent law-creating function over and above what had been the case until then. It had especially been criticised that the Supreme Court and the Eastern High Court were more or less occupied by judges having served previously as civil servants in the Ministry of Justice. Now a new independent body - **The Judicial Appointments Council** - has been established. The body makes recommendations to the Minister of Justice before the Minister appoints a judge to a vacant position. This covers all judges apart from the President of the Supreme Court. The body is constituted by one Supreme Court judge, one High Court judge, a City or Town court judge, one advocate and two representatives of the public. The members are appointed by the Minister of Justice on recommendation of the Supreme Court, the High Courts, the Danish Association of Judges and the General Council of the Bar. The two members of the public are appointed on recommendation from special bodies and organisations representing essential sides of social life. Since only one person shall be recommended to a vacant position the Minister can do nothing else than accept or reject the recommendation.

The object of the future recruitment of judges in Denmark is to secure that the professional background at all levels of the judicial system becomes more comprehensive and broad. This shall be achieved by appointing persons with an insight and experience from different legal fields, including persons with different approaches to the solution of legal problems, to the courts to a higher degree than earlier, so that the corps of judges has a broad composition. The object should also be reflected in the weight to be given to a broad basis of experience of the individual judge at his appointment. This objective is regarded so essential that it is reflected in a statutory provision. At the same time it is regarded to be of crucial importance that the generally high level of quality among judges is maintained. Therefore, the applicant's legal and personal qualifications should remain the decisive factor, which is also expressed in the provision.

In Hungary the National Council of Judiciary (NCJ) plays an important role in the appointment and promotion of judges. The NCJ is presided by the President of the Supreme Court and consists of 9 judges (elected by the delegatory meeting of all judges), the Minister of Justice, the Supreme Public Prosecutor,the president of the National Law Society and two Members of the Parliament. The NCJ expresses opinions about candidates for the position of the President and the Vice President of the Supreme Court. NCJ further appoints the presidents and vice presidents of High Courts and County Courts. Before the creation of NCJ in 1998 these tasks were fulfilled by the Ministry of Justice.

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the Constitutional Committee of the Parliament the new procedure to be followed when judges are appointed shall ensure "that different social values are reflected among the judges". This language, which can be regarded as a euphemism, means in clear terms that the appointments shall become quite political at least as far as the highest judicial posts are concerned.

The President of the Supreme Court is elected by the Parliament but the other judges in Hungary are appointed by the President of the Republic in a manner prescribed by law.

In some other states the judiciary has a less important or even only a symbolic role in the selection and appointment of judges. Thus for instance in Norway, where the appointment is the prerogative of the Crown the appointments follow a proposal by the Minister of Justice at the suggestion of her departmental advisers. From 1990 a special Advisory Council for appointment of judges has been set up. The recommendations of this council, which is composed of representatives from the judiciary and the bar, are, however, not public.

Also in Germany the influence of the judiciary on the appointments of judges does not seem to be very strong. In Germany the judges of the highest federal courts are appointed by the competent Minister and a Board for the appointment of judges. The Board consist of the competent Minister from each Land and an equal number of Members elected by the Bundestag. The Federal Minister has, however, a veto right. Before the appointment is made the opinion of the Presidential Council of the Supreme Court concerned shall be given. All members of the Presidential Council are judges. The Länder are competent to legislate on the appointment of other than the federal judges. In some Länder the procedure is similar to the procedure for appointment of judges to the Federal Courts, whereas in other Länder the Executive decides on the appointment and promotion of judges. The Federal Law, however, prescribes that some sort of co-operation by the judiciary is required also in the procedure for the appointment of the judges of each Land. This duty has been implemented in the various Länder in a different way.

In some countries the judiciary seems to have no or very little influence on the selection of judges. In Switzerland the judges are in fact elected by the citizens of the district (for the district courts) or by Parliament (for the appellate courts and the Federal Supreme Court) for a certain term of office, e.g. for four years with the possibility of reelection. These elections are political. The seats in a court are distributed among the political parties according to their political strength. Usually the key distribution is voluntarily agreed upon according to a proportional representation. The parties then propose their candidates and these normally are accepted by the other parties if they are deemed to qualify as a judge. This naturally under reserve of the election vote.

Even if the judiciary according to statute has a certain role in the selection and appointment of judges, this role may in practice be only symbolic. This is according to the national report the case in Lithuania, where the decisive role in the procedure of selection and appointment of judges belongs to the Government (especially to the Ministry of Justice) and the Parliament. The judges of district and county courts are selected by the Minister of Justice and shall be appointed and dismissed by the President of the Republic on the proposal of the Ministry of Justice. The Council of Judges has only the right to recommend or not to recommend the person designated by the Minister of Justice to the office. The Council of Judges consists of 14 members, 2 of which are appointed by the President of the Republic, 5 are elected by the General Meeting of Judges, 1 by the Association of Judges and 2 appointed by the Minister of Justice. The deputy Presidents of the district and the county courts are directly appointed by the Minister of Justice. Judges of the Court of Appeal are selected by the Minister of Justice as well and are appointed and dismissed by the President of the Republic with a prior approval of the Parliament. A recommendation of the Council of

Judges is necessary as well. Judges of the Supreme Court are appointed by the Parliament on the proposal of the President of the Republic.

In those states where judges are appointed and not elected the appointment is usually for life, but there is a mandatory age of retirement. In Lithuania, however, district court judges shall be appointed for the first time for a term of 5 years. After the expiry of this term they can be reappointed for an unlimited time, but there is a mandatory age of retirement, set at 65. A district court judge can, however, be dismissed from his office without any explanation of the grounds for such dismissal. Also in Latvia there is a probation period for district court judges as well as for Land Book Department Judges. These judges are appointed by the Saeima upon the recommendation of the Minister of Justice for a three-year probation period. After the expiry of this term, upon proposal of the Minister of Justice and following the Panel of the Professional Qualification of Judges, the Saeima approves the judges' appointment to their post for an unlimited term of office. According to the national report the current practice shows that the probation period is sometimes used to influence judges.[79]

Removal of judges, supervision of judges and disciplinary sanctions

At a personal level the judge is in most of the states covered by this report protected against arbitrary removal and can thus be removed or transferred against his will only by a court decision and only in case of gross misconduct or lasting illness. This does, however, not apply in all the states. As mentioned above in Lithuania a judge may, even when he is appointed until he reaches 65 years of age, any time be dismissed from his office without any explanation of the grounds for dismissal. The decisive role in the procedure of dismissal of judges belongs to the Government (especially to the Minister of Justice) and the Parliament. Thus judges of district and county courts can be dismissed by the President of the Republic on the proposal of the Minister of Justice. Judges of the Court of Appeal can be dismissed by the President of the Republic with a prior approval of Parliament and judges of the Supreme Court can be dismissed by the Parliament on the proposal of the President of the Republic.

Until 1998 the situation seemed to be somewhat similar in Latvia. As a result of the activity of the Association of Latvian judges the Minister of Justice has, however, nowadays only upon consent of the Disciplinary Liability Panel of Judges the right to dismiss a presiding judge, who according to Latvian law is responsible for the judgements and decisions made by the judges of his court, from his post before the end of his term of office.

Article 97 paragraph 2 of the German Constitution provides that a full-time permanent judge can against his will be dismissed, suspended or removed only by a court decision and on grounds and after a procedure provided by statute. Also in Denmark the judge is protected against arbitrary removal, since removal or transfer against the will of the judge can take

[79] As an example the National Report mentions that a couple of years ago after the expiry of the probation period the Saeima did not approve the appointment of several judges, and a city was actually left without a court. The judges were blamed for the fact, that following the law they had refused to accept a case for litigation and the consequence was that a certain person had become the mayor of that city. That person still holds the post of mayor in that city, while the judges lost their jobs.

place only by court decision and only in case of gross misconduct or lasting illness. Such cases are decided by the Court of Indictment and Revision, which is composed of a Supreme Court Judge, a High Court Judge and a Town or a City Court Judge.

In Sweden a judge can be dismissed only on specific, in the Constitution enumerated grounds. If a regular judge is dismissed, he has the right to have his case tried in court. The court here in question is the Labour Court and the matter of the dismissal is tried as an ordinary civil labour law case. There is no appeal from the Labour Court to the Supreme Court.

A supervision of the fulfilment of the judges' duties by higher courts or executive authorities seems to be exercised in many states and is not deemed to be incompatible with the independence of the judiciary. Thus in Finland and Sweden all judges, like the civil servants, stand under the scrutiny of the Parliamentary Ombudsman and the Chancellor of Justice, who in Finland is appointed the President of the Republic and in Sweden by the Government. These two have the right to prosecute judges for breach of duty and at least in Finland to give judges written reprimands.

In Germany the executive has the right to supervise judges as far as it does not affect the judges' independence. The independence is not deemed to be affected if it only concerns the fulfilment of the judges' general duties and not his judicial activity. In Hungary the NCJ supervises the administrative practice of presiding judges and the observance of procedural terms and regulations.

In Greece the task of supervision of the jurisdictional work of judges, has been assigned to supreme judicial functionaries, to the enhancement of the system of self-administration of the judiciary . In Switzerland the parliaments (federal and cantonal) have only to control the functioning of the management of justice as such. The appellate courts and the Federal Supreme Court shall give annual reports on the administration of justice to their parliaments. But parliaments may not interfere with decision-work of the courts.[80]

Disciplinary sanctions seem to be possible in most countries. This does, however, not apply to Finland. There, however, almost every kind of unsuitable judicial behaviour and conduct or negligence of some importance in the fulfilment of the judges duties is regarded a criminal offence for which a punishment may be imposed. Thus a criminal punishment in Finland fulfils to a large extent the same function as a disciplinary sanction in many other states. In Sweden, however, regular judges, except for justices of the supreme courts, can be sanctioned with disciplinary punishment, warning or reduction of pay. In Denmark a disciplinary punishment is possible for instance, if the judge shows a marked inability to cope with the cases within reasonable time.

Disciplinary sanctions are usually imposed by a court or another, at least semi-judicial, body. Thus in Denmark the above mentioned court of Indictment and Revision decides on the taking of disciplinary actions against a judge.

[80] A few Years ago it happened, however, that the parliament of a canton during a parliament's session expressed its disapproval with a decision with the Appellate Court of the canton.

In Austria chambers of five judges at the court of appeal (Oberlandesgericht) are competent to impose disciplinary sanctions upon a judge with the exception of judges of the Oberlandesgericht and the Presidents and Vice Presidents of the first instance courts. The Supreme Court is competent to impose disciplinary sanctions on those judges. Also these chambers are as independent form the executive and the legislature as other Austrian courts are.

In Norway, however, the Ministry of Justice has a disciplinary authority with respect to judges. This authority is purposefully weak, and the Ministry has moreover been restrictive in its audits and reactions to unsuitable behaviour by judges in their judicial duties.

Judicial review of Acts of Parliament and Regulations enacted by the Government as well as of other Administration's Acts

In most states a court control of the constitutionality of Acts of Parliament and the legality of the administrative acts is possible. As far as the constitutionally of the legislation is concerned, this is, however, not the case in Finland and the Netherlands. According to the prevailing opinion the Finnish courts have no right to control the constitutionality of the Parliaments legislation. According to the new Constitution which probably will enter into force in year 2000 the Finnish Courts will, however, when trying a single case have the right not to apply an Act of Parliament if it is in conflict with the constitution, but only if the conflict is obvious. In Sweden the same limitation applies not only to the Acts of Parliament but also to regulations enacted by the Government.

As the Finnish Constitution the Dutch Constitution does not allow for any judicial review of Acts of Parliament. But on the other hand Dutch Constitution has opened a back-door for judicial review by reserving international treaties priority over national laws. Since 1953 every judge in the Netherlands has the right to overrule a Dutch statute conflicting with international treaties as soon as they are published. Thus the Dutch courts are quite far subjugated to international law and any judge can declare Acts of Parliament to be at variance with international treaties. In this vein the European Convention of Human Rights and Fundamental Freedoms has been a basis for nullifying a number of Dutch statutes in the area of family law, criminal procedure and social security.
As far as the control of the constitutionality of Acts of Parliament is concerned this right has in some states been entrusted to special Constitutional Courts. This seems to be the case in many federal states as well as in many former communist states.

In Austria the control of the constitutionality of Acts of Parliament falls exclusively under the competence of the Constitutional Court. The judges of the Constitutional Court are only partially recruited from the judiciary. Besides judges in particular advocates, university professors and civil servants from the administration are appointed judges at the Constitutional Court. Party-political considerations - contrary to what is the case as regards other judicial offices - are usually of extreme importance when a judge of the Constitutional Court is appointed. There is no recourse from the other courts, not even from the Supreme Court, to the Constitutional Court. The ordinary courts have no right to control the constitutionality of Parliament's legislation, administrative regulations and international treaties. If an ordinary court is of the opinion that a regulation is not in conformity with the law, it has to ask the Constitutional Court to rescind the regulation. If the Supreme Court or a court which acts as the second instance thinks that an Act of Parliament may be in conflict

with the constitution it has to ask the Constitutional Court to rescind it. The parties do not have a right to make such applications to the Constitutional Court.

Also in Germany the Constitutional Court has exclusive competence to declare that an Act of Parliament is in contradiction with the Constitution. In Latvia a Constitutional Court was established in December 1996. It decides cases on the compliance of laws and other regulatory acts, including international agreements signed or concluded by Latvia, with the Satversme (Constitution). Currently, the following entities - within their competence - have the right to submit applications to the Constitutional Court: the State President, a group of no less than one fifth of the Saeima (Parliament) members,the Cabinet of Ministers, the Supreme Court Plenum, the Prosecutor General, the State Audit Council, the local government council, a minister authorized for the purpose by law, the Human Rights office. In Latvia, however, also the Supreme Court has some years ago formally been given the function of constitutional supervision. Already before that the Plenum of the Supreme Court declared a regulation by which the Supreme Court came under the supervision of the Ministry of Justice discrepant to the Constitution and, consequently not binding upon the Supreme Court.

Also in Lithuania a Constitutional Court has been established. The courts of general jurisdiction are not empowered with the function of deciding upon the constitutionality of statutes. According to the national report: "The special procedure for appointment of the judges of the Constitutional Court, the temporary character of the tenure of the judges of this Court (9 years) and other circumstances show that the Constitutional Court is a quasi-judicial or political- judicial institution". On the other hand the Supreme Court of Lithuania has in a judgment of 17 June 1998 stated that it is under the competence of courts to review the correctness of the statutes passed by various administrative bodies e.g. tax authorities, ministries etc. The Supreme Court has emphasised that a court is not obliged to accept automatically the interpretation presented by administrative authorities. Where the court finds such interpretation incorrect, it is obliged to present its own version of interpretation of the applied law.

In Japan the Supreme Court seems to act as the Constitutional Court. The new Code of civil procedure lightens the Supreme Court's burden so that it can play a more important role as a Constitutional Court.

In many states the judicial review of Acts of Parliament is vested in the ordinary courts. As mentioned above a quite limited right to judicial review is vested in the Swedish courts and a similar right will be vested in the Finnish courts according to the new constitution. In Norway there is a long tradition that the courts can review the constitutionality of Acts of Parliament. The system of reviewing constitutionality of Acts of Parliament in Greece gives the judge a very significant role. The jurisdiction of the courts does, however, - like in some other countries where the review the constitutionality of Acts of Parliament is the task of the ordinary courts - only reach to the incidental refusal of the application of the law. In addition to the review of unconstitutional Acts of Parliament, Greek courts proceed to review the legality of administrative acts to an extent that is still under discussion (as to whether correctness of the factual statements of the administrative organs is also included). The Executive has, however, been reluctant or even sometimes refused to comply with judgments concerning the annulment of illegal administrative acts. Occasionally the Executive has tried

to intervene in litigations concerning the annulment of administrative acts even by means of the legislative.

The Danish Constitution is silent on the issue of whether the courts have the power to control the legality of Acts passed by the Parliament. The question was settled by the Supreme Court in leading cases in the 1920's and there is no doubt that the courts have the authority to set aside a statute as unconstitutional. The Supreme Court did, however, not exercise this power until the 19 th February 1999. The constitutionality of an act may be challenged by any party during proceedings where that issue is of relevance, if he has an actual and concrete interest in the question.

Judges and the press and other mass media

Most cases in the courts are of no interest for the press or other mass media. On the other hand there are sometimes sensational cases in which the press shows particular interest. Most of these cases are criminal cases.

The general impression seems to be that the mass medias' interest in a case does not have any influence on the professional judges. Especially in criminal cases it has in many states from time to time been seen that the counsel for one of the parties, usually the defendant, tries to plead his case in the press before it is settled by a court of law. At least in Latvia advocates (defence attorneys) have got written articles published in the press and given interviews about cases in which they have had no hope of winning by lawful means. In those articles or interviews the court in question has been alleged to be professionally incompetent and hopes are expressed that the court of next instance will probably be more competent.
Until now, the representatives for the prosecution have been more reluctant to plead their case in the press. In Latvia, however, representatives for the prosecution have announced in the media that the guilt of the accused is fully proved and expressed doubts about the fairness of judges when they have refused imprisonment as a security measure for a defendant.

In many countries the press and other mass media are now showing an increasing interest in cases dealt with in the law courts. The media do not, like previously usually was the case, just report the judgments of the courts but also comment and even criticise such judgments. In some countries such public criticism is even regarded as a counterbalance to the judicial independence. There is, however, a tension between the judicial independence and the freedom of the press and other mass media, since there is a danger that in cases which have been given much publicity the independence of the judge may be affected by the opinions which have been expressed and the way in which the case has been dealt with in the press. In Latvia it is not uncommon that articles appear in the press in which journalists give direct indications to the court on what judgement they should pass in a particular case. This phenomenon has also the last years been seen in Finland. Usually such publications are very emotional, while the factual information of the particular case and the currently effective laws are interpreted very freely. If the court pays no attention to the journalist's opinion, more highly emotional articles appear in the press about the lack of professional competence of courts or their possible corruption.

The attitude of the mass media as to the courts seems in many states to be rather negative. This is at least the case in Finland, Greece, Latvia and Lithuania. At least in those countries the press in many cases "acts as a judge" of the courts work. At least in Lithuania and

Finland it has happened that judges by name have been criticised by the press for a concrete judgement or decision. In Japan on the contrary although the mass media sometimes criticise a judgment, it is very rare for them to criticise an individual judge.

Also a certain negative attitude of judges towards mass media can be noted as well. Not all judges are inclined to understand the importance of a free press in a democratic society. This may in particular be the case in countries where the freedom of press has not existed until quite recently but the phenomenon is also well known in some other states.

At least in Austria, Denmark and Switzerland there does not seem to be any major problems in the relations between the judges and the mass media. As can be seen already from what is mentioned above the relations between the mass media and the judiciary in many other countries are not 6unproblematic. There seems not to be any specific rules on contempt of court in any of the states covered by this report. The press and the mass media must for themselves decide discretionary whether they shall comment a case before it has been tried in court. In 1998, however, the introduction of rules on contempt of court was proposed in Lithuania but this proposal was rejected by the Parliament. Also in Greece it has often been proposed to enact restrictive laws, provided that institutional rights are not harmed or to enact laws concerning the function of the mass media.
Punishment of journalists or administrative measures to limit the freedom of the press to deal with cases before court and to criticise judges can certainly not increase the authority and prestige of the courts. If one wants to improve possible strained relations between the mass media other measures have to be taken.

In Hungary official statements and information by the courts for mass media are determined by law. Information to the press and other mass media may be given only by the presiding judge of the court or a person charged by him but not by other judges. This information can, however, only contain the most important dates about the substances of the case, without any subjective opinion. In Denmark the Minister of Justice tabled in November 1998 a bill with numerous amendments in the law aiming to strengthen the cooperation between the judiciary and the press. This bill has not yet been enacted. An example of an already existing cooperation with the press in Denmark is an agreement with some journalists to assist a judge who intends to make a press release in a concrete case. This cooperation has made the press releases more readable to the public.

In some of the German Länder there are guidelines for the cooperation between the judiciary and the mass media. In Greece it has been proposed to inform and instruct the public about matters of judicial organisation and function of the judicial power, and to improve journalistic studies and ethics. The necessity for a contribution of those who are professionally involved with the mass media is felt more than obvious.

Independence of economic groups, trade unions, political parties and other groups

No national report indicates that economic groups, trade unions or other groups have an influence on the performance of a judge's duties or - with possibly one exception -that such possible influence in practice constitutes a sincere problem in the respective country. Such influence is sought to be prevented by very strict rules on disqualification. When a judge according to those rules is not considered impartial, he is not allowed to handle the case. At least in the Nordic countries it is common usage that judges shall not have assignments in

economic or other groups that are likely to influence on their judicial duties. Any effort from those groups, often turning the mass media in their advantage, to influence the judges has usually no result. Thus the judiciary usually remains unaffected of the possible interests of any of those groups. In at least most of the former communist states the process of privatisation and the creation of market economy are not yet finished. Thus the main object of pressure and lobbying of the economic groups today is - as in the Western European countries - not the courts but the Parliament and the Government.

Another thing is that at least in some states e.g. Hungary, where free legal aid for court proceedings, including the assistance of a lawyer, is not available at all or only on very strict conditions, economic groups and multinational companies are able to enforce their rights in court proceedings much better than other parties.

To safeguard the political independence of the judiciary judges are in some countries, e.g. Hungary and Latvia, not allowed to be members of any political party. The decision of Plenum of the Latvian Supreme Court of 14 February 1990 put according to the national report an end to the supervision exercised by the communist party over the judicial power in Latvia. In at least most Western European countries a judge seems to be allowed to have membership in a political party and at least to a certain extent be politically active. It seems, however, to be quite rare that a judge exercises such activity and if he does so he must certainly not emphasise the fact that he is a judge in order to have a stronger political influence. In Japan judges have indeed the freedom to express their political opinions, but in order to be regarded as neutral by the people a judge cannot express his political opinion as he likes.

In Lithuania the pressure on courts today can be seen from the political parties and organisations based on the criteria of nationalism. Trials of the former collaborators with the Nazis or Soviet regimes are politicised by various national and political organisations. Some acts and public statements made by these organisations in fact mean interference with the administration of justice. According to the national report judges are, however, very cautious in this respect and there is no official reaction of courts known in respect of the said activities.

III. ASSUMPTION OF FUNCTIONS AS CONFLICT-FIXER BY JUDGES IN CIVIL PROCEDURE

In many states e.g. Austria, Greece, Germany, the Nordic countries the civil procedure has recognised that the judge may try to be a conflict-fixer rather than only a decision maker. In many states e.g. Finland and Norway most judges have at least until recently been reluctant in this aspect. In some states e.g. Denmark and nowadays also Finland all the judges in the first instance have a duty to propose a case settled, unless such a proposal is regarded to be fruitless. Also in Switzerland judges according to their task to settle disputes often try to lead the parties to an arrangement. This is done at a hearing in which the judge gives a survey on the controversial points to be decided and a provisional judicial appreciation on the points of view of the parties. On that basis the judge proposes possibilities of a settlement.

In matters belonging to the *jurisdictio voluntaria* (uncontested proceedings) the judge has for long been rather a conflict-fixer than a pure decision maker. But also as far as ordinary civil proceedings are concerned there is in Austria a long tradition according to which the court in any stage of the proceedings can ex officio try to get the case settled. This activity of the court is of great practical importance in Austria since it is an important time-saving factor for the courts.

In Greece justices of the peace must attempt conciliation before any hearing in the case. The same duty is imposed on any judge during the first hearing of a labour case. In respect of matters falling within the competence of the district courts and which can be settled by agreement under the substantive law a law enacted in 1995 introduced a mandatory pre-trial stage. Under the penalty of the inadmissibility of any further proceedings an attempt at conciliation must be undertaken on the initiative of the plaintiff's attorney. If this attempt is successful, the conciliatory agreement is registered in a document subject to approval of the court and the document serves as an executory title.

Despite the favourable procedural framework, the practical impact in Greece of pre-trial settlement by justices of the peace has actually been non-existent and the relevance of conciliations out of court is also very limited.

A specific feature of the Danish civil procedure iso an advisory opinion from the judge or the three judges after the deliberation has taken place. At the end of the trial the sole judge or the presiding judge asks the parties whether a judgment is needed or whether the parties would be interested in hearing the conclusion of the court and the grounds for that conclusion on the understanding that such an opinion would also form the conclusion of a written judgment. Obviously, the parties are free to ask for a written judgment either before or having heard the oral presentation of the court's opinion but in about one third of the cases they accept the opinion as settlement and refrain from asking for a proper judgment or they ask for the opinion in writing. The settlement is then entered in the court records and becomes enforceable as a judgment.

In the former communist states the judges do not - except in particular matters e.g. matrimonial and labour disputes - seem to assume functions as conflict-fixers. They only play the traditional role of decision maker.

IV. CLASS ACTIONS

Japan and the European civil law countries do not seem so far to recognise class actions as these are understood in common law countries. The American class action system was considered during the recent revision of the Japanese Law of civil procedure, but the system was not adopted. The new Japanese law allows, however, a third party to select the party who acts for him and join the suit which was commenced. This possibility is especially intended in cases where many people suffered minimal damages.

In Lithuania several new draft laws directly provide for the institute of class actions. In Finland and Sweden proposed legislation concerning class-actions has been lively debated. Objections have been voiced mainly by the commercial sector and certain jurists. In both countries is it at present uncertain if this proposed legislation will be put forward to the Parliament.

In some civil law countries the grant of organizations access to court has been developed by the courts. Thus for instance in Norway organizations for environment protection have been recognised as claimants in an action concerning the validity of the Administration's decision and to claim damages on behalf of the general public for the industrial plant's pollution of the water environment.

In the Netherlands many "repeat players"(such as insurance companies, interest groups, but also government agencies) even without the formal instrument of class-action try to provoke new jurisprudence by carrying border cases up to the highest courts. A specialized law firm at the Hague (landsadvocaat) pursues such strategies in the government interest, commercial interest groups, consumers or automobile clubs present test cases for their members and non-governmental organizations use them in the name of public interest.

In some countries at least something similar to class actions exists in the field of consumer protection. Thus for instance in Denmark the Consumer Ombudsman can upon request of a group of consumers that have uniform claims for damage recover the claim collectively and in Greece a law of 1994 has now granted standing to sue to consumers associations for the protection of collective rights. An action aiming at the protection of the consumers' collective interests is allowed only to consumers' associations having at least 500 members and having been respectively registered at least two years before. The object of this action is the judicial ascertainment of anti-consumer behaviour and its prohibition or the provisional regulation of the situation so that the consumers' interest cannot be harmed. The action can also aim at avoiding the provider's illegal behaviour even before this behaviour manifests itself. Pecuniary compensation or provisional remedies are possible. The proceedings take place before the district court for the place where the defendant has his domicile according to the rules of *jurisdictio voluntaria*, so that the inquisitorial system applies.The judgement has effect *erga omnes*. Also in Austria certain organizations are entitled to sue in matters relating to unfair competition and consumer protection.

The Lithuanian Code of the Civil Procedure provides for the possibility of public institutions or state officials indicated in the law to start court proceedings in the interest of the State or a private person in the cases stipulated by statute. Such a right belongs to some professional

organisations, e.g.trade unions may start court proceedings against an employer if he violates the rights of the employees who are members of a trade union. A special state institution responsible for the supervision of fair competition and protection of the consumers' interest may start court proceedings against producers or suppliers because of the violation of consumers'rights.

V. REGULATION OF CASE-SELECTION BY THE SUPREME COURT AND COURTS OF APPEAL

In countries whose Supreme Court is a court of *Revision* or a court of *Appeal*, leave to appeal to that court is usually required. This is for instance the case in Austria and in all the Nordic countries. In Denmark, Finland and Sweden leave can as a rule only be granted where it is important with regard to the application of the law in other similar cases (precedents) and in the two latter countries also because of a grave error in the lower courts. In Finland, Sweden and Norway the Supreme Court itself decides on applications for leave, but in Denmark, where until 1996 the Ministry of Justice decided on such applications, this task lies with a special board chaired by a Supreme Court Judge. The other members of the Board are: One High Court judge, one City Court judge, a practising lawyer and a professor in law.

In some countries leave to appeal can only be granted if the pecuniary interest for the appealing party exceeds a certain amount. Thus for instance in Norway the pecuniary interest for the appealing party must exceed 100.000 NOK. In Switzerland an appeal in civil litigation to the Federal Supreme Court is possible when a value of litigation of CHF 8000 or more is given. In Austria a revision to the Supreme Court is not possible if the pecuniary interest is less than S. 52.000. If the pecuniary interest is between S. 52.000 and S. 260.000 it is for the court of appeal to decide if leave to revision shall be granted. If the amount is more than S 260.000 it is also for the court of appeal to decide whether leave shall be granted. In this case, however,if the court of appeal has refused to grant leave, recourse may be made to the Supreme Court on the ground that the court of appeal had wrongly refused to grant leave.

In countries, whose Supreme Court is a Court of cassation e.g. Greece, leave to appeal is often for all practical purposes unknown. In those countries judgments are subject to cassation only in respect of questions of law but not on questions of fact. In Lithuania there are, however, suggestions to change statutory limitations of cassation into the system of leave to appeal

Whatever the nature of the recourse to the Supreme Court, a form of recourse against first instance decisions, recognised as "appeal", exists in almost every state. The appeal has the characteristics that the appellate court is not restricted to consideration of questions of law alone and that, normally, the decision on appeal replaces the decision at first instance. In some states e.g. Austria, Denmark and Finland the right of (first) appeal as far as final decisions are concerned is unfettered. Special provisions may apply to interlocutory decisions in those states where the right of appeal is unfettered as well as in other states, but so far as final decisions are concerned, the availability of appeal is commonly regulated by reference to the value of case in litigation. Usually the value of a case to qualify for appeal is relatively low, e.g. in the Netherlands fl. 2.500 and in Norway NOK 20.000.

These limits are usually rigid. In some states e.g. Norway and Sweden, however, where a statutory limit of value is imposed, a case whose value is below the limit may be taken if leave is granted.

VI. "PRIVATE JUSTICE"

Arbitration has long traditions all over the world. Especially in the Netherlands, Sweden and Switzerland arbitration is frequently resorted to. In Austria arbitration is of less importance with regard to domestic disputes but of considerable importance as far as international disputes are concerned. In some states different provisions apply to international arbitration than to domestic arbitration. For instance the Swiss Private International Law Statute of 1987 contains a comprehensive regulation of international commercial arbitration. This regulation is characterized by a tendency to minimize the means of redress. There is only one action for annulment to the Federal Supreme Court given;if none of the parties have their domicile or habitual residence in Switzerland, they may waive their right to bring an action for annulment. Stockholm, Switzerland and Vienna are of considerable importance as neutral venues for international arbitrations.

In Sweden arbitration has even been considered to constitute a threat to the courts' function of setting judicial precedents. Therefore a governmental commission has studied ways to make court proceedings a more attractive alternative. The interest in having cases decided by courts and not by arbitrators was promoted above all by the lack of precedents in the field of commercial law.

In Greece resort to arbitration has, in recent years, increased, particularly as far as disputes related to commerce are concerned. This is supposed to be due to deficiencies and delays in court proceedings. Not only private contracts, but also almost all contracts of the Greek State or of legal entities of public law with private individuals involving disputes of high value include arbitration clauses. According to the practice followed during the last decades, contracts of particular significance between the Greek State and domestic or foreign companies are vested with the status of a "formal" law providing for arbitration as an exclusive method. Most arbitral awards are, however, attacked before the ordinary courts.[81]

In the Central and Eastern European former communist countries arbitration was during the communist regime in fact possible only in international disputes. Nowadays arbitration may in at least most of those countries also be used as a means to settle domestic disputes. Thus for instance in Hungary the parties may agree that arbitration shall take place instead of court proceedings, if at least one of the parties is a person dealing professionally with economic activity, and the legal dispute is related to this activity. At least Hungary (in 1994) and Lithuania (in 1995) have adopted the UNCITRAL Model Law on International Commercial Arbitration. The law applies in those countries both to international and domestic arbitrations

[81] During the years 1968-1987 1855 arbitration awards were registered in the District Court of Athens. Of these awards 87,4 % were attacked before ordinary courts.

Even though mediation and other methods of alternative dispute resolution (ADR) have attracted attention in many states, these methods do not so far seem to be wide spread in any of the states covered by this part of the report. It deserves, however, to be mentioned that in 1995 a *Netherlands Mediation Institute* was established for providing training of mediators and developing procedural models such as the *Rotterdam Minitrial*. Business interest in out-of-court mediation led in 1998 to the foundation of an ADR foundation for business clients.

VII. "JUDICIAL ACTIVISM"

Examples of judicial activism in substantive law can be found in many states. Thus the Supreme Court in Norway in a decision published in Rt 1977 page 1035 concluded that a former patient according to "common principles of law" had a right to see his own journal. In Denmark the Supreme Court on 19 February 1999 for the first time in the 150 years history of the Danish Constitution exercised the power to set aside an Act of Parliament as unconstitutional.
In Lithuania the Supreme Court in a judgment of 5 January 1998 stated that the formes Soviet statutes, which are temporarily still in force in Lithuania, must be interpreted by courts with due regard to the changes in the economic, political and ideological life of the State and the society and held provisions of the old Soviet Code of Civil Procedure regarding State Immunity in fact *contra legem*.

In Greece the practice of the courts to actually act as makers of the law has provoked the question: if, and to what extent the courts should be allowed to intervene in order to decide upon the problem of the "unequal law" and "correct" its inequality. Also the practice of the courts to deny the application of a certain law where the general principles of the Constitution are infringed and a recent tendency of the courts to "discover" new constitutional principles, by using the process of "liberal" interpretation, has according to the national report caused justified objections.

In some states e.g. Hungary and Austria "judicial activism" is mainly exercised by the Constitutional Court. The growing importance on the European Convention for the Protection of Human Rights and Fundamental Freedoms seems, however, more generally to have encouraged courts to interpret national statutes in conformity with the convention even when this would mean a deviation from a literal interpretation or earlier case law.

VIII. INCIDENCE AND PENETRATION OF INTERNATIONAL LAW

The incidence and penetration of international law seems in many countries to have considerably increased. This is in Austria, Finland and Sweden partially due to the fact that those States quite recently joined the European Communities. The growing significance of the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights is a factor which seems to have considerably increased the influence of international law in national courts.
Also in Japan courts use international law in interpreting the domestic laws.

IX. THE COMMUNITY'S ASSESSMENT

In some countries e.g. Austria, Japan, the Netherlands, Norway and Switzerland it is presumed that the vast majority has a fair or high confidence in the courts. The Dutch national report makes reference to a comparative survey of *Eurostal* which shows that the Dutch rank higher than most other Europeans in their belief in legality as well as their trust in legal institutions. In a comparative survey of twelve European countries the Danish, Dutch and the Germans fit into a pattern of high trust in law and legal institutions in contrast to the southern European neighbours who more often demonstrate attitudes of alienation and disbelief.

In many countries, however, opinion polls seem to disclose that the public's confidence in the courts is lower than one might expect. A poll carried out in Sweden in 1995 showed that about 67 % of the population had high or relatively high confidence in the courts. Such a poll carried out in Sweden in 1993 showed, however, that 67 % of the population had little or very little confidence. According to the most recent opinion poll carried out in Lithuania only 17 % of the respondents trust the courts and 47 % express distrust of the courts. The distrust of the society is, however, not only addressed to the courts in Lithuania. In that country the opinion poll shows that only 27 percent trust the police. 21 % the Government, 12% the Parliament and only 7 % the political parties.

In 1998 the World Bank submitted a report "Corruption in Latvia" - Survey Data". In reply to the question about the most honest institution in the state, the respondents ranked courts as No. 17 out of 36. The courts were. however, well a head of the Parliament, the Government, financial institutions, the police, the customs etc.

X. ZUSAMMENFASSUNG

Neue Tendenzen in der Berufsstellung eines Richters

Die sogenannte funktionale Unabhängigkeit des Gerichtswesens, womit gemeint ist, daß ein Richter ausschließlich aufgrund der Gesetzte und seines eigenen Gewissen handeln soll, wird in mehreren Verfassungen, nationalen Gesetzen und internationalen Dokumenten garantiert. Es ist jedoch allgemein bekannt, daß formelle Garantien richterlicher Unabhängigkeit nicht immer tatsächliche Unabhängigkeit bedeuten.

Die fehlende Involvierung der Exekutive und der Legislative in den gerichtlichen Entscheidungsprozeß kann als wichtigster Aspekte richterlicher Unabhängigkeit bezeichnet werden. Es gibt aber auch andere Aspekte richterlicher Unabhängigkeit, wie z.B. die Unabhängigkeit von politischen Parteien, der öffentlichen Meinung, von Massenmedien, einflußreicher wirtschaftlicher Organisationen und Gewerkschaften sowie von Interessensgruppen.

Eine amtliche Unabhängigkeit ist ohne einer persönlichen Unabhängigkeit kaum möglich. Die persönliche Unabhängigkeit ist auf die Auswahl, die Methode der Ernennung und der Beförderung von Richtern, die Amstdauer sowie auf ihre Aufsicht bezogen, inklusive der richterlichen Disziplinargewalt.

In vielen Staaten sind Vertreter der Richterschaft mehr oder weniger am Ernennungsverfahren von professionellen Richtern beteiligt. Die Rolle der richterlichen Vertreter und die Bedeutung ihrer Teilnahme am Auswahlverfahren kann in diesen Staaten jedoch sehr unterschiedlich sein. In den meisten Staaten ist eine Entwicklung zu erkennen, die Rolle der Richterschaft im Auswahlverfahren zu stärken, obwohl in anderen Staaten ein gegenteiliger Trend zu verzeichnen ist.

In den meisten Staaten, in denen die Richter ernannt und nicht gewählt werden, erfolgt die Ernennung normalerweise auf Lebenszeit, doch für die Pensionierung von Richtern ist eine verbindliche Altersgrenze von etwa 65-70 Jahren vorgesehen. In den meisten Staaten sind Richter vor willkürlicher Absetzung geschützt und können daher gegen ihren Willen nur durch eine Gerichtsentscheidung im Falle fahrlässigen Fehlverhaltens oder dauerhafter Krankheit abgesetzt oder versetzt werden, was jedoch nicht auf alle Staaten zutrifft. In den meisten Staaten erfolgt die Überprüfung der Erfüllung richterlicher Pflichten durch höhere Gerichte oder sogar von Vollzugsbehörden, was nicht als widersprüchlich zur richterlichen Unabhängigkeit erachtet wird, sofern davon nur die Erfüllung allgemeiner richterlicher Pflichten betroffen ist und nicht die richterliche Ausübung.

Das Recht auf gerichtliche Überprüfung der vom Parlament verabschiedeten Gesetze ist in den meisten Ländern – zumindest in gewissem Ausmaß – vorhanden. Hingegen scheint das Recht des Gerichts, Parlamentsbeschlüsse aufzuheben, nur in Staaten mit Verfassungsgerichtshöfen gesetzlich verankert zu sein. Der Verfassungs-gerichtshof ist in diesen Staaten auch der einzige Gerichtshof der die Aufhebung von Parlamentsbeschlüssen durchzuführen hat. In jenen Staaten, in denen die gerichtliche Überprüfung von den durch

das Parlament verabschiedeten Gesetzen ordentlichen Gerichten übertragen ist, sind diese Gerichtshöfe lediglich befugt, die Umsetzung von Parlamentsbeschlüssen abzulehnen, die sie als nicht verfassungskonform, aber nicht den Akt als solchen.

Im Gegensatz zu früher, wird heute von den Medien nicht nur über die Entscheidungen der Gerichtshöfe berichtet, sondern diese auch kommentiert und kritisiert. Dies hat daher in solchen Staaten zu Spannungen zwischen der gerichtlichen Unabhängigkeit und der Pressefreiheit geführt.

Keiner der nationalen Berichte deutet darauf hin, daß Wirtschaftskonzerne, Gewerkschaften oder andere Vereinigungen Einfluß auf die Erfüllung richterlichen Pflichten haben.

Die Verbreitung und Durchdringung von internationalem Recht scheint beträchtlich zugenommen zu haben. In den EU-Mitgliedstaaten ist dies auf die zunehmende Rolle des Gemeinschaftsrechts zurückzuführen und in fast allen EU-Staaten auf die wachsende Bedeutung der Menschenrechtskonvention.

RECENT TENDENCIES IN THE POSITION OF THE JUDGE

Prof. Roberto O. Berizonce, Argentina

RECIENTES TENDENCIAS EN LA POSICION DEL JUEZ

by

Prof. Roberto O. Berizonce, Argentina

Este Relatorio General comprende una visión global, necesariamente sintética, de la vasta temática de la posición de los jueces en el mundo contemporáneo y las más recientes tendencias que se pueden vislumbrar en torno de tópicos tan diversos como la estimación valorativa comunitaria de su desempeño, la situación relativa de independencia de los jueces y del propio Poder Judicial respecto de los demás poderes estatales, de la prensa y medios de comunicación, tanto como de los grupos económicos y otros factores de poder. Sin dejar de lado el análisis de las funciones que novedosamente asumen los jueces, fuera de las tradicionales, en el proceso común y también en las acciones colectivas (*class actions* y similares), en los procesos urgentes y de tutela diferenciada; la selección de las causas; en fin, el "activismo" judicial. Para completar la panorámica, se tematiza también, siquiera tangencialmente, la incidencia de los mecanismos de justicia "privada" y del derecho transnacional.

Se trata de tópicos de permanente y renovado interés, muchos de los cuáles han ocupado la atención de anteriores Congresos de la International Association of Procedural Law. Baste recordar, entre otros, los tan enjundiosos debates en torno de la independencia de la magistratura y de su responsabilidad[82], su organización y status social[83], la selección y nombramiento de los jueces[84], su formación profesional[85] y el "activismo" judicial[86], inspirados por muy meritorios aportes de los Relatores Generales mencionados.

La difícil labor que se nos encomendara no hubiera sido posible sin el sustento de aquellas ponencias y debates, y sobremanera por los magníficos aportes ahora recibidos de los ponentes nacionales, a quienes brindamos testimonio de especial agradecimiento. Son ellos los profesores L.P. COMOGLIO (Italia), V. FAIREN GUILLEN (España), J. L. GOMEZ COLOMER (España), S. SHETREET (Israel), A. REIS FIGUEIRA y C. M. FERREIRA DA SILVA (Portugal), A. M. MORELLO (Argentina), G. L. SOSA (Argentina), J. W. PEYRANO (Argentina), J. R. dos Santos BEDAQUE y C. A. CARMONA (Brasil), J.

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[82] E. VESCOVI, *La independencia de la magistratura en la evolución actual del derecho*, en *Effektiver Rechtsschutz und verfassungsmäBige Ordnung*, Würzburg 1983, ed. W. J. HABSCHEID, Gieseking-Verlag. Bielefeld, pp.161 y ss.. N. PICARDI y S. SHETREET, *L'indépendance et la responsabilité des juges et des avocats. Aperçu hitorique. Aperçu comparatif*, en *Papel e organizaçâo de magistrados e advogados nas sociedades contemporâneas*, Coimbra-Lisbon (Portugal) 1991, ed. A. M. PESSOA VAZ, 1995, pp.71 y ss.; 113 y ss., respectivamente.

[83] G. ROTH, *Organization and social status of judges*, en *Papel e organizaçâo...*, ob. cit., pp.147 y ss..

[84] H. FIX. ZAMUDIO, *Selección y nombramiento de jueces*, en *Towards a Justice with a human face*, ed. STORME M., Antwerpen-Deventer, 1978, pp.405 y ss..

[85] F. CARPI y G. DI FEDERICO, *The education and training of judges and lawyers*, en *Papel e organizaçâo...*, ob. cit, pp.385 y ss..

[86] M. STORME y D. COESTER-WALTJEN, *Judicial activism*, en *Papel e organizaçâo...*, ob. cit., pp.309 y ss..

OVALLE FAVELA (México), J. GREIF (Uruguay), M. JARDI ABELLA (Uruguay), R. TAVOLARI OLIVEROS (Chile), C. PARODI REMON (Perú), J. PARRA QUIJANO (Colombia), H. F. LOPEZ BLANCO (Colombia), M. QUINTERO TIRADO (Venezuela), R. HENRIQUEZ LA ROCHE (Venezuela), O. ARGUEDAS SALAZAR (Costa Rica), S. ARTAVIA BARRANTES (Costa Rica), M. AGUIRRE GODOY (Guatemala), J. C. FONSECA (Cabo Verde).

Los tópicos que integran el cuestionario sometido a consideración son los siguientes:

1. Estimación valorativa que se hace en la comunidad (opinión pública) del desempeño de los jueces (confiabilidad, credibilidad, eficacia); discriminar si fuere diferente, la estimación prevaleciente que se hace de la labor de los Tribunales Superiores y de los Jueces Comunes (dentro de éstos por fueros o competencias). ¿Qué espera la sociedad de los jueces y qué pueden éstos efectivamente dar?.

2. Situación relativa (independencia de los jueces) del Poder Judicial en su vinculación con los demás Poderes (Ejecutivo y Legislativo). ¿Controlan efectivamente los jueces la constitucionalidad y la legalidad de los actos de los otros Poderes? ¿Cómo se distribuye el gobierno del Poder Judicial? ¿Está exclusivamente en manos de los propios Jueces (gobierno o autogobierno corporativo de los jueces, cooptación)? ¿En mano de los otros poderes? ¿Cómo es el régimen de control de la labor judicial (por Tribunales Superiores, órganos legislativos, Consejo de la Magistratura, Jurados de Enjuiciamiento)?.

3. Situación del Poder Judicial y de los jueces, en sus relaciones con los medios de comunicación (prensa, mass media en general). ¿Presionan, interfieren, obstaculizan los medios de comunicación la labor de los jueces? ¿Qué sienten subjetivamente y qué actitud adoptan los jueces individualmente y, en su caso, el Poder Judicial (respuestas o posiciones públicas institucionales)?.

4. Situación del Poder Judicial y de los jueces en relación a los grupos económicos (nacionales y multinacionales) y a otros factores de poder (grupos sindicales y formaciones sociales en general). ¿Presionan, interfieren? ¿Qué actitudes adoptan los jueces? ¿Reaccionan (y cómo) frente a las nuevas desigualdades derivadas de la globalización y factores aledaños?.

5. En el proceso civil, además de los roles tradicionales como decisor de los conflictos, ¿Asumen los jueces funciones de "administrador", "gestor", "componedor" (económico, comercial, familiar, de coexistencia, etc)? En este caso indicar normas que adjudican tales funciones y/o criterios jurisprudenciales. Lo mismo, en lo pertinente, en el proceso penal.

6. Régimen (legal o jurisprudencial) de las acciones colectivas y atribuciones (o roles) específicos del juez en su trámite y decisión (alcance cosa juzgada).

7. Régimen (legal o jurisprudencial) de selección de las causas ("management", "certiorari", "leave to appeal"), por los Tribunales Superiores y por los Jueces comunes de grado. Operatividad en concreto del sistema.

8. Poderes diferenciados (legales o jurisprudenciales) atribuidos al juez en los

procesos urgentes y de tutela diferenciada en general (incluyendo los de menor cuantía o pequeñas causas). Operatividad en concreto.

9. Desarrollo (estado de evolución) concreto de los mecanismos de justicia privada (arbitraje, mediación, medios alternativos de solución de disputas). ¿En qué medida (cuantitativa y cualitativamente) compiten con la justicia oficial? ¿Cuál es la estimación valorativa (opinión pública) de su funcionamiento y eficacia?.

10. Ejemplos concretos (casos jurisprudenciales) de "activismo judicial" sustantivo (interpretación de las instituciones fundamentales de la Constitución o de las leyes comunes) y procesal (interpretación de la ley procesal, doctrina del "exceso ritual manifiesto"). Ejemplos jurisprudenciales de la denominada justicia "de acompañamiento"; y de funciones "no adjudicatorias" (el juez como componedor económico, técnico en cuestiones económicas, familiares, etc.).

11. Incidencias y penetración del derecho transnacional ("derecho internacional de los derechos humanos") en el sistema de justicia interno (en los planos de la Constitución, de las leyes orgánicas del Poder Judicial y en los ordenamientos procesales, o bien por vía de interpretación judicial).

I PRELIMINAR SOBRE PRECISIONES SEMANTICAS Y METODOLOGICAS

La expresión "posición de juez" (*position of the judge*) es ambigua. De ahí que resulte imprescindible precisar su contenido y límites, para evitar desacuerdos verbales. Los vocablos de lengua inglesa "position", "status", encuentran expresiones equivalentes en idioma castellano como "situación", "actitud", "rango", "prestigio", "reputación", entre otras.

La "*position of the judge*" remite genéricamente al examen de la *situación* del juez, comprensiva de la *actitud* y del *rango o prestigio*[87] de los jueces.

La restante precisión es metodológica. De lo que se trata en este relato general es de analizar la situación de la magistratura, en concreto y en este presente finisecular. Lo primero supone atenerse no sólo al dato jurídico formal -lo que expresan, a menudo como paradigma teórico, las Constituciones y las leyes-, sino también y con incidencia decisiva, rescatar la experiencia empírica (*factual approach*). Sin descuidar, obviamente, la proyección temporal: el *anterius* del enfoque histórico y el *posterius* que anticipa la visión comparatística. Posición metodológica que aspira al logro de conclusiones concretas y útiles para el fundamento de una verdadera *política jurisdiccional*, en fidelidad a la doctrina sentada desde los anteriores Congresos de nuestra Asociación Internacional de Derecho

[87] Así, en G. ROTH, ob. cit., pp.176 y ss..

Procesal[88].

Importa señalar, asimismo, que este relatorio resulta necesariamente parcial y acotado a brindar una visión de los temas que comprende desde la perspectiva de los países iberoamericanos, adheridos en general al sistema jurídico del *civil law* continental europeo. Enlaza también la experiencia de países tan cercanos, no sólo por pertenecer a la misma "familia" jurídica sino además por los singulares y directos vínculos que los unen, como son España, Portugal e Italia. De ahí que la referencia a los otros sistemas, como el del *common law*, sea sólo tangencial, renunciándose de modo deliberado a todo propósito iuscomparativista, ajeno a los limitados objetivos perseguidos.

II FACTORES QUE INCIDEN EN LA "POSITION" (SITUACION) DE LOS JUECES.

La situación relativa de los jueces en cada comunidad se encuentra directamente vinculada con diversos factores incidentes, que interactuan en conexidad con ciertos presupuestos asentados y dominantes en el contexto general comunitario.

El postulado de la *independencia judicial*, consustancial al Estado de Derecho, tiene carácter instrumental para asegurar la *imparcialidad del juicio*, lo que presupone la libertad de criterio del juzgador -*independencia sustancial o funcional*- para resolver los conflictos sin ataduras, compromisos ni interferencias extrañas, bajo la sóla sumisión a la ley y las valoraciones sociales comunitarias[89]. La independencia de los tribunales no es una reivindicación de éstos ni un privilegio establecido en beneficio de los jueces, sino de los justiciables[90], que pueden bloquear la libre creatividad.

La independencia judicial se integra, además, con la *independencia personal de los jueces*, que remite a las garantías de la duración del cargo (inamovilidad absoluta o seguridades de la designación periódica), estabilidad, retribuciones (y derechos de retiro) intangibles. A su vez, la *independencia colectiva*, es la propia del sistema judicial en su conjunto, frente a los poderes políticos. Por último, también importa asegurar una cierta *independencia interna* que coloque a los jueces a resguardo de presiones y directivas provenientes de los propios colegas, y particularmente de los tribunales superiores, derivadas de la estructuración jerárquica, que puedan bloquear la libre creatividad.

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[88] CAPPELLETTI M., discurso de clausura del VIII Congreso Internacional de Derecho Procesal, Utrecht, 1987, en *Justice and Efficiency. General Reports and Discussions*, ed. Wedekind-Kluwer, Deventer-Amberes-Boston, 1989; asimismo, *Algunas reflexiones sobre el rol de los estudios procesales en la actualidad*, en Rev. Jur. Jus, La Plata, Argentina, n°39, pp.3 y ss

[89] Como lo ha destacado A. M. MORELLO, el juez no ha de ser un "fugitivo" de la realidad. De ahí la necesidad de que la magistratura se encuentre inserta en la realidad político-social de su época, E. VESCOVI, ob. cit., pp.171, 210. El acompañamiento y consideración de la comunidad, como correlato, resulta decisivo para asegurar la independencia judicial (SHETREET S., ob. cit., pp.117-118).

[90] VESCOVI E., ob. cit., pp.172 y ss..

La independencia colectiva requiere ciertas reglas para la protección del Poder Judicial frente al Legislativo y, también, respecto de la ingerencia indebida del Ejecutivo; y correlativamente, una mayor participación judicial en la responsabilidad administrativa para el manejo central de los tribunales [91].

La independencia de los jueces tiene como contrapartida la responsabilidad. En los sistemas democráticos no existe poder sin control. La responsabilidad de los jueces en concreto es presupuesto indispensable para cimentar la confianza pública. La inevitable tensión entre esa responsabilidad y la independencia judicial plantea a menudo situaciones altamente conflictivas que requieren la mayor ponderación para compatibilizar con sutil equilibrio esos principios esenciales[92].

En la realidad a menudo el poder de los jueces aparece interferido y de hecho menoscabado, en mayor o menor grado, por la incidencia de factores diversos, que genéricamente pueden clasificarse en exógenos y endógenos.

II.1 Los condicionantes exógenos son de naturaleza política, económica o social

a. Condicionantes políticos

Son condicionantes políticos, los vinculados con los diversos diseños constitucionales en la distribución del poder del Estado y al cúmulo de potestades y poderes que se reservan a la magistratura en su conjunto, y a los jueces individualmente, en ese reparto.

En el clásico sistema de separación de poderes, o mejor de distribución de funciones, se reservan a la rama judicial atribuciones exclusivas y excluyentes, para el cumplimiento de su cometido. Resaltan la tutela de los derechos fundamentales, el poder de control de la constitucionalidad y legalidad de los actos de los demás poderes, tanto como la potestad coercitiva para imponer sus decisiones. En contrapartida (*checks and balances*), los poderes políticos tienen atribuidas funciones propias que van desde la participación en los mecanismos de designación de los jueces[93] hasta el control de su actividad[94], el ejercicio de poderes disciplinarios y la destitución en juicio político (*impeachment*)[95]. A su vez, los propios jueces limitan sus potestades para resguardar el ejercicio razonable de los poderes propios del Legislativo o del Ejecutivo. Las reglas implícitas del *self restraint*, las derivadas de las cuestiones políticas excluidas (*political questions*) y otras afines, creadas por los propios tribunales, sirven al objetivo esencial de asegurar el ejercicio armónico de las atribuciones de cada segmento, evitando invadir el ámbito de reserva exclusivo de cada uno. En ese delicado equilibrio queda imbricada la independencia judicial; no sólo en el marco

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[91] SHETREET S., ob. cit., pp.131-137; informe, p. 6.

[92] SHETREET S., ob. cit., pp.131-137.

[93] FIX ZAMUDIO H., ob. cit., p.436 y ss.. VESCOVI E., ob. cit., p.195. SHETREET S., informe, pp. 4 y ss..

[94] VESCOVI E., ob. cit., p.200. Sobre la responsabilidad de los jueces, en general, por todos: CAPPELLETTI M., *Who watches the watchmen. A comparative Study on Judicial Responsability*, 31 *Am. Journal of Comparative Law*, 1983, pp.1-62; *id.*, *Giudice irresponsabili?*, Milano, D.A. Giuffre ed., 1998. En versión castellana: *La responsabilidad de los jueces*, Jus Fundación, La Plata, Argentina, 1988, traducción de AMARAL S..

[95] CAPPELLETTI M., ob. cit., versión castellana, pp.42-51, 78-85, 97-99. SHETREET S., informe, pp. 5 y ss., donde formula una tipología de los diversos modelos de responsabilidad en el gobierno del Poder Judicial.

teórico sino más dramáticamente en el terreno real.

El análisis de la "letra" de las Constituciones sólo resulta útil y fructífero a la vista de la realidad; no es bastante la declaración solemne de la independencia judicial, si sólo es un capítulo más del "catálogo de ilusiones"[96]. Importa el "clima" colectivo, el modo como las instituciones judiciales se vivencian colectivamente y el sentir y actuar de los jueces.

Existe en los países de América Latina una reciente tendencia a incorporar al marco constitucional instituciones diversas con la finalidad de asegurar la independencia judicial. En general se han introducido con variantes, modelos continentales europeos como el Consejo de la Magistratura o Consejo General del Poder Judicial, especialmente los que están vigentes en Italia, España y Portugal. Ejemplos de esa tendencia se exhiben en Argentina[97]. Venezuela[98], Colombia y México[99]. Al mismo objetivo se orientan la regulación constitucional del Ministerio Público como órgano independiente y autónomo y del Tribunal de Enjuiciamiento, de composición plural y equilibrada[100]. Se trata de

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[96] Afirma el Prof. PARODI REMON, ninguna norma ni ningún estado puede garantizar la independencia judicial. Ella depende de la misma persona que es el juez, de su formación y hasta de la concepción que tiene de la vida. La independencia es una toma de conciencia (p.8). El principio de independencia judicial, como sostiene el Prof. SHETREET, es variable en su significado y contenido en los distintos países, en correspondencia con el sistema de gobierno, las tradiciones locales, el clima político, e inclusive dentro del mismo país puede tener diferentes significados en distintos períodos (informe, p.2).

[97] SOSA G.L., p.8. La reforma constitucional argentina de 1994 creó el Consejo de la Magistratura, instalado en 1998, que tiene a su cargo la selección de los magistrados y la administración del Poder Judicial. Se integra de modo que se procure el equilibrio entre los representantes de los órganos políticos, de los jueces de todas las instancias, de los abogados de la matrícula federal y personas del ámbito académico y científico. Son sus atribuciones: 1) seleccionar mediante concursos públicos a los postulantes de las magistraturas inferiores; 2) emitir propuestas en ternas vinculantes para el Poder Ejecutivo, para el nombramiento de los magistrados de los tribunales inferiores; 3) administrar los recursos y ejecutar el presupuesto que la ley asigne a la administración de justicia; 4) ejercer facultades disciplinarias sobre magistrados; 5) decidir la apertura del procedimiento de remoción de los mismos, en su caso ordenar la suspensión, y formular la acusación correspondiente ante el Jurado de Enjuiciamiento; 6) dictar los reglamentos relacionados con la organización del Poder Judicial y todos aquellos "que sean necesarios para asegurar la independencia de los jueces" (art.114). En la misma Constitución se instituyó el Jurado de Enjuiciamiento, también de composición plural (art.115), y se reguló el Ministerio Público como órgano independiente con autonomía funcional y autarquica financiera (art.120). Sobre estas instituciones: BERIZONCE R.O., *El Poder Judicial en las recientes reformas constitucionales argentinas*, *Rev. Der. Proc.*, Madrid, 1998, N°1, pp.33-54; también en *Rev. do Processo*, ed. Rev. dos Tribunais, São Paulo, 1998, N°90, pp.192-206.

[98] En Venezuela, el Consejo de la Magistratura es un órgano administrativo que ejerce el gobierno y fija la política judicial, estando integrado por cinco magistrados que representan las ramas del poder público, con mayoría de los designados por la Corte Suprema. Tiene competencia para designar los jueces de acuerdo a las normas de la ley de carrera judicial; establecer mecanismos para la vigilancia de la administración de justicia; conocer y decidir en los procesos disciplinarios; crear juridicciones, tribunales ordinarios y especiales, suprimir o modificar los existentes, entre otras. Es su misión defender la independencia del Poder Judicial (HENRIQUEZ LA ROCHE R., pp.1-2; QUINTERO TIRADO M., pp.1, 4, 28).

[99] De acuerdo al art.256 de la Constitución Política de Colombia (1991), el Consejo Superior de la Judicatura es el encargado de administrar la carrera judicial y de elaborar las listas de candidatos para la designación de funcionarios judiciales. Está integrado por dos Salas, una administrativa de seis magistrados y otra jurisdiccional disciplinaria de siete magistrados. Informes de PARRA QUIJANO J. y LOPEZ BLANCO H.F..

En México la reforma constitucional de 1994 creó el Consejo de la Magistratura Federal como órgano encargado de la administración, vigilancia y disciplina del Poder Judicial de la Federación, así como de la preparación, selección, nombramiento y adscripción de los magistrados inferiores (arts. 97 y 100). Se integra por siete miembros, presididos por el titular de la Suprema Corte de Justicia de la Nación, tres magistrados inferiores

instituciones en ciernes sobre las que no es posible formular juicios valorativos, ni trasladar experiencias europeas, por otra parte de apreciación no siempre concordante y a menudo crítica por ciertas desnaturalizaciones; nos referimos a las de Italia[101], España[102] y Portugal[103].

En cambio, la virtualidad concreta de la independencia judicial muestra oscuros nubarrones en la mayoría de los países del área iberoamericana. En Argentina se denuncia una Corte Suprema, en su actual integración, justamente sospechada de politización, con una "mayoría automática", cercana al poder político gobernante y permeable a sus intereses. Diversos pronunciamientos, logrados por mayoría después de la ampliación del número de sus componentes (1993), evidencian esa penosa situación[104] que ha contribuido decisivamente al desprestigio del Poder Judicial y al menoscabo de la seguridad jurídica. Brasil presenta una situación peculiar, por un lado se viene debatiendo, sin consenso la conveniencia de implantar una forma de control externo a través de un órgano de competencia mixta, que resiste en general la magistratura, sosteniendo el autogobierno[105]; al mismo tiempo, se acentúa la supremacía del Poder Ejecutivo, que restringe el presupuesto del judiciario e influye decisivamente en la designación de los miembros del Supremo Tribunal Federal, en

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designados por insaculación, dos consejeros designados por el Senado y uno por el Presidente de la República (OVALLE FAVELA J., pp. 4-5, con juicio crítico al respecto).

[100] Constitución Argentina de 1994. El Consejo de la Magistratura y el Jurado de Enjuiciamiento se reglamentaron por las leyes 24.937 y 24.939, de 1998.

[101] El Prof. COMOGLIO destaca que el conjunto de las garantías constitucionales vigentes demuestra que en Italia la independencia de la magistratura está confiada a las funciones del Consejo Superior de la Magistratura, órgano de autogobierno, de probada experiencia desde su implementación. Sin embargo en los últimos tiempos se ha generado un desencuentro político de amplias proporciones en torno a la composición de ese órgano (la cuota de miembros "no togados" de nombramiento parlamentario) y del alcance de sus atribuciones, especialmente las disciplinarias sobre los jueces y magistrados del ministerio público, debate que continuaba abierto y cuyo nudo central toca obviamente la garantía de independencia de aquellos últimos (informe italiano, pp.24-27).

[102] Son conocidos los defectos que se endilgan al Consejo General del Poder Judicial español, en su estructura y funciones, por los resquicios del texto del art.122 de la Constitución de 1998, y las críticas a las sucesivas regulaciones orgánicas de 1980 y 1985. Se consagraría así, como explica el Prof. FAIREN GUILLEN un "desequilibrio" en el Poder Judicial que lo pondría, en cuanto al Consejo, a merced de las alternaciones en las votaciones parlamentarias y en la propia constitución de las mayorías de éstas, con lo que desembocó en una inevitable politización en perjuicio de la Justicia (Informe, pp.23-24), y con ello, por añadidura, todo el edificio de los tribunales españoles queda impregnado o al menos coloreado por la tendencia mayoritaria del C.G.P.J. (p.25). Más aún: se cuestiona la utilidad real del organismo, especialmente por sus permanentes confrontaciones con el Tribunal Constitucional (GOMEZ COLOMER J.-L., informe, pp.4-5). Con un Consejo formado básicamente por miembros de origen político partidista, obligado a recurrir constantemente a votaciones forzadas (al "consenso") para nombramientos de magistrados, la judicatura no puede funcionar bien (FAIREN GUILLEN, pp.29-30).

[103] La historia del Consejo Superior de la Magistratura portuguesa también refleja el conflicto entre los valores "legitimidad democrática" y "autogobierno" (1976), si bien el sistema evolucionó en 1992 y 1998 hacia un equilibrio más franco entre tales premisas. La fórmula actual es de 1998 y no es nada pacífica porque coloca en manos del Presidente de la República, órgano político, la decisión sobre la mayoría del cuerpo (REIS FIGUEIRA A. y FERREIRA DA SILVA C. M., p.5). FERREIRA DA SILVA C.M., *O Poder Judiciário em Portugal*, comunicación al Seminario Internacional de Derecho Procesal, Fac. de Direito da UFG, 1998.

[104] SOSA G.L., pp.21-23. La "mayoría automática" se genera cada vez que en asuntos de interés para el grupo político gobernante, cinco de los nueve magistrados se alinean en los fallos. Claro que las sospechas no alcanzan a los tribunales ordinarios, cuya independencia de criterio en general no está puesta en duda (informe cit.).

[105] BADAQUE J.R. y CARMONA C.A., pp.9-10.

lo que se advierte que algunos de éstos no se sienten "moralmente libres" para decidir contra los intereses del Presidente de la República que los indicó[106]. En Colombia, aunque por circunstancias bien diversas, no se puede hablar genéricamente de independencia judicial[107], aunque la influencia del Ejecutivo y del Legislativo sea mínima[108]. La ansiada independencia es calificada de "bastante relativa" en Venezuela, donde se ejercen presiones políticas y económicas que en muchos casos llevan a los jueces a adoptar decisiones que pueden no ser las más ajustadas a derecho[109]. En Perú, el Consejo Ejecutivo del Poder Judicial, órgano de gobierno de la judicatura, se encuentra suspendido en sus funciones[110]. Constituye excepción, dentro de este panorama regional, la situación de Uruguay[111], Costa Rica[112] y Guatemala[113], donde se aprecia el respeto, en diversos grados y matices, de la independencia judicial. También en Chile y en México se reporta un nivel de independencia reflejado por la historia política del país y que se apuntala en el sistema de designaciones[114]. La crítica situación que atraviesan la mayoría de los sistemas judiciales de la región resulta propia y consustancial a las viscisitudes políticas y sociales finiseculares, en el marco de una economía liberal exaltada generadora de agudos contrastes sociales. Tasas negativas de crecimiento, desocupación, marginalidad, conflictos sociales exacerbados, creciente corrupción, son el costo inevitable de políticas perversas. Puede aseverarse que el ansiado mejoramiento de los sistemas judiciales depende decisivamente de una radical transformación de las estructuras políticas y económicas.

Sin embargo, queda por considerar otros datos esenciales en las relaciones del Poder Judicial con los poderes políticos; así el alcance y medida en que los jueces -y particularmente los más altos tribunales[115]- controlan de modo efectivo la legalidad y constitucionalidad de los actos de los restantes poderes. Y recíprocamente, cuál sea la medida de la ingerencia de éstos últimos en el control de los actos y conductas de los jueces, aspecto vinculado a la independencia colectiva antes aludida que tiene respuesta a través de

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[106] BADAQUE J.R. y CARMONA C.A., p.9.

[107] PARRA QUIJANO J., p.2-3. Son ampliamente conocidos los penosos episodios del ataque armado al palacio de Justicia, acaecidos algunos años atrás.

[108] LOPEZ BLANCO H.F., p.2-3.

[109] HENRIQUEZ LA ROCHE R., p.1. Sin embargo, se avizora una nueva etapa de mayor autonomía y jerarquización del Poder Judicial: QUINTERO TIRADO M., pp.5-6.

[110] PARODI REMON C., p.10. Igualmente lamentable es la situación en Paraguay donde existen obstáculos políticos que impiden el cumplimiento de decisiones que afectan al poder gobernante (caso "Oviedo").

[111] GREIF J., afirma que la independencia judicial es "firme y permanente" en Uruguay, lo que puede comprobarse a través del ejercicio del control de legalidad y de constitucionalidad (p.2). En el mismo sentido: JARDI ABELLA M. (pp.1-5). Con la particularidad que no existe Consejo de la Magistratura ni Jurado de Enjuiciamiento, confiándose a la Suprema Corte la designación de los magistrados inferiores a través de un régimen de cooptación "atenuado" (GREIF J., cit.).

[112] ARGUEDAS SALAZAR O., pp.1-2, ARTAVIA BARRANTES S., p. 17, respecto de Costa Rica. Existe un Consejo Superior del Poder Judicial, que tiene a su cargo la administración judicial, compuesto por cinco miembros que representan a los jueces y, uno de ellos, a los empleados.

[113] AGUIRRE GODOY M., en relación a Guatemala, p.2.

[114] TAVOLARI OLIVEROS R., pp.2-3, donde se menciona una reciente reforma constitucional chilena que establece un mecanismo que busca conseguir fuertes consensos en la nominación de los jueces de la Corte Suprema. En México la confiabilidad de los tribunales superiores estaduales ha sido variable en relación directa con la influencia de los gobernadores locales según las épocas (OVALLE FAVELA J., pp.2-3).

[115] Sobre la función de los Altos Tribunales remitimos a los debates y conclusiones del Coloquio de Thessaloniki (1997) sobre "*The Role of the Supreme Courts at the National and International Level*".

los organismos de gobierno y administración del Poder Judicial a los que ya nos hemos referido.

En cuanto al control de constitucionalidad (*Judicial Review*)[116], generalmente en los países del subcontinente americano se sigue el modelo norteamericano difuso[117], que acuerda esa potestad a todos los jueces, inclusive en vía de amparo o protección, sin perjuicio de la labor interpretativa decisiva -"la última palabra"- que cabe a las cortes superiores, guardianas de la supremacía de la Constitución. En cambio, son bien conocidos y transitan por otros andariveles los modelos europeos de justicia constitucional "centralizada" o "concentrada", a los que vienen adscriptos, entre otros, los sistemas de Italia[118], España[119] y Portugal[120], con sus singulares órganos, competencias y procedimientos. Interesa indagar el grado de compromiso concreto que asumen los tribunales en el ejercicio de ese control, y de ello ilustran de común las decisiones finales de los órganos judiciales más encumbrados. Es en este terreno, precisamente, que el "activismo" judicial tiene las mayores posibilidades de proyección[121], y ello se constituye en uno de los parámetros de la efectiva independencia judicial. Los relatos nacionales ilustran acabadamente de ese tipo de "activismo" sustantivo, que se explicita de modo genérico como instrumento para la tutela de las garantías individuales, sea, p.e., asegurando el debido proceso legal (*due process of law*)[122] y en general la aplicación garantista de la Constitución[123], o la tutela privilegiada de los derechos de la personalidad[124], o de derechos a la vida[125], o la creación pretoriana de una específica

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[116] STORME M. y COESTER-WALTJEN D., ob. cit., pp.340 y ss..

[117] Así, en Argentina (SOSA G.L., pp.9-14; PEYRANO J.W., pp.3-4), Venezuela (QUINTERO TIRADO M., pp.7-8). Uruguay (GREIF J., p.2; JARDI ABELLA M., pp.1-2), Colombia (PARRA QUIJANO J., pp.4-6; LOPEZ BLANCO H.F., pp.3-4), Perú (PARODI REMON C., pp.9-10), Guatemala (AGUIRRE GODOY M., pp.2-3). Asimismo, en Cabo Verde (FONSECA J.C., pp.2-3, con diversas particularidades). En Chile, en cambio, se consagra un sistema especial, que no implica el control difuso (TAVOLARI OLIVEROS R., pp.3-4).

[118] COMOGLIO L.P., pp.3-4, donde destaca que no está previsto, por ahora, ningún recurso individual directo de los ciudadanos ante el Tribunal Constitucional, ni siquiera por la tutela de los derechos fundamentales de la persona.

[119] GOMEZ COLOMER J.L., p.5, quien refiere las tensiones generadas entre el Tribunal Constitucional y el Tribunal Supremo cuando aquel ha anulado decisiones de éste.

[120] REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., p.4.

[121] STORME M. y COESTER-WALTJEN D., ob. cit., pp.349 y ss.. Con los alcances, condicionamientos y límites allí destacados.

[122] COMOGLIO L.P., p.24, alude a un *corpus* importantísimo de principios que la Corte Constitucional italiana ha elaborado y consolidado, que tocan los derechos individuales de acción y defensa en juicio, sea las garantías de imparcialidad y de autonomía del juez, en la óptica de un "proceso justo".

[123] GOMEZ COLOMER J.L., p.23, refiere la doctrina del Tribunal Constitucional español que descalifica interpretaciones que impliquen negar el derecho constitucional de acceso a la justicia. En México paradójicamente, algunos sectores autoritarios de la opinión pública perciben que la función protectora de las garantías individuales que llevan a cabo algunos jueces es "demasiado protectora" de los derechos humanos (OVALLE FAVELA J., p. 3). Precisamente, el mayor activismo se advierte en la interpretación del amparo (pp. 11-12). En Israel la legislación sobre derechos de libertad y dignidad del ser humano ha generado el activismo de la Suprema Corte en el control de los otros poderes y contribuido a su legitimación; no obstante, paradógicamente, ello motivó críticas públicas y acciones políticas tendientes a limitar el poder de los tribunales (SHETREET S., informe, pp. 20-21).

[124] REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., pp.14-16, señalan decisiones de los más altos tribunales portugueses que preferencian los derechos a la salud, al reposo y semejantes como absolutos y de tutela inexcusable.

[125] PARRA QUIJANO J., p.13, refiere la doctrina de la Corte Constitucional de Colombia que tuteló el derecho a

acción de amparo o de una vía de impugnación extraordinaria por arbitrariedad de sentencias[126]. Otros tribunales, en cambio, adoptan actitudes más conservadoras, rechazando la idea de la creación pretoriana[127] y aferrándose a la "veneración de la exégesis"[128].

En definitiva, puede aseverarse que el modo e intensidad con que los jueces ejercitan la tutela de las garantías fundamentales de los ciudadanos y el control de constitucionalidad y legalidad es uno de los indicadores más acabados y objetivos del grado de independencia, en las circunstancias concretas. La libertad efectiva que asuman para decidir los casos en que los poderes políticos están involucrados es decisiva y se sobrepone, casi siempre, a las limitaciones derivadas de condicionantes funcionales (autarquía presupuestaria[129], régimen de gobierno de la magistratura, dotación material , medios tecnológicos disponibles, etc.). Claro que la independencia paralelamente se apuntala a través del régimen apropiado de los nombramientos, la estabilidad en el cargo, la intangibilidad de las remuneraciones y las garantías del proceso de enjuiciamiento disciplinario y político.

b. Condicionantes económicos

Son subordinantes económicos, los derivados de la eventual interferencia y condicionamiento de la libre voluntad judicial por parte de grupos económicos, nacionales o multinacionales, y otros factores de poder, sectores sindicales y formaciones sociales en general. No pueden desconocerse ni minorizarse las presiones de todo tipo, directas o indirectas, explícitas o encubiertas, los *lobbies* no legalizados que se valen de "influyentes" pertenecientes al cuadro de funcionarios estatales, de los partidos políticos, sectores del culto y aún de los medios de comunicación, *concertados* para torcer la imparcialidad judicial.

Los informantes nacionales son ampliamente coincidentes en la descripción del fenómeno que nos ocupa, reconociéndose en general la existencia de presiones ilícitas[130], aunque esporádicas[131] provenientes de los grupos económicos nacionales o multinacionales[132], o de

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la vida en caso de negativa de prestación de un servicio de salud en caso de urgencia crítica, que recibió protección constitucional directa e inmediata.

[126] MORELLO A.M., p.4. SOSA G.L., pp.68-71, sobre el "activismo" de la Corte Suprema argentina, especialmente en los años 60` a los 80`. Refiere también la declaración de inconstitucionalidad de preceptos centenarios que consagraban la indisolubilidad del vínculo matrimonial. Asimismo: BERIZONCE R.O., *El activismo de los jueces*, La Ley, Bs.As., 1990-E, p.920, relato nacional al IX Congreso Internacional de Derecho Procesal, Coimbra-Lisboa, 1991.

[127] Así, en Uruguay (GREIF J., p.12; JARDI ABELLA M., pp.14-15. Sin embargo, el Tribunal Contenciosoadministrativo admitió la vía del amparo sin regulación legislativa, en 1985.

[128] TAVOLARI OLIVEROS R., p.12, atribuye esa actitud a los jueces chilenos, quienes se ciñen habitualmente a la letra estricta de la ley, y encuentra su razón en la defectuosa formación en los estudios universitarios

[129] VESCOVI E., ob. cit., pp.182-183, 186. Asimismo, sobre las cuestiones que se suscitan por el control del Poder Ejecutivo sobre el aumento de los salarios judiciales: SHETREET S., ob. cit., pp.127-128. En general, respecto de la distribución de funciones entre ambos poderes, en la legislación comparada y especialmente en el sistema de Israel: autor cit., informe, pp. 13-19.

[130] PARODI REMON C., p.15. GOMEZ COLOMER, p.8. GREIF J., p.3. HENRIQUEZ LA ROCHE, pp.4-5. AGUIRRE GODOY M., p.4. SOSA G.L., p.26. Como señala COMOGLIO , se trata de una patología desgraciadamente inevitable en toda latitud (p.29).

[131] COMOGLIO L.P., p.29, quien alude a los clamorosos procedimientos penales en Italia. SOSA G.L., p.26.

sindicatos o formaciones laborales en los específicos conflictos que los involucran[133], y aún de organizaciones de derechos humanos[134], o de partidos políticos[135] o grupos económicos cercanos al poder[136] y hasta de empleados judiciales[137]. Las formas operativas pasan por amenazas veladas o explícitas, publicaciones periodísticas, ofrecimientos de dádivas y sobornos[138], entre otras acciones ilícitas. Algunas veces no existen denuncias, y de ello se colige que los grupos económicos buscan la solución de sus diferendos no en la vía judicial oficial sino en los medios alternativos[139] En general se destaca que tales formas de interferencia ilícita son episódicas y que normalmente la magistratura se ha demostrado inmune[140], sin que tengan incidencia mayor[141].

En realidad, la cuestión principal reside en la necesidad de asegurar la igualdad de las partes en el proceso, siendo presupuesto de ello que el juez se encuentre libre -o sea inmune- a las presiones que la parte más "fuerte" y poderosa pueda desplegar para torcer su decisión. Tales situaciones no son novedosas, pero en el escenario de una cada vez más acentuada globalización, que abarca todos los órdenes y genera nuevas y crecientes desigualdades económicas y sociales, parece notoria la conveniencia de buscar formas igualmente innovadoras para preservar la independencia judicial como garantía de la igualdad de las partes, que también tutela al ciudadano común cuando debe enfrentarse a tales grupos.

En tal sentido, se debate acerca de la conveniencia de regular y enmarcar la actuación de grupos o personas dedicadas a realizar gestiones (*lobbies*) ante las autoridades públicas en general, en apoyo de intereses privados. Sin embargo, puede replicarse afirmando que el sistema judicial no ha de tolerar presiones sectoriales de ningún tipo y que el sólo reconocimiento de esos grupos menoscabaría el prestigio y jerarquía de los jueces, desde que no cabe asimilar su función a la que corresponde a los poderes políticos. Otros medios parecen más adecuados, como reforzar el sistema de garantías a la independencia judicial[142], perfeccionar los controles disciplinarios sobre la actuación de las partes y sus letrados[143], establecer ramas judiciales especializadas[144], acentuar la publicidad en los procesos para

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PARRA QUIJANO J., p.7. TAVOLARI OLIVEROS R., p.6. FONSECA J.C., p.5. OVALLE FAVELA J., p. 6.

[132] QUINTERO TIRADO M., pp.10-11. HENRIQUEZ LA ROCHE, p.4, alude a la "homogeneidad" existente en Venezuela en el Poder Judicial y los grandes grupos económicos. FONSECA J.C., p.5. Aunque en algunos casos ha mediado la reacción de los tribunales superiores (SOSA G.L., p.26).

[133] En España (GOMEZ COLOMER J.L., p.8.), Venezuela (QUINTERO TIRADO M., p.10), Uruguay (GREIF J., p.3). No ocurre en cambio, en Chile, donde los sindicatos obreros carecen de toda fuerza (TAVOLARI OLIVEROS R., p.6). En la experiencia mexicana los grupos sindicales no ejercen presiones muy relevantes; en cambio, con ocasión de la crisis económica de 1994 grupos deudores de la banca han interferido reiteradamente la actividad judicial (OVALLE FAVELA J., p. 6).

[134] GREIF J., p.3, aunque no tienen en Uruguay peso suficiente.

[135] HENRIQUEZ LA ROCHE, p.4. QUINTERO TIRADO M., p.11.

[136] HENRIQUEZ LA ROCHE, p.4. QUINTERO TIRADO M., pp.10-11.

[137] Así, en Guatemala (AGUIRRE GODOY M., p.4).

[138] PARODI REMON C., p.15-16. QUINTERO TIRADO M., p.11.

[139] En España (GOMEZ COLOMER J.L., p.8), en Colombia (LOPEZ BLANCO H.F., p.5).

[140] COMOGLIO L.P., pp.29-30. SOSA G.L., p.26. REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., p.6.

[141] TAVOLARI OLIVEROS R., p.6. JARDI ABELLA M., p.6.

[142] VESCOVI E., ob. cit., p.208. QUINTERO TIRADO M., pp.5-6.

[143] HENRIQUEZ LA ROCHE R., p.4.

[144] GOMEZ COLOMER J.L., pp.8-9, donde destca la necesidad en España de crear tribunales penales económicos. Esta especialización existe en otros países, como Argentina.

posibilitar el control social de los procedimientos, aplicar efectivamente las previsiones de la normativa transnacional[145] y aún mediante un "activismo" judicial de signo opuesto[146].

c. Condicionantes sociales

Los condicionantes sociales son los influjos de diverso tono e intensidad que provienen de la comunidad e inciden potencialmente en los pronunciamientos. La sociedad sustenta valores compartidos que se originan en tradiciones y usos inveterados o son propios de la idiosincrasia colectiva, de manera que corresponde al juez interpretar esos valores y sentimientos comunitarios a los que debe adecuar sus decisiones[147]. No puede ser un "fugitivo" de la realidad, ni quedar ajeno o solitario a sus espaldas. Se configura una "opinión pública" que se nutre de los valores prevalecientes, condicionando el actuar de los jueces, a modo de saludables controles frente a desbordes de arbitrariedad o capricho y aún ante los defectos del servicio de justicia[148]. No es una limitación formal ni legalmente establecida, pero no deja de resultar operativa e influyente en el ánimo de quien debe juzgar.

Claro que resulta decisivo saber cómo se forma esa "opinión pública", que no siempre se gesta de modo espontáneo sino que a menudo pueda ser inducida y manipulada por los medios de comunicación (prensa, radio, televisión, medios electrónicos)[149]. Se genera un "cuarto poder" crecientemente aguerrido, personificado por los modernos "comunicadores sociales", verdaderos "formadores de opinión" no siempre guiados por la defensa del interés común[150], erigido en condicionante de los actos de los poderes públicos, y también de las decisiones judiciales. La independencia e imparcialidad de los jueces aparece potencialmente jaqueada ahora por los medios de comunicación (*mass media*)[151]. La experiencia judicial pone al desnudo una diversidad de situaciones en la relación judicatura *vs*. medios de comunicación. La avidez informativa y aún el sensacionalismo, son más propios de los hechos de mayor clamor y resonancias[152], particularmente en los procesos penales[153], llegando a intromisiones inadmisibles respecto del procedimiento de las causas , "filtración" de elementos de convicción y difusión pública que perjudica la investigación

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[145] SOSA G.L., pp.26-31.
[146] Así, en Italia, la magistratura del trabajo (COMOGLIO L.P., p.30).
[147] VESCOVI E., ob. cit., pp.171, 203.
[148] SHETREET S., informe, p. 24. COMOGLIO L.P., p.29, destaca el interés de los *mass media* por los graves problemas de insuficiencia del sistema judicial italiano y su contribución positiva al impulso de las reformas. PARODI REMON C., p.12, destaca las ventajas y aspectos positivos de la colaboración de la prensa cuando es franca y oportuna.
[149] PEYRANO J.W., p.6. FAIREN GUILLEN V., p.40 y ss..
[150] PEYRANO J.W., p.6. PARRA QUIJANO J., p.7. TAVOLARI OLIVEROS R., p.4. BEDAQUE J.R. y CARMONA C.A., p.11. QUINTERO TIRADO M., p.10.
[151] FAIREN GUILLEN V., p.40 y ss.. REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., p.6. AGUIRRE GODOY M., p.3. HENRIQUEZ LA ROCHE R., p.3.
[152] Hechos de terrorismo, corrupción, extorsión, mafiosos (COMOGLIO L.P., p.29). Grandes escándalos políticos, terrorismo, corrupción, drogas, menores, delitos económicos (FAIREN GUILLEN V., p.40.). Hechos de corrupción o prevaricato de los jueces (GOMEZ COLOMER J.L., p.7). Retención extraterritorial de menores, filiaciones (SOSA G.L., p.24). Procesos vinculados a la financiación ilegal de los partidos políticos (PARRA QUIJANO, p.7).
[153] GREIF, p.2. FAIREN GUILLEN V., pp.40 y ss., alude a la "teatralización" de la justicia penal. QUINTERO TIRADO M., p.10.

judicial; y hasta el "juzgamiento" anticipado de los reos[154]. Algunas veces los propios jueces -claro que no son los que integran la "mayoría silenciosa"- son permeables y partícipes de la intromisión, por "vedettismo", vanidad, complacencia o infidelidad[155]. Todavía se observa la falta o insuficiencia de procedimientos institucionalizados para el manejo de las relaciones con los medios de comunicación y a menudo el estado de indefensión en que quedan los jueces, que sólo pueden "hablar" a través de sus sentencias.

Ha de convenirse que los remedios para preservar la independencia judicial frente a los desbordes de la prensa y la manipulación de la opinión pública, deben rastrearse en los principios del sistema democrático. No cabe concebir poder alguno sin control, y los medios de comunicación no están excluídos del axioma[156]. Los controles no deben necesariamente limitarse a la autoregulación (*self restraint*) de los propios medios, ni el derecho al sigilo y no revelación de la fuente puede ser atendido con amplitud tal que permita desincriminar el delito. Las conductas punibles han de caer siempre bajo la sanción de la ley y el juzgamiento de los magistrados[157]. Un complejo equilibrio en el que siempre quedará a salvo la libertad de expresión[158], que presupone un periodismo serio, informado, especializado, profesional[159]; también, como contrapartida, que los poderes públicos y los propios jueces no se desentiendan ni hagan "oídos sordos" a las críticas fundadas que reciben de la prensa. Habrá que buscar formas institucionalizadas de relacionamiento entre el Poder Judicial y los medios; las oficinas de relaciones públicas y más específicamente un "vocero", "*spokesman*" informante especializado que represente a la magistratura, pueden aportar al esclarecimiento de la opinión pública y simultáneamente erigirse en la "voz" de los jueces[160], favoreciendo las necesarias buenas relaciones con los medios.

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[154] FAIREN GUILLEN V., p.41. COMOGLIO L.P., p.29. GOMEZ COLOMER J.L., pp.6-7, señala un gravísimo caso de filtración de una votación en el Tribunal Supremo español. Otras veces son los medios los que, como forma de presión, hacen el "retrato" de los jueces, para inducir a la opinión pública (REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., p.6).

[155] FAIREN GUILLEN V., p.40, los denomina "jueces estrellas". COMOGLIO L.P., p.29. En algunos casos han sido los abogados de parte los responsables de la intromisión de la prensa (HENRIQUEZ LA ROCHE R., p.4. FONSECA J.C., p.4). Claro que puede ser atendible que bajo ciertas circunstancias los jueces difundan públicamente los fundamentos de sus resoluciones (OVALLE FAVELA J., p. 6).

[156] Como afirma FAIREN GUILLEN V., p.44, la libertad de prensa puede llevar a sus titulares a un enfatuamiento nocivo para la *res publica*. Los jueces a menudo se sienten abandonados frente al "asalto" de los medios, sin otro apoyo que el que los órganos corporativos que integran puedan brindarles. La Asociación de Jueces soporta a menudo los costos de la acciones judiciales (REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., p.6). Es conocido, el precedente de la Corte Europea de Derechos Humanos en el caso *"The Sunday Times"*, en el que un tribunal inglés aplicó sanciones a la prensa utilizando la noción de *contempt of court* debido a la publicidad indebida brindada al proceso (26-04-1979, A30, 6538/74).

[157] FAIREN GUILLEN V., p.43. Los desvíos que cometen los propios jueces han de caer bajo el peso de las sanciones disciplinarias (REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., p.16. SOSA G.L., p.24, sin perjuicio de las medidas preventivas).

[158] En Chile la libertad de expresión se encuentra condicionada a la "ley sobre abusos de publicidad", que permite a los jueces prohibir la divulgación de informaciones concernientes a determinados juicios y sanciona a los infractores con penas privativas de la libertad, norma que criticada acremente por los periodistas, es aplicada una y otra vez por los jueces, lo que menoscaba el control de la opinión pública sobre el modo cómo los jueces ejercen sus funciones (TAVOLARI OLIVEROS R., pp.5-6).

[159] COMOGLIO L.P., p.29. OVALLE FAVELA J., p. 6. Con relación a los espacios disponibles para los poderes en los medios, se afirma que el Ejecutivo es el poder noticiado, el Legislativo el criticado y el Judicial el ausente (BEDAQUE J.R. y CARMONA C.A., p.11).

[160] En Perú, la LOPJ faculta a los magistrados para solicitar rectificaciones a través de los medios de

II.2 La legitimación democrática de la magistratura

En el fondo de los diversos condicionantes exógenos alienta la vieja idea de que la magistratura es débil como poder o función estatal, confrontada con los poderes políticos -no tiene "ni la bolsa ni la espada", según el conocido juicio de A. HAMILTON[161]-, precisamente por carecer de legitimación popular. Ni siquiera las explicaciones doctrinales más aceptadas, incluyendo la legitimación democrática de los jueces a través del proceso judicial -*il piu partecipatorio fra tutti i processi della pubblica attivitá*-[162] han servido para superar semejante *capitis diminutio*. De ahí que sea notorio el empeño en la búsqueda de instituciones que en concreto sustenten aquella negada legitimación[163]; así, a través de sistemas de designación participativos y pluralistas bajo amplia publicidad -Consejos de la Magistratura-, superadores de la ingerencia política y la cooptación corporativa; o mediante la mejor capacitación y perfeccionamiento -Escuelas Judiciales, en sus diversas modalidades-.

II.3 Los condicionantes endógenos

Existen, por último, otro tipo de condicionantes *endógenos*, algunos propios y consustanciales a la organización de la magistratura, otros linderos y afines a los factores políticos. Son de tal linaje, entre otros, el método de designación e ingreso, la formación y capacitación de los jueces, el régimen de gobierno y administración del Poder Judicial, los mecanismos de control y enjuiciamiento disciplinario, político y social, etc.; sólamente los mencionamos para integrar el cuadro de los condicionantes.

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comunicación en defensa de su honorabilidad cuando hubiera sido cuestionada. El C.P.C. les posibilita ordenar, a pedido de parte y a costa del vencido, la publicación de la sentencia si con ello se puede contribuir a reparar el agravio derivado de la publicidad que se le hubiere dado al proceso (PARODI REMON C., pp.13-14). En Guatemala, la Corte Suprema organiza conferencias de prensa en la propia sede judicial para canalizar las relaciones con los medios (AGUIRRE GODOY M., p.4). En Argentina la idea del vocero judicial viene siendo impulsada, entre otros, por P. J. FRIAS.

[161] Memorado por M. STORME y D. COESTER-WALTJEN, ob. cit., p.381.

[162] CAPPELLETTI M., *Giudici legislatori?*", Milano, D.A. Giuffré Ed., 1984, pp.82-96. Son ampliamente conocidas las concepciones de ELY J. H., *Democracy and Distrust. A theory of Judicial Review*, Harvard University Press, 1980, TRIBE L., *Constitutional Choises*, Harvard University Press, 1985; GUARNIERI C., *Magistratura e politica in Italia. Pesi senza contrappesi*, Il Mulino, Contemporanea 1992; entre otros.

[163] El debate de fondo sobre la "cuota de poder" que corresponde al judiciario, el equilibrio con los segmentos políticos y el "pase de facturas" que éstos últimos alientan por la ineficiencia del sistema judicial en general, sigue abierto en la mayor parte de los paises latinos. Baste como ejemplos, lo que viene acaeciendo en Italia con la revisión constitucional frustrada de 1997 (COMOGLIO L.P., pp.16 y ss.) y España (GOMEZ COLOMER J.L., p.6). En Argentina, la reforma constitucional de 1994 intentó establecer un nuevo equilibrio de fuerzas reforzando la independencia judicial, pero la implementación de las nacientes instituciones ha reavivado las pujas (BERIZONCE R.O., *El Poder Judicial en las recientes reformas constitucionales argentinas*, ob. cit.). El panorama es similar en Brasil (BEDAQUE J.R. y CARMONA C.A., pp.9-10).

III EL DESEMPEÑO DE LOS JUECES EN EL EJERCICIO DE SUS FUNCIONES

Relevados los condicionantes formales y reales que acotan la función jurisdiccional, cabe ahora analizar su desempeño concreto en el marco de las circunstancias finiseculares.

Un esbozo de los principales datos identificatorios del actual cuadro de situación no puede prescindir de señalar cuanto menos los siguientes:

a) La "inflación legislativa"

La "inflación legislativa" y consecuente desvalorización del marco normativo ha incidido cualitativa y cuantitativamente en la misión judicial. Como se destacó elocuentemente en el Congreso Internacional de Coimbra-Lisboa, en el relato de los Prof. STORME y COESTER-WALTJEN[164] en todo el mundo, en las últimas décadas, se ha operado un cambio trascendente en el rol del juez y en el entendimiento de sus funciones, producto de un conjunto de circunstancias confluyentes en cada situación contextual. La creciente "esfumación" de la ley, por la recurrencia a preceptos "abiertos", flexibles, conceptos indeterminados, sus contrastes y "lagunas", tanto como el inmovilismo del legislador, terminan trasladando a los jueces funciones que son más propias de aquél, debiendo asumir tareas integrativas y de "suplencia judicaria"[165]. Paralelamente, la mayor participación social por el conocimiento más acabado de los derechos y la creciente facilitación del acceso, impulsa una demanda de justicia amplificada y cualitativamente más compleja que los jueces se ven obligados a atender ante requerimientos perentorios de efectividad de las garantías[166]. Un creciente "activismo" judicial sustantivo es su consecuencia.

b) Las nuevas funciones del juez

En ese cuadro, los jueces deben asumir progresivamente, junto al clásico rol del decisor de los conflictos, *nuevas funciones no tradicionales*. En el *proceso civil* se dibuja un modelo de *juez "administrador", "gestor"* o *"componedor económico o social"*. Así, tal como se destaca en los informes nacionales, en los procesos concursales y falimentarios[167], donde debe gestionar y administrar e incluso salvaguardar la empresa en crisis para conservar las fuentes de trabajo; o en los conflictos derivados de la contratación colectiva[168], en que debe recomponer los negocios para restablecer el equilibrio de las prestaciones o reformular las

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[164] Ob. cit., p.315.

[165] PICARDI N., *I mutamenti del ruolo del giudice nei nostri tempi*, en *Derecho Procesal en vísperas del siglo XXI. Temas actuales en memoria de los Profs. I. Eisner y J.A. Salgado*, coord. R. Arazi, Ediar, Bs. As., 1997, pp.398-401. MORELLO A.M., pp.1-2. La "inestabilidad" de la ley no es sino una consecuencia de las aceleradas mutaciones colectivas, lo que no constituye en sí mismo un suceso negativo como suele afirmarse desde posiciones conservadoras, que descreen del parlamentarismo.

[166] MORELLO A.M., pp.2-3. La "inflación legislativa" no es factor preocupante mientras se afirme la vigencia de las garantías.

[167] MORELLO A.M., p.4. SOSA G.L., p.33. GREIF J., p.3.

[168] MORELLO A.M., p.4.

claúsulas abusivas[169], o en materia de locaciones urbanas o derivadas de la propiedad común horizontal, cuando arbitra las soluciones económicas en casos de ruina o reconstrucción del edificio; o en los procesos extracontenciosos (jurisdicción voluntaria)[170], v.gr., autorizaciones judiciales para actos personalísimos, como transplantes de órganos, internaciones y tratamientos médicos, abortos; o en los procesos de familia y de minoridad[171], donde actúa como "acompañante" y "componedor" social para arbitrar las soluciones más acordes al interés superior familiar o de los menores; o en los procesos cautelares en general[172], en la tutela preventiva de daños[173].

En el proceso penal el juez ejercita ciertas formas de la denominada "suplencia política", cuando la legislación de emergencia le "delega" enormes poderes procesales en la persecución del terrorismo y la criminalidad organizada, que lo involucran directamente en la lucha contra esos flagelos[174]. Fenómenos diversos que reservan al juez funciones también novedosas son el denominado *plea bargain* anglosajón, que en los delitos no graves permite negociar sobre el proceso y la pena[175], y otras instituciones aledañas como el denominado criterio de oportunidad, el de conversión, la suspensión condicional de la ejecución penal y el procedimiento abreviado[176].

c) La conflictividad colectiva.

La explosión de la conflictividad colectiva en sectores tan diversos como los que se relacionan con la defensa del medio ambiente, el patrimonio común histórico o artístico y paisajístico, la salud pública y las relaciones de consumo en general, entre otros, requiere de un instrumental procesal adecuado, novedoso y apto para tutelar los específicos derechos e intereses "difusos" y "colectivos" o "fragmentarios" y superar las congénitas dificultades procedimentales que plantean tales acciones[177]. Mientras en las legislaciones del sistema del

[169] MORELLO A.M., p.4.

[170] FAIREN GUILLEN V., p.53. GOMEZ COLOMER J.L., p.9. FONSECA J.C., p.6.

[171] NAKAMURA H., *Family Courts. The rol of the judge in Family Conflicts*, en VII Congreso Internacional de Derecho Procesal, cit., pp.47 y ss.. COMOGLIO L.P., p.32, alude a poderes de "equidad creativa" en los procesos de separación y divorcio. REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., p.7. TAVOLARI OLIVEROS, p.7, aunque constituye excepción a la regla general en Chile. FONSECA J.C., pp.6-7.

[172] GREIF J., p.3, refiere a la administración e intervención judicial en las empresas.

[173] PEYRANO J.W., p.7, destaca esta singular misión de los jueces argentinos con responsabilidad social. SOSA G.L., p.42. En México la ley federal de protección al consumidor prevé una acción preventiva de daños que persigue finalidades similares (OVALLE FAVELA J., p. 8).

[174] PICARDI N., ob. cit., p.402-403.

[175] FAIREN GUILLEN V., p.51, destaca el gran éxito práctico en España donde fue introducido en 1998.

[176] PARRA QUIJANO J., p.7. QUINTERO TIRADO M., pp.1, 13. GREIF J., p.6. AGUIRRE GODOY M., p.5. ARGUEDAS SALAZAR O., p.2. FONSECA J.C., p.7. PARODI REMON C., pp.17-18, señala la tendencia a sustituir la imperatividad y el mando del juez por la conciliación, el convenio y la "llegada" a las partes, tanto en el proceso civil, como en el penal. En Argentina se regula el "juicio abreviado" y la "instrucción sumaria" (leyes 24.825 y 24.826, de 1997). Sobre estas cuestiones: GONZALEZ ALVAREZ D., *La conciliación penal en Iberoamérica*, en *Temas atuais do Direito Processual Ibero-americano. XVI Jornadas Iberoamericanas de Direito Processual*, Brasilia, 1998, pp.405 y ss.. SCARANCE FERNANDEZ A., *O consenso na justiça penal brasileira*, ob. cit., pp.447 y ss..

[177] CAPPELLETTI M. y GARTH B., *Access to Justice: The Worldwide Movement to make Rights Effective. A General Report* en *Access tu Justice*, v.I, Milan, D.A. Giuffré ed., 1978. En versión española, *El acceso a la*

common law las *class actions*, *relator actions* y similares han posibilitado una tutela razonablemente efectiva[178], en los ordenamientos iberoamericanas los resultados en general son todavía modestos.
El Código Procesal Civil Modelo para Iberoamérica[179], se limita a regular la legitimación para promover las acciones en defensa de los intereses difusos y los efectos particulares de la cosa juzgada (arts.53, 194) junto con el reconocimiento de mayores potestades judiciales. En general, más allá del reconocimiento constitucional en algunos países[180] las legislaciones no prevén los complejos aspectos procedimentales de la citación de los interesados y la integración de la litis, ni la extensión de la cosa juzgada[181], que si bien tiene eficacia general, salvo si fuere absolutoria por ausencia de pruebas, no puede hacerse valer por los demás integrantes del grupo que por no haber sido citados no integraron la litis.

En Brasil, las leyes 4717 de 1965 y 7347 de 1985 y ulteriormente la ley 8078 de 1990 establecieron una solución particular[182], y generaron una amplia experiencia aplicativa[183]. En Argentina el reconocimiento de la tutela de este tipo de derechos e intereses provino originariamente de la doctrina judicial. La reforma constitucional de 1994 estatuye sobre la protección del medio ambiente, de los usuarios y consumidores y de los derechos de incidencia colectiva en general, regulando una acción de amparo colectivo y la legitimación que corresponde al afectado, el defensor del pueblo y las asociaciones correspondientes. La ley de defensa de los consumidores (1994) prevé procedimientos administrativos y acciones judiciales pero no consagra el principio de gratuidad ni los efectos *erga omnes* de la cosa juzgada hacia los integrantes del grupo[184]. La ley federal mexicana de protección al consumidor regula las acciones de grupo atribuyendo a la Procuraduría Federal del Consumidor la aplicación de la normativa en el ámbito administrativo. La legitimación

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Justicia, ed. Col. Abog. La Plata, 1983 (las citas son de esta edición), pp.34, 68 y ss.. El tema fue objeto de amplio debate en el VII Congreso. CAPPELLETTI M. y GARTH B., *The Protection of Diffuse, Fragmented and Collective Interest in Civil Litigation*, ob. cit., pp.117 y ss.. Asimismo: CAPPELLETTI M., *La protección de los intereses colectivos o difusos*, en *XIII Jornadas Iberoamericanas de Derecho Procesal*, U.N.A.M., México, 1992, pp.245 y ss..

[178] G. C. HAZARD y M. TARUFFO, *La giustizia civile negli Stati Uniti*, Il Mulino, Bologna, 1993, pp.187 y ss.. Los recientes procesos contra companías tabacaleras y sus resultados ilustran al respecto.

[179] *Códigos Procesal Civil y Procesal Penal Modelos para Iberoamérica*, ed. Mrio. de Justicia, Madrid, 1990. Tales proyectos fueron elaborados en el seno del Instituto Iberoamericano de Derecho Procesal y aprobados en 1988. VESCOVI E., *El proyecto de Código Procesal Civil Uniforme para América Latina*, Rev. Inst. Colombiano Der. Proc., Bogotá, 1986, n°4.

[180] Brasil (BEDAQUE J.R. y CARMONA C.A., p.17). Argentina (SOSA G.L., p.39). Colombia (PARRA QUIJANO J., p.8).

[181] En estos términos en general se regula en el C.G.P. de Uruguay (GREIF J., p.4. JARDI ABELLA M., pp.7-9). En Perú el C.P.C. establece la publicación sintética de la demanda en el diario oficial y la obligatoriedad de la sentencia aún "para quienes no hayan participado del proceso" (PARODI REMON C., p.19).

[182] BEDAQUE J.R. y CARMONA C.A., p.17. La inmutabilidad de la cosa juzgada es *erga omnes*, tratándose de intereses difusos o individuales homogéneos, o ultrapartes si son colectivos, cuando la sentencia es estimatoria. En caso de desestimatoria también produce cosa juzgada en relación a terceros, salvo que se fundara en falta de prueba. En relación al Código de Defensa del consumidor: PELLEGRINI GRINOVER A., *A tutela jurisdiccional dos intereses do consumidor brasileiro*, en *XIII Jornadas Iberoamericanas de Derecho Procesal*, U.N.A.M., México, 1992, pp.337 y ss..

[183] BEDAQUE J.R. y CARMONA C.A., p.17.

[184] SOSA G.L., pp. 39-46 refiere las aplicaciones jurisprudenciales más recientes, algunas restrictivas de la legitimación. La ley provincial de Santa Fe n°10.000 estatuye sobre intereses difusos, pero la sentencia no produce efectos *erga omnes* (PEYRANO J.W., p.9).

procesal sólo corresponde a dicho organismo público, no así a las asociaciones de consumidores, lo que se ha traducido en la falta de ejercicio de aquellas acciones [185].

Las dificultades prácticas que plantean este tipo de acciones ha frustrado avances mayores, también en Italia[186] y España[187]. Otras legislaciones no tienen aún suficiente experiencia de aplicación[188], o simplementen no las contemplan[189].

d) Las tutelas diferenciadas y urgentes

El generalizado clamor por la excesiva duración de los conflictos ha derivado en el reconocimiento de una específica garantia sustentada en los tratados internacionales, tendiente a asegurar el dictado de las decisiones *en tiempo razonable*, como presupuesto sustantivo de la efectiva prestación de justicia y de las garantías de la defensa[190]. A partir de esa premisa reverdece la idea de las *tutelas diferenciadas*, los *procesos urgentes*, *monitorios*, y aun las *cautelas anticipatorias*, estudiadas en el Congreso de Utrecht[191]. El Código Procesal Civil Modelo para Iberoamérica recoge las medidas provisionales y anticipatorias (art.280) y los procesos de estructura monitoria (arts.311 a 316). Sin descontar las vías clásicas[192].

Esas nuevas técnicas de tutela pretenden satisfacer y adaptarse a las exigencias y características especiales de ciertas situaciones para las cuales el proceso de cognición común se revela estructural y funcionalmente inadecuado, incrementando el protagonismo del juez. Estrictamente la tutela jurisdiccional diferenciada alude, por un lado, a procesos específicos de cognición plena y acabada, atendiendo a las especificidades de la relación material (procesos sumarios propiamente dichos o bien a tutelas sumarias típicas, precedidas de cognición fragmentaria o incompleta e inacabada, que son las aquí interesa destacar y que se otorgan generalmente en supuestos de rebeldia, abuso del derecho de defensa y otras

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[185] OVALLE FAVELA J., pp. 7-9.

[186] COMOGLIO L.P., p.33.

[187] GOMEZ COLOMER J.L., pp.10-11. FAIREN GUILLEN V., p.55, señala dificultades y denuncia peligros.

[188] En Portugal la ley 83/95 dispone sobre la acción popular, con la particularidad que la cosa juzgada tiene eficacia general, pero no abarca a los titulares de derechos que se hubieren autoexcluído. También se prevé una acción inhibitoria específica. No existe hasta ahora jurisprudencia, no obstante el incremento de las demandas (REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., pp.7-9). TEXEIRA DE SOUZA M., *A tutela jurisdiccional do consumo e do ambiente em Portugal*, en *Temas Atuais...*, ob. cit., pp.383 y ss.. En Colombia, la ley 472 de 1998 regirá recién a mediados de 1999 (LOPEZ BLANCO H. F., p.6).

[189] En Chile, la ley sobre bases generales de medio ambiente no confiere acción judicial directa a los afectados; la ley de protección de los derechos de los consumidores reconoce legitimación a las entidades representativas pero sólo "en defensa de aquellos consumidores que le otorguen el respectivo mandato", lo que como lo señala el informante constituye casi una burla (TAVOLARI OLIVEROS R., pp.8-9).

[190] MORELLO A.M., pp.2-3.

[191] MEYKNECHT y VERSCHOOR, en *Justice and Efficiency*, ob. cit.. Sobre los procesos urgentes: PROTO PISANI A., *Lezioni di Diritto Processuale Civile*, Jovene Ed., Napoli, 1996, 2a. ed., pp.597 y ss., con sus remisiones.

[192] Entre los procesos urgentes se destaca el amparo con sus matices (*habeas data*, *mandado de injunçao*, entre otros) y sus equivalentes, el *mandado de segurança* brasileño, el recurso de protección chileno, la acción de tutela colombiana y otras vías directamente operativas. También los procesos o medidas cautelares crecientemente desarrolladas en la doctrina judicial; procesos de alimentos o interdictales.

hipótesis legales, con sus singulares modalidades[193]. Así, la técnica de la protección anticipada propugna, sin menoscabo del contradictorio, respuestas provisionales e interinas, de tutela temprana, antecedente a la decisión en el mérito, que recaen durante el desarrollo del trámite pero cuyo verdadero alcance es a menudo el de la condena que brinda satisfacción, siquiera parcial, a la pretensión en curso. La reciente legislación brasileña de 1994 estatuye sobre la anticipación de la tutela (art.273, C.P.C.), posibilitando al juez a requerimiento de parte anticipar total o parcialmente los efectos de la tutela pretendida cuando concurran diversos presupuestos que se prevén[194]. El C.G.P. uruguayo de 1989, por su parte, regula las medidas provisionales y anticipadas (art.317)[195]. Ambas legislaciones articulan el proceso de estructura monitoria[196]. En México y Argentina, se abre paso una tendencia similar que se advierte en jurisprudencia reciente [197].

El común denominador de las tutelas urgentes y diferenciadas en general, asienta en los poderes del juez que vienen considerablemente ampliados[198], por el mayor márgen de discrecionalidad ponderativa en la evaluación de las especiales circunstancias que las condicionan. Es éste un escenario altamente propicio para el "activismo" judicial, aunque no pueda ignorarse la sana advertencia que destaca la inconveniencia de la proliferación de las tutelas especiales en tanto puedan debilitar el sistema genérico de garantías, que reposa en la funcionalidad del proceso común de cognición[199].

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[193] BEDAQUE J.R. y CARMONA C.A., p.14-16. Sobre los procesos sumarios: FAIREN GUILLEN V., pp.60 y ss.. En relación a los procesos urgentes: PROTO PISANI A., *Lezioni...*, cit., pp.597 y ss.; *Appunti sulla giustizia civile*, Bari, 1982, pp.213-214; 244-246

[194] BEDAQUE J.R. y CARMONA C.A., p.13-14. BEDAQUE J. R., *Da tutela anticipada no Direito Processual brasileiro*, en *Temas Atuais...*, ob. cit., pp.61 y ss..

[195] GREIF J., p.8.

[196] JARDI ABELLA M., p.9. BEDAQUE J.R. y CARMONA C.A., p.16.

[197] OVALLE FAVELA J., pp. 11-12, alude a un "amparo provisional". PEYRANO J.W., p.10, refiere a las medidas "autosatisfactivas". V. también sobre este aspecto, BEDAQUE J.R. y CARMONA C.A., p.15.

[198] El activismo del juez se perfila actualmente sobre todo con el campo de los procesos urgentes y sumarios, como se concluyó en Coimbra-Lisboa (STORME M. y COESTER-WALTJEN D., ob. cit., p.312).

[199] Influyen también aspectos vinculados a la estructura judicial y a la sobrecarga de tareas, que no cabe desdeñar. GOMEZ COLOMER se refiere a las dificultades de la regulación del amparo constitucional español y a las diversas propuestas para superar el "cuello de botella" que paraliza la actividad del Tribunal Constitucional (pp. 12 y ss.). LOPEZ BLANCO H.F., pp.8-9, denuncia la alarmante tendencia legislativa que en Colombia torna urgente, de decisión prevalente, toda nueva regulación, lo que deriva en el atraso notorio de la actividad jurisdiccional ordinaria. OVALLE FAVELA J., alude a la amplitud del amparo mexicano y las dificultades que plantea su proliferación para su pronto despacho (pp. 9-10).

e) La jurisdicción "protectora" o de "acompañamiento"

Emerge, también, con características típicas la protección debida a ciertas situaciones en las que el órden público y el interés general se encuentran comprometidos, aun en el marco del proceso civil. En los conflictos de familia, en aquellos que involucran a menores o incapaces y en general los que derivan de las relaciones de "coexistencialidad" (procesos sociales en general), los jueces deben asumir potestades singulares, desplazándose la tradicional misión de composición equidistante hacia otra diversa en la que están impelidos a "acompañar" y asegurar, a menudo preventivamente, la efectiva operatividad de los derechos de la parte más débil y de tutela privilegiada. Una *jurisdicción "protectora", de "acompañamiento"*[200] que dibuja un nuevo rostro de la justicia, más humano, bajo reglas procesales que sin mengua del contradictorio, resultan más flexibles y adaptables a los requerimientos del caso, despojadas de todo exceso o rigor formal.

El Código Procesal Civil Modelo para Iberoamérica estatuye reglas específicas de protección privilegiada para las cuestiones de familia y menores, laborales, agrarias y demás de carácter social, previendo en relación a éstas últimas que los jueces dispondrán de todos los poderes instructorios que la ley acuerda a los tribunales del órden penal en la instrucción de las causas (art.310)[201]. Se trata de asegurar la tutela efectiva de los altos valores en juego, evitar que se frustren por exigencias administrativas o formales, con lo que adquieren particular virtualidad los principios de instrumentalidad y adecuación de las formas y de colaboración[202]. En lo sustantivo, es terreno fértil para la actuación de los poderes "equitativos"[203] que la ley le transfiera.

f) La justicia de pequeñas causas.

Igualmente notable es el renovado interés por la atención de los conflictos de menor cuantía o de "bagatela", bajo nuevas formas de enjuiciamiento que perfilan la denominada *justicia de pequeñas causas o de vecindad*, en la que la sumariedad del conocimiento, el informalismo, la instrucción oficiosa[204], la búsqueda de soluciones concertadas y autocompuestas, las decisiones según equidad[205], dibujan un escenario singular donde el juez está llamado a asumir funciones trascendentes como componedor amistoso de los específicos conflictos.

En Brasil se experimenta un modelo de avanzada a partir de la ley 7244 de

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[200] CAPPELLETTI M., *Appunti su conciliatore e conziliazione*, Riv. trim. dir. e proc. civ., 1981, pp.49, 56 y ss., entre otros.
[201] El C.G.P. uruguayo contiene un precepto similar (art.350).
[202] MORELLO A.M., p.5.
[203] COMOGLIO L.P., p.32, con referencia en Italia al proceso del trabajo y a las controversias en materia de locación, comodato, separación y divorcio.
[204] COMOGLIO L.P., p.31. FAIREN GUILLEN V., p.62.
[205] COMOGLIO L.P., p.31. FAIREN GUILLEN V., p.62.

1984, que instituyó los *Juizados Especiais de Pequenas Causas*[206], y ulteriormente la ley 9.099 de 1995, de *Juizados Especiais Civeis y Criminais*, y que constituyen motivo de inspiración para los ordenamientos iberoamericanos.

g) El fenómeno de la "sobrecarga" (overload).

En paralelo con el auge de la litigiosidad, otro factor operante que han mencionado los informantes, es la *creciente sobrecarga de trabajo* (*overload*) que padecen los tribunales, y que derivara en algunos países en verdaderas situaciones de colapso del sistema[207]. En el VIII Congreso de nuestra Asociación se estudió ese preocupante fenómeno desde sus vertientes histórica, procedimental y sociológica[208], arribándose a valiosísimas conclusiones que mantienen plena vigencia. Es procedente referirnos aquí tan sólo a algunos desarrollos complementarios de lo acaecido entre nosotros en la última década. La persistencia y el recrudecimiento de la sobrecarga cuantitativa y cualitativa (procesos complejos) en prácticamente todos los tribunales ordinarios[209] y superiores[210], ha llevado de modo incipiente a experimentar algunas de las "soluciones" que ofrece el derecho comparado: descarga y transferencia de funciones de administración y gestión financiera, incremento de la jurisdicción extracontenciosa[211], técnicas de manejo de casos[212] (*case flow management*), regulación del flujo de recursos ordinarios[213] y extraordinarios[214] (*leave to appeal, certiorari*), bien que en "versiones" propias y singulares no siempre fieles a los modelos teóricos[215] y todavía en general no suficientemente experimentadas. Lo cierto es, sin

[206] BEDAQUE J.R. y CARMONA C.A., pp.17-18.

[207] Así, en Italia (COMOGLIO L.P., p.28), España (GOMEZ COLOMER J.L., pp.2-3, 12), Brasil (BEDAQUE J.R. y CARMONA C.A., pp.2-4), Argentina (SOSA G.L., p.54, en relación a la Corte Suprema), Colombia (LOPEZ BLANCO H.F., pp.1-2), Venezuela (QUINTERO TIRADO M., p.2).

[208] V. GIMENO SENDRA, *Historical survey*, P. JULIEN, *Procedural survey* y M. BORUCKA-ARCTOVA, *Sociological survey*, ob. cit..

[209] BEDAQUE J.R. y CARMONA C.A., pp.2-4, especialmente la sobrecarga de los recursos contra decisiones interlocutorias.

[210] La situación de los tribunales superiores es común a la mayoría de los países, aunque por causas diversas. Por caso, España (GOMEZ COLOMER J.L., p.12), México (OVALLE FAVELA J., p. 10), Brasil (BEDAQUE J.R. y CARMONA C.A., pp.3 y ss.). Para una visión general: *The role of the Supreme Courts at the National and International Level*, J. A. JOLOWICZ, General Report, cit..

[211] Así, en Portugal (REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., p.10). El tema fue desarrollado en el VII Congreso: ZTALEV Z., *Non-contentious Proceedings and their Development*, ob. cit., pp.253 y ss..

[212] Como se concluyó en Coimbra-Lisboa, resulta necesario que el juez se convierta en *manager*, evolución originariamente calificada como *case flow management* (M. STORME y D. COESTER-WALTJEN, ob. cit., pp.334, 380). El avance más significativo en orden a la gestión y manejo de los tiempos procesales por el tribunal está dado por la adopción del proceso por audiencias. Así, en C.G.P. uruguayo siguiendo el modelo del Código Procesal "tipo" para Iberoamérica.

[213] Así, concediendo la apelación sin efecto suspensivo y posibilitando la ejecución provisional inmediata de la sentencia, bajo garantía suficiente (C.G.P. Uruguayo, art.260), siguiendo las previsiones del Código Modelo para Iberoamérica. En cambio, FAIREN GUILLEN V., pp.56-57, es contrario a toda limitación en los recursos, inclusive los ordinarios, que menoscabaría el principio de igualdad.

[214] El tema fue ampliamente considerado en Utrecht: T. JOLOWICZ y NEMETH, *Managing overload in Appellate Courts*, ob. cit., y en el Coloquio de Thessaloniki 1997, cit.. Se comparte la premisa de que la asignación de las causas entre los magistrados superiores, como técnica para el mejor despacho de los asuntos, no debe perjudicar la independencia interna de los jueces (SHETREET S., informe, pp. 23-24).

[215] En Argentina, la reforma al C.P.C. de la Nación (ley 23.774) posibilitó a la Corte Suprema "según su sana discreción y con la sóla invocación" del precepto rechazar el recurso extraordinario "por falta de agravio federal

embargo, que por factores diversos persiste en general la sobrecarga[216], y sólo se ha logrado aliviar la situación relativa de algunos tribunales.

h) Los medios alternativos de solución de disputas

Como contrapunto de la justicia oficial y reacción contra sus magros resultados, se asiste al fenómeno de la revalorización de los denominados *medios alternativos de solución de disputas*[217], que bajo múltiples técnicas -conciliación, mediación, arbitraje y sus diversas variantes y combinaciones-, brindan instancias diferenciadas que contribuyen al mejor rendimiento y aún a la descarga de la justicia oficial integrando las opciones jurisdiccionales, algunas veces como una verdadera y propia "justicia privada". Semejante avance no sólo pone en jaque el principio tradicional de la exclusividad monopólica de la jurisdicción estatal, sino que implica de hecho el desplazamiento de los jueces oficiales y aún en ciertos casos de los abogados, por la participación de simples ciudadanos no profesionales en la solución de específicas categorías de conflictos. El singular método que se adopta a ese fin excluye la confrontación "adversarial" de las partes y emplaza al órgano -arbitro, componedor, conciliador, mediador- en una dimensión diversa de la de los jueces.

Ha sido bien diversa en los países de Iberoamérica la evolución de las formas alternativas. Los ordenamientos procesales tradicionales regulan la conciliación como modo "anormal" de conclusión de los litigios, que se confía al juez potestativamente durante el proceso[218] o como una instancia preprocesal[219], y como trámite obligatorio en ciertos conflictos de familia[220]. En los años 90 se han incorporado en algunos países otras formas solutorias de

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suficiente o cuando las cuestiones planteadas resultaren insustanciales o carentes de trascendencia", acuñando un *certiorari* "criollo" que presenta algunas analogías con la institución norteamericana. En su operatividad práctica ha permitido aligerar el despacho de las causas (SOSA G.L., p.54), pero se critica el manejo discrecional y arbitrario que viene haciendo la Corte. Un mecanismo similar rige en México (OVALLE FAVELA J., p. 10) y en Chile (TAVOLARI OLIVEROS, p.9). En España se debate el problema de la selección de causas como remedio para solucionar la situación de colapso en que se encuentran el Tribunal Constitucional y el Tribunal Supremo, habiéndose propiciado diversas soluciones aún no consagradas legalmente (GOMEZ COLOMER J.L., pp.12-20). En Brasil se ha introducido el sistema procesal de la denominada "*sumula vinculante*", por el que las doctrinas adoptadas por los tribunales superiores se tornarían obligatorias a todo el Poder Judicial, con el argumento que esto aceleraría todos los procesos, aliviando la sobrecarga de los órganos de segundo grado, pero ha sido criticado como "instrumento antidemocrático y autoritario" (BEDAQUE J.R. y CARMONA C.A., pp.10-11).

[216] En otros ordenamientos se consagran mecanismos de selección en ciertos asuntos. En Colombia la Corte Suprema selecciona sin motivación alguna las sentencias de tutela que habrán de ser revisadas (PARRA QUIJANO J., p.10); las Cortes de apelación chilenas tienen la atribución de no aceptar a tramitación, liminarmente, los recursos de protección cuando carezcan de fundamentos (TAVOLARI OLIVEROS R., p.9).

[217] DENTI V. y VIGORITI V., *Le role de la conciliation comme moyen d'eviter le proces et de resoudre le conflict*, en *Effektiver Rechsschults...*, ob. cit., pp.345 y ss.. Sobre el fenómeno de la participación de los "legos": Z. STALEV y A. M. MORELLO, ponencias generales en el IX Congreso Internacional de Derecho Procesal, ob. cit., pp.221-259 y 261-287.

[218] PEYRANO J.W., p.18. JARDI ABELLA M., p.10. QUINTERO TIRADO M., p.12. BEDAQUE J.R. y CARMONA C.A., p.17, con especial suceso en la justicia de pequeñas causas. ARTAVIA BARRANTES S., p. 6. OVALLE FAVELA J., p. 12.

[219] Así en Uruguay por mandato constitucional (JARDI ABELLA M., p.10), aunque fue perdiendo paulatinamente eficacia práctica.

[220] REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., p.7. ARTAVIA BARRANTES S., p. 6.

autocomposición, como la mediación generalmente siguiendo el modelo norteamericano (ADR)[221], que no acreditan aún experiencia suficiente. En paralelo, se ha remozado el arbitraje, sancionándose leyes específicas[222] o actualizando los ordenamientos procesales, para dar cabida al arbitraje institucional y recogiendo modelos o recomendaciones internacionales[223]. Lo que parece compartido es el anhelo de formar conciencia en torno de las bondades de estos métodos[224], inclusive como sustitutos para la decisión de ciertos y específicos conflictos de la justicia oficial.

Parece claro, sin embargo, que los medios alternativos no sustituyen a los órganos de la jurisdicción estatal ni entran en competencia con ellos. En todo caso, se complementan entre sí para la más adecuada prestación de la justicia. Si bien es falsa la oposición entre uno y otro sistema, dentro del Estado de Derecho tradicional la utilización de métodos alternativos -y especialmente el arbitraje- resulta excepcional y restringida, no porque la exclusividad monopólica deba ser atendida como un dogma, sino por la creencia, aún mayoritariamente compartida[225], de que no obstante todas sus rémoras la justicia oficial puede conjugar mejor y más adecuadamente los principios de igualdad de las partes[226], justicia intrínseca de las decisiones, razonabilidad de tiempos y costos[227]. La garantía de los derechos de los ciudadanos reposa, en última instancia, en el sistema de justicia oficial, pero en el ámbito de los derechos disponibles pueden aquellos ejercer la libertad[228] de someterlos a decisión mediante los medios alternativos.

i) El impacto de la "globalización".

Finalmente el fenómeno de la "globalización" del sistema de derecho y de enjuiciamiento, con base en el *derecho internacional de los derechos humanos*, ha incorporado una nota decisiva con incidencia directa en los sistemas internos nacionales, en los niveles

[221] En la justicia nacional argentina, en el ámbito de la Capital, la ley 24.573 ha instituido la mediación como trámite previo a todo juicio, siguiendo el modelo norteamericano de ADR (SOSA G.L., pp.66-67). No hay auspicio, en cambio, por ahora en Italia (COMOGLIO L.P., p.34). En Brasil se debate arduamente acerca de su conveniencia (BEDAQUE J.R. y CARMONA C.A., pp.17-18).

[222] España, ley 36/98 (GOMEZ COLOMER J.L., p.21), si bien no funciona adecuadamente. Brasil (BEDAQUE J.R. y CARMONA C.A., p.18), donde está ganando prestigio. Perú (PARODI REMON C., p.25), Venezuela (QUINTERO TIRADO M., pp.16-19; HENRIQUEZ LA ROCHE R., p.12). Guatemala (AGUIRRE GODOY, p.8). También en Italia, arts.806-840 C.P.C. (COMOGLIO L.P., p.34).

[223] El arbitraje institucional está consagrado en Portugal (REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., p.10) aunque ha fracasado. También en Uruguay (GREIF J., p.9). En Chile tiene una larga y exitosa tradición (TAVOLARI OLIVEROS R., pp.11-12). OVALLE FAVELA J., pp. 12-13, alude a la experiencia favorable del arbitraje mercantil.

[224] PARODI REMON C., p.25. GREIF J., p.9. AGUIRRE GODOY M., p.8. HENRIQUEZ LA ROCHE R., pp.11-12. OVALLE FAVELA J., pp. 14-15.

[225] GOMEZ COLOMER J.L., p.23. GREIF J., p.23. QUINTERO TIRADO M., p.18.

[226] En realidad más que el arbitraje, destinado a ciertos conflictos, es menester ensanchar los mecanismo sociales de solución de conflictos, como la conciliación en equidad a través de los jueces de paz (PARRA QUIJANO J., p.11). QUINTERO TIRADO M., p.19. ARGUEDAS SALAZAR O., p.3, estima que el público considera ineficiente la justicia privada.

[227] La cuantía de los costos del arbitraje es uno de los principales motivos. GOMEZ COLOMER J.L., p.23. REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., p.12. PEYRANO J.W., p.17. PARRA QUIJANO J., p.11. QUINTERO TIRADO M., p.19.

[228] COMOGLIO L.P., p.34. PARODI REMON C., p.25.

constitucionales, legales y reglamentarios. Es ampliamente conocida la experiencia de los tribunales internacionales, en particular de la Corte de Estrasburgo, y su influencia creciente sobre la legislación y tribunales no sólo europeos sino de otros países, inclusive en iberoamérica.

En el ámbito regional, la Convención Americana sobre los Derechos Humanos (Pacto de San José de Costa Rica) de 1969 contiene un cuerpo amplio de derechos y libertades que los Estados partes se comprometen a respetar, y creó la Comisión Interamericana y la Corte Interamericana de Derechos Humanos, a cuya jurisdicción se han sometido la gran mayoría de los países del subcontinente[229].

Los ordenamientos procesales y aún las leyes de organización judicial[230] se han visto largamente influídas, si bien no ha sido pacífico el entendimiento en torno de la directa operatividad[231]. Aún y con virtualidad no menos vinculatoria la interpretación judicial ha encontrado ancho márgen para desenvolver los principios fundamentales del sistema supranacional[232].

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[229] SOSA G.L., pp.75-76. Sobre la tutela jurisdiccional de los derechos humanos en general: *La tutela giurisdizionale dei Diritti dell'uomo a libello nazionale ed internazionale*, Bologna, 1998. Acerca de los aspectos transnacionales del proceso: *Trans-National Aspects of Procedural Law, X° World Congress on Procedural Law*, Univ. di Catania, a cura di I. ANDOLINA, GIUFFRÉ Ed., Milano, 1998, v.I, II y III. Para la Convención Americana: FIX ZAMUDIO H., *Las relaciones entre los tribunales nacionales y los internacionales*, en esta última ob., v.I, p.181-311. HITTERS J.C., *Efectos de las sentencias y de los laudos arbitrales extranjeros*, ob. cit., v.III, pp.913 y ss.. LANDONI SOSA A., *El proceso transnacional*, en *XIV Jornadas Iberoamericanas de Derecho Procesal*, U.N.L.P., La Plata, 1994, pp.397 y ss.. SOSA G.L., *La cooperación judicial en Iberoamérica*, ob. cit., pp.501 y ss.. HITTERS J.C., *La protección de los derechos humanos en el sistema americano*, ob. cit., pp.527 y ss..

[230] Especialmente, los códigos procesales penales han debido adecuarse a la Convención. GREIF J., p.14; HENRIQUEZ LA ROCHE R., p.14.

[231] FIX ZAMUDIO H., ob. cit., v.I, pp.222 y ss.. Dependiendo generalmente de las claúsulas constitucionales, en la mayoría de los países se considera que los derechos amparados por la Convención son directamente operativos, *self executing*, como en Argentina (SOSA G.L., pp.75-76), donde tienen jerarquía constitucional y por tanto han de primar respecto a las normas internas; Colombia (PARRA QUIJANO J., p.12); Perú (PARODI REMON C., p.28), Guatemala (AGUIRRE GODOY M., p.11); Chile (TAVOLARI OLIVEROS R., p.13). En Uruguay estrictamente se requeriría una reforma constitucional (GREIF J., p.13), aunque también se los considera directamente operativos (JARDI ABELLA M., pp.16-17). México, en cambio, no ha reconocido hasta fines de 1998 la competencia contenciosa de la Corte Interamericana de Derechos Humanos; de ahí que los tratados internacionales no han tenido relevancia en el derecho interno (OVALLE FAVELA J., p. 16). En Brasil no obstante las opiniones doctrinales, la tendencia de los jueces es recusar la referencia a cualquier instrumento internacional como fundamento suficiente para sustentar una pretensión jurídica en el ámbito interno (BEDAQUE J. R. y CARMONA C. A., pp. 11-12).

[232] En Argentina, la C.S.N. ha declarado que la interpretación del Pacto y aún la propia interpretación de la Constitución Nacional debe guiarse por la jurisprudencia de la Corte Interamericana de Derechos Humanos (SOSA G.L., p.76). Se trata de enriquecer en vía interpretativa los propios principios constitucionales, a la manera como, p.e., ocurrió en Italia (COMOGLIO J.L., P.24), España (FAIREN GUILLEN V., pp.64-65) y Portugal (REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., p.14-15). Es lo que preconiza la doctrina brasileña (BEDAQUE J.R. y CARMONA C.A., pp.11-12). El nivel de la Constitución es un "piso" y no un "techo"; son los tratados los que fijan ese "techo" (MORELLO).

IV LA ESTIMACIÓN VALORATIVA QUE SE HACE EN LA COMUNIDAD DEL DESEMPEÑO DE LOS JUECES

Destacados ya el marco de los condicionantes de la función de los jueces y las notas más típicas que conforman el cuadro de las circunstancias presentes y en la que deben actuar, resulta ahora conducente verificar cuál es en general la estimación valorativa que prevalece en cada comunidad en relación al concreto desempeño de sus jueces. Cuál es el grado confiabilidad y credibilidad que merecen; y también el de la eficiencia del sistema de justicia. La indagación de los motivos en los que, en cada caso, se sustentan las opiniones prevalecientes, resulta decisiva para el análisis y propuesta de las reformas necesarias en el marco de una adecuada política judicial.

Sin soslayar las dificultades para aprehender lo que sea la "valoración comunitaria", y aún computando que la opinión pública suele no coincidir a menudo con la "opinión publicada" y que no es la "opinión de los técnicos"[233], habrá que convenir que en esa tarea no cabe desechar la utilidad que brindan las modernas técnicas de las ciencias sociales, extendidas ahora a todos los ámbitos a través de encuestas y sondeos de opinión cuantitativos y cualitativos, aplicadas en conocidas investigaciones en el área iberoamericana[234]. Tampoco cabe soslayar que "lo esperado" de los jueces casi siempre supera lo que ellos y el sistema pueden dar[235]; ni el cuadro negativo que deriva del incremento incesante de la litigiosidad, la sobrecarga inhumana de tareas en algunos órganos, la falta de colaboración de los otros operadores y la insuficiencia de la estructura en general.

De los informes nacionales pueden extraerse al menos algunas conclusiones sentadas en amplias coincidencias, tales como que la opinión pública en general en la gran mayoría de los países del área valora de modo negativo[236], en grados diversos de desaprobación[237], tanto el resultado de la labor de los jueces[238], como el de la rama judicial[239]; que esa percepción

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[233] PEYRANO J.W., p.1. También es cierto que algunos sondeos son interesados o manejados políticamente (COMOGLIO L.P., p.27); y que las "mayorías silenciosas" que operan más y polemizan menos (*id.*, p.28) no siempre interesan en las encuestas.

[234] Así, J.J. TOHARIA, *El juez español*, Tecnos, Madrid, 1975; *Pleitos tengas!*, Siglo XXI de España, Madrid, 1987. En Brasil, E. BOTELHO JUNQUEIRA, *Juices. Retrato em preto e branco*, Letra Capital, Rio de Janeiro, 1997. Para Argentina, F. FUCITO, *La transformación del servicio judicial. Aspectos sociológicos*, ed. Sec. de Justicia de la Nación, Buenos Aires, 1989. En Portugal, DE SOUSA SANTOS B., *Os tribunais nas sociedades contemporáneas. O caso portugues*, Porto, 1996.

[235] MORELLO A.M., p.3. PARODI REMON C., p.6. PEYRANO J.W., p.2. BEDAQUE J.R. y CARMONA C.A., pp.1-2.

[236] FAIREN GUILLEN V., pp.6-7. GOMEZ COLOMER J.L., pp.1-1; BEDAQUE J.R. y CARMONA C.A., p.2. SOSA G.L., pp.1-3. PARRA QUIJANO J., pp.1-2. LOPEZ BLANCO, pp.1-2. PARODI REMON C., p.5. QUINTERO TIRADO M., p.1. HENRIQUEZ LA ROCHE R., p.1. FONSECA J.L., p.1.

[237] Los sondeos periódicos que realiza en España el Instituto de Investigación Sociológica, ponen en evidencia que el 46,6% de los ciudadanos estima (marzo 1998) que la justicia funciona mal o muy mal; un 88,40% entendió que es discriminatoria y a un 50,6% no le inspira ninguna confianza (GOMEZ COLOMER J.L., p.2). En Brasil una reciente investigación reveló que el 54% considera que el Poder Judicial es ineficiente, mientras que el 86% afirma que existe impunidad (BEDAQUE J.R. y CARMONA C.A., pp.2-3). En México no se considera completamente confiable la tarea que llevan a cabo los jueces locales (OVALLE FAVELA J., p. 2).

[238] REIS FIGUEIRAS A. y FERREIRA DA SILVA C.M., p.2, informan que en Portugal en los recientes relevamientos estadísticos los jueces aparecían en tercer lugar en la confianza a las profesiones. En Colombia, el

negativa es más acentuada tratándose de la justicia penal[240]; mientras que a menudo las mayores quejas recaen sobre los tribunales superiores[241]. En punto a los *motivos* en que asienta ese descrédito, sobresalen como propios la ineficiencia por errores judiciales, la excesiva duración de los procesos y trabas al acceso igualitario[242], escándalos sonados en los que los propios jueces son partícipes y actos de corrupción y prevaricato[243] siquiera aislados, impunidad en los procesos penales[244], polémicas lacerantes que contraponen magistratura y partidos políticos[245], progresivo deterioro de la seguridad jurídica[246], condena por tribunales supranacionales[247], entre otros y casi siempre en sintonía con parejos males que aflijen a cada sociedad[248].

Las *consecuencias* que de ello derivan se resumen en un creciente desprestigio social de la judicatura[249], que abarca a todos los operadores, jueces y abogados[250], tanto como una generalizada desconfianza en el sistema de justicia[251]. Resaltan en ese cuadro general algunas notables excepciones que relatan los informantes de Uruguay[252] y Costa Rica[253], donde por el contrario, prevalece un buen nivel de confiabilidad y credibilidad en general. Las propuestas para revertir aquella situación tan dolorosa integran todo un complejo

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73% afirma que tiene poca o ninguna confianza en los jueces (PARRA QUIJANO J., p.1). PARODI REMON C., p.5. BEDAQUE J.R. y CARMONA C.A., pp.2-3, curiosamente los jueces gozan de prestigio.

[239] En España el 42% considera bastante bajo y muy bajo el grado de independencia de los jueces, frente al 32% que estima lo contrario. En la escala de confianza de las instituciones aparecen en un noveno lugar (FAIREN GUILLEN V., p.7), como la institución peor valorada (GOMEZ COLOMER J.L., p.1).

[240] FAIREN GUILLEN V., pp.12 y ss.. TAVOLARI OLIVEROS R., p.1. HENRIQUEZ LA ROCHE R., p.1. AGUIRRE GODOY M., p.1. BEDAQUE J.R. y CARMONA C.A., pp.2-3. También en Uruguay (GREIF, p.1.

[241] FAIREN GUILLEN V., pp.22-26, en buena medida derivada del origen de las designaciones de sus miembros. También en Argentina (SOSA G.L., pp.1-2) hay suspicacias de la independencia de la mayoría de los miembros de la Corte Suprema respecto del poder político oficialista. En Chile, encuestas entre abogados revelan que el 70% considera no satisfactoria la actuación de los tribunales superiores. La desconfianza está asentada también en Brasil: BEDAQUE J.R. y CARMONA C.A., p.9.

[242] COMOGLIO L.P., p.28, refiere a la pendencia en Italia, en todos los nivels en millones de controversias civiles y millones de procedimientos penales no definidos, con riesgo de prescripción. En Brasil existe una situación de virtual colapso del sistema judicial (BEDAQUE J.R. y CARMONA C.A., pp.2-4). En España, el 88% de los encuestados perciben discriminación en la aplicación de las leyes (FAIREN GUILLEN V., pp.7-8. GOMEZ COLOMER J.L., p.2). REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., pp.2-3, aluden a una "psicosis de la morosidad". SOSA G.L., pp.1-2. PARRA QUIJANO J., pp.1-2. LOPEZ BLANCO H.F., pp.1-2. FONSECA J.C., p.1. QUINTERO TIRADO M., pp.1-2.

[243] FAIREN GUILLEN V., pp.11 y ss., relata sonados escándalos judiciales en España. GOMEZ COLOMER J.L., pp.5-7. SOSA G.L., pp.1-2, supuestos de prevaricato, cohecho, abuso de poder, que han conducido a resonantes juicios políticos o renuncias.

[244] COMOGLIO L.P., p.27.

[245] COMOGLIO L.P., p.28.

[246] COMOGLIO L.P., pp.27-28. GOMEZ COLOMER J.L., p.5-7. FAIREN GUILLEN V., p.9 y ss..

[247] FAIREN GUILLEN V., pp.20 y ss..

[248] SOSA G.L., p.3. QUINTERO TIRADO M., p.1.

[249] COMOGLIO L.P., p.24. El prestigio de la magistratura supone, como expresa SHETREET, la confianza pública que deriva de su independencia e imparcialidad y de la eficacia del proceso de resolución de disputas, que debe ser justo, expeditivo y accesible (informe, pp. 19-20, donde alude asimismo al prestigio amplio de que goza la Suprema Corte en Israel, derivado de la observancia de ciertos principios esenciales, la publicidad de sus actos, la motivación de sus decisiones, entre otros).

[250] REIS FIGUEIRA A. y FERREIRA DA SILVA C.M., p.2.

[251] FAIREN GUILLEN V., pp.22 y ss.. SOSA G.L., pp.1-3.

[252] GREIF J., p.1, señala un buen nivel de confiabilidad y credibilidad, no así de eficacia en el fuero penal.

[253] ARGUEDAS SALAZAR O., p.1, salvo las críticas por morosidad en materia civil y laboral.

programa de reformas judiciales que puede resumirse así: mejorar los recursos humanos (selección régimen apropiado de derechos y deberes, controles disciplinarios), adecuar las leyes orgánicas y procesales, acentuar la publicidad de los procedimientos, dotar al sistema de recursos suficientes (infraestructura material, tecnología). Los requerimientos -y las insuficiencias- como los desafíos de siempre...

V LAS PRINCIPALES TENDENCIAS QUE SE AVIZORAN EN LA SITUACIÓN (POSITION) DEL JUEZ

Estamos ahora en condiciones de proponer algunas conclusiones sobre las principales tendencias que se vislumbran hacia el final de la centuria acerca de la situación de los jueces. Claro que conviene advertir sobre las dificultades a menudo insuperables de cualquier intento de generalización sobre tópicos tan complejos como los comprendidos en este informe, vinculados estrechamente con los contextos de pertenencia, obviamente diferenciados, en que los particulares fenómenos se suscitan en cada país o región. La situación (*position*) ha sido siempre, como el proceso, el espejo de una sociedad y de un Estado en un momento dado. De todos modos, y con esas salvedades, analizamos algunos de los tópicos en los que hemos podido encontrar puntos de contacto principales que permiten reconocer ciertas tendencias generales, que son las siguientes.

1. Magistratura y poder en el marco de las sociedades finiseculares

Resulta evidente la persistencia en casi todas las latitudes y aún el recrudecimiento de la puja entre los poderes políticos y la magistratura, por el reparto de las competencias sustanciales, en especial las relativas al gobierno del Poder Judicial, su administración y gestión financiera, el control disciplinario sobre los jueces. En contrapartida, se cuestiona el alcance y medida del control que el judiciario ejerce sobre los actos de los otros poderes. La búsqueda de nuevos y más adecuados equilibrios sigue siendo el gran desafío de políticos y juristas.

Esos conflictos se desarrollan en el marco de sociedades tendencialmente más plurales, abiertas y participativas, que privilegian valores sustanciales como la igualdad en concreto de todos los sujetos (ciudadanos, administrados, consumidores en general), la solidaridad, la justicia intrínseca, el Estado de Justicia superador del tradicional Estado de Derecho. La independencia judicial en tal contexto es un instrumento indefectible para el logro de esos objetivos morales de las sociedades finiseculares; y también es presupuesto de los propósitos económicos del crecimiento sustentable y autosostenido, que supone la seguridad jurídica. Sin independencia del Poder judicial deviene inconcebible la concreción de los objetivos morales y económicos que persiguen las sociedades finiseculares.

2. Independencia judicial vs. grupos de presión y mass media.

El necesario fortalecimiento de la independencia judicial exige el frontal rechazo de todas formas de presión provenientes de grupos sectoriales (políticos, económicos, nacionales y multinacionales, organizaciones ilegales), cuando de modo agresivo interfieren la función judicial.

Al mismo tiempo la explosión de los *mass media* desafía igualmente la independencia judicial, especialmente cuando obstaculizan y perjudican la labor de los jueces. El ejercicio legítimo de la misión informativa, para el fiel conocimiento por la opinión pública de la actuación de la magistratura, apuntala la función judicial, lo que requiere la instauración de relaciones formales e institucionalizadas con los medios masivos de comunicación.

La constatación de la presencia de éstos fenómenos y su interferencia en la misión de los jueces, ha puesto en evidencia, también, las diversas reacciones tendientes a salvaguardar la libre convicción judicial que es garantía insustituible para los ciudadanos.

3. Legitimación democrática, responsabilidad y "cuota de poder" del judiciario

En ese escenario tan complejo, la misión de los jueces y la independencia de la magistratura se asienta en los tiempos finiseculares más que nunca antes, en la propia labor judicial, en la forma cómo los jueces hacen justicia a los ojos de la comunidad y en la medida que asumen y se efectiviza su propia responsabilidad.

La legitimación democrática de los jueces, cuestión decisiva en la puja por la "cuota de poder" que corresponde al judiciario, asienta en el perfeccionamiento y democratización de los sistemas de designaciones (y también, de capacitación y especialización) cada vez más abiertos y pluralistas, tanto como en el incrementado protagonismo de aquellos, particularmente por el acentuamiento del control de constitucionalidad y legalidad de los actos de los poderes políticos y la tutela de las garantías fundamentales de las personas. Es a través de ello que los jueces se convierten en arbitradores y garantes del catálogo de valores que cobija la Constitución y, aún del sistema político institucional que ésta organiza, cuando asumen sus potestades con coraje cívico para poner freno a desbordes y excesos menoscabantes.

Los jueces -como subrayaba M. CAPPELLETTI en sus reflexiones de cierre de Congreso de Utrecht[254]- se han convertido en los directores de una nueva concepción de "gobierno limitado", es decir, limitado por los mandatos investidos en la Constitución y en el *Bill of Right*, particularmente a través de una interpretación legal más creativa y más responsable política y moralmente. Son verdaderos y propios jueces "activistas", en el sentido de las conclusiones de Coimbra-Lisboa (M. STORME y D. COESTER-WALTJEN)[255], que a partir de una visión progresista, evolutiva, reformadora, saben interpretar la realidad de su época y le confieren a sus decisiones un sentido constructivo y modernizador, orientándolas a la consagración de los *valores esenciales* en vigor.

[254] Ob. cit..
[255] Ob. cit., p.381.

4. Las nuevas misiones en un contexto de creciente "globalización" del sistema jurídico

Los jueces -"maestros de la metamorfosis" (M. STORME y D. COESTER-WALTJEN)- están llamados a asumir cada vez más, funciones superadoras de la tradicional misión compositiva en el marco puramente adversarial y garantístico, para convertirse ya en verdaderos y propios "administradores", "gestores", "acompañantes" o "colaboradores", en todos los casos, eficientes custodios de la efectividad en concreto de los derechos de las personas, en un escenario crecientemente "globalizado". Está claro que se encuentra absolutamente superado el modelo tradicional que veía al juez como la "boca inanimada que pronuncia las palabras de la ley". El actual encumbramiento de la función jurisdiccional se exhibe cuantitativamente, por el creciente cúmulo de las cuestiones que se someten a decisión -fruto del mayor acceso a la justicia-, pero más aún cualitativamente, en tanto ya no se agota la misión de los jueces en una tarea meramente mecánica de aplicación de las normas jurídicas, cuan meras "máquinas de subsumir" imaginadas para la sóla función garantística de los derechos subjetivos privados. Mucho más allá de ello, la labor jurisdiccional asume ahora el carácter de interpretación creativa o ya se muestra con otros novedosos perfiles, a menudo acuciada por la influencia de las desiciones pioneras de los tribunales internacionales.

5. Los actores "solidarios"en el drama judicial

Cuando el inolvidable P. CALAMANDREI imaginaba al juez y al abogado iniciando juntos su último camino, los actores del drama judicial estaban reconfortados porque, entre ambos, responsable y solidariamente disfrutaban la tranquilidad espiritual de haber dispensado "el bálsamo para todas heridas", la justicia[256].

En buenos y en malos tiempos, como lo expresara elocuentemente M. STORME en una reciente Jornada iberoamericana, el problema global de la justicia y de su funcionamiento, se reduce al problema de los actores de la Justicia, más particularmente de los jueces. Pero llama la atención el hecho de que hoy la Justicia está mantenida bajo fuego: hay jueces que son asesinados, otros son señalados como corruptos; los hay quienes son nombrados en los tribunales superiores para proteger el Estado de Derecho (*rule of law*), otros son criticados por pusilánimes y perezosos[257]. La misma contradicción muestran los abogados, porque conviven los apasionados defensores de las libertades de los ciudadanos junto con los corruptos que medran con las necesidades de la gente; los inspirados precursores que abren los nuevos caminos de la jurisprudencia, como verdaderos "soldados desconocidos" de las transformaciones del derecho, y los apáticos de mentalidad estereotipada y burocrática.

Jueces y abogados están juntos e indivisiblemente enfrentados al crucial desafío de cumplir la misión trascendente asignada al sistema de justicia. Juntos necesariamente deberán

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[256] *Elogio de los jueces escrito por un abogado*, EJEA, Bs.As., 1969, trad. S. SENTIS MELENDO, p.396.

[257] *Rumbos del proceso civil en la Europa unificada*, conferencia pronunciada el 3-8-98 en la apertura de las XVI Jornadas Iberoamericanas de Derecho Procesal, Brasilia.

recorrer el abrupto camino, porque la Justicia sólo se salvará por la acción mancomunada de unos y otros, si todos ponen *un supplément d'âme*[258].

6. *La paradoja de la creciente "jurisdiccionalización" en un contexto de descreimiento*

Es notorio que en las modernas sociedades de fines de este siglo mientras se constata en las encuestas de opinión la ineficiencia del sistema judicial y el desprestigio de la magistratura, paradójicamente el ciudadano común recurre cada vez más ante el Poder Judicial en la búsqueda de soluciones no sólo para sus conflictos individuales, sino también como gestor de los intereses públicos generales, a conciencia de que, en muchos casos, los otros "poderes políticos" son incapaces de brindárselas, o las transfieren directa o implícitamente a los jueces. Complejas cuestiones sobre tutela del medio ambiente y de los consumidores en general, aspectos político-institucionales relativos a la validez de actos de los restantes poderes, son buenos ejemplos de la creciente "jurisdiccionalización de las disputas". Claro que éste fenómeno no puede justificar el "imperialismo judicial" que desarticula la división de los poderes. Queda siempre el clásico interrogante ya planteado por JUVENAL: *quis custodiet ipsos custodes?* Es cierta, también, la conocida afirmación del Juez JACKSON: "nosotros no poseemos la palabra definitiva por ser infalibles, sino que somos infalibles porque nuestra decisión es definitiva". Pero a alguien debe de adjudicarse la "última palabra"; y si existen mecanismos adecuados de responsabilidad, la elección en favor de los jueces no debería ser cuestionada. Son incuestionablemente, unos de los componentes de un Poder y, por ende, engranaje del "Gobierno"[259].

7. *El "milagro" contemporáneo*

En la valoración de las distintas actitudes que puede asumir el juez en la sociedad contemporánea, superado el modelo tradicional que lo concebía como instrumento meramente pasivo, vocero inanimado de la voluntad general, el denominado "activismo judicial" intenta responder a las reales y concretas exigencias de una sociedad globalizada, democrática, pluralista, dinámica y participativa. Precisamente -y en relación directa- porque la comunidad se ha tornado crecientemente participativa, los hombres de justicia -jueces, doctrinarios y, también abogados- han asumido un rol cada vez más protagónico. Se han convertido en buena medida, en "activistas" de una causa que es intemporal y ecuménica, ya que persigue el perfeccionamiento y progreso de las instituciones mediante la justicia en concreto. Los jueces, actores visibles de semejante transformación, lejos de ser dictadores y sin la pretensión de "ángeles guardianes" de la sociedad, se han encumbrado como la tercera rama "política" del gobierno, especialmente porque ejercen el control de las otras ramas contribuyendo decisivamente al perfeccionamiento de las instituciones democráticas, y modelan el comportamiento colectivo a través de la razón y la persuasión, con vivo espíritu de justicia. Sólo así puede concebirse el "milagro" contemporáneo que muestra a la rama que HAMILTON consideró la "menos peligrosa", proyectada hasta emplazarse como árbitro y garante último de los derechos de los individuos.

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[258] M. STORME y D. COESTER WALDJEN, ob. cit., p.376.
[259] MORELLO A.M., p.1.

VI CONCLUSIO N

Las grandes tendencias que se avizoran en los albores del nuevo siglo respecto de la situación (position) de los jueces y del sistema judicial, destacan entre otros aspectos: 1) una persistente puja entre los poderes políticos y la magistratura, por el reparto de las competencias, especialmente las relativas al gobierno del Poder Judicial, su administración y gestión financiera, el control disciplinario sobre los jueces; 2) un frontal rechazo de todas formas de presión de grupos sectoriales y de las mass media, para afirmar la independencia judicial; 3) los renovados intentos de perfeccionamiento y democratización de los sistemas de designaciones judiciales, como justificación de la legitimación y del mayor "activismo" de los jueces; 4) la creciente asunción por los jueces de nuevas misiones no tradicionales, para convertirse en verdaderos "administradores", "gestores", "acompañantes" o "colaboradores" para la custodia en concreto de las garantías de todas las personas; 5) la correlativa responsabilidad "solidaria" de los abogados, como colaboradores de los jueces en el drama judicial; 6) la paradoja, en fin, de la creciente "jurisdiccionalización" de los conflictos de la sociedad en un contexto de descreimiento respecto de la eficacia del sistema judicial, que ha conducido a acentuar el encumbramiento de la rama judicial hasta emplazarse como árbitro y garante último del sistema de derechos.

VII SUMMARY

PRINCIPAL TENDENCIES OBSERVED AROUND THE POSITION OF THE JUDGE

We are now ready to propose some conclusions on the principal tendencies observed around the position of the judge at the turn of the century. It is obviously convenient to warn about the difficulty, often impossiblity, in generalizing on such complex topics as the ones discussed in this report, closely related to the different context in which each particular phenomenon takes place in every region or country. The position, as well as the procedure, has always been the mirror of the society and the State in a given time. However, having this in mind, we will analyse some of the topics in which we have been able to find important points of contact that allow to define certain general tendencies. They are:

1. Magistracy and authority within end-of-century societies.
In most countries there is an evident persistence and increased dispute among political authorities and the magistracy for the distribution of substancial functions, specially those related to the government of the Judiciary, its administration and financial management, and the disciplinary control of judges. On the other hand, the scope and limits of the control that the Judiciary has on the actions of the other authorities are seriously discussed. The search for a new and more adequate equilibrium is still the great challenge of politicians and experts.
Those conflicts develop within societies tending to be more plural, open and participative, privileging substancial values such as the concrete equality among persons (citizens, consumers in general), solidarity, intrinsic justice, justice system surpassing the traditional government of right. Within this context, judicial independence is an unfailing instrument for the achievement of moral objectives of end-of-century societies, and also a main element for economic objectives of sustainable and self-sustained growth, which grants juridical guarantee. The concretion of moral and economic purposes of any end-of-century society is unconceivable without the independence of the Judiciary.

2. Judicial independence vs. lobbies and mass media.
The necessary stregthening of judicial independence implies a hard rejection of any form of pressure coming from sectorial groups (either political, economic, national or multinational ones, illegal organizations), when aggressively interfering judicial function.
At the same time, the outburst of mass media also challenges judicial independence, specially when interfering with the work of judges. The legitimate exercise of information, for the exact knowledge of public opinion about the work done by the magistracy, supports the judicial function, but this requires the implementation of a formal and institutionalized relationship with mass media.
The clear presence of these phenomena and their interference with the mission of judges have also evidenced different reactions tending to protect free judicial conviction, which is an irreplaceable guarantee for citizens.

3. Democratic legitimation, responsibility and "share of power" of the Judiciary.
In such a complex scenario, the mission of judges and the independence of the magistracy are based at present on the very judicial work, on the way judges work according to the community, and the own responsibility they assume and make effective.
The democratic legitimation of judges, which is decisive in the struggle for the "share of power" corresponding to each judge, is based on the improvement and democratization of

the system of appointments (and also of training and specialization) increasingly more open and plural, on the evolving leadership of judges, particularly in the control of constitutionality and legality of the acts of public authorities, and the tutelage of fundamental guarantees of persons. Through these mechanisms, judges become arbitrators and guarantors of the catalogue of values precepted in the Constitution, and even of the institutional political system that Constitution provides for them when they assume the authority granted, with civic determination to avoid corrupting excess.
As M. CAPPELLETTI pointed out during his closing conference at the Utrecht Congress, judges have become leaders of a new conception of "limited government", that is, limited by mandates granted by the Constitution and the Bill of Right, particularly through a legal interpretation, more creative and politically and morally more responsible. In agreement with the conclusions arrived at in Coimbra-Lisbon (M. STORME and D. COESTER-WALTJEN), judges are real "activists" who, through a progressive, evolutive, reformative vision, know how to interpret reality and give their decisions a constructive and modern sense, orienting them towards essential values in force.

4. New missions for judges within a context of increasing "globalization" of the judicial system.
As "masters of the metamorphosis" (M. STORME and D. COESTER-WALTJEN), judges are bound to assume more functions surpassing the traditional composition mission, within a purely adversary and guaranteeing background, becoming real "administrators", "managers", "escorts" or "collaborators", always watching the effectiveness of the rights of persons and within an increasingly "globalized" scenario. The traditional model that considered the judge as "the inanimate mouth speaking words of the law" is obviously outdated. The present exaltation of the jurisdictional functions shows itself quantitatively, due to the increasing number of cases submitted to decision -due to highest access to justice-, but even qualitatively, since the mission of judges is no more the mechanical task of applying juridical regulations as actual "machines" with the only purpose of guaranteeing private subjective rights. Much more than this, the jurisdictional mission is now a creative interpretation and shows itself with new profiles, often urged by the influence of pioneering decisions of international courts.

5. "Solidary" actors of the judicial drama.
When the unforgettable P. CALAMANDREI imagined the judge and the lawyer at the beginning of their last pathway, the actors of the judicial drama felt satisfied because both of them enjoyed the responsible and solidary spiritual ease of having provided "the cure for all wounds", Justice.
According to the eloquent expression of M. STORME during a recent Ibero-American Meeting, not only in good times but also in bad times, the global problem of justice and its working is restricted to the problem of the actors of Justice, particularly judges. But it is surprising how Justice is nowadays kept working through violence: some judges are murdered, other ones are said to be corrupt; there are some others who are appointed for high courts to protect the rule of law, and others who are criticized for being weak and lazy. The same contradiction is observed for the case of lawyers, since those who are passionate defenders of the citizens rights have to interact with those who are corrupt and take advantage of those in need; the inspired precursors who open new ways towards jurisprudence as real "unknown soldiers" of law transformation, and the apathetic ones of stereotyped and burocratic mentality.
Judges and lawyers are together facing the crucial challenge of executing the fundamental

mission assigned to the justice system. They will have to go through the steep way necessarily together, because Justice will only be saved through the joint action of both of them, if all of them contribute with un supplément d'âme.

6. The paradox of the increasing "jurisdictionalization" within a disbelieving context.
While opinion polls prove inefficiency of the judicial system and discredit of the magistracy, it results amazing how, in modern societies at the turn of the century, the common citizen appeals to the Judiciary in search of the solution not only for his individual conflicts but also as manager of general public interests, knowing that in most cases the other "political powers" will not be provide any solution to them, or that they will be directly or implicitly transferred to judges. Complex cases about the protection of the environment and of consumers in general, political-institutional aspects related to the validity of the acts of the other authorities, are good examples of the increasing "jurisdictionalization of disputes". Obviously, this phenomenon does not justify the "judicial imperialism" dismembering the division of authority. The classical question asked by JUVENAL always remains present: quis custodiet ipsos custodes? The statement by Judge JACKSON is also valid: "we have the definite word not because we are infallible; we are infallible because our decision is definite". But someone must have the "last word", and, if there are adequate mechanisms for responsibility, this selection in favor of judges would not have to be discussed. They are non-questionable parts of authority and for this reason, gears of the "Government".

7. The contemporary "miracle".
When evaluating the different attitudes a judge can assume within this contemporary society, leaving behind the traditional model that considered him a passive instrument or an inanimate spokesman of the general will, "judicial activism" intends to find an answer for actual and concrete demands from a democratic, plural, dynamic and participating society. In close relation with this, since community has become participative, men of justice - judges, doctrine experts and even lawyers- have assumed a more protagonic role. They have become "activists" of a non-temporal and ecumenical motive for the improvement and progress of institutions by means of justice. Judges, visible actors of such a hard transformation, far from being dictators and far from the pretention of being "guardian angels" of society, have turned out to be the third "political" branch of government, mainly because they have the control of the other branches contributing to improve democratic institutions, and shape the collective behaviour through reason and persuasion, with the only spirit of justice. Only in this way can the contemporary "miracle" be conceived. It shows the branch that HAMILTON considered "less harmful", projecting the judge as arbitrator and last guarantor of individual rights.

VIII ZUSAMMENFASSUNG

Aktuelle Entwicklungen in der Stellung des Richters

Die großen Entwicklungen am Beginn des neuen Jahrhunderts betreffend die Stellung der Richter und des gerichtlichen Systems heben neben anderen Aspekten folgende hervor:

1) eine kontinuierlicher Machtkampf zwischen politischen Kräften und den Richtern um die Verteilung der Zuständigkeiten, insbesondere bezüglich derjenigen zur Regelung der richterlichen Gewalt, ihrer Verwaltung und Finanzgebarung und der disziplinären Kontrolle der Richter;

2) eine vollständige Zurückweisung aller Formen von Druck durch Interessensgruppen und Massenmedien, um die richterliche Unabhängigkeit zu sichern;

3) die wiederholten Versuche der Perfektionierung und Demokratisierung der Systeme der richterlichen Ernennungen als Rechtfertigung der Legitimation und des großen "Aktivismus" der Richter;

4) die vermehrte Betrauung der Richter mit neuen, nicht traditionellen Aufgabenbereichen, um sie in wahre "Verwalter", "Geschäftsführer", "Begleiter" oder "Mitarbeiter" zur Überwachung der Garantien aller Personen zu verwandeln;

5) die wechselseitige "solidarische" Verantwortung der Anwälte als Mitarbeiter der Richter im gerichtlichen Verfahren;

6) schließlich das Paradoxon der steigenden "Vergerichtlichung" gesellschaftlicher Konflikte einerseits und des Mißtrauens bezüglich der Wirksamkeit des gerichtlichen Systems, was dazu führt, daß der gerichtlich Zweig zum Schiedsrichter und letzten Garanten des Rechtssystems aufsteigt.

[Übersetzung Irene Tölg]

RECENT TENDENCIES IN THE POSITION OF THE LAWYER

Prof. Manuel Serra Dominguez, Spain

RECIENTES TENDENCIAS EN TORNO A LA PROFESION DE ABOGADO

by

Prof. Manuel Serra Dominguez, Spain

INTRODUCCIÓN

En la distribución de trabajo efectuado con el ponente general estadounidense Prof. William FISCH, convinimos en que por mi parte invitaría a los profesores de paises de "civil law" para presentar sus ponencias nacionales: Europa y América del Sur; mientras que él se dirigiría a los ponentes de "common law": Reino Unido, Irlanda, Canadá y U.S.A., y paises escandinavos.

Efectuadas las oportunas invitaciones a los diversos paises europeos y latinoamericanos, se excusaron de redactar la ponencia nacional alegando exceso de trabajo, los profesores de Suiza, Bélgica, Grecia, México y Uruguay, sin que contestaran los profesores de Francia, Venezuela, Colombia, Guatemala, Brasil y Chile.

Unicamente se han recibido las siguientes ponencias por orden de recepción:

- ITALIA, Profesores TARZIA y FRATINI
- ARGENTINA, Profesor ARAZZI
- ALEMANIA, Profesor SCHUTZE
- ~~ALEMANIA, Profesor BLANKENBURG (No invitado)~~
- PORTUGAL, Profesor LEBRE DE FREITAS
- ESPAÑA, Profesor ALONSO CUEVILLAS

La Ponencia General versará por tanto sobre dichas cinco ponencias, significando que por regla general la regulación de cada uno de dichos cinco paises es bastante similar, y en la mayoría de los casos su legislación se revela en profunda transformación sin contemplar la rica problemática de la sociedad contemporanea.

I. REGULACIÓN POSITIVA DE LA PROFESIÓN DE ABOGADO

La profesión de Abogado está regulada en la mayoría de los paises estudiados por normas de una cierta antiguedad, que solo recientemente están siendo objeto de estudios tendentes a adaptarlas a las modernas necesidades.

En ocasiones, como ocurre en el art. 208 de la Constitución portuguesa, la profesión de Abogado está garantizada incluso por la Constitución:

"Una ley asegura a los Abogados las inmunidades necesarias para el ejercicio de su función y regula el patrocinio forense como elemento esencial para la administración de justicia".

Dicha Ley fué aprobada en 16 marzo 1.984, que contiene el Estatuto de la Orden de los

Abogados, correspondiendo su desarrollo al Consejo General de dicha Orden, que aprobó el Reglamento de Honorarios en 14 julio 1.989, el Reglamento de Inscripción en 7 julio 1.989 y el Reglamento Disciplinario en 15 julio 1.989.

En Italia hay que remontarse al Estatuto aprobado por RDL 27 noviembre 1.933, desarrollado por RD 22 enero 1.934, que integra y actúa el Estatuto General. La norma reguladora de los honorarios de los Abogados es la Ley de 13 junio 1.942. La libre prestación de servicios por los Abogados de los restantes paises miembros de la Comunidad Europea ha sido regulada por Ley de 9 febrero 1.982.

En España, el art. 36 de la Constitucion se refiere en general a los Colegios Profesionales, previendo su regulación por Ley y dando como principio básico de su estructura interna y de su funcionamiento su caracter democrático. Dicha Ley, anterior a la Constitución, de 13 febrero 1.974, ha sido adaptada recientemente a las necesidades de entrada de España en la Unión Europea por el RDL 5/1.996 de 7 junio, y Ley 7/1997 de 14 abril, encontrandose actualmente en avanzado estado de estudio un proyecto de reforma.

En lo que respecta a los Abogados rige en la actualidad el Estatuto General de la Abogacía de 24 julio 1.982, habiendose aprobado recientemente en el Pais Vasco su propio Estatuto, y estando prevista para el próximo otoño la aprobación de otro Estatuto especial para Cataluña.

Por último, en Alemania el Código Federal de la Abogacía (BRAO) de 1 agosto 1.959 pese a su relativa modernidad, ha sufrido importantes reformas como consecuencia tanto de las resoluciones del Tribunal Constitucional, como de la reunificacion alemana, y del ejercicio de la profesión en paises extranjeros. Con fecha 29 noviembre 1.996 se aprobaron el Código de la profesión y el de especialización de los Abogados.

En cada uno de estos paises tanto la legislación orgánica, como la especial regulan aspectos concretos de la profesión de Abogado que analizaremos en los sucesivos apartados.

II. LA PROFESIÓN DE ABOGADO

II.1. Justificación de la profesión de Abogado

Pueden señalarse tres distintos fundamentos que justifican la intervención del Abogado ante los Tribunales: de una parte la complejidad de las leyes positivas que dificultan no sólo su conocimiento sino en gran número de ocasiones incluso su comprensión por los profanos; por otra parte el principio de igualdad de los ciudadanos ante la ley, principio teórico que solo puede garantizarse formalmente equilibrando las desigualdades reales entre las partes mediante su asesoramiento por un profesional; y, por último, colaborar con la actuación de los Tribunales proporcionando, mediante el método dialéctico en que se resuelve el proceso, los materiales indispensables para poder efectuar acertadamente una síntesis del problema jurídico suscitado.

Nos detendremos brevemente en el análisis de cada uno de dichos fundamentos, que ponen de relieve hasta que punto es necesaria en la actualidad la intervención del Abogado para la relación del valor Justicia, y el grave peligro de error judicial que puede derivarse de la no intervenci6n del Abogado en un proceso jurisdiccional:

a) Si bien es cierto que el positivismo constituyó una indiscutible conquista de la Revolución francesa, encaminado a proporcionar una mayor seguridad a las relaciones jurídicas, facilitando así su cumplimiento espontáneo por los interesados, tambien lo es que el excesivo culto a la ley positiva ha derivado de hecho en un distanciamiento entre la ley y el sentimiento natural de Justicia. En cuanto el legislador acierte a recoger en las leyes la solución a la que igualmente habrían llegado la gran mayoría de los ciudadanos, estos pueden asimilar y ajustar sus conductas a la ley positiva, incluso sin necesidad de conocerla. Pero la inflación legislativa moderna, y el ansia desmedida del planificador de invadir todas las parcelas de la sociedad, contribuye cada vez más a la creación de normas totalmente artificiales, que no sólo no son "sentidas" por el ciudadano, sino que se revelan incluso como opresoras del mismo ciudadano, al limitar sus derechos naturales. Las normas urbanísticas, fiscales o arrendaticias son claros ejemplos de legislación "antinatural" que obliga exclusivamente por el peso de la sanción pero que es objeto de un notable disfavor del ciudadano medio. Parece lógico que solo la intervención de una persona especializada en el conocimiento de las leyes pueda disminuir la indefensión del ciudadano ante leyes artificiales. Pero incluso respecto de leyes naturales, como puede ser el Código civil o el Código penal, las variaciones jurisprudenciales, no asequibles en principio al ciudadano medio, pueden constituir un factor de indefensión para el ciudadano que no esté debidamente asistido de Abogado.

b) Habida cuenta que las leyes procesales son esencialmente técnicas y pretenden garantizar la resolución más perfecta posible a través de un complicado juego de formas procesales que garantizan el principio básico de igualdad de las partes, se comprende que por definición dichas leyes sean escasamente asequibles a los ciudadanos, precisando su aplicación correcta una especialización que sólo es posible mediante la intervención del Abogado. Derivase de ahí la necesidad de intervención del Abogado en el proceso que enlaza con el carácter artificial y técnico de las normas procesales y en parte se justifica por lo expuesto en el anterior apartado. Pero conviene matizar que las normas procesales no son, o al menos no deberían ser, caprichosas, sino que pretenden garantizar la formación de una sentencia justa con pretensiones de invariabilidad a través del enfrentamiento dialéctico de las partes al que el Juez asiste como árbitro decisor. El carácter de lucha, de juego y de arte que varios autores con acierto han predicado de las normas procesales, convierte en necesaria la intervención del Abogado en el proceso. Pero es que, además, dicha intervención posibilita la vigencia real del principio teórico de igualdad de las partes. Si se permitiera a las partes litigar por sí solas, sin intervención de Abogado, la victoria correspondería en la gran mayoría de los casos a la parte más diligente y más preparada, intelectual y jurídicamente. La obligatoria
intervención del Abogado ante los Tribunales de Justicia garantiza formalmente el principio de igualdad de partes, al contar cada una de ellas con un profesional del derecho legalmente habilitado para el ejercicio de su profesión. Podrán ciertamente producirse diferencias entre los Abogados que defiendan a ambas partes, pero como mínimo queda garantizada la posesión por cada Abogado de unos conocimientos jurídicos reconocidos administrativamente que posibilitan el ejercicio de su función.

c) Por último, conviene no olvidar que la necesaria intervención de Abogado en el proceso no sólo constituye una garantía para las partes, sino principalmente supone una ayuda insustituible para el órgano jurisdiccional. A través del método dialéctico, que alcanza una importancia extrema en el proceso civil, pero que también influye precisamente por su utilidad formal en el proceso penal, el Juez llega al momento de la decisión contando con todos los argumentos, favorables y desfavorables, que le han proporcionado los Abogados de las partes. Se encuentra en una situación inmejorable para poder efectuar una síntesis de las posturas encontradas de las partes y llegar a una sentencia justa. La defensa no constituye únicamente un derecho de los justiciables, sino principalmente y ante todo una garantía de acierto de la decisión jurisdiccional. La colaboración que prestan los Abogados en los procesos judiciales constituye precisamente una de las grandes conquistas del ordenamiento jurídico y reviste una importancia insustituible en los actuales momentos de crisis de la Administración de Justicia, facilitando el enjuiciamiento de unos órganos jurisdiccionalmente poco preparados funcionalmente y colapsados por un exceso de trabajo.

II.2. Requisitos para el ejercicio de la profesión

Concurre un presupuesto común en todas las legislaciones examinadas: la aprobación de una Licenciatura en las Facultades de Derecho, existiendo únicamente diferencias entre el periodo de tiempo preciso para dicha enseñanza universitaria, que normalmente es de cinco años, pero que en algunos supuestos puede reducirse a cuatro o aumentarse a seis, y en el sistema seguido para la calificación: por el profesorado de las propias Facultades de Derecho o por el Estado.

Se han suprimido las antiguas restricciones de acceso a las profesiones jurídicas por parte de las mujeres, que actualmente están accediendo en número casi superior al de los varones a las profesiones juridicas. El ponente ~~aleman~~ BLANKENBURG señala que en Alemania las mujeres solo fueron admitidas al ejercicio profesional en el año 1.922, siendo excluidas de nuevo bajo el régimen nazi, y pese a que fueron admitidas despues su número siguió siendo muy bajo, pero se está incrementando extraordinariamente, pasando las estudiantes de derecho de un porcentaje del 15 % en el año 1.973 a un porcentaje del 45 % en el año 1.990. Nuestra experiencia docente pone de relieve que en la actualidad dicho porcentaje ha sido superado, llegando en ocasiones en la Facultad de Derecho de Barcelona a superar el 75 % de los alumnos inscritos en los últimos cursos.

Característica común a todas dichas legislaciones es asimismo la inscripción en un Colegio Profesional, variando tan sólo el ámbito territorial de dicho Colegio y si basta la colegiación en un solo Colegio o es indispensable estar colegiado en todos los Colegios.

Con la única excepción de España, en todos los paises examinados se requiere la realización de una práctica profesional, de las características que examinaremos a continuación.

II.3. La Colegiación profesional

Se justifica la necesidad de que los Abogados para el ejercicio de sus funciones esten inscritos en un Colegio profesional en dos distintos órdenes de razones:

a) De una parte, la defensa de los intereses de los Abogados frente a posibles presiones procedentes tanto de los poderes políticos como de la propia Administración de Justicia. Un Abogado individual carecería de medios de defensa frente a dichas presiones, mientras los Colegios de Abogados, dotados de una fuerte autonomía jurídica y económica, pueden asumir fáilmente la defensa de la profesión frente a los ataques que puedan desnaturalizarla.

b) Pero al mismo tiempo el control del Colegio sobre sus Colegiados, constituye una garantía insustituible del mantenimiento del prestigio inherente a la profesión de Abogado. Tanto en lo relativo a la regulación de honorarios, como en la aplicación de sanciones disciplinarias, como incluso en el establecimiento de incentivos para los profesionales, los Colegios de Abogados desempeñan una función esencial.

La problemática surge en torno a dos cuestiones:

1ª.- El caracter obligatorio o facultativo de la Colegiación; y

2ª.- Si es suficiente dicha Colegiación en un único Colegio o por el contrario es indispensable la colegiación en todos y cada uno de los Colegios en cuyo territorio desee ejercer el Abogado.

La normativa tradicional hasta el momento obligaba necesariamente a los Abogados a inscribirse en todos y cada uno de los Colegios en cuyo territorio deseara prestar sus servicios. Pero en los últimos tiempos, incluso manteniendose la colegiación obligatoria, se está atenuando jurídicamente, aunque con una importante resistencia por parte de los Colegios tradicionales, la multicolegiación con caracter obligatorio.

Como veremos en un próximo apartado únicamente en Portugal la inscripción en un Colegio de Abogados permite actuar en todo el territorio nacional, mientras que en Italia es indispensable designar el domicilio de un colega en el lugar donde deben prestarse los servicios, y en España no es posible actuar como Abogado en un determinado Tribunal, sin estar dado de alta o habilitado en el Colegio profesional del lugar. En Alemania la actuación del Abogado está limitada al territorio en que haya obtenido permiso para ejercer.

La importancia de la colegiación llega al extremo de que tanto en Portugal, como en España o Italia, los requisitos para el ejercicio de la profesión se establecen precisamente para inscribirse en los Colegios de Abogados, hasta el punto de que, como advierte el Ponente español, únicamente pueden utilizar el titulo de "Abogados" los que figuren inscritos en un Colegio Profesional.

Como principales excepciones a la colegiación se establecen la de los Licenciados en Derecho que sean funcionarios públicos, que pueden defender a las Corporaciones en que presten sus servicios, y los Licenciados en Derecho que se defiendan esporádicamente a sí mismos, a su cónyuge o a sus hijos, que precisan no obstante la previa autorización del Colegio de Abogados correspondiente, que normalmente acostumbra a darla.

II.4. Práctica profesional

El gran número de Abogados colegiados - que en Alemania alcanza los 80.000 y en Italia los 90.000 -, derivado básicamente de la masificación de las universidad y del conveniente acceso de todas las capas sociales a las enseñanzas superiores, determina que en la mayoría de los paises se establezca con caracter previo a la colegiación acreditar unos conocimientos prácticos específicos que habiliten para el ejercicio de la profesión.

Unicamente en España por el momento, ante la fuerte resistencia de los colectivos de estudiantes ante dicha necesaria medida, es posible la inscripción simplemente mediante justificar la obtención del titulo de Licenciado en la Facultad de Derecho. Sin embargo, tal como indica la ponencia española, en las propuestas de reforma se preven como sistemas alternativos la previa pasantía en un despacho profesional o completar la formación en alguna de las varias Escuelas Jurídicas propiciadas por las propias Facultades de Derecho o los Colegios Profesionales.

En Portugal, se establece con caracter obligatorio previo a la inscripción en la Orden de los Abogados la superación de un periodo de formación de 18 meses encaminado a proporcionar "una formación adecuada para el ejercicio de la actividad profesional, de forma que pueda desempeñarla en forma competente y responsable, tanto en sus vertientes técnica como deontológica".

En Italia, el periodo de práctica forense es de dos años despues de la licenciatura, transcurridos los cuales debe superarse con éxito un examen de estado. Existen actualmente dos proyectos de reforma dirigidos no solo a disminuir el número de Abogados ejercitentes, sino tambien a igualarlos en todo el territorio nacional, previendose en uno de ellos aprobado por el Consejo de Ministros en julio 1.998, un periodo de practica de tres años, seguido de un examen nacional en Roma, con una preclusión de tres exámenes infructuosos.

III. INTERVENCIÓN OBLIGATORIA O FACULTATIVA DE LOS ABOGADOS EN LOS DISTINTOS PROCESOS

III.1. En el proceso civil

Se siguen diversos criterios según los paises, atendiendo tanto al grado de los Tribunales, como a la cuantía de los asuntos:

a) Normalmente, es obligada la asistencia de Abogado ante los Tribunales de apelación, y siempre ante el Tribunal Supremo.

b) La cuantía varía según los paises:
En Portugal es obligatoria a partir de 500.000 Escudos, si procede apelación ante el tribunal de 1ª Instancia, y de 2.000.000 Escudos, si procede apelación ante los Tribunales de 2ª Instancia: cuantías recientemente elevadas por la Ley Orgánica de los Tribunales Judiciales de 13 enero 1.999 a las sumas de 750.000 Escudos y 3.000.000 Escudos, elevación aplicable a partir del 15 septiembre 1.999.

En Italia, puede la parte defenderse por si misma en aquellos procesos ante el Juez de Paz de cuantía inferior a un millón de liras, pudiendo no obstante dicho Juez autorizar, habida cuenta la naturaleza y entidad de la causa, a prescindir de la asistencia de Abogado aún cuando el valor sea superior.

En Alemania, corresponde a los Tribunales locales, cuya competencia alcanza los 10.000 DM decidir si es precisa o no la asistencia de Abogado en los procesos que se siguen ante ellos. Ante los Landgericten y Tribunales Superiores es indispensable la presencia de Abogado.

En España, se exceptúan de la asistencia de Abogado los juicios verbales (cuantía máxima 80.000'- Ptas.) y los de desahucio por falta de pago de viviendas, asi como los actos de jurisdicción voluntaria cuya cuantía sea inferior a 400.000'- Ptas. El Proyecto de Ley de Enjuiciamiento Civil actualmente en discusión ante las Cortes, que ha motivado una fuerte oposición por parte de la Judicatura, de la Abogacía y de gran parte de la Universidad española, eleva dicha cuantía en los juicios ordinarios a la suma de 300.000'- Ptas.

El necesario respeto al principio de igualdad de las partes, debería determinar que si el demandante, como es norma general, acude al proceso asistido de Abogado, el demandado pudiera tambien acudir con Abogado de su elección, cuyo coste debería incluirse, caso de vencimiento, en la tasación de costas que pudiera efectuarse.

III.2. En el proceso penal

La importancia de los intereses en juego en el proceso penal, unida al caracter marcadamente positivo de las leyes penales, convierten en indispensable la asistencia de Abogado en todos los procesos penales.

Unicamente hay que distinguir entre la asistencia al imputado, que deviene tan necesaria que de no designarlo el propio imputado, se le asigna Abogado de oficio por parte del juez; y la asistencia del perjudicado, quien si bien precisa de Abogado para constituirse como parte en el proceso, puede, como parte contingente que es, dejar de intervenir en el mismo, siendo en tal supuesto defendidos sus intereses por el Ministerio Fiscal.

La necesaria asistencia de Abogado es puesta de relieve en todas las ponencias nacionales, destacando la ponencia italiana que dicha asistencia no excluye el ejercicio en determinados casos del derecho de autodefensa del imputado, y la ponencia española el caracter facultativo de la asistencia de Abogado en los juicios de faltas, lo que ha sido muy discutido por la doctrina, sobre todo en aquellos juicios de faltas derivados de accidentes de circulación en los que se debaten responsabilidad civiles de gran montante económico que de ser tramitadas en procedimiento civil deberían serlo con asistencia de Abogado.

III.3. En el proceso laboral

Dada la simplicidad de las cuestiones debatidas en el proceso laboral, en principio no es obligatoria la defensa por medio de abogado, si bien en méritos del principio de igualdad de partes aquella que deseara acudir al proceso asistida de Abogado debería indicarlo así en su demanda a los efectos de que la parte contraria pudiera acudir asistida igualmente de defensor.

Esta es la solución prevista en el Derecho positivo español, en el cual, además, se autoriza la representación no sólo por Abogado, sino tambien por Procurador o por Graduado Social.

En el Derecho portugués es obligatoria la asistencia de Abogado respecto del empresario, en las mismas cuantías que en los procesos civiles, pero no así respecto de los trabajadores que son asistidos por el Ministerio Público en aquellos casos en que no hayan designado Abogado de su elección.

En Italia, la intervención de Abogado es necesaria siempre que la causa exceda de 250.000 Liras.

En Alemania, es facultativa la intervención en la primera instancia ante los Juzgados de lo Laboral de cualquier Abogado independientemente del territorio en que esté colegiado. Es obligatoria la asistencia de Abogado, tambien sin limitación de territorio, para la segunda y tercera instancias.

III.4. En el proceso administrativo

Tanto en Italia como en Portugal es indispensable siempre la defensa mediante Abogado, si bien la Administración puede defenderse a traves de sus propios funcionarios.

En España la reciente Ley de 13 julio 1.998 preve que ante los Juzgados unipersonales el Abogado pueda ostentar tanto la defensa como la representación, si bien en los Tribunales colegiados la representación corresponde al Procurador, lo que constituye una novedad respecto de la regulación anterior. La defensa de la Administración del Estado corresponde a un cuerpo especial de funcionarios denominados Abogados del Estado.

En Alemania es facultativa la presencia de Abogado en primera y segunda instancia, siendo indispensable tan sólo en el proceso ante el Tribunal Federal de lo Administrativo. Pueden actuar no sólo los Abogados, sino tambien los Profesores de Universidad.

III.5. En el proceso tributario

No existe en España el proceso tributario, siendo planteadas las reclamaciones tributarias ante los mismos Tribunales contencioso-administrativos.

En Italia es indispensable la asistencia de un defensor en los litigios de valor superior a 5.000.000 de liras, sin ser preciso que se trate de un Abogado, pudiendo ser desempeñada por los doctores y por los peritos mercantiles.

En Alemania es facultativa la intervención de Abogado, si bien, en caso de necesidad, el Tribunal puede designar abogado a una de las partes.

IV. DEBERES DEL ABOGADO

IV.1. Frente a los Tribunales

Existe una sustancial coincidencia entre todas las ponencias presentadas respecto de las obligaciones del Abogado en su intervención ante los Tribunales de Justicia, que se centran básicamente en la probidad, la lealtad y la veracidad en cuanto al fondo de sus declaraciones y el respeto en cuanto a la forma de su intervención.

La lealtad del Abogado está estrechamente relacionada con el cumplimiento de la defensa jurídica. El Abogado tiene, obligación de defender a su cliente con el máximo celo y diligencia, pero ello significa tambien, en aras a obtener una resolución acorde a los intereses que defiende, pero vinculada tambien a la justicia, que debe ofrecer al Tribunal una información que se ajuste a la verdad, sin inducir a la confusión ni al error, uniendo sus conocimientos de técnica juridlca puestos al servicio de la parte por él defendida con la deontología jurídica, sin olvidar que si bien su interés primero será la defensa jurídica del asunto encomendado, su función está justificada por su colaboración en la formación de la justicia del caso concreto.

Formalmente el Abogado tiene la obligación de guardar el respeto y la consideración debidas a los miembros de los Tribunales de Justicia, obligación que es recíproca y que debe verse correspondida con igual respeto y consideración por parte de los Tribunales.

El derecho de defensa ofrece un margen muy amplio de actuación, sin más limitación que la que viene impuesta por la Ley. En las relaciones Abogado-Tribunales de Justicia, el Abogado queda sujeto en muchas ocasiones a la potestad de corrección disciplinaria por parte del Tribunal, que será estudiada en un próximo apartado, debiendo por el momento anticipar que en este terreno el Tribunal se convierte en juez y parte de su propio asunto, toda vez que auna, en algunos casos, la condición de ofendido y al propio tiempo debe juzgar su propia ofensa.

Interesa destacar para un correcto desarrollo de las relaciones del Abogado con los Tribunales de Justicia el carácter de colaborador necesario del primero para el funcionamiento de los segundos, carácter que en estos últimos tiempos se tiende por desgracia a olvidar incrementandose los enfrentamientos entre los Abogados y el personal jurisdiccionnal que en definitiva redundan en perjuicio de la propia Justicia a que ambos coordinadamente deben servir.

Las relaciones entre los Administradores de Justicia y los Abogados vienen determinadas por la ley, pero deberían estar presididas por la cordialidad y el respeto mutuos, respeto inexistente en muchas ocasiones por desconocimiento de la función propia y del supuesto oponente. El derecho de defensa juridica tiene un techo muy alto y el Abogado debería conocer muy bien la técnica juridica que debe aplicar, siendo ésta una función primordial de las Escuelas de Práctica Juridica, para evitar incurrir en actuaciones irrespetuosas e insolentes que pueden encubrir la propia ignorancia. Pero debería saber tambien como dirigirse al Tribunal, conocer sus derechos y ejercitarlos y hacerse respetar. Entra aquí la función primordial del Colegio de Abogados en defensa de sus colegiados, ya que muchas

veces actuaciones personales tendentes a lograr el reconocimiento del respeto que se le debe al Abogado, solo consiguen ganarse la enemistad permanente, con todas sus consecuencias personales, del titular del órgano jurisdiccional cuyo respeto se pretendía conseguir.

Dicho respeto mutuo adquiere singular importancia en las actuaciones orales, regidas por el principio de inmediación, y debe extremarse cuidadosamente en las actuaciones penales en que la presencia del cliente puede motivar una pérdida de prestigio mutua del Tribunal y del Abogado enfrentados. Tengase en cuenta que la introducción del Jurado exige una especial atención al mutuo respeto debido entre los Tribunales y el Abogado.

IV.2. Frente a sus clientes

Existe tambien sobre este punto una marcada coincidencia entre las varias Ponencias nacionales, pudiendo resumirse en los siguientes puntos:

1º.- El principal deber es el cumplimiento, con el máximo celo y diligencia y guardando el secreto profesional, de la misión de defensa que le sea encomendada, para lo cual realizará diligentemente las actividades que le imponga la defensa del asunto confiado.

2º.- Debe recalcarse asimismo que pese a la complejidad de la técnica jurídica y precisamente por ello, el Abogado debe periódicamente informar a su cliente, en la forma más llana y comprensible, de la situación del caso ante los Tribunales, así como de las eventuales perspectivas de éxito, cuidando en todo caso de advertir el carácter siempre incierto de cualquier resolución judicial. En especial, debe poner especial cuidado en informar a su cliente de los problemas sociológicos del proceso, centrados en un coste y una duración excesivas, tanto antes de iniciar cualquier actuación judicial, como en el curso de la misma, poniendo especial enfásis en la responsabilidad de la Administración del Estado en el mantenimiento de tan insostenible situación.

3º.-Por último, conviene destacar las obligaciones del
Abogado respecto de la parte contraria que se centran en la abstención de cualquier acto u omisión que determinen una lesión injusta y el trato considerado y cortés en cada caso.

IV.3. El secreto profesional

Está regulado en términos similares por el art. 41 del Estatuto español, por el art. 81 del Estatuto portugués, por los arts. 249 CPC y 200 CPP italiano, y por los arts. 43.a.2 BRAO y 2 del Código de la profesión alemán. El Abogado tiene el derecho y al propio tiempo la obligación, a veces difíciles de distinguir, de guardar secreto profesional. Secreto profesional que es inherente a la profesión que ejerce, a toda su actividad como defensor de las causas de sus clientes, asi como asesor y, a veces, incluso colaborador en las actividades de las personas que acuden a su despacho para la solución de sus problemas o simplemente para una consulta; la relación de confianza entre cliente y Abogado exige que los hechos conocidos a través de la consulta no puedan ser divulgados terceros. Es evidente y comprensible que el Abogado viene a ser una especie de confesor de su cliente.

El articulo 41 del Estatuto General de la Abogacía española protege este derecho-deber de secreto profesional por parte del Abogado. Y aclara en que consiste el secreto profesional: "Constituye al Abogado en la obligación y en el derecho de no revelar ningún hecho ni dar a conoce ningún documento que afecten a su cliente, de los que hubiera tenido noticia por él mismo en razón del ejercicio profesional".

El Abogado, en razón a las consultas que realiza en su despacho, tiene conocimiento de hechos, documentos y circunstancias que en plan de consulta o confidencialmente le confía su cliente. Por ello el Abogado, además de obligación, tiene el derecho de guardar silencio sobre dichas materias.

Deben criticarse como gravemente atentatorias a dicho secreto profesional, tanto algunas disposiciones fiscales que responsabilizan al Abogado por el asesoramiento prestado a sus clientes, como sobre todo la ingerencia indiscriminada en los despachos profesionales, bien mediante inspecciones oficiales, bien mediante escuchas telefónicas, tanto si están autorizadas legalmente, como si se efectuan clandestinamente. La utilización de los avances técnicos no puede en ningún caso suponer una lesión del secreto profesional, debiendo ser denunciadas enérgicamente por los Colegios de Abogados, tales prácticas que dificultan el contacto entre Abogado y cliente, indispensable para el correcto desarrollo de la defensa.

IV.4. La publicidad del Abogado

La ponencia italiana no hace referencia alguna a esta cuestión, que sin embargo es ampliamente abordada tanto por la ponencia alemana como por la ponencia española, dado que se trata de un tema de la máxima actualidad en ambos paises que ha sido objeto de importantes y recientes reformas.

Tradicionalmente venía manteniendose un criterio restrictivo de la publicidad del Abogado que sigue vigente en el art. 80 del Estatuto portugués, que tras prohibir rotundamente toda clase de publicidad, directa o indirecta, mediante circulares, anuncios y medios de comunicación social, únicamente permitía el uso de rótulos en el exterior de sus despachos y la utilización de tarjetas de visitas y papel de carta con simple mención del nombre del Abogado, dirección de su despacho y horario de visitas.

Similar regulación se contenía en el Estatuto español, el cual sin embargo ha sido superado por el Colegio de Abogados de Barcelona, que ha aprobado en 21 julio 1.998, un nuevo Reglamento de Publicidad, orientación extendida a toda Cataluña en 11 diciembre 1.998 y que está recogida además en el Proyecto de nuevo Estatuto actualmente en deliberación, cuyo articulo 25 transcribo literalmente:

1. Los Abogados podrán efectuar publicidad de sus servicios y despachos conforme a lo establecido en la legislación vigente, en el presente Estatuto General y en las demás normas y acuerdos colegiales.

2. La publicidad de los Abogados y sus despachos, sea directa o indirecta, así como su intervención en consultorios jurídicos de medios de comunicación social, deberá someterse a autorización previa de la Junta de Gobierno del respectivo Colegio de Abogados, de conformidad con el art. 8.1 de la Ley General de Publicidad, por referirse a derechos constitucionalmente reconocidos como los de defensa y asistencia jurídica. La

autorización se entenderá concedida si en el plazo de un mes no es denegada o condicionada a determinadas modificaciones, mediante resolución motivada e impugnable conforme al presente Estatuto General.

3. No obstante, los Abogados podrán, sin necesidad de autorización previa:

a) Utilizar membretes en los que se exprese el nombre, profesión, titulación académica del Abogado o Abogados integrados en un despacho, indicación de la dirección, teléfonos y otros datos relativos al mismo, en la forma usual en cada Colegio.

b) Colocar en el exterior del inmueble donde esté instalado su despacho o vivienda, así como en la puerta de ésta o cerca de ella, un rótulo o placa indicadora del despacho, con las dimensiones y características usuales en el ámbito de cada Colegio.

c) Hacer constar su condición de Abogado en las guías telefónicas, de fax, télex o análogas.

d) Remitir o publicar informaciones sobre los cambios de dirección, teléfono y otros datos relativos a su despacho profesional, también en la forma usual en cada Colegio.

e) Intervenir en conferencias o coloquios, publicar colaboraciones en prensa especializada o no y efectuar declaraciones ante los medios de comunicación social, haciendo constar su condición de Abogado.

4. Los Abogados que presten sus servicios en forma permanente u ocasional a empresas individuales o colectivas, deberán exigir que las mismas se abstengan de efectuar cualquier clase de publicidad que no se ajuste a lo establecido en este Estatuto General.

Por lo que respecta a Alemania, hasta el año 1.987 existía una prohibición absoluta de publicidad. La anulación de dicha prohibición por el Tribunal Constitucional motivó profundas reformas tanto en el art. 43 b BRAO, que autoriza la publicidad de los Abogados mientras informen objetivamente de la forma y contenido de la actividad profesional por ellos desarrollada y no tenga la finalidad de conseguir hacerse cargo de un determinado asunto.

Los arts. 6 a 10 del Código de la Profesión han completado dicha regulación estableciendo una serie de reglas que han sido objeto de amplia discusión jurídica y que son extensamente desarrolladas en la ponencia alemana del profesor SCHUTZE. Se admite la publicidad en la que se expresen los titulos académicos y los temas dominantes, con un máximo de tres, pero se prohibe emplear términos equívocos como los de "experto" o "especialista". Especiales precauciones se utilizan respecto de la publicidad de los despachos colectivos.

IV.5. Deberes frente a sus compañeros

Están expresamente regulados en el art. 86 del Estatuto portugués y en el art. 46.b del Estatuto español, asi como en los arts. 12, 14 y 15 del Código de la profesión alemán, siendo el principio general el de "guardar, respecto de los compañeros de profesión, las obligaciones que se deríven del espíritu de hermandad que entre ellos debe existir, evitando competencias ilícitas y cumpliendo los deberes corporativos", respecto del cual cabe destacar las siguientes aplicaciones prácticas en la actuación ante los Tribunales de Justicia:

1º.- Ante todo conviene señalar el caracter esencialmente técnico de la profesión de Abogado que le obliga a mantenerse por encima de las tensiones del caso concreto. No debe

olvidar nunca el Abogado el caracter fungible de su actuación en el proceso, siendo meras cuestiones de oportunidad las que determinan que defienda a una u otra parte. Ello obliga a guardar el más exquisito respeto hacía el compañero en la redacción de los escritos judiciales y en los trámites orales, evitando cualquier referencia hacia el Abogado contrario, y procurando atribuir al contrario, y nunca al Abogado, los posibles errores cometidos.

2º.- Si bien los errores jurídicos, tanto formales como materiales, en que pueda haber incidido el Abogado contrario deben ser denunciados en aras a la defensa, debe efectuarse la denuncia con toda objetividad, evitando recrearse en el defecto cometido. En particular, debe procurarse no denunciar formalismos carentes de todo contenido, o aprovechar desviadamente oportunidades procesales sin otra finalidad que la de dilatar la marcha del proceso.

3º.- Para mantener el clima de confianza en las relaciones mutuas entre los Abogados, debe evitarse cuidadosamente la aportación al proceso de las cartas remitidas entre ellos intentando un arreglo amistoso, e incluso debe procurarse silenciar la referencia al detalle de dichas negociaciones.

4º.- Especial importancia revisten las relaciones entre Abogados en los actos orales que deban desarrollarse en audiencia pública antes estudiados. Recordaremos en particular la obligación del Abogado que no pueda o no quiera asistir a una vista pública de avisar previamente al Abogado contrario; y la elemental regla de cortesía de esperar un plazo prudencial, como mínimo de quince minutos, la presencia del Abogado contrario antes de iniciar el acto.

V. DERECHOS DEL ABOGADO.

V.1. Garantías de la defensa

El derecho a la defensa se encuentra garantizado tanto en Italia como en España por el art. 24 de su Constitución, que lo elevan a derecho fundamental, cuya infracción determina la nulidad de todo lo actuado, y que en España puede ser denunciado incluso ante el Tribunal Constitucional vía recurso de amparo.

En Portugal los arts. 54 a 64 del Estatuto regulan minuciosamente dichas garantías, limitando la inspección de los despachos profesionales, y la detención de su correspondencia, concediendoles trato preferencial respecto del examen de expedientes, y facultandoles para examinar cualesquiera procesos, libros o documentos que no tengan caracter reservado, sin necesidad de presentar poder.

En Alemania, los Abogados sólo pueden ser excluídos de un proceso cuando han participado en el delito, se aprovechan de su trato con el acusado para cometer delitos, o cuando existe peligro para la seguridad del Estado (Art. 138 StPO).

La defensa de dichas garantías corresponde no sólo a cada Abogado individualmente considerado, sino principalmente al Colegio de Abogados, cuya principal justificación reside precisamente en "defender, cuando lo estime procedente y justo, a los colegiados en el desempeño de las funciones de la profesión o con ocasión de las mismas"

V.2. Los honorarios profesionales

Pese a que el contrato entre el Abogado y su cliente sea considerado como un arrendamiento de servicios, siendo por tanto el precio un elemento esencial del mismo, la necesaria relación de confianza entre el Abogado y su cliente ha determinado que en la práctica la determinación de los honorarios profesionales sea convenida libremente entre las partes, siendo raros los casos en que se suscita discusión entre el Abogado y su cliente en torno a su cuantía.

La principal problemática reside en los supuestos de condena en costas, en los que la parte vencida debe correr con el pago de los honorarios del Abogado de la parte vencedora, en cuyo supuesto, ausente la relación de confianza, resulta indispensable la fijación de unas normas orientadoras para determinar su importe.

Los criterios para determinar dicha cuantía acostumbran a ser homogéneos en todas las ponencias presentadas: cuantía y complejidad del asunto, categoria de los Tribunales, tiempo invertido en la defensa, de todos los cuales normalmente predomina, por su caracter objetivo y de fácil comprobación, el relativo al valor del objeto litigioso.

Las principales diferencias residen tanto en la forma de determinación de dichos honorarios, de existir desacuerdo, y en al procedimiento a seguir para su reclamación:

a) En Italia los honorarios son fijados cada dos años por acuerdo del Consejo Nacional Forense, que debe ser aprobado por el Ministro de Gracia y Justicia, siguiéndose el criterio de honorarios máximos y mínimos, que son cuantificados por el Juez en la propia sentencia que pone término al proceso, pudiendo excepcionalmente apartarse de dichos limites. Su reclamación puede efectuarse bien mediante el proceso monitorio, bien mediante reclamación ante el propio Tribunal que ha conocido del proceso.

b) En Portugal no existe una regla general de fijación de honorarios por parte de la Orden de los Abogados, estando facultados no obstante las asambleas de cada comarca para establecer, con caracter orientativo, tablas de honorarios medios que recojan la práctica de la comarca. En caso de impago de la minuta el Abogado puede reclamar su importe por los procedimientos ordinarios, teniendo derecho no obstante a retener en garantía de su cobro los documentos, valores u objetos que le hayan sido entregados.

c) En España regía hasta el año 1.996 un sistema de fijación de honorarios mínimos por parte de los Colegios de Abogados, considerandose competencia desleal minutar por debajo de los mismos. El RD 7 junio 1.996 prohibió dicha práctica, autorizando tan sólo la fijación de honorarios orientativos, que en la práctica fija cada Colegio teniendo como principal criterio orientador la cuantía del asunto, sin que dichos criterios sean obligatorios para los Tribunales, quienes pueden, en caso de discusión, moderarlos, facultad que raramente utilizan en la actualidad. Su reclamación, cuando se trata de honorarios devengados en procesos judiciales, se efectúa mediante un proceso de ejecución especial privilegiado denominado "jura de cuentas" frente al Procurador de los Tribunales, que legalmente en méritos de una disposición actualmente anacrónica, viene obligado a su pago.

d) En Alemania, el Código Federal sobre honorarios los determina en función de la cuantía del litigio, sin tomar en consideración ni el tiempo invertido, ni la complejidad del proceso, ni su duración ni el número de actuaciones. No obstante son lícitos los pactos sobre honorarios previos al proceso que deben redactarse siempre por escrito, y pueden tomar en consideración otros factores y muy principalmente el tiempo invertido. Está prohibido hacer depender la cuantía de los honorarios del resultado del proceso.

V.3. El pacto de "quota litis"

El pacto de cuota litis definido por el Código de Deontología como "el acuerdo entre el abogado y el cliente, antes de la conclusión definitiva de un asunto en el que se hallan en juego los intereses de este último, mediante el cual el cliente se obliga a pagar al abogado una parte del resultado del asunto, consistente en una suma de dinero o en otro bien o valor", se encuentra normalmente prohibido en todas las legislaciones examinadas.

Se considera contrario dicho pacto tanto a la dignidad del Abogado, que debe desarrollar la defensa más conveniente para su cliente en forma totalmente imparcial sin hallarse interesado en el resultado del asunto, cuanto en la naturaleza del contrato de prestación de servicios que debe ser en todo momento remunerado independientemente de cual sea el resultado del proceso.

Precisamente por ello el art. 2223 del Codice Civile italiano sanciona expresamente la nulidad de dicho pacto, y en los restantes paises constituye una falta grave que es sancionada disciplinariamente.

Ello no impide que, como advierte la ponencia española, lamentablemente dicho pacto acostumbra a estar muy extendido en la práctica, principalmente en aquellos procesos, como los laborales y los relativos a accidentes de circulación, en los que los demandantes son gentes de escasos recursos económicos y por el contrario la posible indemnización a percibir puede alcanzar sumas considerables, muy superiores al trabajo desarrollado en cada caso por el Abogado.

En Alemania se justifica la prohibición en la necesaria imparcialidad del Abogado que no debe tener ningún interés económico en el resultado del proceso, si bien se autoriza una rebaja de los honorarios en el supuesto de pérdida del proceso en los supuestos de defensa del pobre, y en los procesos sobre derecho de la competencia y de sociedades anónimas.

V.4. La provisión de fondos

Constituye una práctica generalmente admitida y reconocida además en los Estatutos, que los Abogados puedan interesar de sus clientes, con caracter previo a la aceptación de un asunto o en el transcurso del mismo, una provisión de fondos que garantice suficientemente la remuneración de sus servicios.

Como limites a dicha provisión de fondos deben destacarse que nunca pueden sobrepasar la cuantia razonable estimada de los honorarios, y que una vez prestados los servicios debe procederse a su liquidación.

La falta de entrega de los fondos interesados permite al Abogado renunciar a la defensa, siempre que no perjudique los intereses del cliente, o incluso, en el derecho español, reclamar en los procesos judiciales dicha provisión de fondos directamente del Procurador de los Tribunales.

V.5. La justicia gratuita

Las antiguas regulaciones del beneficio de pobreza a los que carecían de bienes suficientes para litigar, han sido sustituidos por modernas legislaciones que tienden a garantizar el libre acceso de todos los ciudadanos, independientemente de sus ingresos, a los Tribunales de Justicia.

En Portugal, el Decreto Ley de 29 diciembre 1.987 establece dos distintas modalidades de asistencia gratuita: a traves de gabinetes de consulta jurídica que funcionan prácticamente en todo el territorio nacional; y a traves de la defensa en las actuaciones judiciales.

En Italia, la Ley 20 julio 1.990 preve, singularmente en los procesos penales, el patrocinio gratuito, que pueden solicitar ante el Juez que conoce de la causa quienes tengan ingresos anuales inferiores a 10.890.000 Liras, y que si es concedido determina que los honorarios del Abogado correspondan al Estado.

En España, despues de varias modificaciones legales no convincentes, se ha promulgado la reciente Ley 10 enero 1.996, que garantiza tanto el asesoramiento gratuito previo al proceso, como la defensa gratuita por Abogado no sólo cuando sea legalmente necesaria su intervención, sino incluso cuando el Juez la estime conveniente para preservar el principio de igualdad de parte, extendiendola además a la gratuidad de inserción de anuncios oficiales, a la exención de depósitos para interponer recursos, y a una reducción del 80 % en los documentos notariales o inscripciones registrales que se precisen. Disfrutan de dichos beneficios quienes tengan unos ingresos inferiores al doble del salario minimo interprofesional, fijado cada año por el Gobierno, y corresponde al Colegio de Abogados la tramitación y la gestión del beneficio de justicia gratuita.

En Alemania, el Abogado viene deontológicamente obligado a avisar a su cliente de la posibilidad de gozar del beneficio de pobreza, que no sólo se concede para actuaciones judiciales, sino tambien para asesoramiento extrajudicial, estando determinada su concesión por la doble circunstancia de carencia de bienes suficientes para cubrir total o parcialmente las costas procesales y por la existencia de suficientes expectativas de éxito del asunto.

VI. RESPONSABILIDAD DEL ABOGADO

VI.1. Responsabilidad disciplinaria

Los diversos Estatutos establecen la responsabilidad disciplinaria de los Abogados por las faltas en que puedan incurrir en el desempeño de sus funciones, graduandose las sanciones a imponer que pueden ir desde un simple apercibimiento hasta la expulsión del Colegio respectivo, distinguiendos las faltas leves, de las graves y de las muy graves, sin que exista la debida tipicidad en la descripción de cada una de dichas faltas.

Las sanciones impuestas por los Colegios respectivos son susceptibles en todo caso de recurso, primero en vía administrativa, y acto seguido ante los Tribunales de Justicia.

Se preve igualmente la corrección disciplinaria por parte de los Tribunales de Justicia por las faltas que cometan los Abogados en las actuaciones procesales, y muy singularmente en los actos orales.

VI.2. Responsabilidad civil

No existen reglas especiales en el Derecho portugués en torno a la responsabilidad civil de los Abogados, lo que constituye un claro ejemplo de la escasa frecuencia con que se formulan dichas reclamaciones en dicho país.

No ocurre lo mismo en España, donde lamentablemente en los últimos años se está produciendo un considerable aumento de las reclamaciones por responsabilidad civil de los Abogados, que ha obligado a los Colegios a suscribir seguros colectivos de responsabilidad civil, a que haremos referencia en un próximo apartado. Tanto el art. 442. 1 de la Ley Orgánica del Poder Judicial, cuanto el art. 102 del Estatuto preven que los Abogados en su ejercicio profesional están sujetos a responsabilidad civil cuando por dolo o negligencia dañen los intereses cuya custodia les ha sido confiada. Para evitar las reclamaciones abusivas preve el art. 106 del Estatuto la previa comunicación del Decano por parte del Abogado a quien le haya sido confiada dicha reclamación, a los efectos de que se realice por parte de éste una función de mediación.

En Italia la responsabilidad profesional del Abogado está limitada por el art. 2.236 del Codice Civile únicamente a los supuestos de dolo y culpa grave, existiendo no obstante en el art. 162 del Codice di Procedura Civile una hipótesis especial de responsabilidad del Abogado en los supuestos de nulidad de actos procesales por causa a él imputable, responsabilidad que es declarada en la misma sentencia que pone término a la causa.

En Alemania el Abogado responde por dolo o negligencia, con un plazo de prescripción de tres años y posibilidad de limitar contractualmente su responsabilidad a la cuantía máxima garantizada por el seguro. Como causas más frecuentes de responsabilidad se señala la pérdida de plazos y la no información de los riesgos que pueden derivarse de una actuación determinada.

VI.3. Responsabilidad penal

Son varios los delitos en que pueden incidir los Abogados en el ejercicio de su profesión, destacando como más significativos la prevaricación, la revelación de actuaciones procesales secretas, la defensa de la parte contraria, la destrucción de documentos del proceso, la coacción respecto de peritos y testigos, el desacato y la perturbación del orden en la audiencia de un Tribunal, con las diversas modalidades propias en cada pais del principio de tipicidad.

En el Derecho español es indispensable antes de formular querella contra otro Abogado ponerla en conocimiento del Decano del Colegio de Abogados, incurriendo en responsabilidad disciplinaria quien omitiera dicha comunicación, o formulara una querella manifiestamente infundada o con propósito fraudulento.

VI.4. Los seguros de responsabilidad

Aún cuando no exista ninguna norma que imponga un seguro obligatorio de la responsabilidad profesional del Abogado en España, ante el considerable incremento de las reclamaciones, algunos Colegios han suscritos pólizas colectivas cubriendo la responsabilidad de sus colegiados hasta un cierto límite, facilitando a los Abogados completar dichos seguros a su cargo personal.

El aumento progresivo de dichas reclamaciones, en parte propiciadas por la misma existencia del seguro que desdibuja la responsabilidad personal del Abogado, ha determinado no sólo un constante incremento de las primas de dichas pólizas de seguro, sino incluso que sea motivo de grave preocupación de los Colegios de Abogados que han presentado ponencias al respecto en los Congresos celebrados.

En Portugal e Italia parece que no existe especial preocupación por el tema, indicandose por el ponente italiano que no son muy frecuentes los seguros de responsabilidad, y por el portugués que están limitados a la cuantia de 20.000.000 de escudos.

Por el contrario en Alemania es obligatorio contratar un seguro de responsabilidad para cubrir la actuación profesional, con una cuantía mínima de 500.000'- DM, si bien en la práctica los grandes bufetes superan con mucho dicha suma. La no contratación del seguro puede determinar la pérdida de la colegiación.

VII. EL ABOGADO INTEGRADO EN UNA EMPRESA

VII.1. Los despachos colectivos de Abogados

La inflación legislativa, sometida además a constantes cambios, conduce cada vez más a una especialización de los Abogados en unas materias concretas y determinadas. Por otra parte los cada vez más crecientes costos de instalación y mantenimiento del despacho profesional aconsejan la asociación de varios Abogados en despachos colectivos, a los efectos de una mejor división del trabajo y de una distribución proporcional en los gastos derivados de la misma.

Las leyes no pueden escapar a dicha realidad, lo que determina que en Italia los despachos colectivos de Abogados hayan sido regulados por una reciente Ley de 7 agosto 1.997, y que en España el art. 28 del Proyecto de Estatuto General regule ampliamente la problemática de los despachos colectivos, suprimiendo la limitación a veinte del número máximo de socios actualmente establecido en el art. 34 del vigente Estatuto, y sometiendolos a la disciplina del Colegio de Abogados, en el que figurarán inscritos en un Registro especial.

Dicho proyecto parte de la libertad individual del derecho de cada Abogado para aceptar o rechazar los casos que se le sometan, extendiendo a todos ellos la obligación de secreto profesional y las incompatibilidades y prohibiciones que afecten a alguno de ellos en concreto.

En Alemania se distinguen los despachos colectivos, en los que cada Abogado tiene una total independencia, y sólo participa proporcionalmente en los gastos comunes, de las sociedades de Abogados, bien como sociedad civil, bien como sociedad de participación, e incluso se ha autorizado recientemente la constitución de sociedades de responsabilidad limitada de Abogados, y se encuentra en estudio la admisión de sociedades anónimas.

VII.2. El Abogado funcionario de la Administración

Tanto en España como en Italia el Estado es representado y defendido en sus actuaciones en los Tribunales de las diversas jurisdicciones por un cuerpo especial, el de Abogados del Estado, que disfrutan en España de determinadas privilegios procesales, como los de determinar la competencia en las capitales de provincia, o interesar ampliación de los plazos concedidos para la contestación a la demanda.

Las Comunidades Autónomas, las Corporaciones Locales y los Organismos de la Administración, normalmente se valen de Abogados funcionarios licenciados en derecho, que no precisan colegiación, o de Abogados designados singularmente para cada caso concreto.

En Alemania, el art. 47 BRAO prohibe el ejercicio de la profesión no sólo a los funcionarios públicos, sino incluso a quienes temporalemente desempeñan funciones públicas o trabajan como empleados en un servicio público, exceptuandose únicamente aquellos abogados que desempeñen honoríficamente una misión administrativa, y a los dispensados por la Administración de Justicia de dicha incompatibilidad.

VII.3. El Abogado empleado de una empresa

Las grandes empresas, y muy especialmente los Bancos, Compañías de Seguros y concesionarias de servicios públicos, acostumbran a tener sus propios Abogados, bajo régimen laboral, con dedicación parcial o exclusiva, y con obligación de cumplimiento de determinados horarios.

En el articulo 27 del Proyecto español de Estatuto de la Abogacia se establece que debe formalizarse el contrato por escrito y deberá respetar la libertad e independencia del Abogado, debiendo además expresarse si los servicios se prestan o no con exclusividad.

En los supuestos de condena en costas, el Abogado tiene derecho a percibir de la parte contraria sus minutas de honorarios, sin obligación de ingresarlos en la empresa a la que ha defendido.

En Alemania se permite el ejercicio de la Abogacia a los Abogados de una empresa privada, siempre que no peligre su independencia, que no sea incompatible con su trabajo, y además que aunque su ejercicio como Abogado sea reducido, tenga un volumen significativo.

VII.4. El Abogado en una empresa de servicios múltiples

Se trata de una figura cada vez más frecuente, en la que distintos profesionales: economistas, Arquitectos urbanistas, Abogados, Agentes de la Propiedad Inmobiliaria, Graduados Sociales, etc..., se asocian para ofrecer conjuntamente sus servicios a los clientes que estén interesados en los mismos.
La ponencia española advierte de las dificultades que actualmente encuentra dicha figura surgida en la realidad mercantil, que está admitida en principio en el art. 29 del Proyecto de Estatuto, permitiendo que se constituyan bajo cualquier forma lícita en derecho, y prohibiendo únicamente la asociación de profesiones liberales incompatibles con la Abogacia, responsabilizando al Abogado de las infracciones deontológicas en que puedan incidir, y facultandoles para vetar cualquier decisión que pudieran adoptar.

VII.5. Actuación del Abogado en los arbitrajes de derecho privado

Tanto en Italia como en España normalmente los Abogados desempeñan funciones arbitrales, tanto en derecho como en equidad, tanto si son designados especificamente por las partes, como si han sido designados por Tribunales permanentes, que en España acostumbran a estar propiciados e integrados por los propios Colegios de Abogados.

El art. 12 de la Ley de Arbitrajes de Derecho Privado de 5 diciembre 1.988 reserva a los Abogados la actuación como árbitros de derecho, e incluso en los arbitrajes de equidad, que no precisan conocimientos jurídicos, se preve que caso de desacuerdo de las partes, el Juez pueda designar un Abogado que desempeñe funciones arbitrales.

En Alemania no se requiere la condición de Abogado para actuar como árbitros, surgiendo incluso dudas sobre su imparcialidad e independencia en el supuesto de que con anterioridad al arbitraje hayan defendido asuntos de una de las partes.

VIII. AMBITO DE ACTUACIÓN DEL ABOGADO

VIII.1. Limitación del Abogado al territorio del Colegio de Abogados

Mientras en Portugal el Abogado puede actuar sin limitaciones ante todos los Tribunales portugueses, y en Italia únicamente si se actua ante un Tribunal distinto de la circunscripción territorial del Abogado, es indispensable que designe domicilio en el despacho de otro Abogado con domicilio en la sede del Tribunal donde deba actuar, en España se mantiene inexplicablemente una situación casi feudal, en la que el Abogado únicamente puede ejercitar su función dentro de los limites del Colegio de Abogados a que pertenece, existiendo en ocasiones en una misma provincia varios Colegios de Abogados.

Dicha situación totalmente anacrónica se mantiene, por respeto a los derechos adquiridos de los Colegios de Abogados, en el Proyecto de Estatuto de la Abogacia, en cuyo art. 17 tras autorizar a los Abogados españoles a actuar libremente en el territorio de los Estados miembros de la Unión Europea, contradictoriamente restringe la actuación dentro de España

pero en Colegio distinto al en que esté colegiado al previo pago de unas cuotas, que, tal como advierte el Ponente español, en muchas ocasiones son tan elevadas que son disuasorias de la actuación de un Abogado colegiado en distinto Colegio.

Los principales Colegios de Abogados de España, los de Madrid y Barcelona, han firmado un convenio en el cual se pone término a tal estado de cosas, permitiendo a los Abogados de cualquiera de dichos Colegios ser habilitados en el otro sin pago de cuota alguna.
En Alemania se requiere permiso especial para actuar en cada territorio judicial.

VIII.2. La actuación ante los Tribunales Superiores

En Italia la actuación ante el Tribunal de Casación, ante el Consejo de Estado, ante el Tribunal de Cuentas, ante el Tribunal Superior de las aguas públicas, ante la Comisión Tributaria Central y ante el Tribunal Supremo Militar, exige la inscripción en un Registro especial abierto en el Consejo Nacional Forense. Lo mismo ocurre en Alemania para la actuación ante un Tribunal Superior y ante el Tribunal Federal.

No existe limitación alguna en Portugal, y en España pueden actuar directamente ante el Tribunal Supremo tanto los Abogados inscritos en el Colegio de Abogados de Madrid, como los Abogados inscritos en los Colegios de Abogados de que proceda el recurso.

VIII.3. Actuación del Abogado dentro de la Unión Europea

La directiva comunitaria 249 CEE de 22 marzo 1.977 supuso un avance considerable en el principio de libre circulación de Abogados dentro de los paises que forman parte de la Unión Europea, habiendo sido acogida en Italia por Ley 9 febrero 1.982 en España por el RDL 7 junio 1.996 y la Ley 14 abril 1.997 y en Portugal por Ley de 28 mayo 1.986, si bien en Italia la exigencia de un "concerto" con un Abogado inscrito en el Colegio ha suscitado bastantes polémicas.

En España el art. 17 del Proyecto de Estatuto de la Abogacia faculta a cualquier Abogado incorporado a un Colegio de Abogados de España prestar libremente sus servicios en todo el territorio de la Unión Europea, y a los Abogados de la Unión establecer su despacho profesional en España, si bien en la práctica han surgido algunos inconvenientes, sobre todo en aplicación del principio de reciprocidad.

VIII.4. Actuación del Abogado en otros paises extranjeros

Por lo que respecta a la actuación del Abogado colegiado en un pais perteneciente a la Unión Europea en otro país distinto, la regla general, en defecto de tratado específico, es la prohibición de actuación, si bien el Ponente portugués admite la aplicación en dicho supuesto del principio de reciprocidad.

VIII.5. Habilitación de juristas no colegiados

Por regla general se permite que el Licenciado en Derecho pese a no estar colegiado pueda asumir su defensa propia y la de sus más próximos parientes, sin necesidad de estar inscrito en su Colegio profesional, siempre que sea autorizado al respecto por el Colegio del territorio en que vaya a actuar, autorización que se concede normalmente sin necesidad de pago alguno de cuotas.

Lo que resulta excesivo es que dicha autorización se haga extensiva incluso a los Abogados colegiados en otro Colegio, para actuar en defensa propia en Tribunales sitos en Colegio distinto de aquel en que estaban colegiados.

IX. LOS ABOGADOS Y OTRAS PROFESIONES JURÍDICAS

La figura del Procurador de los Tribunales, encargado de representar a la parte en los procesos judiciales, es peculiar del Derecho procesal español, siendo desconocida tanto en Italia como en Portugal, como en Alemania.

Su intervención era obligatoria en España en los procesos civiles de cuantía superior a las ochocientas mil pesetas; en los procesos penales ordinario y por Jurado, y en el acto del juicio oral del procedimiento abreviado, y facultativa en los procesos laboral y contencioso-administrativa.

Pese a su singularidad las nuevas leyes tienden a reforzar su figura para contribuir a una mayor agilización de la Administración de Justicia, habiendo convertido la nueva Ley de la Jurisdicción Contencioso-Administrativa en obligatoria su intervención ante los Tribunales Colegiados, y reducido el Proyecto de Ley de Enjuiciamiento Civil a la suma de 300.000'-Ptas. el limite para que sea obligatoria la intervención de Procurador.

En la jurisdicción laboral, intervienen asimismo en España y en Italia los graduados sociales, que en principio deberían limitarse simplemente a la representación de sus clientes pero que en la práctica están asumiendo cada vez más funciones de asesoramiento y defensa jurídica.

X. MODERNAS TENDENCIAS EN LA PROFESIÓN DE ABOGADO

Las Ponencias recibidas no señalan cuales sean los aspectos en que debería evolucionar la posición del Abogado, silenciando en exceso los aspectos criticables de la actual regulación.

Unicamente la ponencia del profesor argentino Rolando Arazi destaca magistralmente la transformación efectuada en estos últimos años del Abogado ante los Tribunales en Abogado mediador, orientado precisamente a eliminar el debate judicial.
Ciertamente los grandes despachos colectivos tienden actualmente más a asesorar a sus clientes para evitar los pleitos, y en su caso para transigir las posibles diferencias, que en acudir a los largos y costosos procesos judiciales ante los Tribunales de Justicia, incompatibles con las necesidades de las relaciones jurídicas contemporaneas.

Desde dicha perspectiva resulta inaplazable:

a) Conceder una mayor importancia a la formación universitaria de los futuros Abogados, no limitandose a una enseñanza meramente dogmática, sino poniendolos en contacto con la realidad viva del Derecho.

b) Debe revisarse el caracter anacrónico de los Colegios de Abogados. Aún cuando la colegiación sea necesaria para la defensa del prestigio de la profesión, nunca debe convertirse en obstáculo para la defensa jurídica. Desde dicha perspectiva resulta insostenible el actual minifundio de algunos Colegios de Abogados.

c) La dinámica moderna está fomentando los grandes despachos colectivos de Abogados, en detrimento de los tradicionales Abogados artesanos unipersonales. Dicho cambio de perspectiva exige una revisión a fondo de la profesión del Abogado.

d) Debe fomentarse el acuerdo previo entre Abogado y cliente en orden a la cuantía de los honorarios, evitando ciertamente los pactos de "cuota litis", pero al mismo tiempo un automatismo excesivo en la aplicación de las tarifas de honorarios profesionales, que deben ajustarse a la complejidad de cada caso concreto.

e) La intervención del Abogado debe generalizarse en todas aquellas cuestiones que por su especial complejidad no estén al alcance de los no juristas. En todo caso debe garantizarse que dicha necesaria intervención no redunde en perjuicio de la parte contraria en los supuestos de condena al pago de las costas.

Barcelona, a 30 de marzo de 1.999

MANUEL SERRA DOMINGUEZ
Catedrático de Derecho Procesal
UNIVERSIDAD DE BARCELONA

XI. CONCLUSIO

La ponencia recoge y sistematiza las ponencias nacionales remitidas por los Profesores PICARDI y FRATINI (ITALIA), ARAZZI (ARGENTINA), SCHUTZE Y BLANKENBURG (ALEMANIA), LEBRE DE FREITAS (PORTUGAL), y ALONSO CUEVILLAS (ESPAÑA).

Analiza el triple fundamento de la intervención del Abogado en el proceso; los presupuestos requeridos en las diversas legislaciones para el ejercicio de la profesión y muy especialmente la formación práctica y la colegiación; el caracter necesario o facultativo de su intervención en los procesos civil, penal, laboral, administrativo y tributario; los deberes y derechos del Abogado, respecto de los Tribunales, de sus compañeros y de sus clientes, destacando los aspectos relativos a la publicidad del Abogado, al secreto profesional, a la regulación de sus honorarios y al pacto de "quota litis"; analizando la triple responsabilidad civil, penal y administrativa en que incurren, con especial atención a los seguros de responsabilidad.

Especial atención se dedica en las ponencias a los despachos colectivos de Abogados, a los Abogados funcionarios públicos, a los Abogados integrados en una empresa y al ámbito territorial de actuación de los Abogados, tanto dentro de cada Estado, como dentro de la Unión Europea, o en otros paises extranjeros.

Por último, a manera de recomendaciones finales, se insiste en la necesidad de dar mayor contenido práctico a la enseñanza universitaria; de revisar las limitaciones territoriales impuestas por la colegiación; de fomentar el previo acuerdo entre Abogado y cliente en torno a la cuantía de los honorarios profesionales; y de generalizar la intervención obligatoria de Abogado en todas aquellas cuestiones cuya complejidad exceda de los conocimientos de los no juristas.

Barcelona, 14 julio 1.999

XII. SUMMARY

This report systematises the national reports submitted by the following professors: PICARDI and FRATINI (Italy), ARAZZI (Argentina), SCHÜTZE and BLANKENBURG (Germany), LEBRE DE FREITAS (Portugal) and ALONSO CUEVILLAS (Spain).

It analyses the three fundaments for intervention in proceedings by the lawyer; the prerequisites required in different legal systems for practising the profession and especially the practical training and admittance to professional associations of lawyers; the compulsory or voluntary character of intervention in civil, criminal, labour, administrative or tax proceedings; the lawyers' rights and duties in regard to courts, colleagues and clients, with special emphasise on the publicity of lawyers, their professional discretion, the regulation of their fees and the 'quota litis'-pact; further it analyses the triple civil, criminal and administrative liability a lawyer might have to undertake and special insurance therefore.

Special attention is dedicated in the reports to collective law offices, to publicly employed lawyers and to lawyers working in enterprises and finally to territorial aspects of professional practice, either within a single state, the European Union or a non-member state.

Ultimately, as a final recommendation the necessity is emphasised to give more practical value to university teaching; to revise the territorial limits for admittance to professional associations of lawyers; to facilitate pre-trial agreements about fees between lawyers and clients; and to introduce compulsory intervention of lawyers in such questions, which because of their complexity exceed the knowledge of non-jurists.

Barcelona, 14 July 1999

(Translated into English by Ninel J Sadjadi)

XIII. ZUSAMMENFASSUNG

Aktuelle Entwicklungen in der Stellung des Anwaltes

Der Bericht sammelt und systematisiert die von folgenden Professoren übersendeten nationalen Berichte: PICARDI und FRATINI (ITALIEN), ARAZZI (AGENTINIEN), SCHÜTZE und BLANKENBURG (DEUTSCHLAND), LEBRE DE FREITAS (PORTUGAL), und ALONSO CUEVILLAS (SPANIEN).

Die Untersuchung betrifft die dreifache Grundlage des Eingreifens des Anwaltes im Prozeß; die in den verschiedenen Rechtsordnungen angeordneten Voraussetzungen für die Berufsausübung und insbesondere die praktische Gestaltung und die Aufnahme in die Anwaltskammer; die Notwendigkeit oder Freiwilligkeit seines Eingreifens im Zivil-, Straf-, Arbeits-, Verwaltungs- und Steuerverfahren; die Rechte und Pflichten des Anwaltes bezüglich der Gerichte, seiner Kollegen und Klienten, wobei die Aspekte hinsichtlich der Werbung des Anwaltes, des Berufsgeheimnisses, der Regelung seines Honorars und des Vereinbarung "quota litis" hervorgehoben werden; untersucht wird auch die dreifache - zivilrechtliche, strafrechtliche und verwaltungsrechtliche – Verantwortlichkeit, in die er gerät, mit besonderer Beachtung der Sicherheiten für diese Verantwortlichkeit.

Spezielle Beachtung wird den Berichten über die gemeinsamen Kanzleien der Anwälte, über die Anwälte im öffentlichen Dienst, über die in ein Unternehmen integrierten Anwälte und über das örtliche Umfeld der Amtsführung der Anwälte sowohl innerhalb jedes einzelnen Staates als auch innerhalb der Europäischen Union oder in den Nichtmitgliedstaaten gewidmet.

Zuletzt, als Schlußempfehlung, wird auf der Notwendigkeit bestanden, die Ausbildung an den Universitäten praxisbezogener zu gestalten; die für die Aufnahme in die Anwaltskammer auferlegten territorialen Grenzen zu überprüfen; die [dem Prozeß] vorhergehenden Übereinkommen zwischen Anwalt und Klient über das Honorar zu fördern; und das zwingende Eingreifen des Anwaltes in all jenen Fragen, deren Komplexität die Kenntnisse von Nichtjuristen übersteigt, allgemein einzuführen.

Barcelona, 14. Juli 1999

Übersetzung von Irene Tölg

RECENT TENDENCIES IN THE POSITION OF THE LAWYER

Prof. William Fisch, USA

RECENT TENDENCIES IN THE POSITION OF THE LAWYER

by
Prof. William B. Fisch, USA

Common Law Jurisdictions, and Scandinavia

This preliminary summary report covers common law and Scandinavian countries, while my co-general reporter Prof. Manuel Serra Dominguez is reporting on civil law countries. I have received national reports from the following colleagues:

Australia: Prof. Stan Ross, University of Sydney
Canada: Prof. Yves-Marie Morissette, McGill University
Denmark: Cand.jur. Helle Blomquist, University of Copenhagen
Ireland: Dean Paul O'Connor, University College Dublin
New Zealand: Prof. Christopher Finlayson, Wellington
Scotland: Prof. Douglas Cusine, University of Aberdeen
United States: Prof. David Clark, University of Tulsa

My outline distributed to these national reporters asked a number of specific questions identifying common issues concerning the role of lawyers and the law governing their conduct, and asked in particular for information about changes in their systems, either recent or pending, on the issues mentioned or any others of which they were aware. This preliminary report generally follows the outline, and relies overwhelmingly on the excellent national reports, although I have added some information from other sources particularly about England. For reasons of space, I have omitted from this summary the information I requested concerning lawyer disciplinary structures and the involvement of non-lawyers in the rule-making and/or disciplinary process. Since it is in summary form, all but a few primary references are omitted. A more complete report will be prepared for publication after the Congress.

I. ORGANIZATION OF THE PROFESSION

a) Formal Divisions

i) In general

Formal divisions of the legal profession -- *i.e.*, those enforced by officially sanctioned restrictive or exclusionary rules permitting only certain specially qualified lawyers to perform certain professional services -- have been based on either functional or geographical criteria or both. Functional divisions in various systems have centered on four types of characteristic legal service: advocacy, agency, advice, and drafting. The common-law world has known one such division originating in England: that between barristers and solicitors, whose principal defining roles (*i.e.*, those protected by exclusionary rules) have been advocacy and agency, respectively, in litigation. Some major common-law systems never adopted such functional divisions (notably the U.S., Canada, and a majority of Australian jurisdictions) and there is a trend everywhere toward abolishing or weakening them. One

important jurisdiction – the Canadian province of Quebec – maintains both a private law system based on the civil law and the notary as a separate legal profession specializing in the drafting and advising functions, essentially similar to that of France.[260]

Geographic divisions limit a lawyer's delivery of services to particular districts or localities, typically (as in continental Europe) to the territory of a particular court's jurisdiction; often the limitation will apply only to certain functions such as the agency function in litigation. In common law countries, at least in recent times, only one such division has been prominent: the allocation by federal systems (U.S., Canada, Australia) of general responsibility for the legal professions to their constituent states or provinces.[261] Here too, as with unitary systems around the world, the boundary-blurring pressures of modern business enterprise have helped stimulate a trend toward reducing the restrictive effects of such geographic divisions. Regional agreements, such as the EU and NAFTA and those between Australia and New Zealand, have also played a role.

In Denmark, which counts itself generally among the civil law systems, independent practitioners constitute a formally unitary profession. There is no separate profession comparable to the civil law notary. Rather, among lawyers generally the major division is between practicing lawyers and civil servants; indeed it was only in 1868 that practicing lawyers themselves achieved formal independence from the state. The other Scandinavian countries appear to share this profile.

ii) Functional Divisions

(1) Scope of the Lawyer's Monopoly

Common-law systems present two basic patterns with respect to the scope of the licensed lawyer's monopoly over the professional provision of legal services. The English pattern is the narrower one: barristers or solicitors or both together have an effective monopoly over forensic services (advocacy and agency before the courts), the preparation of documents relating to legal proceedings (including those relating to applications for probate or administration of a will), and the preparation of legal instruments relating to real or personal property; but neither has a monopoly over drafting other legal documents such as wills and contracts, or (more importantly) over legal advice as such. This model is followed generally in Scotland, Ireland, New Zealand and Australia. The broader model is that of the United States, where virtually all jurisdictions extend the lawyer's monopoly to all of the characteristic services, including advice. This model is followed in Canada.

If there is a discernible trend it is certainly in the direction of narrowing the monopoly in the face of determined competition from other professions, and of allowing non-lawyers to perform certain characteristic legal services. In the Australian state of New South Wales, the solicitors lost their monopoly on conveyancing in this decade, and in Victoria non-solicitor conveyancers are permitted to do the work, albeit subject to advertising restrictions that

[260] Of course specialization of all kinds – by type of service, by subject-matter, by client interest-group, by geography, by hierarchical position of court, etc. – is rampant and increasing on a less formal level, regulated not by forbidding lawyers to provide services but at most by controlling their right to claim special qualifications. On the whole, efforts by lawyer regulatory agencies to provide certification procedures have lagged behind private interest groups, and some systems have relaxed advertising restrictions so as to allow announcement both of areas of concentration in practice and factually accurate statements of private certification.

[261] The limitation of the English barrister's exclusive right of audience to the central courts based in London is in principle hierarchical rather than geographic.

preserve a competitive advantage for the solicitors. In England, the government has had power since 1990 to authorize professional bodies other than the Bar and the Law Society to grant rights of audience and to prepare probate applications, although no such regulations have yet been issued. In the U.S., while the broad-gauged monopoly remains intact, enforcement against other professionals -- particularly that initiated by bar associations -- has been hampered in many states by antitrust concerns, and interprofessional agreements have sought to fill the need for working guidelines.
In Denmark, the lawyer's monopoly over the delivery of legal services is limited to forensic representation; with respect to nonforensic practice, the law forbids non-lawyers only from advertising that they provide legal advice or assistance for compensation.

(2) Barrister and Solicitor

The English division between barristers and solicitors is also found in Scotland (where the former are called „Advocates"), Ireland, New Zealand,[262] and in the Australian states of New South Wales, Queensland, and Victoria. All of these jurisdictions, however, have taken at least a first step toward fusion by eliminating one of the historical foundations of the division, namely the barristers' legal monopoly over advocacy (exclusive rights of audience) in the higher courts. Solicitors were given rights of audience in all courts in New South Wales in 1892, in Victoria in 1891, in Queensland in 1973, and New Zealand in 1982; the same right exists in Ireland. In England and Scotland statutes enacted in 1990 gave the respective Law Societies (the solicitors' professional bodies) authority to grant rights of audience in the higher courts to specially qualified solicitors, and regulations implementing this authority have now taken effect; they generally require both a number of years prior experience in advocacy and a separate course and examination in practice before the higher courts. Only in England and Scotland, therefore, is the right of audience in higher courts within the particular system[263] still made dependent by law on special qualifications.
Two other restrictive rules have reinforced the division by preserving the solicitors' substantial monopoly on the agency function: the self-imposed requirement that barristers accept instructions only from solicitors or certain other professionals and not directly from clients, and the so-called „cab-rank" rule requiring barristers to accept a case offered to them by a solicitor absent good reasons for refusing it. For the time being, at least, English barristers are adhering to only slightly modified versions of these rules.
Where barristers remain a distinct sub-profession but no longer have exclusive rights of audience, they are in effect litigation specialists who are free to take cases on their own but prefer to work on solicitors' instructions; they have remained strong enough in the three Australian states and Ireland, at least, effectively to discourage solicitors from taking full advantage of the right to appear without a barrister. From the client/consumer perspective, the maintenance of such restrictive practices even on a voluntary basis can have the effect of limiting the availability of the best-trained and most experienced advocates.

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[262] Although the New Zealand legal profession is fused, the law provides for a special certificate to practice as a „barrister sole", whereby the lawyer commits herself to practice only as a barrister.
[263] In the United States, the federal courts are a separate judicial system, in which each court maintains its own rules for admission to practice before it. These rules are founded in every case upon admission to practice in the state courts for the state or states in which the particular federal court sits (or, in the case of the Supreme Court, on admission to practice in any state or the District of Columbia) but there is an increasing trend toward requiring a special examination and training in federal law and federal judicial procedure, or even a level of experience as an advocate, as a condition of admission to practice before a federal court.

(3) The Civil Law Notary

As mentioned above, Quebec retains the civil law notary as a distinct legal profession. However, the scope of the notary's monopoly on the drafting of certain legal instruments is narrower in Quebec than in most of continental Europe, and ordinary lawyers (*avocats*) have taken perhaps more of the drafting work into their own offices than might be typical in Europe. Notaries in Scotland must be solicitors, but their functions are virtually limited to the administration of oaths.

iii. Geographic Divisions

(1) Within the Admitting Jurisdiction

In common law jurisdictions as well as Quebec, admission to practice law is granted either by a national authority or, in the case of federal structures, by a state- or province-wide authority; once admitted, the lawyer may practice or appear in court anywhere in the country, state or province. In Denmark, admission was limited to a particular court until 1990, when country-wide admission was introduced.

(2) Interstate Practice within Federations

Three of the countries reported here -- Australia, Canada, and the United States -- have federal structures which leave primary responsibility for regulation of the legal professions to the constituent states or provinces. In principle, only lawyers admitted to practice in the particular state or province are qualified to provide the protected services there, and in the U.S. and Canada that means advice as well as representation, advocacy and drafting services. Enforcement of this monopoly against lawyers from other states has been spotty in the U.S., and it has been recognized that transactional services rendered incidentally to a representation centered in the lawyer's home state are not necessarily objectionable. The California Supreme Court, on the other hand, had occasion just last year to enforce the monopoly in the context of a malpractice and fee dispute between a New York law firm and a California corporate client; it held that the firm was not entitled to recover fees from its client, under California law, for those services which its members had rendered in California without a local license to practice.[264]

These internal boundaries can properly be crossed in a number of ways. In Australia and Canada, there are federal courts before which any lawyer admitted in any state/province is entitled to appear without further formality. In the U.S. and Canada long-standing custom, often codified in statute or rule, authorizes state/provincial courts to permit lawyers admitted in another state or province to appear before them in particular cases. In the U.S. it is frequently required for this *ad hoc* admission that the out-of-state lawyer associate a locally-admitted lawyer on the case, at least for purposes of communication and receipt of documents. The Canadian provincial statutes on this issue typically limit the subject matters of such interprovincial representation to interprovincial or federal matters, but the U.S. rules generally do not.

A more significant development is multiple admissions, allowing lawyers admitted in one state to gain the right to practice in others, including the right to establish offices, without giving up the first and without re-examination or re-training. This process is under way in

[264] *Birbrower v. Superior Court*, 949 P.2d 1 (Cal. 1998).

Australia, where at least four important jurisdictions (New South Wales, South Australia, Victoria and the Australian Capital Territory) have already established reciprocal rights of practice within a framework proposed by the Law Council of Australia (national organization of state Law Societies) and approved by the state Attorneys General, pursuant to a more general framework for mutual recognition of occupational and professional qualifications established by Commonwealth law.[265] Notification and/or registration is all that is required to exercise such rights.

In the U.S., a once-wide-spread network of reciprocal admission rules allowed lawyers admitted in another state who have been engaged in active practice there for a number of years (typically 5) to gain admission without examination, subject only to evaluation of character and the existence of reciprocal rights in the applicant's home state. The list of participating states has greatly diminished over recent years, probably because of a generalized fear of overpopulation in the profession, and it no longer includes the most populous states. At least there is general recognition of academic qualifications, and the U.S. Supreme Court has held that the constitution forbids a state to require, as a condition of admission to its legal profession, that the applicant establish residence in the state,[266] so that multiple admissions as such may not be foreclosed. In Canada as well a constitutional decision, interpreting a provision guaranteeing the right to pursue a livelihood in any province, invalidated a provincial bar rule forbidding local lawyers to form partnerships with lawyers in other provinces.[267] Thus the right to be admitted in more than one province, though not necessarily the right to be relieved of normal requirements for admission, is assured in Canada.

Given the above, it is not surprising to note that in all three countries interstate law firms are now permitted, well-established and continually growing in importance, despite the fact that they involve cross-border sharing of fees generated by local as well as cross-border services. The only requirement that even the most aggressive local authorities appear to insist on is that protected services rendered in their jurisdiction be rendered by locally licensed practitioners.

(3) Lawyers from Foreign Countries

It is one thing for states or provinces linked by a federal constitution and (setting aside the special case of Quebec in Canada) a common legal culture to recognize the standing of professionals from sister jurisdictions. It is quite another to recognize practitioners trained in other countries which may not share either the political commitment or the common culture. Nonetheless the economic pressures work in this direction, and have elicited various responses.

Regional arrangements have established mutual recognition regimes for a number of our jurisdictions. Four of them (England/Wales, Scotland, Ireland and Denmark) are members of the European Union, which now requires mutual recognition of qualifications, the right to deliver services, and the right of establishment for legal as well as other professionals.

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[265] This in turn was preceded by a constitutional decision holding that Queensland could not require a lawyer already admitted in another state, as a condition of admission to practice in Queensland, that the applicant establish permanent residence there and cease to practice elsewhere. *Street v. Queensland Bar Association* (1989), 63 A.L.J.R. 715 (H.C. of A.).

[266] *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988).

[267] *Black v. The Law Society of Alberta* (1989), 93 Nat. Rep. 266, 58 D.L.R. 4th 317.

Denmark has a similar relationship with the other Nordic countries (Norway, Sweden and Finland) dating from the 1950's. Australia and New Zealand entered into an agreement in 1997 which provides for lawyers in either country with 5 years' experience there to practice in the other country based on a simple registration procedure. All of these countries happen to share the more limited view of the lawyer's monopoly, which does not include the advising function as such; but the mutual arrangements mentioned include essentially all of the protected services.

The North American Free Trade Agreement (NAFTA) between Canada, Mexico and the United States provides for the better of national or MFN treatment respecting service providers, and forbids a member from requiring either residence or establishment as a condition of the provision of services. The Parties are at work developing a uniform rule regarding „foreign legal consultants" (FLC, specially licensed practitioners authorized to practice their home-country law in the licensing country).

In the United States, the FLC movement has been gaining momentum independently of NAFTA, and nearly half of U.S. jurisdictions (led by New York) have such rules permitting foreign-trained lawyers to practice international and foreign-country law under the title „legal consultant". In addition, more than half of U.S. states (again led by New York) have liberalized their admissions rules to allow foreign-trained lawyers to become full members of the local bar on the basis of shortened training in local law, opening up the opportunity for multiple admissions on the international level.

In Canada, which (like the U.S.) follows the broad definition of the lawyer's monopoly, it does not appear that generalized FLC rules are in place, although expedited admission procedures recognizing foreign-country training have been adopted.

II. THE ROLE OF LAWYER(S) FOR THE PARTIES IN LITIGATION AND OTHER OFFICIAL PROCEEDINGS

a. Mandatory and Prohibited Representation

There are no courts or proceedings in the common law world in which all parties are obligated to appear through a lawyer; however imprudent it may be in practice – not least because it tends to annoy judges who have to make accommodations for the lack of professional representation – it is virtually everywhere considered a fundamental right for a natural person to appear in court and act for him or herself. Rather, there is a traditional rule that companies and other juristic persons must appear through a lawyer, because they are incapable of appearing *pro se*. They are abstract entities, they can only act through officers or agents, and before courts that is the essence of the practice of law: appearing in a representative capacity before a tribunal.

On the other hand there are a few jurisdictions, notably Canada, New Zealand and some states of the U.S., in which lawyers are excluded from certain special tribunals established for minor disputes, in the interest of informality and immediacy.

In Denmark, the court in criminal cases must appoint counsel for persons accused of crimes, but there is in principle no mandatory representation in civil cases. However, if a judge believes it necessary in order for a civil case to be conducted in a proper way, she has the authority to order an unrepresented party to seek legal representation. There are no proceedings from which lawyers are excluded.

b. Allocation of responsibility for procedural tasks

The traditional roles of the lawyer in Anglo-American civil procedure remain firmly in place. In particular, those that are not necessarily shared by other traditions – that of investigator when evidence is not in the possession of the client, and that of presenter of evidence and examiner of witnesses at trial – are unchanged in all the systems reported here. The most interesting movements in common law civil procedure in recent years designed to mitigate some of the perceived excesses of the „adversary system" – the development of case management techniques on the part of judges including the imposition of procedural sanctions against lawyers who abuse the system, and efforts to train both judges and lawyers in the use of more informal and/or consensual methods of dispute resolution – do not affect the basic distribution of responsibility for the various elements of formal judicial procedure but are directed to the manner in which the participants (lawyers, parties and judges) perform their assigned tasks. Nonetheless common law judges have the formal authority to take a more active role in the evidence-gathering and proof-taking processes, and the case-management approach can encourage greater use of that authority even while respecting the primary responsibility of the lawyer. In New Zealand we are told that judges are indeed taking more opportunities to do so in the last decade or so, and a similar story can be told in the U.S.

In Denmark, the lawyer's role in civil cases is more characteristic of the civil law tradition, although when witnesses are called it is the party who requested the witness (and therefore typically that party's lawyer) -- rather than the judge -- who does the principal questioning. In relation to the client, the lawyer's investigative role in practice is more subdued. Criminal cases and administrative procedures involve greater judicial or agency independence from the evidentiary submissions of the parties.

c. Lawyers' Fees and their Regulation

i. Regulation in general

Detailed regulation of lawyers' fees is essentially unknown in the common-law systems under review, either in the relationship of lawyer to client or for purposes of taxation of costs to the losing party in litigation. The governing rules of professional law impose only a general reasonableness standard. In England and Ireland, the Law Society has authority to adopt regulations governing fees for solicitors' non-contentious work, and in Ireland at least this regulation took the form of fixed itemized fees for some specific tasks; but on the whole the general reasonableness standard prevails even in these regulations. Statutes may, as in most U.S. states, regulate fees for services rendered in particular types of proceedings, such as probate and trust administration or class actions; but these remain exceptional. Effective regulation may come indirectly. In England, Scotland, New Zealand, Australia and Canada, the court (often through an officer called a Taxing Master or Auditor) routinely reviews solicitors' bills for purposes either of awarding costs to the winning party in litigation or even of settling the client's obligation to pay his own lawyer. These officers develop their own scales or tariffs for determining what fee is reasonable in what setting, and these scales, even if they do not formally limit judicial discretion, have considerable influence over the general practice of billing to clients. With respect to non-forensic services, the Law Society typically provides a mechanism for review of solicitors' accounts at the instance of the client, subject to appeal to the judiciary.

In the U.S., although a winning party in litigation is entitled to taxation of attorneys' fees as costs only in exceptional cases, increasing use is being made of similar mechanisms for lawyer-client fee disputes, including mandatory arbitration rules which require a lawyer

wishing to collect on his bill to submit to binding arbitration before bringing suit. In short, a public interest in assuring that lawyers' fees are reasonable is being given increasingly formal and institutional expression.
In Denmark, where lawyers' fees are also not normally taxed to the losing party as costs, fees are subject only to a general statutory standard of reasonableness. As in the U.S., attempts by the bar to set fees on a more detailed basis were derailed by the competition laws. However, where the state pays part or all of a party's legal fees pursuant to a legal aid scheme, independent practitioners are used and their fees are regulated by a fee schedule (based on hourly rates) negotiated between the bar and the Ministry of Justice. This kind of legal aid plays a significant role in civil cases.

ii. Particular methods of calculation: the contingent fee

The systems under review in this paper present a mixed picture with respect to fees that are in some way contingent on the client's success in the matter for which services are rendered. Three principal types of contingency are represented, all of which have been considered objectionable as unfair to the client, destructive of the lawyer's independent professional judgment, an unfair method of attracting clients, or all of the above. The so-called „speculative fee", whereby the lawyer agrees to take a normal fee but only if the client is successful, is the least objectionable form and is permissible in most Australian states. A more speculative form of this arrangement analogous to the continental European *palmarium*, promises to the successful lawyer a fee that is higher than that which would be owing on a non-speculative basis, measured by the normal fee; it has long been permitted in Scotland („speculative action") and has been approved in this decade in England („conditional fee") and in at least four Australian states („uplift agreement"), typically subject to a maximum increase that varies from jurisdiction to jurisdiction. Finally the *quota litis*, whereby the lawyer's fee is payable only from and is to be measured as a percentage of the amounts recovered for the client, remains forbidden in the common law world except for the U.S. and Canada („contingent fee"). The contingent fee is subject in a number of states and provinces to rules fixing maximum percentages, and in most it is still forbidden in criminal and domestic relations cases; in addition the professional law of most jurisdictions now requires that it be agreed to in writing by the client explaining in detail how it will be calculated as well as informing the client about alternative methods.
Even in Canada the *quota litis* remains little used for two reasons. First, the formalities and limitations placed on it by the professional law make lawyer-client agreements more difficult to achieve. Second, as a matter of substantive private law the status of such agreements is uncertain in relation both to the client and to opposing parties. The common law provinces have not yet abolished the torts of champerty, maintenance and barratry, all directed against the lawyer (or other person) who stirs up litigation; and the Quebec civil code expressly provides that the acquisition of litigious rights by a lawyer or notary is void *ab initio*. Finally Ontario, the most populous province, does not permit it even as a matter of professional law, although a recent statute on class actions does purport to permit it in that context. Thus the Canadian lawyer who enters into such an agreement may find it unenforceable against the client, or worse yet may risk liability to opposing parties.
In New Zealand, the Law Society has adopted Rules of Professional Conduct which permit a „contingent fee", without specifying whether any particular form of contingency might remain objectionable. As in Canada, however, the enforceability of such rules remains uncertain, because the courts have not determined whether the common law tort of champerty and maintenance, previously understood to be committed by a lawyer who takes a

case on a contingent fee basis, might still be a barrier. Local law societies are in the process of trying to agree on detailed rules for contingent fees, and the model most likely to gain acceptance in the bar is the *palmarium* or „conditional fee".
In Denmark, the Bar Association has adopted a code of conduct which forbids the *quota litis*, and it is generally not in use. The legal status of these rules is uncertain, however, and no other law expresses such a prohibition.
With respect to fees contingent on the outcome of the representation, therefore, one can identify a trend toward loosening the traditional prohibition, but official resistance to the *quota litis* as a particular form of contingency remains high everywhere except the U.S.

III. PARTICULAR DUTIES OF THE LAWYER TO THE CLIENT

a. Confidentiality

i. Source of the protecting law

In common law countries the law governing lawyer confidentiality and privilege is either professional law, threatening disciplinary action against lawyers who voluntarily disclose confidential information, or procedural law, protecting the client from forced disclosure of confidential information by himself or his lawyer as well as from improper introduction of such information into evidence in official proceedings. The crime of improperly disclosing professional confidences is unknown. Denmark, on the other hand, follows the civil law model of incorporating the duty of professional secrecy into the criminal code.

ii. Presumptive scope of the protection

The scope of the protected information varies in common law countries according to whether it is the professional law or the procedural law that is being invoked. The specific phrasing of the professional laws will differ in detail, but most will forbid voluntary disclosure, without client consent, of any information concerning the client acquired in the professional relationship, whether from the client or from another source. The privilege provided by the procedural law, on the other hand, typically will protect from forced disclosure only *communications* between lawyer and client for the purpose of obtaining legal advice or services. In addition to this „legal professional privilege" or „attorney-client privilege", the procedural law typically provides a „litigation privilege" or „work product protection" for communications and other information undertaken or produced either by the client or the lawyer for use in existing or contemplated litigation; in the U.S., at least, this latter protection is subject to being overridden by a showing by the opponent that the information is not available in any other form, whereas the former is not.

iii. Exceptions

(1) Privilege

The privilege provided by the procedural law is subject to a number of well-established exceptions which do not appear to be undergoing substantial change. Express or implied client waiver of the privilege, use or intended use of the communications for the purpose of committing or aiding a crime, and necessity for disclosure to resolve a dispute between lawyer and client concerning the lawyer's services, are perhaps the most widely shared exceptions to the privilege. Specific laws may abolish or modify the privilege for specific purposes, but in a number of jurisdictions it is founded in part on the client's constitutional

rights to counsel and against forced self-incrimination, so that the power of the legislature to restrict the privilege may be strictly limited in the criminal context.

(2) Confidentiality

Exceptions to the prohibition against a lawyer's voluntarily disclosing confidential information generally parallel those to the privilege in common law countries. For the most part these also seem to be well-established and stable in recent times. Denmark recognizes one exception which is not clearly shared by the other countries under review here: that lawyers may be required to testify concerning confidential information, in criminal cases not involving their own client, where the court considers it necessary in the interest of justice.

One type of exception has given rise to extensive debate and considerable variation in positions from jurisdiction to jurisdiction, especially within the U.S.: a lawyer's knowledge, based on confidential information, of the client's intention to cause harm to another person or otherwise violate the law, under circumstances in which the lawyer could prevent the harm or wrong by appropriate disclosure. Relatively recent efforts have been made in other systems as well to address this exception in formal rules, at least in England, New Zealand and Australia, but the U.S. experience may serve to illustrate the problems. The debate has tended to center on two variants: the intention to commit a wrong in general, and the specific problem of the client's intention to testify falsely in court.

(a) Protecting others from client wrongdoing

At least from the early part of this century the American Bar Association, the most influential organization in the U.S. devoted to formulating and recommending rules of professional conduct for lawyers, took the position that the intention of the client to commit a crime was not protected by the lawyer's duty of confidentiality, and that the lawyer who chose to make preventive disclosure of such intention was not in breach of professional duty. This was incorporated into the ABA's Code of Professional Responsibility in 1969 (DR 4-101(c)(3)) in permissive form (the lawyer „may reveal..."), and was adopted by the vast majority of American state regulatory authorities. Thus while the exception was limited to prospective conduct constituting a crime, it extended to *any* crime; on the other hand it was widely believed that few lawyers chose to act on the permission, and that the principle of confidentiality was dominant among the rank and file of the bar.

When the ABA revised its model rules in 1983, in the Model Rules of Professional Conduct, it adopted a much narrower version of this exception (r. 1.6(b)(1)), limiting it to prevention of a crime likely to result in imminent death or serious bodily harm – perhaps believing that the bar would be more likely to respond to the more limited exception. However, a majority of state authorities rejected this proposal in favor of retaining the old rule, and a noticeable minority adopted rules making disclosure to prevent death or bodily harm mandatory. The equally influential American Law Institute, addressing this body of law for the first time in the Restatement of the Law Governing Lawyers (1998), takes the position (s. 117A) that the exception should remain permissive, but that it should extend to any opportunity to prevent death or serious bodily harm, whether or not the threat involves the client's conduct and whether or not that likely conduct would be criminal. Moreover, the ALI would extend the exception to serious financial harm as well. The ABA is now in the process of reconsidering

the entire subject of lawyers' professional law and will likely consider revising its position on this issue as well.[268]

The 1969 Code of Professional Responsibility assumed that *corrective* disclosure (*i.e.*, disclosure of a wrong after it has been perpetrated by the client) would be generally inappropriate for a lawyer, especially if the wrong were a crime. It did address one category of corrective disclosure, however, namely that of client fraud against a person or a tribunal; initially it made such disclosure mandatory for the lawyer in possession of information clearly establishing that the client had committed it in the course of the representation (DR 7-102(B)(1)). In 1974 this recommendation was revised to apply only where the information was not protected by the duty of confidentiality; but the great majority of state authorities had adopted the original version and refused to adopt the amendment. The 1983 Model Rules dropped all reference to client fraud other than perjury, and in effect abolished the exception for that class of client misconduct altogether. The American Law Institute, on the other hand, addressing the more general underlying concerns of corrective disclosure in the case of fraud – namely that the lawyer's own services may unwittingly have contributed to the client's wrong, and that the victim may not be immediately aware of the harm – takes the position that corrective disclosure should be permitted whenever the lawyer's services may have been used by the client to inflict serious financial harm on another. Several state authorities have adopted rules of this tenor, and it is possible that this view will gain wider acceptance in the near future.

The Law Society of England and Wales now takes a position essentially identical to the ABA's Model Rule 1.6(b)(1), permitting disclosure of the client's intention to commit a crime threatening serious bodily harm or death. New Zealand has adopted a broader version of the exception, extending it permissively to all prospective crimes and making it mandatory in the case of possible physical injury. In the Australian state of New South Wales, codifying a position taken by the Bar Council in an advisory opinion, the Professional Conduct Rules permit disclosure of confidential information „for the sole purpose of avoiding the probable commission or concealment of a felony", at least in circumstances in which „the law would probably compel its disclosure". The Law Council of Australia, playing a role similar to that of the American Bar Association, has incorporated this rule into its Model Rules of Professional Conduct and Practice.

(b) Client perjury

The ABA's 1983 Model Rules of Professional Conduct did address the specific problem of client perjury (r. 3.3), and took the view, subject to possible constitutional protections for the client, that if preventive steps fail and the client testifies falsely in court, and if attempts to get the client to recant are unsuccessful, the lawyer should disclose that fact to the court if that is the only way the effects of the perjury can be removed. This position has been widely accepted by the state regulatory authorities, and the U.S. Supreme Court has handed down a decision which strongly supports the view that a client's constitutional rights would not be violated by disclosure under such circumstances. England appears to adhere to the view that

[268] There is also support for the view that a lawyer may be liable in tort to the victim of a client's act inflicting serious physical harm, if the lawyer knew of the client's intentions and failed to take appropriate steps to warn the victim or otherwise prevent the wrong; but this type of liability, applied in some states to psychiatrists, has yet to be successfully invoked against a laywer.

the lawyer's obligation in such a situation is not to assist the client in the perjury, but if it happens without the lawyer's assistance the lawyer should remain silent.

b. Loyalty (duty to avoid conflicts of interest)

i. Judicial Enforcement

For the most part the countries under review have similar understandings of the lawyer's duty to avoid conflicts of interest, whether between a client's interest and the lawyer's own, or between clients. The circumstances giving rise to such conflicts tend to be very fact-specific, and it can be said for most jurisdictions that they have received increasingly detailed and nuanced treatment in express rules, bar opinions and judicial decisions over the last few decades. My questionnaire singled out a few issues, one of which was the extent to which enforcement of the conflict of interest rules occurred not only in the disciplinary context but also in the context of pending litigation in which lawyers may be engaged in conflicted representation.

In England, Ireland, New Zealand, Canada and the U.S. it is understood that the courts have inherent power to disqualify a lawyer from representing a particular party in a specific case, at the instance of another party with conflicting interests in the matter to whom the lawyer also owes a duty of loyalty. In some jurisdictions such as the U.S. and Canada, the mechanism for invoking this power in a pending proceeding would be a simple motion to disqualify submitted in the same proceeding, in others such as England it appears the preferred mechanism is a separate action for an injunction against the lawyer. An injunction action would be appropriate in any event where the lawyer's improper representation is extrajudicial.

It is also understood that judicial orders are within the sound discretion of the court, and are only one possible remedy for violations of the duty of loyalty. The court should therefore take into account not only the interests of the moving party and the requirements of the applicable rule of professional law, but also the interests of the current client and of the court as well in deciding whether such an order of disqualification is appropriate in the particular case.

In Denmark the courts are not considered to have the inherent power to prohibit lawyers from appearing for particular parties in particular cases, so that in general the issue is left to disciplinary authorities. A sharp distinction is made between civil and criminal cases, however: if the court appoints defense counsel in a criminal case, it must refuse to appoint a lawyer for whom the representation would represent a conflict of interest, and it has authority to disqualify any lawyer from representing more than one defendant in the same case where the clients' interests conflict.

ii. Imputation of Disqualification to Affiliated Lawyers

One of the issues with respect to which some courts have applied a standard to the order of disqualification that differs from the rule of professional law applicable in disciplinary proceedings, is that of the imputation of disqualification from one lawyer to that lawyer's partners and associates in a firm. All of the systems under review except Denmark[269] have settled rules presumptively forbidding all lawyers in a firm from acting in a matter in which any one of them would be forbidden to act. Considerable discussion has occurred in the

[269] Denmark does not have a formal rule to this effect, but Danish firms appear to proceed from the assumption that such a rule would be applied if the issue were presented.

common law systems, however, on whether there should be an exception to this imputed disqualification, where assurances are provided that the member who is individually disqualified will be effectively screened off from participating in or influencing the representation conducted by other members (so-called „Chinese Walls" or „Cones of Silence"). This has been treated as a realistic possibility only in the case of conflict between a prospective client of the firm on the one hand, and a former client of the individual lawyer on the other who was not also a client of the present firm (the problem of the migrating lawyer, who joins the firm after terminating the relationship with the former, now complaining client).[270]

In the U.S., the Model Rules of Professional Conduct – followed in this respect by the great majority of state regulatory authorities – distinguish between lawyers who move from government service to a private firm, and those who move from one private firm to another. In the former situation the „Chinese Wall" exception is recognized (r. 1.11), but in the latter situation it is not (r. 1.10). The distinction is justified by special concern for making government service (not thought of in the U.S. as necessarily a lifetime career for lawyers) so burdensome that good lawyers would not be willing to consider it for fear of foreclosing future options. A number of courts, however, led by federal courts who are not formally bound by state disciplinary rules, have recognized the screening exception for all migrating lawyers in deciding motions to disqualify law firms. The mobility of lawyers from one private firm to another has become increasingly important in a competitive market, particularly in view of the general pattern of merger and consolidation of smaller firms into larger ones, and overly stringent rules of imputed disqualification threaten to impede the effective delivery of legal services as well as to clog the courts with disqualification motions. This judicial initiative in turn has led a number of American states to revise their rules of disciplinary law, and the American Law Institute's Restatement supports applying the screening exception to private-to-private migrations, albeit with the added criterion that the confidential information acquired or potentially acquired in the first representation be unlikely to be important in the second. It seems likely that the ABA will seriously consider revising its Model Rule accordingly in the present review process.

In England the exception has been recognized for private-to-private migrations, but under a particularly heavy burden of persuasion for the screening firm which has not often been met in reported cases. Some Canadian cases have also given it very grudging recognition, and most courts would be inclined to do so only where special hardships would otherwise be visited on otherwise innocent parties. A recent decision of the New Zealand Court of Appeal suggests that it may be prepared to recognize it in appropriate cases, though earlier decisions had rejected it. In none of these jurisdictions is such an exception recognized in the professional or disciplinary law.

IV. ORGANIZATION OF LAW FIRMS

a. Permissibility of Partnerships and other Shared-Responsibility Entities

By long-standing tradition and self-imposed rule, barristers in England, New Zealand and Australia as well as advocates in Scotland are forbidden to form partnerships even with other

[270] Where both conflicting representations – either simultaneous or successive – are conducted by members of the same firm, no justification is seen for treating the individual members as if they were practicing independently.

barristers. In those jurisdictions as well as the other, fused systems under review, solicitors and other lawyers may form partnerships, which subject the partners to joint and several liability for all obligations of the firm including the rendition of legal services by any member of the firm.

More recently, the use of corporate and other limited-liability forms, either pursuant to laws specific to the professional context or pursuant to general company law subject to limitations imposed by the professional law, has been permitted for lawyers in the U.S., Canada, Scotland and some Australian states. Denmark also now permits the use of company forms. In the U.S., at least, the most widely accepted justifications for this change were (i) to allow law firms to take advantage of more favorable tax rates applicable from time to time to organizational forms having separate legal personality, and (ii) to allow them to take advantage of more efficient management structures. A third justification, limitation of liability, has been more controversial, and will be discussed below.

The actual use of these limited liability forms where they are permitted has varied considerably from jurisdiction to jurisdiction or even from locality to locality, in light of applicable restrictions and conditions imposed either by the professional law or general company law. In Scotland, for example, it appears that no firms have incorporated, because of financial obligations imposed on the use of such forms. In Denmark nearly one-fourth of all law firms are incorporated.

b. Limitation of Liability through Company Forms

In the traditional partnership form, each partner is personally liable for all debts of the partnership, jointly and severally with all other partners, at least after exhaustion of partnership assets. Three categories of firm liability may be distinguished, in terms of the relative acceptability of limiting the personal liability of individual members through use of a company form: (i) liability for the professional services rendered by the member; (ii) liability for professional services rendered by other members or employees of the firm; and (iii) liability for ordinary debts not arising out of professional services (office rent, equipment and library costs, salaries of non-lawyer employees, etc.).

All American states now permit incorporated practices by virtue of special statutes specific to professional practices, but none of the statutes permits individual members to limit their personal liability for their own services. All but perhaps nine states permit some limitation of liability for the services of others, though often only if the member did not personally participate in or exercise control over such services, or (in one state) if the firm carries an adequate level of professional liability insurance. All but perhaps one or two permit limitation of personal liability for ordinary debts.

Denmark and Canada do not permit principals in incorporated firms to limit their liability for any professional services rendered by members or employees of the firm. The Australian state of Victoria initially forbade principals in incorporated practices to limit their personal liability, as do New South Wales, South Australia, and Tasmania; but Victoria very recently amended its law to permit it.

Even where principals are permitted to take advantage of the liability-limiting characteristics of company forms, it appears to be quite rare for firm assets, including insurance coverage, to be inadequate to meet its liability needs, so that the personal liability of the members will come into play. It is also probable that in those rare situations, if they occur, members will be reluctant for good will reasons to rely on the limitation if they have the personal resources needed.

c. ***Multi-Disciplinary Partnerships***

Of all the jurisdictions here reported, only two (the Australian state of New South Wales, and the U.S. District of Columbia (national capital)) now formally permit lawyers to form partnerships or other responsibility-sharing associations with non-lawyers, when any part of the firm's business involves the practice of law. The New South Wales statute requires that lawyers maintain effective control of the legal practice, have majority voting rights in the partnership, and earn a majority of the partnership's gross income. The District of Columbia rule permits non-lawyers to be partners, but requires that the sole purpose of the firm be the practice of law, so that the non-lawyer's services must contribute to the provision of legal services; perhaps the drafters had non-lawyer office managers in mind, who can be very valuable to the firm and for whom profit-sharing might be a great incentive to stay. It is reported that very few D.C. firms have found it advantageous to do so.

Less formal relationships with other professionals, such as mutual referral agreements and space- and cost-sharing arrangements, are not inherently improper in the systems here reported. However, most of them retain some kind of prohibition against a lawyer compensating a third person for the referral of legal business, so that management of the relationship can be complicated and risky. Nonetheless the pressures of competition from accounting and consulting firms, many of whom employ lawyers to perform services that are at least closely analogous to protected legal services, have caused virtually all jurisdictions to give a high priority to reconsideration of the current prohibition against MDPs, and to identify the conditions, if any, under which they should be allowed. Rigorous enforcement of the lawyer's monopoly over advice and drafting, where it exists, seems very unlikely to be effective in eliminating this competition. Employment of other professionals on a salaried basis to provide their services on behalf of the firm, while generally permitted, is not likely to allow the law firm to compete effectively with independent practitioners of those professions, unless the firm can offer the incentive of profit-sharing and co-principalship. It cannot be excluded that a trend will develop in favor of permitting at least a closely regulated form of MDP.

V. ZUSAMMENFASSUNG

LETZTE ENTWICKLUNGEN IN DER BERUFSSTELLUNG DES JURISTEN RECHTSSPRECHUNG DES COMMON LAW UND SKANDINAVIEN

von

Prof. William B. Fisch, USA

Der einleitende Bericht verweist auf verschiedene Entwicklungen des Rechts zur Ausübung rechtlicher Berufe. Abgesehen von geringen Abweichungen, reflektieren diese Entwicklungen zunehmend wettbewerbsorientierte Rahmenbedingungen, sowohl innerhalb des Berufsstands als auch in bezug auf andere Dienstleistungsanbieter. **Erstens**: formelle Trennungen innerhalb des Berufsstands, sowohl funktionell (Anwälte in Staaten, die der Tradition des „Common Law" folgen) als auch geographisch (Staats- und Landesgrenzen in Staaten mit Common Law Tradition, oder Gerichtsbezirke in Dänemark), werden geschwächt oder beseitigt, während marktbedingte, wesentlich flexiblere Spezialisierungen zunehmend auf einer eher informellen Ebene stattfinden. **Zweitens**: einige aus alter Zeit stammende Feindseligkeiten gegenüber bestimmten Methoden der Bemessung von Honoraren für rechtliche Dienstleistungen verringern sich - insbesondere andere verschiedenen Formen der Sicherheitsrücklagen als *quota litits*, wie etwa *palmarium* oder Konditionalhonorare - zugunsten größeren Freiheiten bei der Vertragsgestaltung zwischen Juristen und Klienten. **Drittens**: Einschränkungen bezüglich der Gesellschaftsformen unter Juristen werden entschärft, - insbesondere der Gebrauch von Gesellschaftsformen mit beschränkter Haftung – zugunsten größerer Flexibilität, die persönliche Haftung eines Juristen in bezug auf seine Dienstleistungen bleiben stets erhalten. Sogar das Verbot von Zusammenschlüssen von Gesellschaften mit Nichtjuristen, die ihre Honorare teilen, wird gegenwärtig überprüft. **Viertens**: Vorschriften, die das Verhaltens von Juristen bestimmen, insbesondere jene, die zentrale Verpflichtungen gegenüber den Klienten beinhalten, wie etwa Vertraulichkeit und Loyalität, werden derzeit im Detail überarbeitet, sowohl durch feine Abstimmung der festgesetzten Normen als auch durch die Lehrmeinung von Gerichten sowie Disziplinareinrichtungen. Länder, die der Tradition des „Common Law" folgen, haben zumindest zunehmend die Grenzen solcher zentraler Verpflichtungen erkannt, die im Interesse der Öffentlichkeit oder dritten Personen zu sehen sind.

LEGAL EDUCATION AND CIVIL LITIGATION IN A CHANGING AND CONFLICTING SOCIETY

Prof. Loïc Cadiet, France

FORMATION JURIDIQUE ET CONTENTIEUX CIVIL DANS UNE SOCIÉTÉ EN ÉVOLUTION

par

Prof. Loïc Cadiet, France

(Professeur à l'Université Panthéon-Sorbonne [Paris I])

Pour des raisons de pure commodité tenant à leur grand éloignement géographique, les rapporteurs généraux sur le thème de *La formation juridique dans une société contentieuse en évolution* [271] ont procédé de la manière suivante pour établir leur rapport général. Ils ont établi ensemble un questionnaire destiné à recueillir des informations sur les différents aspects du sujet. Ce questionnaire a ensuite été adressé à un certain nombre de rapporteurs nationaux dont les pays ont été choisis séparément par chaque rapporteur général. Chacun d'eux a enfin procédé à la synthèse des réponses faites au questionnaire commun par les rapporteurs nationaux qu'il avait personnellement contactés. La synthèse qui suit a été établie à partir des rapports nationaux fort aimablement adressés par :

- M. Wolfgang Lüke, Professeur à l'Université de Dresde, pour l' *Allemagne*,
- Mme Daphne-Ariane Simotta, Professeur à l'Université de Graz, pour l' *Autriche*,
- M. H. Patrick Glenn, Professeur à l'Université McGill (Montréal), pour le *Canada*,
- Melle Helle Blomquist, Assistante à l'Université de Copenhague, pour le *Danemark*,
- M. Manuel Ortells Ramos, Professeur à l'Université de Valence, pour l' *Espagne*,
- M. Yvon Desdevises, Professeur à l'Université de Nantes, pour la *France*,
- M. Miklos Kengyel, Professeur à l'Université de Pécs, pour la *Hongrie*,
- M. Achille Saletti, Professeur à l'Université de Milan, pour l' *Italie*,
- M. Abdellah Boudahrain, Professeur à l'Université de Rabat-Agdal, pour le *Maroc*,
- M. Mieczyslaw Sawczuk, Professeur à l'Université de Lublin, pour la *Pologne*,
- Mme Alena Winterova, Professeur à l'Université de Prague, pour la *République Tchèque* [272].

Les réponses des différents rapporteurs nationaux sont nécessairement inégales car, d'un pays à l'autre, les informations offertes varient, en quantité comme en précision. Les données statistiques, notamment, sont loin d'être toujours disponibles et, quand elles le sont, elles ne permettent pas toujours de répondre à l'ensemble des questions posées. La comparaison des situations nationales étudiées en souffre nécessairement. Le produit de cette recherche ne saurait donc être considéré comme étant d'une pertinence totale. Il n'est possible d'y voir que l'indication d'ordres de grandeur et de simples tendances. Sous réserve de quelques adaptations internes, le plan de ce rapport général suit l'ordre du questionnaire envoyé aux rapporteurs nationaux. Il commence par la description des professions juridiques (I) et du contentieux civil (II) de chaque pays. Il continue par l'exposé de la formation juridique qui y est dispensée (III) et s'achève, en guise de conclusion, sur la synthèse des appréciations générales librement développées par chaque rapporteur national sur les différents aspects du sujet étudié (IV).

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[271] Tatsuo Ikeda, Professeur à l'Université d'Osaka (Japon) et Loïc Cadiet, Professeur à l'Université Panthéon-Sorbonne (France)

[272] Le rapporteur général n'a pas reçu les rapports nationaux pour la Grande-Bretagne et les Pays-Bas.

I. LES PROFESSIONS JURIDIQUES

Les professions juridiques et judiciaires ne sont pas les mêmes d'un pays à l'autre. Il existe sans doute, dans chaque pays, deux grandes catégories de professions comparables, celle des juges et celles des professionnels qui assistent, voire représentent les justiciables en justice (les avocats, *lato sensu*). C'est sur ces deux professions que l'accent a été mis dans ce rapport car, pour les autres, la comparaison n'est guère possible.

I.1. Population des pays

Pays (date de l'estimation)	Nombre d'habitants (ordre décroissant)
Allemagne (1996)	81 896 000
France (1995)	59 478 900
Italie (1998)	57 553 703
Espagne (1996)	39 668 394
Pologne (1995)	38 620 000
Canada (1996)	29 000 000 [273]
Maroc (1998)	27 000 000
Hongrie (1998)	10 135 000
Tchéquie	10 000 000
Autriche (1997)	8 075 000
Danemark (1995)	5 200 000

Les chiffres indiqués servent de référence pour apprécier, en valeur relative, le nombre de juges, l'effectif des avocats, le nombre de facultés de droit et d'étudiants en droit ainsi que le taux de litigiosité. Les *ratios* seront établis par référence à une population de 100 000 habitants.

[273] Dont 7 000 000 environ au Québec.

I.2. Nombre de juges

Les juges non professionnels (*lay judges, lay arbitrators*) n'ont pas été pris en compte dans l'évaluation faite pour ce rapport. En revanche, le choix a été fait, pour les pays où ils existent, d'ajouter l'effectif des magistrats du ministère public (*public prosecutor, ministerio fiscal, finanzprokuratur*) à celui des juges.

PAYS	NOMBRE DE JUGES	NOMBRE D'HABITANTS
Hongrie	30 juges	3 878 habitants
Allemagne	26 juges	3 899 habitants
Tchéquie	23 juges	4 277 habitants
Autriche	20 juges	4 935 habitants
Pologne	19 juges	5 379 habitants
Italie	15 juges	6 503 habitants
Danemark	11 juges	8 813 habitants
France	11 juges	9 356 habitants
Espagne	8 juges	12 315 habitants
Canada	8 juges	12 554 habitants
Maroc	Inconnu	Inconnu

A lui seul, ce tableau autorise peu d'enseignements.

Certains pays (la Hongrie, l'Allemagne) comptent trois fois plus de juges que d'autres (l'Espagne, le Canada), ce qui est beaucoup. Cette différence ne parait pas correspondre à une césure du type pays de *Civil law/pays de Common law*, ni dépendre de l'importance de la population. Il semble, en revanche, que les pays les plus judiciarisés soient géographiquement très proches. Ce sont des pays d'Europe centrale appartenant à une zone d'influence largement germanique. Or, en Allemagne, la formation juridique est conçue, de manière prépondérante, sur le modèle du juge.

I.3. Effectif des avocats

Pays	Nombre d'habitants	Nombre d'avocats
Espagne	389 habitants	256 avocats
Canada	491 habitants	203 avocats
Italie	559 habitants	179 avocats
Allemagne	1076 habitants	93 avocats
Danemark	1333 habitants	75 avocats
Hongrie	1351 habitants	74 avocats
Pologne	1414 habitants	71 avocats
France	1745 habitants	57 avocats
Autriche	2290 habitants	44 avocats
Maroc	5400 habitants	19 avocats
Tchéquie	Inconnu	Inconnu

Sous des noms divers, des professionnels de la justice interviennent pour assurer la défense des intérêts des justiciables devant les juridictions, qu'il s'agisse de les conseiller en les assistant au cours des procédures judiciaires ou, carrément, de les représenter en vertu d'un mandat *ad litem*. Ces fonctions différentes sont, dans certains pays, le fait d'une seule et même profession [15] tandis que, dans d'autres pays, elles sont assurées par des professions distinctes (ex. Maroc, Espagne, Pologne), la France offrant l'image d'une organisation encore plus complexe faisant coexister trois professions distinctes [16]. Quand cette diversité existe, les effectifs de chaque profession ont été réunis.

La première leçon de ce tableau est que l'effectif des avocats varie considérablement d'un pays à l'autre puisqu'il va de 1 (Maroc) à 14 (Espagne). Mais son enseignement le plus frappant vient de son rapprochement avec le tableau précédent. Il semble en effet que, par rapport à leur population, *ce sont les pays ayant le moins de juges qui comptent le plus d'avocats et les pays ayant le moins d'avocats qui ont le plus de juges, comme si le nombre d'avocats et le nombre de juges étaient inversement proportionnels l'un par rapport à l'autre.*

Ces données, articulées aux précédentes, permettent aussi de connaître le rapport du nombre d'avocats au nombre de juges.

PAYS (ordre décroissant)	NOMBRE D'AVOCATS POUR 1 JUGE
Espagne	31,69 avocats / 1 juge
Canada	25,54 avocats / 1 juge
Italie	11,63 avocats / 1 juge
Danemark	6,61 avocats / 1 juge
France	5,36 avocats / 1 juge
Pologne	3,80 avocats / 1 juge
Allemagne	3,62 avocats / 1 juge
Hongrie	2,50 avocats / 1 juge
Autriche	2,15 avocats / 1 juge
Maroc	Inconnu
Tchéquie	Inconnu

Les données de ce tableau ne coïncident pas complètement avec les données du tableau précédent. Pour l'Espagne, l'Italie, le Canada et l'Autriche, le classement est le même, mais il ne l'est pas pour d'autres pays comme l'Allemagne et la France.

[15] Ainsi, en Allemagne, en Autriche, au Canada, au Danemark, en Hongrie, en Italie, en Tchéquie.
[16] Avocats: 34 078; avoués près les cours d'appel: 394; avocats au Conseil d'État et à la Cour de cassation: 87.

II LE CONTENTIEUX CIVIL

II.1. Évaluation du contentieux

Ces données ne sont pas disponibles pour tous les pays. Les indications recueillies permettent cependant de dresser un tableau approximatif de la litigiosité dans chaque pays. La litigiosité est ici définie comme le nombre d'affaires pour 100 000 habitants. Elle prend appui, en principe, sur le *nombre d'actions en justice introduites* en une année [17].

PAYS (ordre décroissant)	NOMBRE D'AFFAIRES POUR 100 000 HABITANTS
Autriche	10 846 affaires / 100 000 hab.
Pologne	8 817 affaires / 100 000 hab.
Hongrie	5 499 affaires / 100 000 hab.
Allemagne	3 969 affaires / 100 000 hab.
Tchéquie	3 500 affaires / 100 000 hab.
France	3 379 affaires / 100 000 hab.
Canada (Québec)	2 959 affaires / 100 000 hab.
Italie	2 483 affaires / 100 000 hab.
Danemark	1 942 affaires / 100 000 hab.
Espagne	1 516 affaires / 100 000 hab.
Maroc	Inconnu

Rapportées aux informations relatives au nombre d'avocats et au nombre de juges, ces données peuvent donner à penser que *la litigiosité d'une société serait ainsi proportionnelle au nombre de ses juges et non pas, contrairement à une idée souvent reçue, au nombre de ses avocats.* L'Espagne, qui a le plus grand nombre d'avocats par habitant et, avec le Canada, le plus faible nombre de juges, est le pays dans lequel le taux de litigiosité est le plus faible.

II.2. Évolution comparée de la population, de l'effectif des professions juridiques et du contentieux

Il est difficile d'apprécier l'évolution, dans le temps, de l'effectif des professions juridiques dans ses relations avec l'évolution de la population et celle des litiges car tous les rapports nationaux ne comportent pas d'indications en ce sens. Aucune règle générale, sorte de loi sociologique, ne peut donc être tirée de ces données numériques qui autorisent seulement quelques constats et, dans le meilleur des cas, quelques hypothèses.

[17] En l'absence de statistiques fédérales, le nombre retenu pour le Canada est le *nombre d'affaires en cours* devant les seules juridictions du Québec.

1°) De manière générale, *l'augmentation du contentieux est supérieure à l'augmentation de la population*, ce qui signifie que la litigiosité augmente par habitant. L'Autriche en fournit une illustration spectaculaire puisque qu'entre 1950 et 1995, la population a augmenté de 16 % et le contentieux civil de 405 %. Mais les écarts paraissent moins importants ailleurs.

2°) *Si l'augmentation du contentieux civil a été continue depuis le début du siècle, il semble qu'elle se soit progressivement amplifiée à partir des années 1950-1960, pour connaître une accélération plus grande encore, dans la plupart des pays, dans les années 1970-1980, avant de se stabiliser, voire diminuer légèrement à partir des années 1990 et, plus nettement, à partir de 1995* [18]. Des circonstances locales liées à la chute du mur de Berlin et aux changements de régime politique qui en ont résulté dans certains pays d'Europe centrale peuvent expliquer ce phénomène. Mais le constat est également fait dans des pays qui n'ont pas connu pareils changements. Il est lié, plus généralement, au développement des droits politiques, civils, économiques et sociaux [19].

3°) Il est difficile, en revanche, d'aller plus loin et, notamment, de définir la *nature des relations entre l'augmentation du contentieux et l'augmentation des effectifs des professions juridiques*. Tout au plus peut-on, pour certains pays, dresser quelques constats qui ne convergent pas forcément.

III. LA FORMATION JURIDIQUE

III.1. Formation juridique dispensée par l'Université

III.1.1. Étudiants en droit

PAYS	NOMBRE D'ÉTUDIANTS EN DROIT
Italie (312 250)	542 étudiants / 100 000 hab.
Espagne (199 814)	503 étudiants / 100 000 hab.
Autriche (28 310)	350 étudiants / 100 000 hab.
France (200 000)	336 étudiants / 100 000 hab.
Hongrie (15 320)	151 étudiants / 100 000 hab.
Pologne (57 876)	150 étudiants / 100 000 hab.
Allemagne (112 448)	137 étudiants / 100 000 hab.
Danemark (6 000)	115 étudiants / 100 000 hab.
Tchéquie (7 000)	70 étudiants / 100 000 hab.
Canada (10 500)	36 étudiants / 100 000 hab.
Maroc	Inconnu

[18] A quelques années près, le phénomène est notamment observé par les rapporteurs nationaux pour le Danemark, l'Espagne, la France, la Hongrie, voire l'Italie. Il ne l'est pas pour la Tchéquie, ni pour l'Allemagne. Mais, pour ce dernier pays, l'augmentation durable du contentieux est peut-être à mettre sur le compte de la réunification. Le rapporteur national pour l'Allemagne semble opiner en ce sens.

[19] V. p. ex., pour la France, L. Cadiet, *Le spectre de la société contentieuse*, *in* Mélanges Gérard Cornu, PUF, 1994, pp. 29 et s.. En Autriche, l'augmentation du contentieux est attribuée à la mauvaise situation économique du pays.

Comme pour les résultats précédents, l'écart entre le pays comptant le moins d'étudiants en droit (Canada) et le pays qui en compte le plus (Espagne) va de 1 à 15. Mais au regard du nombre d'étudiants, le classement ne coïncide ni avec celui de l'effectif des avocats, ni avec celui de l'effectif des juges. Par exemple, ce ne sont pas les pays qui ont le plus d'étudiants en droit qui ont, nécessairement, le plus d'avocats (comp. Canada et Autriche). Il faut en outre tenir compte d'autres considérations comme l'existence ou non d'une sélection à l'entrée de la faculté et du fait que le constat objectif fourni par le rapport entre le nombre d'étudiants en droit et le chiffre de la population ne coïncide pas forcément avec l'appréciation subjective qu'on peut avoir de ce rapport à l'intérieur de chaque pays.

III.1.2. Facultés de droit

PAYS (nombre total de facultés)	NOMBRE DE FACULTÉS DE DROIT POUR 100 000 HABITANTS
Espagne (72 facultés)	0,18
France (60 facultés)	0,10
Hongrie (8 facultés)	0,07
Italie (44 facultés)	0,07
Autriche (5 facultés)	0,06
Canada (20 facultés)	0,06
Allemagne (40 facultés)	0,04
Tchéquie (4 facultés)	0,04
Maroc (11 facultés)	0,04
Danemark (2 facultés)	0,03
Pologne (15 facultés)	0,03

Pour l'essentiel, les résultats de ce tableau confirment les précédents. Il y a, fort logiquement, un lien entre le nombre d'étudiants en droit et le nombre de facultés. Mais la règle n'est pas absolue comme le montre l'exemple polonais. Ces données, articulées avec les précédentes concernant le nombre d'étudiants en droit, permettent de dégager l'effectif moyen des facultés de droit dans chaque pays.

PAYS	EFFECTIF MOYEN DES FACULTÉS
Italie	7 096 étudiants
Autriche	5 662 étudiants
Pologne	3 858 étudiants
France	3 330 étudiants
Espagne	3 330 étudiants
Danemark	3 000 étudiants
Allemagne	2 811 étudiants
Hongrie	1 915 étudiants
Tchéquie	1 750 étudiants
Canada	525 étudiants
Maroc	Inconnu

La tendance, en Europe continentale, est assurément aux grosses facultés de droit. La comparaison entre le Canada et l'Italie est tout à fait significative puisque l'écart va de 1 à

13. Cet écart n'est pas sans incidence du point de vue des méthodes d'enseignement.

Les facultés de droit appartiennent plutôt au secteur public. Lorsqu'elles existent, les facultés de droit privées sont minoritaires, voire très nettement minoritaires (5 % en France, 9 % en Italie, 14 % en Espagne, 20 % en Pologne, 25 % en Hongrie). Mais elles sont tendance à augmenter lorsque l'État n'est pas en mesure de faire face aux besoins de formation des étudiants en droit. Le phénomène est observable en Europe centrale. Quant à la question de savoir *s'il existe, en dehors des facultés de droit, d'autres types d'écoles préparant aux professions juridiques* (*ie,* Écoles d'administration, écoles de commerce ou de gestion), la réponse est mélangée. Si, dans quelques pays, les facultés de droit paraissent être en situation de monopole (Autriche, Italie, Tchéquie, Pologne), la majorité des pays semble admettre l'existence, à côté des facultés de droit, de formations juridiques dispensées soit par des Écoles d'administration publique (ex. France, Maroc, Pologne), soit par des Écoles de commerce ou de gestion (ex. Danemark, France, Hongrie), appartenant tantôt au secteur privé, tantôt au secteur public.

III.1.3. Nombre d'étudiants préparant, en fin d'études universitaires, l'examen ou le concours d'entrée dans les écoles d'application professionnelle

Tous les pays n'ont pas, sur ce point, des informations disponibles. La question postule au surplus que toutes les professions juridiques soient accessibles dès la fin des études universitaires. Tel est le cas en Europe continentale, mais tel n'est pas le cas au Canada comme, d'ailleurs, dans les pays de *Common law* en général. En *Europe continentale*, la situation générale est caractérisée par le fait que les étudiants se destinant au barreau sont plus nombreux que les étudiants se destinant à la magistrature. Le rapport moyen paraît être de 1 pour 3 (Hongrie, France), voire 1 pour 4 (Autriche), étant précisé qu'un étudiant peut fort bien se préparer aux deux professions en même temps, ce qui est du reste la règle dans certains pays comme l'Allemagne où la formation pré-professionnelle est unifiée (*referendariat* ou *preparatory service).* Au *Canada*, où le diplôme juridique donne directement accès à la profession, les étudiants se destinant au barreau représentent environ 80 % de la promotion des diplômés.

III.1.4. Durée des études pour obtenir le diplôme sanctionnant la fin du cursus normal des études juridiques

Les durées indiquées sont celles permettant aux étudiants d'obtenir le diplôme de fin d'études supérieures donnant accès aux principales professions juridiques; ces durées ont été indiquées en semestres (*terms*), étant rappelé qu'une année universitaire en comporte normalement deux.

PAYS	DURÉE THÉORIQUE
Canada	6 semestres
Allemagne	7 semestres
Autriche	8 semestres
Espagne	
France	
Italie	
Maroc	
Danemark	10 semestres
Hongrie	
Pologne	
Tchéquie	

Les données figurant dans ce tableau ne rendent pas exactement compte de la réalité. *La durée réelle des études est souvent plus longue que la durée théorique* envisagée par les textes. Cette différence qui peut aller, comme au Canada, jusqu'à doubler la durée totale des études supérieures tient à différentes causes: nécessité d'une formation universitaire antérieure, échecs répétés aux examens, multiplication des diplômes universitaires... En dehors de ces motifs particuliers, une tendance plus générale existe à l'allongement des études juridiques là où leur durée est la plus courte. Des projets de réforme sont même à l'étude dans certains pays, comme l'Italie et la France, pour porter à 10 semestres, soit 5 ans, l'obtention du diplôme de maîtrise. En revanche, la durée est critiquée là où elle apparaît trop longue (ex. Autriche).

III.1.5. Matières inscrites au programme des facultés de droit

Il est difficile de faire la synthèse des situations nationales car il n'y en a pas deux qui soient strictement identiques et la conception même de programme n'y est pas partout la même (ex. Allemagne: programme d'examen et non pas d'enseignement). Deux constats généraux peuvent cependant être faits. Le *premier* est que tous les programmes comportent des matières fondamentales, obligatoires, et des matières facultatives, plus spécialisées, entre lesquelles les étudiants ont la liberté de choisir dans une mesure plus ou moins large. Le *deuxième* constat est que, si les programmes d'enseignement sont en général arrêtés par les pouvoirs publics, les professions juridiques y sont parfois associées. Quant aux universités, elles disposent d'une marge de manoeuvre variable qui est, dans l'ensemble, assez limitée, voire (ex. Allemagne). Quant à la nature des matières elles-mêmes et à leur part respective dans la totalité du *cursus*, la diversité resurgit.

1°) Les *matières juridiques* forment le noyau dur de la formation dispensée par les facultés de droit. Les mêmes matières fondamentales s'y retrouvent à quelques différences près. D'une part, le contenu des matières fondamentales n'est pas forcément le même selon les pays. D'autre part, une nuance peut être observée entre les pays selon le caractère plus ou moins positiviste de leur conception de l'enseignement du droit. Le droit comparé n'occupe, généralement, qu'une place relativement marginale, y compris dans les pays dont le système juridique, empruntant à plusieurs sources, est un lieu privilégié de comparaison (ex. Canada).

2°) A part le Canada (et le Danemark dans une moindre mesure) où le droit est le noyau *exclusif* de l'enseignement des facultés de droit, dans les autres pays, *l'économie*, la *sociologie*, la *philosophie*, *l'histoire*, la *comptabilité*, voire la *psychologie* (Autriche) et les *statistiques* (Autriche, Hongrie) sont également enseignées, tantôt comme matières obligatoires, le plus souvent comme matières facultatives. Quant aux *langues étrangères*, les informations fournies par les rapports nationaux sont parfois lacunaires. Dans certains pays, l'enseignement d'une langue étrangère est proposé (ex. Allemagne, Danemark, Tchéquie), voire imposé dans les premières années d'études, certaines universités continuant de le proposer dans les années suivantes (ex. Espagne, France, Hongrie, Pologne). Le *latin* a encore droit de cité dans de rares pays en raison, semble-t-il, de l'enseignement du droit romain qui y a encore cours (ex. Pologne).

3°) Dans la majorité des cas, l' *arbitrage* n'est pas enseigné distinctement du cours de droit judiciaire privé (*civil procedure*). Les enseignements d' *informatique appliquée au droit* (informatique juridique, *data processing*) ont tendance à se développer, dans la plupart des pays, mais non pas tous (ex. Maroc, Tchéquie), dans la mesure cependant de l'équipement des facultés en ordinateurs. L'internet est de nature à être un puissant accélérateur de ce développement. En revanche, ni les *modes alternatifs de règlement des conflits (ADR),* ni l' *éthique* ne font l'objet d'enseignements spécifiques, quand ils ne sont pas purement et simplement négligés (ex. Maroc, Tchéquie, voire Allemagne). Des évolutions se dessinent cependant ici et là (ex. Espagne, France et, surtout, au Danemark).

III.1.6. Parts des enseignements généraux et des enseignements spécialisés

1°) Lorsqu'elle est offerte aux étudiants, la spécialisation intervient surtout dans la deuxième moitié de leur *cursus* universitaire. La part respective des matières peut résulter d'un choix de matières proposées aux étudiants en option générales et des matières spécialisées n'est pas indiquée dans tous les rapports. Cette spécialisation au cours de leurs *cursus,* bien que ce *cursus* continue de déboucher nécessairement sur un diplôme unique en droit (ex. Autriche, Canada, Danemark, Espagne, Hongrie, Pologne, Tchéquie) [20]. Mais elle peut aussi, plus radicalement, résulter de l'inscription de l'étudiant dans un diplôme juridique spécialisé couronnant son *cursus*. Cette dernière possibilité est particulièrement nette en France où, à l'issue de la troisième année, les étudiants doivent s'inscrire dans une des maîtrises définies par la loi pour obtenir: maîtrise de droit privé, maîtrise de droit public, maîtrise de droit européen, maîtrise de carrières judiciaires et sciences criminelles, maîtrise de droit des affaires, maîtrise de droit des affaires, maîtrise de droit international, maîtrise de droit social, voire maîtrise de droit notarial. Un système voisin existe également en Italie et au Maroc.

2°) Cette conception paraît fort éloignée de la conception allemande, fort bien décrite par le rapporteur national pour l'Allemagne, dans laquelle la formation juridique repose sur la notion du *Einheitsjurist*, du juriste „ universel " *(a person specially qualified for the Law, but nowhere thereof in particular)*, lui-même envisagé à travers le modèle du juge. En quelque sorte, celui qui peut le plus (être juge), peut le moins (devenir avocat). Dans cette conception, presqu'exclusivement procédurale et contentieuse, les étudiants doivent se préparer à un certain nombre de matières jugées fondamentales sur lesquelles porteront leurs examens qui sont d'ailleurs conduits par des professionnels du droit, notamment par des juges. Les autres matières sont donc considérées comme accessoires.

III.1.7. Méthodes d'enseignement

1°) Quant à la *nature des enseignements*, le nombre fait loi en ce sens que les effectifs nombreux d'étudiants favorise le recours à des enseignements de type magistral dispensés en amphithéâtre (*ex catedra lecture*) tandis que les effectifs restreints autorisent une

[20] Certains de ces pays offrent cependant la possibilité d'une réelle spécialisation aux étudiants de troisième cycle (*postgraduate*): ainsi, la Hongrie.

pédagogie plus rapprochée, géographiquement (petites salles de cours) et méthodologiquement (travaux dirigés, voire appliqués permettant un suivi individuel des étudiants). Cette „ loi " conduit à séparer le Canada (comme d'ailleurs l'ensemble des pays de *Common law*) des autres pays.

2°) Quant aux *techniques pédagogiques*, elles sont essentiellement orales, moyennant l'utilisation, par les étudiants, de supports pédagogiques traditionnels (documents de base, cours polycopiés - *materials, textbook...)*. A part quelques pays (ex. Canada, Danemark et, semble-t-il, l'Espagne), les techniques de projection visuelle et sonore y sont peu en usage. En revanche, l'usage de l'ordinateur a tendance à se répandre, principalement dans sa fonction de traitement de texte ainsi que pour un usage documentaire (CD roms et internet), rarement comme support pédagogique direct (*Powerpoint*). Les technologies informatiques font aussi leur apparition pour les examens (ex. Italie, Danemark).

III.1.8. Effet de la mondialisation sur le programme des enseignements ou sur les méthodes de travail

L'effet de la mondialisation est identifiée à travers trois phénomènes.

1°) *L'importance croissante prise par les matières du droit international* au sens large. Les nécessités du marché du travail, relayées par les besoins qu'expriment les étudiants, conduisent les pouvoirs publics et les universités elles-mêmes à faire une place de plus en plus grande aux considérations internationales.

2°) *L'influence exercée par les nouvelles technologies et, singulièrement, par le „ web "*. L'opinion dominante est que cette influence est assez limitée pour le moment, quand elle ne parait pas quasiment absente de certains rapports (ex. Autriche, Italie, Maroc, Pologne, Tchéquie). Les *programmes d'enseignement* ne semblent pas encore sensiblement modifiés par l'internet. L'influence se fait davantage sentir sur les *méthodes d'enseignement* [21].

3°) *Le développement de la possibilité offerte aux étudiants d'obtenir des diplômes en droit dans plusieurs pays, ce que permet la multiplication des programmes d'échanges internationaux*. Rares sont les pays qui n'en offrent pas et, dans les pays qui en proposent, malgré la résistance de quelques facultés [22], la tendance est bien au développement de ces programmes auxquels les étudiants sont en général très favorables. Sauf quelques enseignements à visée principalement introductive (ex. Danemark, Hongrie, Tchéquie, Espagne), il n'y a pas, en général, de cours spécialement conçus pour les étudiants étrangers. Mais il arrive que des formations complètes d'une année (au format d'un LL.M.) soient offertes à des étudiants étrangers et constituées soit, de cours empruntés au cursus ordinaires, soit de cours spécialement conçus pour les étudiants étrangers (ex. l'Allemagne et la Hongrie). A ces initiatives unilatérales, s'ajoutent de plus en plus des coopérations

[21] V. *supra* 3.1.7.

[22] Une résistance de ce type est signalée par le rapporteur pour le Canada.

internationales. Les *cursus* nationaux intègrent alors un séjour de quelques mois dans une université étrangère en validant les enseignements suivis et sanctionnés à l'étranger. Cette politique, initiée par les universités, est de plus en plus soutenue et relayée par les États, dans le cadre de la coopération bilatérale ou multilatérale: ainsi, les programmes ERASMUS (avec l'ECTS: *European Community Course Credit Transfert System*) [23] et SOCRATES au sein de l'Union européenne. Certaines universités proposent même des *cursus* complètement intégrés depuis la première année jusqu'à l'obtention du diplôme final, une moitié du *cursus* étant suivie par l'étudiant dans sa faculté d'origine et l'autre moitié dans la faculté d'accueil à l'étranger, le diplôme final faisant l'objet d'une validation dans les deux pays [24].

III.1.9. Contrôle des professions juridiques sur l'organisation ou le contenu des formations juridiques dispensées par l'Université

Du point de vue des rapports institutionnels avec les professions juridiques, trois catégories différentes de systèmes apparaissent.

1°) *Dans un nombre important de pays*, les professions juridiques et judiciaires n'exercent pas de contrôle sur l'organisation et le contenu des formations juridiques dispensées par l'Université (ex. Autriche, Espagne, France, Italie, Maroc, Tchéquie).

2°) A l'opposé, le *Canada*, le *Danemark* et la *Hongrie* offrent l'exemple d'une certaine forme de contrôle prenant la forme d'un pouvoir d'accréditer les facultés ou d'exprimer des recommandations relativement à la formation qui y est dispensée.

3°) L' *Allemagne* parait offrir un système intermédiaire. La formation juridique dépend certes entièrement de l'État, dans tous ses aspects. Mais, les Universités ont très peu de liberté dans la définition des programmes et le contrôle des connaissances. En revanche, les professions juridiques, essentiellement les fonctionnaires et la magistrature, sont très étroitement associées par l'État au contenu des enseignements, aux modalités des examens et à la formation pré-professionnelle (*referendariat* ou *preparatory service*), ce qui leur donne un réel pouvoir d'influence.

III.1.10. Cumul des fonctions de professeurs de droit et de praticiens du droit

1°) Il est assez généralement admis qu'un praticien du droit, les juges souvent plus que les avocats, puisse assurer des enseignements en faculté de droit, le plus souvent assurés comme vacataire avec une rémunération en fonction des heures d'enseignement effectuées (*part-time lecturer*).

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[23] V. J.-M. Peltier, *L'enseignement du droit national aux étudiants étrangers: contribution du programme* Erasmus, Revue internationale de droit comparé 1993, pp. 79-96.

[24] En France, l'Université de Paris I propose ainsi des maîtrises intégrées, dites doubles, avec des universités allemande, américaine, anglaise et espagnol, un autre projet étant à l'étude avec une université italienne. En Espagne, l'Université *Complutense* de Madrid et, en Allemagne, l'Université de Cologne offrent également des formations comparables.

2°) La possibilité inverse pour les professeurs de faculté d'être en même temps praticien du droit est plus restrictivement définie. Dans la plupart des pays en effet, même s'ils jouissent d'un statut spécifique au sein de la fonction publique, les professeurs de droit sont des fonctionnaires (*civil servants*). Pour autant, les conséquences tirées de cette qualité varient substantiellement d'un pays à l'autre. Quatre catégories se dessinent selon que le cumul n'est autorisé qu'avec une profession libérale (ex. Canada, Espagne, France, Hongrie, Italie, Maroc, Tchéquie), selon qu'il l'est avec une fonction juridictionnelle (ex. Allemagne), selon qu'il est totalement autorisé (ex. Pologne) ou, au contraire, totalement interdit (ex. Autriche).

III.2. Formation professionnelle

III.2.1. Formation professionnelle initiale

A la question de savoir comment un étudiant devient juriste et, plus précisément, avocat ou juge, la synthèse des rapports nationaux fait apparaître une grande diversité de réponses étant précisé qu'en principe, l'accès aux professions n'est pas subordonné au respect d'un *numerus clausus* pour les avocats tandis qu'il l'est, par hypothèse, pour les juges.

1°) Dans un *premier système*, illustré par le Canada et assez répandu dans les pays de *Common law*, les Facultés de Droit ne produisent que des *lawyers* ayant principalement vocation à devenir avocat (*solicitor* ou *barrister*), le diplôme universitaire étant le titre d'accès à la profession. L'élève-avocat doit seulement effectuer un stage pratique tout en suivant les cours de formation professionnelle organisés dans la province par le barreau lui-même, à l'issue de quoi est organisé un examen de sortie. Ce n'est qu'au bout de plusieurs années d'exercice professionnel, en qualité d'avocat ou de professeur (vers 40/50 ans), que le juriste est susceptible de devenir *juge* sur nomination du gouvernement.

2°) Dans un *deuxième système*, l'étudiant en droit diplômé peut devenir avocat aussi bien que juge à l'issue de sa formation universitaire, mais l'accès à ces deux professions est subordonné à des conditions variables selon les pays.

♦ Certains pays ont un *système de formation parallèle*, sinon unique, des magistrats et des avocats, subordonné à un *examen* ou à un *concours* d'entrée dans la profession, *à l'issue d'un stage* d'une durée variable, de deux à cinq ans selon la profession et le pays (ex. Autriche, Hongrie, Italie, Pologne).

♦ D'autres pays réservent aux magistrats et aux avocats un *système de formation différente*. Mais cette distinction n'est pas comprise partout dans le même sens car, *dans certains pays*, la formation des avocats est moins institutionnalisée que celle des juges (ex. Espagne, Maroc, Tchéquie), alors que d'autres pays semblent au contraire adopter la solution inverse (ex. Danemark). Cette distinction, cependant, est susceptible d'évoluer. Des

changements sont ainsi observables en Espagne où, à côté de la filière traditionnelle d'accès au barreau (simple stage), tend à se développer l'apprentissage au sein d'écoles d'application professionnelle (*Escuelas de pràctica juridica*) créées à l'initiative de la profession d'avocats et de l'université.

3°) La France offre l'illustration d'un *troisième système* encore différent. Ce système repose sur l'obligation faite à l'étudiant souhaitant devenir avocat ou juge de suivre les enseignements d'une école d'application professionnelle à l'issue de sa formation juridique universitaire (l'*École nationale de la magistrature*, ENM, pour les magistrats; un des trente *Centres régionaux de formation professionnelle des avocats*, pour le barreau). L'entrée dans cette école est subordonnée à un examen (pour les avocats) ou à un concours d'accès (pour les magistrats). La formation professionnelle y dure 2 ans pour les magistrats, 1 an pour les avocats, combinant périodes d'enseignements et périodes de stage pratiques au cours desquels les auditeurs de justice et les élèves-avocats doivent se soumettre à un certain nombre d'obligations. Pour les avocats, cette formation professionnelle est sanctionnée par un nouvel examen (le *Certificat d'aptitude à la profession d'avocat*, CAPA, *bar exam*) autorisant l'étudiant à s'inscrire au barreau en qualité d'avocat stagiaire, pendant deux ans à l'issue desquels il peut devenir avocat à part entière. L'université n'exerce qu'une responsabilité indirecte au sein de ces écoles d'application professionnelle, en offrant aux étudiants en droit une préparation à l'examen d'entrée aux Centres de formation professionnelle des avocats et au concours d'entrée à l'École nationale de la magistrature. Cette préparation d'une durée d'un an est organisée au sein des Instituts d'études judiciaires (IEJ). Les étudiants peuvent s'y inscrire parallèlement à la dernière année de leur *cursus* universitaire (4ème année, de maîtrise).

4°) A l'autre bout de la palette des systèmes, l'*Allemagne* offre enfin le modèle à peu près unique d'une formation unifiée de tous les professionnels du droit, qu'ils se destinent à la magistrature ou au barreau. Cette phase de formation aux professions débute à l'issue de la première partie des études juridiques (universitaire et théorique) sanctionnées par le Premier Examen d'État (*First State Examination - Erstes Juristisches Staatsexamen*). Elle constitue la deuxième partie, pratique et professionnelle, des études de droit, appelée *Referendariat* ou *JuristischerVorbereitungsdients* (*Preparatory service*). Le référendariat doit initier les *référendaires* aux principaux aspects des professions juridiques et aux différentes techniques de la pratique juridique à travers divers stages pratiques auxquels s'ajoutent des enseignements dispensés par les professionnels du droit. Cette période préparatoire aux professions est sanctionnée par le Deuxième Examen d'État (*Second State Examination in Law*) dont sont quasiment absents les professeurs d'Université. L'entrée dans la vie professionnelle se fait ainsi entre 6 et 8 ans. A partir de là, les diplômés s'orientent soit vers la magistrature, soit vers le barreau. *Pour devenir magistrat*, il faut faire acte de candidature auprès des ministères de la justice des *länder* allemands, les candidats recrutés devenant juges stagiaires (*probationary judges*) pendant trois ans à l'issue desquels ils ont normalement vocation à être titularisés. Par contraste, aucune voie royale n'existe *pour devenir avocat*. Les diplômés peuvent s'inscrire immédiatement au barreau en créant leur propre cabinet ou en intégrant un cabinet déjà existant.

III.2.2. Formation professionnelle continue

La formation professionnelle continue ne se présente pas de la même manière pour les avocats et pour les juges y compris, ce qui peut paraître paradoxal, dans les pays où la formation professionnelle initiale est unifiée comme en Allemagne. Rarement institutionnalisée, elle repose le plus souvent sur un investissement spontané du professionnel auprès des universités, d'organismes privés ou d'associations professionnelles, à travers les séminaires ou les colloques qu'elles organisent à l'intention des professionnels.

III.3. Débats et réformes relatifs à la formation juridique

Les débats et les réformes sont souvent déconnectées, les premiers portant sur ce que devrait être la formation idéale d'un juriste, alors que les secondes sont le plus souvent inspirées par des considérations pragmatiques où les aspects financiers sont loin d'être absents. Quatre questions font l'objet de débats plus ou moins importants alimentant, parfois, des projets de réforme.

1°) La *durée des études* ne fait pas l'objet de débats au delà de ce qui a déjà été indiqué plus haut. La formation universitaire, du moins en Europe continentale, tend à s'étirer sur une durée moyenne de 5 années, tandis qu'une période de 2 à 3 ans prépare ensuite les étudiants à l'exercice effectif de leur profession.

2°) Quant au *contenu des études*, la question de savoir quelle doit être la part des aspects théoriques et pratiques, des enseignements généraux et des enseignements spécialisés est une question récurrente posée à peu près partout. Les réponses qui lui sont données dépendent du point de départ. Dans les pays qui lui font peu de place, le souhait d'une spécialisation accrue est fort logiquement perceptible (ex., mais pour des raisons différentes, Allemagne, Hongrie, Maroc). A l'inverse, dans les pays qui lui faisait une place assez précoce (ex. Espagne, France), la tendance est au contraire au renforcement de la formation juridique générale. Ces deux évolutions conduisent au rapprochement des systèmes.

3°) Le *nombre de juristes* est une question beaucoup plus débattue, qu'il s'agisse du nombre d'étudiants ou, par la suite, du nombre de praticiens.

♦ S'agissant du *nombre d'étudiants en droit*, en dehors des examens d'entrée ou du paiement de droits d'inscription élevés (ex. Hongrie, Pologne, Tchéquie), la maîtrise des flux d'étudiants est recherchée dans le recours au système des crédits (ex. Espagne, Pologne, France et, bientôt peut-être, Hongrie).

♦ Quant à la question du *nombre de praticiens du droit*, elle ne se pose vraiment que

pour les professions purement libérales dans la mesure où les professions du secteur public (ce qui comprend la magistrature, mais aussi les offices ministériels comme ceux des notaires) sont limitées en raison du nombre d'emplois ou de charges disponibles[25]. En France, la crise économique a ainsi engendré un débat sur l'instauration d'un *numerus clausus* limitant l'accès à la profession d'avocat. Un débat comparable existe en Espagne ainsi qu'en Italie où a été proposée l'introduction d'un examen unique au niveau national pour rendre plus difficile l'accès au barreau. Une solution indirecte consiste, au Danemark, à limiter à 2 personnes le nombre de stagiaires que peut employer un avocat en place. Mais, comme le montre l'exemple allemand, l'existence d'un *numerus clausus* ne règle pas pour autant le problème de l'augmentation du nombre de juristes. Dans ces conditions, s'il devait y avoir une sélection, c'est à l'entrée dans les facultés de droit qu'elle devrait être organisée.

4°) La spécialisation des études de droit a déjà été évoquée. Quant à la question de la *spécialisation des praticiens du droit*, elle présente deux aspects.

♦ Il s'agit d'abord de la *spécialisation juridique*. Cette question se pose principalement pour les avocats et elle dépend largement de la précédente: plus le marché des avocats devient compétitif, plus il devient important pour un avocat de se distinguer des autres en affichant une spécialisation particulière. Cette tendance existe notamment en Allemagne et en France où les avocats se sont vus reconnaître le droit de faire état d'une spécialisation dans un certain nombre de matières arrêtées par la loi. Cette question de la spécialisation est également posée dans un bon nombre de pays où il n'en existe pas (ex. Danemark). En amont, le souhait d'une formation professionnelle plus institutionnalisée des avocats est exprimé dans les pays où elle se réduit à un stage pratique, ce stage serait-il sanctionné, par un examen, ce qui n'est pas toujours le cas (ex. Espagne).

♦ La question de la spécialisation *juridique*, au regard d'une expertise particulière dans certains domaines du droit, ne doit pas être confondue avec le problème de la spécialisation *professionnelle* qui se pose dans les pays où les praticiens du droit ne sont pas regroupés dans une profession unique. Le débat se développe alors sur le point de savoir si les différentes professions juridiques doivent rester séparées ou doivent fusionner en une seule profession. Ce débat existe singulièrement en France où l'évolution s'est faite, depuis une trentaine d'années, dans le sens d'une unification croissante des professions juridiques, que ce soit par le niveau de qualification universitaire requis pour y accéder (4 ans aujourd'hui) ou, plus radicalement, par des opérations de fusion professionnelle (en 1971, entre avocats et avoués de première instance; en 1991, entre avocats et conseils juridiques). Mais ces fusions successives, qui portent le barreau français à 35 000 membres, laissent encore subsister bien d'autres professions, qu'il s'agisse des notaires (7 628), des huissiers de justice (3 225), des avoués auprès les cours d'appel (394) ou des avocats au Conseil d'État et à la Cour de cassation (87). Cette division émousse le poids des professions du droit par rapport aux professions du chiffre (expertise-comptable, audit...) qui revendiquent le pouvoir de développer une activité juridique dans le domaine de leur activité principale

[25] Dans certains pays, un débat existe cependant sur l'abandon du *numerus clausus* limitant l'accès à certains professions: ainsi, en Autriche, à propos des notaires. La crainte est alors exprimée que le nombre de juristes sans emploi augmente dans les années à venir, la faiblesse des ressources financières de l'État ne lui permettant pas d'employer un aussi grand nombre de juristes.

(droit des sociétés, droit social, droit fiscal). Or, ces professions sont mieux implantées que les juristes auprès des entreprises.

III.4. Influence de la concurrence internationale sur la situation des professions juridiques

La question de l'influence de la concurrence internationale reçoit des réponses diverses.

1°) *S'agissant des avocats*, quelques phénomènes sont attribués, par quelques rapporteurs nationaux, à la concurrence internationale, à commencer par *l'implantation de grandes firmes juridiques étrangères* dans les villes principales des pays (ex. France, Hongrie, Québec), grâce au concours de plus en plus fréquent de professionnels locaux. Par un effet de cascade, le développement de ces grands cabinets remet en cause les structures traditionnelles d'exercice de la profession d'avocat car elle favorise *le regroupement des cabinets nationaux*, cette augmentation de la taille des cabinets exerçant à son tour une influence sur le comportement des étudiants ainsi portés à obtenir un *curriculum* acceptable par de grands cabinets (ex. Allemagne, Canada, Danemark, France). D'autres effets sont rattachés à la concurrence internationale: la *remise en cause de la territorialité de l'activité de certaines professions juridiques* là où elle existe (ex. Danemark); *l'évolution des modalités d'exercice de ces professions vers des formes de type commerciale* en permettant par exemple aux professionnels de se grouper sous la forme de sociétés commerciales à responsabilité limitée (ex. Danemark, France); *l'orientation des firmes juridiques vers de nouvelles activités comme celles de l'arbitrage, de la médiation et de la conciliation* (ex. Danemark); *la mise en danger l'existence d'un nombre croissant de firmes juridiques au point que la question* est posée, dans certains pays, de l'application des procédures de faillites (*bankruptcy*) aux professions libérales et notamment aux cabinets d'avocats (ex. Danemark, France).

2°) L'influence de la concurrence internationale est signalée à propos des avocats. Elle ne l'est pas pour les autres professions juridiques et, plus particulièrement, *pour la magistrature*. Il convient cependant de signaler que l'ouverture internationale de l'économie entraîne nécessairement une internationalisation croissante des litiges, donc un besoin accru de compétences appropriées aux différents aspects du droit international pour procéder efficacement à leur règlement. La formation future des juges devrait faire une place de plus en plus importante à ces considérations (ex. Allemagne, France).

IV CONCLUSION

IV.1. Appréciation du lien entre l'évolution du contentieux civil et l'évolution des professions juridiques

1°) Une première série de réponses se développe sur le *registre, qualitatif,* de l' *adaptation des professions juridiques à l'évolution de la nature du contentieux civil.*

♦ *Évolution des compétences professionnelles* en raison de l'internationalisation croissante des relations commerciales qui, à l'image du développement du commerce par l'internet, concerne les particuliers aussi bien que les entreprises. Les avocats de base seront requis d'afficher une expertise nouvelle (Y. Desdevises, *France*),. Cette expertise nouvelle, si elle renforcée dans les pays participant à la construction de l'Union européenne (A. Saletti, *Italie*), apparaît aussi comme un souhait nettement affirmé par les juristes des pays émergents (A. Boudahrain, *Maroc*). Dans un ordre d'idée voisin, déjà observable dans certains pays, les missions des avocats devront sans doute intégrer comme une composante importante de leur activité les modes de règlement alternatif des conflits qui, sans être la panacée, est vraisemblablement appelé à se développer (Y. Desdevises, *France*; A. Boudharain, *Maroc*).

♦ *Évolution des structures professionnelles* en raison de la nécessité, pour les professions juridiques, dans les pays où elles sont multiples, de se regrouper, soit pour donner naissance à une profession unique, soit pour favoriser le développement de cabinets interprofessionnels. Ces regroupements devraient permettre de créer des cabinets plus importants offrant une offre de service plus diversifiée et spécialisée (A. Saletti, *Italie;* M. Sawczuk, Pologne). Cette mutation peut aussi, dans certains cas, passer par une privatisation de professions juridiques fonctionnarisées dont on pense qu'elles rendraient ainsi un service plus efficace (A. Winterova, *Tchéquie,* à propos des huissiers de justice). Cette nécessité d'une redéfinition du périmètre du droit devrait également conduire à une redéfinition des rapports entre les praticiens du droit et les professionnels du chiffre (experts-comptables, cabinets d'audit...) appelés, eux aussi, à donner des conseils juridiques à leurs clients dans le domaine de leur activité principale (Y. Desdevises, *France*). Selon la réponse donnée, la formation donnée à l'Université a vocation à s'en ressentir.

2°) Un deuxième niveau de réponse se développe sur un *registre quantitatif* en ce sens, clairement exprimé par le rapport canadien que *„ toute augmentation du contentieux nécessite une augmentation des services fournis par les professions "* et que cette augmentation passe normalement par *„ une augmentation du nombre des membres de la profession "* (H. P. Glenn, *Canada*). Ce n'est pas à dire, cependant, que doive être agité le spectre de la spirale inflationniste conduisant aux excès de la société contentieuse, la juridicisation croissante de la société, sa *Verrechtlichung* (W. Lüke, *Allemagne*), favorisant le contentieux, la *litigation*. D'abord, l'augmentation du nombre de juristes peut s'expliquer

autrement que par l'augmentation du contentieux (W. Lüke, *Allemagne*, A.D. Simotta, *Autriche*, et H. P. Glenn, *Canada*). En outre, l'augmentation du contentieux n'est pas nécessairement illégitime en soi; elle est l'expression de cette *general expectation of justice*, évoquée par Friedman [26] et liée à la démocratisation de la société [27]. Le risque de dérive n'existe que dans la mesure où la profession devient trop nombreuse sans pouvoir se réglementer car, dans ce cas, elle devient l'une des causes même de l'augmentation du contentieux *(„ law is business "):* c'est l'organe qui se met à créer le besoin (H. P. Glenn, *Canada*) et le risque apparaît alors, tout à la fois, d'une paupérisation de la profession et d'un relâchement de ses exigences éthiques (W. Lüke, *Allemagne*). Une leçon est tirée de ces appréciations en ce qui concerne la formation juridique à l'aube du troisième millénaire.

IV.2. Opinion des rapporteurs nationaux au sujet de la formation juridique à l'aube du troisième millénaire

Cette leçon est exprimée, notamment, par le rapporteur canadien: *„ Le grand défi de la formation juridique, et notamment de la formation en droit judiciaire, à l'aube du troisième millénaire est (...) de maintenir la notion de service à la population comme raison d'être des professions juridiques "* (H. P. Glenn). L'idée se retrouve également sous la plume d'autres rapporteurs qui soulignent la nécessité d'un respect accru de l'éthique professionnelle (Y. Desdevises, *France*; A. Boudahrain, *Maroc*; M. Sawczuk, *Pologne*).

Cette éthique du juriste passe d'abord par la nécessité, pour les facultés de droit, d'offrir des programmes de formation où l'efficacité technique de la norme juridique, donc du conseil juridique, ne soit pas conçue comme une fin en soi. Les facultés de droit doivent se garder de la double tentation de la logique formelle et de l'analyse économique, du scientisme et de l'économisme. La protection des droits de l'homme, dont un rapporteur pense qu'elle va *„ déterminer les objectifs de la formation professionnelle des juristes "* (M. Sawczuk, Pologne), a tout autant d'importance que les nécessités du commerce international. Si les juristes allemands s'inquiètent des excès du dogme du *Einheitsjurist*, du juriste universel, qui réduit la formation du juriste à la seule activité judiciaire nationale de règlement des litiges (W. Lüke, *Allemagne*), il ne faudrait pas pour autant qu'ils jettent *„ le bébé avec l'eau du bain " (man soll nicht das kind mit dem Bade auschütteln).* Dans son principe même, le concept de juriste universel est un beau concept auquel parait attaché bon nombre de rapporteurs (ex. A. Winterova, *Tchéquie*).

Ce n'est pas à dire, cependant, qu'aucune spécialisation ne doive pas être offerte par les facultés de droit au prétexte qu'un juriste spécialisé se saurait pas élargir son jugement à des questions sortant de sa spécialité. Il est douteux que la seule pratique juridique puisse assurer une spécialisation des juristes à un niveau de compétence et de maîtrise suffisantes. Seulement, deux conditions doivent alors être remplies. *D'un côté,* les facultés de droit ne sauraient enseigner la totalité des champs du savoir juridique; toutes les spécialités ne

[26] L.M. Friedman, *Total Justice*, New York, 1985, p. 43.
[27] V. M. Storme, *Le droit judiciaire:* de diversitate unitas?, Justices, n° 7, 1997, pp. 69-86, spéc. p. 73.

peuvent pas être offertes par les programmes d'enseignement (M. Ortells Ramos, *Espagne*, et W. Lüke, *Allemagne*). *D'un autre côté*, cette formation spécialisée doit rester, à l'instar des enseignements généraux, une formation aux *solutions* juridiques et non pas une formation à la *pratique* juridique qui doit relever, quant à elle, des seules professions. Il est cependant permis de souligner, avec les rapporteurs allemand et espagnol, que la formation aux solutions juridiques n'est pas seulement la formation aux règles de droit, c'est la *formation à la manière d'appliquer ces règles à la réalité des situations juridiques, qu'elles soient litigieuses ou non* (M. Ortells Ramos et W. Lüke).

Si le modèle de „ fusée à deux étages " (*the two-level lawyer training*) parait ainsi assez largement admis par les rapporteurs, ceux-ci semblent également souhaiter que la formation professionnelle des avocats et des juges soit plus et mieux organisée dans le sens d'une articulation croissante, au stade de la formation initiale comme à celui de la formation continue (H. Blomquist, *Danemark*. - M. Ortells Ramos, *Espagne*). Les juges, en particulier, ne doivent pas échapper à la nécessité d'une spécialisation plus grande de leurs compétences (M. Ortells Ramos).

Cette répartition des tâches ne doit cependant pas être interprétée comme conduisant les facultés de droit et les professions du droit à s'ignorer respectivement. Ces deux familles, comme les familles d'instruments, jouent certes sur des registres différents, mais elles appartiennent au même orchestre. D'où la nécessité d'associer les professeurs de droit à la formation professionnelle et associer les praticiens du droit à la formation universitaire, cette association pouvant avoir une intensité et revêtir des formes variables selon les questions et selon les pays.

Enfin, ce dialogue interprofessionnel ne peut plus être enfermé dans les frontières d'un seul pays, en Europe, surtout, où l'émergence d'une culture judiciaire transnationale, favorisée par la redécouverte de racines communes trop longtemps occultées [28], est plus à attendre des échanges entre les professions nationales que d'une uniformisation venue d'en haut comme un *deux ex machina* [29].

[28] V. R. Jacob (dir.), *Le juge et le jugement dans les traditions juridiques européennes*, LGDJ, 1996. - V. également M. Storme, *op. cit.*, p. 80, pour lequel „ *il n'est pas exact de prétendre que la procédure de type* continental law *et celle de type* common law *serait inconciliables* ".

[29] En ce sens, rappr. L. Moccia, *Les bases culturelles du juriste européen: un point de vue continental*, Rev. intern. dr. comp. 1997, 799-811

V SUMMARY

Ce rapport a pour objet d'étudier la manière dont, à la veille du troisième millénaire, se présentent le contentieux civil et la formation juridique pour tenter de faire apparaître les relations qui les unissent. Il traite de l' Allemagne, l' Autriche, le Canada, le Danemark, l' Espagne, la France, la Hongrie, l' Italie, le Maroc, la Pologne et la République Tchèque. Cependant, d'un pays à l'autre, les solutions sont d'une très grande diversité car les questions abordées sont fortement imprégnées du particularisme des traditions nationales. Cette diversité se constate, d'abord, à travers la description des professions juridiques (1ère partie) qui sont de nature et d'importance variables, les avocats, notamment n'ayant pas partout le monopole du marché du droit, donc les mêmes fonctions. La diversité s'observe également à travers le contentieux civil (2ème partie) dont le volume et les caractéristiques varient également d'un pays à l'autre. Il semble, toutefois, primo, que l'augmentation du contentieux, en cours de stabilisation, soit supérieure à l'augmentation de la population et, secundo, que la litigiosité d'un pays soit proportionnelle au nombre de ses juges et non pas, contrairement à une idée souvent reçue, au nombre de ses avocats. La diversité s'exprime enfin sur le terrain de la formation juridique (3ème partie), qu'il s'agisse de la formation universitaire ou de la formation professionnelle et, pour cette dernière, de la formation initiale ou de la formation continue. Les liens entre l'université et la pratique sont extrêmement divers de telle sorte qu'aucun modèle général ne se dégage vraiment. En guise de conclusion (4ème partie), ce rapport rend compte des appréciations librement développées par les rapporteurs nationaux, d'une part, sur le lien entre l'évolution du contentieux civil et l'évolution des professions juridiques et, d'autre part, sur ce que devrait être la formation juridique au l'aube du troisième millénaire. Sur ce point, en revanche, la diversité le cède à l'unité car le voeu est très majoritairement formé que les professions juridiques demeurent dominées par la notion de « service à la population », ce qui doit conduire les facultés de droit à dispenser un enseignement dans lequel l'efficacité technique du savoir juridique ne s'acquiert pas dans l'oubli des valeurs de justice et d'éthique

VI ZUSAMMENFASSUNG

JURISTISCHE BERUFSAUSBILDUNG UND ZIVILPROZEß IN EINER ZEIT DES GESELLSCHAFTLICHEN WANDELS

Ziel dieses Berichts ist die Untersuchung, auf welche Art sich der Zivilprozeß und die juristische Berufsausbildung an der Schwelle des dritten Jahrtausends präsentieren, um zu versuchen, die verbindenden Beziehungen darzulegen. Der Bericht behandelt Dänemark, Deutschland, Frankreich, Italien, Kanada, Marokko, Österreich, Spanien, Polen, die Tschechische Republik und Ungarn. Die gefundenen Lösungen variieren erheblich von einem Land zum anderen, weil die behandelten Themen stark von den Eigenheiten der nationalen Traditionen geprägt sind. Diese Vielfalt äußert sich erstens bei der Festlegung der juristischen Berufe (1. Teil), die sich ihrer Natur und Bedeutung nach unterscheiden. So hat zB der Anwalt nicht überall das Monopol auf dem Rechtsmarkt und nimmt somit nicht die gleichen Aufgaben wahr. Die Vielfalt läßt sich weiters beim Zivilprozeß (2. Teil), dessen Umfang und Eigenschaften sich ebenfalls von Land zu Land unterscheiden, feststellen. Es scheint jedoch erstens, daß die Zunahme der Zivilverfahren, welche sich auf dem Wege der Stabilisierung befindet, größer ist als das Wachstum der Bevölkerung, und zweitens, daß das Streitverhalten eines Landes proportional zur Anzahl der Richter ist und nicht – wie weitverbreitet angenommen wird – zur Anzahl seiner Anwälte. Schließlich finden sich Unterschiede auf dem Gebiet der juristischen Ausbildung (3. Teil), sowohl bei der akademischen als auch bei der Berufsausbildung, und für letztere sowohl im Anfangs- als auch im fortgesetzten Stadium. Die Beziehungen zwischen den Universitäten und der Praxis sind dermaßen unterschiedlich, daß sich kein allgemeines Modell aufstellen ließ. Im abschließenden vierten Teil wurden die von den Nationalberichterstattern entwickelten Bewertungen betreffend die Verbindungen zwischen der Fortentwicklung des Zivilprozesses und der juristischen (Berufs)Ausbildung einerseits und die Zukunft der juristischen Ausbildung an der Schwelle des dritten Jahrhunderts andererseits behandelt. In diesem letzten Punkt hingegen weicht die Vielfalt einer Einheit, da das eindeutige und mehrheitliche Anliegen geäußert wurde, daß die juristischen Berufe weiterhin vom Begriff des "Dienstes an die Bevölkerung" geprägt sein sollten, was auch dazu führen soll, daß die rechtswissenschaftlichen Fakultäten ihren Unterricht so gestalten, daß technische Effizienz des juristischen Wissens nicht auf Kosten der Werte Gerechtigkeit und Ethik vermittelt wird.

[Übersetzung Cécile M. Bervoets]

VII SUMMARY

LEGAL EDUCATION AND CIVIL LITIGATION IN A CHANGING SOCIETY

The aim of this report is to examine how civil litigation and legal education manifest themselves at the threshold of the third millennium, it further attempts to indicate the relations which unify them. It deals with Austria, Canada, the Czech Republic, Denmark, Germany, Hungry, Italy, Poland and Spain. However, from one country to another the solutions are quite diverging since the themes are highly affected by particularities of the national traditions. This divergence appears firstly through the description of the legal professions (1st part), which vary in nature and importance. Lawyers for instance do not have similar monopolies at legal markets everywhere and thus not the same functions. This diversity can further be noticed in civil litigation (2nd part) since volume and characteristics vary from one State to another. It seems however, firstly, that the increase of civil procedures which is in course of stabilisation, is superior to the growth of population and, secondly, that the number of litigations in a State is proportional to the number of judges and not – as often presumed – to the number of its lawyers. The diversity can finally be noticed in the field of legal education (3rd part), academic education as well as professional education and concerning the latter at the initial as well as at the continued stage. The links between universities and practice are extremely various, so that actually no general model could be made up. Concluding (4th part), this report relates the viewpoints of the national reporters concerning on the one hand the relation between the development of legal education and the evolution of the legal professions and on the other hand concerning the future of legal education on the threshold of the third millennium. In this point though the diversity cedes for unity, since a large majority expressed the desire that legal education remain based on the notion of "service to the people" and that as a consequence, the law faculties perform in such way that values of justice and ethics are not forgotten when learning technical efficiency of legal know-how.

[Translated into English by Cécile M. Bervoets]