Janet Walker & Oscar G. Chase

Common Law Civil Law and the Future of Categories

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Janet Walker
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Preface

This volume comprises many of the papers presented at the International Association of Procedural Law (IAPL) Conference, held in Toronto on June 3–5, 2009.

The IAPL is an association of proceduralists from more than 50 countries. It was formally organized in Bologna in 1955, following preliminary meetings in Florence and Vienna. The founders believed that furthering the appreciation, study and implementation of just and effective legal procedures was an important response to the lawlessness of the despotic regimes of the first half of the 20th century.

Since those early meetings, the Association has continued to foster the study of procedural law through the exchange of information and publications, and the organization of international conferences. In recent times, world congresses have been convened every four years, with the most recent held in 2007 in Salvador da Bahia, Brazil, and the next scheduled for Heidelberg in 2011. Interim annual meetings have been held in Europe, North and South America, and Japan. All interested scholars are welcomed at the annual conferences and world congresses.

The Association is composed of distinguished scholars of procedure elected by the Council. At the time of the conference, the members of the Presidium were President Federico Carpi (Italy), Vice-President Ada Pellegrini Grinover (Brazil), Vice-President Oscar G. Chase (United States.), Vice-President Masahisa Deguchi (Japan), Secretary-General Peter Gottwald (Germany), Secretary-General Michele Taruffo (Italy) and Executive Secretary-General Loïc Cadiet (France).

Over the years, the IAPL has had the good fortune to have among its members many of the leading figures in comparative procedure, some of whom have served as its President, including Enrico Redenti, Niceto Alcalà Zamora y Castillo, Mauro Cappelletti, Marcel Storme and, most recently, Federico Carpi. Many other great proceduralists have been members of the Association. The task of choosing which of them might be mentioned here would be invidious. However, as is customary at the annual conferences, the participants in the Toronto Conference took time during the official opening to pay tribute to those who had passed away in the previous year. This is what President Carpi had to say:

On April 21, 2009, the death occurred of Augusto Mario Morello, head of the important Argentinean School of Procedural Law. He was an indefatigable friend who attended all of our international meetings, and he was, for many years, a member of our board of directors. Upon leaving the board, he was elected an honorary member. Augusto Morello was the founder of the internationally renowned "La Plata School". He leaves an enormous body of professional writings, with over 100 books and thousands of articles — far too many to mention today; I would single out only his studies of Supreme Courts. He was also a judge of the Argentinean Supreme Court. I can still see, and feel in my heart, his great humanity, his disinterested enthusiasm, and his love of social justice. As Roberto Berizonce rightly said in his memoir, Augusto taught people to love dreams, illusions and utopias, as only a great spirit knows how to do. The Association shares the loss of the international scientific community, and especially that of his pupils, Roberto Berizonce, Eduardo Oteiza, Juan Carlos Hitters, Eduardo de Lazzari, Mario Kaminker, Angelo Ledesma and Osvaldo Gozzaini — all very active members of our Association.

December 2008 saw the death, following a long illness, of Luigi Montesano, who was formerly a Professor at Rome University. He was a reserved man who made a very profound mark on Italian Procedural Studies. Although he did not enjoy international encounters, he was a scholar of the highest quality. South American Scholarship, which traditionally has cultural ties with Italy, had reason to appreciate the rigour and the originality of his work. I must also mention a master of German civil procedure, Karl-Heinz Schwab. His first monograph on the subject of the trial, *Der Streitgegenstand im Zivilprozess*,[1] immediately became a classic text; this was followed by a vast quantity of legal writings. Particular mention should be made of his revision of Rosenberg's *Lehrbuch*,[2] as well as his commentary on arbitration, which was started by Baumbach, and later revised by Gerhard Walter.

In April of this year, the death occurred of Raymond Martin, a well-known French lawyer, whose subject was deontology; he was also a man of letters, and he even won the "prix du Palais Littéraire" in 2001.

And finally, very recently, on May 17, we lost Steve Goldstein, a dear friend and a great scholar. His contributions as a council member

[1] Karl-Heinz Schwab, *Der Streitgegenstand im Zivilprozess* (München: Verlag C.H. Beck, 1954).

[2] L. Rosenberg, *Lerhbuch des Deutschen Zivilprozessrechts*, 6th ed. (München: Verlag C.H. Beck, 1954).

> of our Association bore witness to his wisdom, balance, courtesy and respect for others. He was a Professor at Penn Law School, and a consultant to the U.S. Supreme Court. In 1976, he accepted the chair of Procedural Law at the Hebrew University of Jerusalem. He taught Comparative Procedure, Comparative Judicial Systems and American Law. He was visiting professor at many universities in Europe, Japan, and the United States. I remember him in Oxford, Cambridge and Bologna, when he roused much interest among the young. With his death, comparative studies — which were enriched by his contributions — have lost a world-class scholar, and we have lost a very dear friend.

The Toronto Conference ("IAPL 2009") proved to be a productive meeting of procedural specialists from around the world. The scholarly engagement was lively, and penetrating analyses covered the depth and range of the field — all in search of insight into the current and future state of the common law / civil law divide. The papers presented were supplemented with a specially commissioned video recording of an interview by Joshua Rozenberg (filmed by John McIntyre and produced by Adam Finley) of Lord Woolf, who reflected on the historic reforms of procedure in England and Wales that his efforts had brought about. From the vantage point of a decade following their implementation, Lord Woolf was able to offer a comparative perspective that enriched the conference discussions.

We have a great many people to thank for the success of the event, beginning with our respective deans, Dean Richard Revesz of the NYU School of Law and Dean Patrick Monahan of the Osgoode Hall Law School, who agreed, together with the Dwight D. Opperman Institute of Judicial Administration, to host the conference. Further support was provided by the Law Society of Upper Canada, Air Canada, Thomson Reuters and Aspen Publishers.

Mr. Barry Leon, then of Torys LLP in Toronto, served tirelessly as the third member of the Conference-Chair trio. The staff of Osgoode Professional Development ensured we had all that we needed at the facilities, and the staff of Osgoode's Information Technology Department and Research Office provided fine support for the web presence and registration. Additional administrative support was provided by Torrey Whitman of the Opperman IJA, and Johan Marique Garcia and Becky Walker of Osgoode.

This volume of papers would not have been possible without the excellent editorial assistance of Daniel Hohnstein, Osgoode Hall Law School, Class of 2011, and the research assistance of Sarah Brodie, NYU

School of Law, Class of 2012, and Gian-Luca Di Rocco, Suzanne Akehurst and the team at LexisNexis. And last, but certainly not least, we are grateful to all the contributing authors for their wonderful papers. We hope you enjoy them!

Janet Walker
Oscar G. Chase
Toronto, February, 2010

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Professor Walker teaches Conflict of Laws and International Commercial Arbitration at Osgoode Hall Law School, where she has also taught Civil Procedure and served as Associate Dean. She is the author of *Castel and Walker: Canadian Conflict of Laws*, *Halsbury's Laws of Canada: Conflict of Laws* and *Civil Litigation* (with Lorne Sossin); and she is the General Editor of *Civil Litigation: Cases and Materials*. She has taught as a visiting professor at Monash, Haifa, Toronto, NYU, NUS, and for the past nine years at Tunis II; and she was an international advisor to the ALI/Unidroit Project on Transnational Principles and Rules of Civil Procedure. She is the common law advisor to the Federal Courts Rules Committee, and she is the Leverhulme Visiting Professor at Oxford. She is a member of the Council of the IAPL.

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Judith Resnik — Managerial Judges, Jeremy Bentham and the Privatization of Adjudication

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Common Law, Civil Law and the Future of Categories: An Introduction

Oscar G. Chase* **and Janet Walker****

Reform and harmonization are breaking down the distinctions between common law and civil law procedure. The old categories have become less relevant to dispute resolution. Changes are occurring in both systems in the roles of parties, judges, counsel and witnesses. Harmonization projects, mixed jurisdictions, and jurisdictions in transition are demonstrating that the traditional distinctions may not define the dispute resolution processes of the future.

Reforms may be making the practical distinctions between one country and another within the civil or common law more significant than the distinctions between the civil and common law generally. International commercial arbitration and international criminal tribunals are blending practices in ways that resemble neither tradition as much as they do new and flexible approaches to the processes of resolving disputes.

We invite you to join the members of the International Association of Procedural Law and leading proceduralists from around the world to hear their perspectives on the ways in which procedural reform is precipitating a collapse of the traditional categories of civil and common law in response to a new range of concerns and aspirations for procedure, and to share your experiences with the evolution of procedure and your views on the way in which it is being shaped by the changing role of dispute resolution in society.

So read the invitation to the conference: "Civil Law – Common Law: Categories of the Future and the Future of Categories" that was presented in Toronto on June 3–5, 2009. Participants considered whether, in view

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of ongoing worldwide procedural reforms, the age-old categories of common law and civil law continue to be useful procedural taxonomies and, if not, whether new categories are emerging that will have a role to play in the future. Distinguished scholars from 35 countries representing most of the world's legal systems took an informed look at the directions of procedural reform in the context of the conference themes.

I. WHITHER THE CATEGORIES OF COMMON LAW AND CIVIL LAW?

A leitmotif of contemporary comparative law scholarship is the harmonization (or "approximation" or "convergence") of procedural systems. In part this is an aspirational theme, exemplified by the ALI/UNIDROIT *Principles of Transnational Civil Procedure*. It is also descriptive. Comparatists have observed a variety of points on which representatives of the common law and civil law traditions are converging. This has led some to renew their questioning of the distinction between "adversarial" and "inquisitorial" systems and now to wonder about the continuing utility of the categories of "common law" and "civil law", at least where procedure is concerned. The jury trial has, of course, lost virtually all of its purchase as a marker of common law procedure, as the U.S. is the only country in which its use remains important (and even there its use has declined substantially). Beyond that, one observes an increasing role for the judge in the supposedly "adversarial" common law systems, greater use of written proof in place of oral testimony, and a move toward neutral experts. We also see a trend toward concentrated hearings in some civil law countries, and even, in the latter, non-trivial steps toward involuntary "discovery" by the litigants. But it is not the case that every common law system has changed in exactly the same way or that every civilian system (whether Romanist or Germanic in orientation) has adopted the same feature of the traditional common law process. The outcome of some of the more radical reforms of civil justice systems could well be described as diversifying rather than harmonizing them with their counterparts in other countries.

One consequence of these developments is that the two paradigms that have shaped comparative procedural thinking for centuries no longer have the descriptive or normative power that they once did. The terms "civil law" and "common law" no longer serve as useful shorthand and obscurant over-generalizations. As some common law and civil law systems come to resemble one another more, it is arguable that they are

becoming (ironically) less like other legal systems once thought to be within their category. These developments raise important questions for scholars of procedure, which we attempted to capture in the title of the Conference. Some scholars would "dustbin" the traditional categories. Professor Zekoll asserted some time ago that "attempts to categorize and label procedural systems … [constitute] an impulse that many comparatists cannot, but should, resist".[1] Ugo Mattei has raised the further objection that "Western centrism cannot be the foundation of a classification that aims to cover the whole world".[2] But, as H. Patrick Glenn insisted only two years ago, we must be mindful that the major traditional categories have always been porous and have always been internally complex — perhaps necessarily so: "[T]heir identities are not mutually exclusive ones."[3]

With this complex background of post-modern critical assessments of traditional paradigms and a worldwide blossoming of procedural reforms that take new and challenging directions, we asked contributors to address these, among other questions:

- In what context, if at all, does it remain useful for proceduralists to categorize a system as common or civil law?
- What new categories have emerged for use as normative or descriptive shorthand?
- Are there particular procedural developments that have proven effective regardless of categories (*e.g.*, tools of fact investigation, group representation and pre-action protocols)?
- Can we do without categories? What are the theoretical and pedagogical implications of a category-less world?
- What are the historical antecedents of this situation and what can we learn from the history of category collapse (such as that of "socialist" systems)?
- Apart from the content of rules of process, what can we say about the processes by which rules and rule-change are produced?

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[1] Joachim Zekoll, "Comparative Civil Procedure" in Mathias Reimann and Reinhard Zimmerman, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 1328, at 1329. Ugo Mattei has also criticized the civil law / common law paradigm and proposed a new categorization under which the world's legal systems would fall into one of three systems or "patterns", those belonging to the "rule of professional law" or the "rule of political law" or "the rule of traditional law". Ugo Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" (1997) 45 Am. J. Comp. L. 5, at 16 [hereinafter "Mattei"].

[2] Mattei, *id.*, at 19.

[3] H. Patrick Glenn, *Legal Traditions of the World*, 3d ed. (Oxford: Oxford University Press, 2007), at 355.

- What about the "style" of litigation — have differences of style survived the collapse of formal rules?
- What are the political causes and consequences of the harmonization/fragmentation of categories?

The result was a stimulating and lively conference, as is well captured by the papers that were presented there, many of which are contained in this book.

II. CATEGORIES: PROSPECTS AND PROBLEMS

The themes of the conference necessarily suggest that we step back for a brief moment from procedure *per se* and think about the central concept of categories. How can we evaluate the continued accuracy and utility of our common law / civil law paradigm without addressing the concerns and values of categorization? Could we do without categories? Could we do without *these* categories?

According to Professors Amsterdam and Bruner, "A category is a set of things or events or actions (or whatever) treated as if they were, for the purposes at hand, similar or equivalent or somehow substitutable for each other."[4] Though "[c]ategories are ubiquitous and inescapable in the use of the mind … they are also inevitable beguilers" and "we are always at risk that our categories may lead us astray."[5] Why? Most obviously because once we assign a legal system (or thing or group of people) into a category, "we will attribute to it the features of that category and fail to see the features of it that don't fit."[6] This is arguably the case in the world of proceduralists, for if local practices are changing without respecting the traditional confines of labels, our academic categories will accordingly become more and more misleading with time.

Another unavoidable risk of categorization flows from the reality that categories are not found in nature; they are created by human beings, and are created for any number of purposes apart from providing useful mental heuristics. They are the "badges of our sociopolitical allegiances".[7] That is, consensual systems of categories "function to create

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[4] Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* (Cambridge: Harvard University Press, 2000), at 20 [hereinafter "Amsterdam & Bruner"].

[5] *Id.*, at 19.

[6] *Id.*, at 49.

[7] *Id.*

and promote communal solidarity".[8] This is in part the mark of a healthy society, yet it carries with it the danger of hegemonic exclusion when used to categorize social groups. The separation of some group or groups into "the other" has too often been (and regrettably still is) the prelude to victimization. While we do not suggest that the common law / civil law divide necessarily carries such malign freight, the resonance of those terms with groups of nations, proud of — or at least emotionally attached to — their own legal systems suggests a warning against uncritically applying those particular categories. That warning reaches the alarm level when we consider the trope sometimes used in place of the common law and civil law division: "adversarial systems" in opposition to "inquisitorial systems".

Procedure under common law has sometimes been called "adversarial" because it gives the disputants (or their lawyer-champions) substantial control over the proceedings, allowing for a clash of forensic skills in the courtroom. Civil law process grants more authority over the lawsuit to the presiding judge, such as scheduling the course of the proceeding and taking a hand in questioning witnesses; this prompted the "inquisitorial" label. But as Damaška has well put it, that word suggests the infamous "Inquisition" of the medieval Roman Catholic Church. He points out that "[t]o Anglo-Americans, the two concepts are suffused with value judgments: the adversary system provides tropes of rhetoric extolling the virtues of liberal administration of justice in contrast to an antipodal authoritarian process ..."[9] In his keynote address to the conferees, Professor Damaška again criticized the adversarial/inquisitorial shorthand:

> But while these two contrasting models capture many salient differences between traditional forms of *criminal* justice in the two branches of the Western legal tradition, and while they bring out some important contrasts that existed between Western and Soviet approaches to civil procedure, they could be misleading as means to identify distinctive features of Anglo-American and continental European styles … of *civil* litigation.[10]

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[8] *Id.*, at 24.

[9] Mirjan Damaška, *The Faces of Justice and State Authority*: *A Comparative Approach to the Legal Process* (New Haven and London: Yale University Press, 1986).

[10] Mirjan Damaška, "The Common Law / Civil Law Divide: Residual Truth of a Misleading Distinction" [hereinafter "Damaška"] in Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories* (Markham, ON: LexisNexis Canada, 2010) [hereinafter "Walker & Chase"] 3, at 3.

The dispute resolution procedures of modern states share the basic principles of the right to be heard, to present evidence, to be represented by counsel, and to have an impartial adjudicator. The admitted differences in the role of the judiciary in civil cases are not so dramatic or substantial as to justify the labelling of one as "adversarial" and the other as "inquisitorial", especially given the judgmental baggage inherent in those words. The labels too easily lead to self-congratulation on one hand and disparagement of the other. Is there a kernel of these emotions lying deep within the common law / civil law distinction — on both sides of the divide?

Several conferees addressed the issue of categories directly. Professor Taruffo expressed skepticism

> about the possibility and the advantages of thinking in terms of "categories", as if the problem consisted of how to put some new and updated concepts into the place of the old and outdated ones. In most areas of culture, and also of legal thinking, the traditional dogmas, and the use of concepts that are too abstract and too vague, have been set aside in favour of more concrete approaches that are based upon the historical, social and ideological dimensions of legal phenomena.[11]

He goes on to muse that "a possible suggestion for the future could be not to think (only) in terms of categories, but to think (at least mainly) in terms of the *values* that should be implemented in the administration of civil justice."

Crediting Professor Taruffo's critique of categorization as a normative enterprise, we may wonder if his category-skepticism also applies to the descriptive work these taxonomies perform. Professor Glenn reminds us in his paper that categories are necessary for coherent thought. He asserts:

> It is one thing to jettison a taxonomic process that has always been a dubious one in the field of law, whatever justification might exist for it in the physical sciences. It is another thing, however, to reject categories and distinctions as a means of thought, since without them we would appear condemned to a form of permanent intellectual stall. … It appears rather to be a question of the importance that we assign to the distinctions and the categories we create. Are they simple intellectual aids, or reflections of underlying and definitive truths? The taxonomic project would take them as reflecting underlying truths or reality, as might be the case in the hard sciences.

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[11] Michele Taruffo, "Some Remarks about Procedural Models" in Walker & Chase, *id.*, 621, at 627.

> They can equally be seen as mere intellectual aids, however, if we are willing to admit some tension or ambiguity in our underlying categories: here, those of civil and common law, or western law in general.[12]

If, then, legal academics are by training drawn to categorization as an indispensable aid to organized thought, so too are they trained to examine critically the received categories. We are not such prisoners of our habits of thought that we cannot discard them when they fail us. As expressed by Soraya Amrani-Mekki, "Leur pérennité suppose qu'il n'y ait pas une distortion trop importante avec l'observation du réel. Le cas échéant, elles doivent évoluer ou disparaître."[13]

III. DEFINING THE RECEIVED CATEGORIES

Our exploration of the continuing validity of the received categories requires us to identify the features of a legal system that places it in one or another group, for to categorize in any meaningful way, one must "match the observed attributes of the instance in question with the defining properties of each category into which it might fit".[14] What are the indicia of the civil law and common law systems? What features must we find before we can place a legal system into one or the other? Several presenters addressed this question by setting forth what they understood to be the generally accepted distinguishing features. Tellingly, they did not always agree.

Professor Damaška, providing a valuable historical perspective, looked at the different systems as they flowered in what he calls the *laissez-faire* period of the 19th century following the Napoleonic codification. On both sides of the English Channel, party control of the action predominated. Although the continental judge, rather than the attorneys, interrogated the witnesses, it is misleading in Damaška's view to make too much of this difference. Instead, he argues, the most important contrast between the two systems flowed from "the different structure of procedural authority … the contrast was one between continental unitary courts staffed with professional career judges, and common law divided

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[12] H. Patrick Glenn, "A Western Legal Tradition?" [hereinafter "Glenn"] in Walker & Chase, *id*., 601, at 608-609.

[13] Soraya Amrani-Mekki, "The Future of the Categories, the Categories of the *Futur*" in Walker & Chase, *id*., 247, at 247.

[14] Amsterdam & Bruner, *supra*, note 4, at 43.

courts composed of judge and jury".[15] Because common law process required "temporal concentration", this led to what some commentators have called the "grand discriminant" between the systems: "the opposition between episodic and concentrated proceedings". As the "day-in-court" Anglo-American trial needed advance preparation, the proceedings were divided into a preparation stage and a presentation stage, whereas the sequential unfolding of the continental process over a series of hearings did not require as sharp a division. Structural differences of authority, writes Damaška, also explain the continental preference for documents rather than the orality dominant in the common law process. The bureaucratic and hierarchical civilian court manifested a "penchant for supervision" with an appetite for searching appellate review enabled by written records. For Damaška, then, "Continental systems appear as a species of party-controlled procedure in a hierarchical-bureaucratic apparatus of justice, and common-law systems as a species of party-controlled procedure in a more egalitarian and less bureaucratized institutional setting."

Other contributors were more apt to list specific procedural variances as discriminants. Professor Baumgartner mentions the following features of the Swiss *Code of Civil Procedure* as aspects of "what is usually considered civil law tradition":

> the strict separation of private and public law litigation …; judge-controlled litigation and taking of evidence; the absence of juries; the absence of common law-style rules of evidence; the absence of motion practice; clear delimitation of judicial power; *de novo* appeals; … limited joinder of parties and claims, no U.S.-style discovery and a narrow bite of *res judicata*.[16]

Professor Taniguchi finds the "two most commonly accepted scales" to be "(1) the respective roles of the judge and the parties; and (2) the bifurcation between the evidentiary hearing and the preparatory stage that precedes the hearing".[17] As Professor Gascón explained in a "Report from the Floor", there is "widespread belief" that the principal characteristics of the civil law systems that distinguish them from those of the common law are: the judge has the power to "adduce evidence" and to

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[15] Damaška, *supra*, note 10, at 7.

[16] Samuel P. Baumgartner, "Civil Procedure Reform in Switzerland and the Role of Legal Transplants" in Walker & Chase, *supra*, note 10, 75, at 82.

[17] Yasuhei Taniguchi, "How Much Does Japanese Civil Procedure Belong to the Civil Law and to the Common Law?" [hereinafter "Taniguchi"] in Walker & Chase, *id*., 111, at 111.

establish the "legal framework it considers most appropriate"; the examination of witnesses "is rigid, ... it is the judge who asks the questions"; "civil procedure is ordered and directed by the judge"; there is no discovery; and "written sources prevail over oral sources".[18] (Though he went on to say that many of these features no longer apply to Spain following the reform of civil procedure in 2000.)

In his paper on the changing roles of the parties and witnesses, Professor Jeuland emphasized the lawyer's conduct of cross-examination and the parties' power to select their own expert as features of the common law process.[19] Professor Maleshin mentioned as the main attributes of the classic common law procedural system civil juries; pre-trial conferences; party controlled pre-trial investigations; dramatic and concentrated trials; passive judges; class actions; and party-selected and paid experts. He contrasted these with the civil law features of the absence of civil juries; a lack of distinction between the pre-trial and trial phases; active judges; judicial proof-taking and fact-gathering; judicial examination of witnesses; and court-selected experts.[20]

So far the discussion has focused on the processes used in civil cases, as opposed to criminal prosecutions. In many ways, a sharper common law / civil law divide is found in the realm of criminal procedure. The "two contrasting models" — a common law trial

> controlled by litigants who present their respective cases to a passive judge, and its civil law counterpart as controlled by an active judge who conducts an inquiry into the facts and the law of a dispute … capture many salient differences between traditional forms of *criminal* justice [but] they could be misleading as means to identify distinctive features … of *civil* litigation.[21]

The contributions of Justice Pocar and Professor Schwikkard explore these differences in the context of convergence in specific cases. In both cases the movment has been away from the common law model. Justice Pocar traces the procedural history of the ICTY, which initially embraced the main features of the adversarial system (though not all of its details), to the current use of such civil law practices as (1) a unified proceeding,

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[18] Fernando Gascón Inchausti, "Where is the Dividing Line? The Case of Spanish Civil Procedure", available online at http://www.iapl/2009.org/documents/2aReportfromthefloorGascon.pdf.

[19] Emmanuel Jeuland, "Le changement de rôle des témoins et des conseils dans quelques pays de droit civil et, en particulier, en France" in Walker & Chase, *supra*, note 10, 193.

[20] Dmitry Maleshin, "Russian Civil Procedure: An Exceptional Mix" in Walker & Chase, *id*., 341, at 342-43.

[21] Damaška, *supra*, note 10, at 3 (emphasis in original).

"where a Trial Chamber renders a single combined verdict, including sentence, and there is no need for a separate sentencing hearing"; (2) the introduction of a pre-trial judge whose role is "to gather the information that is necessary for a more efficient judicial control over the conduct of the trial without substantially affecting the dominant roles of the parties involved".[22] Professor Schwikkard shows how South Africa, where the common law style has dominated, has recently been drawn to a more investigative role:

> In inquisitorial systems, it is the neutrality of the investigating judge that ensures impartiality and the consequent protection of the accused from arbitrary action. This is bolstered by the requirement that guilt be proved irrespective of a "guilty plea" and the system's intolerance of the concept of plea bargaining … As adversarial fairness relies on an equality of arms, fairness in most instances is going to be undermined by the inability of the accused to match the capacities of state resources.[23]

The procedural elements that our contributors — all specialists in comparative procedure — have identified as distinguishing features do not map perfectly in each and every analysis, but there is sufficient overlap to allow us to test the "ancient categories" against emergent trends. Of course, this can best be done by a careful reading of the papers that make up the balance of the book. To summarize them here would hardly do them justice. Instead we turn to the question that inspired the conference and the papers.

IV. Do The Categories Have a Future?

Lord Harry Woolf, the principal architect of the 1998 English procedural reforms that in no small part prompted the central question of our conference, was unable to join us in Toronto but was kind enough to videotape some edifying thoughts on the reforms in the context of convergence. In his view, the new English rules met those of the Continent "mid-Channel". He noted such civil-law influenced developments as greater control over expert witnesses, a greater reliance on documents such as witness statements and, most notably, the greater control over

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[22] Fausto Pocar, "Common and Civil Law Traditions in the ICTY Criminal Procedure: Does Oil Blend with Water?" in Walker & Chase, *supra*, note 10, 437, at 444 and 446.

[23] Pamela Schwikkard, "Procedural Models and Fair Trial Rights" in Walker & Chase, *id*., 277, at 278-79.

the proceedings that the new rules give the English judge. As we have seen, countries on the west side of the Channel — and on the east side of the Pacific — have also moved tectonically. Well, "mid-channel" and "mid-ocean" procedures are neither Anglo-American nor continental. But what are they?

A perhaps insuperable barrier to the abandonment of our time-honoured (even if time-worn) categories is that there is no new paradigm at hand to replace them. Several alternatives were mentioned by the conference participants, but none without problems of their own. The misleading and pejorative character of the adversarial-versus-inquisitorial division will not serve well. And the continental-versus-Anglo-American typology, which is often used interchangeably with civil-versus-common law, not only incorporates the latter's failings, but introduces a hegemonic exclusion of many parts of the world and hegemonic *inclusion* of others (Australia? Ghana?).

Professor Glenn pointed out that some scholars have asserted that a division between Western and non-Western systems more accurately describes the state of the world, and that the common law / civil law division is therefore a subcategory of decreasing importance.[24] Yet, agreeing here with Glenn, the category of the Western legal system suffers from definitional uncertainty regarding both content and geographic application. In the realm of legal procedures there remain few differences that are captured by location-based categories. Japan, most notably, has a civil litigation code of procedure with French and German origins and a heavy dose of post-war U.S. influence, though retaining some local features with deep cultural roots.[25]

A more accurate (and less hegemonic) term than "Western" might be "modern" legal systems as opposed to all others. The obvious trouble with this is that it would lump together every system from China to Peru, precluding whatever utility might be gained from making a finer cut, assuming there is one to be made. And "modern" suggests claims to the effectiveness of the approach that seem unlikely to be sustained upon anything more than the most superficial of examinations.

A different taxonomy is implicitly suggested by a panel that was organized by Barry Leon on International Arbitration. Reflecting on the reality of their practice, the arbitration experts noted that because international arbitration often involves arbitrators and litigants from various

[24] Glenn, *supra*, note 12.
[25] Taniguchi, *supra*, note 17.

parts of the world, it is necessary to craft procedures that respect more than one tradition, creating another kind of "mid-Channel" experience. The experience and new perspectives gained may in the long run prompt changes in official processes "back home". More likely, positive evaluations of arbitral processes will lead to further reliance on arbitration and other methods of resolving disputes in fora other than the state courts. We may therefore yet see in decades hence economies and nations in which arbitration and various forms of ADR predominate.

The new paradigm that emerges may divide the world between privatized and officialized system-oriented states. This could be a world, perhaps as foreshadowed by the difference Damaška has taught us to see between bureaucratic-oriented and party-oriented procedures, with some common law countries, most notably the U.S., pursuing an extreme form of party dominance. Indeed, the Damaškan construct of hierarchical, bureaucratic systems opposed to egalitarian less-bureaucratic processes again exemplified by the U.S. may also be considered as a replacement for the currently predominant categories. While useful as a scale on which to evaluate systems and proposed changes, they lack the precision of boundary needed to serve as convenient systemic labels. Thus, with no alternative taxonomy yet available to reach out to, the inertial force causes us to remain where we are.

Abandonment of the traditional paradigm faces yet other difficulties even if we grant that it fails to capture intra-system variations and inter-system convergence. As important as any of these claims for the status quo is the actuality upon which most of the commentators agreed: that there remains a "residual truth" that is conveyed by the traditional taxonomy. Another set of difficulties can be summed up by noting that the very same paradigm remains relevant — and even reliable — in other spheres of comparative law. Criminal procedure comes readily to mind, as discussed above.[26]

Moreover, the distinction continues to play a role in American constitutional law as it relates to criminal procedure because the U.S. Supreme Court has a marked preference for interpretations of criminal procedural rules that are in the common law, "adversarial" tradition over those that smack of civil law "inquisitorialism". In recent cases the Court has justified outcomes by labelling them "adversarial" (good) or "inquisitorial"

[26] See, in this volume, Damaška, Pocar and Schwikkard usefully opposing inquisitorial and adversarial systems.

(bad).[27] Second, the substantive law that process serves to implement is itself conventionally divided into civil and common law ways of thinking. There is undoubtedly seepage between the two systems' modes of law-finding because reliance on precedent has become more common and acknowledged by "civil law" judges. Still, there remains in that world a deep commitment to reasoning from abstract general principles that must be contrasted with an equally firm commitment to finding the law in a collection of fact-based appellate decisions.[28]

Finally, we must bow to the power of tradition and historical fact — not only the reflexive inclination to place a procedural system into one of the two categories (which is traditional) but also the reality that those labels accurately apply to ways of thinking about and designing dispute-resolution processes that have endured for centuries. This does not mean that they will, or should, last for millennia.

New intellectual and national constructs and patterns will surely arise. A case in point is the fate of "socialist" procedure that characterized the Soviet Union and its political brethren. It was once recognized even by non-socialist scholars as a definable system distinct in many ways from the civil and common law. And while it still exists as a historical fact, and while elements still influence some former socialist countries, no one now speaks of a world divided into common law, civil law and socialist law. If this conference revealed anything, it is that we cannot yet see the horizon beyond which scholars no longer speak of a civil law / common law world.

We are left, then, in a more complex and interesting world than that of our intellectual forbears. We are dominated by an intellectual and political tradition that no longer reflects the reality of the world in which we must do what scholars do: describe, explain, interpret and critique. We must continue to do so nonetheless, aware that the objects of our study will continue to evolve, shaped by the changing technology, politics and culture in which they live. We can live with these categories yet, so long as we do not live "of" them, that is, we do not allow them to capture our intellects and our loyalties. As Professor de la Oliva Santos

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[27] See, *e.g.*, *Crawford v. Washington*, 541 U.S. 36, at 50 (2004) (referring to the importance of the jury as fact-finder). See generally David Alan Sklansky, "Anti-Inquisitorialism" (2009) 122 Harv. L. Rev. 1634 (describing and critiquing the role of "anti-inquisitorialism" in Supreme Court jurisprudence).

[28] On the difference between substantive law finding in the U.S. and Germany, see James Maxeiner, "It's the Law! Applying the Law Is the Missing Measure of Civil Law / Common Law Convergence" in Walker & Chase, *supra*, note 10, 469.

asserted, convergence will not happen for its own sake but existing diversity will continue to provide models and comparisons for countries seeking to improve their own systems. So, while the common law and civil law may retain some hard grain of relevance, it would be fruitful to expand the scope of inquiry to considerations of economic, social and political divergence to help explain the variations in civil procedure. By this we may be able to make better sense of the enormous diversity of practices that exist today, and that to some extent have always existed.

V. THE PAPERS IN THIS VOLUME

It is hoped that this introduction will have whetted the appetite for the penetrating examination of these themes contained in the papers that follow. This volume tracks, more or less, the progress of the discussion through the conference.

Key elements of the discussion are signalled in **Part I — Rethinking the Common Law / Civil Law Divide**. The foundational paper is by Mirjan Damaška, whose iconic contribution to the literature in *The Faces of Justice and State Authority* cast such a long shadow that one cannot help but be struck by the continuing originality and energy of thought. Professor Damaška explores the irony of discerning a residual truth in a distinction that is fundamentally misleading. Marcel Storme's and Oscar Chase's comments underscore both the message — the importance in embracing the need for categories to take care not to be led astray by them — and the medium — the pleasure of reading the work of someone whose wonderfully fresh perspective applies in equal measure to common law procedure and to the English language itself.

Moving to the main body of papers, **Part II — Country Studies from Across the Divide** contains a series of six country studies from across the common law / civil law divide undertaken by leading comparative proceduralists. The contributors — Professor Linda Mullenix (United States), Professor Andrés de la Oliva Santos (Spain), Professor Samuel Baumgartner (Switzerland), Mr. Neil Andrews (England), Professor Yasuhei Taniguchi (Japan), and Mr. Murat Özsunay (Turkey) pursue thoughtful examinations of particular legal systems that have been variously associated with one or the other of the two major legal traditions. Their papers consider whether, in the wake of procedural reform, the categories still hold. Each was asked to identify key reforms and to consider how they are changing the categorization of the legal system. Each was asked to discuss

the challenges that have been faced in implementing and gaining acceptance of the reforms and how these challenges have been met or are being met. The results are a remarkably diverse set of views on the implications of reform for the traditional categories.

Part III — The Changing Roles of the Participants takes a different tack on the issues by shifting away from a holistic analysis of particular legal systems to a comparative examination of the changing roles of key participants in the adjudicative process. If key features of the distinction between the common law and civil law traditions can be found in the distinctive roles of witnesses and counsel, and judges and parties, then a closer look at the way in which these roles are changing can help to assess the extent to which the categories continue to be meaningful. Three contributors — Dean David Bamford (Australia), Justice Ian Binnie (Canada) and M. Emmanuel Jeuland (France) — draw on their experience with reforms in their legal systems to consider the changing roles of witnesses and counsel in "getting straight to the facts". They consider questions such as whether the role of expert witnesses is changing in the common law; whether the use of witness statements and written advocacy is affecting the role of counsel in the common law; whether party witnesses will become acceptable in the civil law; whether counsel will assume a larger role in questioning witnesses in the civil law; whether pre-hearing disclosure is changing the roles of counsel and witnesses in the civil law; and whether constraints on documentary disclosure will change the role of counsel and witnesses in the common law. Three further contributors — Professor Judith Resnik (United States), Professor Eduardo Oteiza (Argentina), and Mme Soraya Amrani-Mekki (France) draw on their experience with reforms in their countries to consider the changing roles of judges and parties in "getting results". They consider questions such as: whether managerial judging is transforming the role of judges in the common law; to what extent judges can shift from adjudicating to mediating disputes; and how the changing role of judges is changing party engagement in the litigation process.

Despite the many insights gained through the foregoing approaches to examining the impact of reform on the common law / civil law divide, no comparatist would pretend that the picture was yet complete. As ill-fitting as the labels "common law" and "civil law" may be to the legal systems that we routinely place in these categories, there are many legal systems that we would not think of as fitting within these categories at all. **Part IV — Country Studies from Beyond the Divide** returns to the theme of country studies, but this time, the focus is on countries that are

beyond the divide. For mixed jurisdictions and jurisdictions in transition, the questions that animate the discussions of civil justice reform are different from those relating to whether aspects of the legal system can be said to be on the verge of crossing "the divide". For mixed jurisdictions, their bi-jural foundation leads them to consider whether the particular blend of practices that has developed best reflects their mixed heritage and the evolving aspirations for their systems of justice. These are discussed in the papers of Dean Pamela Schwikkard (South Africa), Professor Celia Wasserstein Fassberg (Israel), and Chief Justice Allan Lutfy and Ms. Emily McCarthy (Canada). For countries undergoing fundamental changes in their economic and political systems, such as Brazil, Russia, China and Croatia, key questions include whether the procedural reforms supporting economic or political transition are taking legal systems closer to the common law or civil law; and whether these jurisdictions in transition are developing a new blend of practices that is better described in ways other than "common law" or "civil law". These are discussed in the papers of Professor Ada Pellegrini Grinover and Mr. Kazuo Watanabe (Brazil), Dean Dmitry Maleshin (Russia), Professors Margaret Woo and Yanmin Cai (China) and Professor Alan Uzelac (Croatia).

From the preceding parts of the volume, comprising analyses of the impact of procedural reform on the categories of common law and civil law in particular countries and processes, **Part V — International Harmonization Projects and Developments** takes up the study of international harmonization projects and developments themselves, and the impact that they can have on the traditional categories. In a session that was moderated by one of the most famous pioneers in the field of procedural harmonization, Professor Marcel Storme, Ms. Eva Storskrubb examines the process of procedural harmonization in Europe; Professor Rolf Stürner examines the influence that the ALI/Unidroit Project on Transnational Civil Procedure has had on the private enforcement of European Competition Law; and Judge Fausto Pocar, formerly President of the International Criminal Tribunal for the Former Yugoslavia and co-commentator on the Draft Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, examines the newly developed procedural rules in the field of international criminal law and their relationship to the common law and civil law traditions.

No matter how instructive systemic studies of categories in the evolution of legal systems can be, the very fact of their systematic nature can lead

to gaps and limitations in the analysis. **Part VI — Convergence in Other Contexts** seeks to fill those gaps with papers that address convergence in two other important contexts: convergence at the interstices of substance and procedure; and convergence in "dispute resolution" processes. The first topic, "Convergence at the Interstices of Substance and Procedure", is considered in the papers by Professor James Maxeiner, "'It's the Law!' the Missing Measure of Civil Law / Common Law Convergence"; Vice-President Baosheng Zhang and Mr. Hua Shang, "Evidentiary Provisions of the People's Courts and Transition of the Judges' Role"; and Professor Burt Neuborne, "The Experience of the Holocaust Cases". The second topic, "Convergence in 'Dispute Resolution' Processes", is considered in papers by Richard Marcus, "Exceptionalism and Convergence: Form versus Content and Categorical Views of Procedure"; Professor Peter Murray, "Mediation and Civil Justice: A Public-Private Partnership?"; Professor Edward F. Sherman, "Judicial Supervision of Fees in Aggregate Litigation: The American *Vioxx* Experience as an Example for Other Countries" and Ms. Déirdre Dwyer, "Categories of English Civil Procedure".

Having descended to the forest floor to explore the many pathways developed through procedural reform and the way in which they converge and diverge from one another, we return to the treetops in **Part VII — Cultural Dimensions of Reform and Harmonization** to consider the cultural dimensions of procedural reform and harmonization. A brief historical reflection by Professor Peter Gottwald on the changing significance of "culture" introduces the broader consideration by Professor Patrick Glenn of the themes of the volume in relation to the debate over the idea of a "Western legal tradition" and the force it may have in the context of procedural law and judicial institutions. As with the foundational paper by Professor Damaška, the capstone paper by Professor Glenn seems all the more remarkable for the continuing vitality and originality of thought it shows in bringing to bear the iconic analysis introduced in *Legal Traditions of the World* on the particular subjects considered in this volume. And moving from the iconic to the iconoclast, Professor Taruffo offers his own unique thoughts by questioning the very precepts of the conference themes, suggesting the possibility of replacing *categories* with *values*.

Finally, in **Part VIII — Looking Ahead: The Future of Categories — Categories of the Future**, having considered the questions from all perspectives, we venture into the fourth dimension with two eminent comparatists from the common law and civil law, Professors Geoffrey

Hazard and Loïc Cadiet, "looking ahead" and offering their thoughts on the future of categories. Professor Hazard reminds us that in understanding civil justice systems as a reflection of forms of state authority and cultural traditions, we should not overlook the way in which they are embedded in the social context in which they operate, and this can have an enduring influence on specific practices. Professor Cadiet explores the issues, both retrospectively and prospectively, and from a macro- and a micro-comparative basis to suggest yet another approach to the subject — one involving a model of cooperative procedure emphasizing the collaborative engagement between the participants — one which operates in a pluralistic system of justice.

With these final papers it becomes clear that, contrary to the age-old saying, "plus ça change …", we are encouraged to believe that the more things change, the more new ideas emerge for discussion.

Part I

Rethinking the Common Law / Civil Law Divide

The Common Law / Civil Law Divide: Residual Truth of a Misleading Distinction

Mirjan Damaška*

I. INTRODUCTION

The contrast between common law and civil law systems of civil justice is often expressed by juxtaposing adversarial and inquisitorial models of procedure. On the conventional understanding of these two models, civil litigation in common law systems then appears as controlled by litigants who present their respective cases to a passive judge, and its civil law counterpart as controlled by an active judge who conducts an inquiry into the facts and the law of a dispute. But while these two contrasting models capture many salient differences between traditional forms of *criminal* justice in the two branches of the Western legal tradition, and while they bring out some important contrasts that existed between Western and Soviet approaches to civil procedure, they could be misleading as means to identify distinctive features of Anglo-American and continental European styles, respectively, of *civil* litigation. These models overemphasize differences that exist in control over procedural action, and neglect disparities related to their unequal institutional contexts. This was clearer in the past, but it is, in an attenuated form, visible even today.

II. THE *LAISSEZ-FAIRE* PERIOD

To place the issue in proper perspective, it is useful to begin by looking at the system of continental civil procedure pioneered by the French *Code de Procedure Civile* of 1806.[1] As is well known, the system was

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[1] An initial reservation is in order. The existence of a homogeneous continental system of civil procedure may be asserted only when its forms are observed from across the Channel and at a highly reductionist level of abstraction. If one maintains an internal continental perspective and

widely followed on the continent of Europe throughout much of the 19th century's *laissez-faire* period. At the time, the typical civil case was conceived as an instrument for the resolution of a controversy, the subject matter of which was amenable to an out-of-court settlement by the litigants without negative externalities — that is, without damage to third parties or the public.[2] In accordance with this conception, litigants were authorized to control the life of the lawsuit: they controlled its commencement, progress and even its end, because they could freely settle the dispute themselves and withdraw the case from the court. Importantly also, the determination of the factual parameters (the scope) of litigation was their exclusive prerogative. In some jurisdictions they could also determine the legal framework within which the lawsuit was to be considered. Within these party-determined bounds, judges retained little space for self-propelled factual inquiries: they lacked the power to call fact-witnesses on their own initiative, and, with minor exceptions, were limited to considering only items of evidence supplied by the litigants. Nor were they permitted independently to determine the appropriate relief or remedy. In short, the litigants exercised a firm grip on most aspects of procedural action, and it is not without reason that they were proclaimed to be masters of the lawsuit (*domini litis*).

There was one exception, however. Due to the continued hold of the Roman-canon notion that fact-finding (*ventilatio veritatis*) is an essential part of the judicial office, judges were charged with interrogating witnesses and developing other evidence. An outsider could easily take this highly visible judicial activity as proof that continental civil justice was, at bottom, a judicial inquiry into the facts of the case — just as it was in the coeval continental criminal process. But this parallel could not be sustained beyond the surface of things. Unlike continental criminal judges who were, in fact, energetic searchers for the truth, their confrères in civil cases were not independently inquisitive, and their fact-finding was rather anemic. Several reasons contributed to the deflation of their fact-finding zeal, apart from the prevailing attitude that ordinary lawsuits did not involve transcendent interests.

To begin with, serious obstacles to effective information-gathering were erected. Generous testimonial privileges proliferated, justified by

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reduces the level of abstraction, the unity of continental procedure becomes elusive — not only for the period now under consideration, but even for the civil justice during the *ancien régime*.

[2] For references, see K.W. Nörr, *Naturrecht und Zivilprozess* (Tübingen: Mohr, 1976), at 25, 48. Only a narrowly drawn category of suits (*e.g.*, family law matters, matters involving personal status) was treated as involving transcendent public interests.

the desire to protect individual autonomy and the purlieus of private life.[3] If parties could be used for the purpose of obtaining factual information at all, they were accorded sweeping rights to refuse to testify.[4] Discovery of documents in the custody of the opponent was severely restricted, and only minimal obligations were imposed on parties to surrender documents in their possession.[5] A further diminution of judicial fact-finding energy was due to the fact that the judge was not permitted to second-guess litigants' stipulations and admissions, even if it was not clear to him that the facts underlying these declarations actually existed.[6] Why would the judge diligently search for the truth if parties could at any moment make the fruits of his labour otiose? In short, the monopoly power of the civil judge to develop evidence did not produce powerful "inquisitorial" effects.

Contrary to what a common law observer might expect, the absence of energetic judicial probing was not compensated for by zealous digging for information by litigants' counsel. Lawyers had few contacts with witnesses, and conducted almost no factual inquiries. In proposing evidence to the court, they relied mainly on information supplied by their clients. But they advanced the contrary positions of their clients from first pleadings to closing arguments, often zealously, so that lawsuits were adversarial encounters, capable of turning into "wars without the Red Cross".[7]

Here, a fleeting glance cast at the coeval Anglo-American systems is revealing. Equity procedure was, of course, inquisitorial in many senses of the term.[8] But even in common law courts, party control over civil lawsuits was not more pronounced than on the Continent — at least in the eyes of continental visitors. True, collecting evidence and proof-taking was here the business of litigants, or rather their counsel.

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[3] A few jurisdictions went so far as to dispense witnesses from the duty to answer questions likely to dishonour them, or even expose them to direct financial loss. For the influential German version of these privileges, see *Zivilprozessordnung*, at § 384.

[4] See, *e.g.*, J.A. Jolowicz, "Fact-finding: A Comparative Perspective", in D.L. Carey Miller & P. Beaumont, eds., *The Option of Litigating in Europe* (London: British Institute of International and Comparative Law, 1993), at 133, 138-39.

[5] The principle was extolled that litigants should not be compelled to produce evidence unfavourable to them. *Nemo tenetur edere contra se*.

[6] Second-guessing was permissible only in the narrow category of lawsuits mentioned, *supra*, note 2.

[7] This is Klein's metaphor. See F. Klein, *Pro Futuro; Betrachtungen über Probleme der Civilprozessreform in Österreich* (Leipzig: Franz Deuticke, 1891), at 39.

[8] As far as England is concerned, it deserves to be noted that civil justice was administered not only by common law courts and the Chancery, but also by two "civilian" courts (the ecclesiastical courts and Admiralty). It was only in 1873 and 1875 that two legislative acts simplified this complex court structure.

In performing these tasks, however, parties had at their disposal powerful devices to compel each other to produce unfavourable evidence — devices that the continental *laissez-faire* process did not recognize as contrary to litigants' autonomy. [9]

A more fundamental aspect of party control over civil litigation — their monopoly on determining the scope of litigation — was not explicitly recognized: it was merely observed in practice, and no formal barriers existed to prevent its abandonment in special situations. Apprised of vaguely defined "inherent powers" of common law judges, a continental visitor could easily be led to believe that the mastery of Anglo-American parties over the lawsuit was dependent on judicial self-restraint in the sphere of "mine and thine", and, for this reason, was less stable than in his homeland.[10]

We need not decide whether this conclusion rested on the misapprehension of common law culture. The mere possibility that continental observers could form this belief demonstrates how misleading it can be to maintain that the contrast between Anglo-American and continental civil procedure of the *laissez-faire* epoch arose out of the fact that the former was controlled by the parties and the latter by the court.

Wherein did the contrast then chiefly reside? Some commentators have located the "grand discriminant" in the opposition between episodic and concentrated proceedings.[11] Continental lawsuits unfolded, in fact, through a series of successive hearings in the course of which all the material bearing on the case was gradually assembled, while common law courts compressed procedural action into a trial where all matters would ideally be considered in a single block of time. Since such "day-in-court" trials needed preparation, common law litigation comprised two separate stages, while its continental counterpart did not require any such divide, and, from the common law perspective, appeared as a single, staggered trial.

Another contrast between common law and civil law procedure was identified in the preference of the former for in-court testimony ("orality"), and in that of the latter for written evidence ("text").[12] Differences

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[9] See R.W. Millar, "The Mechanism of Fact Discovery: A Study in Comparative Civil Procedure" (1937) 32 Ill. L. Rev. 261 *et seq*., at 424.

[10] For ruminations along these lines, affected by a soupçon of monocultural myopia, see A. Mendelssohn-Bartholdy, *Das Imperium des Richters* (Strassburg: Karl J. Thübner, 1908), at 120.

[11] The view persisted until quite recently. See, *e.g*., B. Kaplan, "An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure" (1971) 69 Mich. L. Rev. 821, at 841.

[12] This is still often maintained. See, *e.g.*, J.M. Jacob, *Civil Justice in the Age of Human Rights* (Aldershot: Ashgate Publishing, 2007), at 40. It should not be forgotten, however, that equity

in the domain of legal remedies against judgments were also invoked as important. In civil law systems, these remedies were treated as a matter of litigant's right, and postponed the enforcement of first-instance decisions, whereas appeals, properly so-called, either did not exist in common law countries of the period,[13] or, if they did exist, played a lesser role, and so did not in principle have a suspending effect. Also, while continental legal remedies entailed a comprehensive review of a decision's substantive propriety, common law remedies aimed primarily at ascertaining whether the decision-maker obtained the proper informational input.

But the most important contrast between the two systems flowed from the different structure of procedural authority. At the level of original jurisdiction, the contrast was one between continental unitary courts staffed with professional career judges, and common law divided courts composed of judge and jury. At the level of legal remedies, the contrast was one between several layers of hierarchically organized appellate courts, and the traditional common law tendency toward a single level of adjudication.[14] Both contrasts were so pregnant with implications and freighted with significance that they not only provide insight into seldom-mentioned procedural differences, but also explain — and place into context — all those we have just mentioned.

The common law bifurcated court needed a body of procedural and evidentiary law to regulate the internal relationships between its two parts — especially because of the lay component within the court. Numerous and intricate rules generated by this need had no counterpart on the Continent, and it is surprising that this difference has not been emphasized more by commentators.[15]

What has been noted, however, is that the "grand discriminant" — the opposition between "day in court" and episodic proceedings — has its source in the different apparatus of authority. Common law litigation required temporal concentration, commentators noted, due to practical difficulties involved in reconvening members of the jury for a series of

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procedure was written, and that the role of documentary evidence in the common law courts of the period can easily be underestimated. See M. Taruffo, *Il Processo Civile di "Civil Law" e di "Common Law*: aspetti fondamentali (2001) 124 Foro Italiano, Parte V 345, at 346, 347 [hereinafter "Taruffo"].

[13] In England, a regular appeals system was introduced only at the very end of the 19th century.

[14] For an attempt to stylize these differences by constructing to ideal types of authority and placing continental and Anglo-American systems between these polar extremes, see Mirjan R. Damaška, *The Faces of Justice and State Authority*: *A Comparative Approach to the Legal Process* (New Haven, CT: Yale University Press, 1986), at 16-69 [hereinafter "Damaška"].

[15] The area of evidence may be an exception.

court sessions. Continental lawsuits, on the other hand, were organized as a sequence of discrete hearings, since professional judges were capable of sustained action over time, and preferred to proceed in this more methodical way.

If one's vision extends beyond the original decision-making level, the alleged contrast between "orality" and "text" can also be associated with discrepant authority structures. Because of its penchant for supervision, the continental judicial hierarchy required lower echelons to keep records of temporarily scattered activities, so that official files — replete with documents of evidentiary significance — gained in importance at the expense of the spoken word. The continental appetite for review also explains why discretionary decision-making was less acceptable in the continental than in the common law procedural environment. As is well known, rigid official hierarchies are reluctant to vest lower echelons of authority with discretion, since its exercise is difficult to supervise: hierarchies prefer to saturate the official apparatus with rules that more closely circumscribe desired outcomes.

A less vertically integrated common law machinery of justice, by contrast, found it easier to assign large doses of discretion — including vague "inherent powers" — to its officials. Even the characteristic activity of common law counsel in preparing and developing evidence can be traced to a machinery of justice devoid of strong bureaucratic features: it draws no bright line between official and private activity, and has no problem farming out fact-finding to outsiders — be it the litigants themselves or their lawyers. For where paradigmatic decision-makers are themselves outsiders, recruited into the apparatus of justice *ad hoc*, there can be no principled opposition to expanding the "adhocracy" a little further, and outsourcing activities which, in more bureaucratic settings, could easily be considered the exclusive province of officials. And, as already mentioned, the continental machinery of justice has, from its inception, regarded the development of evidence as a quintessentially official task.

Consider now how the previously noted difference in the regime of legal remedies can be related to the two contrasting machineries of justice. Where decisions are inscrutable, as they are in common law jury verdicts, it is difficult to challenge their substantive propriety. For this reason they tend to be attacked indirectly, by targeting the propriety of the information presented to inscrutable adjudicators. The target of attack becomes the input into the decision-making process, rather than

its output.[16] But where all official activities must be documented, as they must on the Continent, decisions are more transparent, and the outcome of the decision-making process can be challenged directly. Or, to take another example, where appeals are a routine superior review of decisions made below, as is the case in hierarchical organizations, it makes sense to postpone enforcement until the highest authority has spoken. By contrast, where decisions made in the first instance are presumably final, special procedural steps may be required for the postponement of their enforcement.

What conclusion can be drawn from the foregoing review of civil procedure in the *laissez-faire* epoch? Because litigants' domination of lawsuits was comprehensive in both the common law and the civil law orbits, differences in terms of procedural control recede into the background as relatively unimportant, and differences related to the contrasting organization of procedural authority assume centre stage. Continental systems appear as a species of party-controlled procedure in a state-centred, hierarchical-bureaucratic apparatus of justice, while common law systems appear as a species of party-controlled procedure in a more egalitarian and less bureaucratized institutional setting, open to civil society. And if proceedings in which parties retain control over crucial aspects of procedure are equated with adversarial procedure, one could also say that both systems were adversarial, agonistic tug-of-war affairs, and that the most salient differences between them stemmed from features related to the contrasting organization of procedural authority itself.

III. OVERVIEW OF SUBSEQUENT CHANGES

But could this still be the appropriate characterization of the situation? As a prelude to attempting an answer to this question, departures from *laissez-faire* arrangements must be summarized briefly. For a start, it must be recognized that party control over lawsuits was considerably weakened everywhere. In the political realm, the background for this development was the transition from uninvolved governance toward a more active and comprehensive role of government in society. Among proximate causes for this development, swelling court caseloads were powerful motivating factors. Against this new political landscape, and discredited by practical needs, the view began to lose ground that civil

[16] Examples of such input issues include the questions of whether proper instructions were given to lay decision-makers, or whether admissible evidence was presented to them.

lawsuits are a mere continuation of transactions by autonomous individuals — each pursuing his or her own interest, and each litigating as he or she saw fit. As a result, civil procedure was now increasingly attributed a social function. Conducted in the public interest, it had to be run efficiently and made more resistant to misuse by litigants or their lawyers. Affecting more than the parties themselves, it had to yield more accurate reconstruction of facts. Wherever this new understanding of litigation took hold, judges acquired tasks at the expense of litigants' control over lawsuits. Litigants' sovereignty over the lawsuit remained uncontested only in regard to its beginning, continued existence and factual boundary. The traditional apparatus of justice and the procedural features related to it became fair game for reform, insofar as they came to be viewed as impediments to more effective adjudication.

On the Continent, the process had started already in the waning years of the 19th century, and it picked up pace in the course of the 20th — especially in its last few decades. The initial reform steps were limited to increasing the power of the court to expedite matters and control the progress of lawsuits. Thus, for instance, the judge acquired the power to impose time limits on lawyers for accomplishing certain acts. But, gradually, some countries moved beyond such managerial concerns, and empowered the judge to seek evidence *motu proprio.*[17] Impelled by a greater concern for the accuracy of factual findings, some jurisdictions also expanded the judge's authority to compel litigants to produce documents in their possession.[18] The traditional episodic style of litigation came under attack as a source of delay, and, under influence from across the Channel, several countries enacted provisions demanding that, whenever possible, lawsuits be decided in two hearings — one of a preparatory nature, and the other for proof-taking and final arguments.[19] Viewed as another source of delays, appeals to the top of the judicial hierarchy were increasingly limited.[20]

Yet both the scope and specifics of these reforms varied considerably. The source of an important internal variance was the fact that not all countries authorized judges to order factual investigations *motu proprio*,

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[17] For the French "*measures d'instruction*", see R. Schlesinger *et al*., *Comparative Law*, 6th ed. (New York: Foundation Press, 1998), at 464.

[18] *Id.*, at 446-48.

[19] Examples are Austria, France, Germany and Spain. The ideal of two stages has lately been embraced by the Council of Europe.

[20] Even the propriety of postponing the enforcement of first instance judgments was sporadically put to question. See the new §§ 708 and 709 of the German *Zivilprozessordnung*.

and, even where this legislative change took place, it did not always affect the life of the law. Thus, while in some jurisdictions judges actually began to use instruments designed to augment their fact-finding role, in others they remained reluctant to do so. And while in some jurisdictions procedural concentration greatly advanced, in others the old instalment style of proceeding lingered. In the wake of all these internal variations, the common ground of continental civil litigation is now much more elusive than before.

In common law lands, the reform movement was at first also limited to greater judicial involvement with the progress and preparation of lawsuits. In the United States, it was associated with the appearance in mid-20th century of a pre-trial fact-finding system that vested members of the private bar with unprecedented authority to obtain sworn testimony and to compel the other party to disclose information. Since this innovation was capable of generating vexatious practices and delaying the progress of lawsuits, judicial oversight became necessary: judges acquired the power to fix time-tables, regulate the specifics of the exchange of information between the parties, convene pre-trial conferences to identify or sharpen issues and exercise similar managerial prerogatives.[21] The trend toward increasing judicial power at the expense of litigants affected the trial stage as well. Here, for example, judges acquired the power to appoint non-partisan expert witnesses, and, in some jurisdictions, to call ordinary witnesses on their own motion.[22]

In England, procedural reforms were instituted later, but carried further — especially by the *Civil Procedure Rules 1998*.[23] It is not so much that the English judge has acquired more instruments to speed up pre-trial proceedings and keep matters properly focused than his or her American colleague. Indeed, in terms of potential consequences, a more important difference is that the judge may now order litigants to supply him or her with summaries of their respective cases in advance of the trial, so that he or she can come to trial as well informed of issues and

[21] Developed in U.S. federal courts for cases of great complexity, these managerial powers are now used in most American courtrooms. See J. Resnik, "Managerial Judges" (1982) 96 Harv. L. Rev. 374.

[22] See *Federal Rules of Evidence*, rr. 707, 614. Judges are even authorized to fashion remedies beyond the litigants' prayer for relief. See *Federal Rules of Civil Procedure*, r. 54(c). This unusual authorization, curious from the continental perspective, may have been contemplated for suits instituted in the public interest. It should be noted, however, that all of these powers are seldom used in practice.

[23] S.I. 1998/3132 L.17. For a useful overview of the English system under the 1998 Rules, see Oscar G. Chase & Helen Hershkoff, eds., *Civil Litigation in Comparative Context* (Eagan, MN: Thomson West, 2007), at 15-25.

evidence as his or her continental counterpart who routinely reads the documents from the official file before hearings. Another striking difference *vis-à-vis* America — as well as the older common law regime — is that English experts are no longer treated as partisan witnesses. As in the continental tradition, they are supposed to be "assistants" to the judge: not only can the judge appoint them on his or her own initiative, but he or she can also demand that opposing, party-appointed experts cooperate and produce a joint report. On his or her own initiative, the judge can also decide that evidence on an issue be given by an expert common to the parties.[24] Even at the trial stage, the English judge is now in a position to limit the litigants' freedom to present their cases in more important ways than in America: the judge may determine the way in which their evidence is to be placed before the court, and confine the inquiry to particular issues that he or she has selected. The characteristic use of live testimony can be dramatically reduced: much more easily than in America, evidence may be presented to the court in the form of documents that contain earlier statements of witnesses.

An important reason why United States jurisdictions could not go so far in the way of reform is that they retained the traditional common law justice apparatus to a greater extent than England and other common law countries. It is sufficient to observe that the civil jury remains the paradigmatic adjudicator only in full-fledged American civil lawsuits, while it has virtually disappeared from England and other parts of the common law world.[25] This alone is of great significance.[26] Consider that the large body of rules regulating the relationship between judge and jury — a conspicuous feature, we saw, of traditional procedural law — retains its relevance only in American civil lawsuits. So do many common law rules of evidence that have been developed with an eye to lay adjudicators. Another child of jury trials, the sharp separation of pre-trial and trial stages retains its vitality only in America.[27]

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[24] See, *e.g.*, A. Zuckerman, *Civil Procedure* (London: Butterworths, 2003), at 20.30-20.37 [hereinafter "Zuckerman"].

[25] Civil jury trials in England, for example, are now confined to actions for defamation and misconduct by the police. See Neil Andrews, *English Civil Procedure* (Oxford: Oxford University Press, 2003), at 34-36.

[26] We say "this alone", because the survival of the "coordinate" apparatus of authority is not manifested solely in the retention of the jury. See Damaška, *supra*, note 14, at 232-34.

[27] The fact deserves to be mentioned in parentheses that continental procedural rules, irreconcilable with jury trials, can now become a source of inspiration for common law countries other than America.

But the absence of the civil jury affects more than rules: it also opens up space for potential transformations in the way in which procedural protagonists act and imagine their respective roles. Take judges, for example. They can no longer share the moral discomfort for substantively wrong decisions with the jury: they are now the only fact-finder, and verdicts are their sole responsibility. Other things remaining equal, then, would it be strange if they were to become more active in influencing the formation of evidentiary material? Would it be surprising if they increased their intervention in the presentation of evidence? The more they know about the facts of the case in advance of the trial, the less they need to worry about becoming blundering intruders in the proof-taking activity of litigants' counsel. Nor do they have to worry that their intervention might be interpreted by the jury as an abandonment of neutrality, or as an encroachment on its fact-finding responsibility. So rich indeed are the implications of the unequal departures of common law countries from the traditional machinery of justice that a divide has arisen in the realm of civil procedure between the United States and the other common law jurisdictions.

But the United States has not only retained more of the old apparatus of justice than other common law countries. It has also remained closer to *laissez-faire* attitudes toward the functions of government in society: larger spheres of American social life remain guided by private actors and market forces. One of the consequences of this difference, relevant to our theme, is that the scope and goals of civil justice are no longer identical across the common law world. Thus, for example, issues which can be decided as an internal administrative matter in countries that have nationalized a social service are subject to civil litigation in America.[28] For all these reasons, the unity of the common law style of civil litigation is now as difficult to ascertain as the unity of civil procedure in countries sharing the continental legal heritage.

IV. BLURRING OF THE CONTRAST

After this unpardonably telescopic abridgement of more than a century's worth of events, let us return to the question of whether one can

[28] An example is suits by American regulatory agencies and private individuals to enforce regulations concerning entities that are in most common law countries nationalized. The garden-variety contract and tort case is thus only a part — and not the most important one — of civil litigation. The greater probing power of American pre-trial discovery can perhaps be understood against the background of this broader scope of civil procedure.

still meaningfully talk about the contrast between civil law and common law procedure in civil cases. The contrast is problematic, if only because it requires the juxtaposition of two distinct units whose existence has just been thrown into doubt. But we also saw that changes that have evolved in some common law countries have drawn them closer to what are conventionally thought to be continental forms of civil justice, while changes in some continental countries have moved them closer to what are conventionally considered common law procedural arrangements. The frontier between the two Western procedural families has thus become increasingly ill marked, open and transgressed. No wonder that some thoughtful commentators claim that the opposition has outlived its usefulness.[29]

That claim raises two separate issues for us. We must first examine what remains of differences from the *laissez-faire* period that we have attributed to the contrast between lawsuits in the setting of a hierarchical-bureaucratic apparatus of justice, and lawsuits in a more egalitarian and less bureaucratic environment. Having identified the vestiges, we must then consider whether they justify the continued juxtaposition of the common law and civil law style in the administration of civil justice.

Turning to the search for vestiges, it should be acknowledged at the outset that countries exist in both the civil and common law orbits where civil litigation still exhibits features that we observed in the *laissez-faire* period and traced to different structures of authority. On the Continent, systems of civil procedure persist that are characterized by a series of court hearings, with documents piling up in the file of the case, with counsel doing little investigative or proof-taking work, with judges being anemic fact-finders and with parties routinely filing dilatory appeals to higher courts.[30] In the common law world, United States jurisdictions still institute a style of litigation that is replete with procedural and evidentiary features generated by a divided trial court that features independent lay adjudicators — a style in which decision-makers exercise a great deal of discretion and in which the appellate process is concentrated more on the input than on the output of the decision-making process. It would be a mistake, however, to use these conservative extremes as proof of the continued relevance of the old contrast. These *partes* ought not be taken *pro toto*. Surviving traces of the *laissez-faire*

[29] See, *e.g.*, A. Uzelac, "Reforming Mediterranean Civil Procedure", in C.H. Van Rhee & A. Uzelac, eds., *Civil Justice Between Efficiency and Quality: From Ius Commune to the CEPEJ* (Antwerp: Intersentia, 2008), at 71, 73; Taruffo, *supra*, note 12, at 355.

[30] Uzelac terms them playfully "mediterranean civil procedures". *Id.*, at 73.

contrast must be sought in the space between these limiting cases — in the civil procedures of those common law and civil law countries where reforms have drawn them closer to one another.

In this zone, the rapprochement between common law and civil law arrangements is indeed quite substantial. We noted that, in both orbits, judges now control the progress and preparation of lawsuits, have considerable powers to compel the production of documents, may appoint neutral experts and sit without the jury. We also noted that the distinction between concentrated and episodic lawsuits has become blurred. An increasing number of continental systems now require that lawsuits in the first instance be completed in two hearings, while the managerial role of the common law judges has extended their trial function backward in time. Also, some continental jurisdictions make efforts to scale down reliance on documentary evidence, while most common law countries move in the opposite direction by relaxing or abolishing the ban on hearsay evidence with the albatross of its exceptions. The juxtaposition of "orality" and "text" has thus been further reduced in significance. At the level of legal remedies, the characteristic continental emphasis on the right to appeal has been weakened: many countries now restrict the right to appeal in matters of minor importance, as well as appeal to the apex of judicial hierarchy. Last, but not least, the most powerful motive for reform seems everywhere to be the pragmatic one of making litigation more efficient.

V. VESTIGIAL DIFFERENCES

What then survives of the old contrast? In early stages of lawsuits, a prominent relic is the different approaches toward gathering the material for decision. In common law countries, the task is entrusted to partisan counsel: the judge merely supervises their activity, and intervenes only if a dispute between them arises. On the Continent, the task is still performed by the judge, or some delegated official. This distinction between "privatized" and "officialized" action is reflected in different regimes for the mandatory disclosure of information. Common law "discovery" implies an exchange of information between the parties and is independent from the submission of evidence: litigants freely decide what information received from the opponent shall be used in proof-taking. The scheme approximates private transactions performed by counsel. On the Continent, disclosure of information assumes an official flavour, since it requires inclusion of the relevant items in the official file of the

case: the item becomes evidence in the case and of potential use in other proceedings. But the existence of the official file is, in itself, a telling sign of the persisting hierarchical and bureaucratic arrangements. From the inception of the lawsuit until its end, the file serves as the backbone, or the nerve centre, of proceedings that are expected to take place before several levels of authority. In common law jurisdictions, we still find no real counterpart of such official documentation: here, parties preserve their separate files.

At later stages of lawsuits, the contrast reappears between the readiness of common law systems to entrust procedural action to parties or their lawyers, and the civil law's bureaucratic preference for official action. On the common law side, proof-taking is notoriously divided between two partisan cases, with opposing counsel developing evidence through direct and cross-examination. Fact witnesses are associated with the parties who call them, and only court-appointed and joint expert witnesses now reduce the stark polarization of means of proof.[31] With proof-taking organized as a partisan affair, the burdens of going forward with evidence and of persuading the adjudicator can clearly be divided between the litigants. In civil law hearings, on the other hand, the development of evidence remains the primary responsibility of the judge: he or she interrogates witnesses first, and the parties, or their lawyers, can only then pick up leftovers of bench examinations, or propose additional questions to be asked of witnesses. Proof-taking is not divided into two contrary cases, and witnesses are not as strongly associated with the litigants as in common law countries. Inevitably, burden of proof issues assume a different character: part of the burden is carried by the court.

Although the decline of the jury has created room for the two systems to come closer together in the domain of recourse against judgments, remnants can still be found of features stemming from the old common law emphasis on a single level of adjudication and from the civil law's attachment to hierarchically organized multi-stage proceedings. The previously indicated difference in the enforcement of trial judgments is an example. More important are persisting differences concerning the authority of trial judges to respond to challenges to their judgments. The common law judge retains significant power to reconsider his or her own decision, and to decide whether an appeal against the

[31] The old notion that parties vouch for "their" witnesses has not completely disappeared. Thus, for example, parties can still challenge the credibility of their witnesses only in narrowly circumscribed situations. See, *e.g.*, Zuckerman, *supra*, note 24, at 19.45-19.46.

decision to the higher court is warranted.[32] In civil law systems, on the other hand, once a trial judge has spoken, the procedural segment conducted before him or her comes to an end, and corrections of the decision can be made only by his or her hierarchical superiors. Nor is he or she authorized to decide whether the process of appellate review deserves to take place.

But, overall, and especially at the level of the systems' practical functioning, the differing ways in which common law and civil law judges perceive their roles is probably the most important survivor of traditional contrasts. Common law judges do not view accurate fact-finding as central to their task, and experience little difficulty in deciding lawsuits on the basis of the evidence presented to them by the parties. Whether this attitude is a legacy of long centuries when fact-finding was for the jury, or whether it is due to more recent notions that referees should not play the game, the fact remains that, even in most reform-minded common law countries, judges do not engage in fact-finding activities, but merely supervise the development of evidence by the litigants. Continental judges, on the other hand, are heirs to the long-standing tradition that accurate fact-finding is at the heart of their vocation. *Judex cum sedebit, quidquid latet adparebit*.[33] Feeling responsible for finding out the truth, judges are reluctant to be limited by evidence as put to them by self-interested parties. Judicial fact-finding passivity in the *laissez-faire* civil lawsuits was, viewed historically, an aberration, and, in the changing ideological climate, it is easier for them than for common law judges to assume activist fact-finding postures. Thus, if one's interest in the differences between common and civil law extends beyond their normative frameworks to cover the systems' actual functioning, these discrepant understandings of the judicial office assume great importance. For even an identical normative text — say, the rule authorizing judges to order factual investigations on their own motions — is likely to have a different impact in a setting where judges conceive of themselves as referees versus a setting where they feel responsible for factually accurate judgments. The adjudicative temperaments differ, and while in the former the rule is likely to remain a dead letter, in the latter it may frequently be invoked.

Related to the unequal understanding of the judicial office is the different way in which litigants' counsel go about performing their job. In civil

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[32] English trial courts, for example, must give permission ("leave") for appeal in nearly all cases.

[33] Goethe, *Faust*, First Part, Cathedral, Choir, no. 3810.

law systems, they are still seldom vigorous participants in proof-taking or zealous searchers for evidence. The near monopoly of the judiciary in proof-taking reduces their incentives to be active in this regard. In common law systems, a similar dynamic is at work, albeit in a different direction: since judges do not engage in fact-finding, partisan lawyers do.

VI. ARE VESTIGES EVANESCENT?

Having identified these vestiges, the question then becomes whether they justify the continued opposition of common law and civil law systems of civil procedure? The negative answer to this question is suggested by the possibility that most of the identified relics are in the process of disappearing. Even the differences just discussed in the understanding of judicial office may be *in articulo mortis*. Imagine what could easily happen in common law countries. As the fact-finding role of the civil jury recedes further into history, and as more externalities are detected in civil litigation, the view could prevail that judges are indeed responsible for accurate factual findings. It might soon be argued that they should be permitted not only to steer, but also to row.

But even in the absence of such radical change, judicial fact-finding activity may be on the increase. As reforms patterned on the English example enable judges to acquire factual knowledge early on, it may only be a matter of time before they begin to feel that evidentiary gaps, which they perceive in the performance of their managerial responsibilities, should be filled.[34] Nor is the image of judges as referees so deeply rooted in popular Anglo-American legal consciousness as is sometimes asserted. If it were, television shows featuring small claims court judges as fact-finders would not be produced and be so widely popular in common law countries. On the Continent, a movement in the opposite direction seems to be afoot, albeit it is for the moment confined to criminal procedure. Here, reforms have become fashionable — Italy being a prominent example — to place the primary responsibility for proof-taking on the parties, and to assign only a complementary fact-finding role to judges. Assuming that these legislative innovations take hold in forensic practice, they will most likely affect the civil side of adjudication as well. If and when these transformations come to pass, a middle-of-the-road position on the role

[34] For a similar argument, see J.A. Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52 I.C.L.Q. 281, at 288.

of civil judges will have prevailed in both branches of the Western procedural tradition.

As things presently stand, however, it seems premature to declare the demise of the inherited understanding of judicial tasks. Instructive in this regard is the situation in some international criminal courts that are staffed with lawyers from both continental and Anglo-American countries. Following the new continental fashion *in criminalibus*, the primary responsibility for the development of evidence in these courts was assigned to the parties, with judges authorized by the parties to intervene in proof-taking and to demand additional evidence. Yet the practical application of this normative scheme differs: judges trained in civil law countries readily interfere with partisan proof-taking, while their common law colleagues tend to be much more cautiously reserved toward — and sometimes even critical of — extensive judicial intervention in fact-finding processes.[35] Within the single normative framework, different understandings of judicial roles thus persist and influence the life of the law.

One way to dismiss other remnants of the old contrast as inconsequential is to argue that they emerge only when trials are considered on the common law side. But since the majority of cases in common law countries no longer reach this climactic procedural event,[36] meaningful comparison should focus on the earlier stages of the lawsuits, where similarities between common law and civil law systems overshadow differences. In common law countries, the exercise of the judicial managerial function generates discrete sessions that resemble continental hearings, and the role of documentation in the course of these sessions also increases. But, as we have tried to show, contrasts related to divergent structures of authority manifest themselves even here. The effects that stem from a pre-trial process in which the disclosed information remains in private hands, and one in which it becomes evidence in the official file of the case, should not be dismissed as insignificant. The old contrasts retain a practical bite, even if limited to a procedural segment.

All that has been said so far is not to deny that the importance of the contrasts may have diminished to the point where it is, or should be,

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[35] See, *e.g.*, P. Wald, "The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court" (2001) 5 Wash. U.J.L. Pol'y, at 87, at 90; S. Bourgon, "Procedural Problems Hindering Expeditious and Fair Justice" (2004) 2 J. Int'l Crim. Justice, 526, at 530.

[36] If one adds dispositive pre-trial adjudication to consensual settlements, only about 5 per cent of filings reach American trials. See D.A. Sklansky & S.C. Yeazell, "Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa" (2006) 91 Geo. L.J. 683, at 696, n. 37.

overshadowed by differences independent from the opposition between common law and civil law. Owing to the myriad wonders of communication and transportation, borrowings within and between legal families multiply. Networks of communication pulsate with the flow of information, creating entangled convergences that appear syncretistic and styleless when analyzed in terms of conventional categories — including those of common law and civil law. In regard to specific procedural subjects, and in some special types of civil litigation, similarities and differences have already emerged that clearly cut across that traditional divide. Also important are rapid technological advances and the new ways of organizing procedural authority that they have made possible; the result is a weakening of old arrangements that, as we have emphasized throughout this article, are significant to procedural form.[37] On the common law side, for example, the decline of the jury epitomizes changes in its traditional machinery of justice. On the Continent, classical bureaucratic notions, supportive of many procedural arrangements, are undergoing transformations one could, until recently, only dimly perceive. Rigid judicial hierarchies are loosened, not only because of their tensions with pluralist democracy, but also because of the emerging multiplicity of overlapping judicial hierarchies and ever-present efficiency concerns.

Indeed, there is also ubiquitous concern with increased efficiency. In the midst of this concern, a tendency is discernible to de-emphasize preoccupations with procedural form — including residual differences between common law and civil law regimes — and to concentrate instead on measures likely to contribute to the efficient functioning of civil justice.[38] But consider that efficiency, properly understood, is a measure of the relation of the valued output, or goal of an activity, to the cost of achieving it. The speed and cost at which a justice system disposes of ingested cases tell us little about its efficiency unless we include its goals into the efficiency equation: without reference to them, efficiency is a contentless ideal.

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[37] As Max Weber has remarked, all social science typologies — including his own ideal types — are transient "as history moves on in the onward flowing stream of culture". M. Weber, "Objectivity in Social Science and Social Policy", in E.A. Schils & H.A. Finch, eds. and transl., *Max Weber on Methodology of Social Sciences* (New York: Free Press, 1949), at 104.

[38] The work of the European Commission for the Efficiency of Justice exemplifies this tendency. On efficiency and other "functionalist" approaches to theorizing about civil procedure, see Taruffo, *supra*, note 12, at 359.

Now, it would be wrong to believe that goals and value systems of more or less bureaucratized machineries of justice are exactly alike.[39] Their assessments of the importance of accurate fact-finding, consistency in decision-making, dissent, official discretion or the outsourcing of official action, all differ in significant ways. Thus, so long as vestiges persist in civil procedure of attitudes traceable to disparate common law and civil law structures of authority, they should not be disregarded, even if one's principal concern is the increase of procedural efficiency. Nor is it really passé, for the purpose of rough orientation on a number of procedural issues, to keep in mind that continental civil procedure retains remnants of procedural attitudes and arrangements congenial to a state-centred, hierarchical-bureaucratic machinery of justice, while its common law counterpart keeps alive vestiges of a more egalitarian and less bureaucratized institutional environment, more opened to civil society.

[39] Much of the literature on the subject tacitly assumes the inter-systemic identity of goals and values.

Le *Common Law* / *Civil Law* Divide: An Introduction

Marcel Storme*

I. INTRODUCTION

C'est avec grand intérêt que j'ai lu le rapport introductif de notre éminent collègue Mirjan Damaška. Ce texte nous donne une synthèse originale : le résidu d'une distinction déroutante entre la *civil law* et la *common law*[1].

Préliminairement, je voudrais attirer l'attention sur quatre approches de cette distinction.

1. J'ai eu le privilège de présider un groupe de travail (1987-1993) qui, à la demande de la Commission européenne, a préparé un rapport sur le rapprochement du droit judiciaire en Europe[2].

J'en extrais le passage suivant :

> In the debates on the unification of procedural law, the same question always arises: Continental v. common law?
>
> Not 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.
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> It goes without saying that, historically, there are fundamental differences between procedural law in the common law countries and that in the continental-law countries. In this day and age, however, the

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* IAPL Secretary General (1983-1985) and President (1995-2007).

1 C'est à juste titre que Damaška souligne qu'à l'intérieur de chaque système procédural, existent des différences qui font qu'il n'y a pas vraiment une unité dans chacun des deux systèmes. J'y ajoute que, même au niveau du droit judiciaire national, des divergences se développent à la suite du comportement des acteurs de justice (la routine ou le train-train qui déforme parfois les règles du code).

2 M. Storme, éd., *Rapprochement du droit judiciaire de l'Union européenne* [*Approximation of Judiciary Law in the European Union*], Dordrecht, Martinus Nyhoff, 1994.

approximation process is intensifying in the light of what I have described as "il principio del finalismo"[3]:

> Instead of arguing about the dogmatic bases of procedural law, it is better to adopt a pragmatic line, which leads straight to what is wanted — namely an end to the dispute.
>
> The pattern could be as follows.
>
> One party decides to submit the dispute to the court: together with its co-litigants, it demarcates the ground on which the case will be conducted (dispute, object).
>
> But, from that moment, a judge comes into play, and a certain amount — even a definite amount — of cooperation stamps its mark throughout the proceedings.
>
> It would, moreover, be as well to make this cooperation absolutely plain at the outset, by allowing the judge to call the parties together and draw their attention to the need to adjust the procedure, and to add any other relevant facts and the underlying evidence, or to bring in third parties. The judge will then take the opportunity to point out what, in his opinion, are the appropriate bases in law of the dispute ("Rechtsgespräch").
>
> From that time, the judge will direct the subsequent course of the proceedings with due regard for the rights of the defendant, the other parties remaining free and independent with respect to the content and the limits of their claims or their defence.
>
> The procedural formalities will be judged in accordance with the "principio del finalismo."

2. En arbitrage international, il arrive souvent que les parties soient représentées par des conseils appartenant aux deux cultures juridiques. Lorsque j'étais président du collège arbitral, j'ai toujours essayé de trouver un juste équilibre entre la procédure écrite (plutôt la *civil law*) et la procédure orale (plutôt la *common law*), *ma non troppo* : pas de *containers* de documents et de conclusions, et pas de *hearings* qui durent des semaines!

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[3] Storme, *op. cit.*, p. 55-56.

> An analysis of international arbitration indicates that, prima facie, certain crucial differences between the continental approach and common law practice exist. The main differences relate to the general hearing (written/verbal), the position of the parties in relation to the arbitrator, the proof-taking procedure, the duty to give reasons for the decision, and the division of competences between the judiciary and the arbitrator. On the other hand, it must be pointed out that the main trends in international arbitration lead to a blurring of these differences. In particular, mention may be made of the lex mercatoria, reduction in judicial control, and the evolution towards transnational arbitration[4].

3. Il est certain qu'au sein des *international lawfirms* à Bruxelles, « une pollinisation croisée » a lieu entre le droit civil et la *common law*.

4. Il me semble enfin qu'une révolution copernicienne a eu lieu dans le domaine de la procédure civile.

Au XIX^e^ et XX^e^ siècles, les auteurs processualistes proclamaient le caractère national de cette branche du droit. C'est grâce notamment à Mauro Cappelletti que l'*access to justice* est devenu une matière par excellence pour appliquer la méthode comparative.

En effet, on veut partout dans le monde combattre ce que Sir Jack Jacob a qualifié de « three headed hydra in civil justice: costs, delays and vexation » ou, comme Damaška, le dit : « The most powerful motive for reform seems everywhere [notre soulignement] to be the pragmatic one of making litigation more efficient. »

II. LE JUGE

Au congrès de Coïmbra, j'ai pu rapporter sur l'activisme du juge dans le domaine de la procédure[5].

Depuis lors, on peut aisément souligner avec Damaška : « That the rapprochement between common law and civil law arrangements is indeed quite substantial ».

Nous pouvons en tout cas constater que de plus en plus « le juge n'est pas sans pouvoir sur le fait, mais qu'il n'a pas le complet monopole du droit » [6].

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[4] M. Storme, « International Arbitration – A Comparative Essay » (1994) 2 E.R.P.L. 359.

[5] Voir Rapport M. Storme, « L'activisme du juge », dans *Role and Organization of Judges and Lawyers in Contemporary Societies*, IX World Conference on Procedural Law (Coïmbra-Lisboa, 1995), p. 405 et suiv.; voir également : J. Linsmeau et M. Storme, *Le rôle respectif du juge et des parties dans le procès civil*, Mechelen, Kluwer, 1999, p. 1 et suiv.

[6] Linsmeau et Storme, *op. cit.*, p. 17.

Cela signifie que le juge peut aller chercher les faits au fond du panier que l'on a posé devant lui et qu'il doit appliquer la règle de droit qu'il estime adéquate.

Mais, quelle que soit l'étendue du pouvoir du juge, il est certain qu'il ne peut l'exercer s'il ne respecte pas les droits de la défense. Il s'agit ici d'un principe fondamental commun aux deux systèmes procéduraux.

III. PROCÉDURE

Il me semble indiqué de relever dans le rapport Damaška les thèmes principaux pour lesquels à mon avis les différences sont « evanescent ».

1. Pretrial - trial

Lors du congrès à Salvador de Bahia, les rapporteurs généraux ont conclu que partout la tendance se fait jour de réglementer la phase préliminaire (*pretrial*) du procès afin d'éviter éventuellement sa continuation (*trial*)[7].

2. More voice, less print

Dans le monde de la procédure civile, nous constatons une forte tendance vers un système biphasé, un système à deux phases consécutives (une phase écrite, puis une phase orale), qui ressemble beaucoup à celui de la *common law*[8].

3. La preuve

Il est clair, et le rapport Damaška le souligne à juste titre, que la preuve reste un domaine assez particulier.

J'ose pourtant attirer l'attention sur la proposition faite par la Commission Storme de généraliser en Union européenne une procédure de découverte des documents (*discovery*) :

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[7] Rapports Neil Andrews, Bart Groen et José Roberto de Santos Bedaque, « New Trends in Pre-action », dans A. Pellegrini Grinover, *XIII Congresso Mondial de Direito Processual* (Rio de Janeiro, 2007), p. 201 et suiv.

[8] Voir, par exemple, l'Espagne et les Pays-Bas : M. Storme, « Plaidoyer pour une procédure plus orale » (2007) Journal des tribunaux 308.

> It shall be the obligation of every party to an action to serve on all other parties a list of the documents which are in his or her possession, custody, or power, which relate to any question in issue in the action, and which have not previously been communicated to those parties:
>
> (a) where a general rule of national law so requires; or
>
> (b) where the court, after all parties have been given the opportunity to be heard, so orders.

4. Voies de recours

De longue date, j'ai plaidé en faveur de l'abolition de la voie d'appel. L'appel n'est en effet pas un droit fondamental, comme l'a souligné la Cour des droits de l'homme à Strasbourg.

Comment peut-on raisonnablement expliquer aux justiciables qu'un juge puisse en appel décider différemment du premier juge, alors que les faits de la cause, les arguments juridiques, les parties litigantes et même les conseils sont les mêmes dans les deux instances?

Il existe dès lors une tendance en faveur d'une « *leave for appeal* » et même d'une sélection des cas qui sont soumis au contrôle de la cour de cassation.

5. Jury

Au sujet du jury, ou peut discerner différents courants. Parfois, la participation des citoyens à l'administration de la justice est proposée non seulement pour résoudre le problème de la surcharge des cours et tribunaux, mais aussi pour souligner une certaine responsabilité sociétale quant au fonctionnement du pouvoir judiciaire. Il serait bon à cet égard de relire Tocqueville[9].

IV. POUR CONCLURE

« Civil procedure was now increasingly attributed a social function », constate Damaška.

N'oublions pas qu'à un certain moment, les juges étaient rémunérés par les parties.

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[9] Alexis de Tocqueville, *De la démocratie en Amérique*, Paris, Éditions Flammarion, 2010.

Depuis lors, le procès civil s'est développé comme une « *Wohlfahrtseinrichtung* » (Franz Klein), une institution pour le bien-être social.

L'État est devenu responsable de la gestion d'une bonne solution des conflits privés. C'est pourquoi le bon fonctionnement de la justice doit rester une tâche primordiale de chaque État.

Je me souviens d'avoir discuté longuement à Quito (Ecuador 1996) avec des collègues désignés comme experts de la Banque mondiale sur la « *Reforma de la Justicia* ». Eux voulaient à tout prix importer le modèle A.D.R. californien, oubliant qu'en Amérique latine, une justice hiérarchique reste tributaire de l'histoire et de la culture de ce continent (Espagne, Église catholique, tradition tribale).

Et ainsi je rejoins Damaška lorsqu'il rappelle que la procédure de la *civil law* est dominée par « a hierarchical-bureaucratic machinery of justice ».

Comments on Professor Damaška: Residual Truth of a Misleading Distinction

Oscar G. Chase[*]

I am honoured to comment on the very helpful paper[1] with which Professor Damaška opened the 2009 International Association of Procedural Law ("IAPL") conference[2] (the "Conference"). In it, he succinctly set the stage for the discussion that was to follow over the next two days. Professor Damaška gives us the historical background of the categories that we have re-examined, lays out the more recent developments in many parts of the world that have inspired our enterprise, and offered some reasons why those categories are — and are not — still useful and, to some degree, accurate descriptions of the legal world that we inhabit today.

While he comes down on the side of the continuing utility of the hoary divisions, he also questions just how useful they remain. Thus, he sets the stage, but does not compel the dénouement. In short, he leaves us with plenty to do! In my few pages here, I will touch on the main points of Professor Damaška's paper and try to raise some additional questions. I will spend some moments on the issue of categorization *per se*, asking what functions categories serve in general and what dangers they present.

It is important to situate the present paper in the context of Professor Damaška's prior work. I would claim that, in no small part, it is he who is responsible for bringing us to our current confused, but interesting moment. It was, after all, his book, *The Faces of Justice and State*

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[1] Mirjan Damaška, "The Common Law / Civil Law Divide: Residual Truth of a Misleading Distinction" [hereinafter "Damaška"] in Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories* (Markham, ON: LexisNexis Canada, 2010) [hereinafter "Walker & Chase"] 3.

[2] International Association of Procedural Law (IAPL), *Common Law – Civil Law: The Future of Categories / Categories of the Future* (2009 IAPL Annual Conference, Toronto, Canada: June 3-5, 2009). See IAPL 2009, online: <http://www.iapl2009.org/> [hereinafter "IAPL 2009"].

Authority[3] that, over two decades ago, questioned the received procedural categories, and proposed a new paradigm for understanding and differentiating among procedural systems. You will recall that in *Faces of Justice*, Professor Damaška firmly rejected the once dominant "Adversarial versus Inquisitorial" dichotomy because of its misleading normative implications and the imprecision of its boundaries. This is not to say that he abandoned tradition altogether. Often, he referred in "*Faces of Justice*" to "continental" or "civil law" countries, and contrasted them to the "Anglo-American" or "common law" world.

He did so, however, in the service of an entirely new construct, and described two new categories of what he called "the character of procedural authority".[4] On one level (which I find most relevant to his Conference paper), he differentiated between systems according to their "structures of authority".[5] In this way, he found that some procedures revealed a preference for a hierarchical, bureaucratic structure by, *inter alia*, a professional judiciary, official control of the fact-finding process and robust supervision of lower courts. In contrast, other systems favoured coordinate decision-making, and this was exemplified especially by the jury, by private responsibility for fact investigation, and by the use of judges who had no special training for the job other than the practice of law. This new approach to mapping procedural systems was not an example of categorization for its own sake: the great contribution of *Faces of Justice* was that it linked the character of procedural systems to the general attitudes toward state authority of the societies in which they were found. Most relevant to this Conference, he showed that there were patterns of procedural character that differed from those that were traditionally dominant, and that these new categories helped to better understand procedural systems. Further, while he found parallels between the hierarchical and coordinate systems and the traditional common law / civil law divide, he also showed that the two systems of category did not map squarely onto each other. This frees us, and even encourages us, to step "outside the box" of our comparatist forbears with a more nuanced and sophisticated appreciation of difference. This is precisely what we did at the Conference for much of the time in the days that followed, and our work is reflected in the papers that have been reproduced here.

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[3] Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven CT: Yale University Press 1986) [hereinafter "*Faces of Justice*"].

[4] *Id.*, at 9.

[5] *Id.*, at 17.

Professor Damaška's insistence on viewing procedures as manifestations of attitudes about authority informs his present paper. After describing how modern efforts to reform national systems have led both to a blurring of the traditional differences between the common law and the civil law nations, and to growing incongruence within each group of nations, he argues that vestiges of the prior clear demarcations remain, and are not likely to disappear very soon.

And why is that? It is because, as Professor Damaŝka puts it in the paper for this Conference, "continental civil procedure retains remnants of procedural attitudes and arrangements congenial to a state-centred, hierarchical-bureaucratic machinery of justice, while its common law counterpart keeps alive vestiges of a more egalitarian and less bureaucratized institutional environment".[6] We must ask, though, how long and how deeply will these differences hold, if indeed they do? The current worldwide economic crisis has led to political and administrative actions in the United States, for example, that would have been rejected out of hand as "European and Socialist" only two years ago. Does this augur procedural convergence as well? Or is the current pro-regulatory vogue merely that — and destined to yield to more traditional habits of mind?

There is another sense in which Professor Damaška's paper reminds us how wedded we are to the traditional common law / civil law terminology: we have no other categories readily at hand to fall back on. Instead of common law and civil law, we can distinguish, as Professor Damaška does in his current and past work, between Anglo-American and continental systems. However, in any case, the "Anglo-American" and "continental" labels are merely proxies for the common law and the civil law traditions. Further, they have the added problem of leaving one to wonder, "Where is the rest of the world?" Our Asian, Latin American, African and Middle Eastern colleagues might well ask, "Just what continent are you talking about?"

A rather different problem arises when we avoid dichotomies by blending common law and civil law traditions into the ragout of "Western" legal systems. That term is both under- and over-inclusive. "Western", as it is used here, is a proxy for "modern" systems. That term — "modern" — serves to distinguish all of the systems that were represented at the Conference from those, such as oracular judging, that are sometimes referred to as "primitive". The trouble, then, is that this term does not offer us a shorthand way of distinguishing among the traditions within modernity

[6] Damaška, *supra*, note 1, at 21.

that share a set of similarities. Can we turn back to Professor Damaška, and adopt, perhaps, a distinction between bureaucratized-tending and coordinate-tending systems? Where is the Mercator who will accurately map the world for us?

Let us step back for a brief moment from procedure *per se*, and think about the problem — and I suggest we call it that — of categories. How can we evaluate the continued accuracy and utility of our common law / civil law paradigm without addressing the concerns and the values of categorization *per se*? Could we do without categories? Could we do without *these* categories?

Professor Glenn reminds us in his paper[7] that categories are necessary for coherent thought, and yet they have the capacity to lead our reason astray in very dangerous ways. Thus, the category of "the other" is undoubtedly responsible for the worst of human behaviour. There is a warning there for us. Consider that the real curse of the outmoded adversarial / inquisitorial trope was not its inaccuracy, but its normative implications. These too easily lead to self-congratulation and disparagement of the other. Is there a kernel of these emotions lying deep within the common law / civil law distinction — on both sides of the divide?

I end with one last comment on Professor Damaška's paper. Like so much of his work, it is dense, it is informative, it is powerfully reasoned and it is delightfully readable. It cannot go unsaid that Professor Damaška is a master of English prose. If there is a "Nabokov" of comparative law, Professor Damaška is he (although, to my knowledge, he does not collect butterflies or write salacious novels). Like that master of the English language, he came of age speaking a Slavic tongue, was school-taught English as a third or fourth language, came to America as a mature man and was appointed to a prestigious academic position. Most important, in both cases, is that the sparkling playfulness of the writing leaves me, the native speaker, hopelessly envious. Here is just one example from his paper from this Conference: referring to the "deflation of … fact-finding zeal"[8] on the part of continental judges of the 18th and 19th centuries, Professor Damaška explains: "Generous testimonial privileges proliferated, justified by the desire to protect individual autonomy and the purlieus of private life."[9] Please notice the quintuple alliteration. Accidental? Is this an accidental use of "purlieus of private life"? Hardly.

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7 H. Patrick Glenn, "A Western Legal Tradition?" in Walker & Chase, *supra*, note 1, 601.
8 Damaška, *supra*, note 1, at 4.
9 *Id*., at 4-5.

The prose grabs our attention, underscores the point and plays with the words at the same time.

I thank Professor Damaška for giving us so much to discuss.

Part II

Country Studies from Across the Divide

Country Studies from Across the Divide: The Impact of Reform on Convergence

Janet Walker*

To what extent has civil justice reform brought about a convergence of the features of procedural law that once served to distinguish common law and civil law systems? To answer this, six comparatists from legal systems that have been associated with either the common law or the civil law tradition were asked whether the categories of "common law" and "civil law" still hold in the wake of recent reforms to their civil justice systems. They were also asked about key reforms and whether and how these might be changing the categories. Finally, they were asked about challenges to implementing reform and to the acceptance of proposals for reform, and how these challenges have been met in their legal systems. Surprisingly, in answering these questions, each participant raised another factor for consideration that bore significantly on the questions above, thereby demonstrating the intricacy and profundity of the issues at play.

Does it matter whether a legal system likes the idea of harmonizing its practices with others? This is the question prompted by Linda Mullenix's thought-provoking analysis of American civil justice reform.[1] In her paper, Professor Mullenix discusses the inherent tendency to resist consideration of foreign practices in legal reform, which has been described as American "exceptionalism". Having described this inherently conservative approach to convergence, her paper documents the ironic enthusiasm of a conservative reform movement in the late 20th century for a series of reforms that would have drawn the American legal system

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1 Linda S. Mullenix, "American Exceptionalism and Convergence Theory: Are We There Yet?" in Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories* (Markham, ON: LexisNexis Canada, 2010) [hereinafter "Walker & Chase"] 41.

closer to its European counterparts. In a further ironic twist, Professor Mullenix argues that the procedural area of development that has been considered the most distinctively "American" — class actions — is proving to be the area in which the procedures most resemble the civil law tradition. However difficult it may seem for some to accept that class actions are anything but exceptionally American, Professor Mullenix asserts that "the entire arena of complex litigation dispute resolution has come to resemble, *de facto,* many attributes of civil law traditions". It would seem, then, that even the most entrenched resistance to convergence cannot prevent convergence from coming about as an unintended by-product of reform.

Does it matter whether a legal system cares about the potential for convergence as an outcome of reform? According to Andrés de la Oliva Santos, the development of the new *Spanish Civil Procedure Act 2000* demonstrates that while convergence was not the objective, there were certain features of common law procedure that inspired particular reforms:[2]

> Given my participation in the drafting of the Act, I can assert without fear of contradiction that the said changes were not a result of a desire to converge Spanish civil justice with procedural models from the common law realm. However, the fact that this desire was not the driving force behind the reform does not mean that certain realities of the common law are unknown or disdained.[3]

In Professor de la Oliva Santos's view, convergence is merely a spontaneous result of efforts to improve civil justice in each country. Procedural systems like the Spanish system are indifferent to the possibility of convergence as an outcome. Reformers are concerned primarily with making their own procedural law function as effectively as it can regardless of whether this makes it more — or less — like other legal systems.

What if the harmonization of internal differences in procedure exhausts the energy for reform? This would seem to have been the case in the new Swiss *Code of Civil Procedure*, which is expected to come into force in 2011. According to Professor Samuel Baumgartner, who was involved in the lawmaking process, "the Committee spent most of its time learning about, and discussing, the comparative advantages of the procedural rules of the various cantons. Understandably, this left little

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[2] Andres de la Oliva Santos, "Spanish Civil Procedure Act 2000: Flying Over Common Law and Civil Law Traditions" in Walker & Chase, *id*., 63.

[3] *Id.*, at 69-70.

time for international comparative analysis."[4] While those familiar with American exceptionalism may have attributed it to the enormous complexity and diversity of the American legal system, the example of the Swiss federation shows how the challenges of internal harmonization projects can themselves be daunting. While Professor Baumgartner offers, in addition, the plausible explanations of inertia and conservatism for the lack of initiative in considering foreign precedents, the more interesting and compelling explanation he offers is that of the lack of "the necessary in-depth comparative background information on how a particular foreign rule or approach works".[5] The example of Swiss procedural reform demonstrates how, in a community that is alive to the value of identifying and adopting the most effective procedures, there may remain practical limits to the ability to embrace the opportunities for improvement that might be available by drawing on examples from abroad.

Is it possible to bring about change in a basic feature of the culture of disputing through procedural reform? Mr. Neil Andrews's reflections on the Woolf Reforms in England[6] would seem to suggest that it is. It is frequently observed that established attitudes about disputing can reduce the potential for procedural reform, but Mr. Andrews's analysis suggests that in England the attitudes themselves were the subject of concern that prompted reform. "[D]isputes had become the (lucrative) playthings of rival teams of lawyers",[7] and this drove some of the most significant of the reforms. Much has been written elsewhere about the specifics of the reforms, but Mr. Andrews reflects thoughtfully on the way in which "English civil procedure has moved from an antagonistic style to a more cooperative ethos".[8] It is interesting to note that a significant feature of these reforms, the "case management resolution", which prevents cases from being left to drift without official direction, is one that, incidentally, does bring English procedure closer to its civilian counterparts.

How do we define the common law and civil law traditions to begin with? And how do we measure the extent and direction of reform in a system whose fundamentals were largely imported from a country in one

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[4] Samuel P. Baumgartner, "Civil Procedure Reform in Switzerland and the Role of Legal Transplants" in Walker & Chase, *supra*, note 1, 75, at 89.

[5] *Id.*, at 92.

[6] Neil Andrews, "English Civil Justice in the Age of Convergence" in Walker & Chase, *supra*, note 1, 97.

[7] *Id.*, at 109.

[8] *Id.*, at 98.

legal tradition and then reshaped following a period of occupation by a country from the other legal tradition? The experience of procedural reform in Japan, as described by Professor Yasuhei Taniguchi,[9] who was involved in the most recent round of reforms in the late 1990s, raises these questions. Japan is anything but typical of countries that are entrenched in one or the other of the major traditions and that are considering the advantages of some of the other traditions' features. Moreover, as Professor Taniguchi explains, the roots of modern Japanese civil procedure, which were borrowed from Germany, diverged from the outset in important ways from the civil law tradition as measured by the indicia most commonly used to distinguish between the common law and the civil law.

Finally, *Where do we situate a country that began by importing voluntarily a code so specific that it can be traced not just to one or another of the major traditions, or even to a single country, but to a particular region of that country?* In this respect, the experience with Turkish civil justice reform, which, after eight decades and six failed attempts at reform, finally produced a new code in 2009, is nothing short of unique. Mr. Murat Özsunay's detailed review of its innovations on the previous procedures,[10] which were borrowed from the canton of Neuchâtel, makes a fascinating sequel to the discussion of the Swiss reforms, which have harmonized the procedural law of Neuchâtel with that of the other cantons in the federation.[11] Moreover, recalling the proud affirmation of American exceptionalism, the example of the recent Turkish reforms demonstrates the potential for a legal system that is bent on drawing the best from foreign examples, ironically, to wind up with a unique blend of procedures — one that confounds simple categorization, and one that presses us to question more deeply our taxonomy of procedural systems.

These six country studies from across the divide provide much more than illustrations of the hypothesis that the countries considered could readily be classified as common law or civil law and that procedural reform was undermining the distinctiveness between them. In fact, each, in its own way, demonstrates the remarkable power of comparative procedure to cause us to question the traditional categories themselves.

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[9] Yasuhei Taniguchi, "How Much Does Japanese Civil Procedure Belong to the Civil Law and to the Common Law?" in Walker & Chase, *supra*, note 1, 111.

[10] Murat Özsunay, "The Turkish 2009 Draft Code of Civil Procedure, Eight Decades after the Voluntary Adoption of the Swiss-Neuchâtel Code of Civil Procedure" in Walker & Chase, *id*., 119.

[11] Samuel P. Baumgartner, *supra*, note 4.

American Exceptionalism and Convergence Theory: Are We There Yet?

Linda S. Mullenix[*]

I. INTRODUCTION

In a world characterized by the increasing globalization of legal practice,[1] one would expect to find an increasing degree of cross-fertilization and borrowing of legal concepts. In particular, one might expect to see the erosion of rigid concepts and categories that have long signalled the differences between the common law and civil law traditions.[2]

This article discusses the extent to which civil justice reform efforts in the United States reflect the convergence between the American common law and civil law systems. The article explores three inconsistent and, perhaps, contradictory themes that reflect an explicit American resistance towards foreign law concepts on the one hand, but implicit utilization of some civil law traditions on the other. While it is difficult to rationalize these seeming inconsistencies, the situation is, perhaps, explained by the peculiarly American resistance to theoretical concepts or

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[1] See generally Leonard Bierman & Michael A. Hitt, "The Globalization of Legal Practice in the Internet Age" (2007) 14 Ind. J. Global Legal Stud. 29; Hans-Jürgen Hellwig, "At the Intersection of Legal Ethics and Globalization: International Conflicts of Law in Lawyer Regulation" (2008) 27 Penn. St. Int'l. L. Rev. 395 (2008); William D. Henderson, "The Globalization of the Legal Profession" (2007) 14 Ind. J. Global Legal Stud. 1; Pierrick Le Goff, "Global Law: A Legal Phenomenon Emerging from the Process of Globalization" (2007) 14 Ind. J. Global Legal Stud. 119; D. Daniel Sokol, "Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Further Study" (2007) 14 Ind. J. Global Legal Stud. 5; and Laurel S. Terry, "The Legal World Is Flat: Globalization and Its Effects on Lawyers Practising in Non-Global Law Firms" (2007) 28 Nw. J. Int'l L. & Bus. 572.

[2] See Oscar G. Chase, "American 'Exceptionalism' and Comparative Procedure" (2002) 50 Am. J. Comp. L. 277, at 283 [hereinafter "Chase"] (noting that "the 'too-familiar' division of the modern world's procedural systems into the adversarial (common law) camp versus the inquisitorial (civil law) camp turns on categories that are imperfect at best — differences between nations within a category can be considerable. Moreover, the core terms are insulting as well as misleading. … Nonetheless, the labels can serve as a convenient shorthand, so long as we recall their limitations").

foreign norms alongside the ready embrace of pragmatism and practical solutions by the United States.

Part II briefly canvasses the various means for judicial reform and harmonization projects in American law. This part also describes the well-known theory of American exceptionalism in the procedural universe, and how American exceptionalism serves as a barrier to convergence with foreign legal traditions. Hence, American reform efforts have hewn closely to the concept of American exceptionalism and have thus resisted any drift towards the embrace of civil law traditions. Consequently, in American jurisprudence at least, the traditional categories of the common and civil law are still highly relevant in describing the American legal system.

Part III of this article then explores a diverting (and unintended) American expression of sympathy for civil law concepts that emerged during the 1980s and 1990s with the civil justice reform movement in the United States. Clearly, the American civil justice reform advocates did not anchor their reform efforts in admiration for civil law systems. Ironically, however, in the quest for civil justice reform, American ideological conservatives embraced a program for reform that incorporated a civil law mindset about access to justice, coupled with numerous features of civil law systems. If convergence had its moment in American legal history, it is, perhaps, to be found in the civil justice reform movement of this period.

Finally, Part IV explores the phenomenon of how the American resolution of complex litigation has informally mimicked many civil law traditions and the ways in which civil law systems similarly resolve complex, massive disputes.[3] This section traces two possible convergence themes: (1) informal convergence through pragmatic American class action settlements; and (2) formal convergence through the adoption of class action procedural devices in civil law countries. Thus, while civil law countries still rhetorically reject American-style class litigation, this resistance to class action style procedural mechanisms seems itself to be eroding. Therefore, complex dispute resolution presents the most interesting opportunity for convergence of traditional common law and civil law categories.

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[3] Linda S. Mullenix, "Lessons from Abroad — Complexity and Convergence" (2000) 46 Vill. L. Rev. 1 [hereinafter "Mullenix, 'Lessons'"].

II. AMERICAN EXCEPTIONALISM AND LAW REFORM PROJECTS

Many, if not most, of American law reform projects pursue the goal of rationalizing, harmonizing, reforming or "re-stating" the law of American jurisdictions. The dual federal-state structure of the American legal system ensures that law reform projects are conducted through multiple auspices, and are ongoing on almost a perpetual basis.

The most familiar institutional entities engaged in law reform projects in the United States include the advisory rules committees of the federal and state judiciaries,[4] the National Commissioners on Uniform State Laws[5] and the American Law Institute,[6] among other similar bodies.[7]

Law reform bodies in the United States may undertake law reform projects for various reasons. In some cases, a law reform group may be asked to undertake a specific law reform project.[8] In other instances, advisory groups are entrusted with the task of continuing rule revisions.[9]

Depending on the nature of the project or the source of the request, law reform bodies may seek to revise existing rules to reflect current practice, to resolve some difficulty with existing rules, or to harmonize rules with emerging practice in other jurisdictions. Some reform bodies may be asked to formulate model rules.[10] Other institutions, such as the American Law Institute, may undertake projects to re-state developed

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[4] There are numerous academic analyses of federal and state rule-making processes in the United States. See generally Robert G. Bone, "The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy" (1999) 87 Geo. L.J. 887; Glenn S. Koppel, "Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process" (2005) 58 Vand. L. Rev. 1167; and Richard L. Marcus, "Reform Through Rulemaking?" (2002) 80 Wash. U.L.Q. 901.

[5] The National Conference of Commissioners on Uniform State Laws describes its history and purpose. See Uniform Law Commission (ULC), The National Conference of Commissioners on Uniform State Laws (NCCUSL), "About NCCUSL: Introduction to the Organization — History, Purpose, Financial Support and Procedures": <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11>.

[6] The American Law Institute "was founded in 1923 following a study by a group of prominent American judges, lawyers, and teachers, who sought to address the uncertain and complex nature of early 20th-century American law". The "Committee on the Establishment of a Permanent Organization for the Improvement of the Law" recommended that a perpetual society be formed to improve the law and the administration of justice in a scholarly and scientific manner. See The American Law Institute (ALI), "About ALI", online: <http://www.ali.org/index.cfm?fuseaction=about.instituteprojects> [hereinafter "ALI, 'About ALI'"].

[7] See, *e.g.*, *Model Business Corporations Act* (2005) [hereinafter "*Model Act*"] (adopted by 29 states).

[8] See, *e.g.*, Linda S. Mullenix, "Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing a Cost and Reduction Plan Under the Civil Justice Reform Act of 1990" (1992) 11 Rev. Litig. 165 (describing the appointment of Civil Justice Reform Advisory Groups to promulgate reform plans for the federal district courts).

[9] For example, the federal advisory rules committees are entrusted with the task of continuing rule review and revision.

[10] See *Model Act*, *supra*, note 7.

common law across many state jurisdictions,[11] or to draft proposals for emerging areas of law.[12]

While it is perhaps difficult to universally describe the approach and methodologies of law reformers in the United States, it is perhaps safe to venture that one common characteristic among American law reform projects is the lack of reference to foreign law.[13] Hence, there is little evidence that American law reform efforts are on a course of convergence with civil law traditions, or that the traditional categories describing common law and civil law systems are eroding significantly in the United States.

What accounts for this American non-recognition of civil law concepts in its law reform projects? The basic answer is rooted in the well-documented phenomenon of so-called "American exceptionalism".[14] American exceptionalism finds expression in at least two ways: the uniqueness of American procedural rules and norms of access to justice, accompanied by an attitude that famously — or perhaps infamously — eschews reliance on foreign law concepts.[15]

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[11] Describing its projects relating to restating the common law, the American Law Institute states: "The founding Committee had recommended that the first undertaking of The American Law Institute should address uncertainty in the law through a restatement of basic legal subjects that would tell judges and lawyers what the law was. The formulation of such a restatement thus became the first endeavor of the Institute." See ALI, "About ALI", *supra*, note 6.

[12] In discussing its projects for law reform and legislative proposals, the American Law Institute states: "[t]he Institute also engages in intensive examination and analysis of legal areas thought to need reform. This type of study generally culminates in a work product containing extensive recommendations or proposals for change in the law." See *id.*

[13] See, *e.g.*, Richard L. Marcus, "Putting American Procedural Exceptionalism into a Globalized Context" (2005) 53 Am. J. Comp. L. 709 [hereinafter "Marcus, 'Globalized Context'"].

[14] See generally Chase, *supra*, note 2; Marcus, "Globalized Context", *id.*; and Thomas D. Rowe, Jr., "Authorized Managerialism Under the Federal Rules — And the Extent of Convergence with Civil-Law Judging" (2007) 36 Sw. U.L. Rev. 191 [hereinafter "Rowe"]. See also William W. Berry III, "American Procedural Exceptionalism: A Deterrent or a Catalyst for Death Penalty Abolition?" (2008) 17 Cornell J.L. & Pub. Pol'y 481.

[15] See Sir Basil Markesinis & Jörg Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (New York: Routledge-Cavendish, 2006), at 55-62. In describing the American judicial attitude towards reliance on foreign law, they note (at 55):

> Our thesis is that the United States is currently going through an acute paroxysm. But, at the same time, the multiple objections levied against the idea of foreign borrowings can also help highlight some of the difficulties that confront other systems, as well. Finally, we set the scene by starting with the United States because here one encounters some of the strongest pronouncements against even attempting the exercise; and the tone of the American debates can, at times, be surprisingly strident.

See also Steven G. Calabresi, "'A Shining City on a Hill': American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law" (2006) 86 B.U.L. Rev. 1335; Daniel A. Farber, "The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History" (2007) 95 Cal. L. Rev. 1335; Frank H. Easterbrook, "Foreign Sources and the American Constitution" (2006) 30 Harv. J. L. & Pub. Pol'y 223; Paul Finkelman, "Foreign Law and American

Professor Oscar Chase has located the concept of American exceptionalism not only in the United States' distinct legal culture, but in broader American societal norms as well.[16] Among these values, Chase identifies liberty, egalitarianism, individualism, populism and *laissez-faire*,[17] which he suggests influence not only governmental institutions, but the American way of disputing as well.[18] Thus, Chase further argues that American cultural predilections are reflected in four peculiarly American aspects of civil procedure: the civil jury, party-dominated pre-trial discovery, the passive judge and party-chosen experts.[19]

To this list of unique American procedures, Professor Richard Marcus adds other characteristics of American procedural exceptionalism: relaxed pleading, broad discovery, limited cost shifting, potentially remarkable awards for pain and suffering or punitive damages, and heavy reliance on private lawyers to enforce public norms.[20]

American procedural law reform projects, then, have sought to refine or adjust existing rules, but have not sought to import civil law constructs into American procedures. Hence, comparative civil or common law traditions simply are not part of the American reform conversation. The converse proposition has proven equally availing. Thus, the American Law Institute and UNIDROIT's recent efforts to set forth a set of transnational rules of civil procedure[21] embodied the theory of American exceptionalism in a refusal to import core American procedural norms into the final transnational procedures.[22]

Perhaps the only area in which commentators have observed any degree of convergence concerns the role of the American judge. A number of American proceduralists have similarly noted that: "[s]ome of the gaps

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Constitutional Interpretation: A Long and Venerable Tradition" (2007) 63 N.Y.U. Ann. Survey of Am. L. 29; Rebecca R. Zubaty, "Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority" (2007) 54 U.C.L.A. L. Rev. 1413; and Ernest A. Young, "Supranational Rulings as Judgments and Precedents" (2008) 18 Duke J. Comp. & Int'l L. 477.

[16] Chase, *supra*, note 2, at 279-80.

[17] *Id.*, at 281, citing Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (New York: W.W. Norton, 1996).

[18] Chase, *id.*, at 282.

[19] *Id.*, at 280, 287-301.

[20] Marcus, "Globalized Context", *supra*, note 13, at 710. Professor Marcus describes this list as "hackneyed". He also identifies the jury trial as uniquely American. Notwithstanding the list of distinctive American procedural features, Professor Marcus suggests that American procedure reflects trends in three countries (at 711).

[21] American Law Institute & UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge: Cambridge University Press, 2004).

[22] See Marcus, "Global Context", *supra*, note 13, at 735 ("In sum, we may be left with American exceptionalism as the major obstacle to harmonization along the lines set out in the *Principles*").

between American and civil-law systems have been narrowed by the development and institutionalization of pretrial managerial judging in the United States, and by European reforms."[23] However, even this slim convergence theory has its limitations (and may be prone to overstatement), because American approaches to pre-trial fact gathering remain a distinctive feature of American procedure.[24]

III. CONVERGENCE AND AMERICAN CONSERVATIVE IDEOLOGY

1. The 1980s Civil Justice Reform Critique: The Contract with America and the *Common Sense Law Reform Act*

As indicated above, the doctrine of American exceptionalism largely has served as a barrier to convergence of American common law and civil law concepts. Thus, with rare exceptions, American jurists in their law reform efforts — as well as in their judicial decision-making — have largely refrained from any reliance on, or reference to, the legal norms or concepts of other legal systems, especially those of civil law systems.

Notwithstanding this long-standing American tradition of eschewing foreign legal concepts, there is a more complex, parallel narrative of American reform efforts that supplements the nearly exclusive focus on American procedural exceptionalism. As a purely political narrative, it also embodies a certain degree of ideological irony. As will be discussed below, American political conservatives who stridently reject European and "Old World" political and cultural systems nonetheless embrace an array of civil justice reforms that essentially describe and mimic the civil law justice systems of these countries.

This political reform narrative focuses on a more complicated political history, with roots in the 1980s American conservative movement heralded under the general rubric of "civil justice reform".[25] In the United States, this reform movement — spearheaded by political conservatives — has endured for over 30 years, and it embraces efforts by multiple actors in multiple forums to reconfigure access to courts and to the civil justice system in the United States.[26]

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[23] Rowe, *supra*, note 14, at 212.

[24] *Id.*

[25] See generally *Special Issue on Implementing Civil Justice Reform* (Spring 1992) 11 Rev. Litig.

[26] See generally Stephanie Mencimer, *Blocking the Courthouse Door: How the Republican Party and Its Corporate Allies Are Taking Away Your Right to Sue* (New York: Free Press, 2006) [hereinafter "Mencimer"]; *Symposium on Civil Justice Reform* (1994) 46 Stan. L. Rev.

The conservative movement for civil justice reform not only embodies a pro-business ethos, but also embraces an array of attitudes about civil litigation and civil justice in the United States. The 1980s movement for civil justice reform encompassed a sweeping critique of the delivery of civil justice and inspired a political movement to accomplish wholesale reform of civil justice in the United States.

According to the civil justice critique, the United States is the most litigious country in the world, and Americans are the most litigious people on the planet — willing and encouraged to sue anyone who might conceivably be held responsible for alleged grievances.[27] Americans are encouraged to file civil litigation because of easy access to plaintiffs' counsel, lenient rules on client solicitation and attorney advertising, and a contingency fee system that provides little or no risk to potential plaintiffs to bring suit. The attorney fee structure and attorney advertising also encourage "entrepreneurial" plaintiffs' attorneys to seek litigious clients with grievances. As a consequence of this over-litigiousness, courts are flooded with too many lawsuits, many of which are frivolous.[28]

Among many types of litigation, of particular baneful effect on business interests are frivolous tort suits and vexatious securities class actions. Plaintiffs are encouraged to pursue litigation inspired by large compensatory damage verdicts as well as the potential for the award of large punitive or hedonic damages. Tort litigation is plagued by lax evidentiary standards that allow juries to hear "junk science" in support of plaintiffs' claims. The transaction costs of litigating civil suits fall disproportionately on corporate defendants, who often carry the burden of expensive and intrusive civil discovery. In addition to onerous transaction costs, defendants often settle civil lawsuits rather than risk jury trials, participating in what some courts and commentators have labelled "settlement blackmail".[29]

(issue devoted to the ongoing civil justice reform movement). See also Joseph R. Biden, Jr., "Congress and the Courts: Our Mutual Obligation" (1994) 46 Stan. L. Rev. 1285.

[27] See Deborah Rhode, "Essay: Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution" (2004) 54 Duke L.J. 447 (describing canards of the conservative civil justice critique and various lobbying efforts to achieve civil justice reform).

[28] See Mencimer, *supra*, note 26, at 12, 132 (referring to complaints of frivolous lawsuits); Thomas O. McGarity, "The Perils of Preemption" (2008) 44 Trial 20 [hereinafter "McGarity"] (describing accountability crisis to shield corporate America from "burdensome and unnecessary" regulatory responsibilities and "frivolous" common law tort liability).

[29] See McGarity, *id.*, at n. 1, citing William Haltom & Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago: University of Chicago Press, 2004), at 6 (alluding to "widely circulated horror stories about frivolous lawsuits, greedy lawyers, shameless plaintiffs, and duped jurors").

Finally, the civil justice critique includes criticism of aggregate claims resolution, most notably class action litigation. Hence, the potential for transforming ordinary, traditional one-on-one litigation into a massive class action lawsuit poses the threat of truly calamitous consequences for business or corporate entities. Indeed, all of the problems identified with traditional litigation increase exponentially when pursued through class action auspices. For corporate and business defendants, the threat of potential class litigation is often enough to precipitate a settlement. Hence, class litigation emboldens plaintiffs and class counsel to file strike suits against corporate defendants in the hopes of a speedy and lucrative classwide settlement.

This critique of the American civil justice system gained political traction in the mid-1980s and found its political expression during the 1988-89 presidential campaign, when the Republican presidential ticket campaigned on a platform of civil justice reform. The campaign for civil justice reform reached a famous apogee in 1991 when Vice President Dan Quayle issued a wholesale attack on the legal profession.[30] Almost all of the grievances that conservatives would advance against civil justice delivery in the United States found expression during the Bush-Quayle administration, and culminated in the *Report from the President's Council on Competitiveness*, which delineated the obstacles to a competitive economy and outlined proposals for civil justice reform.[31] Although the philosophical roots of the civil justice reform movement were articulated under the Bush-Quayle administration, conservative interests would accomplish scant substantive legislative reforms during this period.

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[30] Vice President Dan Quayle, Address at the American Bar Association Annual Meeting (Presented August 13, 1991) (transcript available from Federal News Service). See also Andrew Blum, "ABA Takes Softer Stand on Quayle" (October 14, 1991) 14.n6 Nat'l L.J. 3 (discussing Quayle's speech); Dawn Ceol, "Quayle Urges Reform of Civil Justice System" (August 14, 1991) *Washington Times* A4 (report on Quayle's speech); Julie Johnson, "Do We Have Too Many Lawyers?" (August 26, 1991) *Time* 54 (noting the pro-business bias of the proposed Quayle reform efforts); David Margolick, "Address by Quayle on Justice Proposals Irks Bar Association" (August 14, 1991) *New York Times* A1 (reporting on Quayle's speech and the opposition to his proposals); Greg Rushford, "Touting Tort Reform" (September 2, 1991) *Legal Times* 5 (discussing tort lawyers' general endorsement of the recommendations for civil justice reform by the President's Council on Competitiveness); "For the Record" (August 15, 1991) *Washington Post* A20 (excerpts from Quayle's speech to the ABA); "Taking the Lead" (November 4, 1991) 14.n9 Nat'l L.J. 12 (positive reaction to Quayle speech); "The Costs of Lawyering" (August 19, 1991) *Christian Science Monitor* 20 (positive reaction to Quayle's speech).

[31] See *A Report from the President's Council on Competitiveness, Agenda for Civil Justice Reform in America* (1991) [hereinafter "*Bush-Quayle Report*"].

Instead, the only civil reform effort to achieve legislative approval during the Bush-Quayle administration was enactment of the *Civil Justice Reform Act of 1990*.[32] Although labelled a "*Civil Justice Reform Act*", this legislation actually mandated self-examination and docket reform in the 94 federal district courts.[33] While each federal district court was required to propose and promulgate measures, programs and procedures to expedite the procedural resolution of cases on their dockets, the *Civil Justice Reform Act* did not address the core substantive grievances of the conservative civil justice reform movement identified in the *Bush-Quayle Report*.[34]

The conservative civil justice reform movement ought to have lost political currency with the change in administration effectuated by the election of the Democratic President William Clinton in 1992.[35] However,

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[32] *Judicial Improvements Act of 1990*, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified in scattered sections of 28 U.S.C.). See also S. Rep. No. 416, 101st Cong., 2d Sess. (1990) (legislative history); H. Rep. No. 732, 101st Cong., 2d Sess. (1990) (legislative history). The popular name of Title I is the "*Civil Justice Reform Act of 1990*". "Civil Justice Expense and Delay Reduction Plans" are authorized by amendment to Title 28 of the United States Code. See Pub. L. No. 101-650 § 103 (amending 28 U.S.C. §§ 471-82) (1991).

[33] See *Civil Justice Reform Act of 1990* § 103(b) (requiring that each federal district court implement a civil justice expense and delay reduction plan within three years after enactment of the legislation). See also 28 U.S.C. § 477 (1991) (requiring the Administrative Office of the United States Courts and the Federal Judicial Center to transmit the model plans and reports to the House and Senate judiciary committees) and § 479(a) (requiring the Judicial Conference of the United States to prepare a comprehensive report on all plans received from the district courts within four years of enactment of the legislation).

[34] See generally Mark Ballard & David Bauman, "Biden Unveils Litigation Bill" (January 25, 1990) *Gannett News Service* (discussing the Biden bill); Marcia Coyle & Fred Strasser, "Senate Sets Its Sights on Delays in Civil Trials" (July 23, 1990) 12.n46 Nat'l L.J. 5 (discussing Biden's bill and noting the opposition from the Judicial Conference of United States and the American Bar Association's Board of Governors); Stephen Labaton, "Business and the Law: Biden's Challenge to Federal Courts" (April 16, 1990) *New York Times* D2 (reporting on the *Civil Justice Reform Act* and judicial conference opposition); Richard A. Rothman, "Civil Justice Reform Act: Too Little, Too Fast" (April 17, 1990) N.Y.L.J. 2 (an early criticism of the *Civil Justice Reform Act*); Fred Strasser *et al*., "Conference OKs Plan to Cut Court Costs, Delays" (May 21, 1990) 12.n47 Nat'l L.J. 5 (noting Judicial Conference opposition to the *Civil Justice Reform Act* and setting forth the Conference's own proposals); "Biden Introduces Court Reform Bill" (January 26, 1990) *Washington Times* A2 (announcing the *Civil Justice Reform Act*); "Legislation: Mixed Bag of Changes Designed to Improve Federal Practice" (January 15, 1991) 59 U.S.L.W. 2419 (describing provisions of the *Judicial Improvements Act of 1990*); "Proceed With Caution" (March 8, 1990) N.J.L.J. 6 (criticism of the *Brookings Report* and the *Civil Justice Reform Act*).

[35] See, *e.g.*, "The 1992 Campaign: The Vice President; Quayle Says Letter Shows Lawyers 'Own Clinton'" (August 28, 1992) *New York Times* A16 (reporting on Vice President Dan Quayle's efforts to portray candidate Governor Bill Clinton as "in the pocket" of plaintiff trial lawyers and opposing civil justice reform efforts to curb litigation excesses and abuses).

with the 1994 mid-term elections of a Republican majority in Congress,[36] particularly in the House of Representatives,[37] the civil justice reform movement experienced a startling revitalization. As a consequence of his ascendancy to Speaker of the House, Congressman Newt Gingrich became the chief spokesperson, articulator and advocate for the conservative civil justice reform movement.[38]

The revitalized civil justice reform movement found expression in Representative Gingrich's proposed *Contract with America*,[39] a document that some 300 Republican legislators signed and advocated. Foremost among the contractual provisions were eight reforms directed at Congress itself and the ways in which that legislative body functions.[40]

In addition to the eight fundamental reforms directed to Congress, the *Contract with America* also set forth 10 legislative initiatives to advance the cause of civil justice, to be proposed within the first 100 days of the 104th Congress.[41] These proposed bills included a new piece of

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[36] See Adam Clymer, "The 1994 Elections: Congress the Overview; G.O.P. Celebrates Its Sweep to Power; Clinton Vows to Find Common Ground" (November 10, 1994) *New York Times* A1 (reporting on the Republican sweep of Congressional and gubernatorial electoral races).

[37] *Id.* (reporting on the Republican landslide that resulted in a total of 227 seats for the Republicans and 199 seats for the Democrats, with eight House races yet undecided, and Senate Republican victories with eight additional seats, with a 53-46 Republican Senate majority).

[38] See Adam Clymer, "The New Congress: Congress; Gingrich Moves Quickly to Put Stamp on House" (November 17, 1994) *New York Times* A1 (Gingrich's initiatives for the new Congress); Adam Clymer, "Republican All for One, and the One is Gingrich" (December 6, 1994) *New York Times* A1 (Gingrich is chosen Speaker of the House of Representatives); Jason DeParle, "The 1994 Elections: The Republicans; New Majority Agenda: Substantial Changes May Be Ahead" (November 11, 1994) *New York Times* A26 (discussing upcoming legislative initiatives based on the *Contract With America*); Catherine S. Manegold, "The 1994 Election: The G.O.P. Leader; Gingrich, Now a Giant, Claim's Victor's Spoils" (November 12, 1994) *New York Times* I11; Katherine Q. Seelye, "Republican Plan Ambitious New Agenda in Next Congress" (November 15, 1994) *New York Times* A1 (Republican leadership announces measures to push through Newt Gingrich's *Contract With America* in 100 days).

[39] See *Republican Contract with America*, online: United States House of Representatives <http://www.house.gov/house/Contract/CONTRACT.html> [hereinafter "*Contract with America*"].

[40] The *Contract with America* enumerated eight fundamental reform proposals, including provisions that would: (1) require that all laws that apply to the rest of the country also apply equally to Congress; (2) select a major independent auditing firm to conduct a comprehensive audit of Congress for waste, fraud or abuse; (3) cut the number of House committees, and cut the committee staff by one-third; (4) limit the terms of all committee chairs; (5) ban the casting of proxy votes in committee; (6) require committee meetings to be open to the public; (7) require a three-fifths majority vote to pass a tax increase; and (8) guarantee an honest accounting of the federal budget by implementing zero-base-line budgeting. The *Contract with America* set forth 10 legislative bills to be proposed in Congress during the first 100 days. These legislative proposals included the *Common Sense Legal Reform Act* ("CSLRA"), *infra*, note 42, which embodied the Republican civil justice reform program.

[41] These proposed initiatives included: (1) *The Fiscal Responsibility Act*; (2) *The Taking Back Our Streets Act*; (3) *The Personal Responsibility Act*; (4) *The Family Reinforcement Act*; (5) *The American Dream Restoration Act*; (6) *The National Security Restoration Act*; (7) *The Senior Citizens Fairness Act*;

legislation entitled *Common Sense Legal Reform Act*.[42] The overall spirit animating the CSLRA was to curb the presumed excesses and abuses of the overly litigious American society.[43] Basically, it embodied the core principles animating the conservative critique of civil justice in the United States, refined over a decade.[44]

To this end, the CSLRA proposed altering attorney fee awards to reflect a loser-pays rule,[45] additional provisions to assure accountability in the determination of attorney fees;[46] curbing the use of junk science and other dubious expert testimony in civil litigation,[47] product liability reform,[48] limitations on punitive damage awards,[49] and enhanced notice and statute of limitations requirements.[50] Title II of the proposed CSLRA addressed reform of securities class litigation[51] as well as RICO claims against defendants.[52]

Consequently, an embedded value of the conservative reform movement was to restrict access to justice through various means. In addition

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(8) *The Job Creation and Wage Enhancement Act*; (9) the CSLRA, *infra*, note 42; and (10) *The Citizen Legislature Act*. See *id.* Despite clear legislative majorities, none of these initiatives would be enacted into law. In some cases, President Clinton vetoed various versions of these initiatives.

[42] See *Common Sense Legal Reform Act of 1995* in *Contract with America*, *supra*, note 39 [hereinafter "CSLRA"]. This bill originally was introduced on January 4, 1995 as 104 H.R. 10, 104th Cong., 1st Sess. ("A bill to reform the Federal justice system; to reform product liability law"). See generally Patrick E. Longan, "Congress, the Courts, and the Long Range Plan" (1997) 46 Am. U.L. Rev. 625, at 645-53 [hereinafter "Longan"] (describing the CSLRA and the history of the legislation); Carl Tobias, "Reforming Common Sense Legal Reforms" (1998) 30 Conn. L. Rev. 537 (general description of CSLRA provisions and the history of the legislation); and Carl Tobias, "Common Sense and Other Legal Reforms" (1995) 48 Vand. L. Rev. 699 (same).

[43] CSLRA, *id.* The preamble to the bill states that it is a bill to "reform the Federal civil justice system; to reform product liability law; and to amend the Securities Exchange Act of 1934 to promote equity in private securities litigation".

[44] See, *e.g.*, Peter Passell, "Civil Justice System Is Overhaul Target" (January 27, 1995) *New York Times* 7 (reporting on the introduction of the CSLRA). See also Anthony Ramirez, "Consumer Crusader Feels a Chill in Washington" (December 31, 1995) *New York Times* (describing an interview with Ralph Nader and the risks to the consumer movement posed by conservative civil justice reform initiatives).

[45] CSLRA, *supra*, note 42, s. 101 ("Award of Attorney's Fee to Prevailing Party in Federal Civil Diversity Litigation").

[46] *Id.*, s. 104 ("Attorney Accountability").

[47] *Id.*, s. 102, *Common Sense Legal Reform Act of 1995* ("Honesty in Evidence").

[48] *Id.*, s. 103 ("Product Liability Reform").

[49] *Id.*, s. 103(c) ("Limitations on Punitive Damages").

[50] *Id.*, s. 105 ("Notice Required Before Commencement of an Action"), 105(d) ("Statutes of Limitation").

[51] *Id.*, ss. 201-206. These sections contain provisions with the colourful titles: "Prevention of Lawyer-driven Litigation" (s. 202); "Prevention of Abuse Practices that Foment Litigation" (s. 203); and "Prevention of 'Fishing Expedition' Lawsuits" (s. 204); "Establishment of a 'Safe Harbor' for Predictive Statements" (s. 205).

[52] *Id.*, s. 207 ("Amendment to Racketeer Influenced and Corrupt Organizations Act").

to various procedural mechanisms that were designed to restrict access to justice and to curb overly litigious litigation, conservative ideologues also embarked on a strategic campaign to utilize pre-emption doctrine to accomplish the same goals.[53]

Use of pre-emption doctrine appears for the first time as a strategy to achieve the conservative vision of civil justice reform with the ascendancy of Representative Gingrich in the 104th Congress, the *Contract with America* and the new Republican majority in the House of Representatives. In this regard, the 104th Congress proposed to create sweeping new federal substantive products liability law, and to link new federal tort law to a pre-emption doctrine that would supersede state law.[54]

Thus, the concept of the pre-emption doctrine as a conservative civil justice reform strategy concretely emerged in 1995. However, during the Clinton presidential years, from 1995 through 2001, the Gingrich Congress failed to enact most of its civil justice reform initiatives,[55] including various versions of the CSLRA.[56] In this period, the only reform initiative that managed to be enacted into law (and not vetoed by President Clinton) was the *Private Securities Reform Litigation Act of 1995*.[57]

This inability and failure of the conservative Gingrich Congress to enact sweeping civil justice reform then led to what many commentators have characterized as "stealth tort reform" through legislative and administrative means, including new initiatives that utilized the pre-emption doctrine.[58]

The history of the civil justice reform movement in America during the 1980s and 1990s is interesting, then, both for its critique of the American civil justice system as well as for its set of sweeping reform proposals. As indicated above, many if not most of the conservative

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[53] Linda S. Mullenix, "Strange Bedfellows: The Politics of Pre-emption" (2009) 59 Case Western Reserve L. Rev. [forthcoming].

[54] CSLRA, *supra*, note 42, s. 103(a).

[55] See Longan, *supra*, note 42, at 646 (noting that the various procedural reforms that were part of the original *Contract with America* were incorporated into several bills for consideration, but only the *Private Securities Reform Litigation Act of 1995* passed through Congress and was enacted into law). The *Private Securities Reform Litigation Act of 1995* is codified as Pub. L. No. 104-67, 109 Stat. 737 (codified as amended 15 U.S.C.A. 77a to 78u-5 (West Supp. 1996)).

[56] See Peter Passell, "Economic Scene: A Dole Bill to Revise Tort Law May Lure Some Democrats" (May 2, 1996) *New York Times* (describing the Dole legislative initiative for tort reform in light of expected Clinton veto).

[57] *Supra*, note 55.

[58] See, *e.g.*, Margaret H. Clune, *Stealth Tort Reform: How the Bush Administration's Aggressive Use of the Preemption Doctrine Hurts Consumers* (Centre for Progressive Reform, White Paper No. 403, October 2004), online: <http://www.progressivereform.org/articles/preemption.pdf>; McGarity, *supra*, note 28, at 25-26.

proposed civil justice initiatives embraced the essential elements of civil law systems. Indeed, the conservative civil justice critique, in many ways, describes the way in which European and other foreign nationals view the American legal system. Ironically, these same American ideological critics of European political systems readily embraced a very European critique of the American legal system, and also proposed a series of law reform efforts that mimic many of the dynamic aspects of civil law systems.

IV. CONVERGENCE AND COMPLEX LITIGATION

As indicated above, except for enactment of the *Private Securities Reform Litigation Act of 1995*, none of the platforms of the conservative civil justice reform movement in the United States were enacted into law. Apart from the peculiar convergence of norms relating to civil justice delivery, conservative advocates were not successful in achieving formal convergence of civil law categories or traditions.

If we are to find any indications of convergence, we must look elsewhere in American law. Again, any notions of convergence have not been accomplished formally, but have rather evolved through informal means and are more likely the result of American pragmatism.

Two points are somewhat striking. First, one may observe informal convergence in complex dispute resolution through the ways in which American class action settlements mimic civil law traditions. Second, formal convergence may well be the future of complex dispute resolution, as more civil law countries move towards the embrace of class-action style procedural mechanisms. If categories are eroding, it may well be in the universe of complex dispute resolution.

1. Informal Convergence in Complex Dispute Resolution: The Example of American Class Action Settlements

Nearly a decade ago, I wrote that while the common law and civil law traditions continued to remain distinct, the arena of complex litigation seemed to provide interesting examples of theoretical convergence.[59] This seemed especially striking in the way in which American litigators and courts accomplished class action settlements. As I discuss below,

[59] Linda S. Mullenix, "Lessons", *supra*, note 3.

despite the formalism of the American class action rule,[60] the actual process and substance of class action settlements in many ways mimic numerous central characteristics of civil law systems.

This observation made a decade ago has increasing relevance today, as many complex disputes in the United States continue to be resolved through class action settlements that are less adjudicative, less adversarial and more administrative in nature.[61] In addition to striking parallels in procedural approaches, the substance of American class action settlements also embodies many characteristics of civil law systems.

The class action arena, however, is not the only place in which one may find examples of nascent convergence or the erosion of traditional categories. For example, since I last wrote in 2000, the American legal system has experienced large-scale mass disaster claims resolution through the auspices of the World Trade Center Victims' Compensation Fund.[62] This effort represents the most striking example of mass claims resolution through a fund approach, rather than through contested and protracted litigation.[63] Hence, the World Trade Center Victims' Compensation Fund was

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[60] Fed. R. Civ. P. 23.

[61] See Linda S. Mullenix, "Resolving Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm" (1999) 33 Val. U. L. Rev. 413 (describing the trend towards an administrative model of aggregate dispute resolution).

[62] See *Air Transportation Safety and System Stabilization Act*, Pub. L. No. 107-42, 115 Stat. 230 (2001) [hereafter "ATSSSA"] (codified as amended at 49 U.S.C. § 40101 (2006)). The primary purpose of the ATSSSA was to provide assistance to the airline industry. Congress included the 9/11 Fund "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001". ATSSSA § 403, 115 Stat. at 237. Congress also created an exclusive federal cause of action for damages arising out of the terrorist attacks. See ATSSSA § 408(b)(1), 115 Stat., at 240-41. Thus, 9/11 victims had a choice to either file a claim with the Fund or litigate the claim in federal court. See ATSSSA § 403, 115 Stat. at 237, § 408(b)(1), 115 Stat., at 240-41.

[63] See Robert Ackerman, "The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy" (2005) 10 Harv. Negot. L. Rev. 135, at 143; Janet Cooper Alexander, "Procedural Design and Terror Victim Compensation" (2003) 53 DePaul L. Rev. 627, at 631; George W. Conk, "Will the Post 9/11 World Be a Post-Tort World?" (2007) 112 Penn. St. L. Rev. 175, at 188; Kenneth Feinberg, "The Building Blocks of Successful Victim Compensation Programs" (2005) 20 Ohio St. J. on Disp. Resol. 273, at 274; Betsy J. Grey, "Homeland Security and Federal Relief: A Proposal for a Permanent Compensation System for Domestic Terrorist Victims" (2006) 9 N.Y.U. J. Legis. & Pub. Pol'y 663; Erin G. Holt, "The September 11 Victim Compensation Fund: Legislative Justice Sui Generis" (2004) 59 N.Y.U. Ann. Surv. Am. L. 513, at 514 [hereinafter "Holt"]; Stephen Landsman, "A Chance to be Heard: Thoughts About Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund" (2003) 53 DePaul L. Rev. 393, at 401-402; Linda S. Mullenix, "The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund" (2004) 53 Emory L.J. 1315; George Rutherglen, "Distributing Justice: The September 11th Victim Compensation Fund and the Legacy of the Dalkon Shield Claimants Trust" (2005) 12 Va. J. Soc. Pol'y & L. 673, at 674; Mike Steenson & Joseph Michael Sayler, "Mass-Tort Catastrophes and Disaster Compensation Funds, The Legacy of the 9/11 Fund and the Minnesota I-35W Bridge-Collapse Fund: Creating a Template for Compensating Victims of

an American experiment that mirrored the large-scale fund mechanisms favoured by some civil law countries that historically lack class action procedural devices. Although it remains to be seen whether the World Trade Center Victims' Compensation Fund is a one-time *sui generis* model for mass-claims relief,[64] there is at least some indication that it might provide a model for other mass disaster litigation.[65] These experiments with legislative and administrative adjustment of claims — particularly tort claims — present the clearest examples of the convergence of common and civil law traditions, although they are not intentionally modelled on civil law.

Apart from the fund approach exemplified by the World Trade Center Fund, class action settlements in the United States remain the chief vehicle that mimics civil law systems procedurally and substantively. In order to fully grasp the ways in which the American settlement class mimics civil law traditions, it is perhaps fundamental to understand that American class action litigation typically is not litigation at all.[66]

As I have written elsewhere, American class action "litigation" essentially concerns two central events in the class action process: class certification and class settlement.[67] American class action litigation is adversarial from the initiation of a class action through to the proceedings to certify a class action. However, if plaintiffs successfully convince a court to certify a class action, then, in most cases, the defendant or defendants will agree to settle the dispute. Over the past 30 years, American class action litigation has largely evolved into a means for class settlement rather than for litigation through a trial by jury.

When American class action litigation is understood primarily as a group settlement mechanism, the core norms embedded in this approach are non-adversarial and non-adjudicative. In addition, many if not most of the central characteristics of the American common law tradition fall by the wayside. Thus, once American class litigation is appreciated

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Future Mass-Tort Catastrophes" (2009) 35 Wm. Mitchell L. Rev. 524 [hereinafter "Steenson & Sayler"]; and Joe Ward, "The September 11th Victim Compensation Fund: The Answer to Victim Relief?" (2003) 4 Pepp. Disp. Resol. L.J. 161, at 173.

[64] See, *e.g.*, Holt, *id.* (analyzing potential constitutional flaws in the Victims' Compensation Fund legislation and arguing the one-time basis for this approach to mass disaster claims resolution).

[65] See Steenson & Sayler, *supra*, note 63 (arguing possible applications to the Minnesota bridge collapse disaster).

[66] See generally Linda S. Mullenix, "I Class Action Settlements negli Stati Uniti" ("Class Action Settlements in the United States"), in La Conciliazione Collettiva, Università degli Studi di Milano, 147-219 (2009) (describing the American class settlement process and the reality that few, if any, class action cases are actually litigated).

[67] *Id.*

chiefly as a non-adversarial,[68] non-adjudicative means for dispute resolution, this understanding embodies a significant erosion of the traditional "categories" expressing the major divisions between common law and civil law systems.

In focusing on American class settlements, one sees a model of dispute resolution that embraces several features of civil law systems. Class settlement will be supervised by a managerial judge with considerable powers over the parties and the substance of the settlement. Because of the strong managerial role of this judge, class settlement processes may often be less party-initiated and more judicially guided. For example, in some (but not all) settlements, judges will utilize court-appointed special masters or experts[69] to assist the court with the development of the evidence in support of the settlement.

Depending on the nature of the underlying dispute, the extensive discovery process that is a signal characteristic of the American adjudicative system may be condensed, curtailed or abbreviated in significant ways.[70] Because the case will be settled, there will be no jury trial. And, in the absence of a jury trial, the parties' exposure to certain litigation risks is mitigated, such as the influence of "junk science" in support of adjudicated claims.

Most aggregate settlements do not include awards of punitive damages. In addition, because of the averaging effects of aggregate settlements, such settlements avoid the distortions of enormous compensatory damages that often result from American jury trials. Furthermore, most settlements result in fee-shifting, with the loser paying the plaintiffs' attorney fees, costs and expenses. Finally, class settlements will be accomplished largely through administration claims-resolution facilities and commercial vendors, rather than by the parties or the attorneys.[71]

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[68] Of course, class settlement negotiations will occur "in the shadow" of the threat of a possible classwide trial, and in this regard may be viewed as "adversarial". However, most class action attorneys recognize that the actual likelihood of a class trial is fairly remote, diminishing this potential threat.

[69] See Federal Judicial Center, *Manual for Complex Litigation*, 4th ed. (2004), § 21.644 [hereinafter "FJC, *Manual*"] (role of magistrate judges, special masters and other judicial adjuncts in settlement). See also Sol Schreiber & Laura D. Weissbach, "In re Estate of Ferdinand E. Marcos Human Rights Litigation: A Personal Account of the Role of the Special Master" (1998) 31 Loy. L.A. L. Rev. 475.

[70] FJC, *Manual*, *id.*, §21.4 (post-certification case management).

[71] *Id.*, § 21.66 (settlement administration).

Central to the American class settlement process is the ascendancy of the managerial judge,[72] a central feature of most civil law systems. Unlike in traditional one-on-one litigation, the American federal judge has a powerful and extensive role in supervising, brokering and approving class action litigation and settlements.[73]

At the initiation of a class action, the federal judge has a threshold responsibility for determining whether a class action may proceed as such in a formal class certification process.[74] The judge must assess whether the class representatives and proposed class counsel are adequate to represent claimants' interests,[75] and must appoint class counsel to represent the class.[76] The judge may meet with the parties' counsel during the development of the litigation,[77] and some federal judges, in varying degrees, also may participate in settlement negotiations with the parties, in order to assist in the brokering of a settlement.[78] Because class action judges typically undertake these roles, class litigation is more judge-centred and less party-initiated than traditional bipolar litigation.

The extent of judicial involvement depends on the temperament of the individual judge, with some federal judges playing a more activist role in shaping class action settlements than others.[79] In extreme cases, some federal judges have offered the litigants previews of their potential ruling on the merits of class claims and defences in order to serve as an inducement to settlement.[80] However, such judicial involvement in settlement negotiations is highly controversial, and not the norm among federal judges.[81]

The American judge plays a highly significant role in final approval of the settlement itself,[82] and also in assuring due process protection of

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[72] See generally Rowe, *supra*, note 14 (generally describing the American managerial role, with special attention to the role of the judge in class action litigation).

[73] FJC, *Manual*, *supra*, note 69, §§ 21.1-21.4, 21.6, 21.7 (pre-certification case management; deciding the class certification motion; post-certification communication with class members; post-certification case management; settlements; attorney fee awards). See also §§ 22.1 *et seq*. (relating to judicial managerial role in supervising mass tort class actions).

[74] Fed. R. Civ. P. 23(c)(1).

[75] Fed. R. Civ. P. 23(a)(4).

[76] Fed. R. Civ. P. 23(g).

[77] Fed. R. Civ. P. 16.

[78] See FJC, *Manual*, *supra*, note 69, § 13.11.

[79] See, *e.g.*, Peter Schuck, "The Role of Judges in Settling Complex Cases: The Agent Orange Example" (1986) 53 U. Chi. L. Rev. 337 (describing Judge Jack Weinstein's extensive involvement with the parties negotiating the Agent Orange class action settlement).

[80] See *id.*

[81] See D. Marie Provine, *Settlement Strategies for Federal District Judges* 28 (Federal Judicial Center, 1986).

[82] FJC, *Manual*, *supra*, note 69, §§ 21.6, 22.9.

absent class members through application of the requirements of Rule 23(e),[83] which relates to class action settlements. No class action may be settled, compromised or dismissed without approval of the court. A proposed settlement must be evaluated during a so-called fairness hearing before the judge.[84] The judge must make a determination on record evidence whether the class may be certified for final approval, and whether the terms of the settlement are fair, adequate and reasonable.[85]

The judge may offer views on the settlement agreement, but may not rewrite provisions of the settlement. If the judge conducts preliminary conferences with the settling parties, the judge may offer views that encourage the parties to change and modify provisions of the settlement agreement prior to serving notice to the class of the settlement terms.[86]

The Federal Judicial Center has suggested that in reviewing proposed class action settlements, judges must adopt the role of a skeptical client and critically examine the class certification elements, settlement terms and proposed procedures, because there is typically no client with the motivation, knowledge or resources to protect the interests of the class.[87]

Thus, the central role of the managerial judge in the American class action settlement process provides an enticing illustration of how aggregate litigation in the United States has experienced a drift towards civil law models of dispute resolution. Because class action settlements entail such active judicial involvement, and because class action settlement typically reflects extensive party compromises, the ways in

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[83] Fed. R. Civ. P. 23(e). It should be noted that the provisions of Rule 23(e) apply only to classes that have been certified by the court, but not to class actions that are filed and not certified.

[84] Fed. R. Civ. P. 23(e)(2). Prior to 2003, there was no requirement for a fairness hearing in the rule. The requirement of a hearing was added as part of the 2003 amendments to Rule 23.

[85] *Id.* Federal courts have articulated different standards to guide the determination of whether a proposed settlement is "fair, adequate, and reasonable". The court will evaluate: (1) whether the proposed class is suitable for final certification as under Rules 23(a) and (b); (2) whether the substantive and procedural terms of the settlement are "fair, adequate, and reasonable"; and (3) whether the court should approve class counsel's fee award. The standards for assessing whether a proposed settlement is "fair, adequate, and reasonable" vary across the federal courts. For illustrations of judicial assessment of settlements, see, *e.g*., *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96 (2d Cir. 2005) (approving settlement); *Staton v. Boeing Co*., 327 F.3d 938 (9th Cir. 2003) (rejecting settlement); *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003) (rejecting settlement); and *Reynolds v. Beneficial National Bank*, 288 F.3d 277 (7th Cir. 2002) (reversing and remanding approval of class action settlement).

[86] FJC, *Manual*, *supra*, note 69, § 21.61 ("Judicial Role in Reviewing Proposed Class Action Settlement").

[87] *Id.*

which complex cases are procedurally and substantively resolved mimic civil law concepts in many regards.

2. Formal Convergence: Civil Law Systems' Adoption of American-Style Class Actions

This article suggests that the American settlement class has pragmatically embraced several characteristics of civil law systems. However, it is perhaps noteworthy to observe that, currently, several common and civil law systems seem to be converging on concepts of American-style aggregate litigation (in theory, if not in exact detail).[88] Perhaps the most outstanding example was the Italian enactment of an opt-in class action statute, partially modelled on the American class action rule, which was repealed.[89] The Italian and other continental and Latin American examples are highly interesting developments because, for many years, most civil law systems have rejected American-style class litigation.[90]

An analysis and discussion of the burgeoning interest among civil law countries in modes of aggregate litigation is outside the scope of this article, which focuses instead on examples of American convergence with civil law norms and categories. Moreover, the increasing numbers and varieties of civil law class action initiatives are too numerous to survey in this article.[91] However, the reader is commended to the March 2009 issue

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[88] See, *e.g.*, Deborah Hensler, Christopher Hodges & Magdalena Tulibacka, sp. eds., *The Globalization of Class Actions*, *The Annals of the American Academy of Political and Social Science Series*, vol. 622 (Sage & American Academy of Political and Social Science, March 2009) [hereinafter "Hensler, Hodges & Tulibacka"]; Edward F. Sherman, "American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems" (2003) 215 F.R.D. 130, at 151.

[89] Richard Hopley, Andrew Fishkin & Rebecca Hartley, "Teaching an Old Dog New Tricks: The Introduction of Class Action Litigation in Europe" (December 15, 2008) 194 N.J.L.J. 942 [hereinafter "Hopley, Fishkin & Hartley"] (commenting on the Italian class action statutes and other class action legislative initiatives throughout Europe). My Italian colleague, Professor Andrea Guissani, informs me that Italy repealed its class action statute, but a new class action statute has been enacted.

[90] See, *e.g.*, Richard B. Cappalli & Claudio Consolo, "Class Actions for Continental Europe? A Preliminary Inquiry" (1992) 6 Temp. Int'l & Comp. L.J. 217 (describing European resistance towards American class action procedure). There is an older literature exploring the theme of civil law opposition to American-style class action procedure. See generally William B. Fisch, "European Analogues to the Class Action: Group Action in France and Germany" (1979) 27 Am. J. Comp. L. 51; Harald Koch, "Class and Public Interest Actions in German Law" (1986) 4 Civ. Just. Q. 66; Michele Taruffo, *Group Actions in Civil Procedure*, Italian National Reports to the XIII International Congress of Comparative Law (1990).

[91] See Hopley, Fishkin & Hartley, *supra*, note 89.

of *The Annals of the American Academy of Political Science*,[92] which catalogues at length various legislative developments that illustrate the globalization of class action practice.

The emerging globalization of class action procedure provides a provocative theme for considering convergence theory. In the end, convergence may more likely embrace attitudes and norms, rather than literal legislative details. In this regard, a federal district court decision in May 2007, considering class certification against French corporate defendants, is instructive.

In 2002, plaintiffs filed a federal securities fraud class action in New York City against a French corporation, Vivendi Universal, S.A., and two French senior officials.[93] In evaluating whether to certify the class, the Court had to determine whether the class action was a superior method of litigation for various foreign nationals, including French, English, German, Austrian and Dutch shareholders.[94] This enquiry, in turn, required the Court to assess American jurisdiction over the French defendants, and whether foreign tribunals would recognize and enforce the American class action judgment.

The Court considered lengthy expert witness testimony on choice-of-law issues. In conclusion, the Court determined that an American opt-out judgment "would not offend French concepts of international public policy".[95] The Court further noted that: "[w]hile it is clear that such class actions are presently not permitted, it is equally clear that the ground is shifting quickly."[96] In support of this conclusion, the Court cited the French defendants' own expert witness:

> French law does not cease to evolve in a direction favorable to class actions. Following the practice of the United States, the President of the French Republic seriously wished to develop collective actions and put in place a commission of study on April 13, 2005 responsible for the introduction of a sort of "class action" for relationships with consumers.
>
> Quite naturally the issue of the introduction into French law of "securities class actions" was raised in order to more effectively protect shareholders and investors … The least that one can say is that this tendency is strongly gaining ground and that the evolution of French law seems very rapid. While not long ago one considered that they

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92 See Hensler, Hodges & Tulibacka, *supra*, note 88.
93 *In re Vivendi Universal, S.A., Securities Litigation*, 242 F.R.D. 76 (S.D.N.Y. 2007).
94 *Id.*, at 96-107.
95 *Id.*, at 101.
96 *Id.*

> seemed far from French law, works are multiplying today to attempt to take the exact measure and to acclimate them in France. … French law is thus oriented toward "class actions" in matters of protection of shareholders and investors.[97]

The Court similarly found that the rules relating to English representative actions, chiefly Rule 19.6, would permit English tribunals to recognize an American class action judgment or settlement adjudicating the claims of its class members.[98] And, in spite of the fact that the Netherlands had not yet enacted a shareholder class action statute, the Court nonetheless found that, because the Dutch legislature had enacted class legislation in other contexts, this indicated that "recognition of a judgment in this case would not be contrary to fundamental principles of fairness in Dutch law".[99]

The Court distinguished the situation of German nationals, however. "In this regard the Court notes that, in contrast to France and England, collective actions remain unknown in Germany."[100] Although Germany had pending legislation to provide for test cases in securities fraud litigation, the Court found that this proposal was not a collective action in the sense that non-party shareholders would be bound by the result. "By comparison, both France and England, albeit in limited circumstances, recognize collective actions in which the interests of non-parties are pursued and non-parties are bound by the results."[101]

Thus, at least one American federal court has surveyed developments in civil law systems and ascertained a sufficient degree of convergence to permit an American federal court to adjudicate the class claims of foreign nationals. The United States may or may not be eroding civil law categories or converging with civil law norms, but at least one federal court believes that the opposite is occurring, and at a rapid pace.

V. CONCLUSION

So, with regard to convergence and the erosion of traditional categories: are we there yet?

The American answer to this question continues to be a qualified "no". As indicated above, the primary barrier to achieving convergence

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97 *Id.*
98 *Id.*, at 102-104.
99 *Id.*, at 105.
100 *Id.*, at 104.
101 *Id.*, at 105.

with civil law norms is deeply embedded in the American notion of its own exceptionalism. Americans are theoretically disinclined to embrace foreign values or processes.

On the other hand, one may find American examples of unintended appreciation for, or embrace of, certain civil law traditions. The most interesting example is provided by the 1980s-1990s debate over civil justice reform in the United States, which ironically espoused programs and ideals that many civil jurists would readily recognize. Additionally, the entire arena of complex litigation dispute resolution has come to resemble, *de facto*, many attributes of civil law traditions.

Finally, Americans may not be there yet, but, in regard to collective dispute resolution, civil law systems may very well be converging with the United States. Hence, complex litigation presents the most intriguing opportunity for evolving theories of convergence.

Spanish Civil Procedure Act 2000: Flying Over Common Law and Civil Law Traditions

Andrés de la Oliva Santos[*]

I.

The program for the 2009 annual conference of the International Association of Procedural Law[1] ("IAPL") advised speakers to concentrate on the following three questions or topics:

- Do the categories still hold in the traditional civil and common law jurisdictions?
- What are the key reforms and how are they changing the categories?
- What are the challenges to implementing and gaining acceptance of reforms, and how are they being met?

I am going to make an effort not to overlook these suggested questions. However, the current situation of procedural law in Spain, where a major reform of civil procedure is already in place, makes it advisable to deal with the questions in a different order from that which is proposed in the program.

First, with regard to the second topic, I must refer to the key aspects (*i.e.*, the main reforms) of the new *Spanish Civil Procedure Act*,[2] which was passed in January 2000, and came into force one year later. As I go through these key reforms, I shall, at the same time, tackle the third topic. Eventually, I will try to address the first topic by drawing a relationship between the Spanish reform of civil procedure and the distinction between the civil law and the common law. I will also give

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[1] International Association of Procedural Law ("IAPL"), *Common Law — Civil Law: The Future of Categories / Categories of the Future* (2009 IAPL Annual Conference, Toronto, Canada: June 3-5, 2009). See IAPL 2009, online: <http://www.iapl2009.org/> [hereinafter "IAPL 2009"].

[2] Ley 1/2000, de Enjuiciamiento Civil, de 7 de enero (published on "Boletín Oficial del Estado" de 8 de enero) [hereinafter "SCPA" or "Act"].

some brief, personal remarks about the subsistence and the convergence of these two legal systems.

II.

We will begin with the main changes that have been introduced by the new SCPA. I should start saying that it replaced an old Act that dated back to the 19th century (1881, to be specific). Today, after some initial resistance, the new SCPA has been fully embraced, and it is now regarded as being a real step forward.[3]

The Act has established two sole kinds of ordinary proceedings: the "verbal trial" and the so-called "ordinary trial". The "verbal trial" is commenced by a written claim, which may be made either in full or in brief. After the claim is submitted, the parties are called to a single, oral and public hearing for allegations by the plaintiff and the defendant and also for the taking of evidence. Once the hearing is over, judgment will be granted. This trial is meant for relatively simple matters, with a low economic value (*e.g.*, less than 3,000).

Where the case is to follow the course of an "ordinary trial", on the other hand, proceedings are again commenced by a written claim. However, this claim is required to be exhaustive in its grounds, and it must simultaneously put forward all of the evidence that may materially be introduced in the process by the plaintiff. The defendant also files his or her defence in writing, and has the burden of supplying the documents, reports and other forms of evidence that support his or her position. Up to this point, there are many technical innovations, but there is nothing structurally different from the process that was in place prior to the enactment of the new SCPA. From this moment on, however, there is a radical change from the previous model.

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[3] See *Report of the Spanish General Council of the Judiciary* for 2008, online: <http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpj/cgpj/principal.htm> [hereinafter "*Report*"]. A large section of this report is devoted to an "Overview of Justice in 2007", with a number of statistics. The national average for the duration of civil cases at first instance stands at between 7.2 and 8.1 months, and at 4.1 months for those cases for which the Family Courts have jurisdiction. The outer limits, by provinces, for the duration of cases at first instance in common civil matters stands at 9.4 and 5.1 months. The average national duration at the appeal stage stands at 5.2 months. Therefore, the average national duration for ordinary civil proceedings that are heard in two instances would stand at around 13 to 14 months. In 63.6 per cent of cases at the appeal stage, the judgment at first instance is upheld in its entirety. In 19.5 per cent of appeals, the judgment at first instance is reversed in part. Only in 16.1 per cent of appeals is the judgment at first instance reversed in full.

In particular, the new Act has sought to make two significant innovations: first, to restore the seriousness of evidence; second, to make adequate preparation for the path towards judgment, so that the likelihood of a non-judgment due to procedural defects is greatly reduced, and the chances of a correct judgment on the merits are increased.

Until the new SCPA was enacted, evidence was produced in civil proceedings, in matters of certain significance, in the following manner. With regard to time limits, the old law prescribed a single term within which to adduce and hear evidence. Alternatively, in cases of greater significance, the law prescribed one time frame for adducing evidence and another time frame in which to hear it.

It would be commonplace for the judge — without any knowledge of the case and, therefore, with no serious basis upon which to determine the relevance or the non-relevance of the evidence that was presented by the parties — to decide on the written proposals that adduced evidence. Further, a decision that ruled the evidence to be admissible could not be appealed, while an appeal was permitted against a decision that ruled the evidence to be inadmissible. For these reasons, judges tended to allow all of the evidence that the parties put forward, including irrelevant or useless evidence. This situation was worrying because it created confusion about the aim of the proceedings, and it made the proceedings last, to an unjustifiable degree, much longer.

Furthermore, the hearing of evidence was held separately — *i.e.*, on a different day — from the adduction of evidence. This separation gave rise to situations in which the evidence was frequently not heard before a judge. Although the old law required a presiding judge to hear every piece of evidence, the examination of witnesses or the declarations of the parties (which were deemed to be confessions, with a rigid legal value) became, in common practice, brief answers that were written by a court official to questions that were, likewise, in written form. The evidentiary material would commonly consist of a series of papers that the judge could examine right before giving the judgment, without regard to significant probative elements — *i.e.*, those relating to the direct and immediate contact between the judge and the hearing of the evidence. It was frequently the case that it was not possible to hear all of the admissible evidence within the prescribed time limit. At best, the hearing of evidence, in the manner that I have just described, led to a significant delay in passing judgment. On other occasions, a judgment was passed before all of the evidence had been heard — even if the tribunal had previously admitted the unheard (and, hence, unconsidered) evidence as

relevant and useful. In short, many judgments were granted without a real judicial hearing of the evidence.

The new Act radically changes this situation in a number of ways.

First, it regulates the hearing of evidence by concentrating it into one oral and public event — the "trial". Following this trial, judgment is passed. This event must be both audio and video recorded, and the judge and the parties have access to this recording.

Second, as I have already explained, there is a desire to prepare properly for the trial and the judgment, and, for this purpose, a so-called "pre-trial hearing" is established.[4] The pre-trial hearing is also oral, public and recorded. It comprises a rich content of functions and aims, which I shall immediately proceed to examine in brief.

The pre-trial hearing begins with an attempt to reach a settlement, in order to put an end to the proceedings. If no settlement is reached, the next stage is to consider a range of procedural issues, including: the legal capacity of the parties, *res judicata*, *lis pendens*, defects in the statement of claim or the statement of defence, and, eventually, any other procedural issue that may determine or compromise the future success of the proceedings (with the exception of those issues that relate to jurisdiction, which will have already been solved, immediately after the plaintiff filed the claim). These issues may have been raised by the defendant in his or her written defence or by the plaintiff at the same hearing, although it is also possible for the court to raise them *ex officio*. Any discussions that are held may follow different paths, but, in the end, either the case does not proceed because the procedural problems cannot be resolved (*i.e.*, where there is *res judicata* or *lis pendens*), or the way forward, towards a judgment on the merits, is clear.

If no procedural questions arise, or where such issues have been favourably resolved, the pre-trial hearing then proceeds in order to allow the lawyers to make any additional statements that were impossible to include in the initial statements of claim and defence, respectively, at the times those documents were drafted. Furthermore, accessory petitions are allowed, provided that they do not make an essential alteration to the subject matter of the proceedings. Likewise, the parties must adopt a position with regard to the documents and the reports that have been filed, and they must ultimately fix the precise terms of their dispute with the judge (this is known as the *determination of the subject matter of the dispute*).

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[4] SCPA, *supra*, note 2, arts. 414-30.

If there is no debate about the relevant facts, and the dispute is only one of law, then the case is now ready for judgment to be passed — immediately after the pre-trial hearing — without the trial phase. However, where relevant facts are in dispute, the proceedings turn, in the same hearing, to the matter of the evidence that is to be adduced by both parties. In this manner, the parties are *pushed* by the very structure of the proceedings to adduce only relevant and useful evidence. Likewise, the judge, by deciding at that same hearing on the admissibility or inadmissibility of the evidence, has fresh in his or her mind the knowledge of the matter that is in dispute when he or she makes decisions. Furthermore, it is now possible to query the admissibility of evidence that the other party considers to be irrelevant or useless.

In addition, the pre-trial hearing provides a second opportunity to reach a settlement and, thus, bring the case to an end. The time that the law provides for this opportunity follows immediately after the determination of the subject matter of the dispute, given that, at this point, the parties may be more inclined to negotiate a settlement than they had been at the start of the litigation process.

In actual practice, these legal objectives are being met. The pre-trial hearing really does prepare, satisfactorily, the way for the trial. At the trial, the evidence is heard orally and on an adversarial basis: parties, witnesses and experts are subject to examination, cross-examination and questions addressed by the judge, who is actually present.[5]

III.

I will now say a few words about the challenges that the reform has faced and, also, about its acceptance. Lawyers and judges had to get used to the idea of their greater responsibilities, respectively, and more frequent direct and oral participation in the proceedings. The truth is that after lawyers staged a brief resistance to the reform, they adapted themselves, along with the judges, to the authenticity of an adversarial and oral process. Nowadays, they perform their respective roles properly. This adaptation has been helped by the fact that, today, public proceedings (such as the pre-trial hearing and the trial) are recorded on video. The recordings may be reviewed not only by the judge, when he or she passes the first judgment, but also by the appeal court and the lawyers (*i.e.*, in order to prepare the proceedings subsequent to the recording). The fact is that the parties, if

[5] With regard to the efficiency of this process, see *Report*, *supra*, note 3.

they are unable to attend the proceedings personally, may watch the recording later; this mere possibility has had a positive influence on the efforts of the lawyers (and even on how they dress).

Before and immediately after the enactment and entry into force of the new Act, I argued that one of the formal criteria that had driven the reform was that of "careful verification that the new Act should not require excessively onerous transformations from any of the professional groups affected, but rather changes of a similar degree from all".[6] I think that the *calculation of resistance* and the *forecast of acceptability* that were made by the Spanish legislators both turned out to be correct. The various groups that were involved were unable to find serious grounds for opposing the changes that affected them; or, to put it another way, they were unable to deny that the innovations that the Act was introducing were beneficial to the subjects of the legal system.[7]

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[6] The Minister of Justice expressed it thus:

> With realism, being aware of and giving due regard to the capacity, opinions, and the realistic possibilities of Judges and Magistrates, as well as Judicial Secretaries, Officials, Auxiliary Staff, and Agents, as well as the capacity and opinions of Lawyers and Court Advocates, the new Civil Procedure Act, which I believe to be necessary, requires changes, new ways of doing things, which themselves require efforts for renewal on the part of all parties referred to. I believe that these efforts are reasonable and mutually balanced. And to overcome them it would not be necessary to rely on a lack of confidence in the capacity or in the will to put them into effect. What's more: it would be an unjust slur to deny that the protagonists of the Justice system are well suited or well disposed.

M. Mariscal de Gante y Mirón, *Una ley para una Justicia eficaz* [*A law for an effective system of Justice*] (Conference given in Barcelona, Spain, June 19, 1998), published in "The Protection of Credit in the Civil Procedure Bill", *Official Gazette of the Ministry of Justice*, no. 1825 (July 15, 1998), at 6, 7.

[7] M. Mariscal de Gante y Mirón, "Speech of the Minister of Justice at the Lower House of the Spanish Parliament", *Diario de Sesiones del Congreso de los Diputados* [*Journal of Parliamentary Sessions*], 1999, VI Legislature, no. 217, at p. 11.626:

> We have sought and achieved a very broad participation, but, of course, *the inspiration for the Bill was not the desire to please everyone*. The Government has endeavoured that no one should go without being heard or truly represented, and has not wished to prejudice anyone. It has endeavoured that the undeniable efforts that the implementation of a new Act will require should be distributed, for want of a better word, equitably. The Bill that I have the honour of tabling has been drafted without any doctrinal influences and without massive cribbing from foreign models. It has been drafted on the premise *that it is right to change and that it is possible to change* within our Civil Justice system by way of a new procedural instrument, and by thinking about which way, realistically, these changes should be achieved. *This Bill has not been inspired by a legislative-policy aim of pleasing everybody*. Because this aim is profoundly erroneous at the "ought to be" and "is" levels. *A new Civil Procedure Act should seek what is best for all the subjects of the legal system, and not — not even collaterally — maximum satisfaction for all social, economic, and professional sectors that are most closely involved in the Civil Justice system*. (emphasis added)

IV.

I now return to the key changes. Once judgment has been given — within either a "verbal trial" or an "ordinary trial" — an appeal may follow. On this point, the new SCPA does not establish a model of civil procedure that is based on just one, single instance. Our historic model is maintained here, and a second instance is established. This second instance is not a *novum judicium* (the possibility of a second trial under the same conditions as the first), but rather a *revisio prioris instantiae* — that is, the possibility of a full review of the judgment that was given in the court of first instance, with respect to both its legal and its factual grounds. This means that the appellate court is allowed to review not only the applicable law of the case, but also the appraisal of the material evidence that was produced by the parties. The appellate court shall not, however, review personal evidence, since only the very same judge who received this evidence shall decide on it (due to the rule of "immediacy").

However, the new SCPA introduces a radical innovation with regard to a very deep-rooted Spanish tradition. That innovation consists of the right to obtain provisional enforcement of the judgment that is given at first instance without the need to provide surety against any losses that might arise in the event that the judgment is reversed. This marks the historic end of a situation that has lasted for over 150 years. Under the old Act, first-instance judgments were, in principle, unenforceable. Today, however, first-instance judgments may be enforced even when the winning party does not have significant liquid monetary resources.

There are also other changes of great importance that I should at least mention. These are: the introduction of a very fast procedure for the protection of monetary credit (the so-called "admonitory procedure"); a uniform and clear regulation of the enforcement of judgments; and a modern and flexible system of interim measures, which Spanish legislation has always lacked previously. I should also mention the attempt to attribute to the Supreme Court (in its role as civil court of cassation) a much more limited and attainable task, in order to favour the likelihood of high-quality and highly useful judgments. On this point, to which I shall return later, the desired effect has not been achieved in full.

V.

What do the categories of common law and civil law have to do with the changes that have been introduced by the new SCPA? Given my

participation in the drafting of the Act, I can assert without fear of contradiction that the said changes were not a result of a desire to converge Spanish civil justice with procedural models from the common law realm. However, the fact that this desire was not the driving force behind the reform does not mean that certain realities of the common law are unknown or disdained. On the contrary, knowledge of the experiences of various countries with common law traditions has served to reinforce the aim of ensuring adequate preparation for trial. It is understood that this preparation does not amount to a waste of time, and that, on the contrary, it helps to ensure that trials are performed effectively and with maximum efficiency. In fact, the establishment of the pre-trial hearing took advantage of this experience.

Likewise, we had in mind the adversarial system when we consolidated — as a rule, with certain clear and justified exceptions — a civil process that was conceived as, essentially, a debate between the parties, advised by their lawyers, who are supposed to make proper use of the equal tools that are available to them. Above the parties, a neutral (but not indifferent) judge is to solve the dispute. He or she has no authority to substitute for the lawyers. Rather, the judge's role is to hand down the legal decisions that are necessary in order for the proceedings to progress correctly and effectively, and, ultimately, to pass a judgment that responds, logically and in full, to the claims that have been made by the litigants. It is clear that these civil proceedings, understood in this way, are in full accordance with the Spanish tradition and legal realism.[8] The

[8] See SCPA, *supra*, note 2, Recitals, s. VI (expressing the "fundamental inspiration" for the new Spanish civil procedure):

> The new Civil Procedure Act continues to be inspired by the principle of petitionary justice or the dispositive principle, from which all logical consequences are extracted, with the aim that, not only do civil proceedings, as a rule, seek to protect the legitimate rights and interests of certain legal subjects, who are responsible for instigating the proceedings and configuring the subject matter of the dispute, but also that the procedural duties incumbent on these subjects and the logical processes for obtaining the judicial protection they seek, may and should reasonably configure the work of the jurisdictional body, for the benefit of all.
>
> Ordinarily, civil proceedings respond to the initiative of a party that considers it necessary to obtain judicial protection in accordance with its legitimate rights and interests. According to the procedural principle referred to, it is not deemed to be reasonable that the jurisdictional body should be responsible for investigating and verifying the veracity of the facts alleged as constituting a case that allegedly requires a response in the form of judicial protection according to Law. Likewise the court is not burdened with the duty and the responsibility of deciding what kind of protection, out of all those possible, may be that which corresponds to the case. It is the party that considers that it requires protection that has the burden of seeking it, determining it with sufficient precision, alleging and proving the facts, and adducing the legal grounds that correspond to the aims of the

reaffirmation of the Spanish tradition has been facilitated, in the face of certain ideological pressures, by its similarities with the adversarial systems of various common law countries. The powers, duties, and responsibilities of the judge — and, more specifically, of the first-instance judge — have been notably increased in comparison to those that were provided under the old Act. Although they have reduced the judge's passivity, they have not, however, impinged on his or her neutrality.

Besides, the enforcement of first-instance judgments through the facilitation of provisional executions constitutes a certain convergence of the new model of Spanish civil procedure with the single-instance processes of civil procedure that apply in various common law countries. There was awareness of this convergence when the new Act was being drafted.

With regard to the links between the categories and the new SCPA, I should refer to the role of the Supreme Court in civil proceedings. In fact, some quarters of the Spanish Supreme Court were expressly postulating the introduction of a system similar to the *writ of certiorari* for the admission of appeals for cassation. However, the introduction of this procedure, which appears to be very important in the functioning of both the House of Lords in the United Kindom and the Supreme Court of the United States, was rejected in our country. In accordance with Spanish tradition, and given the constitutional principle of equality before the law and — I have no desire to conceal it — the concern over the discretion and the criteria of a Supreme Court like that in Spain,[9] which is very

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said judicial protection. It is precisely in order to meet these burdens without incurring in defencelessness and with all due safeguards that the parties are required, with the exception of unusually simple cases, to be represented by a Lawyer.

This fundamental inspiration for the proceedings — except in those cases with an overriding public interest which must be addressed — does not in any way constitute an obstacle to, as is done in this Act, the court applying the Law that it knows within the limits laid down by the legal facet of the cause of asking. And still less does the said principle constitute any hindrance to the Act notably reinforcing the coercive powers of the courts with regard to the enforcement of their judgments or the penalizing of procedural conduct that is manifestly contrary to the achievement of effective judicial protection. On the contrary, it amounts to provisions that are in harmony with the role attributed to the parties, which are required to undertake with seriousness the burdens and responsibilities inherent to the proceedings, without prejudicing the other subjects of the proceedings or the functioning of the Administration of Justice.

[9] According to data published in 2009, the Spanish Supreme Court is currently formed of a total of 95 magistrates. The Supreme Court in plenary session is devoid of powers, which are attributed to its five divisions: the Civil Division, with 15 magistrates; the Criminal Division, with 23 magistrates; the Contentious-Administrative Division (which hears appeals against administrative acts and provisions at the highest levels), with 36 magistrates; the Social

different from its peers in the United Kingdom and the United States, it was preferable to lay down various specific principles in the Act (including high monetary value and, mostly, the need for uniform judicial standards at the maximum level) for the purpose of determining which matters would have access to the Supreme Court.[10]

VI.

Let us turn, at last, to the final matter: the convergence of the systems or categories (*i.e.*, the common law and the civil law) and the eventual existence of a trend towards unification and the disappearance of the diversity. When dealing with this issue, I must be extremely careful, since a superficial analysis may bring about elements that create confusion, misleading questions or inaccurate answers. Indeed, at the moment, procedural models are not uniform within either of the two major systems or categories. Furthermore, it is difficult to avoid tackling the diversity of legal systems without a certain unconscious prejudice, either for or against, one's own legal system. Therefore, general questions that are not misleading and accurate answers to such questions can only be provided by the most solid of experts in comparative law — that is, those who have acquired a serious knowledge of the diversity of legal systems and a full understanding of this diversity that takes into account cultural realities and, of course, historical backgrounds.

Given that I am not, in the least, one such expert in comparative law, I shall refrain from going beyond the territory that I am familiar with. Also, I shall avoid submitting to the temptation, which is so widespread nowadays, to replace statements that are based on verifiable facts with a sort of amateur essay writing of legal comparisons — an undertaking that can be superficial and even frivolous. I am confident, nonetheless, that the readers of this paper are capable of distinguishing between the data

(or Labour) Division, with 13 magistrates; and the unique Military Division, with 8 magistrates. See online: <http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpj/ts/principal.htm>.

[10] Michaele Taruffo, *Il vertice ambiguo*, *Saggi sulla Cassazione civile* (Bologna, Il Mulino, 1991), at 181:

> Pure difficilmente proponibili, per essere troppo lontane della nostra esperienza, sono tecniche di selezione presenti negli ordenamenti di *common law*, como il potere discrezionale, che è prerrogativa della Corte Suprema statunitense e della House of Lords inglese, di rifiutare *in limine* il esame nel merito dell'impugnazione. Si tratta infatti di tecniche efficacissime, che riduscono il carico di lavoro delle due Corti Supreme a poche centinaia di casi all'anno, ma che sono strettamente legate alle pecualiarità di quei sistemi, sia dal punto de vista storico sia da quello della disciplina complessiva delle impugnazioni.

and the experience that I can provide, and the impressions and the ideas that I venture to put forward for public discussion.

That said, and at the risk of being venturous, I dare to conclude with the following thoughts.

First, the criteria that have been used, thus far, to settle the divide between the common law and the civil law might not be clear, accurate or reliable enough.[11] I do not think anybody should be considered responsible for that, for it is extremely difficult to lead so many small differences into those two general categories. However, if the criteria of the divide are indeed (still?) not reliable and sure enough, the observed convergences in different aspects of civil justice could be seen as the results of efforts to improve civil justice in each country, rather than the outcome of a purposive effort toward general convergence, and even less as an effect of a plan to overcome the categories of common law and civil law.

Second, I share the opinion that there is a trend towards priority of functional (non-ideological) considerations in the evolution of civil justice in many countries. Only in that sense is there a certain convergence between categories.[12]

Third, I nevertheless think that the civil law system is still notably distinct from the common law system by reason of the much greater theoretical and practical importance that the former gives to the statutory law. As I have said on another occasion, the common law is a *world of judges* or a *world of jurists*, and the civil law remains a *world of laws enacted by legislative bodies*.[13]

This diversity has numerous manifestations and very deep roots. The evolution of Roman law, and all that precedes, surrounds and follows the French Revolution, for example, has much to do with this difference between the two worlds. Just consider how we should not underestimate or leave behind the differences with respect to the recruitment and the training of judges and magistrates. This sole factor, based, in turn, on different cultural realities, gives rise to many important consequences.

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[11] The content of some provisional papers of this conference, as well as the opening speech of Mirjan Damaška, confirms the lack of a minimum of consensus about sure and precise criteria to settle the "divide". This being the case, general theories on convergence and on the disappearance of the diversity of the categories are still too risky for my liking.

[12] I agree, for example, with Taruffo's conclusions in this regard. See Michele Taruffo, "Poteri probatori delle parti e del giudice in Europa" (2006) año LX Riv. Trimestrale di Diritto e Procedura Civile 451. See also Michele Taruffo, "El proceso civil de 'Civil Law': aspectos fundamentals" (2006) 12 Ius et Praxis 69, at n. 1.

[13] S. De la Oliva, *Casación, oralidad y nuevo proceso civil. Tres conferencias chilenas*. (Santiago de Chile: Edcs. Jurídicas de Santiago, 2009), at 55-58.

Fourth, it is worth highlighting the blurring of the distinction between the common law and the civil law that is based specifically on the binding or the non-binding nature of the judgments. In both legal systems, it is clear that the value of judgments — both their formal legal value and their effective, or actual, value — resides in their intrinsic authority; in other words, this value depends on the quality of the analyses of problematic legal realities and on the formal and material quality of the answers to these real problems, in accordance with solid rationales and equitable criteria. These criteria are, to a vast extent, common to the cultures of all civilized countries. Where the mandatory or binding precedent does not have these qualities, its effectiveness will be problematic and unsustainable. Where the non-binding (but rather authoritative) precedent does have these qualities, it will be effective and sustainable.

Fifth, at the current state of the science of procedural law, jurists should not treat the convergence and the (possible?) elimination of the diversity of systems or categories as a prescriptive task. Rather, it should continue to be a spontaneous result of our efforts. In my opinion, changes along the lines of the theorized convergence should only be encouraged where the changes are clearly required by the progress of justice in each concerned country. Of course, for this progress to happen, it is essential to overcome any "village" or nationalistic mentality,[14] and to take up the contributions of good comparative law — or, as Varano rightly prefers to say, legal comparison, *Rechtsvergleichung* — which, above all, seek a better knowledge of the rules and of the legal realities that are to be compared.[15]

[14] Of course, nobody consciously wishes to behave with a "village" or nationalistic mentality, but, in truth, sometimes — too many times, maybe — we do behave like this. For instance, this mentality arises when we deal with problems or general issues of civil procedure with only the knowledge acquired through our own experiences and through readings of our homeland literature. This, indeed, is not rare, and it has brought about results that may not be deemed to be either brilliant or cosmopolitan. I was surprised, for example, to witness at an international conference in 2009 an elementary discussion about whether an expert should be regarded as evidence or as a judge's assistant, and also about the specific boundaries of the expert's task. These two issues had already been raised. See Friedrich Stein, *Das private Wissen des Richters (Untersuchungen zum Beweisrecht beider Prozesse)* (Leipzig: C.L. Hirschfeld, 1893). Stein's conclusions were generally considered to be accurate, and, even today, this work is regarded as a classic in continental Europe. However, the aforementioned discussion simply ignored his work.

[15] Vincenzo Varano & Vittoria Barsotti, *La tradizione giuridica occidentale*, 2d ed., vol. 1 (Torino: Giappichelli, 2004), at 5-21.

Civil Procedure Reform in Switzerland and the Role of Legal Transplants

Samuel P. Baumgartner[*]

I. INTRODUCTION

In response to the general theme of this outstanding conference, I begin my contribution by noting that I have always been skeptical of the strong forms of the convergence thesis in comparative law. That is, I doubt that the differences between civil law and common law are crumbling, soon to be confined to the dustbin of history, or that the legal systems across the world will shortly be left with few distinctive characteristics.[1] Of course, there is bound to be some convergence of rules and approaches across legal cultures as various forms of international interaction increase. Transnational actors, power politics and exposure to foreign approaches, among other things, all may cause a legal system to adopt solutions and approaches from abroad.[2] But there are likely to be plenty of countervailing causal processes at work in law reform, and civil procedure reform is no exception.[3] Moreover, as Alan Watson's work nicely demonstrates, there have been whole-scale legal transplants long before the advent of globalization.[4] Thus, the presence of transplants in procedural reform does not necessarily indicate that we are inevitably moving towards convergence.

Of course, I also think that the differences between civil law and common law procedure have frequently been overdrawn. Juxtaposing the

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[1] See, *e.g.*, B.S. Markesinis, ed., *The Gradual Convergence* (Oxford: Oxford University Press, 1994); Ugo A. Mattei, Luisa Antonioli & Andrea Rossato, "Comparative Law and Economics" in Boudewijn Bouckaert & Gerrit De Geest, eds., *Encyclopedia of Law and Economics*, vol. 1 (Cheltenham: Edward Elgar, 2000) 505, at 508-14.

[2] *Cf.* Samuel P. Baumgartner, "Transnational Litigation in the United States: The Emergence of a New Field of Law" (book review essay) (2007) 55 Am. J. Comp. L. 793, at 799-801.

[3] See, *e.g.*, Ralf Michaels, "Two Paradigms of Jurisdiction" (2007) 27 Mich. J. Int'l L. 1003.

[4] See Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2d ed. (Athens: University of Georgia Press, 1993) [hereinafter "Watson, *Legal Transplants*"].

two systems provides many insights, to be sure. Civil law and common law countries, respectively, share a considerable history of ideas, concepts and institutions. That common history, however, is not equally strong in all countries, and it began to diverge at various points in time for different jurisdictions.[5] Moreover, the advent of the constitutional state and, later, the modern welfare state brought with it other formative influences, some of which are shared across the civil law / common law divide.[6]

From this perspective, it should come as no surprise that the current procedural reform project in Switzerland — the creation of the first Federal Code of Civil Procedure in Swiss history — shows few signs of bringing Swiss civil procedure, traditionally seen as part of the civil law family, any closer to common law concepts and approaches. The thrust of the reform has been to create a single, unified code of civil procedure by combining the best features from the various cantonal codes.[7] Foreign rules and approaches, however, have remained largely off the table.

In this article, I shall paint the landscape of procedural reform in Switzerland and use the product of that effort to inquire into the reasons why the reformers in that country chose to forego virtually any adoption of foreign concepts or approaches, whether from civil law or common law origins. In doing so, I hope to contribute to our understanding of the forces that oppose, as well as the forces that promote, convergence in procedural reform.

II. THE CURRENT REFORM EFFORT AND ITS BACKGROUND

The current civil procedure reform in Switzerland is part of a much larger package to reform procedural law and the federal judiciary. This package includes the creation, for the first time in Swiss history, of a federal code of civil procedure, a federal code of criminal procedure, a lower federal criminal court and a lower federal administrative court.[8] This is quite an extensive reform package by any standard. Although

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[5] See, *e.g.*, Rudolf B. Schlesinger *et al.*, *Comparative Law*, 6th ed. (New York: Foundation Press, 1998), at 257-63, 281, 283-313 [hereinafter "Schlesinger *et al.*"].

[6] See, *e.g.*, William B. Ewald, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?" (1995) 143 U. Pa. L. Rev. 1889, at 1987-88, 2046-65.

[7] See, *e.g.*, Christoph Leuenberger, "Die neue schweizerische Zivilprozessordnung" in Thomas Geiser *et al.*, eds., *Rechtliche Rahmenbedingungen des Wirtschaftsstandortes Schweiz* (Zürich: Dike, 2007) 601, at 602 [hereinafter "Geiser *et al.*, *Rahmenbedingungen*"].

[8] See "Justizreform" in *Bundesamt für Justiz*, online: <http://www.bj.admin.ch/bj/de/home/themen/staat_und_buerger/gesetzgebung/justizreform.html> [hereinafter "Justizreform"].

many of these reforms have been proposed for a very long time, they never came to fruition. Change finally arrived in 2000, however, with the strong vote of the Swiss populace in favour of a constitutional amendment giving the federal government the power to implement the above-mentioned reforms.[9] Such popular support in favour of federal power in this area is a relatively new phenomenon, however.

Since 1848, Switzerland has been a parliamentary democracy with a federal form of government. Governmental power is shared by the federal government and the 26 cantons (or states). The 1848 Constitution provided for relatively little federal power outside of foreign affairs, monetary policy and tariffs.[10] But various groups, encouraged by nationalist events in neighbouring Germany and Italy, soon proposed the adoption of a new constitution that would have significantly increased the areas of federal power — including in criminal and private law and procedure.[11] However, the proposal was rejected by popular vote in 1872, due to opposition in both conservative Catholic and anti-federalist French-speaking cantons.[12] A scaled-back proposal for a new constitution with only modest increases in federal powers was adopted in 1874 and amended in 1898. Since then, substantive private law and criminal law have been a matter of federal legislative power.[13] Civil and criminal procedure and the organization of the courts, on the other hand, remained the province of state law.[14] Moreover, the federal judiciary has been limited to a federal Supreme Court, which acts as a limited constitutional court and as a final arbiter on questions of substantive federal law.[15]

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[9] *Id.*

[10] *Bundesverfassung der Schweizerischen Eidgenossenschaft* (September 12, 1848), reproduced in Wilhelm Fetscherin, *ed.*, *Repertorium der Abschiede der Eidgenössischen Tagsatzungen aus den Jahren 1814-1848*, vol. 2, 764 (Bern: K.J. Wyss, 1876), arts. 13-59.

[11] See, *e.g.*, Thomas Sutter, *Auf dem Weg zur Rechtseinheit im schweizerischen Zivilprozessrecht* (Zürich: Schulthess, 1998), at 4-38 [hereinafter "Sutter"].

[12] See, *e.g.*, Ulrich Häfelin & Walter Haller, *Schweizerisches Bundesstaatsrecht*, 2d ed. (Zürich: Schulthess, 1988), at 17.

[13] See *Bundesverfassung der Schweizerischen Eidgenossenschaft* (May 29, 1874), AS 1, 1 (1875), art. 64 (providing for federal power in some areas of private law, including the law of obligations and intellectual property); Constitution of 1874, as amended on November 13, 1898, AS 16, 885, 888 (1898) arts. 64(II) & 64*bis*(I) (providing for federal power in all areas of substantive private and criminal law).

[14] *Id.*, arts. 64(III) & 64*bis*(II). There is one important exception: The procedure for enforcing money judgments and uncontested monetary claims, including bankruptcy law, has been a matter of federal law as well. See art. 64(I).

[15] *Id.*, arts. 110-114. The role of the Court as a constitutional court is limited primarily because of its inability to declare federal statutes void as unconstitutional. See art. 113(III).

Not surprisingly, the resulting differences in civil procedure and court organization in the various cantons produced difficulties in the quickly growing class of cases that cross state borders. Hence, attempts to introduce a unified national system of civil procedure were made on a number of occasions. None of them, however, came to fruition. The rejection of the 1872 proposal cast a long shadow.[16] Moreover, straw polls among various bar groups over time indicated that judges and litigators quite liked the existing system with different procedural rules in different cantons.[17]

Another problem that soon manifested itself was the lack of uniformity in enforcing federal substantive law. As proceduralists across the globe know, there is no clear dividing line between substantive and procedural law, and avowedly procedural rules frequently have substantive consequences.[18] The Federal Supreme Court thus began a slow but steady process of creating federal common law in the guise of ensuring uniform application of federal substantive law. By the end of that process, the Court had managed to declare many a traditional area of state procedure entirely a matter of federal substantive law, including *res judicata*, *lis pendens*, declaratory and preliminary relief, and group litigation rights.[19] Catching on to the problem, the federal legislature began to adopt traditionally procedural rules in federal substantive legislation, most prominently rules on personal jurisdiction, burden of proof, evidence, costs and speed of proceedings.[20] This proliferation of federal rules accelerated during the second half of the 20th century, culminating in the adoption of a new federal *Act on Private International Law*[21] in 1987. In that Act, federal lawmakers adopted an exhaustive set of rules on personal jurisdiction and the recognition and enforcement of foreign judgments in international cases, in addition to a new choice of law regime.

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[16] See, *e.g.*, Sutter, *supra*, note 11, at 55-72.

[17] See, *e.g.*, Frank, Sträuli & Messmer, *Kommentar zur Zürcherischen ZPO*, 3d ed. (Zürich: Schulthess, 1997), at 13; *id.*, at 62 [hereinafter "Frank, Sträuli & Messmer"].

[18] See, *e.g.*, Stephen B. Burbank, "Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy" (2006) 106 Colum. L. Rev. 1924, at 1926-27.

[19] See, *e.g.*, Oscar Vogel & Karl Spühler, *Grundriss des Zivilprozessrechts*, 8th ed. (Bern: Stämpfli, 2006), at 68-71 [hereinafter "Vogel & Spühler"]; Stephen Berti, *Zum Einfluss ungeschriebenen Bundesrechts auf den kantonalen Zivilprozess im Lichte der Rechtsprechung des Schweizerischen Bundesgerichts* (Zürich: Schulthess, 1989). Regarding group litigation rights, see, *e.g.*, Samuel P. Baumgartner, "Class Actions and Group Litigation in Switzerland" (2006) 27 Nw. J. Int'l L. & Bus. 301, at 316-26 [hereinafter "Baumgartner, 'Class Actions'"].

[20] See, *e.g.*, Vogel & Spühler, *id.*, at 62-67.

[21] *Bundesgesetz über das internationale Privatrecht* of December 18, 1987, SR 291 [hereinafter "*Private International Law Act*"].

By the late 1980s, it was clear to any Swiss lawyer that there was, in fact, a substantial body of federal procedural law. Apart from the question whether the constitutional preservation of the power to make procedural law for the states had been undermined, this had significantly weakened the argument that an adoption of federal procedural rules was neither feasible nor necessary.[22] But it took the ratification of the Lugano Convention[23] to precipitate change. The Lugano Convention sets uniform rules on personal jurisdiction, *lis pendens*, and the recognition of judgments in cross-border cases involving EC and EFTA member states. Ratification of the Lugano Convention had the jarring effect that, in some situations, cantonal courts were required to treat foreign litigants better than litigants from other cantons.[24] Moreover, the adoption of the Lugano Convention and the new *Private International Law Act* further increased the difficulty for litigants to locate the applicable procedural law in the thicket of international treaties, proliferating federal statutes, state civil procedure codes, federal common law and state practice.[25] The clear vote in favour of an updated and streamlined federal constitution by the Swiss populace in 1998 gave the final impetus to put before the people a constitutional amendment providing for federal power in civil and criminal procedure. That amendment was adopted in 2000.[26]

Given the experience with the Lugano Convention, the first piece of federal legislation passed under the new federal power was an act that entirely federalized the law of personal jurisdiction.[27] In addition, the Justice Department empanelled a committee of experts to draft a new federal code of civil procedure. The Committee presented its work product in June of 2003.[28] After a public comment period, the Federal Council (the executive) presented an adapted version of the Committee's draft to Parliament. Parliament adopted the final version of the Code on

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[22] See, *e.g.*, Frank, Sträuli & Messmer, *supra*, note 17, at 15-16.

[23] *Convention on jurisdiction and the recognition of judgments in civil and commercial matters*, 1988 O.J. (L 319) 40 [hereinafter "Lugano Convention"].

[24] See, *e.g.*, Frank, Sträuli & Messmer, *supra*, note 17, at 16.

[25] See, *e.g.*, Adrian Staehelin, Daniel Staehelin & Pascal Grolimund, *Zivilprozessrecht* (Zürich: Schulthess, 2008), at 15; Fridolin M.R. Walther, *Die Auslegung des schweizerischen Zivilprozessrechts, insbesondere des Bundesgesetzes über den Gerichtsstand in Zivilsachen* (Bern: Stämpfli, 2002), at 132-33.

[26] See *supra*, text accompanying note 9.

[27] *Bundesgesetz über den Gerichtsstand in Zivilsachen* of March 24, 2001, SR 272.

[28] See Schweizerische Zivilprozessordnung ("ZPO"), *Bericht zum Vorentwurf der Expertenkommission*, June 2003, online: <http://www.ejpd.admin.ch/etc/medialib/data/staat_buerger/gesetzgebung/zivilprozess.Par.0006.File.tmp/vn-ber-d.pdf>, at 6 [hereinafter "Begleitbericht"].

December 19, 2008.[29] The deadline for a possible referendum passed on April 16, 2009. Thus, the new Code is planned to enter into force on January 1, 2011.[30]

III. THE NEW CODE

From the beginning, the Committee's primary task was to create a code of civil procedure that would break the long spell of shipwrecked unification proposals. The Justice Department thus carefully selected committee members to ensure representation from bench and bar as well as from academia; from small firms as well as from large; from French- and Italian-speaking regions as well as from German; from Catholic as well as from Protestant areas; and so on. Accordingly, the Committee never considered adopting truly novel approaches — including foreign ones — that would not mesh easily with traditional Swiss procedural concepts.[31] Similarly, the Committee knew better than to model its work on the code of a single canton. Instead, it attempted to draw from all cantonal codes of civil procedure, although more so from the recently reformed ones.[32] In addition, the Committee decided to restate the federal statutory and common law rules that had developed over time to pre-empt state procedural law in domestic cases.[33]

The end result, after adoption by Parliament, is a Code that should look familiar to all Swiss lawyers, although they may find surprises in the details. With 408 relatively brief articles, the Code is considerably shorter than its counterparts in surrounding countries. It achieves this, in true Swiss tradition,[34] by eschewing much technical language and complex conceptual elaboration, as well as by leaving various details for practice to develop.

The Code begins with a general part, specifying the scope of application and dealing with issues common to all kinds of proceedings,

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[29] *Schweizerische Zivilprozessordnung* of December 19, 2008, BBl 2009, at 21 [hereinafter "ZPO" or "Code"].

[30] See "Neue Prozessordnungen treten auf 1. Januar in Kraft" (Medienmitteilung EJPD of March 31, 2010), available at <http://www.ejpd.admin.ch/ejpd/de/home/dokumentation/mi/2010/2010-03-31.html>.

[31] See Begleitbericht, *supra*, note 28, at 15.

[32] *Id.*

[33] See, *e.g.*, Hans-Peter Walter, "Auf dem Weg zur Schweizerischen Zivilprozessordnung" (2004) 100 Schweizerische Juristenzeitung 313, at 319. On those rules, see *supra*, notes 18-20 and accompanying text.

[34] See, *e.g.*, Franz Wieacker, *A History of Private Law in Europe*, trans. by Tony Weir (Oxford: Clarendon Press, 1995), at 389-91.

such as personal jurisdiction in domestic (as opposed to transnational) cases; recusal; joinder of parties and claims; calculation of amount in controversy; rules on costs; and general rules on conducting the proceedings and on taking evidence.[35] The Code then contains rules on ordinary proceedings, which begin with a written complaint and answer, followed by a preliminary hearing, a full-fledged main hearing and judgment.[36] Following that, there are provisions for a number of special proceedings. These include simple (*e.g.*, less formal, more oral) proceedings for amounts in controversy of 30,000 Swiss francs (approximately US $25,000) or less; summary proceedings (*e.g.*, for preliminary relief), in which only certain kinds of evidence are permitted or in which there is a lower standard of proof, or both; and family law proceedings, where the Code abandons many of its underlying classical liberal concepts in favour of increased judicial supervision in order to ensure equal treatment of the weaker party.[37] The Code then contains rules on appeals and enforcement proceedings,[38] although the enforcement of money judgments remains the province of a much older federal law on debtor/creditor relations and bankruptcy.[39] Finally, there is a chapter on domestic arbitration.[40]

The drafters ensured that the new Code complies with international treaties ratified by Switzerland, including several Hague Conventions and, most importantly, the *European Convention on Human Rights*.[41] Thus, some rights of the parties are more clearly defined under the Code than they may currently be in cantonal practice. For instance, the Code states a right of the parties to prove their respective cases,[42] as well as a privilege against self-incrimination.[43] Similarly, the judge will be obligated to disregard illegally obtained evidence unless he or she considers the interest in finding the truth to prevail.[44]

Apart from these clarifications required by international law, however, there are only two foreign imports in the Code. The first is a brief chapter on party- and judge-initiated mediation that was added to the Committee's proposed draft upon heavy lobbying by mediation firms

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35 ZPO, *supra*, note 29, arts. 1-196.
36 *Id.*, arts. 197-242.
37 *Id.*, arts. 243-307.
38 *Id.*, arts. 308-52.
39 *Cf. supra*, note 14.
40 ZPO, *supra*, note 29, arts. 353-99.
41 (1950), 213 U.N.T.S. 221.
42 *Id.*, art. 152(1).
43 *Id.*, art. 163(1)(a).
44 *Id.*, art. 152(2).

from large cities.[45] The second is inspired by a provision in the Lugano Convention, itself based on procedures known in a number of European countries: the parties to a contract can have a promissory note drawn up and authenticated by a notary (a specialized lawyer in Switzerland).[46] The resulting note is enforceable like a court judgment, except that a few narrow defences are permitted.[47] On the other hand, a request by a few members of Parliament to consider the introduction of class actions for labour, landlord-tenant and consumer disputes received only scant attention from the Committee, which brushed it aside with the comment that such a device is foreign to Swiss traditions.[48]

Thus, the new Swiss Code of Civil Procedure remains true to Swiss tradition and shows little evidence of transplants from other parts of the world (other than those mandated by international treaty). A large portion of the Code is rooted in what is usually considered civil law tradition. This is in evidence in the strict separation of private and public law litigation (the new Code only applies to the former);[49] judge-controlled litigation and taking of evidence;[50] the absence of juries;[51] the absence of common law-style rules of evidence;[52] the absence of motion practice;[53] clear delimitation of judicial power;[54] *de novo* appeals; and a small litigation package (limited joinder of parties and claims, no U.S.-style discovery and a narrow bite of *res judicata*).[55] The Code also continues

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[45] *Id.*, arts. 213-18. Most importantly, art. 214(1) provides that: "[t]he court can recommend at any time that the parties consider mediation."

[46] Lugano Convention, *supra*, note 23, art. 50. On the profession of the notary in civil law jurisdictions such as Switzerland, see, *e.g.*, Schlesinger *et al.*, *supra*, note 5, at 22-24.

[47] ZPO, *supra*, note 29, arts. 347-52.

[48] See Begleitbericht, *supra*, note 28, at 15, 45-46. For more background on the decision to avoid introducing class actions in the new Code, see Baumgartner, "Class Actions", *supra*, note 19, at 309-16.

[49] See, *e.g.*, Baumgartner, "Class Actions", *id.*, at 307-308.

[50] See, *e.g.*, Martin Kaufmann, "Beweiserhebung durch das Gericht vs. Beweiserhebung durch die Parteien" in Geiser *et al.*, *Rahmenbedingungen*, *supra*, note 7, 657, at 657-58.

[51] In the late 19th and early 20th centuries, there were proposals for introducing a civil jury in various cantons. The Canton of Zurich actually did introduce a civil jury in 1874, but abolished it again in 1911. See, *e.g.*, R.C. van Caenegem, "History of European Civil Procedure" in Mauro Cappelletti, chief ed., *International Encyclopedia of Comparative Law*, vol. 16 (Tübingen, J.C.B. Mohr (Paul Siebeck), The Hague: Mouton, New York: Oceana, 1973) 95 [hereinafter "van Caenegem"].

[52] *Cf.* Schlesinger *et al.*, *supra*, note 5, at 443-45.

[53] *Id.*, at 435-36.

[54] See, *e.g.*, Baumgartner, "Class Actions", *supra*, note 19, at 321.

[55] On these matters, see, *e.g.*, Samuel P. Baumgartner, "Related Actions" (1998) 3 Zeitschrift für Zivilprozess International 203, at 210. In a slight deviation from the depiction in the text, the Code does extend the *appel en cause*, a limited form of third-party complaint, from the French-speaking cantons to the rest of Switzerland. See ZPO, *supra*, note 29, arts. 81-82.

the established European tradition of generally charging court costs and the winner's attorney's fees to the losing party.[56]

At the same time, however, the new Code displays a number of features with a long history in at least some cantonal codes that may be surprising to those who have been fed the usual diet of descriptions of civil law procedure. First, most Swiss judges have, for centuries, been selected in some form of public or parliamentary election.[57] After all, one of the major reasons that the various Swiss states sought independence from Habsburg from 1291 on was their unwillingness to be subject to far away judges imposed by the empire.[58] Although judicial elections in most cantons are usually a matter of internal party politics and, thus, rarely involve public election campaigns, the possibility of not being re-elected or reappointed after the usual four- or six-year service period,[59] although rare, is real.[60] Despite this feature, there is, in some cantons, a tradition of a career judiciary of sorts in the sense that many lower-level judges begin their careers as long-term judicial clerks. From there, they are then elected to a judgeship. In other cantons, a considerable number of judges, especially at the appellate level, come to office with at least some practical experience outside the judiciary. Since the new Code is leaving the organization of the judiciary largely to the cantons,[61] none of this is likely to change.

Along similar lines, there are a few cantons that never gave up the early Germanic tradition of public deliberation and vote of the courts at both the first instance and the appellate levels. All cantons have, however, since been required by federal law to provide the parties with a written judgment and opinion in cases that can be appealed to the Federal

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[56] *Id.*, arts. 104-112.

[57] In three cantons, at least some of the lower-level judges are appointed by the state's highest court, rather than elected. See, *e.g.*, Alfred Bühler, "Von der Wahl und Auswahl der Richter" in Heinrich Honsell *et al.*, eds., *Festschrift für Heinz Rey zum 60. Geburtstag* (Zürich: Schulthess, 2003) 521, at 533.

[58] Similarly, the newly independent states soon worked to remove themselves from the jurisdiction of the far away judges imposed by the Catholic Church. On all this, see Emil Schurter & Hans Fritzsche, *Das Zivilprozessrecht des Bundes* (Zürich: Rascher, 1924), at 5-29.

[59] In a number of cantons, the larger political parties use specialized committees to vet a candidate's professional quality. See, *e.g.*, Vogel & Spühler, *supra*, note 19, at 87.

[60] A few recent instances in which cantonal and federal judges either almost failed or did fail to be re-elected because of unpopular decisions have led to renewed questions about whether this system adequately protects judicial independence. See, *e.g.*, Stephan Gass, "Wie Sollen Richter und Richterinnen gewählt werden? Wahl und Wiederwahl unter dem Aspekt richerlicher Unabhängikeit" (2007) 16 Aktuelle Juristische Praxis 593.

[61] ZPO, *supra*, note 29, art. 3.

Supreme Court.[62] Moreover, written opinions in Switzerland follow the civil law tradition of stating only the opinion of the entire court, without any dissents or concurrences. Yet, in some cantons, deliberation and vote still occur on the bench in the presence of the parties and any members of the public who wish to observe the proceedings.[63] However, since the cantons that follow the practice of the surrounding countries of secret deliberation and vote seem to feel equally strongly about the importance of their approach for the integrity of the judicial process,[64] the new Code leaves the matter up to the cantons to regulate.[65] The Code does, however, provide that the public is excluded from the entire proceedings in certain matters, including all family law cases.[66]

A third, perhaps unexpected, feature[67] of the new Code is the presence of a single, concentrated, oral hearing (*Hauptverhandlung*, *audience de jugement*).[68] I hesitate to call it a trial only because it is held without a jury and because the judge, in civil law fashion, remains in charge of the hearing and of the questioning of the witnesses. Again, this is nothing new. Some of the procedural codes of the cantons have provided for this kind of main hearing for a long time.[69] They therefore made a much clearer break with the seemingly endless series of evidentiary hearings in Romano-canonical procedure than did the *German Code of Civil Procedure*

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[62] *Bundesgesetz über das Bundesgericht* of June 17, 2005, SR 173.110, art. 112.

[63] See, *e.g.*, *Gesetz betreffend die Zivilprozessordnung für den Kanton Bern* of July 7, 1918, BSG 271.1, art. 204 [hereinafter "Code of Civil Procedure of the Canton of Bern"]; *Zivilprozessordnung* of September 11, 1966, BGS 221.1, § 53 [hereinafter "Code of Civil Procedure of the Canton of Solothurn"]; *Code de procédure civile du canton de Neuchâtel* of September 30, 1991, RSN 251.1, art. 333 [hereinafter "Code of Civil Procedure of the Canton of Neuchâtel"].

[64] On the history behind this approach, see, *e.g.*, Kurt H. Nadelmann, "The Judicial Dissent: Publication v. Secrecy" (1959) 8 Am. J. Comp. L. 415.

[65] ZPO, *supra*, note 29, art. 54(2).

[66] *Id.*, art. 54(3), (4).

[67] *Cf.* Benjamin Kaplan, "An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure" (1969) 69 Mich. L. Rev. 821, at 841:

> What then is the grand discriminant, the watershed feature, so to speak, which shows the English and American systems to be consanguine and sets them apart from the German, the Italian, and others in the civil law family? I think it is the single-episode trial as contrasted with discontinous or staggered proof-taking. This characteristic must greatly affect the anterior proceedings that culminate in trial.

[68] ZPO, *supra*, note 29, arts. 228-234.

[69] Article 176(1) of the Code of Civil Procedure of the Canton of Bern, *supra*, note 63, provides:

> If [after the exchange of the pleadings] the instructing judge [*i.e.*, the panel member delegated to prepare the main hearing] considers the matter insufficiently clear to permit a judgment to be handed down at the time of the main hearing, he summons the parties and discusses the case with them in free conversation. He shall make use of his [power to ask questions not directly raised by the pleadings], especially by questioning the parties so as to clarify contested facts and to encourage them to amend their pleadings [with regard to alleged facts and proposed means of proof] accordingly.

of 1877.[70] And they did so without relegating the taking of evidence to the pre-hearing *instruction*, as has been the case in French civil procedure since 1806.[71] In order for a concentrated oral hearing to work, these cantons have provided for some form of preliminary hearing beforehand, at which the judge encourages the parties to clarify their claims and attempts to identify, with the parties, the relevant pieces of evidence, including proposed witnesses.[72] If unexpected evidence nevertheless turns up during the main hearing, it is, of course, possible to adjourn that hearing. In some cantons, the preliminary hearing is also the time for the judge, more or less gently, to suggest settlement — an approach that appears to have made it into the new Code.[73]

Fourth, there are a number of civil law jurisdictions that sustained the prohibition of party testimony from Roman Canonical procedure well into the 20th century on the theory that party testimony is notoriously self-serving and, thus, useless as a means of proof.[74] Not so in a number of Swiss cantons, where parties as well as non-parties have long been subject to questioning by the judge. In those cantons, there remains a distinction between the testimony of non-parties and that of parties, whereby the latter usually cannot result in a perjury charge if a party has intentionally given factually incorrect answers.[75] Again, the assumption is that parties are likely to at least slant their testimony. Technically, the parties are thus not considered witnesses. Nevertheless, the drafters of these codes realized that there may still be considerable probative value in the testimony of parties.[76] The new Code adopts one form of this

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[70] Zivilprozessordnung [German Code of Civil Procedure] of January 30, 1877, 1877 RGBl at 83. In the United States, Justice Kaplan has coined the term "conference method" to refer to the series of evidentiary hearings under the German Code of 1877. See Benjamin Kaplan, "Civil Procedure — Reflections on the Comparison of Systems" (1960) 9 Buff. L. Rev. 409, at 410.

[71] See, *e.g.*, J.A. Jolowicz, "Civil Procedure in the Common and Civil Law" in Guenther Doeker-Mach & Klaus A. Zieger, eds., *Law and Legal Culture in Comparative Perspective* (Stuttgart: Franz Steiner Verlag, 2004) 26, at 33-37 [hereinafter "Jolowicz"].

[72] ZPO, *supra*, note 29, art. 226. Unlike many of the cantonal provisions on which this approach is fashioned, art. 226, as a matter of course, allows the court to conduct several preliminary hearings, at all of which evidence may be taken. It thus appears to permit judges from cantons that are used to the German-style "conference method" to continue that method to some extent. In Germany, in the meantime, the reform of 1976 required courts to attempt a single oral hearing whenever possible, which appears to have become reality at least in some courts. See, *e.g.*, Peter Gottwald, "Civil Procedure Reform in Germany" (1997) 45 Am. J. Comp. L. 753, at 761.

[73] ZPO, *supra*, note 29, art. 226(2).

[74] See, *e.g.*, Dagmar Coester-Waltijen, "Parteiaussage und Parteivernehmung am Ende des 20. Jahrhunderts" (2000) 113 Zeitschrift für Zivilprozess 269 [hereinafter "Coester-Waltijen"].

[75] See, *e.g.*, Vogel & Spühler, *supra*, note 19, at 287.

[76] However, in some cantons, party testimony cannot be used to prove a fact in favour of that party. See *id.* In others, as well as in the new Code, it is entirely up to the court to determine the

approach: The parties are to be told that they may be subject to a disciplinary fine of 2,000-5,000 Swiss francs (approximately US $1,500-3,750) for false testimony.[77] However, since they are not technically witnesses, the parties cannot commit perjury, with one exception: the court may ask a party to respond to specific questions on pain of a perjury charge in the case of false testimony.[78] This is usually done where a point of fact in the knowledge of one party is particularly important to the outcome of the case and the court has no other means to establish the truth of that fact.[79]

Another principle of German common law procedure that has had considerable staying power in Europe is the Roman law rule of *nemo contra se edere tenetur* (nobody can be required to produce a document against himself).[80] Accordingly, German procedure did not generally permit the judge to order a party to produce a document identified by the opponent as being relevant to prove its case until 2002.[81] Other European countries got rid of the doctrine only a few decades ago, and then only to some extent.[82] Again, some Swiss cantons abolished this approach long ago.[83] Along with these cantons, the new Code provides that both parties and non-parties have an obligation to provide evidence in their control.[84] Parties refusing to live up to that obligation face adverse inferences on

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probative value of party testimony, whether or not it serves to support that party's case. *Id.*, at 288; ZPO, *supra*, note 29, art. 157.

[77] ZPO, *id.*, art. 191.

[78] *Id.*, art. 192.

[79] This is, of course, traceable to the old decisory oath under German common law, which represented the first step towards permitting party testimony, long before England and the United States permitted parties to testify. See, *e.g.*, Coester-Waltijen, *supra*, note 74, at 274-76, 277-79. For a description of the decisory oath in English, see John Henry Merryman, *The Civil Law Tradition*, 3d ed. (Stanford: Stanford University Press, 2007), at 119-20; Jolowicz, *supra*, note 71, at 34.

[80] Digest 2, 13, 1 (*Ulpian*).

[81] See, *e.g.*, Oscar Chase *et al.*, *Civil Litigation in Comparative Context* (St. Paul: Thomson West, 2007), at 222-26; Gerhard Walter, "The German Civil Procedure Reform Act 2002: Much Ado About Nothing?" in Nicolò Trocker & Vincenzo Varano, eds., *The Reforms of Civil Procedure in Comparative Perspective* (Torino: Giappichelli, 2005) 67, at 75-76 [hereinafter "Walter"].

[82] See, *e.g.*, Alphonse Kohl, "Roman Law Systems" in Mauro Cappelletti, chief ed., *International Encyclopedia of Comparative Law*, vol. XVI: Civil Procedure, Chapter 6: Ordinary Proceedings in First Instance (Tübingen: J.C.B. Mohr (Paul Siebeck), The Hague: Martinus Nijhoff Publishers, 1984) 75.

[83] In the Canton of Bern, for instance, the law provides that parties and non-parties alike are required to divulge relevant documents in their possession. In the case of non-compliance by a party, the judge can make an adverse inference. In the case of non-compliance by a non-party, that non-party faces a fine or a prison sentence, and is liable to the party in whose favour the document was invoked for the damage incurred. Code of Civil Procedure of the Canton of Bern, *supra*, note 63, arts. 235-238.

[84] ZPO, *supra*, note 29, art. 160.

the merits.[85] Non-parties who refuse to cooperate risk a fine as well as being held liable for the extra court costs arising from their behaviour.[86]

A final feature of the new Swiss Code that may look familiar to common law lawyers, especially from the United States, is its strong emphasis on settlement. This feature, too, however, has a long tradition in Switzerland. In this case, the tradition goes back to the *French Code of Civil Procedure* of 1806[87] and preceding statutes passed right after the French Revolution. According to those statutes, the parties had to submit to conciliation in front of a justice of the peace before a lawsuit could be filed.[88] The idea soon caught on in Switzerland.[89] However, not all cantons adopted this approach. In Geneva, for example, the drafters of the *Code of Civil Procedure* of 1819[90] left pre-action conciliation voluntary. They did, however, permit the judge to suggest settlement at any time during the proceedings, well aware of the dangers of such an approach.[91] This approach, too, was soon adopted by many cantons. Thus, while most surrounding countries only briefly experimented with conciliation and other forms of alternative dispute resolution, and did not return to these matters until very recently in their procedural laws,[92] both mandatory conciliation and judge-supervised settlement negotiations have been a mainstay in many of the Swiss procedural codes since the early 19th century.[93] Given the long Swiss tradition in this area, it is not surprising that the new Code generally requires the parties to bring their case before

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[85] *Id.*, art. 164.

[86] *Id.*, art. 167.

[87] Code de procédure civile of April 14, 1806, édition originale et seule officielle (Paris: Imprimerie Impériale, 1806).

[88] See, *e.g.*, Alain Wijffels, "France" in C.H. van Rhee, ed., *European Traditions in Civil Procedure* (Antwerpen: Intersentia, 2005) 197, at 197-99 [hereinafter "van Rhee, *European Traditions*"].

[89] See, *e.g.*, Paul Oberhammer & Tanja Domej, "Germany, Austria and Switzerland" in van Rhee, *European Traditions*, *id.*, at 215, 218.

[90] Loi sur la procédure civile du canton de Genève of September 29, 1819, reproduced in C. Schaub & C. Brocher eds., *Loi sur la procédure civile du canton de Genève avec l'exposé des motifs par feu P.F. Bellot, professeur de droit* (Genève: A. Cherbuliez & Cie, Paris: Sandoz et Fischbacher, 4th ed., 1877).

[91] See, *e.g.*, C.H. van Rhee, "The Influence of the French Code de Procédure Civile (1806) in 19th Century Europe" in Loïc Cadiet & Guy Canivet, eds., *De la commémoration d'un code à l'autre : 200 ans de procedure civile en France* (Paris: Litec, 2006) 129, at 135 [hereinafter "van Rhee, 'Influence'"].

[92] See, *e.g.*, C.H. van Rhee, "Introduction" in van Rhee, *European Traditions*, *supra*, note 88, 185, at 185-87; Walter, *supra*, note 81, at 73-74.

[93] The effect of these provisions today depends a bit on how they are handled in practice. In some places, such as in the city of Bern, mandatory conciliation sessions are scheduled in 15-minute intervals, thus leaving little time for real settlement talks. Other courts have become incredibly successful in getting cases settled. Yet lawyers sometimes complain of judicial strong-arming.

a "settlement authority" before they are permitted to file suit.[94] It is equally unsurprising that the Code permits the court to suggest settlement at the preliminary hearing stage.[95] From here, then, it did not require a leap of faith to equally permit the judge to bring up the possibility of mediation, an approach for which there is no Swiss tradition.[96]

As these examples demonstrate, the laws of various Swiss cantons have long shared more features with civil procedure in the United States and, to a lesser extent, with other common law countries, than traditional descriptions of civil law litigation systems would have one believe. Largely, this has been the result of developments unique to Switzerland rather than of borrowing from the common law. To me, this is simply further evidence that the distinction between common law and civil law procedure has been overdrawn.

IV. REASONS FOR THE DEARTH OF INTERNATIONAL BORROWING IN THE NEW CODE

With that in mind, it is not, perhaps, too surprising to learn that the only borrowing in the new Swiss Code of Civil Procedure is that imposed by international treaty law. Nevertheless, one may wonder why the drafters of the new Code failed to adopt any other features from abroad, while the European Community surrounding Switzerland is in the process of harmonizing various aspects of civil procedure, perhaps with the ultimate goal of unifying litigation procedure altogether. Obviously, it is difficult to know every reason leading to this omission. Having been on the inside of the lawmaking process in Switzerland for three years (although not with regard to this project) and having had conversations with a number of the members of the Committee of Experts who drafted the new Code over time, however, I will try to identify what I gather to be the major reasons for the drafters' inclination to shun borrowing.

First and foremost, the Committee's task was to overcome the long history of opposition to a federally unified code of civil procedure. Thus, the Committee had to tread carefully. Departing too much from the rules and concepts known in the various cantons simply would have put that

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[94] ZPO, *supra*, note 29, arts. 197-212. As in the cantonal codes, there are exceptions for certain kinds of proceedings. See art. 198. In addition, the parties can agree to forego the conciliation proceeding in cases with an amount in controversy of 100,000 Swiss francs (approximately US $80,000) or more. See art. 199.

[95] See *supra*, note 73 and accompanying text.

[96] See *supra*, note 45 and accompanying text.

mission in danger. Moreover, the Committee's chosen approach of steering clear of controversial new subject matter is in line with the requirements of Swiss consensus democracy: Switzerland is a multi-party democracy with a government that has been shared by representatives of the four leading parties in Parliament since 1959. No party has had control over either Parliament or the executive since 1891 or has even had a majority in either institution since 1954. The result has been a consensus approach to law-making that tends to disfavour bold, new ideas.[97]

The Committee tried to meet this challenge by drawing from the existing cantonal codes of civil procedure rather than by imposing new concepts or by adopting a single cantonal code.[98] That approach immediately brought to light a basic problem. Few Swiss lawyers have practised under the procedural code of more than one canton, and few scholars have spent much time comparatively analyzing the procedural laws of the various cantons. Indeed, the only comprehensive inter-cantonal comparative study dates from the early 1930s,[99] and even it does not always go as deep as one might wish for the purposes of informed decision-making in law reform. As a result, the Committee spent most of its time learning about, and discussing, the comparative advantages of the procedural rules of the various cantons. Understandably, this left little time for international comparative analysis.

Thus far, the reasons for shunning foreign procedural imports described here — strong federalism, first unification in Swiss history and consensus democracy — are somewhat unique to Switzerland. But there are other reasons that are more portable. Recall, for instance, that one of the tasks on the Committee's plate was to consider whether to adopt a class action in matters of labour, landlord-tenant and consumer disputes.[100] The Committee quickly disposed of that task by concluding summarily that class actions are foreign to Swiss traditions.[101] The Committee's conclusion satisfied lawyers, academics and political groups during the public comment period.[102] This sentiment was later

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[97] See, *e.g.*, Jürg Steiner, *Amicable Agreement Versus Majority Rule: Conflict Resolution in Switzerland*, rev. ed., trans. by Asger Braendgaard & Barbara Braendgaard (Chapel Hill: University of North Carolina Press, 1974).

[98] See *supra*, note 32 and accompanying text.

[99] See Emil Schurter & Hans Fritzsche, *Das Zivilprozessrecht der Schweiz*, vol. II/1 (Zürich: Rascher, 1931), vol. II/2 (Zürich: Rascher, 1933).

[100] See *supra*, note 48 and accompanying text.

[101] See Begleitbericht, *supra*, note 28, at 15.

[102] See Zusammenstellung der Vernehmlassungen, *Vorentwurf für ein Bundesgesetz über die Schweizerische Zivilprozessordnung* (ZPO) (2004), online: <http://www.bj.admin.ch/etc/medialib/data/staat_

shared during the debates in Parliament.[103] Thus, class actions never had a chance of being introduced into the new Code.

There are a variety of jurisprudential, doctrinal and cultural reasons why class actions would be an uneasy fit for the current law of civil procedure in Switzerland.[104] The Committee briefly pointed to some of those reasons in its report.[105] But there was something else: rejection of the perceived pathologies of U.S.-style litigation. At the heart of this rejection is a deep unease with the way in which the jury trial[106] — a procedure steeped in equity,[107] anti-formalism, entrepreneurial lawyering, the prospect of punitive damages[108] and the tendency towards the lawsuit as a business deal (which the aforementioned features support)[109] — result in a litigation system in the United States in which power (including judicial power), money (who has it and who does not), and tactics seem to be more important in the outcome of litigation than who is right and who is wrong on the merits.[110] This unease emerged in the 1980s and early 1990s when what the Germans call the "judicial conflict" with the United States resulted in extensive depictions in German law journals of the U.S. litigation system as arbitrary and unfair — interestingly unfair

buerger/gesetzgebung/zivilprozess.Par.0004.File.tmp/ve-ber.pdf>, at 96-98 [hereinafter "Zusammenstellung der Vernehmlassungen"].

[103] See, *e.g.*, 2007 AB Ständerat 498, at 499 (reassurance by Justice Minister Blocher that introduction of class actions was not envisioned in the draft Code).

[104] See, *e.g.*, Baumgartner, "Class Actions", *supra*, note 19, at 310-12, 320-23.

[105] See Begleitbericht, *supra*, note 28, at 15.

[106] See, *e.g.*, Felix Dasser, "Punitive Damages: Vom 'fremden Fötzel' zum 'Miteidgenoss?'" (2000) 96 Schweizerische Juristenzeitung 101, at 102-103 (speaking of the aleatoric character of U.S. jury decisions).

[107] I am referring here to the "enormous flexibility and latitude of U.S. procedure — including its ability to create new remedies, judicial discretion, liberal pleading, the availability of the class action device, and the ability of the parties to join every conceivable claim", as well as to discovery. Samuel P. Baumgartner, "Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases" (2002) 80 Wash. U. L.Q. 835, at 841 [hereinafter "Baumgartner, 'Human Rights'"]. See also Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective" (1987) 135 U. Pa. L. Rev. 909.

[108] Punitive damages are a major source of objection against the U.S. litigation system in Switzerland and elsewhere. See, *e.g.*, Heinrich Honsell, "Amerikanische Rechtskultur" in Peter Forstmoser *et al.*, eds., *Der Einfluss des europäischen Rechts auf die Schweiz* (Zürich: Schulthess, 1999) 39, at 45-48 [hereinafter "Honsell"]; Ronald A. Brand, "Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too Far" (2005) 24 J.L. & Com. 181.

[109] See, *e.g.*, Sarah Rudolph Cole, "Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution" (2000) 51 Hastings L.J. 1199; Judith Resnik, "Procedure as Contract" (2005) 80 Notre Dame L. Rev. 593; and William B. Rubenstein, "A Transactional Model of Adjudication" (2001) 89 Geo. L.J. 371.

[110] See, *e.g.*, Baumgartner, "Human Rights", *supra*, note 107, at 843-46; Burkhard Heβ, "Entschädigung für NS-Zwangsarbeit vor US-amerikanischen und deutschen Zivilgerichten" (1999) 44 Die Aktiengesellschaft 145, at 149-50.

primarily to defendants, but that view should not be surprising, given the reports' provenance in the U.S. tort reform movement.[111] This German scholarship has influenced Swiss thinking as well, especially in German-speaking Switzerland.[112] The perception that U.S. courts were exercising their country's hegemonic power in dealing with foreign parties and foreign sovereignty concerns further supported the unease.[113]

In the late 1990s, objections to U.S.-style class actions further intensified in Switzerland in reaction to the Holocaust Assets Litigation, in which several classes of Holocaust survivors sued the major Swiss banks for conversion of their families' bank accounts during and after the Second World War and for other misdeeds.[114] Although the cases presented a number of difficult legal and factual questions, they were settled, after 18 months, for $1.25 billion without a single legal ruling by the trial judge.[115] In the United States, lawyers often see this as an instance in which the class action device helped elderly Holocaust survivors receive what was rightfully theirs from intransigent Swiss banks.[116] In Switzerland, however, where considerable parts of the population had initially been sympathetic to the plaintiffs' claims, the episode was ultimately perceived as further evidence that power, including governmental power, is more important than the merits in resolving class actions in the United States.[117] Not surprisingly, then, the Committee mentioned, as a reason to reject the adoption of class actions in Switzerland, the perceived danger that "baseless claims would be filed for the sole reason of forcing the defendant into a settlement".[118] More generally, this episode hardened the

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[111] See Samuel P. Baumgartner, "Is Transnational Litigation Different?" (2004) 25 U. Pa. J. Int'l Econ. L. 1297, at 1340-41 [hereinafter "Baumgartner, 'Transnational Litigation'"].

[112] *Cf.* Honsell, *supra*, note 108, at 45-52 (presenting a rather one-sided narrative of U.S. tort law and procedure).

[113] See Baumgartner, "Transnational Litigation", *supra*, note 111, at 1352-53.

[114] For an account of that litigation by one of its protagonists, see Burt Neuborne, "Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts" (2002) 80 Wash. U. L.Q. 795 [hereinafter "Neuborne"]. For an account by the chief U.S. government negotiator in the matter, see Stuart Eizenstat, *Imperfect Justice, Looted Assets, Slave Labor and the Unfinished Business of World War II* (Jackson: Public Affairs, 2003), at 75-186.

[115] See, *e.g.*, Neuborne, *id.*, at 805-12.

[116] See, *e.g.*, Michael J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (New York: NYU Press, 2003), at 293-301.

[117] See, *e.g.*, Baumgartner, "Human Rights", *supra*, note 107, at 847 (noting that "when the $1.25 billion settlement became public, a great number of editorialists, members of Parliament, and other protagonists of public opinion berated the Swiss banks for selling out to the 'blackmail' from overseas").

[118] Begleitbericht, *supra*, note 28, at 46.

conviction of many in Switzerland that class actions and other features of U.S. litigation are best avoided.

Most importantly, however, the lack of borrowing in the new Swiss Code of Civil Procedure is simply the result of inertia and conservatism in the traditional sense of the word.[119] Swiss lawyers, as lawyers in many other places, prefer the procedural rules they know over those they do not. That is not to say that Swiss lawyers consider their respective cantonal codes to be perfect. Indeed, the rate at which most cantons have engaged in procedural reform over the past two decades indicates that the opposite is true.[120] However, most of these reforms have been limited to fiddling with details and adapting cantonal codes to newly imposed federal law requirements. Bold changes are unlikely to find favour. Similarly, foreign approaches are viewed with suspicion. The reason is simple: few lawyers have the necessary knowledge about the ways in which foreign solutions work in the intertwined edifice of a foreign jurisdiction's procedural law, let alone about the often unspoken jurisprudential assumptions that underlie the application of those solutions, assumptions that are the result of legal education and acculturation in practice.[121] The upshot is an unwillingness to consider foreign approaches unless there is a very good reason to do so.

One way to overcome this inertia, if perhaps not conservatism, is, therefore, to provide the necessary in-depth comparative background information on how a particular foreign rule or approach works. As I have suggested elsewhere, a powerful means for this purpose is the process of negotiating and ratifying treaties, as well as the learning that occurs through subsequent practice under those treaties.[122] In the present case, article 50 of the Lugano Convention requires member states to enforce a promissory note authenticated by a notary in another member state if the note conforms to the standards for such instruments under the law of the originating state.[123] Since Swiss law did not provide for such an enforceable note, the Swiss negotiators needed to make sure they understood this

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[119] There is nothing particularly Swiss about this phenomenon. See Watson, *Legal Transplants*, *supra*, note 4; Alan Watson, *The Evolution of Law* (Baltimore: Johns Hopkins University Press, 1985), at 119.

[120] See, *e.g.*, Sutter, *supra*, note 11, at 124-25.

[121] On this point, see Baumgartner, "Transnational Litigation", *supra*, note 111, at 1373-75.

[122] See Samuel P. Baumgartner, *The Proposed Hague Convention on Jurisdiction and Foreign Judgments: Transatlantic Lawmaking for Transnational Litigation* (Tübingen: Mohr Siebeck, 2003), at 58-62, 120-25.

[123] Generally, this means that the notary must draft the document as well as authenticate the signatures of the parties for the document to become directly enforceable. See, *e.g.*, Jan Kropholler, *Europäisches Zivilprozessrecht*, 8th ed. (Frankfurt: Verlag Recht und Wirtschaft, 2005), at 503-504.

instrument and the way it operated in the countries from which such requests for enforcement would be forthcoming before committing to the Lugano Convention. They then had to explain the instrument to Parliament for purposes of ratification of the Convention. Once ratified, article 50, along with the other provisions, were explicated to the practising bar by both negotiators and scholarly experts in the field.[124] Soon, monographs on the operation of article 50 and the instrument of the enforceable authenticated promissory note appeared.[125] In the end, the drafters of the new Code had sufficient information on that instrument to consider it worth adopting.

Another way to overcome inertia consists in forcing change from outside of a country's legal elite. Within the European Community, for example, the Commission has been pushing unification in one specific area of transnational litigation after another.[126] Similarly, the European Court of Justice has declared invalid a number of rules of domestic civil procedure that discriminate against residents of other member states of the Community.[127] This has led to a significant increase in research and scholarship in comparative procedure as well as to increased legislative activity in order to implement the required changes within the member states.[128] These forced changes have led to increased borrowing among the member states of the Community. They may even end in a European code of civil procedure, as some have suggested.[129] Of course, Switzerland is not a member state of the European Community and, thus, has not

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[124] See, *e.g.*, Franz Kellerhals, "Vollstreckbare öffentliche Urkunden aus schweizerischer Sicht — Bemerkungen zur Ausgangslage" (1993) 1993 Der Bernische Notar 1; Monique Jametti-Greiner, "Die vollstreckbare öffentliche Urkunde" (1993) 1993 Der Bernische Notar 37; Andreas B. Notter, "Vollstreckbare öffentliche Urkunden" (1993) 74 Zeitschrift für Beurkundungs- und Grundbuchrecht 84; and Gerhard Walter, "Wechselwirkungen zwischen europäischem und nationalem Zivilprozessrecht: Lugano Übereinkommen und Schweizer Recht" (1994) 107 Zeitschrift für Zivilprozess 301, at 334-39.

[125] See, *e.g.*, Christian Witschi, *Die vollstreckbare öffentliche Urkunde nach Art. 50 Lugano-Übereinkommen in der Schweiz* (Bern: Stämpfli, 2000).

[126] See "Judicial Cooperation in Civil Matters", online: <http://eur-lex.europa.eu/en/legis/latest/chap1920.htm>.

[127] See, *e.g.*, *Hayes v. Kronenberger*, case C-23/95, [1997] E.C.R. I-1718; *Mund & Fester v. Hatrex International Transport*, Case C-398-/92, [1994] E.C.R. I-467; *Hubbard v. Hamburger*, Case C-20/92, [1993] E.C.R. I-3790. On these legislative and case law developments, see Gerhard Walter & Fridolin M.R. Walther, *International Litigation: Past Experiences and Future Perspectives* (Bern: Stämpfli, 2000), at 7-35 [hereinafter "Walter & Walther"].

[128] See, *e.g.*, Burkhard Heß, "The Integrating Effect of European Procedure Law" (2002) 4 Eur. J. L. Ref. 3; Astrid Stadler, "Das Europäische Zivilprozessrecht — Wie viel Beschleunigung verträgt Europa?" (2004) 24 Praxis des internationalen Privat- und Verfahrensrechts 2.

[129] See, *e.g.*, Walter & Walther, *supra*, note 127, at 46. See also Konstantinos D. Kerameus, "Political Integration and Procedural Convergence in the European Union" (1997) 45 Am. J. Comp. L. 919, at 924-28 (describing efforts to unify civil procedure in Europe).

actively participated in these changes. But it has ratified a number of international treaties in matters of procedure, which the drafters of the new Code had to implement.

Finally, during the public comment period of the proposed Code, none of the voices of public policy criticized the drafters for failing to borrow approaches from abroad.[130] The one exception was that of mediation firms forcefully complaining about a lack of reference to mediation. In response, the drafters changed the proposed Code accordingly.[131] This suggests that politically active groups, too, can support or overcome standard inertia in this area. The fact that the conduct of transnational litigation by lawyers and judges in the United States led to an unwillingness in Switzerland to consider features of U.S. civil procedure as worth emulating seems to further support this suggestion.[132]

V. CONCLUSION

Today, examples of cross-border borrowing in procedural lawmaking are easy to find. In various European Union countries alone, academic publications are abuzz with comparative scholarship suggesting the adoption of this or that rule in domestic procedure. Even in England, which is not bound by article 65 of the *Treaty Establishing the European Community*[133] and the many reform proposals imposed by Brussels under its authority, the Woolf Committee was not shy to borrow from abroad to find solutions to identified problems with English civil procedure.[134] Taking a step back from these recent developments, however, it should be clear to anyone with a passing interest in the comparative history of litigation procedure that cross-border borrowing in this area is nothing new. It may even be as old as procedural law itself. Robert Millar, for instance, traces U.S. discovery and other features of equity procedure to early

[130] There were two exceptions. The University of Geneva criticized the decision not to adopt a class action and the University of Zurich more generally lamented the obvious lack of international comparative work behind the proposed draft. See Zusammenstellung der Vernehmlassungen, *supra*, note 102, at 97-98, 76. Neither, however, pushed its views further in the political process.

[131] See *supra*, text accompanying note 45.

[132] See *supra*, text accompanying notes 104-118.

[133] *Treaty Establishing the European Community*, Consolidated Version, 2006 O.J. (C 321) 37.

[134] Lord H. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty's Stationery Office, 1996).

Roman Canonical law on the European Continent, and other features of U.S. procedural law to early Germanic procedure.[135]

The interesting question, therefore, is not whether there is borrowing, but when and why it occurs. One plausible suggestion is that this is mostly a matter of ideas, whether or not those ideas respond to a specific need of a particular society.[136] But if so, why do some ideas travel, while others do not, or only to some countries? For instance, the 1806 Code of Civil Procedure of France,[137] however flawed, influenced a great number of procedural codes on the European Continent at the time.[138] Is this because the 1806 Code was shaped to some extent by ideas of the French Revolution? Or because it simply contained ideas whose time had come? If the latter, why was *it* widely borrowed from and not the 1667 Code Louis, on which it was largely based? From this perspective, it is interesting to look at the recent Swiss Code of Civil Procedure and ask about the reasons why its drafters largely shunned foreign influences — unless required or suggested by international treaty — and opted instead for inter-cantonal borrowing. To me, the Swiss example suggests that cross-border borrowing in civil procedure depends not only on the strength of ideas, but also on an understanding of how particular approaches work within the litigation system from which to borrow, as well as on the identity and the strength of the interests of politically active groups. Either way, the traditional inertia in this area can be overcome by externally forced change.[139]

Another thing I think the foregoing look at Swiss civil procedure demonstrates is that the distinction between common law and civil law systems has often been overdrawn. The frequent focus in the common law world on two or three "representative" civil law jurisdictions in the study of comparative procedure has helped to identify differences and to provide useful perspective. At the same time, however, it has led to generalizations that do not withstand further scrutiny. As demonstrated above, procedure and court organization in various Swiss cantons has long differed in considerable respects from the stories that usually emanate

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[135] See, *e.g.*, Robert Wyness Millar, *Civil Procedure of the Trial Court in Historical Perspective* (New York: New York University Law Center, 1952), at 27-28, 201; Robert Wyness Millar, "The Mechanism of Fact Discovery: A Study in Comparative Civil Procedure" (1937) 32 Ill. L. Rev. 261, at 266-76. For this purpose, it helps to remember that early chancellors were clerics with a staff of clerics, all well versed in Roman Canonical Law. See van Caenegem, *supra*, note 51, at 45.

[136] See Watson, *Legal Transplants*, *supra*, note 4, at 100.

[137] See *supra*, note 87.

[138] See, *e.g.*, van Rhee, "Influence", *supra*, note 91.

[139] See *supra*, notes 126-129 and accompanying text.

from the focus on two or three countries. Those different approaches seem to be more closely related to features of the U.S. litigation system, although none of them were borrowed from the common law world. Those who study instances of convergence in procedural law may want to take this into account in defining their point of departure.

English Civil Justice in the Age of Convergence

Neil Andrews[*]

I. INTRODUCTION

Does the modern English civil procedural system manifest signs of moving towards civilian styles of procedure? My thinking on this, after consultation with colleagues, has yielded the following points:

(i) If there is any hint of convergence, this has occurred without any recorded study by English policymakers of the practices of civilian systems (although English-language treatments of civil law systems have emerged and are increasing);

(ii) Under the new procedural code — the *Civil Procedure Rules 1998*,[1] via the "Woolf Reforms"[2] — English judges have been granted wide-ranging powers to manage the development of civil cases, especially in large actions. This was a fundamental change because English procedure had previously avoided judicial management (although, as I will explain below, case management had emerged as a convenient and necessary technique in some branches of the High Court even before the Woolf reforms).[3] Moreover, the new

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[1] (England and Wales), S.I. 1998/3132, L.17, online: Ministry of Justice <http://www.justice.gov.uk/civil/procrules_fin/stat_instr.htm> [hereinafter "CPR"].

[2] See Lord Woolf, *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty's Stationery Office, 1996), online: Department for Constitutional Affairs <http://www.dca.gov.uk/civil/final/index.htm> [hereinafter "Woolf, *Final Report*"]; Lord Woolf, *Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty's Stationery Office, 1995), online: Department for Constitutional Affairs <http://www.dca.gov.uk/civil/interim/woolf.htm> [hereinafter "Woolf, *Interim Report*"]. For a collection of comments on the CPR system, see D. Dwyer (ed.), *The Civil Procedure Rules Ten Years On* (Oxford: Oxford University Press, 2009) [hereinafter "Dwyer"].

[3] On the CPR system, from the perspective of the traditional principle of party control, see Neil Andrews, "A New Civil Procedural Code for England: Party-Control 'Going, Going, Gone'" (2000) 19 C.J.Q. 19 [hereinafter "Andrews, 'Going'"]; Neil Andrews, *English Civil Procedure* (Oxford: Oxford University Press, 2003) 13.12, at 13.12-13.41, 14.04-14.45, 15.65-15.72 [hereinafter "Andrews, *English Civil Procedure*"].

code has changed the culture of English court-based litigation. English civil procedure has moved from an antagonistic style to a more cooperative ethos. Lawyers have adapted to the judicial expectation that they should no longer pursue their clients' interests in a relentless and aggressive manner.

(iii) English civil procedure appears to occupy a mid-range position between the distinctively robust American system and the court-oriented systems of the civilian tradition. As a result, the English system of disclosure imposes quite strict restrictions on the scope of documentary disclosure.[4] Each party must now disclose and allow inspection of the documents upon which he or she wishes to rely, or that adversely affect his or her case, or that either adversely affect or support the opponent's case.[5] Furthermore, pre-action disclosure in commercial cases is controlled to prevent arrant forms of "fishing".[6] England has yet to countenance U.S.-style contingency fee agreements in ordinary court litigation (under the American system, the attorney's fee is measured as a percentage of the size of the damages award or settlement).[7] As for the respective powers of the court and of the parties, English judges must respect the parties' procedural rights: (a) to define the issues that are in dispute; (b) to make private decisions about how the claim and how the defence, respectively, are to be factually supported (*i.e.*, by gathering, refining and presenting witness evidence and other forms of evidence); (c) where the court has given permission for expert evidence to be used in the case, to select the relevant party-appointed experts, and to procure their expert opinions for use in evidence at trial;[8] and, finally, (d) to formulate legal submissions with respect to the claim or to the

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[4] See especially CPR, *supra*, note 1, rr. 31.3(2), 31.7(2), 31.9(1). See generally Neil Andrews, *The Modern Civil Process* (Tübingen: Mohr & Siebeck, 2008), para 6.03 [hereinafter "Andrews, *Modern Civil Process*"].

[5] CPR, *id.*, r. 31.6. The court can vary the width of disclosure in special situations. See CPR, *id.*, r. 31.5(1), (2).

[6] *Id.*, r. 31.16(3) (containing a general power to order pre-action disclosure of documents against a "respondent who is likely to be a party to subsequent proceedings").

[7] For a convenient source of details concerning the U.S. system, see Richard Moorhead & Peter Hurst, *"Improving Access to Justice": Contingency Fees — A Study of Their Operation in the United States of America — A Research Paper Informing the Review of Costs*, ed. by Robert Musgrove (Civil Justice Council: November 2008), online: <http://www.civiljusticecouncil.gov.uk/files/cjc-contingency-fees-report-11-11-08.pdf>.

[8] Under the CPR system, the main rule is that no expert evidence can be presented in a case unless the court has granted permission. See CPR, *supra*, note 1, r. 35.4(1)-(3).

defence (a freedom that the parties retain), and to present statutory or case law authorities in order to support these submissions.

(iv) There is scope for learning from "soft law" projects, such as the *Approximation of Judiciary Law in the European Union*,[9] by Marcel Storme, and the *Principles and Rules of Transnational Civil Procedure*,[10] created by the American Law Institution ("ALI") and the United Nations International Institute for the Unification of Private Law ("UNIDROIT"). Each of these inquiries has endeavoured to identify shared procedural principles and possible comparative compromises between rival traditions.

(v) There is a strong argument for procedural pliability. Within Europe, national systems should not be compelled to submit to a tyrannical and rigid pan-continental template. To impose the straitjacket of international uniformity would create a two-fold risk: first, that the preliminary transnational document would be defective *ab initio*, or would soon prove to be inflexible; and, second, that rival schemes could no longer compete in a constructive and creative fashion. During the last 30 or 40 years, there has been much procedural change in England. These have not been minor adjustments; rather, they have concerned fundamental elements and institutions of civil justice. This shows the folly of abandoning national control over procedural innovation and development.

II. ENDURING FEATURES OF THE ENGLISH CIVIL SYSTEM

In 1997,[11] I explained that the pre-CPR system had six main characteristics. These remain cardinal features of the present system. It is against the background of these aspects of continuity that we will shortly consider the changes and the developments that have been engendered by the new CPR system during the last decade.

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[9] Marcel Storme, ed., *Approximation of Judiciary Law in the European Union* (Gent: Kluwer, 1994) [hereinafter "Storme, *Approximation*"]. Professor Marcel Storme is the long-serving President of the International Association of Procedural Law ("IAPL"). He retired from that office in 2007 and was succeeded by Professor Federico Carpi of Bologna.

[10] For the official text, see ALI/UNIDROIT, *Principles and Rules of Transnational Civil Procedure* (Cambridge: Cambridge University Press, 2006), at 157*ff*. [hereinafter "ALI/UNIDROIT, *Principles and Rules*"] (containing a full bibliography of works that are associated with this project).

[11] Neil Andrews, "Development in English Civil Procedure: How Far Can the English Courts Reform their Own Procedure?" (1997) 2 Z.Z.P. Int. 3 [hereinafter "Andrews, 'Development'"].

There are six enduring features. First, nearly all first-instance, English civil trials are adjudicated by professional judges who sit alone, and, therefore, lack the support of both fellow judges and a civil jury (*e.g.*, jury trial in civil matters is now confined to specific tort claims: for defamation, for malicious prosecution or for false imprisonment).[12] Second, large actions involve a segmented passage through various interim and pre-trial stages and remedies.[13] Third, litigation is conducted under the shadow of the principle that each litigant risks an order to pay the legal costs that are reasonably incurred by the other, if the latter emerges victorious from the fray.[14] This cost-shifting rule operates intensively because English legal costs are high (at the time of writing, June 2009, Lord Justice Jackson's "Civil Litigation Costs Review"[15] places the whole topic of costs and funding under scrutiny). Fourth, the professional division between different types of litigation lawyers has been maintained: overall control of the case rests with solicitors, who delegate specific tasks, such as advocacy or advice on law or evidence, to specialists, namely, barristers. Fifth, trial is a rare event because most cases settle, and the parties nearly always accommodate themselves to the wisdom of compromise. Finally, appeal is discouraged, and this is a phenomenon now starkly enshrined by the distinctively English rule that there is no right to appeal — merely the opportunity to petition the trial judge and the appellate court for permission to appeal.

III. CHANGES AND CHALLENGES ASSOCIATED WITH THE CIVIL PROCEDURE RULES (1998)

In the preface to *Andrews on English Civil Procedure*,[16] published four years after the Woolf reforms were implemented, I suggested that the cluster of the CPR and associated, but independent, developments (some of them preceding the Woolf reports) involved 12 changes. It

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[12] Andrews, *English Civil Procedure*, *supra*, note 3, at 34-06 *ff*.

[13] See, *e.g.*, Sir Leonard Hoffmann, "Changing Perspectives on Civil Litigation" (1993) 56 Mod. L. Rev. 297.

[14] Andrews, *Modern Civil Process*, *supra*, note 4, at para 9.06.

[15] A preliminary report appeared in May 2009. See Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report* (Judiciary of England and Wales: May 2009), online: <http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm>. Lord Justice Jackson's final report appeared in December 2009. See Judiciary of England and Wales, *Review of Civil Litigation Costs: Final Report*, online: <http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf>.

[16] Andrews, *English Civil Procedure*, *supra*, note 3, at Preface.

should be emphasized that not all of these were directly the result of Lord Woolf's two reports of 1995 and 1996. Three independent changes had, in fact, preceded Lord Woolf's 1999 procedural reforms. First, the interests of fiscal economy had led to the introduction of the conditional fee system.[17] As a departure from the common law prohibition on "contingency" arrangements for the provision of litigation services, the *Courts and Legal Services Act 1990*[18] permitted lawyers to agree on "conditional fee agreements" ("CFAs") with litigants. In 1995, secondary legislation introduced CFAs for personal injury litigation, and, in 1998, further rules expanded the CFA system beyond personal injury litigation.[19] Second, the *Human Rights Act 1998*[20] incorporated the *European Convention on Human Rights*[21] into English law (with effect from October 2, 2000). Third, as I explained in 1997,[22] rule changes and judicial initiative had created the framework for case management — that is, active involvement of judges, before trial, in the preparation of a case for adjudication, with emphasis on the need for proportion (and, hence, overall economy) and expedition.

The CPR system innovates, but it also builds on English trends that have developed in the last decade or more of the 20th century. Within the new system, six topics deserve special attention: access to justice, settlement, case management, expertise, restricted appeals, and, finally, the lack of queues for the court — that is, the diminishing demand for court litigation. These topics will now be briefly examined.

1. Access to Justice

Lord Justice Jackson's *Review of Civil Litigation Costs* (2009) contains numerous and quite complex recommendations for possible reform of the English system of costs and funding, and there have been national and comparative studies of these topics in the recent literature.[23]

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[17] For a clear statement of this background, see M. Zander, *The State of Justice* (London: Hamlyn Lecture Series, Butterworths, 2000), at 1.

[18] (U.K.), 1990, c. 41.

[19] On this development, see Andrews, *Modern Civil Process*, *supra*, note 4, at 9.19*ff*.

[20] (U.K.), 1998, c. 42.

[21] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 U.N.T.S. 221.

[22] Andrews, "Development", *supra*, note 11, at 14*ff*.

[23] The final report was published in December 2009: www.judiciary.gov.u (at <http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf>: P. Gottwald (ed.), *Litigation in England and Germany: Legal Professional Services, Key Features and Funding* (Gieseking: Bieldefeld, 2010); N. Andrews, "Costs and Conditional Fee Agreements in English Civil

2. Settlement

As I have explained elsewhere, most English litigants gain access to consensual justice, rather than an adjudicated decision: most cases settle without trial and, indeed, without any preliminary judicial consideration of the merits of the parties' rival positions.[24] Indeed, the English system bends over backwards to maximize the rate of settlement. Two aspects of the settlement process deserve mention here.

First, there is the distinctively English system of stimulating and enhancing settlement through the use of pre-action protocols. As I have previously explained in 2007[25] and 2008,[26] a leading aim of the English scheme of pre-action protocols is to promote early and informed settlement in order to avoid the expense and the inconvenience of formal litigation. This is rooted in the philosophy that formal litigation, notably trial, is a form of dispute resolution that should be treated as a matter of "last resort". The rules contained in the protocols are largely self-executing, and they require the disputants to cooperate. The courts become involved in the pre-action phase of litigation only retrospectively, once the proceedings have begun. The judges are then prepared to criticize parties who have failed to comply with the pre-action protocol. The courts have a wide discretion to adjust costs orders to reflect this criticism.

The second aspect concerns the procedural reinforcement of settlement offers, under Part 36 of the CPR, with costs sanctions (this system is described elsewhere,[27] and it is interesting that the ALI/UNIDROIT project endorses Canadian and English use of such settlement leverage).[28] Settlement offers, whether made by defendants or claimants, or by potential litigants, cannot be ignored. The CPR uses the leverage of potential costs liability to quicken the recipient's attention to the merits of accepting a partial victory, rather than fighting for complete vindication of the claim or the defence. The CPR's innovation was to permit claimants to make such settlement offers, and to introduce "costs leverage" in

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Litigation", in Gottwald, *op. cit*., 185-216; J. Peysner, "A Blot on the Landscape", in Dwyer, *supra*, note 2, at 157*ff*.; P. Hurst, "Costs Orders as a Case Management Tool", in Dwyer, *op. cit*., at 171*ff*.; J. Sorabji & R. Musgrove, "Litigation, Cost, Funding, and the Future", in Dwyer, *op. cit*., at 229*ff*.

[24] Andrews, *Modern Civil Process*, *supra*, note 4, at para. 10.07.

[25] For an examination of nearly 20 jurisdictions on this topic for the World Congress on Procedural Law in Brazil, see Neil Andrews, "General Report" in A. Pellegrini Grinover & R. Calmon, eds., *Direito Processual Comparado: XIII World Congress of Procedural Law* (Rio de Janeiro: Editora Forense, 2007) 201 [hereinafter "Andrews, 'General Report'"].

[26] Andrews, *Modern Civil Process*, *supra*, note 4, at 2.26*ff*.

[27] *Id.*, at 10.15*ff*.

[28] ALI/UNIDROIT, *Principles and Rules*, *supra*, note 10, r. 16.6 at 118, 120.

order to support such offers (before the CPR, such costs leverage had been confined to defendants). More recently, payments into the court have been abolished; a money offer is now enough.[29] The defendant does not need to make a payment into the court of the sum that is proposed as a payment.

3. Case Management[30]

Lord Woolf, in his reports of 1995 and 1996,[31] adopted the case management technique as the mainstay for medium-sized or large claims (*i.e.*, "multi-track" actions).[32] This included, therefore, all High Court litigation. The court must ensure that matters are properly focused, that procedural indiscipline is checked, that expenses are reduced, that progress is accelerated and that just outcomes are facilitated or awarded.

Case management has three main functions:[33] first, to encourage the parties to pursue mediation, where this is practicable;[34] second, to prevent the case from progressing too slowly and inefficiently; finally, to ensure that judicial resources are allocated proportionately, as required by "the Overriding Objective" in Part 1 of the CPR. This instructs the court and the parties to consider the competing demands of other litigants who wish to gain access to judges, whose courtroom availability represents the court's scarce resources.

Under the CPR, judges have active managerial responsibilities, which can be grouped as follows.[35] Cooperation and settlement: encouraging cooperation between the parties;[36] helping the parties to settle all or part of the case;[37] encouraging alternative dispute resolution;[38] and, if necessary, staying the action in order to enable such extra-curial negotiations

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[29] CPR, *supra*, note 1, rr. 36.1, 36.4.

[30] See Andrews, "Going", *supra*, note 3; Andrews, *English Civil Procedure*, *supra*, note 3, at 13.12-13.41, 14.04-14.45, 15.65-15.72.

[31] See Woolf, *Interim Report*, *supra*, note 2; Woolf, *Final Report*, *supra*, note 2. For commentary on these reports, see A. Zuckerman & R. Cranston, *The Reform of Civil Procedure: Essays on "Access to Justice"* (Oxford: Oxford University Press, 1995) [hereinafter "Zuckerman & Cranston"].

[32] Andrews, *Modern Civil Process*, *supra*, note 4, at 3.04.

[33] On case management and settlement, S. Roberts, "Settlement as Civil Justice" (2000) 63 Mod. L. Rev. 739, 745-47.

[34] Andrews, *Modern Civil Process*, *supra*, note 4, at c. 11.

[35] CPR, *supra*, note 1, rr. 1.4(2), 3.1(2), Pts. 26, 28, 29.

[36] *Id.*, r. 1.4(2)(a).

[37] *Id.*, r. 1.4(2)(f).

[38] *Id.*, r. 1.4(2)(e).

or discussions to be pursued.[39] Determining relevance and priorities: helping to identify the issues in the case;[40] deciding the order in which the issues are to be resolved;[41] and deciding which issues need a full trial and which issues can be dealt with summarily.[42] Making summary decisions:[43] deciding whether to initiate a summary hearing (under Part 24 of the CPR);[44] or deciding whether the claim or defence can be struck out as having no prospect of success (including making such a strike-out the automatic result of a party's failure to comply with a procedural order);[45] or deciding whether to dispose of a case on a preliminary issue;[46] and excluding issues from consideration.[47] Maintaining impetus: fixing timetables and controlling the progress of the case in other ways;[48] and giving directions that will bring the case to trial as quickly and as efficiently as possible.[49] Regulating expenditure: deciding whether a proposed step in the action is cost-effective,[50] and taking into account the size of the claim ("proportionality").[51]

Lord Woolf commented on these powers in *Biguzzi v. Rank Leisure plc*: "judges have to be trusted to exercise the wide discretions which they have fairly and justly. … [Appeal courts] should not interfere unless judges can be shown to have exercised their powers in some way which contravenes the relevant principles."[52] Appellate courts show considerable deference to judges' case management decisions, unless they are incorrect in principle.[53]

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[39] *Id.*, r. 3.1(2)(f). See also Andrews, *Modern Civil Process*, *supra*, note 4, at 11.31.

[40] CPR, *id.*, r. 1.4(2)(a).

[41] *Id.*, rr. 1.4(2)(d), 3.1(2)(j).

[42] *Id.*, r. 1.4(2)(c).

[43] On summary judgment, see Andrews, *Modern Civil Process*, *supra*, note 4, at 5.18 (on striking out, at 5.23; also, on preliminary issues, at 5.17).

[44] Practice Direction (within the CPR): PD (26) 5.1, 5.2.

[45] CPR, *supra*, note 1, r. 3.4(2). For an example of striking out for failure to comply with an "unless" order, see *Marcan Shipping (London) Ltd v. Kefalas*, [2007] E.W.C.A. Civ. 463, [2007] 1 W.L.R. 1864, at paras. 33-36 (C.A.).

[46] CPR, *supra*, note 1, r. 3.1(2)(l).

[47] *Id.*, r. 3.1(2)(k).

[48] *Id.*, r. 1.4(2)(g).

[49] *Id.*, r. 1.4(2)(l).

[50] For a suggestion that video-conferencing should be used for short appeals, see, *e.g.*, *Black v. Pastouna*, [2005] E.W.C.A. Civ. 1389, [2006] C.P. Rep. 11 (C.A.), *per* Brooke L.J.

[51] CPR, *supra*, note 1, rr. 1.4(2)(h), 1.1(2)(c).

[52] [1999] 1 W.L.R. 1926, at 1934 (C.A.).

[53] *Thomson v. O'Connor*, [2005] E.W.C.A. Civ. 1533, at paras. 17-19 (C.A.), *per* Brooke L.J.; *Three Rivers District Council v. Bank of England*, [2005] E.W.C.A. Civ. 889, [2005] C.P. Rep. 46, at para. 55 (C.A.). See also authorities cited in Andrews, *English Civil Procedure*, *supra*, note 3, at 13.61-13.68, 38.49; Zuckerman & Cranston, *Reform of Civil Procedure*, *supra*, note 31, at 23.193*ff*.

4. Expertise[54]

The three problems that were experienced before the introduction of the CPR system were: first, the tendency for expert witnesses who had been hired by a litigant to lose their objectivity and to tailor their reports to suit that party's case; second, the need to control the number of experts who were involved in a particular case, especially with a view to achieving proportionality between their use and the case's value or importance;[55] third, the need to promote "equality of arms" between rich and poor parties. Under the CPR system, the main rule is that no expert evidence can be presented in a case unless the court has granted permission.[56]

Under the CPR, English law allows matters of expert evidence to be admitted through the use of a "single, joint expert",[57] by party-appointed experts or by court assessors.[58] Use of single, joint experts is a major innovation of the CPR system. Such an expert acts jointly for the parties and is paid by both. Like all experts under the CPR system, he or she owes an overriding duty to the court: to present evidence that he or she honestly believes to be accurate.[59] However, compared with the alternate system of party-appointed experts, a single, joint expert is more likely to enjoy neutrality and objectivity. It has often been suspected that party-appointed experts' evidence might be tailored to suit the appointing party.[60]

Some suggest, however, that the problem of compromised neutrality is exaggerated. The party-appointed expert system can inject salutary skepticism, debate and "intellectual honesty", into the process of taking a "view" on debatable matters of opinion — a point emphasized by Professor Hazard in the ALI/UNIDROIT's *Principles of Transnational Civil Procedure*.[61] Furthermore, in his 1996 report on the civil justice system, Lord Woolf said that

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[54] L. Blom-Cooper, ed., *Experts in Civil Courts* (Oxford: Oxford University Press, 2006).

[55] CPR, *supra*, note 1, r. 35.1 (stating that: "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings").

[56] *Id.*, *supra*, note 1, r. 35.4(1)-(3).

[57] See Andrews, *Modern Civil Process*, *supra*, note 4, at 7.10.

[58] The court assessor system is of minor significance, as it is confined to maritime collisions, patent disputes and costs issues. See Andrews, *Modern Civil Process*, *supra*, note 4, at 7.04.

[59] *Id.*, at 7.05.

[60] See *Abbey National Mortgages plc v. Key Surveyors Ltd.*, [1996] 3 All E.R. 184, [1996] 1 W.L.R. 1534, at 1542 (C.A.), Sir Thomas Bingham M.R. (a pre-CPR case that was concerned with the appointment of a court expert under the old RSC Order 40).

[61] ALI/UNIDROIT, *Principles of Transnational Civil Procedure*, online: <http://www.unidroit.org/english/principles/civilprocedure/main.htm>, at principle 22.4. See also ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge: Cambridge University Press, 2006), at 130, principle 22.4.

> in large and strongly contested cases the full adversarial system, including oral cross-examination of opposing experts, is the best way of producing a result. That will apply particularly to issues on which there are several tenable schools of thought, or where the boundaries of knowledge are being extended.[62]

The major problem with the single, joint expert system is the danger of inaccuracy, for experts are fallible. For this reason, the better view is that English law is correct to have retained the system of party-appointed experts for large or complex litigations, or, in smaller cases, as a "safety-net" for single, joint expert evidence that is unsatisfactory.[63]

5. Permission to Appeal[64]

The experienced nature of the English judiciary (see the next paragraph for an explanation of this), as well as the intense desire for finality, explain the introduction of a remarkable modern rule: nearly all appeals require the court to give its permission (formerly known as "leave").[65] Such leave is given in response to the appellant's speedy request to the first instance court (it must normally be given within 14 days,[66] a period that cannot be extended by party agreement).[67] If the lower court refuses permission, a fresh application for permission can be made to the appeal court.

There is no "career judiciary" in England (or in Scotland). English civil judges are appointed after they have gained significant experience as legal practitioners. Subject to only a handful of exceptions, High Court judges remain former barristers. Most solicitors tend to either "burn out" through overwork or gain sufficient revenue to be uninterested in an elevation to the prestigious High Court bench.

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[62] Woolf, *Final Report*, *supra*, note 2, at 141.

[63] For details, see Andrews, *Modern Civil Process*, *supra*, note 4, at 7.13, 7.14.

[64] Sir Henry Brooke, D. di Mambro & L. di Mambro, eds., *Manual of Civil Appeals*, 2d ed. (London: Butterworths, 2004).

[65] CPR, *supra*, note 1, r. 52.3(1) (except for decisions that affect a person's liberty).

[66] CPR, *id.*, r. 52.4(2). Appeals out of time will only exceptionally be permitted. See *Smith v. Brough*, [2005] E.W.C.A. Civ. 261, [2006] C.P. Rep. 17 (C.A.).

[67] CPR, *id.*, r. 52.6(1), (2).

6. Litigation Less Popular

There has been a decrease in the amount of litigation in England under the CPR system. It is no longer possible to refer to listing crises and chronic congestion. It is widely known that the permanently resident public, including even large companies and government departments, no longer wishes to spend large sums on litigation. The CPR, although excellent in many respects, did not alter the system of remuneration for lawyers. The financial background is well known. Law firms require revenue. Litigation is a source of fees. Individual lawyers have "billing targets". Billing clients by the hour naturally leads to the search for more "billable hours" in preparation for trial.

Besides expense, there are other factors that have rendered litigation less attractive than before. Litigation is normally conducted by lawyers. As a result, the client can lose control, sometimes all control, of the action. Furthermore, the system of all-or-nothing victory at judgment, with costs liability for the defeated litigant, introduces a high risk. In short, the process is expensive, alien (and alienating) and fraught with risk. To reverse the exodus from the court system, the formal system must become much more attractive: more focused and cheaper; and judges must be more robust in the exercise of their powers to maintain clarity and temporal discipline.

IV. HARMONIZATION AND CONVERGENCE: TRANSNATIONAL PRINCIPLES

The ALI and UNIDROIT's joint project, *Principles and Rules of Transnational Civil Procedure*,[68] aims to combine common law and civil law approaches to civil litigation. The general aim of composing a "soft law" fusion of common law and civilian procedure was preceded by Marcel Storme's innovative project in Europe, a visionary search for shared civil procedural principles, which combined civil and common law learning and experience.[69]

The ALI/UNIDROIT Principles offer a balanced distillation of best practice, especially in the sphere of transnational commercial litigation. They are not restricted to the largely uncontroversial "high terrain" of

[68] ALI/UNIDROIT, *Principles and Rules*, *supra*, note 10, at 157*ff.* (containing a full bibliography of works associated with this project).

[69] Storme, *Approximation*, *supra*, note 9.

constitutional guarantees of due process. The Rules are more detailed. As Geoffrey Hazard, Jr. explains, the Rules are "merely one among many possible ways of implementing the Principles".[70]

The Principles and the Rules were drafted by a team that was appointed by the ALI and UNIDROIT. This team met for a total of 20 days in Rome, during the years 2000-2003 (the present author was privileged to be a member). The common law representatives were clearly outnumbered by a ratio of 7-2 by the civil law representatives. It is also fair to say that the civil law members of the group were strong in their resistance to certain common law ideas. Everywhere, the restraining hand of the civil law is visible, and robust common law tendencies (American and English) are curbed.

It was apparent throughout the drafting group's discussion that there were radical differences between the U.S. and English systems, and between the various civil law jurisdictions that were represented around the table. These differences made, and continue to make, into nonsense both the glib phrase "Anglo-American procedure" and the crude expression "civilian procedure".

As I have suggested elsewhere,[71] the Principles operate at three levels of importance: fundamental procedural guarantees, other leading principles and framework (or incidental) principles. Sometimes, the Principles acknowledge that there is scope for radical differences of approach on aspects of practice. Such agnosticism pervades discussion of the following topics: sanctions for procedural default, receipt of expert evidence, examination of witnesses and the system of appeal. The ALI/UNIDROIT text was widely admired by the English commentators, who found this work to be suggestive, original and admirably flexible.[72]

Although the ALI/UNIDROIT project is relatively young (completed in 2004, and published in 2006), it seems likely that it will assist greatly in the intellectual mapping of civil justice, and that it will also influence policy-makers. Some topics that might be considered at a revision council include:

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[70] ALI/UNIDROIT, *Principles and Rules*, *supra*, note 10, at 99.

[71] Neil Andrews, "Embracing the Noble Quest for Transnational Procedural Principles" in M. Andenas, N. Andrews & R. Nazzini, eds., *The Future of Transnational Commercial Litigation: English Responses to the ALI-UNIDROIT Draft Principles and Rules of Transnational Civil Procedure* (London: British Institute of Comparative and International Law, 2006), 21*ff.*

[72] A.A.S. Zuckerman, "Conference on 'The ALI-UNIDROIT Principles and Rules of Transnational Civil Procedure'" (2002) 21 C.J.Q. 322.

(i) pre-action co-ordination of exchanges between the potential litigants;[73]

(ii) multi-party litigation (the latter is a "hot" and controversial topic within the United States, Europe[74] (including England),[75] Canada, Australia and Brazil;

(iii) greater attention given to:

  (a) the interplay of mediation and litigation;[76]

  (b) costs and funding (in England, the expense of litigation is the greatest impediment to effective civil justice; Lord Justice Jackson's *Review of Civil Litigation Costs*[77] places the whole topic of costs and funding under scrutiny);

  (c) evidential privileges and immunities (notably, attorney-client privilege, protection of negotiation and mediation discussions, and the privilege against self-incrimination);[78] and

  (d) transnational "provisional and protective relief"[79] (notably, asset preservation).

V. CONCLUSION

The CPR system places considerable control of case management into the hands of judges. Before 1999, too many cases had been left to drift without official direction. These disputes had become the (lucrative) playthings of rival teams of lawyers.

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[73] See Andrews, "General Report", *supra*, note 25.

[74] C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Oxford: Hart, 2008).

[75] Neil Andrews, "Multi-party Litigation in England: Current Arrangements and Proposals for Change" (2009) 167 Revista de Processo 271 (Brazil).

[76] Andrews, *Modern Civil Process*, *supra*, note 4, *passim*; Neil Andrews, "Alternative Dispute Resolution in England" (2005) 10 Z.Z.P. Int. 1; Neil Andrews, "Mediation: A Pillar of Civil Justice in Modern English Practice" (2007) 12 Z.Z.P. Int. 1; and Neil Andrews, "I Metodi Alternativi di Risoluzione delle Controversie in Inghliterra" in V. Varano, ed., *L'Altra Giustizia* (Milano: Giuffre Editore, 2007) 1 (in Italian).

[77] See note 15.

[78] In England this is a fast-moving and delicate topic. See Andrews, *Modern Civil Process*, *supra*, note 4, at 6.26-6.40.

[79] Neil Andrews, "Towards an European Protective Order in Civil Matters" in Marcel Storme, ed., *Procedural Laws in Europe: Towards Harmonisation* (Antwerp: Maklu, 2003); Neil Andrews, "Provisional and Protective Measures: Towards an Uniform Protective Order in Civil Matters" (2002) VI Uniform L. Rev. 931 (Rome).

However, the post-1998 English case management revolution has not abrogated the fundamental principle (also widely respected within the civilian tradition) that the scope of the litigation is determined by the parties' pleadings, rather than dictated by the court. Nor has English law abandoned the principle that the parties must choose how to support their rival contentions, by adducing witness evidence and documentary evidence, and by framing and researching legal submissions (this contrasts with the more active involvement of some civil law courts). Furthermore, under the English system, witness statements and expert reports are prepared in consultation with the parties' lawyers and *without judicial supervision*. At trial, factual witnesses and experts are examined and cross-examined by the parties (normally by their advocates) in the presence of a judge, whose only task is to listen.[80] The trial judge must only ask occasional questions, and those only for the purpose of clarification. Thus, in 2006, the Court of Appeal affirmed that, if the judge were to intervene excessively, he would "arrogate to himself a quasi-inquisitorial role"[81] — something which is "entirely at odds with the adversarial system".[82]

[80] For the details of the trial, see Andrews, *Modern Civil Process*, *supra*, note 4, at 8.02*ff*.
[81] *Southwark LBC v. Kofi-Adu*, [2006] E.W.C.A. Civ. 281, [2006] H.L.R. 33, at para. 148 (C.A.).
[82] *Id.*

How Much Does Japanese Civil Procedure Belong to the Civil Law and to the Common Law?

Yasuhei Taniguchi[*]

In dealing with this topic, it is first necessary to determine the scale with which we measure the degree of the common law character and the civil law character of a particular system of civil procedure. In this paper, I follow the two most commonly accepted scales, namely: (1) the respective roles of the judge and the parties; and (2) the bifurcation between the evidentiary hearing and the preparatory stage that precedes the hearing.

It is well known that the modern Japanese system of civil procedure was originally borrowed from Germany — that is, the German *Zivilprozeßordnung*[1] of 1877-1890. Except for certain important differences, especially the non-adoption of the system of compulsory representation by a lawyer (*i.e.*, *Anwaltszwang*) in all levels of the judiciary, the 1890 *Code of Civil Procedure*[2] of Japan was an almost verbatim translation of the 1877 ZPO. This system was generally characterized by a liberal, 19th-century trend, and the parties were given the ultimate power to define, through pleadings, the substantive scope of the litigated subject, although it was a duty of the judge to actively intervene in the parties' activities by "clarifying" the matter.[3] The judge also controlled the evidentiary stage. It was the judge's primary duty, and prerogative, to examine the witnesses. Input from the parties (through their respective attorneys) during this examination process was merely supplementary.

At the same time, this (originally German) law already avoided what had been considered in Germany to be the shortcomings of the earlier

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[1] *Zivilprozeßordnung* (adopted effective December 21, 1879) [hereinafter "ZPO"]. See Peter Murray & Rolf Stürner, *German Civil Justice* (Durham: Carolina Academic Press, 2004), at 30 [hereinafter "Murray & Stürner"].

[2] *Minji Soshô-hô*, *Law No. 29* (1890) [hereinafter "1890 CCP"]. No English translation is available.

[3] For the early development of German civil procedure, see Murray & Stürner, *supra*, note 1, at 25 *et seq*.

system: *i.e.*, the parties had been required to exhaust all of the possible allegations before the next phase — for the presentation of evidence, under a system of "strict separation of the argument part of the proceeding from the reception of factual proof"[4] — could be started. Such a system burdened the court with unnecessary allegations because the parties were afraid of the preclusion of late allegations that might *conceivably* arise later on. In order to avoid this problem, the German drafters of the ZPO decided to allow the parties to produce all necessary allegations at any time before the close of the plenary hearing, and to do so in combination with (and at the same time as) the production of evidence, either testimonial or documentary.

Although I am not a legal historian myself, if my understanding (as described above) is correct, then the ancient, pre-ZPO German system was more like the common law procedure in terms of the bifurcation of the procedural stages between the allegation stage (*i.e.*, the pleading) and the evidence-taking stage (*i.e.*, the trial). Presumably, the German drafters wanted to eliminate the shortcomings of the old system by fusing the two stages together, and, at the same time, to prevent the resulting delay and injustice with the traditional judge's power of intervention.

The ZPO system that was imported into Japan in 1890 immediately revealed the inherent problems that have just been suggested — *i.e.*, delay and injustice. Because of the freedom that was provided to the parties, a chronic delay occurred because the parties, either strategically or due to ignorance and laziness, tended to present important allegations and evidence only in the later stages. Japanese judges in the late 19th century might not have possessed sufficient skill and authority to correct this by using their own power of control. It is more likely, however, that they wanted to bring a correct solution to the disputes that were before them, even if that meant tolerating some delay.

The first departure from the original German model took place in 1926.[5] Many innovative procedural devices were introduced into Japanese procedure by this reform, such as the representative suit, which was borrowed from English law. One of the most emphasized aspects of the 1926 reform related to the bifurcation of the procedural stages. The preparatory proceeding was now made mandatory, as a rule. During this proceeding, the parties were required to present all of the allegations, so that the issues that were to later be resolved by evidence would be solidly

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4 *Id.*, at 26.

5 *Bylaw No. 61: Amendment to 1890 CCP* (1926) (enforced from 1929).

fixed. No belated allegations could be accepted. On the other hand, the judicial clarification duty was reduced to the "power" to clarify, and the judge's new power to examine evidence *ex officio* was added. It is assumed that the drafters thought that if the preparation of a case was complete, then the judge's clarification would become less necessary; if, however, the parties were to neglect the production of evidence, the judge might have to take the initiative, *ex officio*, to investigate during the proof stage.[6]

This legislative purpose of the reformed procedural laws can be characterized as an effort to move Japanese procedure toward the common law bifurcation model, yet still retain the civil law feature of the strong judge. What happened in reality, however, was disappointing. The hope for a good preparation simply failed. The parties and their attorneys were not ready to live up to the law's expectation. After the conclusion of the preparatory proceedings, the parties would routinely continue to present further allegations. The judges were reluctant to dismiss these belated allegations outright because they wanted to provide the correct solution to the cases before them. Adversarial sporting theory, typical to the traditional common law procedure, was considered totally contrary to the judicial mission.

The judges facing this reality then either ignored the preclusion effect on the late allegations or used the allowed exceptions despite, or rather than, the preparatory proceedings. In either way, the legislative intention for bifurcation proved a failure. What became the standard was the so-called "May rain"[7] or "dentist" method of hearing.

Civil procedure became a series of short sessions for both making allegations and taking evidence. Because newly introduced evidence could make it necessary for either party to amend the allegation or even the claim (*i.e.*, the cause of action), the hearings became intermittent and tended to continue endlessly.[8] On the other hand, this required a strong intervention by the judge. The power of clarification was interpreted by the highest court, in contradiction of the language of the provision, to

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[6] The 1926 amendment, *id.*, was certainly influenced by the 1924 German amendment of the ZPO, which increased "the authority of the judge with some compromise to the principle of party control of litigation". Murray & Stürner, *supra*, note 1, at 31.

[7] "May rain" is a translation of "*samidare*", a term that originally referred to the "strong rain" of the rainy season. Although the rainy season now occurs in the month of June, under the current, solar calendar, it previously occurred during May of the previous, lunar calendar. The expression is used today to denote intermittent and non-persistent occurrences. In fact, in modern May, under the solar calendar, it does not rain very much in Japan.

[8] See *id.*

mean the duty of clarification. On its own, however, this was not enough to correct the situation.

Post-war legal reform under the American occupation, which started in 1945, involved some small, but fundamental, reforms of the civil procedure. It was rather natural, under the American regime, that the effort for bifurcation be continued. Considering the total failure of the pre-war reform, the adoption of preparatory proceedings became discretionary, although the preclusion of late allegations was maintained. The newly promulgated *Supreme Court Rules of Civil Procedure*[9] required the plenary hearing to be held continuously. Under the "May rain" method, however, it was held, in reality, only once in three or more months in the busy, urban courts. It was influenced by American adversarial ideology; the witnesses now had to be examined first by the parties (principal and cross-examinations) and then by the judge (which was in contrast to the previous system, in which the parties had played only a supplementary role). The judge's power to examine evidence *ex officio* was likewise deleted. The provision for the judge's power of clarification was not deleted, but judges were told not to exercise that power so that the parties would enjoy greater initiative.

The post-war reform was patently intended to make Japanese procedure more like that of the common law. It tried not only to strengthen bifurcation, but also to change the fundamental relationship of the roles between the judge and the parties. As anticipated, the reform was, again, a failure. It did not bring any change to the "May rain" practice at all. The Supreme Court did not take more than 10 years before going back to the pre-war interpretation of the clarification power as a judge's duty. Examinations of witnesses, however, had to be done by the parties (through their attorneys) because it was mandatory. The judges were then frustrated by the lawyers, who were untrained in the art of witness examination. As a result, this part of the process only consumed time, and thereby worsened the "May rain" situation. Cross-examination was often postponed until the next session (which could take place even a few months after the principal examination).

Dissatisfaction with the situation mounted, and, by the 1980s, society came to demand more efficient judicial service from the court. Practitioners

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[9] *Supreme Court Rules of Civil Procedure No. 27: Rules for Continuous Hearing of Civil Cases* (1950) [hereinafter "Rules"]. This statute was later integrated into and expanded in the *Supreme Court Rules of Civil Procedure No. 2* (1956). Under the new Constitution of 1946, the Supreme Court was given the power to promulgate rules of procedure in order to supplement the laws of procedure included in the 1890 CCP, *supra*, note 2.

who had been raised under the post-war system, with its unitary professional training of judges and practitioners together, became more competent and cooperative with the judges. Willing judges and lawyers started to initiate experiments that were aimed at developing better methods of preparation for continuous evidentiary hearings. The improvements that they sought were not necessarily analogous to the features of the common law model. The voluntary conference of the judge and the attorneys was also aimed at reaching a settlement. It was therefore commonly referred to as the "argument and settlement conference". Even where this conference might fail to produce a settlement, it would nevertheless provide a good foundation for an evidentiary hearing on significantly narrowed issues.

Pushed by these movements, a new commission — created for the purpose of considering the reform of civil procedure — was instituted within the Ministry of Justice. I was a member of this commission. One of its targets, among others, was, as before, the realization of a real bifurcation of civil procedure. The preparatory proceedings had been strengthened through the inclusion of examination of documentary evidence. This process was now expanded by a more liberalized document production order. Continuous evidentiary hearing was declared by the new, 1996 *Code of Civil Procedure*[10] itself, and not merely by the Rules, as before. Examination of the witnesses by the parties was retained as the rule, but the judge was given the power to change the order by personally initiating the examination. This possibility is particularly important in cases in which a party is not represented by a lawyer. Further, for the purposes of case management, the judge is now expected to confer with the parties in order to draw up a schedule that leads to the conclusion of the first instance.[11] Finally, the preclusion effect of the preparatory proceedings was a bit loosened, so that a late allegation must now meet with some sanctions. These sanctions include a duty of explanation for the delay in bringing the allegation and a risk of rejection (under the rationale that the presentation has not been provided in a timely fashion).

The new Code was promulgated in 1996 and enforced from January 1, 1998. It has been regarded as a success in all aspects. There were statistical surveys conducted by a group of numerous procedural academics both before the reform and several years after the enforcement of the new

[10] *Law No. 109* (1996) (enforced in 1998) [hereinafter "1996 CCP"].

[11] This possibility was added by an amendment to the 1996 CCP, *id.*, in 2003. See *Law No. 108* (2003).

law. These surveys used the same scales.[12] On May 10, 2009, there was a small symposium held on the survey results at the annual meeting of the Japan Society of Sociology of Law in Tokyo.[13] The evaluations by the panellists were generally positive in affirming the success of the reform, and this indicated a step forward, toward an expedited civil procedure. As a matter of fact, the time that was needed, from the filing of a complaint to the delivery of a first instance judgment, was significantly shortened by an average of about five months.

The statistical data are too numerous to be summarized here. Generally speaking, the goals of an efficient preparation phase and a more intensive evidentiary hearing have, to a considerable degree, been realized. In most cases, preparatory proceedings have taken place. In view of the semi-mandatory nature of the preparatory phase, this seems to be a good result. The intensity of the evidentiary hearing is not like its common law counterparts, but the "May rain" practice is, at least, now in the process of fading away. The evidentiary hearing is not as continuous as that of the common law model. More than one witness, however — including the party, in person — will often be examined and cross-examined. In many cases, either only one day, or even only one morning or afternoon, needs to be spent for the evidentiary hearing — an efficiency that was almost non-existent under the "May rain" system. Even if more than one day needs to be used, the interval between hearings is now much shorter, and the number of witnesses who are examined on each day has been increased. In short, the hearings have now become more like the "June rain" — *i.e.*, the rainy season in Japan, when it rains more frequently and more intensely than it does in May.

The common law type of evidentiary hearing (the trial) can be successfully achieved only with successful discovery of sufficient evidence from the other party. The Japanese version of discovery, which is essentially limited to the document production order, was significantly expanded in the language and the practice of the law by the 1996 CCP, and it is now available in the preparatory stage. Later additions of some

[12] Some basic pre- and post-reform data has been published in Minjisoshô Jittai Chôsa Kenkyukai, Daihyô Morio Takeshita [Civil Procedure Survey Project Group, represented by Morio Takeshita], ed., *Minjisoshô no keiryô bunseki* [*Statistical Analysis of Civil Procedure*], vol. 1 (2000), vol. 2 (2008). The Supreme Court has also published its own survey results. Saikôsaibansho Jimusôkyoku [General Secretariat of the Supreme Court], ed., *Saiban no jinsokuka ni kakaru kenshô ni kansuru hôkokusho* [*Report Concerning Review of Expedited Procedure*] (2007).

[13] No published material about the symposium is available yet.

new devices, such as pre-filing discovery,[14] have not proven very effective because of a lack of sanctions for non-compliance. There is now a renewed argument for the further expansion of some of the more effective forms of discovery. Unless and until this is achieved, a complete bifurcation must remain impossible and incomplete. In criminal procedure, the new type of criminal court — involving six lay assessors, in addition to three professional judges — was started on May 21, 2009, for the purpose of trying serious crimes. Because the assessors cannot be kept for very long, a common law type of trial is necessary. To this effect, a new system for the preparation and discovery of evidence has been introduced into criminal procedure. Although there is no possibility that the same thing will happen in civil cases, it will be interesting to watch how it functions.

The strong power of the judge to lead the whole process is retained, at least in theory. It is exercised as a power to control the progress of the proceedings by, *inter alia*, setting deadlines and fixing the time of the hearing. It is also exercised as the clarification power, through which the judge guides the substantive contents of the litigation in the proper direction. The degree of the judge's intervention, however, depends on the competency and the efficiency of the attorneys, although *pro se* litigation, which still occurs often in Japan, must be different in this respect. The clarification power can also be exercised in the so-called case management aspect. Under the new system, the initial scheduling is greatly emphasized. In short, the civil law feature of the strong judge is still maintained. A good question to consider, however, is how this is different from, and similar to, the so-called managerial judge who is now arising in the common law world as well.

A bifurcation of process was a necessity in the jury trial of the common law. It can be a commendable system anywhere, provided that the pre-trial stage and the evidence-taking are conducted efficiently and properly. If not, justice cannot be done — and, in fact, it has frequently not been done in Japan. For a long time, it was common for lawyers to close their eyes to the injustice that resulted from the "showdown" nature of their trials. They justified this by relying on the sporting theory and the principle of self-responsibility. Certain members of the bar responded

[14] Pre-filing discovery was introduced by the 2003 amendment to the 1996 CCP. See *Law No. 108*, *supra*, note 11. This amendment was intended to enable a prospective plaintiff to obtain from the contemplated defendant the information necessary to draft a better-informed complaint. The ineffectiveness of this new system seems due to the lack of sanctions imposed on non-compliant defendants.

to the challenge by training themselves to excel as good litigators, analogous to successfully competing athletes. The clients who were served by the vast number of otherwise mediocre lawyers, however, had to suffer. Judicial intervention became necessary, not only to save public costs from inefficient procedure, but also to equalize the quality of the judicial service to citizens.

In Japan, since the reception of the German law until recently, a weak bar has depended upon the judges, who have paternalistically tried to achieve just results. Under the pressure of the caseloads, the "May rain" method was a necessary result. Thanks to an increasing number of lawyers who are more independent and responsive, however, the "May rain" method is now gradually becoming more like the rain in June.[15] In common law, such lawyers were produced by the necessities of a bifurcated procedural system and non-interventionist judges. In Japan, bifurcation is not a consequence of necessity, but rather a desired goal, for the purpose of making civil procedure more efficient. The growing ranks of increasingly competent and independent lawyers have made this bifurcation possible. Thus, although the causes are different, the result is similar. The real merit of a bifurcated system can be achieved only when an extensive process of discovery is possible. Japanese procedure is similar to other civil law systems in the sense that it does not yet have such an extensive process available.

My conclusion is that Japanese procedure is well positioned at the half-way point between civil law and common law, although the original, prototypical models of both systems have already disappeared in most of the real world.[16]

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[15] See Yasuhei Taniguchi, "The Changing Image of Japanese Practicing Lawyers (Bengoshi): Reflections and a Personal Memoir" in Harry N. Scheiber & Laurent Mayali, eds., *Emerging Concepts of Rights in Japanese Law* (Berkeley: UC Berkeley Robbins Collection, 2007) 223 [hereinafter "The Changing Image of Japanese Practicing Lawyers"].

[16] For my previous writings on this and related subjects, see "Between *Verhandlungsmaxime* and Adversary System — In Search for Place of Japanese Civil Procedure" in Peter Gottwald & Hanns Prütting, eds., *Festschrift für Karl Heinz Schwab zum 70. Geburtstag* (Munich: C.H. Beck, 1990) 487; "Development of Civil Procedure in Japan: An Experiment to Fuse Civil Law and Common Law" in Kiss Daisy & Istvan Varga, eds., *Magister Artis et Boni Aequi — Studia in Honorem — Németh János* (Budapest: ELTE Eötvös Kiadó, 2003) 835; "Japan's Recent Civil Procedure Reform: Its Seeming Success and Left Problems" in Nicolò Trocker & Vincenzo Varano, eds., *The Reforms of Civil Procedure in Comparative Perspective* (Turin: Giappichelli: Editore, 2005) 91, partly reprinted in Oscar Chase *et al.*, *Civil Litigation in Comparative Context* (St. Paul, MN: Thomson West, 2007) 35; "The Changing Image of Japanese Practicing Lawyers", *id.*; "The Development of an Adversary System in Japanese Civil Procedure" in Daniel H. Foote, ed., *Law in Japan: A Turning Point* (Seattle and London: University of Washington Press, 2008).

The Turkish 2009 Draft Code of Civil Procedure, Eight Decades after the Voluntary Adoption of the Swiss-Neuchâtel Code of Civil Procedure

Murat R. Özsunay[*]

I. PRE-REPUBLIC — OTTOMAN EMPIRE (1299-1923)

Until the last half of the 19th century, the procedural law of the Ottoman Empire ("Empire") was Islamic. As such, it was administered in religious courts (Courts of Sheria). The procedure was the same in both civil and criminal cases. It should be remembered that the Ottomans, *i.e.*, the people of the Empire, were composed of multi-cultural, multi-racial, multi-religious — and in historic due course multi-national — officially recognized "*millet*"s. These were, as such, granted partial jurisdictional autonomy within their own *millet*.[1]

Following the historical milestone of the 1839 *Tanzimat*[2] (or *Imperial Edict for Reform*), which included partial secularization (*i.e.*, westernization of the law), continental European procedure and continental European substantive law began to make their appearances. An exception to this approach was the *Mecelle-i Ahkam-ı Adliye*,[3] an authentic, detailed, quasi-civil code that was based on Islamic principles, but presented in a "codified" style. It remained in force until 1926 and incorporated some procedural rules that were applicable in religious (*ser'iye*) and secular (*nizamiye*) courts.[4]

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[1] See on PC "millet" in Encyclopedia Britannica 2002 Expanded Edition DVD.

[2] See on PC "Tanzimat" in Encyclopedia Britannica 2002 Expanded Edition DVD.

[3] See on PC "Mecelle" under "Cevdet Pasa, Ahmet" in Encyclopedia Britannica 2002 Expanded Edition DVD.

[4] Delmar Karlen & İlhan Arsel, *Civil Litigation in Turkey* (Ankara: Ajans-Türk Press, 1957), at 7 [hereinafter "Karlen & Arsel"]. For details on the legal system and westernization of the

Following this period, the *French Code of Civil Procedure*[5] was voluntarily chosen as a model and its effects became evident in the following laws:

- The 1862 (IC 1278)[6] *Usulü Muhakeme-i Ticariye Nizamnamesi*[7] (or *Regulation for Commercial Procedure*), which was applicable only in (secular) commercial courts.
- The 1879 (IC 1295) *Usulü Muhakematı Hukukiye Kanunu*[8] (or *Code of Civil Procedure*) for secular commercial and secular civil courts. This code was not applicable in religious courts. The 1862 Regulation, however, continued to remain in force in certain courts of the Empire.[9]
- The 1911 *Zeyil*[10] (or *Annex*), which brought major changes to the aforementioned laws, parts of which were subsequently amended.[11]

II. REPUBLIC OF TURKEY 1923: 1927 *HUKUK USULU MUHAKEMELERI KANUNU*[12] (OR *CODE OF CIVIL PROCEDURE*)

The Republic of Turkey ("Republic" or "Turkey") was established in 1923.[13] Afterwards, it gradually became a secular state, particularly with

law during the Ottoman Empire and after the foundation of the Republic of Turkey, see Ergun Özsunay, "Legal Science during the Last Century: Turkey" in M. Rotondi, ed., *Inchieste di Diritto Comparato, La science du droit au cours du dernier siècle; La scienza del diritto nell'ultimo secolo* (Padova: CEDAM, 1976) 693, at 697. See also Ergun Özsunay, "The Total Adoption of Foreign Codes in Turkey and its Effects" in Università degli studi di Bari, Quaderni degli Annali della Facoltà di giurisprudenza, *Le Nuove frontiere del diritto e il problema dell'unificazione, II* (Milano: A. Giuffrè, 1979) 801.

5 French *Code de Procédure Civile* (1806) [hereinafter "1806 French Code of CP"].

6 Islamic Calendar ("IC"), as used in the Ottoman Empire before the Republic of Turkey.

7 [hereinafter "1862 Regulation"], Hakan Pekcanitez, Oguz Atalay & Muhammet Özekes, *Medeni Usul Hukuku*, 5th ed. (Ankara: Yetkin Yayinlari, 2006), 50 [hereinafter "Pekcanitez, Atalay & Özekes"].

8 [hereinafter "1879 Code"], Pekcanitez, Atalay & Özekes, *id.*, at 50.

9 Pekcanitez, Atalay & Özekes, *id.*, at 50.

10 [hereinafter "1911 Annex"], Saim Üstündag, *Medeni Yargilama Hukuku*, Cilt I-II, Nesil Matbaacilik (Istanbul, 2000), at 84 [hereinafter "Saim Üstündag"].

11 Saim Üstündag, *id.*, at 84.

12 No. 1086, Official Gazette: 02, 03, 04.07.1927, No. 622, 623, 624; Series: 3rd Order, vol. 8, at 1559-1656 [hereinafter "1927 HUMK" or "HUMK"].

13 The Republic was established after the defeat of the Ottoman Empire in the First World War (1918), which resulted in the invasion of the capital (from 1453 to 1923) Istanbul, and vast parts of Asia Minor (Anatolia) — *i.e.*, the core of the Empire. These events triggered the Turkish Independence War (1919-1922), which was led and won by General Mustafa Kemal Atatürk (1881-1938). Ankara became the new Capital of the Republic.

respect to its "sources" of law. Mustafa Kemal Atatürk, now the founding father of the Republic, favoured a swift and comprehensive modernization and secularization of the existing law. This was achieved through the voluntary adoption of "selected" continental European Codes, which underwent minor modifications. The changes in civil procedure, however, were not as radical. As noted above, Turkish commercial and (eventually) civil procedure had mainly been based on the French model since the 19th century.

As a result, Turkey's voluntary adoption (with modifications) in 1927 of the 1925 *Swiss-Neuchâtel Code of Civil Procedure*[14] made only relatively minor alterations to the former French-Turkish pattern, which had already been in effect in the Ottoman Empire for over half a century.[15]

Roughly one year before the 1927 adoption of the Swiss-Neuchâtel Code, the Turkish substantive law had changed. In 1926, the Civil Code — *i.e.*, the 1926 *Türk Kanunu Medenisi*[16] and the accompanying 1926 *Borçlar Kanunu*[17] (or *Code of Obligations*) — had already been adopted from Switzerland.[18] This new substantive law had called for the revision and the unification of the existing procedural law.

The Code of Civil Procedure of the (French-speaking) Canton Neuchâtel (1925) was preferred for a number of reasons:[19] it was the most

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[14] *Code de Procedure Civile (du 7 avril 1925)* [hereinafter "1925 Swiss-Neuchâtel Code"]. This Code remained in force until it was replaced with a new cantonal Code (*Code de Procedure Civile, 30 septembre 1991*) which entered into force on April 1, 1992 [hereinafter "1991 Swiss-Neuchâtel Code"]. See, *infra* note 25, also H. Yavuz Alangoya, Kamil Yildirim, Nevhis Deren Yildirim, *Medeni Usul Hukuk Esaslari*, 4th ed. (Istanbul: Alkin, 2004), at 34.

[15] Karlen & Arsel, *supra*, note 4, at 5-7.

[16] No. 743, Official Gazette: 04.04.1926, No. 339 [hereinafter "1926 MK"]. The 1926 MK took no notice of Islamic substantive law references and principles derived from the black letter and interpretation of the Koran (the main religious text of Islam), including those pertaining to family law and law of inheritance as well as foundations. It was partially modernized and totally replaced in 2001 with the new Turkish Civil Code, the *Türk Medeni Kanun*, No. 4721, Official Gazette: 08.12.2001, No. 24607 [hereinafter "2001 TMK"]. Despite a new numbering system for its articles, the 2001 TMK also follows the basic Swiss model. The modernization of the *Borçlar Kanunu* (or *Code of Obligations*), *infra*, note 17, is expected in the near future. The official draft text of the new *Borçlar Kanunu* continues to reflect Swiss influence [hereinafter "BK-T"].

[17] No. 818, Official Gazette: 08.05.1926, No. 366 [hereinafter "1926 BK"]. *Inter alia*, the Law of Companies was excluded. This was to be found in the 1926 *Türk Ticaret Kanunu* (Turkish Commercial Code) which was subsequently replaced with the 1956 *Türk Ticaret Kanunu* (Turkish Commercial Code) No. 6762, Official Gazette: 09.07.1956, No. 9353 [hereinafter "TTK"]. This Code is roughly based on the German *Handelsgesetzbuch* ("HGB") model, thanks to an influential German-Turkish law professor, Dr. Ernest E. Hirsch (1902-1995). It is expected that the 1956 TTK will soon be modernized. An official draft text is already being reviewed by all of the circles concerned [hereinafter "TTK-T"].

[18] Some "federal" features of these voluntarily adopted Swiss Codes were naturally custom-tailored for the new republican — but non-federal, central — Turkish justice system.

[19] Saim Üstündag, *supra*, note 10, at 84.

recent European Code drafted at the time; an influential professor in the Istanbul Law Faculty had studied law in Neuchâtel; and most lawyers in the Turkish 1925 Draft Commission could examine the original text easily, since they had learned French as a foreign (European) language.[20]

In the Turkish adoption, the 1927 *Hukuk Usulü Muhakemeleri Kanunu* ("1927 HUMK" or "Code"), there were a few omissions of the source Swiss-Neuchâtel Code. The provisions that were omitted were replaced with other rules that originated in different sources. Some of the existing rules of the 1879 *Usulü Muhakemati Hukukiye* were kept. Other rules were based on the German Zivilprozessordnung[21] model. In particular, rules dealing with evidence (German, *Beweismaterial*) and deeds were adopted from the French law.[22]

Following its adoption, many legislative amendments were made to Turkey's 1927 HUMK — most of them for the sake of a "speedy" trial. However, these amendments were not always sufficient or effective enough to serve their purposes, and they were sometimes criticized for having harmed the genuine integrity of the Code. Moreover, as some rules were revised and "moved" to more specific laws, they were deleted from the original 1927 HUMK.[23]

Changes in recent years to the 1927 HUMK include the following amendments:

- The right to reopen trial (*yargilamanin yenilenmesi*) will now be granted for finalized cases when the European Court of Human Rights ("ECHR") finds a violation of the right to a fair trial under article 6 of the *European Convention on Human Rights*.[24]

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[20] Since the 1950s, German and English have dominated as the foreign languages of choice among Turkish academics.

[21] Currently: *Zivilprozessordnung* of 05.12.2005 (BGBl. I S. 3202, ber. I 2006 S. 431, ber. I 2007 S. 1781, as amended) [hereinafter "German ZPO"].

[22] Pekcanitez, Atalay & Özekes, *supra*, note 7, at 50.

[23] For example, in the 1927 HUMK, *supra*, note 12, arts. 114-148 were shifted to the *Tebligat Kanunu* [hereinafter "TebK"] (or *Act on Notifications*), art. 61 was shifted to the *Avukatlik Kanunu* [hereinafter "AaaL"] (or *Act on Attorneys-at-Law*), and arts. 18, 537-545 were shifted to the 1982 *Act on International Private Law and Procedural Law*, No. 2675 [hereinafter "1982 MOHUK"], which was recently replaced, in 2007, By-law No. 5718 [hereinafter "2007 MOHUK"]. See Baki Kuru, Ramazan Arslan & Ejder Yilmaz, *Medeni Usul Hukuku — Ders Kitabi* (Ankara: Yetkin, 2006), at 78. Since the 2001 enactment of the *Milletlerarasi Tahkim Kanunu*, No. 4686 [hereinafter "AIA"] (or *Act on International Arbitration*), the 1927 HUMK provisions on arbitration (containing outdated rules that are seldom used) are solely applicable to domestic arbitration.

[24] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 U.N.T.S. 221, art. 6(1) [hereinafter "European Convention"].

- New rules have been added with regard to the admissibility, as evidence, of electronic data and documents that feature e-signatures.
- District-based courts of middle instance (*istinaf*) have been added to the two-instance civil trial system (although they are not yet operational).

The Turkish amendments were not necessarily parallel to the amendments of the source Swiss-Neuchâtel Code. In Neuchâtel, the 1925 Code was replaced with a new code in 1992.[25] In the comparative work of Turkish academics, references are still made to the (former) 1925 source Swiss-Neuchâtel Code rather than to the present 1992 Neuchâtel Code.[26]

In addition to various amendments, there were also many attempts in Turkey to "redraft" the entire HUMK, however, the Turkish Grand National Assembly ("TBMM"), *i.e.*, Parliament, did not adopt any of the Draft Codes of 1946, 1952, 1955, 1967, 1971 and 1993.[27]

III. 2006/2009 *HUKUK MUHAKEMELERI KANUNU TASARISI*[28] (OR *DRAFT CODE OF CIVIL PROCEDURE*)

1. In General

The 2006 HMK-T Drafting Commission ("2006 Commission") was composed of a number of academics, high and trial court judges, lawyers

[25] *Code de procédure civile (CPCN), Le Grand Conseil de la République et Canton de Neuchâtel, sur la proposition du Conseil d'État, du 11 mai 1988, et de la commission législative*.

[26] Baki Kuru, Ramazan Arslan & Ejder Yilmaz, *Hukuk Usulu Muhakemeleri Kanunu ve Ilgili Mevzuat* (Selected Code texts with notes), 29th ed. (Ankara: Yetkin, 2006), Neuchatel Kantonu Medeni Usul Kanunu (abbreviated as Nös. UK), at 21.

[27] HMK-T Legislative Commentary — General Part (*Genel Gerekçe*) as reproduced in: Ali Cem Budak, *Karsilastirmali Hukuk Muhakemeleri Kanunu Tasarisi* (comparatively printed Code texts, with notes, based on the pre-June 2009 HMK-T version), 2nd ed., XII Levha, Istanbul, February 2009, at 1 [hereinafter "Ali Cem Budak"].

[28] [hereinafter "HMK-T"]. As of the conclusion of this paper, the latest revised HUMK-T version was the one which had been finalized on April 15, 2009 by the Justice Commission of the Turkish Grand National Assembly ("TBMM"). This version was attached to the Report by said Commission (*Adalet Komisyonu Raporu*), dated June 2, 2009, Reg. No. 1/574, Decision No. 24 [hereinafter "TBMM JC Report"]. As of December 2009, this version was being examined by the TBMM. For the analysis of earlier versions of HMK-T, see Hukuk Muhakemeleri Kanunu Tasarisi'nin Getirdigi Yenilikler ve Bu Yeniliklerin Degerlendirilmesi (Conference papers by various writers, March 22-29, 2008, Editor: Mehmet Ertan Yardim), Kadir Has University Law Faculty & Istanbul Bar Association, Istanbul, 2008, also, H. Yavuz Alangoya, Kamil Yildirim & Nevhis Deren Yildirim, *Hukuk Usulu Muhakemeleri Kanunu Tasarisi — Degerlendirme ve Oneriler* (Istanbul: Istanbul Bar Association, 2006).

of the Ministry of Justice, one public notary and one attorney-at-law. It held numerous meetings between 2004 and 2006.[29]

The 2006 Commission examined the failed Turkish drafts of 1967, 1971 and 1993. It also reviewed a draft of the *Swiss Federal Code of Civil Procedure*,[30] which was subsequently adopted in Switzerland on December 19, 2008.[31] Further, it explored contemporary European laws of civil procedure, including, especially, the codes of Neuchâtel, Germany, Austria and France. Finally, the *ALI / UNIDROIT Principles of Transnational Civil Procedure*[32] were also translated and studied.

The HMK-T (or "Draft") of 2006 then went through revisions by other parties (a process that had been anticipated by the domestic law concerning the stages of law-making). Code articles that were subsequently inserted or deleted inevitably shifted and changed the other article numbers within the Draft. The most recent version is dated June 2, 2009, and has been finalized as a *TBMM Adalet Komisyonu Raporu*[33] (or *Report by the Justice Commission of the Turkish Grand National Assembly*). Hence, any reference made to an HMK-T article number in this paper is made to the June 2009 Draft. It is likely that the definitive text of the HMK that is eventually adopted by the TBMM will have a slightly different content as well as a corresponding last-minute article numbering scheme again.

The 2006 Commission (mother of the June 2009 Draft) aimed to preserve the basic approach of the 1927 HUMK (*i.e.*, No. 1086). It recognized the facts that the 1927 HUMK had established an 80-year-old civil procedural experience and that a voluminous Court of Cassation (*Yargitay*) jurisprudence had stemmed from this experience. Accordingly, the HMK-T has introduced some new devices and rules that retain compatibility with the known concepts of the HUMK. As such, it can be said that the HMK-T is a revision of the 1927 HUMK.[34]

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[29] HMK-T Legislative Commentary — General Part (*Genel Gerekçe*) as reproduced in Ali Cem Budak, *supra*, note 27, at 8.

[30] Schweizerische Zivilprozessordnung ("ZPO"), dated 19.12.2008 [hereinafter "Swiss Federal CCP"].

[31] The article numbers of the Swiss Federal CCP that was subsequently adopted in 2009 do not match with those of the draft that was used by the Turkish Commission.

[32] International Institute for the Unification of Private Law ("UNIDROIT") & American Law Institute ("ALI"), *ALI / UNIDROIT Principles of Transnational Civil Procedure* (2004), online: <http://www.unidroit.org/english/principles/civilprocedure/main.htm>.

[33] See, *supra*, note 28.

[34] It has been alleged that the numbering of the articles in the HUMK could not be preserved in the HMK-T because 80 of the articles in the former would no longer exist in the latter. Nonetheless, the HMK-T has retained the general structure of the HUMK.

To begin with, the HMK-T preserves the essential distinction between the Civil Court of Peace (*Sulh Hukuk Mahkemesi*) and the Civil Court of General Jurisdiction (*Asliye Hukuk Mahkemesi*). These two courts have different procedures and grant different legal remedies. On the other hand, particular attention has been given to the simplification and the unification of some established HUMK devices, such as various statutes of limitations for various cases.

The HMK-T contains a total of 458 articles. Like the 1927 HUMK, the Draft includes a (significantly revised) part on domestic arbitration[35] that is compatible with the UNCITRAL Model Law.[36] As it did in the 1927 HUMK, this part excludes the provisions that deal with the enforcement of final judgments, which are otherwise provided for in the *Icra Iflas Kanunu*[37] (or *Enforcement and Bankruptcy Code*). It should be noted that execution offices (*icra dairesi*) established under the IIK remain operational as before; the registries of the courts do not administer execution of their own final judgments. The HMK-T avoids casuistic method and detailed rules; instead, it merely sets out the basics. Rather than article numbers, which are bound to change in the years to come, cross-references within the Draft are made to the names of codified rules and/or concepts.

As a part of state policy since the Republic, Turkish formal and technical language has evolved rapidly, intentionally replacing words of non-Turkish origin (mostly of Arabic and Persian origin) with their Turkish equivalents. As a matter of principle, the HMK-T uses contemporary language. However, some established (*i.e.*, old) legal terms have been left untouched.

Some of the significant changes that were proposed in the Draft were later dropped, for various reasons, in subsequent versions. One of the reasons was that the putative HUMK was not the "proper place", considering the nature of the change in question. An example of this was observed in the proposed "compulsory representation before the court by an attorney-at-law" (*avukat*) in cases exceeding a certain monetary amount.[38]

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[35] HMK-T, *supra*, note 28, at arts. 413-450. See also Part III.3(v) in this article.

[36] Ali Cem Budak, *supra*, note 27, at 379, fn. 18. See Murat R. Özsunay, "Principles and Rules of the UNCITRAL Model Law as Essentially Adopted by the Turkish Act on International Arbitration", in C. Klausegger *et al.*, eds., *Austrian Arbitration Yearbook 2008* (Vienna: 2008), at 343-68.

[37] No. 2004, Official Gazette: 19.06.1932, No. 2128, as amended [hereinafter "IIK"].

[38] It was argued that this issue should be examined as a whole — *i.e.*, not limited to litigation before civil courts — and that the more appropriate law through which a wide-scope change could eventually be made was the *Avukatlik Kanunu*, No. 1136 (or *Act on Attorneys at Law*).

2. Some Established Concepts and Practices That Are Making Their Way into the Black Letter of the New HMK

Although they were not expressly mentioned or even named in the 1927 HUMK, there are some concepts and practices that have nevertheless been recognized in its application. These previously unwritten concepts and practices are now being identified (*i.e.*, named) and printed in the HMK-T for the sake of ensuring clarity and completeness in the new codification of the law.

For example, the wide-ranging term "interim legal protection" (*geçici hukuki korumalar*) has, until recently, been used in Turkey only by the doctrine of the same name. The HMK-T now employs this term, however, as the heading of a part[39] that covers two prescribed types of interim legal protection: the "interim measure" (*ihtiyati tedbir*)[40] and all other forms of legal protection including the recording of evidence (*delil tesbiti*, German: *Beweissicherung*).[41]

Another example is direct third party intervention (*asli müdahale*), which is provided for under article 71. According to this provision, a third party who makes a full or a partial claim on a right or a thing that is the subject of a lawsuit shall be entitled to file a petition to intervene in the lawsuit between the original litigants, as long as their (*i.e.*, initial) lawsuit is pending. When this happens, the direct intervention suit of the intervening third party and the pending lawsuit between the main litigants will be tried and concluded together. Although such direct third party intervention is accepted practice, this is the first time that the underlying doctrine has been explicitly defined amidst the rules for interventions.

As before, legal transactions that exceed a certain monetary amount can only be proven by a deed. The 2006 Commission noted that this requirement also exists in some other Mediterranean countries, such as France, Italy and Greece.

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[39] HMK-T, *supra*, note 28, Part Ten, arts. 395-412.

[40] *Id.*, arts. 395-405.

[41] However, "provisional arrest" (*ihtiyati haciz*), which is prescribed solely with regard to monetary obligations, is no longer covered (as it was, before, in the 1927 HUMK) within the HMK-T. Instead, it is traditionally found in the IIK, *supra*, note 37. Turkey adopted the IIK in 1932 from the 1889 Swiss *Bundesgesetz über Schuldbetreibung und Konkurs* of April 11, 1889 as amended [hereinafter "SchKG"]. Naturally, there are additional types of interim legal protection within the HMK-T. See, *e.g.*, *id.*, art. 412. There are also other specific provisions laid down by different Codes, such as the 2001 TMK, with respect to family and inheritance law issues.

With respect to matters of proof and evidence,[42] the HMK-T has employed the term "document" (*belge*) under a general, broad-spectrum definition that captures multiple variant meanings. In the procedural sense, a document can be anything that stores information, including electronically created data, which is capable of proving facts that pertain to the subject matter of the dispute. Naturally, not all documents have the same degree of strength in this role; some can be more convincing than others.

The HMK-T therefore differentiates between documents. In Turkey, the traditionally known deed (*senet*) is a specific type of document. For historical and practical reasons, it is not defined in the HMK-T. Roughly speaking, a piece of paper that contains text and has been signed by hand has always been recognized as a deed. As such, a deed is believed to be better capable of proving a fact when compared to certain other documents. On the other hand, a document with a secure e-signature is not a deed, but it is deemed to be a document that has "the effect of a deed".[43]

Additionally, the HMK-T now clarifies the definition of "on-site inspection".[44] To be brief, it defines this term to mean the personal observations of the judge that are based on his or her use of the five senses, either inside or outside the courtroom. During an on-site inspection, the judge may also benefit from the expertise of court-appointed expert witnesses. Further, the HMK-T obliges a person to endure an inspection when he or she has been ordered by the court to do so. This includes enforceable medical examinations to determine fatherhood.

3. Selected HMK-T Provisions That Introduce New Features

(a) Articles 30-39[45] — Further Principles of Procedural Law, Some of Them New, That Are Now Explicitly Codified

Over time, the Court of Cassation (*Yargitay*) has established several (previously) "unwritten" principles, doctrines and practices of civil procedure (*yargılamaya hakim olan ilkeler*). In the HMK-T, however, these items have now been named, defined and listed. The right to be heard before the court (*hukuki dinlenilme hakki*)[46] is an example; it

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42 HMK-T, *supra*, note 28, arts. 205-230.
43 *Id.*, at art. 211(2).
44 *Id.*, arts. 294-298.
45 *Id.*, arts. 30-39.
46 *Id.*, art. 33.

enables "equality of arms" within the scope of article 6 of the European Convention.[47]

Arguably, the most significant (and truly new) of these additions in the HMK-T is the duty to act in good faith and to tell the truth (*dürüst davranma ve dogruyu söyleme yükümlülügü*).[48] This objective duty to act in good faith (German: *handeln nach Treu und Glauben*) is an established principle of civil law, codified in the 2001 TMK,[49] and it aims to prevent the abuse of rights that are granted by substantive law. This duty has long been deemed to also be applicable to the prevention of the abuse of procedural rights. As such, the new HMK-T provision, adopted from article 52 of the Swiss Federal CCP, places the accepted principle in the black letter of the Turkish code of civil procedure for the first time.

What is more, Turkish law has not, until now, imposed a duty on the litigant parties to tell the court — or to tell each other before the court — the "whole" truth with respect to the facts upon which the case is based. Until HMK-T, in practice, neither the parties nor their attorneys had any reason to believe that they were under a personal, professional or legal duty to tell the "whole" truth when presenting the alleged facts of their respective cases. An exception to this would occur, however, if the court were to require that the submissions be given while under oath (*yemin*); under this circumstance, failure to fully and honestly disclose the facts could constitute a punishable criminal act.[50] When no such oath is required or made, however, the judge always reminds a litigant who is being personally interrogated (*isticvap*) before the court "of his or her duty to tell the truth (*gerçegi*)"[51] — but whether or not this duty should extend to the whole (*i.e.*, complete) truth is not obvious.

Unlike the Swiss Federal CCP and the Turkish HMK-T, the German ZPO requires party-declarations to not only be truthful, but also "complete" (*vollständig*).[52] Could a party who is incomplete in his or her personal statements simply say, when asked, "I do not know," and get away with it? In other words, is a party's declaration of a lack of

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47 *Supra*, note 24.

48 HMK-T, *supra*, note 28, art. 35.

49 *Supra*, note 16, art. 2.

50 Naturally, the parties' eyewitnesses (testifying under oath) have always been under a duty to tell the truth of and about the facts, although there are some exceptions to this rule.

51 1927 HUMK, *supra*, note 12, art. 230; HMK-T, *supra*, note 28, art. 179(2).

52 *Supra*, note 21, § 138(1) ZPO.

knowledge the easy way out? The German ZPO, unlike the Turkish HMK-T, allows for this kind of escape only with respect to facts that involve neither the party's own actions nor the subject of his or her own observations.[53]

The non-binding HMK-T legislative commentary (*gerekçe*) indicates that a greater degree of tolerance is granted to the parties in Turkish civil procedure: the drafters accepted and recognized the right of a litigant party to withhold certain facts that are against his or her case, and therefore provided that the litigant is entitled to choose to disclose such facts as he or she sees fit. Once a party has chosen what and how much to tell, however, this declaration should be "the truth". According to the drafters, the court shall deny and disregard a party's declaration if he or she fails to comply with this duty. Further, if a party deliberately lies to the court, he or she may then be found to have committed procedural party deception — *i.e.*, fraud (*usul hilesi, yargilama dolandiriciligi*; German: *Prozessbetrug*).

On the other hand, the *Türk Ceza Kanunu*[54] (or *Turkish Penal Code*) does not have a specific provision that defines a procedural party deception (fraud) of this kind. Nonetheless, in the opinion of a recent writer, the relevant articles that define fraud by deception (*dolandiricilik*) may already cover a litigant's deliberate act to deceive in a civil proceeding.[55]

Thus, the HMK-T adopts a middle-of-the-road approach. The litigant party must not only act in good faith, but he or she must also tell the truth. The facts that the litigant must be truthful in divulging, however, can be strategically "selected" facts, rather than all of the facts that are known to him or her. To put it simply, the HMK-T expects more truth from the litigant than does the Swiss Federal CCP, but it can tolerate less truth than the German ZPO requires.

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[53] *Id.*, § 138(4).

[54] No. 5237, Official Gazette: 12.10.2004, No. 25611, as amended [hereinafter "TCK"].

[55] *Id.*, arts. 157-159. See, Altan Heper, "Yargılama Dolandiriciliği" *Güncel Hukuk* (Journal, July 2009), at 36.

(b) Articles 1-10[56] — Subject Matter Jurisdiction (Görev; German: sachliche Zuständigkeit) of General and Specific Courts Redefined and Extended

As before, the subject matter jurisdiction of Civil Courts of Peace[57] has been based on two main criteria: (1) Disputes not exceeding a certain monetary amount (up to 5,000 Turkish liras, circa U.S. $3.330 as of late 2009), except for matters of bankruptcy, composition (*konkordato*) and "reorganization of businesses through settlement"[58] (*uzlasma*) which are covered under the IIK[59] and foundations. (2) Irrespective of the monetary amount of the subject matter, issues explicitly designated for these courts, *inter alia*, certain types of disputes related to lease/rent (*kira*) contracts which have been expanded in HMK-T.

Additionally, the HMK-T introduces, for the first time, a legislative definition and provisions for *ex parte* judicial proceedings (*çekismesiz yargi*).[60] Rather than relegating the law of *ex parte* judicial procedure to a distinct code, as is the case in some other countries, the HMK-T adopts the approach of the Swiss Federal CCP. Nearly all of the conceivable *ex parte* proceedings — the origins of which are scattered throughout various parts of different codes, including the 2001 TMK, the 1926 BK, the TTK and the IIK — are now categorized according to their subject matter and listed systematically, albeit not exclusively, within the HMK-T. Any other (*i.e.*, unlisted) issue that fits the new definition shall also be subject to *ex parte* judicial proceedings. As a rule, *ex parte* judicial proceedings fall within the subject matter jurisdiction of the Civil Courts of Peace.

The HMK-T has also redefined the subject matter jurisdiction for partial-claim suits (*kismi dava*; German: *Teilklage*).[61] Until recently, it was only possible for a claimant to file a second (*i.e.*, follow-up) lawsuit after a successful partial-claim suit if he or she had explicitly reserved the right — at the time of filing the first, partial-claim suit — to subsequently demand any additional (*i.e.*, remaining) claims.[62] This requirement could, in some

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[56] HMK-T, *supra*, note 28, arts. 1-10.

[57] *Id.*, art. 8.

[58] *Id.,* art. 8(1)a.

[59] IIK, *supra*, note 37, arts. 154-183, 285-309/l, 309/m-309/ü respectively.

[60] HMK-T, *supra*, note 28, arts. 388-394.

[61] *Id.*, arts. 5, 115.

[62] It is common practice for a plaintiff to bring, initially, only a small or specific part of a larger claim before the court. This is done in order to limit the costs of the litigation, at least at the outset of the plaintiff's claims. If the plaintiff is successful in this initial, partial-claim suit, then he or she may have the right to file a second suit — for the remaining part of his or her claims against the

cases, invoke the jurisdiction of two different courts for the same legal dispute. For example, multiple jurisdictions might be activated by the disputed amounts (*müddeabih*; German: *Streitgegenstand*) of the respective claims. The Civil Court of Peace might have jurisdiction for a smaller initial claim, whereas the Civil Court of General Jurisdiction might have jurisdiction for a larger remaining claim. As a matter of tradition, these two courts have always had different procedures; the former is a "simplified" procedure, while the latter is a "written" procedure.

The HMK-T puts an end to this dilemma. When determining the initial competent court, the reserved (*i.e.*, remaining) part of the plaintiff's claim shall also be taken into account. This means that, in most cases, the initial partial-claim suit will be filed with the immediate, first-instance upper court.

The June 2009 draft of the HMK-T introduces a new category that serves, specifically, to capture and consolidate all compensation claims for "bodily damages suffered by human beings"[63] (*i.e.*, by real person plaintiffs, rather than legal persons). The scope of such damages traditionally includes death, physical injury, disability, and pain and suffering caused, unlawfully, by the respondent. The new category distinguishes this range of claims from all other compensation claims.

The HMK-T places such claims, regardless of the amount being sought, exclusively under the jurisdiction of the Civil Courts of General Jurisdiction. As a consequence, the applicable substantive law (for the determination of the damages) and the applicable procedural law (for the litigation process) shall be unified.

This victim-oriented approach aims to eliminate the potentially uneven outcomes of similar suits (regarding bodily damages to human beings) that are tried before different national court systems on the bases of the legal nature and the status of the respondent.[64] In short, the victim of bodily damages shall now bring a civil law action — even if it is against a state legal entity or administration — before a civil court, rather than bringing an administrative lawsuit before an administrative

same respondent — based more or less on the same legal grounds. In this subsequent suit, the plaintiff is often more confident about the outcome and the eventual expense of the litigation.

[63] HMK-T, *supra*, note 28, art. 10.

[64] The present laws on compensation for "damages in general" stipulate that applicable substantive and procedural laws depend upon the nature and the function of the potential wrongdoer/respondent, rather than upon the nature or the function of the victim/plaintiff. As a consequence, all compensation claims against civil state administrations and military administrations for their alleged wrongdoings have (thus far) been brought before competent administrative courts (*Idare Mahkemesi*).

court. In this respect, claimants will benefit from a unified substantive and procedural law.

(c) Articles 11-25[65] *— Scope of Agreements on Territorial Jurisdiction: Narrowed Capacity for Selection of Venue (yetki; German: örtliche Zuständigkeit, Gerichtsstand, forum)*

Under mandatory provisions of the HMK-T, agreements between parties concerning the territorial jurisdiction of court that will resolve their dispute may now only be made between merchants and/or public legal entities. The Draft adopts a protective social approach, taking into account probable abuses by stronger parties: *i.e.*, a stronger party may compel a weaker party to accept the jurisdiction of a court that is in a *yetki* more favourable to the former. Merchants and/or public legal entities shall be allowed to opt for one or more courts for the resolution of disputes that arise between them. Unless these parties agree otherwise, only the courts that they have chosen through a so-called "negative territorial jurisdiction (venue) agreement" (*olumsuz yetki sözlesmesi*) shall have jurisdiction.

(d) Article 130[66] *— Voluntary Change of Parties (tarafta iradi degisiklik)*

The voluntary change of parties, which is presently only accepted as a matter of doctrine and not used in actual practice, will be recognized and provided for by the HMK-T. Any one of the parties of a pending case may request a change of his or her existing opponent(s), provided that the latter openly gives consent to the requested change. The 2009 amendments of the Draft further define the limits of this consent: if the request is justified by an error in substantive fact or is not contrary to good faith, it shall be granted by the judge, notwithstanding the consent of the opposing litigant(s). The same is also true when an erroneous or incomplete assertion of a litigant's identity results from a plausible misunderstanding on the part of the other litigant.

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[65] HMK-T, *supra*, note 28, arts. 11-25.
[66] *Id.*, art. 130.

(e) Articles 111-119[67] — Known and New Types of Civil Lawsuit (dava çesitleri) That Are Listed and Defined for the First Time

The HMK-T explicitly lists and defines, for the first time, a number of new and established civil suit types. Although all of these types are recognized as doctrine — and most are also established in practice — this is their first appearance in the black letter of the law. These types include performance suits (*eda davasi*; German: *Leistungsklage*),[68] declaratory suits (*tespit davasi*; German: *Feststellungsklage*),[69] suits for change of legal right or status (*insai dava*; German: *Gestalltungsklage*),[70] suits for indefinite-value claims and indefinite-value declaratory judgments (*belirsiz alacak ve tespit davasi*; German: *unbezifferte Forderungsklage*),[71] partial suits (*kismi dava*; German: *Teilklage*),[72] joinder of parties (*davalarin yigilmasi*; German: *Klagenhäufung, Anspruchshäufung*),[73] suits for alternative claims with preferred sequence (*terditli dava*), suits for performance of selective obligations unselected by the respondent debtor (*seçimlik dava*) and legal action by association or legal persons for a specific group of people, quasi-class (*topluluk davasi*; German: *Verbandsklage*).[74]

(i) New Types of Civil Lawsuits Introduced by HMK-T

Actions for indefinite-value claims and actions for indefinite-value declaratory judgments have previously been unknown to Turkish practice. These types of actions were introduced, however, in the June 2009 amendments to the HMK-T.[75] The "new" provision, which is basically a *mot-à-mot* translation from the Swiss Federal CCP,[76] allows a plaintiff to initiate an action for an indefinite-value claim when he or she cannot reasonably be expected to determine, completely and definitely, the amount or value of the claim at that time (*i.e.*, the time at which the claim is initiated). The same is true when a determination of the amount or value

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67 *Id.*, arts. 111-119.
68 *Id.*, art. 111. *Cf.* Swiss Federal CCP, *supra*, note 30, art. 84.
69 HMK-T, *id.*, art. 112. *Cf.* Swiss Federal CCP, *id.*, art. 88; German ZPO, *supra*, note 21, § 256.
70 HMK-T, *id.*, art. 114. *Cf.* Swiss Federal CCP, *id.*, art. 87.
71 HMK-T, *id.*, art. 113. *Cf.* Swiss Federal CCP, *id.*, art. 85.
72 HMK-T, *id.*, art. 115. *Cf.* Swiss Federal CCP, *id.*, art. 86.
73 HMK-T, *id.*, art. 116. *Cf.* Swiss Federal CCP, *id.*, art. 90; German ZPO, *supra*, note 21, § 260.
74 HMK-T, *id.*, art. 119. *Cf.* Swiss Federal CCP, *id.*, art. 89.
75 HMK-T, *id.*, art. 113.
76 Swiss Federal CCP, *supra*, note 30, art. 85.

of the claim would be impossible. The plaintiff does need to affirm, however, the legal relationship that gives rise to liability and a minimum amount or value. As soon (after the claim has been initiated) as it becomes possible to determine the exact or the appropriate amount of the claim, the plaintiff shall be allowed to increase the initial, minimum amount. As this increase is sanctioned and protected by the provision, it will not violate the broad, ordinary procedural prohibition against increasing an initial claim once an action is underway.

Additionally, no action for a partial claim can be initiated if and when the amount of the obligation is clearly agreed upon by the parties or otherwise undisputed. Contrary to present case law, the HMK-T does not require the plaintiff to explicitly declare in the initial petition that he or she reserves the right to make any remaining (*i.e.*, excluded) claims through subsequent actions. This means that the plaintiff's failure to explicitly reserve such a right shall no longer be deemed a waiver thereof.[77]

Finally, the HMK-T allows associations and other legal persons to file suits in their own names (in accordance with their statutes) in order to protect the interests of their members, their interest holders, or the group of persons that they represent; to determine the rights of the same; or to prevent the rights of the same from being violated presently or in the future. This new procedural vehicle, although far from the Anglo-American class action, is more or less derived from that system for the sake of establishing a mechanism that is more effective at protecting social interests.

(f) Articles 120-121[78] — Pre-requirements for Filing a Civil Lawsuit, i.e., Procedural Conditions of Action (dava sartlari, German: Verfahrensvoraussetzung)

The HMK-T consolidates most of the recognized pre-requirements for filing a civil lawsuit — which were previously scattered, in various articles, throughout the 1927 HUMK — and also adds several new provisions, the content of which is thereby introduced to Turkish procedural law for the first time. Parties as well as the court, *ex officio*, should observe these pre-requirements until the conclusion of the litigation;

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[77] Bilge Umar, "Hukuk Muhakemeleri Kanunu (HMK) Tasarisiyla Simdiki HUMK Kurallarina Getirilmek Istenen Degisikliklerin Baslicalari" in (2007) 68 Türkiye Barolar Birligi (TBB) Dergisi (Journal), at 328, para. 36 [hereinafter "Bilge Umar"].

[78] HMK-T, *supra*, note 28, arts. 120-121.

naturally the sooner they become aware of them the better it is for a well-timed conclusion of the proceedings. In particular, the effect of pending cases before other courts (*derdestlik*) has been redefined, and it is now included in the list of pre-requirements.

(g) Articles 122-123[79] *— Preliminary Objections (ilk itirazlar) Redefined*

Preliminary objections (*ilk itirazlar*; French: *moyen prejudiciel*) were initially adopted into the 1927 HUMK from the 1925 Swiss-Neuchâtel Code. These particular objections, which can only be raised by the parties during the very first stage of the litigation, generally involve the respondent's answers to the plaintiff's original petition. Unlike the Swiss Federal CCP, the HMK-T has retained this specific category of objection, although it has limited the number of preliminary objections to a minimum. Two such objections (previously under the 1927 HUMK) have now been moved into the list of pre-requirements for filing a civil lawsuit,[80] explained in Part (f), above.

(h) Article 171[81] *— Prejudicial Questions (bekletici sorun) Explicitly Defined*

The HMK-T provides, for the first time in codified Turkish civil procedural law, specific provisions that deal with prejudicial questions. To summarize the effect of these provisions: if, within a pending dispute, there is a difficult and central issue that needs to be resolved, and this issue is already in the process of being resolved before a different court or administrative authority — the outcome of which could automatically determine the outcome of the pending dispute — the court will give each of the litigants a chance to make an application to await the result. If a concerned litigant makes such an application in due time, the court will then wait for the outcome of the other case before proceeding.

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[79] *Id.*, arts. 122-123.

[80] *Id.*, art. 120(1)ğ and 120(1)ı, formerly listed as "preliminary objections" in HUMK art. 187(1)1 and 187(1)4.

[81] *Id.*, art. 171.

(i) Article 126[82] *— Stipulated Advance Payments for Future Litigation Costs*

It is common to observe a waste of litigation time in the current practice of Turkish courts due to delayed deposit of even minor litigation costs which may arise. A stipulated advance payment (or "pre-payment"), by the plaintiff, for the full and total costs of subsequent (*i.e.*, future) litigation is a measure that the HMK-T has taken to avoid this problem. The plaintiff must deposit such an advance payment when he or she files a new lawsuit with the court. At that time, the court shall calculate the sum of the payment as an approximate estimate of the costs that are likely to be involved. Additionally, whenever a litigant generates further costs through the collection and submission of evidence, the plaintiff must deposit a corresponding payment within a definite time frame (*kesin sure*) prescribed by the court.

(j) Articles 143-148[83] *— Pre-examination (ön inceleme) as a Distinct and Obligatory Procedural Stage*

Pre-examination (*ön inceleme*), as a distinct and obligatory procedural stage, is a new entry in Turkish procedural law. The current procedure slows down when courts begin to examine the evidence and assess the legal arguments, and this happens even before all of the relevant evidence has been collected, and, often, while party-controlled preparations and submissions are still being completed. Therefore, the HMK-T foresees an obligatory pre-examination stage in which disputes will be identified, and issues — such as the above mentioned pre-requirements for filing a civil lawsuit, *i.e.*, procedural conditions of action (*dava sartlari*) and procedural preliminary objections — will be duly dealt with *before* the commencement of the investigation (*tahkikat*) stage (that is, before consideration of the merits of the case). A judge shall be held liable if he or she acts otherwise.

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[82] *Id.*, art. 126.
[83] *Id.*, arts. 143-148.

(i) Encouragement of Amicable Settlement During the Pre-examination Stage

During the new pre-examination stage, the judge shall, in most cases, encourage the parties to reach an amicable settlement (*sulh*). In the 2006 version of the HMK-T, the judge was also empowered to encourage the parties to resort to mediation (*arabuluculuk*). The June 2009 version eliminated this possibility, however, under the rationale that there is not yet a specific law in place to regulate mediation processes.[84]

Whether voluntary or mandatory, pre-court, pre-trial alternative dispute resolution ("ADR") mechanisms, including domestic arbitration, do not have deep roots in the republican history of Turkey. Generally speaking, there is, for the moment, no obligation on potential litigants to resort to ADR methods prior to filing a civil lawsuit before the state courts.[85] The present HMK-T does not aim to change this; it may, however, be amended to introduce judge-encouraged, voluntary mediation in the pre-investigation stage, if and when the recent specific draft Act on mediation is also adopted.

(k) Article 158[86] *— Cross-examination by the Parties' Attorneys at Law Is Allowed*

Until recently, there has been no tradition in Turkey of lawyer-performed cross-examination, in either criminal or civil cases. Previously, all parties and their lawyers, and even the public prosecutor, had to ask the judge to pose certain questions to the person being heard in the courtroom. If the judge considered such a question to be proper, he or she would usually either abridge or rephrase it and then proceed to ask it as his or her own question. In this way, the judge expected that the answer would be given directly back to the bench. If the person giving the answer turned to face the original source of the question — *i.e.*, one of the

[84] Various features of an initial draft Act on mediation that will cover "voluntary-only", out-of-court settlement methods (*i.e.*, other than arbitration) are currently being heavily debated. Some bar associations seem to resist the idea that laypersons (*i.e.*, non-lawyers) who are rapidly trained and successful in a specific style of examination may soon qualify to be active in the general arena of dispute resolution mechanisms — a realm that has long been considered by many to be traditionally (and legally) reserved for qualified lawyers.

[85] The well-known exception is the *Tüketicinin Korunmasi Hakkinda Kanun* (or *Consumer Protection Act*), No. 4077, Official Gazette: 08.03.1995 No. 22221, as amended [hereinafter "TKHK"]. Under the TKHK, potential litigants are required to go through a mandatory pre-court trial stage before a consumer protection board.

[86] HMK-T, *supra*, note 28, art. 158.

litigants' lawyers — he or she might be orally warned by the judge to look straight at the bench. An observer of this process could be forgiven for developing the impression that proper and relevant questions could only be asked by the presiding judge, who would sometimes appear to lack enough time and curiosity to thoroughly and vigorously do so. Moreover, most attorneys were neither specially trained for, nor enthusiastic about, getting personally involved in the tense oral confrontation of direct questioning.

Cross-examination, as a procedural right (*i.e.*, rather than as a procedural request, subject to the permission of the judge), was first introduced in the 2004 *Ceza Muhakemesi Kanunu*[87] (or *Code of Criminal Procedure*). Until the 2009 amendments of the HMK-T, it was unheard of in Turkish civil procedure. To my surprise, the general summary on the first pages of the June 2009 TBMM Report,[88] which attempts to list the significant changes that were made by the 2006 Commission, does not mention the introduction of cross-examination in the HMK-T. One can only discover this change through either a systematic, article-by-article, parallel comparison of the 2006 and 2009 HMK-T draft versions, or an accident of coincidence.

Under the 2009 HMK-T, the attorneys of litigants — as licensed legal professionals who take part in the court hearings — shall have the right, provided that they observe the discipline of the court hearing, to directly question any eyewitness, any court-appointed expert witness, and any other person who is formally summoned to appear in the court hearing. The litigants themselves, being laypersons (and, possibly, emotionally involved), shall only be allowed to ask their questions through the judge, however.

When an objection is raised against any question that has been asked, either by the attorneys or by the litigants, the judge shall decide whether the objection is sustained or denied (*i.e.*, overruled).

Finally, the HMK-T provides that each member of the bench may also ask his or her own questions, and these may be directed to any and all persons before the court.

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87 No. 5271, Official Gazette: 17.12.2004, No. 25673 [hereinafter "CMK"].

88 TBMM JC Report, *supra*, note 28, at 128-29.

(l) Articles 231-245[89] *— The Court-ordered "Complementary Oath" (tamamlayici yemin) Is Abolished: The Wording of the Oath Is Secularized*

The HMK-T does not adopt the so-called complementary oath that a litigant might, under exceptional circumstances and on the initiative of the court, be ordered to give. Under the 1927 HUMK, this device has been available only when the existing evidence is either inconclusive in nature, or found by the judge to be unconvincing or otherwise insufficient. Such oath shall only be tendered, therefore, at the close of a case. Under the HMK-T, such inadequate or weak evidence can only be supported by further evidence.

Further, a new oath will be instituted in the HMK-T, and its wording will be more secular than that of its predecessor. It will depart from a direct reference to the concept of "*Allah*" (the common Islamic name for God). Instead, a person who testifies before the court will be expected to swear on his or her good name, honour, and "all my beliefs and values which I consider sacred [*kutsal*]".[90]

(m) Articles 272-293[91] *— Status and Responsibilities of Court-appointed Expert Witnesses Revised*

The HMK-T introduces rules for court-appointed expert witnesses that are parallel to provisions in the Turkish Criminal Code[92] ("CMK"). Expert witnesses are to be selected from annually renewed lists that are prepared by Justice Commissions under District Civil Courts (which are not yet operational; see below). While the 1927 HUMK did not require expert witnesses to take an oath, but left this measure optional — at the discretion of the judge — the HMK-T mandates a compulsory oath before the local Civil Justice Commission. Further, expert witnesses are now deemed to serve as civil servants in the course of their activities.[93]

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[89] HMK-T, *supra*, note 28, art. 229, compare HUMK arts. 346, 352. HUMK arts. 355-362 are omitted in HMK-T.

[90] *Id*, art. 239. In my opinion, it could be argued that even the term "sacred", which is used as a sort of substitute for the precise religious mandate of the previous oath, nevertheless recalls a religious significance or otherwise refers to a sense of dogmatic, non-human and supreme morality that an individual, in this day and age, need not possess in order to attach significance to his or her own individual beliefs and values. I believe that the change is, nevertheless, a step forward, that is, in the right direction.

[91] HMK-T, *supra*, note 28, arts. 272-293.

[92] CMK, *supra*, note 87, arts. 62-73.

[93] Legislative commentary (*gerekçe*) to HMK-T art. 282 (art. 280 of the previous version).

Their liabilities — which have been refined and shall now be comparable to the liabilities of judges in the 2009 Draft amendments — include the keeping of secrets.

Where a report that has been drafted by a court-appointed expert is incorrect, either by deliberate design or as a result of gross negligence, and this causes a litigant to suffer damages, the state undertakes to compensate the litigant for these damages. The 2009 amendments to the Draft make it compulsory for the state to then demand from the offending expert(s) the reimbursement of this compensation.

Since most courts in Turkey are currently overloaded with pending cases, the time that a judge may take to personally examine a file is very limited. The time pressure on judges with backlogs inevitably leads them to appoint expert lawyers for the purpose of interpreting general matters of Turkish law. Although these experts require no legal expertise or specialization that extends beyond what a judge can be expected to possess, most judges simply do not have the time to research and determine these matters on their own. As a consequence, some judges tend to solicit and make use of non-binding written opinions by expert lawyers in the legal reasoning of their judgments. The HMK-T re-emphasizes the principle of refraining from appointing such expert lawyers unless it is absolutely necessary. In my opinion, this rule would only achieve its purpose if and when there are enough judges, such that each judge has fewer files on his or her desk and, thus, more time to deal with the legal considerations of each case.

(n) Article 299[94] — Active Role of (Non-appointed) Party-selected Expert Witnesses (uzman) Recognized

As an optional supplement to the testimony of court-appointed expert witnesses, the HMK-T explicitly allows the litigants to submit to the court a report (*uzman görüsü*) that contains scientific opinions from an expert witness (*uzman*)[95] of their own choice. The core idea behind this procedural element has been adopted, more or less, from the Anglo-American legal tradition.[96] A party who opts to make use of this

[94] HMK-T, *supra*, note 28, art. 299.

[95] "*Uzman*" is a generic Turkish term that means "expert". The Anglo-American party-selected expert witness has been translated, in Turkish legal literature, as "*taraf bilirkisisi*" or "*uzman tanik*". The HMK-T, however, does not adopt any of these terms.

[96] Bilge Umar, *supra*, note 77, at 339, para. 93.

provision cannot ask the court to grant him or her extra time for the sole purpose of obtaining the report.

After a party-selected expert witness report has been submitted by one of the litigants, the judge may, either upon request or *ex officio*, summon the authoring expert to be heard at a court hearing. During this hearing, the judge and the parties may ask the party-selected expert witness any necessary questions. If a party-selected expert witness fails to appear before the court after he or she has been duly summoned, then the court shall not assess his or her report on the file.

The HMK-T neither requires party-selected expert witnesses to take a compulsory oath, nor provides a discretionary power to compel an oath when it is deemed necessary. Finally, a party who solicits an expert witness report must bear all of the costs related to that report (and, if necessary, the subsequent hearing in court). The court does not take these costs into account when it calculates the sum total of litigation expenses at the conclusion of the proceedings.

(o) Limits of the Use of New Technologies

(i) National Judicial Network Project (*Ulusal Yargi Agi Projesi*)[97]

The already operational National Judicial Network Project ("UYAP") is a government "informatics system" that has been prepared by the Ministry of Justice.[98] More and more local courts enter, upload and save their data — which includes scanned documents for pending case files — on UYAP's central servers. As long as the lawyer (*avukat*) possesses a secured e-signature and is registered with UYAP, he or she can, through an individual account, access and examine online data and scanned documents within the case files that he or she is associated with. Through UYAP, lawyers will soon be able to lodge an action online, before any court. Fees and advance payments for litigation expenses will also be payable online, utilizing officially designated e-banking. Finally, electronic versions of the documents that are required by the HMK-T have become an acceptable alternative to traditional, physical documents (*i.e.*, hard copies). Through UYAP, these electronic documents can be prepared and served on the relevant recipients electronically, using secured e-signatures. Such e-documents will be deemed to have the same effect as physical documents.

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[97] National Judiciary Informatics System, online: <http://www.uyap.gov.tr/english/index.html> [hereinafter "UYAP"].

[98] *Id.*, online: General Information <http://www.uyap.gov.tr/english/genelbilgiler/genelbilgi.html>.

(ii) Article 155[99] — Live Audio-visual Transmissions into the Courtroom

The use of new technologies, which is generally subject to the request and the approval of the parties, should enable speedy and cost-effective trials. Live audio-visual transmissions into the courtroom from a remote location can only be used with the mutual consent of the litigants and the permission of the court. Accordingly, litigants, their attorneys at law, eyewitnesses and court-appointed expert witnesses may be heard without being physically present in the courtroom. A live audio-visual transmission, however, may not be as effective as an in-person presence. This is especially true when one considers the absence of live and direct eye contact, which is sometimes essential for the purpose of evaluating the credibility of the person being heard. Therefore, the parties shall not be compelled to agree to the use of such transmissions.

Although the consent of the litigants and the permission of the court are normally indispensable requirements for an audio-visual transmission, the HMK-T makes an exception[100] for faraway litigants who are residents of the distant locality from which they are compelled to participate. When such a litigant has to be personally questioned — or interrogated (*isticvap*) — by the court, this may be done through a live audio-visual transmission, provided that it is technically possible (*i.e.*, the technological capacity must, of course, exist at the litigant's remote location). In such a case, there is no need for the consent of the parties or the permission of the court. Otherwise, the live audio/visual transmission shall be made from the local court of the distant locality, and that court shall act as proxy (*istinabe*).

Finally, the HMK-T provides that, under exceptional circumstances, an oath (*yemin*) may be taken before a court through a live audio-visual transmission into the courtroom from a remote location. The person who is taking this oath must be a resident of another city (*il*) in Turkey, and that particular locality must have facilities with the technological capacity to make such a transmission.[101] In this matter, the HMK-T makes no express reference to the consent of the litigants or the permission of

[99] HMK-T, *supra*, note 28, art. 155.
[100] *Id.*, art. 178.
[101] *Id.*, art. 242.

the court. Otherwise, the oath-taker will be expected to take the oath before the local court that is acting as proxy.[102]

(iii) Article 159[103] — Audio-visual Recordings of Court Hearings

A court may order the audio-visual recording of a hearing when it deems that this measure is essential, under the circumstances, for an effective trial. Such court-ordered recordings are for the practical use of the court and the litigants only, and they are not to be disclosed to the general public.

In an unprecedented addition to Turkish procedural law, the HMK-T now explicitly prohibits all persons, including members of the media, from making unauthorized photographic, audio or video recordings of court hearings. Without proper authorization, making such a recording shall constitute a punishable act under the TCK.[104]

(iv) Article 216[105] — Secured Electronic Signature as a Document (*güvenli elektronik imza*)

If an item of data has been secured with an electronic signature, and a party denies the authenticity of the item and/or the data therein, then that party shall be heard by the judge first (*i.e.*, prior to hearing the evidence that is provided by the data). If the judge cannot reach a conclusion about the authenticity of the data, then court-appointed expert witnesses shall examine it.

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[102] See the Draft Legislative Commentary on the HMK-T, art. 242 (art. 239 in the previous version as published by Ali Cem Budak, *supra*, note 27, at 219). As a comparative law example, it cites the ZPO, *supra*, note 21, §§ 128(a), 479. *Cf.* ZPO, Title 11, §§ 478-84 (*Abnahme von Eiden und Bekräftigungen*). These Title 11 provisions do not allow an oath to be taken through a live audio-visual transmission.

[103] HMK-T, *supra*, note 28, art. 159.

[104] TCK, *supra*, note 54, art. 286.

[105] HMK-T, *supra*, note 28, art. 216.

(p) Types of Trial Procedures Reduced in Number and Redefined: Articles 124-192[106] *— "Written" (yazili) Procedures; Articles 322-328*[107] *— "Simplified" (basit) Procedures*

The HMK-T abolishes two of the four trial procedures that were established under the 1927 HUMK — specifically, the accelerated (*seri*) and the oral (*sözlü*) procedures. During these procedures, lawyers would often request extensions of the short procedural time limits that were granted by the courts. As a consequence, the legislative purpose for these procedures, which had been to enable relatively speedy trials, was defeated. As a result, these procedures did not differ much from one another in actual practice.

The remaining trial procedures, which were inherited from the 1927 HUMK by the HMK-T, were the standard written (*yazili*) trial procedure and the simplified (*basit*) trial procedure. In comparison to the written trial procedure, the simplified trial procedure not only facilitates an efficient process — it *compels* the judge and the parties to proceed in a speedy manner. To name a few differences: certain procedural stages can be combined; the initial, written correspondence between the litigants is limited (*i.e.*, in number of instruments); the subsequent submissions to the court are oral; and the periods between the court hearings are shorter.

(q) Articles 347-366[108] *— The Recent Re-introduction of a Middle Instance (istinaf) to Be Kept and the Three-instance Civil Procedure to Finally "Enter into Force"*

The Ottoman Empire utilized a three-instance civil court system, which featured middle-instance (*istinaf*) courts. However, since the early years of the Republic of Turkey, and under the 1927 HUMK, there have been only two instances: the local, first-degree trial courts and the overloaded Court of Cassation (*Yargitay*) in Ankara. The Court of Cassation also serves as a court of appeal, thus assuring that laws are interpreted the same nationwide as well as examining the merits of individual cases from local courts of first instance.

After a *Yargitay* Civil Law Chamber judgment given upon an appeal, a request may be made to the same Chamber for a rectification of its own judgment (*karar düzeltme*). In this role, the *Yargitay* can hardly be

[106] *Id.*, arts. 124-192.
[107] *Id.*, arts. 322-328.
[108] *Id.*, arts. 347-366.

identified as a third instance court because the very same (appeal level) justices will return to and examine their own judgment upon its examination for rectification (quasi / simulated third-instance). This inevitably creates a backlog for the *Yargitay*.

In recent years, an amendment has been made to the 1927 HUMK in an attempt to (re-)introduce appellate courts of middle instance (*istinaf*). Designed as district (*bölge*) civil courts that will operate in the space between the trial courts of first instance and the *Yargitay*, their intended purpose is to filter and thereby decrease the flow of case files to the Capital. Unfortunately, however, these *istinaf* district courts are not yet a *de facto*, let alone operational, establishment.

The drafters of the HMK-T did not need to make any changes to the content of the provisions that describe the current three-instance system (which seems to exist only on paper, anyway). The HMK-T simply adopted the (currently non-operational) *istinaf* provisions directly from the HUMK, necessarily restructuring and renumbering them in the process of assimilation.

(r) Articles 452, 157[109] *— Strengthened Discipline Measures: Monetary Fines and Imprisonment*

The HMK-T has introduced enhanced disciplinary measures that include court-ordered fines (*disiplin para cezasi*) and even imprisonment (*disiplin hapsi*). The former is meant to discourage disruptive behaviour that is conducted in bad faith with the aim of compromising the effectiveness of the proceedings. The latter is meant to preserve the order that is necessary in the hearings. Under the 2009 version of the Draft, attorneys at law are exempt from these disciplinary measures. Finally, for the sake of effectiveness, the HMK-T requires the immediate execution of such court-ordered sentences (*i.e.*, without delay).

(s) Article 308[110] *— Certified Judgment Obtained Without Payment of the Remaining Judgment Fee (bakiye ilam ve karar harci)*

Until recently, in Turkey, when the winning party in a litigation needed a certified final judgment, he or she had to first ensure that payment had been made, in full, for any and all of the remaining judgment

[109] *Id.*, arts. 452, 157.
[110] *Id.*, art. 308.

fees owed to the registry of the court (and, hence, to the state)[111] under the Law of Charges (*Harçlar Kanunu*).[112] In practice, this usually meant that the winning plaintiff had to come up with enough money to pay not only for his or her own (possibly modest) portion of the remaining judgment fees, but also for the losing respondent's (often much larger) portion. The plaintiff, after paying the respondent's portion of the fee for the sake of obtaining the certified judgment, had to then demand reimbursement of this payment from the respondent. However, if the winning plaintiff did not have enough money to cover any and all of the remaining judgment fees, the registry of the very court that rendered the judgment (in the plaintiff's favour) would refuse to certify its final judgment. This hindered the enforcement of that judgment with the support of the competent execution office (*icra dairesi*), which can only be utilized if the final judgment can be submitted in certified form.

As one can imagine, this dilemma (which is something of a "catch-22") has raised fair trial issues that include, in particular, concerns about access to justice. Thanks to a Turkish applicant, this problem recently found its way to the European Court of Human Rights ("ECHR") in *Ülger v. Turkey*.[113] In its judgment, the ECHR held, *inter alia*, that non-enforcement of the final judgment due to the winning litigant's incapacity (or failure) to fulfil the legislated pre-payment requirement had violated the applicant's right to a fair trial under the European Convention.[114] Nonetheless, some local courts and Civil Law Chambers of *Yargitay* failed to correctly interpret the "general" binding effect of this ECHR judgment. The offending provision of the *Law of Charges* ("HK") remained in force

[111] When the court renders a final judgment, a so-called "remaining judgment fee" is to be paid to the state for the conclusion of the legal services (under the rationale that these services have been provided by a state court). This fee — which may be viewed as a kind of tax — is generally based on the amount (or value) of the legal dispute and the respective moneys that have been awarded, in the judgment, to the litigants. Naturally, the losing party will bear the greater portion of this fee. A winning plaintiff will most likely wish to have the judgment enforced as soon as possible, and, for this purpose, he or she will need to obtain a certified copy of the judgment from the court registry. A losing respondent, however, will rarely have much interest in the aftermath of the trial. Often, therefore, there is no pressing need for such a respondent to obtain a certified copy of the final judgment. Nevertheless, the state must collect the judgment fee from all of the litigants: often more of the balance from the loser and comparatively less from the winner. Similar systems may exist in various other countries.

[112] No. 492, Official Gazette: 17.07.1964, No. 11756, as amended [hereinafter "HK"], art. 28(1)a.

[113] Application no. 25321/02, Judgment, Strasbourg, June 26, 2007.

[114] European Convention, *supra*, note 24, art. 6, § 1.

until the provision was declared unconstitutional, thus null and void by the Turkish Constitutional Court (or *Anayasa Mahkemesi*.[115]

The 2009 version of the HMK-T, too, will make it possible for each litigant to obtain a certified copy of the final judgment — even without paying for his or her own portion of the remaining judgment fees — and would anyway have rendered the said contrary HK provisions inapplicable. Naturally, the state will not be hindered from collecting any of the remaining fees from the specific, individual litigants who owe them.

(t) Article 336[116] *— Attorneys' Fees (Vekalet Ücreti) the Litigants May Eventually Recover from Each Other Ruled by the Court in the Name of the Litigants, Yet for the Account of Their Own Attorneys*

As globally known, when litigants pay out of their pockets for their own lawyer's services in the course of the court proceedings, the costs of these services (*i.e.*, the lawyers' fees) are — at least, based on some official point of reference — calculated by the court in the final judgment. The courts, moreover, rule to what extent such costs are to be borne, *i.e.*, distributed, among the litigants, generally based on their comparative success in the given case.[117]

One might also assume that such lawyers' fees as calculated by the court would eventually be paid to the winning litigant. While this is the case in most other countries, it is not the case in Turkey. Even when the winning litigant collects from the losing litigant an amount for the purpose of paying his or her lawyer's fees (*i.e.*, the winning litigant's "costs"), at no time does this collected amount belong to the winning litigant; rather, it belongs to that litigant's lawyer. The lawyer's right to

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[115] E. 2009/27, K.2010/9, 14.1.2010, Official Gazette, No: 17.03.2010-27524.

[116] HMK-T, *supra*, note 28, art. 336.

[117] In Turkey, as is the case in many other countries, the courts also calculate, *ex officio*, all litigation costs when they render their final judgments. These calculations include the fees that are to be paid to each litigant's lawyer, based on his or her relative success, respectively (that is, based on the result). Often, a court will then require the losing litigant to provide payment for the sum of these fees. In such calculations, Turkish courts shall not take into account the actual amount that each litigant has agreed to pay his or her own lawyer, which, as a contract between the two, is subject to the 1926 BK (*Code of Obligations*). Instead, the courts will simply refer, for their purposes, to an official catalogue of minimum lawyers' fees. This catalogue, however, is not prepared by the Bar Associations, which have their own catalogues (containing higher recommended fees). It is quite common for a litigant to agree to pay a lawyer much more than the lawyers' fee that is calculated by the court. It should finally be noted that, under HMK-T as in HUMK, in exceptional cases where the respondent has acted in bad faith or the plaintiff has initiated a manifestly ill-founded action, the court may, in its final judgment, order the concerned litigant to also pay the other the actual amount as individually agreed between the latter and his or her lawyer in full or part (art. 335(1)).

claim this amount in the final judgment — which may elsewhere be deemed as a double dipping — is granted by the *Avukatlik Kanunu*[118] (or *Act on Attorneys at Law*). Therefore, even a winning litigant cannot recover from the losing litigant a part of the fees that the former has already paid to his or her lawyer. Any amounts that the court calculates as the lawyer's fees will, at all times, belong only to that lawyer to whom the fees belong. Thus, the winning lawyers are paid both by their own litigant clients and by their opponent litigants. This naturally means that the winning litigants can never receive or keep any court-calculated fees to be paid by the losing litigants, *i.e.*, even a winning litigant never recovers his or her lawyers' fees from anyone. This globally uncommon right of lawyers in Turkey to be paid by opponent losing parties who are not their own clients may be ethically arguable. However, this prospect may be motivating for the lawyers, *i.e.*, knowing that they will make additional money if they win, and such boosted motivation may — at the end of the day — be also beneficial for their own clients.

The black letter of the present 1927 HUMK,[119] however, is not clear enough about how the lawyer's right to claim these fees under the *Avukatlik Kanunu* ("AK") should be implemented within the existing procedure. As a consequence, there has been a vast discussion, since 2001, about whether the final judgment of the court should affirm that the lawyer's fees, as calculated by the court, should be paid in favour of the winning litigant or, alternatively, in favour of the winning litigant's lawyer. It has been argued that the court cannot render judgments for or against the litigants' respective lawyers, but only with respect to each of the litigants themselves; the rationale behind this argument is that the lawyers are not actually party to the case before the court — only the litigants are. This view has been criticized (mostly by attorneys at law) for jeopardizing the lawyer's right to successfully collect the court-calculated fees from the losing litigant. The risk of failing to collect these fees is especially pronounced when the lawyer's client is reluctant or unwilling to initiate the collection procedure because he or she is hesitant to pursue the matter with the erstwhile opponent. If, in the result, no fees are collected, the client will be unable to pass them on to the lawyer to whom they are owed by law.

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[118] No. 1136, Official Gazette: 07.04.1969, No. 13168, last amended on May 5, 2001, art. 164 [hereinafter "AK"].

[119] See 1927 HUMK, *supra*, note 12, arts. 417, 423(1)6.

The 2009 version of the HMK-T ends this discussion by requiring payment of court-ordered fees to the winning litigant and not to his or her lawyer.[120] As long as article 164 of the AK remains untouched, however, it would appear that these fees will continue to "belong to" the winning lawyer rather than to the winning litigant.

(u) Articles 52-55[121] — Direct Liability of the State for the Acts of Judges

According to the 1927 HUMK, a litigant can sue for damages if he or she suffers as a result of either intentional, wrongful acts or gross negligence on the part of a judge in the course of that judge's judicial services concerning the litigant.[122] Offending acts are specifically listed in the 1927 HUMK.[123] The 2009 version of the HMK-T retains most of the same grounds for compensation.[124]

Under the 1927 HUMK, an offending judge should be sued personally. Under the 2009 version of the HMK-T, however, this will change, and any lawsuit for damages that arises from the wrongful or negligent conduct of a judge will be filed not against that judge, but against the state.[125] To this effect, the state shall undertake direct liability for the acts of judges as civil servants. This will harmonize Turkish civil procedure with the constitutional mandate for state accountability in such matters.[126] If a litigant who sues the state is successful in his or her case, and is duly awarded a compensation payment for the damages that he or she has suffered, the state shall pay this award directly to the complainant. After making this payment, the state may then sue the offending judge in order to recover the amount of the award; typically, this suit will be heard before the same court that held the state liable.

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[120] HMK-T, *supra*, note 28, art. 336.

[121] *Id.*, arts. 52-55.

[122] 1927 HUMK, *supra*, note 12, arts. 573-576.

[123] *Id.*, art. 573.

[124] HMK-T, *supra*, note 28, art. 52.

[125] It should be noted that a complainant who seeks to sue the state for the wrongful or negligent conduct of a judge must first exhaust all of the other domestic remedies that are available (*i.e.*, by, *inter alia*, lodging an appeal of the allegedly compromised decision to a higher court). The purpose of this requirement is to minimize the damages that have been caused by — and that are being claimed against — the individual offending judge. The court that handles the compensation case shall, *ex officio*, inform the judge whose acts are the basis of the complainant's damage claims.

[126] *Türkiye Cumhuriyeti Anayasasi*, No. 2709 (Constitution of the Republic of Turkey), Official Gazette: 09.11.1982, No. 17863 (Mük.), as amended, arts. 40(3) and 129(5).

For various social, financial, and professional reasons (and especially for practising attorneys at law), filing such a suit for damages against the state can be significantly less complex than filing it against the offending judge. Even so, the prospective complainant should be aware and remain mindful of the devices that have been put in place to discourage weak or vexatious claims. First, complainants will be assigned a hefty fine if the court deems the case ill founded and insufficient on its merits. Second, an unsuccessful complainant may be faced with a compensation claim by the previously (and, as it happens, falsely) blamed judge, which the latter may bring before a different court in response to the failure of the complainant's suit.

(v) Articles 413-450[127] *— Domestic Arbitration Rules Harmonized with the Turkish Act on International Arbitration*[128] *and the 1985 UNCITRAL Model Law*[129]

Although first adopted into Turkish civil procedure in 1856, domestic arbitration has not yet become a fashionable alternative to litigation. In 2001, with the introduction of the AIA, the 1927 HUMK provisions on arbitration[130] ceased to be applicable to matters of international arbitration; to this day, however, they have remained applicable to matters of domestic arbitration. The new HMK-T provisions for domestic arbitration, which will replace the 1927 HUMK provisions, are almost identical to the provisions of the AIA. It should be noted that the AIA is mainly an adoption of the 1985 UNCITRAL Model Law, although there are some slight differences that were inspired by Swiss Federal Statute on International Private Law, which also covers international arbitration (German: *Bundesgesetz über das Internationale Privatrecht*, 12. *Kapitel: Internationale Schiedsgerichtsbarkeit*). As a result of this harmonization effort, domestic and international arbitration will soon be regulated by parallel rules in the HMK-T and the AIA, respectively.[131] Given that the *ratio*

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[127] HMK-T, *supra*, note 28, arts. 413-450.

[128] Milletlerarasi Tahkim Kanunu, No. 4686, Official Gazette: 05.07.2001, No. 24453 [hereinafter "AIA"].

[129] United Nations Commission on International Trade Law ("UNCITRAL"), *UNCITRAL Model Law on International Commercial Arbitration* (1985) with 2006 Amendments [hereinafter "1985 UNCITRAL Model Law"].

[130] 1927 HUMK, *supra*, note 12, arts. 516-536.

[131] Contrary to the existing, 1927 HUMK rules on domestic arbitration, but parallel to the AIA, the HMK-T shall not apply to disputes that concern *in rem* rights on immovable property that is located in Turkey (*tasınmazlara iliskin ayni haklar*). The HMK-T, like the AIA, adopts the 1985

legis of the AIA — namely, to free international arbitration from the archaic rules of the 1927 HUMK — will soon cease to be necessary (or, in principle, to even exist), one wonders why Turkey should continue to maintain two sets of very similar provisions (that is, one for domestic arbitration and one for international arbitration). These laws could be amalgamated, with relative ease, into the forthcoming HMK-T or a new, stand-alone, unified Arbitration Act (as some other countries have done).

UNCITRAL Model Law provisions with regard to the issue of "Kompetenz-Kompetenz" (*i.e.*, the initial decision concerning the jurisdiction of the subject matter is to be made by the arbitrators themselves). See HMK-T, *supra*, note 28, art. 428(1); AIA, *supra*, note 128, art. 7/H; and *id.*, art. 16. Moreover, the arbitration clause, which forms an important component part of a contract, shall be treated as an agreement that survives independently of the other terms of the contract. See HMK-T, *id.*, art. 418(4). The arbitrators may decide on questions with regard to their own jurisdiction, including any objections with respect to, *inter alia*, the validity of the main contract. If the arbitrators find that the arbitration clause is valid, and accordingly find that they have jurisdiction, any objection to the validity of the main contract shall not hinder the continuation of the arbitral proceedings. Under the HMK-T and the AIA, however, the arbitrators' decision on jurisdiction can only be challenged after the final arbitral decision or award has been made on the merits of the case (*i.e.*, only after the end of the arbitral proceedings). This procedural detail distinguishes Turkish arbitral procedure from that under the 1985 UNCITRAL Model Law. Under the HMK-T and the AIA, a decision on the matter of jurisdiction cannot be challenged before state courts while arbitral proceedings are pending. In comparison, the 1985 UNCITRAL Model Law allows a party to challenge the arbitrators' decision on jurisdiction while the arbitral proceedings are pending. Nevertheless, no matter how early or how late the decision on jurisdiction can be challenged before a state court, the decision on the validity of the entire contract, or on the validity of any (other) internal provision thereof, shall be considered to be an issue that is related to the merits of the case. Therefore, any objection that is raised by the respondent party against the validity of any (other) contractual provision shall pertain to an arbitral interpretation of the chosen substantive law — and, as a result, it will not constitute a principal ground for setting the arbitral award aside in subsequent deliberations.

Part III

The Changing Roles of the Participants

Courts and Procedures: The Changing Roles of the Participants

Trevor C.W. Farrow* **and Garry D. Watson, Q.C.****

I. INTRODUCTION

This year's International Association of Procedural Law ("IAPL") conference[1] (the "Conference") focused on the future of categories between and within common law, civil law and mixed procedural traditions. Several factors were discussed at the Conference as potentially responsible for a convergence between (or a partial collapsing of) traditional procedural categories.[2] The changing role of the participants (*e.g.*, witnesses, counsel, judges and parties) within the various procedural traditions, taken together, is one of those factors.

Looking at the two dominant procedural traditions — the civil law and the common law (or, as Thomas Main contemplates: "the Romano-Germanic civil law family and the Anglo-American common law family"[3]) — we have certainly seen, for some time, a degree of convergence in both the traditions themselves and the participants' roles within the traditions.[4] Over the past several decades, however, we have experienced

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1 International Association of Procedural Law (IAPL), *Common Law – Civil Law: The Future of Categories / Categories of the Future* (2009 IAPL Annual Conference, Toronto, Canada: June 3-5, 2009). See IAPL 2009, online: <http://www.iapl2009.org/> [hereinafter "IAPL 2009"].

2 See, *e.g.*, "Rethinking the Common Law / Civil Law Divide" (Conference Panel) in IAPL 2009, *id.* (June 4, 2009).

3 Thomas Main, "Country Studies from Beyond the Divide: An Introduction" in Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories* (Markham, ON: LexisNexis Canada, 2010) [hereinafter "Walker & Chase"] 269, at 269.

4 See, *e.g.*, J.H. Langbein, "The German Advantage in Civil Procedure" (1985) 52 U. Chicago L. Rev. 823. See further Oscar G. Chase & Helen Hershkoff, eds., *Civil Litigation in Comparative Context* (Eagan, MN: Thomson West, 2007). See earlier Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven, CT: Yale University Press, 1986).

a modern wave of civil justice reform.[5] As David Bamford puts it, we are in — procedurally speaking — "revolutionary times".[6] This revolution is, in large measure, grounded significantly in principles of efficiency.[7] In response — or, perhaps, leading the charge — roles within the various procedural systems are actively changing. These changing roles are the focus of the papers that made up the combined panels at the Conference.

II. WITNESSES AND COUNSEL: GETTING STRAIGHT TO THE FACTS

The first set of papers from this panel looks specifically at a number of issues that relate to witnesses and counsel. One matter of particular interest in this discussion is the role of expert witnesses in the evidentiary process. With an increase in the sophistication of society, which, in turn, results in an increase in the sophistication of disputes, expert evidence has become increasingly important in the litigation process. As David Bamford observes:

> There is little debate about the importance of expert evidence in the trial process. Expert evidence is often determinative of causation questions or questions about the nature and the scope of the relief that a court may order. Given such importance, it is not surprising that courts and procedural reformers have been actively searching for mechanisms that will improve the quality and the usefulness of expert opinions, as well as the efficiency with which they are presented to the court.[8]

Debates continue about the selection and the use of experts in the various procedural traditions. A key part of this discussion involves the context of procedural reforms in the common law world. As mentioned,

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[5] See, *e.g.*, Rt. Hon. Lord Woolf, M.R., *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty's Stationery Office, 1996), online: Department for Constitutional Affairs <http://www.dca.gov.uk/civil/final/index.htm>. This report was discussed during the "Special Video Presentation" in IAPL 2009, *supra*, note 1 (June 4, 2009), which featured an interview with Lord Woolf at the Conference. See also Canadian Bar Association (CBA), Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report* (Ottawa: CBA, 1996), online: <http://www.cba.org/CBA/pubs/pdf/systemscivil_tfreport.pdf>; Australian Law Reform Commission (ALRC), *Review of the Federal Civil Justice System* (Discussion Paper 62) (Canberra: Australian Government Publishing Service, 1999), online: <www.austlii.edu.au/au/other/alrc/publications/dp/62/>.

[6] David Bamford, "The Continuing Revolution: Experts and Evidence in Common Law Litigation" [hereinafter "Bamford"] in Walker & Chase, *supra*, note 3, 161, at 161.

[7] For a further discussion of the modern wave of civil justice reform, including its heavy focus on efficiency, see, *e.g.*, Trevor C.W. Farrow, "Public Justice, Private Dispute Resolution and Democracy" [hereinafter "Farrow"] in Ronalda Murphy & Patrick A. Molinari, eds., *Doing Justice: Dispute Resolution in the Courts and Beyond* (Canada: Canadian Institute for the Administration of Justice, 2009) 301.

[8] Bamford, *supra*, note 6, at 162.

much of this reform movement sounds in principles of efficiency. A particular target of this efficiency-based reform movement has been the use of expert evidence.

Two of the three papers in this part of the panel address, head-on, the role and the purpose of experts. David Bamford's paper takes up questions about the selection of experts, joint expert appointments, court appointment of experts and other court management strategies. With all of these discussions in play, Bamford also picks up the convergence theme that runs through the Conference papers[9] and looks at it in the context of the procedural traditions' various approaches to expert evidence.

Justice Ian Binnie pushes the conversation further, with his provocative look at the recent trends and failures of the expert evidentiary process. He focuses on the need for achieving accuracy as well as efficiency, and he discusses some attempts at reform. For Justice Binnie, the "use and misuse of experts is in part a by-product of the adversarial system", not unlike "Adam Smith's vision of the Invisible Hand, which guides its warring participants towards production of the optimal result".[10] However, according to Justice Binnie, current approaches to expert witnesses have, at least on occasion, resulted in "'junk' testimony" or "cheerleader[s] for one side".[11] In his paper, Justice Binnie takes up some potential reform options to deal with a problem that is "becoming increasingly unacceptable to all concerned".[12]

Despite moves toward convergence, it still seems clear that many common law courts are unprepared to rely on a sole, court-appointed expert when there are serious and important issues (*e.g.*, causation in complex personal injury cases) on which there are often sharp divisions in professional views. In such contexts, common law courts still prefer the adversarial input of party-chosen experts.

Equally important questions were raised in this panel about the general roles of witnesses and counsel. For example, is the use of witness statements and written advocacy affecting the role of counsel in the common law? Will party witnesses become acceptable in the civil law? Will counsel assume a larger role in questioning witnesses in the civil

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[9] See, *e.g.*, Mirjan Damaška, "The Common Law / Civil Law Divide: Residual Truth of a Misleading Distinction" in Walker & Chase, *supra*, note 3, 3; Marcel Storme, "Le Common Law / Civil Law Divide: An Introduction" in Walker & Chase, *supra*, note 3, 23.

[10] Ian Binnie, "The Changing Role of the Expert Witness" in Walker & Chase, *id*., 179, at 179-80 [citation omitted].

[11] *Id.*, at 179.

[12] *Id.*, at 192.

law?[13] Is pre-hearing disclosure changing the role of counsel and witnesses in the civil law? Will constraints on documentary disclosure change the role of counsel and witnesses in the common law? Some of these issues are the specific focus of Emmanuel Jeuland's paper,[14] which addresses the issue of the changing roles of counsel and witnesses (including expert witnesses) in the particular context of France. Again, like Bamford, Jeuland comments, in the conclusion of his paper, on the issue of convergence (or, in this case, continued divergence).

Additional "reports from the floor" — from María Luisa Villamarín López[15] and Fernando Gascón Inchausti[16] — have added to this discussion through comments on court-appointed evidence and new procedural rules on oral evidence in Spain.

III. JUDGES AND PARTICIPANTS: GETTING RESULTS

The second half of this panel looked at some equally challenging questions in the context of judges and participants, including: Is managerial judging transforming the role of judges in the common law? To what extent can judges shift from adjudication to mediation of disputes? How is the changing role of judges changing party-engagement in the litigation process? To what extent is the move to not only managerial judges, but also mediator-judges, having an impact on notions of justice and impartiality? Are these changes the result of an exercise that privileges efficiency over other judicial and democratic norms, or, regardless, is it simply a necessary part of how we help to redress current access to justice dilemmas?

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[13] In an interesting comment, Professor Yasuhei Taniguchi related that, when Japan extended the right of witness examination to counsel, the reform largely failed because skill in witness examination rested with judges and not with members of the bar, who were inexperienced in this task. See Yasuhei Taniguchi, "How Much Does Japanese Civil Procedure Belong to the Civil Law and to the Common Law?" in Walker & Chase, *supra*, note 3, 111, at 114.

[14] Emmanuel Jeuland, "Le changement de rôle des témoins et des conseils dans quelques pays de droit civil et, en particulier, en France" ["Changing Roles of Witnesses and Counsel in Civil Law Countries and, in Particular, in France"] in Walker & Chase, *id*., 193.

[15] María Luisa Villamarín López, "Court-Appointed Evidence in Spanish Civil Procedure" in IAPL 2009 (June 4, 2009); Oscar Chase, Janet Walker & Barry Leon, eds., *Common Law – Civil Law: The Future of Categories / Categories of the Future – Conference Materials* (Toronto: IAPL, 2009) 143 [hereinafter "Chase, Walker & Leon"].

[16] Fernando Gascón Inchausti, "Des petits détails avec des conséquences inattendues: oralité, enregistrement des audiences et qualité des jugements dans la procédure civile espagnole" in Chase, Walker & Leon, *id.*, 103.

Judith Resnik, in "Managerial Judges, Jeremy Bentham and the Privatization of Adjudication",[17] provides a provocative look at the process by which civil justice is being transformed from a public process, focused on formal trials, to a private process, in which various forms of settlement between the parties and claims adjudication by administrative agencies are the norm. In her view, the plasticity of procedures laws and norms, reflected in the changing roles of judges and parties, are facilitating a shift to a privatized form of civil justice that may not serve the important ends secured by the historically public nature of the resolution of civil disputes.[18]

Eduardo Oteiza, in his paper,[19] then takes up the issue of the managerial judge, specifically including discussions of case management and mediation, in the context of recent Latin American procedural reforms. As do Bamford and Jeuland, Oteiza again problematizes the simple distinction between common law and civil law traditions. He then pushes that discussion further by foregrounding issues of localism and pluralism when thinking about procedural reform in the context of globalization. Through these discussions, Oteiza's paper is as much a reminder of the continued importance of local and regional customs and traditions as it is a documentation of ongoing reforms in Latin America.

Further "reports from the floor" — from Gemma García-Rostán Calvín[20] and Mónica-Galdana Pérez Morales[21] — have added to this part of the discussion by taking up specific procedural tools that are primarily from Spain.

Finally, Soraya Amrani-Mekki further challenged the panel by presenting her views on the future of categories,[22] which linked this panel back to the main theme of the Conference. Like others at the Conference, Amrani-Mekki certainly does not see the full convergence of procedural traditions happening any time soon. As she concludes: "Le futur des catégories n'est donc pas celui d'une mort certaine bien que parfois

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[17] In Walker & Chase, *supra*, note 3, 205.

[18] For other comments on the privatization of the court process, see Farrow, *supra*, note 7.

[19] Eduardo Oteiza, "Civil Procedure Reforms in Latin America: The Role of the Judge and the Parties in Seeking a Fair Solution" in Walker & Chase, *supra*, note 3, 225.

[20] Gemma García-Rostán Calvín, "The Role of the Victim in Traditional Criminal Proceedings and in Restorative Justice; Legislative Texts of the European Union and Spain" in Chase, Walker & Leon, *supra*, note 15, 223.

[21] Mónica-Galdana Pérez Morales, "The Spanish Order for Payment Procedure" in Chase, Walker & Leon, *id.*, 227.

[22] Soraya Amrani-Mekki, "The Future of the Categories, the Categories of the *Futur*" in Walker & Chase, *supra*, note 3, 247.

annoncée. Au contraire, les catégories sont revitalisées par les nombreuses études visant à les relativiser."[23]

IV. CONCLUSION

The collected papers in this panel clearly confirm that participant roles are changing. What is less clear is the role that these changes are playing, if any, as a bridging force *between* the various procedural traditions. Some convergence is occurring as a result of active, managerial procedural reforms in the common law world, combined with various evidentiary and other reforms in the civil law tradition. Categories, however, still remain. More important, however, are the driving forces behind, and the resulting impacts of, these changing roles *within* the various traditions. As we have mentioned earlier, the desire for increased procedural efficiency is a key motivating force behind most of the modern justice reform initiatives, including those that relate to the changing roles of participants. There is no doubt that improved efficiency will typically militate in favour of increased speed, decreased costs and an overall increase in access to the judicial process. The impacts that these efficiency-seeking trends will have on more fundamental issues of justice, fairness and overall democratic regulation remain to be seen.

[23] *Id.*, at 266.

The Continuing Revolution: Experts and Evidence in Common Law Litigation

David Bamford[*]

I. INTRODUCTION

For common law proceduralists, the last 30 years have been revolutionary times. Across the common law world, there have been major reviews and reforms of civil procedure. England had the Woolf Report[1] in the mid 1990s; in Canada, a number of provinces have undertaken reviews of civil procedure;[2] civil procedure in the United States has been described as being in "ferment";[3] and, in Australia, reviews have been conducted in most states.

The end result of all of this reform has been to break down many of the boundaries that were thought to separate common law and civil law systems. Many of the shibboleths of the common law adversarial process have been challenged by recent procedural reforms. These reforms have included:

- acceptance by courts of responsibility for ensuring efficient management of the litigation process;
- increased attention to the duties of the parties and their counsel, respectively, in the litigation process, and the development of new obligations;
- increased emphasis on promoting settlement; and
- significant changes to the ways in which information is collected and presented to a court.

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[1] Lord Woolf, *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty's Stationery Office, 1996).

[2] Amongst the more prominent have been reviews in Alberta, British Columbia, Nova Scotia and Ontario.

[3] Stephen Burbank & Linda Silberman, "Civil Procedure Reform in Comparative Context: The United States of America" (1997) 45 Am. J. Comp. L. 675.

As a consequence, the traditional model of the non-interventionist judge, whose main function was to ensure that the rules of evidence were properly applied in a continuous trial, and that of lawyers, whose primary duty was the zealous promotion of their client's interests, have been supplanted in many common law jurisdictions.

This article examines the lattermost of the procedural reforms that have been listed above — that is, the changes to the methods and the procedures by which information is collected and presented to the courts — and focuses, in particular, on expert evidence and the challenges to the principle of orality in the common law process. It does so in the context of Australian civil procedure.

In Australia, there are nine jurisdictions that, while subject to the same ultimate court of appeal — the High Court of Australia — have great freedom to develop their own procedural systems. The developments of the last 20 years reflect the old Mao Tse-Tung saying: "let a hundred flowers bloom". Just as this period soon came to an end in China, national imperatives in Australia, like the drive for uniformity and consistency, may soon limit the variability in its procedural systems. Nevertheless, Australia is, for the time being, a good laboratory in which to observe examples of the range of procedural approaches and solutions that can be found across the common law world. In small Australian jurisdictions, individual court reformers have a better chance of implementing procedural innovations. To this effect, Australian reformers have a deserved reputation for being very outward looking — that is, we are continually searching abroad for ways to improve our civil procedure here at home.

II. EXPERT EVIDENCE

There is little debate about the importance of expert evidence in the trial process. Expert evidence is often determinative of causation questions or questions about the nature and the scope of the relief that a court may order. Given such importance, it is not surprising that courts and procedural reformers have been actively searching for mechanisms that will improve the quality and the usefulness of expert opinions, as well as the efficiency with which they are presented to the court.

Often, this search has been driven by long-standing concerns about the quality of the expert evidence that is adduced; these concerns are virtually ubiquitous — they can be found in almost every common law

jurisdiction. They range from suggestions that the traditional approach of party selection and party payment of experts promotes bias, even if only subconsciously, to concerns about the amount of expert evidence that should be adduced, the "battle of the experts" syndrome, and what constitutes the proper fields for expert evidence (*i.e.*, where are the boundaries between expert and lay evidence, and when must the former be required over the latter?). There is an abundant literature on the issues surrounding expert evidence.[4]

Despite a general lack of strong empirical evidence, concerns about the quality of expert evidence persist. The most widely cited Australian research on this matter is an attitudinal survey of judges.[5] It has revealed that the most serious concern that judges harbour is over the level of objectivity on the part of the expert. As Gary Edmond observes, this finding provides only limited insight into the realities of expert evidence.[6]

The challenge is to develop procedures that maximize objectivity and minimize partisanship, while accepting the fact that, often, expert evidence will involve genuinely held differences of opinion.[7] Indeed, the experts of opposing parties may be operating with different understandings of the underlying facts. In other cases, the field of knowledge may be in a state of uncertainty, where competing theories or explanations vie and compete for dominance. To illustrate these difficulties with an example, Justice Michael Kirby cites the long histories of conflicting — but genuinely held — views in the etiologies of various diseases. Throughout the etiological history of a disease, a series of views can be traced, in which each particular view was consistent with the state of research at the time that it was held;[8] as medical progress leads to increasingly refined and accurate views, previously existing views, although genuinely held, are continuously challenged, debunked and replaced (or gradually transformed) by newer, different views. How to ensure the appropriate consideration of these conflicting views is the issue before us, and it includes the question of who is best qualified to undertake this consideration.

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[4] The Index of Legal Periodicals lists some 50 articles on the topic in the last seven years.

[5] Ian Freckelton, Prasuna Reddy & Hugh Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (Melbourne: Australasian Institute of Judicial Administration, 1999).

[6] Gary Edmond, "After Objectivity: Expert Evidence and Procedural Reform" (2003) 25 Sydney L. Rev. 131, at 143-44 [hereinafter "Edmond"].

[7] Déirdre Dwyer, "The Causes and Manifestations of Bias in Civil Expert Evidence" (2007) 26 C.J.Q. 425.

[8] Michael Kirby, "Expert Evidence: Causation, Proof and Presentation" (2003) 6 Jud. Rev. 131, at 135-36.

The responses that reformers have made to these concerns fall into three broad categories:

(1) increased obligations placed on expert witnesses;

(2) the selection of experts in litigation and, in particular,

  (a) the joint appointment of experts, and

  (b) the court appointment of experts;

(3) active court management of the expert evidence process.

1. Increased Obligations Placed on Experts in Litigation

The first reform strategy is to both increase and make more explicit the obligations that are placed on experts in the litigation process. The purpose of these changes is to improve the accuracy of case outcomes by maximizing objectivity — or, more precisely, by minimizing bias. To achieve this, many courts have introduced codes of conduct for experts. These can be in Rules of Court,[9] but, in the Australian context, they are more likely to be found in Practice Directions or as a Schedule to the Rules.[10] The content of these codes is very similar. They highlight these facts:

- Experts have a duty to assist the court, and this duty overrides any existing duty to a party or to the person who is retaining the expert.
- Experts are not to act as advocates for a party.

The emphasis on an expert's duty to the court has been described as the "centrepiece of the new procedural framework" for expert evidence.[11] The reality, however, is that experts have always been under such a duty and have always been expected to be impartial. Thus, the question remains: has the increased emphasis on the duty made any difference to the way that experts undertake their role in the litigation context?

Geoffrey Davies, the former head of Queensland's Litigation Reform Commission and a former judge of the Queensland Court of Appeal, remains dubious about the value of such statements, describing them as

[9] See, *e.g.*, *Uniform Civil Procedure Rules 2005* (New South Wales), r. 31; Schedule 7 (Expert Witness Code of Conduct); *Uniform Civil Procedure Rules 1999* (Queensland), r. 426.

[10] See, *e.g.*, Federal Court of Australia, *Practice Direction: CM 7 — Expert Witnesses in Proceedings in the Federal Court of Australia* (September 25, 2009).

[11] Edmond, *supra*, note 6.

"pious hopes".[12] There is little empirical evidence to help us assess the utility of this reform, although some of the research into the effectiveness of professional ethical codes in business situations is not very encouraging.[13]

What is more likely to have an impact are the additional disclosure obligations — or requirements — that have accompanied the codes of conduct. The Queensland *Uniform Civil Procedure Rules 1999*[14] provide an illustration of the level of prescription and the extended range of matters that must be covered within the expert's report.

Rule 428: Requirements for report

(1) An expert's report must be addressed to the court and signed by the expert.

(2) The report must include the following information —

(a) the expert's qualifications;

(b) all material facts, whether written or oral, on which the report is based;

(c) references to any literature or other material relied on by the expert to prepare the report;

(d) for any inspection, examination or experiment conducted, initiated, or relied on by the expert to prepare the report —

(i) a description of what was done; and

(ii) whether the inspection, examination or experiment was done by the expert or under the expert's supervision; and

(iii) the name and qualifications of any other person involved; and

(iv) the result;

(e) if there is a range of opinion on matters dealt with in the report, a summary of the range of opinion, and the reasons why the expert adopted a particular opinion;

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[12] Geoffrey Davies, "Current Issues — Expert Evidence: Court Appointed Experts" (2004) 23 C.J.Q. 367 [hereinafter "Davies"].

[13] "In contrast to corporate codes of ethics, professional codes of ethical conduct had no influence on perceived wrongdoing in organization nor these codes [*sic*] affect the propensity to report observed unethical activities." Mark John Somers, "Ethical Codes of Conduct and Organizational Context: A Study of the Relationship Between Codes of Conduct, Employee Behavior and Organizational Values" (2001) 30 J. Bus. Ethics 185, at 185.

[14] [Hereinafter "1999 Queensland Rules"].

(f) a summary of the conclusions reached by the expert;

(g) a statement about whether access to any readily ascertainable additional facts would assist the expert in reaching a more reliable conclusion.

(3) The expert must confirm, at the end of the report —

(a) the factual matters stated in the report are, as far as the expert knows, true; and

(b) the expert has made all enquiries considered appropriate; and

(c) the opinions stated in the report are genuinely held by the expert; and

(d) the report contains reference to all matters the expert considers significant; and

(e) the expert understands the expert's duty to the court and has complied with the duty.

Three new requirements are of particular significance. The first requires the expert to outline the range of all possible opinions on the issues in question (*i.e.*, that the report deals with) and to provide reasons why the expert has preferred a particular opinion over the others that are available.[15] The second requires the expert to outline what additional facts could be obtained that would assist him or her in "reaching a more reliable conclusion".[16] The third requires the expert to confirm that the report covers all of the matters that the expert thinks are significant.[17] These requirements reduce the capacity of an expert to provide an opinion that is distorted by omitting inconvenient matters or facts.

In some jurisdictions, the disclosure requirements now extend to all of the information that is provided to experts, as well as to the financial arrangements between the instructing party and the expert. In South Australia, the *Supreme Court Civil Rules 2006*[18] provide, for example, that:

Rule 160: Pre-trial disclosure of expert reports

. . . . .

[15] *Id.*, r. 428(2)(e).
[16] *Id.*, r. 428(2)(g).
[17] *Id.*, r. 428(3)(d).
[18] [Hereinafter "SCR 2006"].

> (5) A party who has disclosed an expert report, and proposes to rely on evidence from the expert at the trial, must, at the request of another party, provide the party making the request with —
>
> (a) a copy of documentary material (including material in the form of computer data) on which an expert has relied for making a report; and
>
> (b) details of any fee or benefit the expert has received, or is or will become entitled to receive, for preparation of the report or giving evidence on behalf of the party; and
>
> (c) details of any communications relevant to the preparation of the report —
>
> (i) between the party, or any representative of the party, and the expert; and
>
> (ii) between the expert and another expert.

In the common law context, this means that party information that is collected for the purposes of litigation — and that might have otherwise been protected from production under privilege — must now be disclosed.

This has obvious implications for counsel, for the purposes of instructing solicitors as well as experts. New roles for experts have been created within the litigation process. Parties may now instruct "shadow" experts — experts who are engaged to advise the party, but who do not give evidence in the case. For lawyers, there is a new set of tactical issues around not only the selection of the expert, but also what information is to be provided to the expert.

2. The Selection of Experts

The appointment of experts has become an increasingly complex issue. Among the initiatives to improve both the accuracy of court outcomes and the efficiency of the litigation process, some common law systems have made significant changes to the appointment process for experts. Traditionally, the parties have had complete autonomy over whom they select as experts. Now, however, this right has been reduced in some jurisdictions. The appointment process has changed in order to encourage parties to jointly choose experts, minimize the number of experts and facilitate the court appointment of experts.

Underpinning these approaches is the belief that the adversarial system promotes party bias in the evidence that is adduced by experts. Davies believes that the adversarial approach, with its requirement to choose between competing views, leads to a polarization of expert evidence, where experts are implicitly, if not explicitly, expected to work towards advancing the case of the party who has engaged and called them.[19]

Two major reforms have been advanced as solutions to this structural problem. These would require the parties to jointly appoint the expert or to give the responsibility for choosing the expert to the court. These remain controversial initiatives, as they run contrary to the principle of party autonomy, whereby the independent control of each party over his or her issues and evidence has been regarded as a defining feature of the common law litigation process.

(a) Joint Experts

In the Australian context, the trend has been towards encouraging the joint appointment of experts. Often, the rules also combine the method of appointment with a preference for appointing one expert only. In the 1999 Queensland Rules, the set of rules that regulate expert evidence begin with a provision that outlines the main objectives in expert appointment — *e.g.*, to "ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court".[20] This rule further provides that, where proceedings have been commenced and the parties agree that expert evidence would be helpful in resolving substantial issues, a joint expert may be appointed by the parties. Should the parties fail to agree on such an expert, the party who seeks the appointment may apply for the appointment of an expert by the court and, to this effect, must provide the names of three candidate experts.[21]

The approach in New South Wales has been to provide for the appointment of single joint experts who are not, however, given "favoured status". Nevertheless, single joint experts are promoted in the practice

[19] "If the expert has not given the opinion in the first place in order, at least partly and perhaps subconsciously, to secure his or her engagement, in other words, because of adversarial bias, this is where adversarial bias will begin." Davies, *supra*, note 12, at 369.

[20] 1999 Queensland Rules, *supra*, note 14, r. 423(b).

[21] *Id.*, r. 429G, 429I.

directions for certain types of cases.[22] The most recent Australian procedural review, the Victorian Law Reform Commission's *Civil Justice Review*,[23] has recommended an objects clause that is similar to that of Queensland, but has adopted the New South Wales approach of facilitating the appointment of joint experts while maintaining the traditional capacity of parties to call their own expert witnesses.[24]

(b) Court-appointed Experts

The second major solution to concerns of expert partisanship is to further reduce the ties between a party and the expert by providing for court appointment of experts. While courts have long had the power to appoint an expert to assist it with factual matters, this power has rarely been used.[25] In New South Wales, the Land and Environment Court has, since 2004, been appointing experts when expert evidence was required. When such an appointment needs to be made, the Court requires the parties to agree on who the expert should be. Parties may seek leave from the court to call their own experts, and permission is granted where the expert would provide additional information.[26] Queensland has followed aspects of the *England's Civil Procedure Rules 1998* by providing for a court-appointed expert in circumstances where the parties cannot agree on a joint expert. Like other parts of the common law world,[27] however, most Australian jurisdictions remain reluctant to use court-appointed experts. This is still seen as too great an infringement on the party's traditional right to present its case as it independently and autonomously chooses.[28]

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[22] See Supreme Court of New South Wales, *Supreme Court Equity Division Practice Note 3: Commercial List and Technology and Construction List* r. 22 (December 10, 2008) regarding cases in the New South Wales Supreme Court Commercial and Technology and Construction list; and Supreme Court of New South Wales, *Supreme Court General Practice Note 10: Single Expert Witnesses* (August 17, 2005) (regarding personal injury cases).

[23] Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (Melbourne: Victorian Law Reform Commission, 2008) [hereinafter "Victorian Law Reform Commission"].

[24] *Id.*, at 511-20.

[25] New South Wales Law Reform Commission, *Expert Evidence*, Report 109 (Sydney: New South Wales Law Reform Commission, 2005), at 33-35.

[26] Peter McClellan, "Expert Evidence: Aces Up Your Sleeve?" (2007) 8 Jud. Rev. 215, at 221 [hereinafter "McClellan"].

[27] For the U.S. perspective, see, *e.g.*, Shirley Dobbin *et al.*, "Federal and State Trial Judges on Proffer and Presentation of Expert Evidence" (2007) 28 Justice System J. 11.

[28] Garry Downes, "Problems with Expert Evidence: Are Single or Court-appointed Experts the Answer?" (2006) 15 J. Jud. Admin. 185.

3. Active Court Management of the Expert Evidence Process

The introduction of managerial judging and its role in the adversarial litigation of common law tradition is probably the most significant procedural development in the current revolution in the law of civil procedure. It, too, is affecting the expert evidence process, and it has been used in attempts to improve both the accuracy of outcomes and the efficiency of the process.

(a) Quantity of Evidence

A minor change is the increasing presence, in the rules of court procedure, of provisions that require the parties to seek the leave of the court to call expert evidence. In Australia, this phenomenon can be found even in some of the more conservative jurisdictions, such as those that have preserved the traditional approach of party autonomy in the selection of experts. What these provisions accomplish in those jurisdictions is to provide the court with the capacity to control the amount of expert evidence that will be adduced and the manner in which it is to be given. The court can either place a maximum on the number of experts that the parties are permitted to call or limit the evidence on particular issues to one witness. These measures are intended to improve efficiency.

(b) Concurrent Evidence

A major change that is gaining traction within Australian courts has the effect of altering the way in which oral evidence is adduced. The traditional trial process requires the parties' witnesses to give their evidence sequentially. The plaintiff completes his or her case before the defendant is required to call his or her witnesses, including expert witnesses. Some jurisdictions, however, are experimenting with an exception to this otherwise dichotomized (*i.e.*, plaintiff/defendant) procedure, whereby experts give their evidence concurrently.[29] In this process, the experts are first sworn in and organized into a panel. They are then questioned, as a panel, in a process that is managed by the judge. Finally, the lawyers question the experts of the panel on the key issues in the case. The

[29] This process is colloquially described as "hot-tubbing". See Gary Edmond, "Secrets of the 'Hot Tub': Expert Witnesses, Concurrent Evidence and Judge-led Law Reform in Australia" (2008) 27 C.J.Q. 51.

experts are able to comment on each other's evidence and to ask questions of the other experts. Described as a "structured discussion", the process is said to improve the accuracy of the outcome because the experts are able to give their views in a manner that is unhindered by the constraints of forensic advocacy that would otherwise be imposed by the barristers.[30] A gloss to this process exists in the Land and Environment Court (New South Wales), where it first became standard practice to require the experts to meet in conference beforehand, in order to identify their differences. This promotes efficiency by enabling the court to focus on the real issues that are in dispute between the experts. The former Chief Judge of the Court estimated that these procedures had reduced by up to 80 per cent the time that had previously been needed, in court, to deal with such matters. It is clear that professional witnesses strongly support the process because they feel that they are able to present their views more accurately.

4. Implications for Experts, Lawyers and Judges

All of these changes have implications for participants in the court process. For experts, writing reports has become more onerous because of the new requirements that call on them to supply more information, to address alternative theories and explanations and to justify their own conclusions against the alternative possibilities. Lawyers now face issues that are more complex when they determine what information should be provided to experts and how the experts are to be selected. Where concurrent evidence is given, lawyers also need to be fully conversant with the expert evidence, as they no longer control the examination of the witness. Judges also face new responsibilities. For one, they are now much more likely to be involved in the selection of the experts. Should a judge be called upon to manage a concurrent expert evidence process, he or she will need to have a very good understanding of the issues that are involved and the evidence that the experts will adduce before it is given in court. No longer can the judge leave it to the lawyers to explore, develop and control the testimony of expert evidence. The judge is now required to inquire into the expert evidence with the assistance of the lawyers. The barristers say that it requires much more preparation on their part, as they do not enjoy the same degree of control over the process, and this means that the testimony might move into unexpected

[30] McClellan, *supra*, note 26, at 223.

— and undesirable — territory. Often, lawyers do not have the luxury of being able to consult, or seek advice from, their experts in the same way that they would if the evidence was being heard sequentially.

III. CHALLENGES TO THE ORALITY PRINCIPLE

Just as some of the changes to expert evidence appear to move common law litigation further from its roots, there has also been a challenge to the common law reliance on orality in civil trials. As Jolowicz, Glasser and others have been demonstrating for the last 20 years, there is an increasing departure from the common law principle that the primary method for receiving evidence at trial is by oral testimony.[31] In his review of civil procedure, Lord Hoffman notes that one of the major changes to trials has been the introduction of written witness statements.[32] In Australia, this practice "has evolved to such an extent that it is nowadays an expectation in much civil litigation in Australia that written statements will be exchanged".[33] These written witness statements have increased the amount and the quality of information that is available to the parties before the trial. These documents are also said to save time at the trial because they effectively replace the need to give oral evidence in chief. As a result, the trial has become much more focused on cross-examination.[34] While this is, primarily, an efficiency measure, the exchange of written witness statements before the trial has the effect of minimizing the possibility that one or both of the parties might be taken by surprise at trial. In this way, written witness statements improve the accuracy of the outcome, as well. Additionally, it is now common for courts to require argument outlines, chronologies and statements of admitted facts.[35] Accompanying these requirements have been major changes to the rules of evidence in order to enable the greater use of this documentary evidence at trial.[36] Appellate

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[31] J. Jolowicz, *On Civil Procedure* (Cambridge: Cambridge University Press, 2000), at 377; Cyril Glasser, "Civil Procedure and the Lawyers — The Adversary System and the Decline of the Orality Principle" (1993) 56 Mod. L. Rev. 307 [hereinafter "Glasser"].

[32] Leonard Hoffman, "Changing Perspectives on Civil Litigation" (1993) 56 Mod. L. Rev. 297 [hereinafter "Hoffman"].

[33] Arthur Emmett, "Towards the Civil Law? The Loss of Orality in Civil Litigation in Australia" (2003) 26 U. New South Wales L.J. 447, at 460 [hereinafter "Emmett"].

[34] Hoffman, *supra*, note 32, at 304-305.

[35] Bryan Beaumont, "Written and Oral Procedures — The Common Law Experience" (2001) 21 Austl. Bar Rev. 275 [hereinafter "Beaumont"].

[36] Emmett, *supra*, note 33, at 450-51.

hearings now rely heavily on written submissions, and time limits on oral arguments are more frequent.

In the conclusion to his 1993 reflections on the developments in civil litigation, Glasser wondered whether or not,

> [w]ith greater technological freedom and the ability to produce, amend and analyse written materials at high speed, … an oral process, such as a trial, employing a race of advocates has a future.[37]

Fifteen years later, it is clear that, while there may be evidence of reductions in trials in some jurisdictions,[38] oral evidence continues to play a critical role in the trial process. Courts still remain convinced that the best method to determine contentious issues is to hear oral testimony and oral argument.[39] Each party's lawyers prepare the written witness statements for their witnesses. They do so with great care, in order to ensure that the statements are drafted in ways that shed only the best light on their case. The extent to which the words in such a written statement are actually those of the witness is unknown. In contrast, oral examination requires the witness to present his or her evidence in person — and in his or her own words — and the court can use the manner of this presentation to assist its assessment of the evidence. These developments mean that the judge now begins the trial knowing much about the case, although it is said that this comes at the cost of publicity. The judge now reads the requisite written materials in private, and the information therein becomes less available to the public than if it had been given as oral evidence.

Further, there is clearly a competing tension between efficiency and accuracy. Increased disclosure may add to the accuracy of the outcomes, but it carries increased costs with it. Some judges and lawyers believe — and there are no references made here to empirical research — that the increased use of written materials has also increased costs to the parties.[40]

All of this is well known, but there does appear to be the faint beginnings of a counter-revolution in Australia. I have already pointed out the temporal disadvantages of many of the reforms. They are focused on the trial phase of litigation and, as a result, they are prepared very late in the

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[37] Glasser, *supra*, note 31, at 324.

[38] Marc Galanter, "The Hundred-Year Decline of Trials and the Thirty Years War" (2005) 57 Stan. L. Rev. 1255; Robert Dingwall & Emilie Cloatre, "Vanishing Trials?: An English Perspective" (2006) 2006 J. Disp. Resol. 51.

[39] Beaumont, *supra*, note 35, at 276.

[40] Emmett, *supra*, note 33, at 460.

litigation process. As a consequence, they are of very limited assistance to the large numbers of cases that settle before trial. To address this, some Australian civil procedure reformers are advocating for the introduction of pre-trial oral disclosure by way of oral depositions. This runs contrary to the reforms that promote increased reliance on written materials and limitations on disclosure.

IV. Disclosure and Oral Depositions

Australian civil procedure, like that in much of the common law world, has long placed requirements on parties to disclose written materials. Traditionally, this process is called discovery, and its disclosure requirements force the parties to provide each other with lists of the relevant documents that they each, respectively, possess and control. The disclosure process has become unfairly tarnished by the experience of major commercial litigation.[41] It is clear that, in these types of cases, the disclosure process can become very expensive for the parties. The broad definition of what now constitutes a document — together with the rapid growth in the numbers of documents that are created in this electronic age — means that the process has become a major undertaking, and, also, that much of the product of this undertaking is of little or no use in the litigation. As a result, a number of reforms have been introduced with a view to limiting the disclosure requirements. In Australia, the most common reform has been an alteration of the definition of a "relevant document". The traditional approach is based on an 1882 English case that gave it a very broad definition — *i.e.*, any document that is either relevant to an issue in the case or that would fairly lead to a train of inquiry that would advance a party's case or damage the opponent's case.[42] Almost all of the major Australian jurisdictions have either already introduced, or are moving toward the introduction of, a new definition for "relevant document", such that it is limited to those documents that are *directly* relevant to an issue in the case.[43]

Another pre-trial procedure that compels the disclosure of information and that has also become less available is the use of written interrogatories. This procedure enables a party to require another party to

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[41] Adrian Ryan, "Discovery: The Law's Need to Adapt to Changing Times" (2008) 18 J. Jud. Admin. 116, at 117.

[42] *Cie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.).

[43] Victorian Law Reform Commission, *supra*, note 23, at 438.

provide written answers, on oath, to written questions. The availability of interrogatories reflects trends in civil procedure. When courts were primarily concerned with improving the accuracy of outcomes, written interrogatories became increasingly available to parties; then, as concerns about efficiency came to the fore, these devices became less available. While one can find instances across the Australian jurisdictions that are at both ends of this spectrum, the main trend, over the last 15 years, has been towards reducing the availability of written interrogatories. This reduction has either made them available for only certain types of cases or required parties to seek the leave of the court before using one. The test for a grant of leave to issue an interrogatory has emphasized that they are only available as last resort — that is, when other pre-trial procedures have failed or are not available.[44]

It is therefore against a history of increasing reliance on written documents and limitations on the extent of disclosure that there have been calls for the introduction or the "ramping up" of oral pre-trial disclosure. Oral disclosure — or oral deposition, as it is commonly called — is rare in the Australian context. Only Victoria and the Northern Territory explicitly provide for oral depositions in their rules, and, even then, such depositions are rarely used. Parties are required to consent to the process and — even in the Northern Territory, where consent may not be required — this is said to be contrary to the local litigation culture.[45]

In contrast, there are provisions in all Australian jurisdictions that enable the pre-trial oral examination of witnesses who will not be available to give evidence at the trial. These examinations are conducted before a judge or a court-appointed officer and they are subject to the same rules of evidence and procedure that are required for examinations at trial.

The Victorian Law Reform Commission, in the face of considerable opposition from the profession and some of the judges on the Supreme Court, has recently recommended procedural changes to facilitate and encourage the use of oral depositions.[46] The Law Council of Australia's

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[44] Kylie Downes, "Interrogatories Under the Spotlight" (2002) 22 Proctor 32; Geoffrey Davies, "Civil Justice Reform: Some Common Problems, Some Common Solutions" (2006) 16 J. Hud. Admin. 5, at 13.

[45] Michael Legg, "The United States Deposition — Time for Adoption in Australian Civil Procedure" (2007) Melbourne U.L. Rev. 146, at 152.

[46] Victorian Law Reform Commission, *supra*, note 23, at 415-19. However, the head of the newly created Commercial Court (within the Victorian Supreme Court), Byrne J., was recently quoted as saying that "the court will test a lot of the suggested changes, such as the taking of deposi-

Federal Court practice group has also suggested that the Federal Court undertake a trial of oral depositions.[47] Both models will attempt to ensure appropriate control of the oral deposition process. Oral depositions would be possible with party consent or by the leave of the court, although there would be a presumption in favour of granting this leave. Oral depositions would be regarded, however, as a procedure of last resort. In order to prevent abuse, the court would have the power to regulate the number of depositions, as well as the time that it would allow for them. Finally, the information obtained by oral pre-trial examination could only be used at trial in limited circumstances.[48]

If a functional analysis is applied to the Victorian proposal, one might conclude that it goes to improving the accuracy of outcomes. It does provide parties with information that will enable them to better assess the merits of the case. Whether this reform could be justified on efficiency grounds is less clear. While it is unlikely to lead to increased settlement rates, it could lead to earlier settlements. The information that would be obtained is the same as that which would be obtained at trial; the benefit of this process is that this information is obtained at an earlier point in time. It assists those cases that do not go to trial, and, as such, is a welcome change.

The question of whether these benefits will outweigh the increased costs that will result if oral depositions are used remains unanswered. There appears to be no empirical basis upon which it could be answered, and one might certainly suspect that it will remain difficult to answer. Given the development of sworn written statements, earlier disclosure of these would achieve much of what it is hoped that oral depositions will do. While written witness statements do not provide the advantages of an oral examination — that is, the opportunity to assess the manner in which a witness presents his or her testimony, and the opportunity to test the information to the same degree as might be done at trial — they do provide the other parties with a good understanding of what the witness would say. Given the cost and the temporal requirements of oral proceedings, it might be thought that this written process would be less expensive and, certainly, more convenient.

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tions. 'In the appropriate case we will give that sort of thing a gallop.'" "New Court Team Aims to Cut Red Tape" *The Australian* (January 30, 2009), at 27.

47 Victorian Law Reform Commission, *id.*, at 390.

48 *Id.*, at 417-18.

V. CONVERGENCE?

It is clear that the overall direction of procedural reform in the areas of expert evidence and orality is moving civil litigation closer, in some ways, to procedures that are presently found in civil law systems. One of the clear messages from the International Association of Procedural Law's Symposium on the Role of Orality[49] was the continuing movement by the common law and the civil law procedural systems in opposite directions, but from opposite starting points. With the passage of time, it is possible that these disparate traditions might end up at similar — or, at least, not too distant — places on the continuum of procedural systems. In Gandia, the civil law proceduralists outlined the problems inherent with procedural systems that are based on documentary processes and the direction of reform that was being pursued in order to increase the scope for orality. Then the common law proceduralists outlined the problems with oral-based procedural systems, noting the current decline of orality and the concurrent rise of document-based processes.

While fundamental differences remain, many of the changes to expert evidence reflect an increasing acceptance by common law jurisdictions of the civil law's traditional reluctance to allow the self-interest of the parties to dominate procedure. The joint expert paradigm is a compromise that maintains a level of party control, but, at the same time, promotes collaboration. The increasing interest in court-appointed experts brings the common law process even closer to the civil law process, although this measure is still resisted by many common law judges and lawyers. The managerial changes to the common law expert evidence process, apart from concurrent evidence, already exist as long-standing procedures in civil law jurisdictions. Concurrent evidence appears to be an uniquely Australian development, but it might easily be transferred to civil law jurisdictions.

The challenge for both civil law and common law litigation systems is to strike the appropriate balance between accuracy and efficiency. Different jurisdictions will reach different conclusions about what that balance should be; it is clear, however, that, irrespective of the historical origins of these different jurisdictions, their conclusions may well become increasingly similar.

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[49] Frederico Carpi & Manuel Ortells Ramos, *Oral and Written Proceedings: Efficiency in Civil Procedure*, Vols. I & II (Valencia: University of Valencia, 2008).

The Changing Role of the Expert Witness

The Hon. Ian Binnie[*]

I. INTRODUCTION

In theory, the expert witness is called upon to provide objective assistance to the court. In practice, at least in our jurisdiction, the expert has traditionally been expected by members of the bar to say whatever can *reasonably* be said on behalf of the client who provided the retainer. One expert, made cynical by his exposure to the legal profession, suggested that in his experience expert witnesses are "chosen not for their wisdom or sagacity but for their willingness to say in the simplest, clearest, least tentative way what a particular side wants said".[1]

The tension between the theory and the reality of expert testimony has resulted in courts taking an increasingly aggressive role in trying to identify and exclude "junk" testimony, or, in the alternative, at least making life more difficult for dodgy purveyors of the serious arts and sciences. Many experts welcome the change. They have long been uncomfortable with the role of cheerleader for one side, or, as it was voiced by a reputable historian chastened by his experience in the witness box:

> It is not that we were engaged in formulating lies; there was nothing as crude and naive as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts, quietly ignoring facts and, above all, interpreting facts in a way to do what Marshall said we had to do — "to get by those boys down there."[2]

The use and misuse of experts is in part a by-product of the adversarial system. The theory has always been that a trial of fiercely contending

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[*] Of the Supreme Court of Canada. I would like to acknowledge the valued assistance of Jean-Michel Boudreau, a former law clerk, who did much helpful research on these matters.

[1] J. Morgan Kousser, "Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing" (Winter 1984) 6 The Public Historian 5 [hereinafter "Kousser"].

[2] Paul Soifer, "The Litigation Historian: Objectivity, Responsibility and Sources" (Spring 1983) 5 The Public Historian 47, at 52, citing Ernest R. May, *Lessons of the Past*: *The Use and Misuse of History in American Foreign Policy* (New York: Oxford University Press, 1973), at 189.

positions will ultimately reveal the truth, a theory not unlike Adam Smith's vision of the Invisible Hand, which guides its warring participants towards production of the optimum result.[3] In courtrooms, as well as in the investment banking business, the thought has belatedly occurred to people that the Invisible Hand has its limitations as a control mechanism. As a result, a number of reforms have been tried, with mixed success.

II. THE JUDGE AS GATEKEEPER

A good example is the "gatekeeper" role that is thrust onto judges to exclude dubious expertise from the courtroom, rather than letting everything go in subject to arguments about "weight". This reform is generally attributed to the decision of the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[4] where the Court suggested four non-exclusive factors that could be considered when assessing the reliability of scientific evidence: (1) whether the theory or technique can be used and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error ("falsifiability") or the existence of standards; and (4) whether the theory or technique used has been generally accepted.[5] A fifth criterion, probably too obvious to belabour, is that the expert should stick within the boundaries of his or her expertise.

In a subsequent case, the U.S. Supreme Court extended the *Daubert* approach to non-scientific expert evidence when to do so would be helpful in determining the reliability of any sort of expert testimony.[6] A similar approach is followed in Canada.[7]

Requiring judges who possess the usual liberal arts background to understand science and technology (or financial derivatives or credit swaps for that matter), rather than to merely listen to someone talk about these things, has proven to be an uphill battle.

In 2001, the RAND Institute for Civil Justice issued a report analyzing trends in 399 U.S. federal district court opinions issued between

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[3] See Kousser, *supra*, note 1, at 15.

[4] 509 U.S. 579 (1993) [hereinafter "*Daubert*"].

[5] *Id.*, at 594.

[6] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); see also *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

[7] *R. v. Mohan*, [1994] S.C.J. No. 36, [1994] 2 S.C.R. 9 (S.C.C.) [hereinafter "*Mohan*"]; *R. v. J. (J.-L.)*, [2000] S.C.J. No. 52, [2000] 2 S.C.R. 600 (S.C.C.) [hereinafter "*J. (J.)*"].

January 1980 and June 1999.[8] Overall, the study showed that there was a significant rise in the proportion of evidence excluded, which suggested the "gatekeeper" technique has had some success in keeping out the worst of junk science. However, another study conducted by the Federal Judicial Centre concerning the impact of *Daubert* found that only about 18 per cent of judges who excluded evidence did so based on a finding that the methods and principles of the expert were unreliable.[9] It seems that U.S. judges rarely discuss the *Daubert* criteria. Their concerns about general acceptance, peer review and insufficient testing of the methodology served to exclude testimony less than 8 per cent of the time. Falsifiability and error rates were discussed in less than 2 per cent of the cases studied. Interestingly, most judges simply announced that the evidence was "not relevant, the witness was not qualified, or the testimony would not have assisted the trier of fact". Other U.S. studies are to similar effect.[10]

I am not aware of any similarly broad-based studies done in Canada. Anecdotally, however, the conventional wisdom is that judges here are equally reluctant to stop "expert" evidence at "the gate". Undoubtedly, the ever-present prospect of an appeal may lead some judges to err on the side of admitting borderline evidence, but another difficulty may be that the "gatekeeper" function requires judges to understand the technical basis of the evidence before deciding whether or not to exclude it. Professor Susan Haack writes that she is

> ... a little worried about the danger of giving judges the false impression that they are qualified to make subtle scientific determinations, when it is hardly realistic to expect that a few hours in a science seminar will transform judges into scientists competent to make subtle and sophisticated scientific judgments — any more than a few hours in a legal seminar could transform scientists into judges competent to make subtle and sophisticated legal determinations.[11]

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[8] Lloyd Dixon & Brian Gill, "Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the *Daubert* Decision" (2002) 8(3) Psych. Publ. Pol. & L. 251.

[9] C. Krafta *et al.*, "Judge and Attorney Experiences — Practices and Concerns Regarding Expert Testimony in Federal Civil Trials" (2002) 8 Psychol. Pub. Pol'y & L. 309.

[10] See, *e.g.*, J.L. Groscup *et al.*, "The Effects of *Daubert* on the Admissibility of Expert Testimony in State and Federal Criminal Cases" (2002) 8 Psychol. Pub. Pol'y & L. 339; E.K. Cheng & A.H. Yoon, "Does *Frye* or *Daubert* Matter? A Study of Scientific Admissibility Standards" (2005) 91 Va. L. Rev. 471.

[11] See Susan Haack, "Trial and Error: The Supreme Court's Philosophy of Science" (2005) 95 American Journal of Public Health S66, reproduced in (2006) 41 The International Society of Barristers Quarterly 376, at 378.

I suggest that the problem is as much, and probably more frequently, that the judge suffers from a crisis of confidence rather than an excess of it.

III. A CLASH OF PROFESSIONAL CULTURES

Many experts are aghast that the courts are required to classify science (and other areas of expertise) as either "reliable" or "junk", whereas experts are inclined to believe that reliability is better conceived of as a continuum. As one of our learned Ontario judges put it, "there is a continuum of reliability in matters of science from near certainty in physical sciences to the far end of the spectrum inhabited by junk science and opinion akin to sorcery or magic".[12]

A good example of failure in the gatekeeping function is *R. v. Dimitrov*,[13] where a trial judge allowed the Crown to lead identification evidence described as "barefoot morphology", in which an "expert" purports to identify suspects by the imprint of his or her feet (socks or no socks) *inside* shoes or boots, despite the lack of any serious testing of the methodology, peer review, established criteria or error rates.

The reality is that reliability is never addressed as an abstract proposition, but is always in relation to the potential effect of the evidence on the outcome of the case. This presupposes that reliability *is* a question of degree and that the required threshold will be assessed relative to the circumstances of a particular case. Evidence which, in all likelihood, would have a considerable effect on the disposition of the case *ought* to be required to meet a greater reliability threshold in order to be admitted. In *Dimitrov*, for example, the suspect evidence of "barefoot morphology" was critical to the identification of the alleged murderer and ought to have been stopped at the gate. Its prejudice overwhelmingly outweighed any probative value. It is unfair (and too easy) for a trial judge simply to say, "let the jury decide if this stuff makes any sense".

The problem for the gatekeeper is to assess how far along that continuum of reliability the evidence has to proceed before reaching the tipping point of admissibility. As observed by Chief Justice Rehnquist, dissenting in *Daubert*: "I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the

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[12] *R. v. T. (J.E.)*, [1994] O.J. No. 3067, at para. 75 (Ont. Gen. Div.), *per* Hill J.

[13] [2003] O.J. No. 5243, 68 O.R. (3d) 641 (Ont. C.A.).

scientific status of a theory depends on its 'falsifiability,' and I suspect some of them will be, too."[14]

The skepticism experienced by many experts about the judiciary's apparent binary view of reliability — the evidence is either admitted or it is excluded — is matched by their distaste for the necessity of reaching a settled conclusion (at least for the purposes of the lawsuit) upon a matter of expert controversy which, in their view, is far from settled. This distaste is not limited to scientists, and was noted by the trial judge in a major Canadian Aboriginal rights case who expressed some sympathy for historians made wretched on the wheel of litigation:

> [H]istorical facts are always open to dispute and revision and history is frequently being rewritten.
>
> Testimony in litigation, on the other hand, once admitted into evidence and interpreted by a court, becomes fixed inter-parties even though the same evidence out of the context of the litigation could, as an intellectual exercise, be given a different interpretation by subsequent scholars or upon other facts emerging to change the context.
>
> ... [M]y answer to this submission is simply that we legal people have our own discipline and I think we must stick with it.[15]

Even less sympathetic to experts was the view expressed by Muldoon J. of the Federal Court of Canada in delivering judgment in *Unilever PLC v. Procter & Gamble Inc*.[16] After several weeks of largely expert evidence dealing with the patent dispute, which he professed not to have understood at all, Muldoon J. stated:

> Expert witnesses — called because, one supposes, of their eminence in the chemical science in which they proudly purport to be expert — are a large hindrance rather than much help because, of course, they are paid to contradict the eminent scientists on the opposite side ... A judge unschooled in the arcane subject is at difficulty to know which of the disparate, solemnly mouthed and hotly contended "scientific verities"

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[14] *Daubert*, *supra*, note 4, at 600. On the issue of "falsifiability", one study claimed that of 400 judges interviewed, only 6 per cent had a clear understanding of the concept, while only 4 per cent really grasped the notion of error rates. See S. Gatowski *et al.*, "Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert* World" (2001) 25 Law & Human Behavior 433. But see also D.S. Caudill & L.S. LaRue, "Why Judges Applying the *Daubert* Trilogy Need to Know About the Social, Institutional, and Rhetorical — And Not Just the Methodological — Aspects of Science" (2003) 45 B.C.L. Rev. 1, at 8 (The authors are highly critical of this study. They think that the study asked the wrong questions and that the methodology was flawed.)

[15] *Delgamuukw v. British Columbia*, [1987] B.C.J. No. 1569, 40 D.L.R. (4th) 685, at 689-90 (B.C.S.C.).

[16] [1993] F.C.J. No. 117, 47 C.P.R. (3d) 479 (F.C.T.D.).

> is, or are, plausible. Is the eminent scientific expert with the shifty eyes and poor demeanour the one whose "scientific verities" are not credible? Cross-examination is said to be the great engine for getting at the truth, but when the unschooled judge cannot perceive the truth, if he or she ever hears it, among all the chemical or other scientific baffle-gab, is it not a solemn exercise in silliness?[17]

Stripped of its colourful language, Muldoon J.'s analysis makes an important point: by what criteria do trial judges *really* assess expert testimony? Is it based on what is said or how it is said or who says it?

IV. THROUGH THE GATE IS ONLY THE BEGINNING

Junk science is sometimes easier to detect than "real science" incompetently presented. In Ontario, we have recently had the scandal of a string of wrongful convictions judged by a judicial inquiry to be largely the fault of a crusading Crown pathologist by the name of Dr. Charles Smith. The inquiry, conducted by Justice Stephen Goudge of the Ontario Court of Appeal, found that Dr. Smith was poorly trained, chronically disorganized, arrogant and incompetent,[18] yet his overbearing expert testimony ran largely unchecked in the Ontario courts for over a decade. As a result of his inquiry, Goudge J.A. recommended that 142 of the cases in which Dr. Smith testified should be reviewed to investigate potential errors and miscarriages of justice. In one case, a mother was committed to trial charged with murder for allegedly stabbing her daughter repeatedly with a knife. The "stab wounds" were later shown to be the result of a savage attack by a pit bull terrier, as the mother had repeatedly protested.[19] In another case, a man spent 12 years in prison for allegedly strangling and sexually assaulting his niece, based on Dr. Smith's evidence, which Dr. Smith later recanted (prompted by an independent investigation by outside experts who rejected his conclusions) and for which he belatedly apologized. In neither of these cases did the trial process, of which the legal community is so proud, succeed in exposing the quackery of the expert testimony.[20]

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[17] *Id.*, at 488-89.

[18] Stephen T. Goudge, *Inquiry into Pediatric Pathology in Ontario: Report, Vol. 1: Executive Summary* (Toronto: Ontario Ministry of the Attorney General, 2008), at 16-18 [hereinafter "Goudge, *Executive Summary*"].

[19] *Id.*, at 26.

[20] *Id.*, at 5.

Another remarkable instance of the potential for the miscarriage of justice created by careless science is the wrongful conviction of Guy Paul Morin. On December 31, 1984, the body of nine-year-old Christine Jessop was found in a field east of Toronto. She had been missing for three months. The autopsy determined that she had been sexually assaulted and died from multiple stab wounds to the chest. Almost four months later, Mr. Morin, a next-door neighbour, was arrested and tried for her murder. At his second trial in July 1992, Mr. Morin was convicted. Eventually, in 1995, DNA typing, introduced as fresh evidence before the Ontario Court of Appeal, caused the Crown to concede that Mr. Morin was innocent of Christine Jessop's murder.

Two pieces of forensic evidence had made a major contribution to Mr. Morin's conviction. First, a single dark hair was found on Christine Jessop's body embedded in skin tissue and her necklace. This "necklace hair", as it came to be known, was thought to belong to the killer. Secondly, fibres were gathered from Mr. Morin's car and it was submitted by the Crown that these fibres "matched" Christine Jessop's clothing, therefore suggesting that she was quite possibly transported in that vehicle from the point of abduction to the location where she was murdered. The fibre evidence tendered by the Crown at the second trial was supposedly based on a study entitled "The Significance of Fibres Found on Car Seats" conducted by two respected English forensic scientists, Roger Cook and Graham Jackson.

Following Mr. Morin's eventual exoneration by DNA evidence,[21] the Government of Ontario established the Kaufman Inquiry, presided over by a retired judge of the Quebec Court of Appeal, which heard from one of the co-authors of the fibre study, Roger Cook. He testified that the fibre examinations performed in Mr. Morin's case were "unusual, inappropriate and dangerous".[22] The Commissioner, The Honourable Fred Kaufman, concluded that the study was "seriously misused" and "likely

[21] Earlier attempts at typing the DNA of blood and semen stains found on Christine Jessop's underpants had failed repeatedly between 1988 and 1991. Due to prolonged exposure to the elements, the samples had degraded and the method used at the time was not sufficiently developed to obtain conclusive results. On January 19, 1995, three scientists (one appointed by the Crown, one appointed by the defence, and the third by the other two) were successful in typing the DNA from the deteriorated sample and concluded that the sperm recovered from the underpants could not have originated from Guy Paul Morin. See Kaufman, *infra*, note 22. With the consent of both parties, these findings were presented as fresh evidence to the Court of Appeal and resulted in Mr. Morin's acquittal.

[22] Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin: Report, Recommendations* (Toronto: Ontario Ministry of the Attorney General, 1998), at 110.

misled the jury".[23] Properly understood, the study had no relevance at all to the Morin situation. Since the Morin and Jessop families were neighbours, some innocent transfer of fibres was to be expected. In fact, the Kaufman Report stated that the fibre similarities, even if they had not been the product of contamination (which they were), "proved nothing".[24]

Similarly, forensic evidence based on the necklace hair only showed that Mr. Morin could not be positively excluded as the source of the hair. In his recommendations, the Commissioner declared that since such evidence was "unlikely to have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of guilt", trial judges should undertake a "more critical analysis of [its] admissibility".[25] Commissioner Kaufman concluded that "[t]here is no doubt that the hair and fibre evidence was crucial to the decision to arrest Guy Paul Morin; its presentation to the jury at the second trial undoubtedly contributed to Mr. Morin's wrongful conviction."[26]

It seems evident that if the courts are to continue to offer themselves as a credible source of dispute resolution, the traditional, rather amateurish, way of receiving and assessing expert evidence will have to be modified and improved.

V. THE TEST FOR ADMISSIBILITY

The legal framework for the reception of expert evidence is fairly straightforward and ought to be workable. In this country, the criteria are relevance, reliability and necessity, measured against the counterweights of time, prejudice and confusion.[27] Evidence is relevant "where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence".[28] This, taken alone, provides a fairly low threshold, but, in the case of expert evidence (at

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[23] *Id.*, at 119.

[24] *Id.*, at 93.

[25] *Id.*, at 312.

[26] *Id.*, at 83.

[27] *Mohan*, *supra*, note 7; *J. (J.-L.)*, *supra*, note 7; R.J. Delisle, "The Admissibility of Expert Evidence: A New Caution Based on General Principles" (1994) 29 C.R. (4th) 267.

[28] *J. (J.-L.)*, *id.*, at para. 47, citing D.M. Paciocco & L. Stuesser, *The Law of Evidence* (Concord, ON: Irwin Law, 1996), at 19.

least), it is qualified by the rule that evidence whose prejudice exceeds its probative value should be excluded.

Relevance presupposes reliability, as "unreliable" expert evidence advances nothing except confusion. The expert evidence in question must be necessary "in the sense that it provides information 'which is likely to be outside the experience and knowledge of a judge or jury,'… . [T]he evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature."[29] This calls for a cost-benefit analysis in terms of its impact on the trial process. In some cases, expert evidence of peripheral value has consumed trial time vastly disproportionate to its usefulness.

Judges cannot simply defer to consensus in the scientific community because science and technology are often moving too quickly for a "consensus" to form before the issue reaches the courts. In an earlier era, common law judges frequently took refuge in a theory of "general acceptance" in the science or art to which the evidence belonged. In *Frye v. United States*,[30] for example, the defendant was accused of murder and he offered the results of a systolic blood pressure description test, a precursor to the polygraph, as evidence of his innocence.[31] This was a novel technique at the time and no community of experts had yet emerged to support its reliability. The Court held that expert testimony was admissible only when the scientific principle or technique from which it was deduced had gained general acceptance in the particular field to which it belonged. General acceptance is not only slow, but it has other limitations. As the Supreme Court of Canada noted in *J. (J.-L.)*, at one point in the not too distant past, the highest authorities in the Western world were agreed that the world was flat.[32]

Moreover, some areas of claimed expertise are more easily validated and reproduced than others. DNA methodologies, for example, lend themselves more easily to testing, critique and the generation of error rates than do theories in the "softer" sciences, such as psychology.

If the courts cannot defer to "general acceptance" in the relevant scientific community, and yet have experienced considerable difficulty

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[29] *Mohan*, *supra*, note 7, at para. 22, citing *R. v. Abbey*, [1982] S.C.J. No. 59, [1982] 2 S.C.R. 24 at 42 (S.C.C.).

[30] 293 F. 1013 (D.C. Cir. 1923).

[31] See the commentary in L. Moresk, "Get on Board for the Ride of Your Life! The Ups, the Downs, the Twists, and the Turns of Applicability of the 'Gatekeeper' Function to Scientific and Non-Scientific Expert Evidence: *Kumho*'s Expansion of *Daubert*" (2001) 34 Akron L. Rev. 689, at 694.

[32] *J. (J.-L.)*, *supra*, note 7, at para. 34.

themselves in coming to grips with various fast-moving fields of science and technology, as well as high finance and other fields of expertise, it becomes apparent that steps must be taken to modify both the ways in which expert evidence is given and assessed, as well as the professionalism of some of those called upon to give the evidence. What is required, in short, is a collective recognition — by both the legal community and the various professional bodies that represent different fields of expertise — of the problems now confronting the trial courts, and a cooperative attempt to bring about a measure of institutional reform.

VI. STANDARDS OF PROFESSIONALISM

I referred, at the outset, to the concept of the expert as part of the advocacy team. This concept was nicely captured by Professor Kousser's description:

> Lawyers see the topic from a different vantage point. If my experience with them is at all representative, attorneys tend to believe that their own experts are pure, even to the point of being too prissy to agree to state their own conclusions in a way which would be most helpful to the lawyers' clients — while the other side's are merely lying for money.[33]

The Goudge Inquiry, on the other hand, was impressed with the *Code of Practice and Performance Standards for Forensic Pathologists*[34] in England and Wales, which provides for a much higher level of candour and disclosure by the expert witness than we are used to in Canada, including an obligation to declare (if I may paraphrase):

(a) details of academic and professional qualifications, experience and accreditation relevant to the opinions expressed, as well as the range and extent of this expertise *and any relevant limitations on it*;
(b) the levels of confidence or certainty with which the opinions are expressed;
(c) any alternative explanations that are raised by the case problem, with an analysis of why these alternative explanations *can or cannot* be ruled out;

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[33] See Kousser, *supra*, note 1, at 6.

[34] The Royal College of Pathologists, *Code of Practice and Performance Standards for Forensic Pathologists* (London: Home Office Policy Advisory Board for Forensic Pathology and The Royal College of Pathologists, November 2004), online: <http://www.rcpath.org/resources/pdf/CodeOfPracForensicPath1104.pdf>.

(d) what the expert has to say that is relevant to the live or pertinent issues in the case;
(e) any area of controversy that may be relevant to the opinions, and placing the opinions in that context;
(f) any *limits of the science or technology or "art"* that are relevant to the particular opinions;
(g) any other expert opinions that have been relied upon in informing the expert opinion; and
(h) the facts found and the reasoning process that was followed, leading to the opinions expressed.[35]

This calls for increased professional candour (almost a checklist for cross-examination by opposing counsel), which should be accompanied by strengthened professional associations of the forensic wing of various areas of expertise. Dr. Smith, for example, claimed to have had little understanding of his role in court. He told the Goudge Inquiry that "[i]n the very beginning, when I went to court on the few occasions in the 1980's, I honestly believed it was my role to support the Crown Attorney. I was there to make a case look good. That's the way I felt."[36]

Justice Goudge recommended that experts would benefit from increased professionalism and education, an enhanced awareness of the risks of confirmation bias, the promotion of an evidence-based culture, and complete transparency concerning both what evidence is communicated to the expert and what parts of the evidence are relied upon to form the opinion.[37] His analysis is a valuable contribution to much-needed reform not only in the field of forensic pathology, but in expert testimony more broadly.

VII. LEGAL EDUCATION

Much greater effort is required in both the general and the particularized education of judges and lawyers — and this effort is overdue. The National Judicial Institute has taken the lead to bring groups of Canadian judges together to explore scientific concepts and subjects that may give rise to litigation. Some of the law societies have developed similar programs for lawyers. As U.S. Secretary of State Donald Rumsfeld memorably pointed

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[35] *Id.* (emphasis added).

[36] "Discredited pathologist admits he was profoundly ignorant" *CBC News* (January 28, 2008), online: <http://www.cbc.ca/canada/story/2008/01/28/smith-inquiry.html>.

[37] Goudge, *Executive Summary*, *supra*, note 18, at 69.

out some years ago, danger lurks not only in the things we don't know, but also in the things we don't know we don't know.

VIII. JUDICIAL RECRUITMENT

Traditionally, little effort has been made in Canada to recruit judges with a scientific or technical background. This is true even of the Federal Court, where most intellectual property litigation takes place. In many jurisdictions, the ideal of the "generalist judge" is giving way to a more specialist bench that is able to operate in particular cases with a much shorter learning curve.

IX. MODIFICATION OF THE ADVERSARIAL SYSTEM

Our present system contemplates that a case must be resolved on the evidence heard in the courtroom. Yet the courtroom, with all its formalities and evidentiary rules, is a poor schoolhouse, and "duelling experts" may make bad teachers. Courts are, however, the masters of their own procedure and have the flexibility to modify to their own advantage the framework within which experts testify. Why, for example, in a case that requires a judge to grapple with serious scientific evidence, can the parties not arrange for an out-of-court seminar on the basic science or expertise involved? This was done for a panel of judges in the House of Lords in *Kirin-Amgen Inc. v. Hoechst Marion Roussel Ltd.*,[38] a patent case. One can imagine this technique being used with equal benefit in a case involving hedge funds, financial derivatives or credit swaps.

As to the expert evidence presented by the parties, the rules of procedure might be modified to require experts to exchange reports and meet face-to-face for an unmediated discussion before trial. This has been recommended by a recent British Columbia Task Force on Civil Justice as a mandatory step, in addition to ordering opposing experts to produce a joint report that defines key terms as well as the points of agreement and disagreement. Whether such a reform, if implemented, is pursued in the spirit that it was intended remains to be seen.

Once the hearing begins, more frequent consideration might be given to a court-appointed expert who is nominated by the parties to sit with the judge or jurors in order to respond to their questions within the relevant

[38] 2004 UKHL 46 (H.L.).

field of expertise. In some cases, it may be appropriate for the court to take the initiative in appointing its own scientific "*amicus curiae*" to provide assistance in evaluating the technical evidence, even without the consent of the parties. This is the tradition in some continental legal systems, and it is the practice in admiralty courts (which have a civil law genesis), including the Federal Court of Canada sitting in admiralty. There is much resistance at the bar to such a proposal, but it should be considered in greater depth in this jurisdiction at least. It might serve the objective of keeping the costs of litigation proportionate to what is at stake, as well as helping to level the playing field.

Moreover, a court should be able to require opposing experts to testify on the same panel and to be subject to questioning in the presence of each other, with the right to question each other in the presence of the trier of fact. The procedure whereby opposing experts testify together on the same panel is regularly used in continental legal systems as well as by administrative agencies in Canada, such as the National Energy Board, and is employed with success in the Federal Court of Australia (where it is known as the "Australian hot pot"). The theory is that experts testifying in the presence of one another are likely to be more measured and complete in their pronouncements, knowing that exaggeration or errors will be pounced upon instantly by a learned colleague, as opposed to being argued about days later, perhaps by unlearned opposing counsel.

X. CONCLUSION

It is easier to identify the problems than to arrive at solutions that are acceptable not only to the bench, but also to the bar (and its clients), as well as to the various communities of experts. Yet the deficiencies of the present approach to expert evidence in the courts are obvious, and, in the result, they risk the credibility of judicial decisions in such matters. The public is rightly shocked by the scandal arising from the demonstrated miscarriages of justice that were based on flawed expert testimony — as disclosed by the Goudge Inquiry into Dr. Charles Smith and the Kaufman Inquiry into the wrongful conviction of Guy Paul Morin. The courts ignore public shock at their peril.

The role of experts has evolved over the years from an idealistic concept of avuncular friends of the courts to a greater tendency, in recent times, towards paid gunslingers. If the initial idea was unrealistic, the second is

becoming increasingly unacceptable to all concerned. There are numerous proposals for reform. The question is whether the natural lethargy of the legal community will allow the best of them to be implemented.

Le changement de rôle des témoins et des conseils dans quelques pays de droit civil et, en particulier, en France

Emmanuel Jeuland[*]

I. INTRODUCTION

Chacun connaît l'histoire de la distinction entre la justice de *common law* et la justice de *civil law*. Cependant, un rappel permet de situer la problématique du témoignage. La distinction entre *civil law* et *common law* remonte au XI[e] siècle environ. La justice en Europe était en crise, étant rendue médiocrement et à un coût élevé par des seigneurs. L'accusateur risquait sa vie si la personne accusée était innocentée et l'appel consistait en un duel contre le juge. Surtout, les modes de preuve, à savoir l'ordalie et le serment, étaient largement de type irrationnel. Le premier système de justice à être reformée fut celle de l'Angleterre. Le jury et des modes de preuve moins irrationnels fondés sur le débat, en particulier le témoignage, furent inventés. Par ailleurs, cette justice a été centralisée entre les mains du roi. Il ne semble pas que le droit romain ait joué le moindre rôle dans cette réforme. Plus de 50 ans plus tard, une autre évolution a eu lieu en Europe continentale. Le droit romain a été redécouvert à Bologne et la procédure extraordinaire a été prise pour modèle par la justice ecclésiastique dont le champ de compétence n'a ensuite cessé de s'élargir car elle était bon marché, rationnelle et efficace. Les procédures royales prendront progressivement pour modèle la procédure romano-canonique, c'est-à-dire une procédure écrite comportant peu de débats oraux et contrôlée par un juge qui établit lui-même les faits. Le témoignage y joua sans doute un rôle mais dans les siècles qui ont suivi, la preuve écrite l'emporta. Lettres passent témoins, affirme un adage. Évidemment, chaque pays de droit civil a son style. La procédure civile française est

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restée longtemps influencée essentiellement par la procédure franque, plutôt accusatoire, mais la part de l'écrit est traditionnellement importante.

On pourrait donc affirmer que le témoignage est au cœur de la procédure de *common law* – il en est un élément structurel – tandis qu'il reste secondaire dans la procédure de *civil law* – il n'est pas un élément de structure. On comprend ainsi que l'expertise ait connu un développement très différent dans les deux systèmes : considérée comme un témoignage en *common law*, mais non considérée comme un témoignage en *civil law* et prenant la place de l'écrit comme preuve prééminente, c'est-à-dire comme preuve structurelle. La question est de savoir si le rôle des témoins et celui des conseils dans la procédure de témoignage ont changé récemment et, implicitement, si le rôle de l'expertise a lui-même évolué. Il me semble que, globalement, la procédure civile française et la procédure civile européenne se sont plutôt rapprochées du type romano-canonique; cependant, dans le même temps, il existe quelques indices d'une importance grandissante du dialogue entre les parties, le juge et, éventuellement, les témoins et les experts : double mouvement apparemment contradictoire mais peut-être révélateur de l'émergence d'un nouveau type de procédure qui n'est plus tout à fait de *civil law* sans être une procédure de *common law*.

L'intitulé de la table ronde est en anglais et il utilise aussi des catégories de *common law*. Pour l'aborder sous l'angle du droit civil, il est donc nécessaire de le déconstruire pour essayer de mettre à jour son ou ses équivalents fonctionnels. Dès lors qu'il existe une procédure de *cross-examination* des témoins par les avocats de la partie adverse, le rôle des avocats est particulièrement développé en matière de témoignage. Cependant, dans le système de *civil law*, il n'existe pas de *cross-examination* si bien que l'avocat n'a pas de rôle particulier. Aussi, l'intitulé de la table ronde ne s'applique-t-il pas aux pays de *civil law*. De plus, dans la procédure de *common law*, l'expert est un témoin et il est même celui d'une des parties. Entre donc dans le sujet à traiter la question de l'expertise. Pourtant, en droit français, l'expert n'est pas un témoin, c'est un auxiliaire du juge. L'avocat joue certes un rôle à son égard mais il est très différent de celui qu'il peut jouer dans une procédure de *cross-examination*. L'équivalent fonctionnel du sujet donné en anglais dans les catégories de *common law* serait donc : le changement de rôle des témoins, des experts et des avocats en procédure civile, étant entendu qu'il s'agit ici du changement de rôle de l'avocat, s'il y a en un, relativement au témoignage et à l'expertise. Il y a donc deux sujets au sens du droit civil là où il n'y en a qu'un pour les pays de *common*

law. Il ne me semble pas que l'on puisse affirmer qu'il existe un changement de rôle des avocats en matière de témoignage même si, en cette matière, on connaît quelques développements. Quant à l'expertise, elle apparaît comme un petit procès dans le grand, qui est décisif, et les avocats y jouent un rôle actif et crucial, mais dans un sens très différent de celui qu'ils peuvent jouer dans une procédure de *cross-examination*. Je prendrai comme exemple principal le droit français et je ferai des références à d'autres droits tels que le droit belge et le droit italien. Il va de soi que la situation des pays dits de *civil law* varie beaucoup sur ce point. Ainsi, l'Espagne connaît la *cross-examination* en procédure civile et l'Allemagne admet les questions supplémentaires directes.

II. LES CHANGEMENTS CONCERNANT LE TÉMOIGNAGE DANS QUELQUES PAYS DE *CIVIL LAW* (FRANCE, BELGIQUE, ESPAGNE)

La matière du témoignage évolue lentement. Il existe dans le Code civil français des dispositions datant de 1804 sur l'admissibilité du témoignage. La France étant un pays qui privilégie la preuve écrite, on a recours aux témoignages pour prouver un acte juridique dont l'enjeu est supérieur à 1500 euros que s'il existe un commencement de preuve par écrit, tel un courier. Ils sont en revanche toujours admis pour prouver des faits, sauf dans quelques cas, tel le témoignage d'un parent dans un divorce. Concernant l'administration du témoignage, c'est-à-dire les procedures de témoignage, les changements ont surtout eu lieu en 1976 avec l'entrée en vigueur du Nouveau Code de procédure civile[1]. Deux modes procéduraux ont été organisés en matière de témoignage. Les déclarations des tiers, régies par les articles 199 à 231 du Code de procédure civile, constituent le mode d'administration judiciaire de la preuve testimoniale : elles visent à éclairer le juge sur les faits litigieux dont les tiers ont eu personnellement connaissance[2], lesquels ont, en vertu de la loi, l'obligation de concourir à la manifestation de la vérité[3]. À la traditionnelle enquête, mode de déclaration orale (2), le Nouveau Code a ajouté le procédé des attestations, mode de déclaration écrite qui est devenu le plus courant (1).

1 Ci-après « CPC ».
2 CPC, art. 199.
3 Code civil, art. 10.

1. Déclaration par voie d'attestation

Le Nouveau Code de procédure civile a consacré la pratique des attestations qui s'était développée dans le néant des textes antérieurs; elles sont l'objet des articles 200 à 203. L'attestation présente assurément par rapport à l'enquête l'avantage d'une plus grande souplesse et d'une plus grande économie; il faut bien dire cependant qu'elle garantit moins que l'enquête la sincérité et la spontanéité des témoins. Formellement, l'attestation est une déclaration écrite relatant les faits auxquels le tiers a *personnellement* assisté ou qu'il a *personnellement* constatés. Cette déclaration doit être écrite, datée et signée de la main de son auteur qui doit lui annexer, en original ou en copie, tout document officiel justifiant de son identité et comportant sa signature (en pratique, il s'agit le plus souvent de la carte nationale d'identité); elle mentionne l'identité du témoin et, s'il y a lieu, la nature des relations qu'il entretient avec les parties, puis elle indique qu'elle est établie en vue de sa production en justice et que son auteur a connaissance des sanctions pénales auxquelles une fausse attestation l'exposerait[4]. La Cour de cassation contrôle avec vigilance le respect de ces conditions. Ces règles ne sont certes pas édictées à peine de nullité, mais les attestations irrégulières *peuvent* être écartées des débats par une décision motivée du juge. Ce pouvoir d'appréciation des juges du fond n'est pas contraire aux principes du droit au procès équitable dès lors que la partie à qui une attestation est opposée a pu en contester la force probante. À l'évidence, ces attestations doivent être communiquées à l'adversaire, le juge ayant toujours la possibilité de procéder par voie d'enquête à l'audition de l'auteur de l'attestation. Le rôle de l'avocat est ici limité; il peut donner des conseils touchant la rédaction de l'attestation, mais on est très loin de la *cross-examination* puisqu'il n'est pas même auditionné. On peut se demander si le développement de l'attestation écrite ne va pas dans le sens du rapprochement de la procédure civile française, qui était restée d'influence franque, avec la procédure romano-canonique qui privilégie l'écrit. C'est devenu le mode de témoignage le plus fréquent.

2. Déclaration par voie d'enquête

L'enquête est l'audition des témoins par le juge. Mode traditionnel de témoignage, la procédure de l'enquête a été allégée et simplifiée par le Code de procédure civile français afin de mieux favoriser la spontanéité

[4] Nouveau Code pénal, art. 441-7.

et la sincérité des témoins. Les résultats ne sont peut-être pas à la hauteur des ambitions car l'enquête est assez peu utilisée en pratique. Les articles 204 à 231 distinguent par ailleurs plusieurs sortes d'enquêtes qui font néanmoins l'objet de règles communes.

L'enquête est dite *sur-le-champ* quand le juge entend immédiatement toute personne dont l'audition lui paraît utile à la manifestation de la vérité[5], sinon elle est ordinaire et le juge fixe une date d'audition. Les témoins sont convoqués par le secrétaire de la juridiction huit jours au moins avant la date de l'enquête et les parties sont avisées verbalement ou par lettre simple de la date de l'enquête[6].

Que l'enquête soit sur-le-champ ou ordinaire, elle obéit aux mêmes règles, lesquelles concernent, *en premier lieu*, le *statut des témoins*. Seules peuvent être entendues comme témoins les personnes capables de témoigner en justice. En matière de divorce ou de séparation de corps, il est interdit aux descendants de témoigner sur les griefs invoqués par les époux[7]. Dès lors que cette condition de capacité est remplie, toute personne légalement requise est tenue de témoigner[8]. Les témoins peuvent demander à percevoir des indemnités[9] mais les témoins défaillants peuvent être cités à leurs frais si leur audition est jugée nécessaire et, en cas de refus avéré de déposer ou de prêter serment, ils peuvent être condamnés à une amende civile de 15 à 15 000 euros. Toutefois, des dispenses de témoignage sont prévues au bénéfice des parents ou alliés en ligne directe de l'une des parties ou son conjoint, même divorcé[10], et, en dehors de ces cas, au profit des personnes qui justifient d'un motif légitime comme le secret professionnel.

En principe, les témoins sont entendus séparément dans l'ordre fixé par le juge, en présence des parties et de leurs défenseurs ou ceux-ci appelés. C'est seulement à ce propos que l'on peut parler de rôle de l'avocat. Après avoir précisé leur identité et la nature de leurs liens avec les parties[11], les témoins prêtent serment sous la sanction des peines qui frappent le faux témoignage (on ne prête pas serment sur la Bible). Puis, les témoins sont entendus et interrogés selon les règles des articles 212 à 218. Afin de conserver une certaine spontanéité, les témoins ne peuvent lire aucun projet.

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5 CPC, art. 231.
6 CPC, art. 230.
7 CPC, art. 205.
8 CPC, art. 206 *in limine*.
9 CPC, art. 221.
10 CPC, art. 206 *in fine*.
11 CPC, art. 210.

Quelles qu'en soient les modalités, le juge jouit du pouvoir discrétionnaire d'ordonner ou de refuser la mesure d'instruction d'audition de témoins, sans contrariété aux dispositions de l'article 6 § 1 de la *Convention européenne des droits de l'homme*[12].

Selon l'article 214 du Code de procédure civile français, « les parties ne doivent ni interrompre ni interpeller ni chercher à influencer les témoins qui déposent, ni s'adresser directement à eux, à peine d'exclusion. Le juge pose s'il l'estime nécessaire les questions que les parties lui soumettent après l'interrogatoire du témoin ». Autant dire que la *cross-examination* est prohibée, l'explication pouvant être décelée dans cette disposition : il s'agit de ne pas influencer les témoins. On retrouve une disposition similaire en droit belge à l'article 936 du Code judiciaire : « La partie ne peut ni interrompre le témoin dans sa déposition ni lui faire aucune interpellation directe, mais est tenue de s'adresser au juge. » En droit italien, ces dispositions se trouvent à l'article 253 : « Il giudice instruttore interroga il testimone sui fatti intorno ai quali è chamato a deporre. Puo altresi revolgergli, d'ufficio o su instanza di parte, tutte le domande che ritiene utili a chiarire i fatti medesimi. E vietato alle parti et al publico ministero di interrogare directamente i testimoni. » L'article indique clairement qu'il est interdit aux parties et au ministère public d'interroger directement les témoins. De manière générale, Michele Taruffo relève que, dans les pays de droit civil, c'est le juge qui interroge : « […] nella maggior parte dei sistemi processuali di civil law chi interroga è il giudice »[13].

Il existe cependant cinq signes d'évolution.

- Tout d'abord, la procédure de *cross-examination* se développe en procédure pénale dans plusieurs pays de droit civil tels que l'Italie, l'Espagne ou la France (Loi du 15 juin 2000). Elle est donc possible dans les pays de droit civil et la justification fondée sur la crainte qu'un témoin soit influencé ne paraît plus totalement convaincante. Ainsi, des auteurs italiens suggèrent que la procédure de *cross-examination* soit également acceptée en procédure civile[14].
- Les principes UNIDROIT admettent la cross-examination avec cependant des nuances à l'article 16.4 : « […] les parties, les témoins et les experts sont entendus selon les règles de l'Etat du for. Une partie a le droit de poser directement des questions additionnelles à une autre partie, à un témoin ou à un expert si le juge ou l'adversaire

[12] 3e civ., 5 avril 2006 : JCP 2006.I. 2004.

[13] « Narrazione processuale » (Janvier 2008) Revista de Processo, p. 94.

[14] F. Carpi et M. Taruffo (dir.), *Commentario breve al codice di procedura civile*, Milan, CEDAM, 2002, sous l'article 253.

procède à l'audition en premier ». La formulation est assez curieuse. D'abord, elle consacre la différence culturelle en renvoyant au droit du for. Neil Andrews relève à ce propos « [...] sometimes, the principles acknowledge that there is scope for radical differences of approach on aspects of practice. Such agnosticism pervades discussion of the following topics: sanctions for procedural default, receipt of expert evidence, examination of witnesses »[15]. Cependant, la phrase suivante reconnaît le droit pour une partie de poser directement une question, ce qui modifie le droit du for.

- Il existe aussi une évolution dans l'arbitrage international qui n'est pas très éloignée des principes UNIDROIT dans la mesure où les juges ou les parties peuvent décider d'y recourir. Certains arbitres acceptent la cross-examination et d'autres, non. Certains auteurs français appellent à une telle utilisation afin que la place française ne perde pas en attractivité[16].
- Les règles de droit judiciaire intracommunautaire[17] permettent à un juge de common law de demander à un juge de droit civil de mettre en œuvre une procédure de cross-examination[18].
- Enfin, le développement de l'audience interactive devant le tribunal de grande instance[19] permet sans doute de discuter davantage entre avocats et magistrats et permet au juge de la mise en état de mieux préparer son rapport à l'audience; un témoignage peut ainsi donner lieu à davantage de discussions mais l'audience interactive ne vise pas spécialement le témoignage. Il existe certains protocoles entre juridictions et avocats qui prévoient une telle audience mais il n'est pas certain que cela ait une influence sur le témoignage proprement dit[20].

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[15] « The Modern Procedural Synthesis: The American Law Institute and UNIDROIT's "Principles and Rules of Transnational Civil Procedure" » (Octobre 2008) Revista de Processo, p. 118; voir : L. Cadiet, dans F. Ferrand (dir.), *La procédure civile mondialisée*, Éditions juridiques et techniques, 2004, p. 134-135.

[16] S. Lazareff, « Déontologie et arbitrage », *Gaz. Pal.* 22-24 avril 2007. 3; voir aussi : X. Normand-Bodard, « La préparation du témoin en arbitrage international » (30 avril 2008) Les Petites Affiches, p. 4, n° 87 (qui estime que la préparation de témoins à l'attestation écrite comme à l'interrogatoire ne porte pas atteinte au droit du contradictoire et au principe de loyauté en matière d'arbitrage international).

[17] *Règlement du 28 mai 2001*, art. 10.3.

[18] Le Code de procédure civile l'admet de manière plus générale en dehors du cadre européen : art. 739.

[19] Voir : S. Amrani-Mekki *et al.*, « Le procès civil à son point de déséquilibre? », JCP 2006.I.146, n°10.

[20] N. Gerbay, *L'oralité du procès civil*, Thèse Paris 1, 2008.

Que penser de ces cinq indices d'évolution? Indéniablement, la *cross-examination* fait son chemin dans les pays de droit civil mais elle ne paraît pas pouvoir être acculturée facilement; elle ne peut l'être pour le moment que dans des procédures particulières (UNIDROIT qui n'est pas un texte obligatoire, commission rogatoire). Son entrée en procédure pénale peut s'expliquer par le souci premier de reconnaître des droits à la défense, ce qui n'est pas en jeu de la même manière en procédure civile. La procédure pénale ne devient pas de plus en plus accusatoire dans les pays de *civil law* même si l'on annonce la disparition du juge d'instruction en France, elle devient de plus en plus contradictoire et respectueuse des droits de la défense. Lorsque la *cross-examination* est appliquée en procédure pénale, les témoins ne sont pas préparés et ils doivent tout de même répondre aux questions posées par les avocats des parties en s'adressant au président, ce qui pose une difficulté spatiale car les salles d'audience n'ont pas été dessinées pour une telle procédure (ainsi, en pratique, j'ai pu voir un avocat collé le dos à la chaire de la cour sous l'emplacement de l'un des juges afin d'être à peu près en face du témoin et que celui-ci puisse répondre sans se tourner vers le président).

D'ailleurs, en procédure civile, la procédure d'enquête est relativement rare en droit français et celle qui est le plus suivie est l'attestation écrite. Mon sentiment est que la *cross-examination* ne se heurte pas seulement à la crainte d'influencer le témoin, mais aussi à un principe structurel qui tient au rôle d'intermédiaire du juge. On a pu dire qu'il est un clerc, un prêtre en France, et on pourrait y voir une influence du catholicisme. De même, le tribunal est davantage un temple ou un palais qu'un lieu de débat, comme l'atteste le vocabulaire puisque l'on parle, en français, de palais de justice et de salle d'audience (comme si on se présentait devant le roi), contrairement à l'anglais qui parle de *court-house* et de *courtroom*. Du coup, l'audience française est rapide : en général, tout est déjà joué, sauf dans les procédures orales (prud'homme, tribunal de commerce, tribunal d'instance), au point où l'audience n'est même plus nécessaire devant le tribunal de grande instance si les avocats sont d'accord. On retrouve le rôle de l'avocat mais dans une position qui n'est pas favorable à la *cross-examination*[21]. Enfin, dans les derniers textes de droit communautaire, la procédure suit clairement le modèle romano-canonique : tout se passe par écrit (informatique) et une audience n'est pas nécessaire, le juge pouvant, à sa discrétion, rendre

[21] CPC, art. 779.

une décision, obtenir des preuves ou convoquer les parties[22]. Quant à l'obtention des preuves,

> […] la juridiction détermine les moyens d'obtention des preuves et l'étendue des preuves indispensables à sa décision […] elle peut admettre l'obtention de preuves par déclarations écrites de témoins d'experts ou de parties. Elle peut également l'admettre par vidéoconférence […] la juridiction ne peut obtenir de preuves par expertise ou témoignage oral que si elles sont nécessaires à sa décision[23].

L'écrit est privilégié et le témoignage oral devient subsidiaire ainsi que l'expertise d'ailleurs, ce qui paraît situer à un même niveau les deux mécanismes. Cependant, autant des formulations similaires dans le Code de procédure civile français ont permis le développement de l'attestation écrite autant elles n'ont pas pu limiter le nombre d'expertises. Il existe donc autant d'indices contraires à la *cross-examination*, et peut-être davantage, que d'indices en faveur de la *cross-examination*; il se peut même d'ailleurs que les avancées de certains mécanismes de *common law*, comme la *cross-examination*, conduisent les procédures de *civil law* à devenir de plus en plus écrites.

III. LES CHANGEMENTS CONCERNANT L'EXPERTISE DANS LES PAYS DE *CIVIL LAW*

Les experts judiciaires sont des professionnels de spécialités diverses (architecte, médecin, géomètre expert, expert-comptable, psychologue, *etc*.), des hommes de l'art, qui se voient confier, par le juge, dans un litige déterminé, une mesure d'instruction. Ce ne sont pas des témoins mais des auxiliaires du juge. Selon l'article 232 du Code de procédure civile, « le juge peut commettre toute personne de son choix pour l'éclairer par des constatations, par une consultation ou par une expertise sur une question de fait qui requiert les lumières d'un technicien ». Ils sont désignés par le juge contrairement à la règle traditionnelle de *common law*. La règle existe aussi en droit belge à l'article 962 du Code judiciaire : « Le juge peut, en vue de la solution d'un litige porté devant lui ou en cas de menace objective et actuelle d'un litige, charger des experts de procéder à des constatations ou de donner un avis d'ordre

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22 *Règlement des petits litiges du 11 juillet 2007*, art. 7.
23 *Règlement des petits litiges du 11 juillet 2007*, art. 9.

technique. » Elle existe aussi en droit italien à l'article 68 : « Il giudice […] si puo fare assistere da esperti ». Cependant, leur avis ne lie pas le juge. Sans doute, arrive-t-il fréquemment que les juges désignent les mêmes experts et l'établissement de listes d'experts par les cours d'appel et la Cour de cassation donne également à croire que l'expertise judiciaire est le fait d'auxiliaires de la justice dont ce serait la fonction permanente. Ces listes, qui sont d'ailleurs renouvelées chaque année, ne sont qu'indicatives. La fonction d'expert judiciaire n'est donc qu'un titre. Cependant, l'usage montre que les juges s'en tiennent souvent aux listes et qu'il existe une sélection discrète et peu discutée des personnes possédant un savoir reconnu. On peut ainsi parler de construction juridique de la science[24]; il arrive, par ailleurs, que le statut de l'expert, outre les règles générales du Code de procédure civile, soit spécialement réglementé par la loi (par exemple, en matière d'analyse génétique). L'inscription sur une liste impose cependant à l'expert de prêter serment; en revanche, aucune prestation de serment ne sera plus exigée de lui lors de sa désignation dans un litige. Quoi qu'il en soit, l'expert doit être impartial : il peut être récusé pour une des causes prévues à l'article 341 du Nouveau Code de procédure civile, voire sur le fondement de l'article 6 § 1 de la *Convention européenne des droits de l'homme* (il en est de même en droit belge).

Les pouvoirs de l'expert ont été définis par la mission d'expertise et il ne peut en principe s'en écarter. Subordonné au juge, l'expert est également tenu de respecter le contradictoire, ce qui n'est pas sans susciter un abondant contentieux. Il doit donc s'assurer que les pièces portées à sa connaissance par l'une des parties l'ont également été à l'autre et convoquer toutes les parties aux réunions. Il doit aussi prendre en considération les observations ou réclamations des parties, ce qu'on désigne en pratique sous le nom de « dires », et, lorsqu'elles sont écrites, ce qui est le plus fréquent, les joindre à son avis si les parties le lui demandent. L'expert peut fixer un délai aux parties pour leur permettre de formuler leurs observations et peut ne pas les prendre en compte si elles sont présentées tardivement; il doit faire mention, dans son avis, de la suite qu'il leur aura donnée. Il doit également soumettre aux parties les résultats des investigations techniques auxquelles il a procédé hors leur présence afin qu'elles puissent, le cas échéant, en

[24] Voir : L. Cadiet (dir.), *Dictionnaire de la justice*, PUF, 2004, sous « expertise »; O. Leclerc, *Le juge et l'expert – Contribution à l'étude des rapports entre le droit et la science*, LGDJ, 2005.

débattre contradictoirement avant le dépôt du rapport d'expertise. Les avocats jouent un rôle crucial en pratique et les rendez-vous d'expertise sont particulièrement importants, parfois même des experts privés accompagnent les avocats. L'expertise amiable ou conventionnelle existe mais le rapport de l'expert ne constitue alors qu'une pièce du dossier. Les débats qui ont lieu lors des opérations d'expertise sont déterminants car, en général, tout est joué au moment de la remise du rapport de l'expert et les parties ont tendance à transiger avant l'audience. Les avocats discutent de la méthode d'expertise, des différentes causes possibles d'un dommage, *etc*. On parle d'un petit procès dans le grand mais ce rôle de l'avocat n'est pas prévu par le Code et l'on ne peut pas dire qu'il ait changé récemment. Néanmoins, on peut avancer que le centre de gravité du procès s'est déplacé de l'audience, qui n'est même plus obligatoire, vers les opérations d'expertise. L'expertise est extrêmement fréquente même si, selon les textes, elle devrait rester subsidiaire.

IV. CONCLUSION

En conclusion, malgré quelques indices d'évolution, on ne peut absolument pas affirmer que la procédure de *cross-examination* se développe dans les procédures civiles des pays de droit civil, notamment parce que l'audience continue de décliner. Il est vrai que l'oralité se transforme davantage avec les nouvelles technologies qu'elle ne disparaît et l'on pourrait assister au développement de la *cross-examination* par vidéoconférence, mais ce n'est pas un fait observé. C'est aussi les avancées scientifiques qui expliquent le développement de l'expertise comme preuve centrale. Cependant, le rôle de l'avocat n'est pas celui d'un préparateur de témoins, il est celui d'un défenseur face à une émanation du juge qu'est l'expert. Si le rôle de l'avocat évolue dans les pays de droit civil examinés ici, ce n'est pas (sauf en matière pénale mais la *cross-examination* qui y est autorisée se développe très lentement[25]) vers une fonction de préparateur de témoins mais de défenseur dans le cadre du

[25] C. Ayela, J. Mestre et V. Péronnet, *Vérités croisées,* Cross examination*, une petite révolution procédurale*, LexisNexis, 2005; C. Ayela et D. Dassa-Le Deist, « Le développement de la *cross examination* dans le procès pénal français », JCP 2006.I.2091-2095, n° 186. Voir aussi : J. Roussel, « Pour une *cross examination* à la française » (14 février 2006) Les Petites Affiches, p. 4, n° 32 (qui note que la *cross-examination* est difficile à acculturer en France car le temps dans la procédure n'est pas appréhendé de la même manière – on ne peut consacrer autant de temps à la *cross-examination* que dans les pays de *common law* – et les témoins n'hésitent pas à mentir, l'incrimination du parjure étant moins prise en considération qu'aux États-Unis; elle cite également un président de chambre qui estime que personne ne maîtrise véritablement la technique).

petit procès qu'est devenue l'expertise. Les jeux sont faits lorsque le rapport est remis et une transaction est souvent conclue. Quand ce n'est pas le cas, le juge doit trancher mais une audience n'est plus nécessaire. L'idée d'une convergence vers une troisième voie à mi-chemin de la *common law* et de la *civil law* n'est donc pas avérée du côté des pays de droit civil envisagés dans cette étude malgré quelques indices (dont le développement de la *cross-examination* en Espagne, mais une étude mériterait d'y être menée pour savoir si les témoins y sont préparés comme dans les pays de *common law*). Ces indices laissent présager une acculturation limitée et sous l'angle d'un droit reconnu aux parties à la *cross-examination* sans remise en cause de la fonction centrale du juge (même dans les principes UNIDROIT, le juge conserve la primauté dans les questions, le droit d'en poser se limitant aux questions additionnelles et le juge conservant la police de l'audience[26]). Il existe même une tendance au renforcement du caractère écrit des procédures civiles en droit interne et en droit judiciaire intracommunautaire avec le déclin de l'audience. Il est à noter que les développements de la procédure civile communautaire se font dans un sens très largement romano-canonique (avec l'injonction de payer européenne qui peut être informatisée et sans audience[27], le règlement des petits litiges qui n'implique pas non plus d'audience[28] mais un échange de moyens par écrit, la jurisprudence de la Cour de justice des Communautés européennes qui a exclu la doctrine du *forum non conveniens* et les injonctions *anti-suit*[29]). Il se peut néanmoins que les procédures de *common law* se rapprochent du modèle romano-canonique en permettant que le juge désigne un expert mais, là encore, il ne s'agit peut-être que d'une acculturation limitée. Il me semble donc que le fossé continue d'exister clairement entre la *civil law* (du moins pour les cas français, belge et italien) et la *common law* en matière de témoignage et d'expertise.

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[26] L. Cadiet, précité.

[27] *Règlement instituant une procédure européenne d'injonction de payer du 12 décembre 2006*, V.L. Cadiet et E. Jeuland, *Droit judiciaire privé*, 6° éd. Paris, LexisNexis, 2009, n° 782.

[28] *Règlement des petits litiges du 11 juillet 2007*, V.L. Cadiet et E. Jeuland, *op. cit*., n° 783.

[29] V.H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe*, 4ème éd. Paris, LexisNexis, 2010, n° 81 et 81-1 (CJCE, 1er mars 2005, Owusu; CJCE, 27 avril 2004, Turner et CJCE, 10 février 2009, West Tankers).

Managerial Judges, Jeremy Bentham and the Privatization of Adjudication[†]

Judith Resnik[*]

I. MANAGERIAL JUDGES

The contemporary situation in the federal courts of the United States is well described by a distinguished trial level judge, Brock Hornby. Relying on visual terms, he raised the question of how "reality television" should portray a federal trial judge:

> In an office setting without the robe, using a computer and court administrative staff to monitor the entire caseload and individual case progress; conferring with lawyers (often by telephone or videoconference) in individual cases to set dates or limits; in that same office at a computer, poring over a particular lawsuit's facts, submitted electronically as affidavits, documents, depositions, and interrogatory answers; structuring and organizing those facts, rejecting some or many of them; finally, researching the law (at the computer, not a library) and writing (at the computer) explanations of the law for parties and lawyers in light of the sorted facts. For federal civil cases, the black-robed figure up on the bench, presiding publicly over trials and

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 This paper, presented at the 2009 Annual Meeting of the International Association of Procedural Law, relates to the book, co-authored with Dennis E. Curtis, *Representing Justice: From Nascent City-States to Democratic Courtrooms and Guantánamo Bay* (New Haven: Yale University Press, 2010), as well as to Judith Resnik & Dennis E. Curtis, "From Rites to Rights of Audience: The Utilities and Contingencies of the Public's Role in Court-Based Processes" in Antoine Masson & Kevin O'Connor, eds., *Representations of Justice* (Brussels: P.I.E. Peter Lang, 2007) 195. See also Judith Resnik, "Courts: In and Out of Sight, Site, and Cite" (2008) 53 Villa. L. Rev. 771. Our thanks to Philip Schofield, who chairs the Bentham Project at University College London, and to Dean Hazel Genn and Joanne Scott of that faculty for helping us to understand more about Bentham and about the cross-currents of procedural reform. We have benefited from exchanges with the Honorable Brock Hornby and the Honorable Joseph Anderson as they have spoken and written about the challenges of judging in the United States. Thanks to Adam Grogg, Sophie Hood, Elliot Morrison, Allison Tait and Sarah J. Watson for help in formulating these comments, and to Janet Walker and Oscar Chase for shaping the occasion on which to provide them.

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> instructing juries, has become an endangered species, replaced by a person in business attire at an office desk surrounded by electronic assistants.[1]

His imagery helps to capture how the mandate of federal judges has shifted. When the 1938 *Federal Rules of Civil Procedure* were promulgated some 70 years ago, they created a "pre-trial" procedure for judges and lawyers to meet and confer in advance of trial. This innovation aimed to simplify trials; the archival records of the rule-drafters do not indicate that judges were supposed to use the occasion to encourage lawyers to settle cases or to seek methods of dispute resolution other than adjudication.[2] Nor, during the decade thereafter, was the process used much. Indeed, when a group that included distinguished proceduralists returned from a visit to German courts in the late 1950s, they wrote for a U.S. audience of their surprise at how the German judge was "constantly descending to the level of the litigants, as an examiner, patient or hectoring, as counselor and adviser, as insistent promoter of settlements".[3]

By the 1980s, however, that description had also become apt for judges in the United States, who were reframing their role and the rules that governed their procedures. Congress provided enthusiastic support, endorsing "alternative dispute resolution" ("ADR").[4] Thus, what had once been "extra-judicial" procedures became "judicial" procedures.[5] As Judge Hornby describes, federal judges are now multi-taskers — sometimes deployed as managers of lawyers and cases, sometimes acting like super-senior partners providing advice for both parties, sometimes serving as settlement masters or mediators, and at other points as referral sources sending disputants either to different personnel within courthouses or to

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[1] D. Brock Hornby, "The Business of the U.S. District Courts" (2007) 10 Green Bag 2d 453, at 462 [hereinafter "Hornby"].

[2] See Judith Resnik, "Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III" (2000) 113 Harv. L. Rev. 924, at 934-43 [hereinafter "Resnik, 'Trial as Error'"]; Judith Resnik, "Managerial Judges" (1982) 96 Harv. L. Rev. 376, at 378-80 [hereinafter "Resnik, 'Managerial Judges'"].

[3] Benjamin Kaplan, Arthur T. von Mehren & Rudolph Schaefer, "Phases of German Civil Procedure II" (1958) 71 Harv. L. Rev. 1443, at 1472. Admiration for German civil procedure can be found in a good deal of U.S.-based literature. See, *e.g.*, John H. Langbein, "The German Advantage in Civil Procedure" (1985) 52 U. Chi. L. Rev. 823.

[4] See *Civil Justice Reform Act of 1990*, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-82 (2006)); *Alternative Dispute Resolution Act of 1998*, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. § 651 (2006)).

[5] The efficacy of such efforts is a distinct question, as studies by RAND's Institute for Civil Justice have raised questions about whether they save time and money. See James S. Kakalik *et al.*, *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (Santa Monica, CA: Rand, Institute for Civil Justice, 1996).

institutions other than the courts. These new aspects of judiciary work are among the factors contributing to the "vanishing trial"[6] — the description given to the fact that, as of 2002, fewer than two of 100 civil cases filed in the federal courts began a trial.

II. DELEGATION TO AGENCIES, OUTSOURCING TO PRIVATE PROVIDERS

The reconfiguration of court-based procedures to focus on settlement is one of three principal techniques that produce the privatization of process that moves adjudicatory decisions away from public purview. A second is the delegation of adjudicatory functions to administrative agencies. One way to map that shift is to consider the number of judges and the volume of cases in the two venues.

By 2001, Congress had authorized some 1,700 judgeships in the federal courts. Approximately 840 slots went to constitutionally chartered trial-level judges, nominated by the President, confirmed by the Senate and protected with life tenure under Article III. In addition, in the second half of the 20th century, Congress created another 324 slots for bankruptcy judges and the position of magistrate judge, with about 470 working full-time by the century's end. Both sets of statutory judges sit, pursuant to statutes, for fixed and renewable terms. The number of judges working *inside* federal courthouses is dwarfed by the almost 5,000 judges who serve in federal administrative agencies dedicated to dealing with specific kinds of disputes, such as decisions related to social security, immigration, employment, veterans and the like.

A snapshot of the shift from court-based to administrative adjudication is provided by a comparison of the volume of evidentiary hearings during 2001 in federal agencies with those in federal courts. That year, some 100,000 evidentiary proceedings — in which the court took testimony of any kind (on motions as well as during trials) — took place inside the more than 550 federal courthouses around the United States. In contrast, an estimated 700,000 evidentiary proceedings took place in four

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[6] See Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1 J. Empirical Legal Stud. 459; Judith Resnik, "Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts" (2004) 1 J. Empirical Legal Stud. 783 [hereinafter "Resnik, 'Declining Trial Rates'"]. For a discussion of changes to Rule 16 of the *Federal Rules of Civil Procedure*, governing the pre-trial procedures, see Resnik, "Managerial Judges", *supra*, note 2; Resnik, "Trial as Error", *supra*, note 2.

federal agencies with a high volume of adjudication.[7] Unlike federal courts, however, where constitutional precepts insist that the courtroom doors remain open, some federal administrative adjudicatory proceedings are presumptively closed to outsiders. Further, even if one is permitted to attend, finding such hearings is difficult because they take place in office buildings not readily welcoming to street traffic.

The third mechanism of privatization is the outsourcing of decision-making through the enforcement of contracts that mandate arbitration in lieu of adjudication. My own 2002 cell phone service agreement provides an example. By unwrapping the phone and activating the service, I waived my rights to go to court and was obligated to "arbitrate disputes arising out of or related to [this or] prior agreements".[8] Even when "applicable law" would permit me to join class actions or class arbitrations, I waived my rights to do so. In purported symmetry, this contract also stated that both the provider and the consumer were precluded from pursuing any "class action or class arbitration".[9]

The law of the United States once refused to enforce such form contracts. One concern was that the party proffering the agreement had more bargaining power than the other. Judges also explained that arbitration was too flexible, too lawless and too informal in contrast to adjudication, which they praised for its regulatory role in monitoring adherence to national norms.[10] Beginning in the 1980s, however, the Supreme Court reversed some of its earlier rulings as it reread federal statutes to permit, rather than to prohibit, the enforcement of arbitration contracts when federal statutory rights were at stake — as long, that is, as the alternative provided an "adequate" mechanism by which to vindicate statutory rights.[11] Judges have not applied the test of "adequate" alternatives to require that the same procedures (such as discovery) be available in courts. Further, the party contesting the enforcement of

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[7] For further details and discussion, see Resnik, "Declining Trial Rates", *id.*, at 798-811.

[8] See, *e.g.*, Verizon Wireless, "Customer Agreement", online: <http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp>. For such an agreement, see Judith Resnik, "Whither and Whether Adjudication?" (2006) 86 B.U.L. Rev. 1101, at 1134-39. Similar examples can be found on the websites of many service providers.

[9] *Id.*

[10] See, *e.g.*, *Wilko v. Swan*, 346 U.S. 427, at 438 (1953). This case law was overturned in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). See generally Judith Resnik, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1995) 10 Ohio St. J. Disp. Resol. 211, at 246-53.

[11] See, *e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, at 119 (2001); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, at 640 (1985); and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, at 218 (1985).

mandatory arbitration clauses bears the burden of showing that the costs charged to the disputants for arbitration are too great to make it qualify as an adequate alternative.[12]

The case law enforcing such pre-dispute contracts insists on the similarities between adjudication and its alternatives, as all are posited to be variations on the dispute resolution theme. Today, consumers and employees who allege that companies have violated federal or state statutes of various kinds (such as truth-in-lending or anti-discrimination laws) can be sent to dispute resolution programs that have been selected by the very same manufacturers and employers that are the sources of complaints. In addition, the Supreme Court has ruled that when parties disagree about how to interpret a contractual arbitration clause — diverging on the question of whether or not arbitration is required — the issue is to be decided, at least initially, by the private arbitrator and not by a judge.[13]

The rationales for this shift in doctrine and practice are many, as analytically different concerns (not detailed here) support efforts for ADR. Many of the reformers share a failing faith in adjudicatory procedure and a normative view that consent of the contracting parties, developed through negotiation or mediation, is preferable to the outcomes that judges might render. "Bargaining in the shadow of the law" is a phrase often invoked,[14] but bargaining is increasingly a requirement of the law of conflict resolution.

As a consequence, the distinctive character of adjudication — as a specific kind of social ordering — is diminishing. Through case management, judicial efforts at settlement, mandatory ADR in or via the courts, devolution of disputes to administrative agencies and enforcement of waivers of rights to trial, the framework of "due process procedure", with its independent judges and open courts, is being replaced by what can fairly be called "contract procedure".[15] Despite the growing numbers of persons called "judges" and of conflicts called "cases", it is increasingly rare for state-empowered actors to be required to reason in public about their decisions to validate one side of a dispute. In mimetic symmetry, both judges in courts and their counterparts in the private sector now produce private outcomes that are publicly sanctioned.

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[12] See *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, at 89-92 (2000).

[13] See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Preston v. Ferrer*, 128 S. Ct. 978 (2008).

[14] See Robert H. Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950, at 950.

[15] See Judith Resnik, "Procedure as Contract" (2005) 80 Notre Dame L. Rev. 593.

III. LAW'S MIGRATION: ADR ACROSS BORDERS

My focus is on the United States, but the narrative of shifting procedural norms is not limited to the United States. Many litigants, judges, lawyers and law professors are members of transnational organizations (such as the International Association of Procedural Law) that serve as mechanisms for the import and export of norms and practices.[16] During the 20th century, many such entities promoted adjudication, both within nation-states and beyond. The growth in border-crossing courts is illustrative. In 1946, the International Court of Justice ("ICJ") at The Hague became the successor institution to the 1920s' League of Nations' court, which in turn had followed the 1906 Central American Court of Justice. The ICJ was joined in the 1950s and the 1960s by regional courts in Europe and the Americas. In the late 1990s, the "treaty courts" — the International Tribunal for the Law of the Seas (ITLOS) and the International Criminal Court — came into being, along with geographically focused specialized courts, supported by the United Nations, to deal with war crimes in Yugoslavia, Rwanda, Cambodia and Sierra Leone.

Alongside the growth in courts is the growth in the market for ADR, which has been embraced by many sectors worldwide. In England and Wales, the "Woolf Reforms" of the 1990s put into place pre-filing "protocols" that require lawyers to negotiate before filing lawsuits.[17] Refusals to accept settlements and insistence on trials can put litigants at risk of cost sanctions.[18] The impact of these reforms has transformed the procedure of England and Wales, as well as influenced practices in some other Commonwealth countries, such as Australia and Canada.

In the European Union, a 2008 Directive on Mediation called for national courts to develop that mode of dispute resolution for cross-border disputes.[19] And just as many transnational courts exist, many private providers of dispute resolution services are competing intensely for market share — with reforms of the laws of commercial arbitration in England

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[16] See generally Judith Resnik, "Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Points of Entry" (2006) 115 Yale L.J. 1564; Judith Resnik, Joshua Civin & Joseph Frueh, "Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)" (2008) 50 Ariz. L. Rev. 709.

[17] See Lord Woolf, *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty's Stationery Office, 1996).

[18] See generally Hazel Genn, "What is Civil Justice For?" in *Judging Civil Justice: 2008 Hamlyn Lectures* (Cambridge: Cambridge University Press, 2009).

[19] *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters*, art. 1, 2008 O.J. (L 136) 3.

aspiring to make that venue more attractive to disputants.[20] New institutions proffer a mix of services — such as "JAMS" (an acronym that denotes the provision of "Judicial Arbitration & Mediation Services") — offered worldwide.[21] What do arbitrations, including of disputes involving governments, offer disputants? In addition to allowing the parties to pick their judges and their procedures, arbitration enables parties to put the procedures and the outcomes outside public view.

My purpose is not to homogenize the important distinctions across jurisdictions, courts and dispute-resolution mechanisms, but rather to underscore a trend. The 20th century marked the "triumph of adjudication" as courts became the *sine qua non* of governments committed to market economies. In contrast, the last decades of that century and the beginning of the 21st herald another trend: the decline of courts in favour of processes and outcomes that are less public and less regulated.

IV. COURTS, THE PUBLIC SPHERE AND JEREMY BENTHAM

The thoughtful trial judge quoted at the outset argued that the judicial "mission" had not changed; judges continued "to interpret and clarify laws, adjudicate and protect rights, maintain fair processes, and punish".[22] Rather, "the method of carrying out that mission has changed".[23] He urged commentators to

> stop bemoaning disappearing trials. Trials have gone the way of landline telephones — useful backups, not the instruments primarily relied upon, if ever they were. Dramatists enjoy trials. District judges enjoy trials. Some lawyers enjoy trials. Except as bystanders, ordinary people and businesses don't enjoy trials, because of the unacceptable risk and expense.[24]

I share the analysis that the methods have changed. But I do not share the conclusion that the new methods have not produced a change in mission. The charge to judges to manage cases competes with and marginalizes the charter to adjudicate, whether by decision-making on the

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[20] See *Arbitration Act 1996* (U.K.), 1996, c. 23.

[21] See JAMS, "JAMS Announces First International ADR Center to Provide More Effective Arbitration and Mediation Worldwide" (May 20, 2009), online: Press Releases <http://www.jamsadr.com/jams-international-adr-center/>, JAMS International Practice <http://www.jamsadr.com/international-practice/>.

[22] Hornby, *supra*, note 1, at 467.

[23] *Id.*

[24] *Id.*, at 467-68.

papers or at trial. The reason to regret the loss of trials, as well as other public adjudicatory procedures, is that such processes make important contributions to functioning democracies. Hence, in addition to describing the mechanisms by which the public nature of adjudication is being eroded, another aim of this essay is to sketch some of what is lost as processes privatize.

To do so, I build on the rationales that Jeremy Bentham (writing around 1812) captured through his discussion of "publicity".[25] Bentham advocated public processes for a host of settings. He sought to reconfigure both the architecture of the spaces in which people worked or lived and the rules by which they functioned. Bentham advocated, infamously, for the "panopticon" prison to put inmates before the public eye, but he also wanted to bring legislators into plain view and to require judges to rely on oral proceedings, again to make their decisions visible.

Bentham provided a thorough analysis of the benefits that publicity in courts provided. He argued that open courts educate the public, enhance the accuracy of decision-making, and enable oversight of, as well as provide legitimacy for, the judiciary. In today's terms, Bentham could be understood both as a procedural reformer, focused on the interstices of legal rules, and as a political theorist, insistent on the role that courts play in contributing to what today is called "the public sphere" — an arena in which members of a polity develop views about the governing norms and practices.[26]

Below, I detail more of the arguments proffered by Bentham and then explain a somewhat different claim: that courts are themselves a site of democratic practices. Public litigation ought to be conceptualized as an activity that contributes to the public sphere*s* (appropriately pluralized, as Nancy Fraser has explained[27]), in that courts are one of many venues to understand, as well as to contest, societal norms. Courts

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[25] Citations from "Bentham" come from a few of the volumes of the *Works of Jeremy Bentham* published in the 19th century by John Bowring, who served as Bentham's literary executor and who put several volumes into print after Bentham's death in 1832. See Jeremy Bentham, "Rationale of Judicial Evidence" (1827) [hereinafter "Bentham, 'Rationale'"], in John Bowring, ed., *The Works of Jeremy Bentham*, vol. VI (Edinburgh: William Tait, 1843), bk. II, ch. X, 351. The Bentham Project, of the University College London, is in the midst of reviewing thousands of sheets of Bentham's original writings and republishing a full set of his works.

[26] See generally Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Cambridge, MA: MIT Press, 1996).

[27] See Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" in Craig Calhoun, ed., *Habermas and the Public Sphere* (Cambridge, MA: MIT Press, 1992) 109.

both model the democratic precepts of equal treatment and subject the state itself to democratic constraints.

But unlike Bentham, I do not presume that the public debate generated through open dispute resolution will necessarily produce either efficient or just results. Rather, my argument is that deeply felt disagreements exist about both facts and legal norms, and that societies need mechanisms to acknowledge those conflicts and to gain understanding — through repeated iterations, to develop, as well as to revisit, governing precepts. The obligations of judges to protect disputants' rights, and the requirements imposed on litigants (the government included) to treat their opponents as equals, are themselves democratic practices of reciprocal respect. By imposing processes that dignify individuals as equals before the law, litigation makes good on one of democracy's promises — or may reveal its failures to conform to its ideological precepts. Moreover, rights of audience divest the litigants and the government of exclusive control over conflicts and their resolution. Empowered, participatory audiences can therefore see and then debate what legal parameters ought to govern.

V. PUBLICITY

By the early part of the 19th century, Jeremy Bentham had begun to conceptualize courts as important venues for the public in their relationship to the state. Bentham's commitment to the principle of openness was fierce: "Without publicity all other checks are insufficient: in comparison with publicity, all other checks are of small account."[28]

Bentham's claims about why courts ought to be public sound familiar. Although he is rarely cited directly, Bentham's explanations have been echoed regularly by modern jurists in both the United States and Europe as they explain the import of provisions for "open courts"[29] and public trials in American constitutions and of the "fundamental guarantee" to a "public hearing" under article 6 of the *European Convention on Human Rights*.[30]

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[28] Bentham, "Rationale", *supra*, note 25, at 355.

[29] See, *e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise Co. v. Superior Ct. of California*, 464 U.S. 501 (1984). See generally Judith Resnik, "Due Process: A Public Dimension" (1987) 39 U. Fla. L. Rev. 405.

[30] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 U.N.T.S. 221, art. 6(1) [hereinafter "European Convention"].

Why ought courts be public? Bentham argued their function as a "theatre of justice".[31] He believed that the public features of adjudication would generate a desirable form of communication between citizens and the state. Bentham did not suggest imposing a legal obligation on judges to deliver opinions, but he thought that judges — if before an audience — would want observers to understand the reasons behind decisions. Thus, it would be "natural" for judges to gain "the habit of giving reasons from the bench".[32] By thereby teaching the public about the rules of law, courts functioned not only as theatres but also as schools.

Further, Bentham saw public processes as the means by which the public could critique both judges and the law, as well as a mechanism to protect those judges who were properly doing their job. Bentham urged that ordinary spectators (whom he termed "auditors"[33]) be permitted to make notes that could be distributed widely. These "minutes" could serve as insurance for the good judge and as a corrective against "misrepresentations" made by "an unrighteous judge".[34]

By suggesting that trials put the state (through its representative, the judge) on display, Bentham raised the spectre that both judges and the state could be *subjected to judgment*. This point is radical when measured against the baseline of Renaissance Europe, when people watching trials were not presumed to hold the power to sit in judgment of judges or to assess the decency of the state's procedures. Yet, by Bentham's era, the responses of observers had weight and relevance. Popular opinion came to matter through the development of a public sphere that could affect political rulers.

One of the reasons why Bentham wanted to put judges on display was because he was not an unalloyed fan of either judges or lawyers. Indeed, he levelled scathing criticisms against "Judge & Co." for shaping self-interested procedural obfuscation that imposed needless costs and delays, benefiting lawyers and judges (then paid fees for their services, which Bentham sought to ban) at the expense of their clients and the public.[35] Bentham called for radical overhaul of the civil courts, which he characterized as "shops" at which "delay [is] sold by the year

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See, *e.g.*, *Schuler-Zgraggen v. Switzerland*, 16 EHRR 405 (1993), at para. 58 [hereinafter "*Schuler-Zgraggen*"]; *Fischer v. Austria*, 20 EHRR 349 (1995) [hereinafter "*Fischer*"].

[31] Bentham, "Rationale", *supra*, note 25, at 354.

[32] *Id.*, at 357.

[33] *Id.*, at 355.

[34] *Id.*

[35] Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford: Oxford University Press, 2006), at 307 [hereinafter "Schofield, *Utility and Democracy*"].

as broadcloth is sold by the piece".[36] What "Judge & Co." had created, Bentham opined, was a "factitious" system — "the work of human agency or omission, of human artifice or imbecility", in contrast with what could be generated through a "natural" system,[37] free of "artificial rules".[38]

Bentham's critique is, in many respects, remarkably modern. As a fierce opponent of the delays and the costs of adjudication, Bentham was equally fierce as an advocate of simplified procedures and the holistic treatment of problems. Proceduralists in the United States could well describe him as a proponent of "liberal rules of pleadings and joinder", a position associated with the 1930s revision of federal practice.[39] Bentham could also be translated in contemporary terms as a proponent of legal services, for he wanted to lower the costs to make justice more accessible. Bentham proposed subsidies for litigation through an "Equal Justice Fund" that would pay even the transportation and hotel costs for litigants who had to travel to court.[40] Expenses would also have been reduced if, as Bentham urged, oral proceedings were made available 24 hours a day, seven days a week with judges always on-call.

Bentham assumed that procedural revisions would both make substantive rules of law patent and produce changes in the content of legal requirements. He thought that publicity would enable the public to maximize its self-interest, which would otherwise be thwarted through the "sinister interest[s]" of the political and legal establishments, collaborating to advance their own concerns instead of those of the "community in general".[41] Bentham's trust in the public prompted not only his proposals for parliamentary and legal reforms, but also a commitment (at least in theory) to universal suffrage, upon a showing that females and males had distinct interests.[42] "'[P]olitical salvation,' could only be

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[36] This comment is quoted in Anthony J. Draper, "'Corruptions in the Administration of Justice': Bentham's Critique of Civil Procedure, 1806-1811" (2004) 7 J. of Bentham Studies, online: UCL Bentham Project <http://www.ucl.ac.uk/Bentham-Project/journal/jnl_2004.htm>, at 5 [hereinafter "Draper, 'Corruptions'"].

[37] William Twining, *Theories of Evidence: Bentham and Wigmore* (Stanford, CA: Stanford University Press, 1985), at 52.

[38] Draper, "Corruptions", *supra*, note 36.

[39] See Stephen B. Burbank, "The Rules Enabling Act of 1934" (1982) 130 U. Pa. L. Rev. 1015; Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective" (1987) 135 U. Pa. L. Rev. 909.

[40] Frederick Rosen, *Jeremy Bentham and Representative Democracy: A Study of the* Constitutional Code (Oxford: Clarendon Press, 1983), at 153-54 [hereinafter "Rosen"].

[41] Schofield, *Utility and Democracy*, *supra*, note 35, at 135.

[42] See Nicola Lacey, "Bentham as Proto-Feminist? Or an Ahistorical Fantasy on 'Anarchical Fallacies'" (1998) 51 Curr. Legal Probs. 441.

achieved by democratic ascendancy", and, over time, Bentham embraced the goal of "dependence of rulers on subjects".[43] Bentham could thus be read to "broaden the scope of democratic theory" by expanding the means of making elites accountable. Adjudication offered one such opportunity.[44]

VI. THE DEMOCRACY OF ADJUDICATION

When references are made to democracy in the context of adjudication, the presumption is often that a discussion of the role of juries will follow. My interest is not in the institution of the jury specifically, but in the general question of the relationship of adjudication to democracy.

A first point is that practices of adjudication, which long predate democracy, contributed to the development of democratic theory. Even in eras when rulers had autocratic power, they sought to justify decisions of judges by reference to facts, customs and rules. Adjudication thus provided an early example of the precept that government power was subject to constraints. Further, centuries ago, judges were instructed to "hear the other side". This injunction can be found inscribed in 17th-century town halls in the Netherlands, just as it can be found on the 20th-century walls of courthouses in the United States and in published decisions of judges on both sides of the Atlantic. Moreover, many town halls had visual depictions warning against corruption, including the scene known as the *Judgment of Cambyses*, in which a corrupt judge is shown flayed alive and his son made to take up the seat of judgment on a bench made from his father's skin.[45] Thus, judges were supposed to be even-handed in treating those eligible to come before them, and in this sense, adjudication was "proto-democratic".

The second point is that democratic norms changed adjudication. Over time, judges moved from being loyal servants of the state to being obliged to be independent actors holding a special authority to sit in judgment of the state itself. England's *Act of Settlement of 1701*[46] provides one example of the burgeoning norm of judicial independence. Across the ocean, it was embraced by the State of Massachusetts in its Constitution of 1780,[47]

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[43] Schofield, *Utility and Democracy*, *supra*, note 35, at 150-52, 155, 348.

[44] See Rosen, *supra*, note 40, at 13-14.

[45] The story of Cambyses was the image regularly depicted. See Dennis E. Curtis & Judith Resnik, "Images of Justice" (1987) 96 Yale L.J. 1727, at 1749-51.

[46] 1701 (U.K.), 12 & 13 W. & M. 3, c. 2.

[47] Mass. Const. of 1780, art. XXIX.

followed by many others, including Article III of the United States Constitution of 1789.[48]

In addition, what were once spectacles of power became obligations, as "rites" turned into "rights". The *Fundamental Laws of West New Jersey of 1676* provided that "justice may not be done in a corner nor in any covert manner".[49] A century later, state constitutions emphatically made such customs the obligations of government to individuals. An early example comes from the 1792 Delaware Constitution, proclaiming that "all courts shall be open".[50] By the middle of the 19th century, several other states had followed suit,[51] and, as of 2008, the words "all courts shall be open" were a part of the constitutions of 19 states.

I have used the United States as an example, but the description provided of adjudication is by no means specific to the United States. Rather, obligations to provide open courts, with rights of the public to attend, and to protect judicial independence are embedded in law around the world. By the middle of the 20th century, the *European Convention on Human Rights* had enshrined its transnational reach by requiring that "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly."[52]

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[48] U.S. Const. art. III.

[49] *Charter or Fundamental Laws, of West New Jersey, Agreed Upon* (1676), c. XXIII, online: Yale Law School, Lillian Goldman Law Library, The Avalon Project <http://avalon.law.yale.edu/17th_century/nj05.asp>.

[50] "All courts shall be open; and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense." Del. Const. of 1792, art. I, § 9, reprinted in Benjamin Perley Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States, Part I* (Washington: Government Printing Office, 1877) 278, at 279 [hereinafter "Poore"]. See also Ky. Const. of 1792, art. XII, reprinted in Poore 647, at 655; Vt. Const. of 1777, ch. II, § XXIII, online: Yale Law School, Lillian Goldman Law Library, The Avalon Project <http://avalon.law.yale.edu/18th_century/vt02.asp>.

[51] See, *e.g.*, Ala. Const. of 1819, art. I, § 14, reprinted in Poore, *id.*, 32, at 33; Conn. Const. of 1818, art. I, § 12, reprinted in Poore, *id.*, 258, at 259; Fla. Const. of 1838, art. I, § 9, reprinted in Poore, *id.*, 317, at 317; Ind. Const. of 1816, art. I, § 11, reprinted in Poore, *id.*, 499, at 500; and Kan. Const. of 1855, art. I, § 16, reprinted in Poore, *id.*, 580, at 582.

[52] European Convention, *supra*, note 30, art. 6. The case law of the European Court of Human Rights has found that the right to a hearing often entails rights to oral hearings if individuals' "civil rights and obligations" are at issue. See *König v. Germany*, App. No. 6232/73, 2 Eur. H.R. Rep. 170 (ser. A) paras. 88-89 (1978). A large body of law parses questions of when these rights are engaged and what forms of hearings suffice. See, *e.g.*, *Riepan v. Austria*, App. No. 35115/97, ECHR 2000-XII, paras. 9-41; *Göç v. Turkey*, App. No. 36590/97, 2002 Eur. Ct. H.R. 589, para. 51. See also *Schuler-Zgraggen*, *supra*, note 30; *Fischer*, *supra*, note 30.

Rules of court for the European Court of Justice similarly provide for hearings to be "public, unless the Court, of its own motion or on application of the parties, decides otherwise for serious reasons".[53] The 1966 *International Covenant on Civil and Political Rights*,[54] promulgated by the United Nations, provides yet another example: "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[55] Of course, such provisions also recognize — as did Bentham — the legitimacy of closures under specified circumstances.[56]

Democracy changed adjudication profoundly in another respect. I have quoted the ICCPR's commitment that "everyone" have the entitlement to a fair hearing before an impartial judge. The term "everyone" represents the extent to which principles of equality of all persons have come to pervade adjudication. While pre-democratic adjudication imposed formal obligations on judges to treat those within the circle of decision equally (by, for example, valuing the testimony of the poor no differently than that of the rich) and prohibited bribes, pre-democratic adjudication did not require that all persons be eligible for that even-handed treatment. Only during the 20th century did transnational precepts insist that all persons should be eligible to bring claims, as well as to be treated as competent to be witnesses, and to serve as lawyers and judges.

Third, democracy's promise to make everyone eligible for its protections presents a profound challenge to adjudication. Thus far, polities have not been willing to create all the courts required, let alone the funding akin to Bentham's Equal Justice Fund, to make good on the proposition of providing access for all. The phenomena of managerial judges, delegation to agencies and outsourcing detailed above can be understood as responses to mitigate the problem of volume produced by this new form of entitlement — the rights of everyone to go to court.

A fourth facet of the relationship between adjudication and democracy needs to be considered: how adjudication *in* a democracy can be a

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[53] *Protocol on the Statute of the Court of Justice of the European Economic Community*, April 17, 1957, 298 U.N.T.S. 14, as amended by Council Decision 88/591, 1989 O.J. (C 215) 1, art. 31.

[54] *International Covenant on Civil and Political Rights*, art. 14, December 16, 1966, G.A. Res. 2200A (XXI), U.N. Doc. 1/6316 [hereinafter "ICCPR"].

[55] *Id.*, art. 14.

[56] For example, the European Convention provides that "the press and public may be excluded from all or parts of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." European Convention, *supra*, note 30, art. 6(1).

source *of* democracy. In this discussion, the term "democracy" is not equated with popular sovereignty principles expressed through elections. Rather, it comprehends a political framework within a social order striving to ensure egalitarian rights, as it is also attentive to risks of minority subjugation. The public processes of courts contribute to the functioning of democracies and give meaning to democratic aspirations to locate sovereignty in the people, constrain government actors and insist on equal treatment under law. While Bentham stressed the protective side of adjudication (policing judges as well as witnesses), I am interested in how the public facets of adjudication engender participatory obligations and enact democratic precepts of equality.

Consider the interaction between observers and courts. Public processes and published opinions of judges permit individuals who are neither employees of the courts nor disputants to learn, first-hand, about processes and outcomes. Indeed, courts — and the discussions that their processes produce — are one avenue through which private persons come together to form a public so as to develop an identity as participants acting within a political and social order. Courts make a contribution by being what could be called "non-denominational" or non-partisan, in that they are some of the relatively few communal spaces not organized by political, religious or social affiliations. Open court proceedings enable people to watch, debate, develop, contest and materialize the exercise of both public and private power.

Moreover, courts provide a unique service in that they create distinctive opportunities to gain knowledge. Conflicts have many routes into the public sphere. The media (including bloggers) or members of government may initiate investigations. Courts may help to uncover relevant information in high-profile conflicts, as can be seen in the litigation related to individuals detained after September 11. But courts distinguish themselves from both media- and government-based investigatory mechanisms in an important respect: the attention paid to ordinary disputes. Courts do not rely on national traumas, or on scandals, or on *ad hoc* enabling acts, or on selling copies of their decisions. They do not respond only when something "interesting" is at issue. What is the utility of having a window into the mundane? That is where people live and that is where state control can be both useful and yet overreaching. The dense and tedious repetition of ordinary exchanges is where one finds the enormity of the power of both bureaucratic states and private-sector actors, and that power is at risk of operating unseen.

Public knowledge gathered from open dispute resolution ought not, however, be presumed to be generative of policies running in any particular direction or of attitudes supportive of judicial rulings. Public awareness can generate new rights, such as protection against gender-based violence (sometimes styled "domestic violence"), as well as new limitations, such as "caps" on monetary awards for torts (based on views of the need to limit juries' abilities to award compensation). Moreover, because even a few cases can make a certain problem vivid, social policies may respond in extravagant ways to harms that are less pervasive than perceived.

Thus I do not conclude, as Bentham appears to have, that expanding the flow of information will enable public opinion to become "more and more enlightened" and thus to advance society's interests.[57] Public displays do not necessarily trigger reasoned discourses, nor does increased information necessarily "produce an improvement in the quality of opinions held by the people".[58] Further, the harms of false accusations — vivid during the 1950s, as individuals were accused in the United States of being "Communists" — are substantial and rendered all the more powerful through the distribution mechanism of the Internet. The development of new methods of producing public events (such as the Internet) requires the elaboration of new rules to constrain and, at times, to limit, dissemination beyond those physically present in courts.

The other facet of what makes courts especially useful in democracies can be seen by shifting attention from what potential observers can see and hear to what litigants, judges, witnesses and jurors do. This aspect of the argument for the utility of transparency hinges on the view that adjudication is itself a democratic practice — an odd moment in which individuals can oblige others to treat them as equals, as they argue in public about their disagreements, misbehaviours, wrongdoings and obligations. Litigation forces dialogue upon the unwilling (including the government), and momentarily alters configurations of authority. The social practices, the etiquette and a myriad of legal rules shape what those who enter courts are empowered to do.[59]

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[57] Schofield, *Utility and Democracy*, *supra*, note 35, at 267.

[58] Bentham thought it would. See Schofield, *Utility and Democracy*, *id.*

[59] The understanding of law as a social practice is central to the work of Robert M. Cover. See Robert M. Cover, "1982 Term — Foreword: Nomos and Narrative" (1983) 97 Harv. L. Rev. 4. See also Judith Resnik, "Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover" (2005) 17 Yale J.L. & Human. 17.

When cases proceed in public, courts institutionalize democracy's claim to constrain state power. In criminal trials, the theory is that the defendant is enabled, by procedures, to "contest the common interpretation" of actions and to oppose government-imposed meanings.[60] Working in open courts, the government employees whom we call judges must account for their own authority by letting others know how and why their power is used. Bentham's widely quoted phrase captures this activity: "Publicity is the very soul of justice. ... It keeps the judge himself, while trying, under trial."[61]

Courts can be a great leveller in another respect, in that participatory parity is an express goal of courts, even when it is not achieved. When government officials are parties to litigation, they are subjected to scrutiny and forced, either as plaintiffs or as defendants, to comply with court rules. Government litigants must bear the exposure that obligations of discovery impose — thereby revealing past deeds, files and e-mails. Courts' processes render instruction on the value accorded to individuals. Given that litigants are required to interact with each other as equals, to make demands on each other, and to be treated with respect by judges, juries, lawyers and staff, public processes open a window for evaluating whether the state is living up to these obligations.

In addition to undermining the state's monopoly on power, forging community ownership of norms, demonstrating inter-litigant obligations and equalizing the field of exchange, open courts can express another of democracy's promises: that rules can change because of popular input. Participants and observers see that the law varies depending on the contexts, the decision-makers, the litigants and the facts that are involved; the public and the immediate participants can argue that the governing rules (or their applications) are wrong. Through democratic iterations — exchanges of courts, legislatures and the public — norms can be reconfigured.

To link adjudicatory practices to democracy is not to claim that public access to adjudication necessarily results in the development of norms that are themselves to be celebrated. As is repeatedly made plain by watching other aspects of democratic processes, including the outcome of majoritarian voting, democratic outputs vary widely and are by no means inevitably progressive. Like the democratic output of the

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[60] See Anthony Duff, *et al.*, "Introduction: Judgment and Calling to Account" in *The Trial on Trial: Judgment and Calling to Account*, vol. 2 (Oxford: Hart, 2006) 1, at 25.

[61] Bentham, "Rationale", *supra*, note 25, at 355.

legislative and the executive branches, adjudication does not always yield wise or just results. The argument is that it offers opportunities for democratic norms to be implemented through the millions of exchanges in courts among the judges, the litigants and the audience. Courts are, therefore, an important site for functioning democracies to demonstrate their legitimacy by putting into practice claims about popular participation in government.

VII. REFASHIONING PROCESSES, PUBLIC OR NOT

The flowering of rights to participate in public judicial processes could be styled the "triumph of adjudication" in the 20th century. The efforts to manage these increased demands on courts by shifting to alternative dispute resolution represent adjudication's decline. While Bentham proposed that the evils of "Judge & Co." be curtailed with simpler and more public procedures, contemporary solutions by ADR proponents entail moving away from courts through the privatization of procedures.

Procedures, laws and norms have great plasticity. In 1850, fewer than 40 federal judges worked at the trial level in the United States, and no building owned by the federal government had the sign "U.S. Courthouse" on its front door. By 2000, more than 1,700 judges had trial-level jobs in the more than 550 federal courthouse facilities. In addition, some 5,000 administrative judges provided adjudicatory proceedings in office buildings around the country. But that group of federal employees represented, in turn, a small fraction of the public employees serving as judges around the country, as more than 30,000 such persons worked for states and provided judicial services.

Many take for granted that large buildings called "courthouses" will continue to be funded, active sites of public discourse. I have less confidence in that vision. Practices that seemed unimaginable only decades ago — from the mundane example of the new reliance on court-based settlement programs to the stunning assertions by the U.S. government of the legitimacy of according little or no procedural rights to individuals at Guantánamo Bay and elsewhere — are now part of the landscape. In the 1970s, consumers of goods and services and employees were not required to sign form contracts that imposed bars to bringing claims to courts. In that era, those who did file federal lawsuits were not greeted by judges who insisted that they first explore alternatives to adjudication.

Most ADR procedures (as they are currently formatted) cut off the communicative possibilities courts provide to record, as well as to struggle with, conflicts over meaning, rights and facts. The new procedures also undermine the discipline imposed on decision-makers. Various private procedures prize "caucusing" — meeting *ex parte* (to borrow the Latin) — rather than enabling each side, as well as the judge, to "hear the other side". The public is utterly left out. Government support of ADR presses disputants to seek private and, often, confidential outcomes through procedures that impose little accountability on third-party mediators or arbitrators, who are subject to market constraints because they hope to be employed in future disputes. The display of justice (or its failures) is on the wane in some of the venues in which it was once vibrant, and its relocation to other venues has not been accompanied by either "rites" or "rights" of audience.

As exemplified in the United States by the promulgation of rules in the 1930s and innovations of managerial judges in the 1980s, procedures change all the time. While the past few decades have made plain that public processes are not always provided in courts, one ought not to assume that privacy or secrecy are essential characteristics of the alternatives to courts. Whether in courts or in their alternatives, one can build in a place for the public (the "sunshine", to borrow the term that legislators have used[62]) or sequester proceedings from the public. Lawmakers have choices about whether to regulate ADR, such as to require that information that has been used in mediation be confidential or to permit its disclosure. Rules can oblige litigants to consent to settlement in open court (as do the legal constraints on pleading guilty of crimes) or can enforce confidentiality agreements. Law can require medical malpractice settlements to be posted on the Web or permit their sealing.

The political choices in procedure are everywhere — to make spaces for the public, or not, to require transparency in the processes and the results, or not. Whatever places are constituted as authoritative, opportunities exist to engender or to preclude communal exchanges. These concerns are especially plain to proceduralists, whether they work in systems formally denoted as "civil" or "common law" — or in the amalgams and variations forming the subject matter of this volume. In the 19th century, Jeremy Bentham advocated for publicity in courts, and, by the 20th century, that precept was a legally embedded obligation. As events in the 21st century have made painfully clear, the existence of

[62] See, *e.g.*, *Sunshine in Litigation Act*, Fla. Stat. Ann. § 69.081 (West 2004).

formal rights does not necessarily result in their implementation. Public processes in courts are in decline, and their alternatives have often defined themselves as mechanisms to avoid that very facet — openness.

Those who are put at risk by this shift are not only litigants or members of the potential audience. As judges press to alter juridical modes and reconfigure courts to be but one of the many places that are now available for dispute resolution, as they embrace management and settlement, as they stop working before the public eye and cease producing results that are subject to public scrutiny, they weaken the arguments for judicial independence from political oversight and for substantial public subsidies of a unique and peculiar function. State-based criminal decision-making (now also infused with bargained-for sanctions) is secured by the need for "peace and security", but one should not assume the resiliency of public civil justice systems that were only in the 20th century reconfigured — in the words of the U.N.'s ICCPR — to be available to "everyone".

Civil Procedure Reforms in Latin America: The Role of the Judge and the Parties in Seeking a Fair Solution

Eduardo Oteiza[*]

I. THE IMPORTANCE OF CONTEXT

In December 2003, the members of the International Association of Procedural Law (IAPL) met in Florence to discuss various processes of reform[1] from a comparative viewpoint. The reports from that meeting are really worth re-reading, as they reveal a significant convergence among legal systems with respect to the need to settle legal disputes within reasonable times, at reasonable costs, and with decisions that are based on true facts and proper application of the law. In his report, Adrian Zuckerman said that "the modern trend of Anglo-American systems is to adopt judicial control of litigation as the principal instrument for accommodating rule enforcement with the objective of doing justice on the merits".[2] Frédérique Ferrand held that, under French law, the civil procedure was "chose des parties et chose du Juge",[3] noting that there was hardly any use in distinguishing between common law and civil law procedure, since the former is "adversarial", while the latter is "inquisitorial". Such reports were used as examples by Nicolò Trocker and Vincenzo Varano to show that reform projects attenuate the differences used for the classification of procedural legal systems.[4]

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[1] See Nicolò Trocker & Vincenzo Varano, eds., *The Reforms of Civil Procedure in Comparative Perspective* (Torino: Giappichelli, 2005) [hereinafter "Trocker & Varano, *Reforms*"]. In particular, see Nicolò Trocker & Vincenzo Varano, "Concluding Remarks" in Trocker & Varano, *Reforms*, 243 [hereinafter "Trocker & Varano, 'Concluding Remarks'"].

[2] A. Zuckerman, "Court Control and Party Compliance — The Quest for Effective Litigation Management" in Trocker & Varano, *Reforms*, *id.*, 143 at 143-61.

[3] F. Ferrand, "The Respective Role of the Judge and the Parties in the Preparation of the Case in France" in Trocker & Varano, *Reforms*, *id.*, 7, at 9.

[4] Trocker & Varano, "Concluding Remarks", *supra*, note 1, at 243-67.

There are, in both the civil law and the common law traditions,[5] attempts to, first, classify and differentiate certain legal elements, and, second, to establish the reciprocal relationships among them. Once the essential elements for an ideal system have been determined, authors try to establish to what extent such elements are present in one legal system or another. The simple dichotomy between civil law and common law, while useful as a starting point, is not sufficient to assess the wide variety of legal systems and the differences between them. The use of the terms "inquisitorial" and "adversarial" has been strongly criticized because the term "inquisitorial" has been pejoratively used to refer to the era of the Inquisition, which was characterized by the excesses of the medieval Roman Catholic church. Defined in very simple terms, the "adversarial" system grants control over the proceedings to the parties, while the "inquisitorial" system places more authority in the hands of the judges. Both of these models, however, are very simple; because they are vague and lack precision, they are of little use for the purpose of characterizing a particular legal system.

A description of a country's legal system that is based, to a greater or lesser degree, on an adherence to either the civil law tradition or the common law tradition will prove insufficient for the purposes of understanding how that legal system works and to what extent it can be effective. It has been noted that such classifications ignore the heterogeneous nature that is inherent in both legal traditions, since both of them are far from being monolithic. Additionally, it is not uncommon to find that certain legal devices that are typical of one particular legal system (*i.e.*, from the common law tradition) have been adopted, with or without modification, by another legal system that is its exact opposite (*i.e.*, from the civil law tradition). Actual legal systems that might be compared by reference to the two primary legal traditions are, in reality, much more dynamic, with different degrees of development. There are processes of convergence whereby the various legal systems adopt rules and criteria that are used in both of the traditional legal approaches. I will not discuss here the dichotomy between the features and the effects of the civil law

[5] I will use the term "tradition" to indicate a set of deeply rooted, historically conditioned attitudes about the nature of law and the role of law in a society. See J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford: Stanford University Press, 1969), at 1-5. The terms "categories" and "models" will be used in a similar way. I will use the expression "legal system" to refer to a set of institutions, procedures and legal provisions that operate in a nation or a body of nations. "Tradition" places "legal systems" into cultural perspective.

and the common law. It should be noted, however, that the study of a legal system and its effects on other legal systems can also be approached from a federal or centralist perspective, or from the perspective of greater or lesser social and economic development.[6] It is worth noting how a rule — or a set of rules — that is set in accordance with the features of one model or the other will, when it is applied to a similar or disparate cultural environment, change its scope and adjust to the context in which it is applied.

Michele Taruffo, when discussing an alleged "crisis dei modeli tradizionali",[7] underscores the fact that the civil law and common law approaches were used to represent values and systems at a particular time in history that may no longer be as important in today's scenarios. The problem begs a determination of how such options have changed with the passage of time. What may have been fundamental in the past may not be considered so fundamental today. In the same way, the compelling needs of today may not have been so compelling in the past.

Every society seeks to have an efficient court system that safeguards the rights of all citizens with decisions that are made fairly, at a reasonable cost and without delay. To that end, attempts are made to strike a reasonable balance among three mutually interwoven elements: justice, time and cost.[8] There exists no general consensus over the best ways, in any legal case, to fix certain values, such as the proper administration of justice, efficiency and affordable costs. Procedural systems are the result of particular choices made by societies and their governments on these matters.[9]

The aim of this paper is to discuss the respective roles of judges and parties in getting results. Here, the term "results" should be understood to reflect a legal system's abilities to engage in effective conflict resolution and, thus, to provide speedy and fair justice at a reasonable cost. It will then be established how and to what extent we can have a legal system that ensures such timely and affordable justice, the decisions of which are based on a certain degree of truth and appropriate application of the

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[6] With regard to the use of civil law / common law classification, see R.B. Schlesinger *et al.*, *Comparative Law: Cases, Texts, Materials*, 6th ed. (New York: Foundation Press, 1998) [hereinafter "Schlesinger *et al.*, *Comparative Law*"]. In particular, see R.B. Schlesinger *et al.*, "The Problem of Classifying Legal Systems" in Schlesinger *et al.*, *Comparative Law*, 283.

[7] M. Taruffo, *Sui confine. Scritti sulla giustizia civile* (Bologna: Il Mulino, 2002), at 67-97.

[8] See A. Zuckerman, *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford: Oxford University Press, 1999), at 3-52 [hereinafter "Zuckerman, *Civil Justice*"].

[9] O.G. Chase *et al.*, *Civil Litigation in Comparative Context* (St. Paul: Thomson West, 2007), at 1-35.

law. All three elements — justice, speed and cost — are considered in order to assess the extent of the results.

The 2009 IAPL panel in Toronto also proposes and assumes the existence of managerial judging[10] — which would redefine the role of the judge — by introducing the question of the impact of mediation on the functions of the judge and the parties. From that perspective, reference should be made to the terms that are used in this paper. The expression "managerial judging" can be likened, *inter alia*, to the idea of "case flow management". According to I.R. Scott,[11] such a term was coined and has gained currency since 1973, following a paper[12] by Maureen Salomon[13] on the report by the American Bar Association's Commission of Standards of Judicial Administration. Salomon considered case flow management to be a goal-oriented process, the basic principle of which is the control by the court over the progress of its cases. It is stated that, as early as practicable, the court should actively *manage* the proceedings, exercising judicious discretion to achieve disposition of the dispute fairly, efficiently and with reasonable speed.[14] The expression "case management" is also used to denote other meanings. It is often used to refer to the courts as organizations or to the decentralized administration of the courts. Here, I will use this term to refer to the judge's active direction and control of the proceedings in consultation with the parties.

Finally, the 2009 IAPL panel in Toronto should consider alternative dispute resolution ("ADR") as a means to achieve better results. ADR is associated with the conduct of mediation, arbitration and other forms of dispute resolution that are used in the United States[15] to reduce the

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[10] The panel was asked to consider the following issues: (1) Is managerial judging transforming the role of judges in the common law? (2) To what extent can judges shift from adjudicating to mediating disputes? and (3) How are the changing roles of judges changing party engagement in the litigation process?

[11] I.R. Scott, "Caseflow Management in the Trial Court" in A.A.S. Zuckerman & R. Cranston, *Reform of Civil Procedure: Essays on "Acces to Justice"* (Oxford: Oxford University Press, 1995) 1.

[12] With regard to the use of management for an efficient administration of the courts, see H. Fix-Fierro, *Courts, Justice and Efficiency: A Socio-legal study of Economic Rationality in Adjudication* (Oxford: Hart Publishing, 2003) 221.

[13] M. Salomon, *Caseflow Management in the Trial Court, Supporting Studies 2,* American Bar Association Commission on Standards of Judicial Administration (1973).

[14] See *ALI/UNIDROIT Principles of Transnational Civil Procedure* (Cambridge: Cambridge University Press, 2004), at Principle 14 ("Court Responsibility for Direction of Proceedings").

[15] See O.G. Chase, "ADR and the Culture of Litigation: The Example of the United States of America" in L. Cadiet, T. Clay & E. Jeuland, *Médiation et arbitrage* (Paris: Litec, 2005) [hereinafter "Cadiet, Clay & Jeuland"]; T. Farrow, "Public Justice, Private Dispute Resolution

courts' case loads (which are derived from increasing litigation). Although I will only refer to mediation, there exists today in Latin America a growing general interest in ADR.

As to the role of the parties in case management, I will only deal with the principle of good faith. This principle includes various standards of procedural fairness, which are embodied in the legal systems that are mentioned below.[16]

Case management and mediation will be described in relation to the recent developments in the judicial reform processes of a significant number of Latin American countries that have reinstated their democratic governments. Certain globalization issues have influenced these reform processes, particularly where attempts have been made to replicate or reproduce these issues without the consensus of civil society.

II. CIVIL LAW AND COMMON LAW IN LATIN AMERICA IN TIMES OF GLOBALIZATION

Globalization is a multiple-effect phenomenon. Jürgen Habermas[17] notes the challenges that must be met by democracies in the Western world that are faced with the dramatic changes wrought by globalization. Nation-states that formed about two centuries ago as a result of the French and American revolutions (which are clearly associated with our understandings of the civil law and the common law) once interacted within a context that was different from the context of today. Their governments, institutions and economies developed under more or less successful institutional models that were limited by their territories and borders. Globalization,[18] understood as a process and not as a status, describes a rapidly growing increase in the volume and the intensity of

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and Democracy" (2008) 4 Comparative Research in Law & Political Economy, online: <http://www.comparativeresearch.net/papers.jsp>.

[16] For a further development of the conduct of the parties, see M. Taruffo, ed., *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness* (The Hague: Kluwer Law International, 1999) (including the reports from the IAPL Congress at Tulane in 1998).

[17] J. Habermas, *Die Postnationale Konstellation* (Frankfurt am Main: Suhrkamp, 1998). For the Spanish edition, see J. Habermas, *La Constelación Posnacional* (Barcelona: Paidós, 2000), at 81-147.

[18] The term "globalization" is used in a broad sense here, to include all such interactions, relationships and processes, and the tendency for the world to become more interdependent in respect of culture, communication, language, ecology and institutions, but not in respect of the development of a common global economy. For that sense, see W. Twining, "Globalisation and Comparative Law" in E. Örücü & D. Nelken, *Comparative Law: A Handbook* (Oxford: Hart Publishing, 2007), at 69-89.

traffic, communications and exchange into, out of, and beyond a country's borders. According to Habermas, the term "globalization" evokes the image of rivers that are overflowing to the extent that they are undermining border controls — a situation that can ultimately lead to the collapse of the nation-state structure. I could add that old gates do not usually work as well as they did before, and do not regulate the flow of water as efficiently as they once did. With increasing clarity, we can note how decisions or projects that are made under a "post-national constellation" affect nation-state institutions, such as law in general and the civil procedure in particular. I merely want to highlight this fact, and note that the legitimacy and the effects of globalization on other values that are also at stake should be carefully analyzed.

With regard to the effects of globalization — and the impact of these effects on decisions that have been adopted by nations in connection with justice — I will refer to Latin America, rather than to Argentina in particular, as members of the post-national constellation have played an active part in judicial reform processes within that region.

The following issues with respect to Latin America underscore the need to analyze the latest events in that region. The first is that Latin America follows the civil law tradition, notwithstanding its ties to the common law or its differences with both legal systems. Latin America, as a group of nations living in a particular region, maintains close ties with Western democracies. Despite their peoples' common past and cultural ties, they present distinguishing and disparate features. For three centuries, these people lived within colonial territories that belonged to Spain, Portugal and France. Their colonial past, and the tradition derived from that particular situation, determined, to a great extent, their subsequent behaviours. When Latin American nation-states became independent, they adopted and adapted legal devices under the influence of the 18th-century revolutions of both France and America. As a result, both civil and common law devices were adopted for the organization of the nation-states. Although the legal systems of Latin American countries were patterned after European continental and Anglo-American legal systems, the development of such systems was influenced by their own social, cultural, political and economic traditions.

The second issue relates to Latin America's own identity. As is the case in any large community of peoples, Latin America is a land of great contrasts and differences. Every country has its own distinguishing features, and it is possible to find striking contrasts within each of them. There remains, however, a certain homogeneity that is derived from their

shared history, which goes far beyond their colonial past and Roman languages. During the 19th and 20th centuries, Latin America built a certain distinctive identity that made it different from North America and Europe, despite its close ties to each.

The third issue is the importance of Latin America, given both its demographic weight and the problems that it faces. Latin America is home to 575,492,000 people,[19] and social inequality and poverty remain the main challenges within the region.[20] According to reports by the Economic Commission for Latin America and the Caribbean ("ECLAC"), Latin America is the most unequal region in the world. According to the human development index ("HDI"), which was developed by the United Nations Development Program ("UNDP"),[21] no country in the region is ranked among the 30 top nations in the world, and this helps to illustrate the difficulties that face these countries.

The fourth issue is the relationship between a strong and stable institutional system that respects and upholds the rule of law, and the political, social and economic development of the countries of the region. During most of the 20th century, and particularly in the aftermath of the Second World War, Latin America experienced times of ongoing political instability and social violence. During the 1980s, the countries in the region restored their democratic institutions. Lawrence Friedman and Rogelio Pérez-Perdomo emphasized the fact that democratization and globalization processes in the region should be analyzed together.[22] In the Latin American context, both phenomena and their relationship with cultural, political and economic issues occurred simultaneously. To a great extent, the civil judicial reform process in the region is closely related to the restoration of democracy and the need to strengthen the rule of law. One of the challenges faced by young Latin American democracies is how to build greater confidence in justice among their citizens.

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[19] See Economic Commission for Latin America and the Caribbean (ECLAC), "CEPALSTAT – Bases de Datos", online: <http://www.cepal.org/estadisticas/bases/> (ECLAC is a United Nations commission that encourages economic and social cooperation among its members).

[20] See United Nations Development Programme (UNDP), *Ideas and Contributions: Democracy in Latin America — Towards a Citizens' Democracy* (New York: UNDP, 2004), at 49. According to the report, 225 million people lived in poverty in 2003, 100 million of whom were indigent.

[21] See Progama de las Naciones Unidas para el Desarrollo, online <http://www.undp.org/spanish/>.

[22] L.M. Friedman & R. Pérez-Perdomo, eds., *Legal Culture in the Age of Globalization: Latin America and Latin Europe* (Stanford: Stanford University Press, 2003), at 1-19.

According to recent surveys, 78 per cent of people in the region feel that there is inequality in access to justice.[23]

III. A BRIEF LOOK AT THE PAST: THE INFLUENCE OF CIVIL AND COMMON LAW

Certain elements in Latin America's current laws of civil procedure would be too difficult to understand without first taking a brief look at their historical context. R.C. van Caenegem[24] explained how Alfonso X, the Wise[25] introduced Canon Law in the Spanish *Code of Laws*, better known as the *Siete Partidas*, which was finally adopted as the *Ordenamiento de Alcalá* of 1348. The *Siete Partidas* influenced Spanish civil procedure up to the 19th century. In Portugal, the *Siete Partidas* also influenced the *Ordenações Alfonsinas* of 1446, which provided that, where domestic laws were inefficient, the provisions of Canon Law would apply. Between 1492 and 1808, Spain turned into a centralist monarchy and became a world power. Reference is made here to the *Siete Partidas* and the *Ordenações Afonsinas* merely to show the Roman-Canon Law origin of the legal system, the principles of which were brought to Latin America by conquistadors. As noted by Jan Kleinheisterkamp,[26] the laws and the practices of the courts that were introduced into Latin American colonies can be described as slow, costly, highly unpredictable and often subjugated to corruption. In a context of legislative confusion and remoteness from the power of the crown, the value of the law was relative.[27] The Spanish king had considerable, but not absolute, power. A significant limitation was the large distance that separated Spanish colonies in America from their central power; this was aggravated by poor communications and the vastness of the territories themselves.

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[23] See *Informe Latinobarómetro. Banco de datos en línea*, at 93, online: <www.latinobarometro.org>.

[24] R.C. van Caenegem, "History of European Civil Procedure" in M. Cappelletti, *International Encyclopedia of Comparative Law*, vol. XVI, c. 2 ("Civil Procedure") (Tübingen: Mohr, 1973) 38, at 38-42.

[25] 1251-1284.

[26] J. Kleinheisterkamp, "Development of Comparative Law in Latin America" [hereinafter "Kleinheisterkamp"] in M. Reimann & R. Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 261, at 261-301. See also K.L. Karst & K.S. Rosenn, *Law and Development in Latin America* (Berkeley: University of California Press, 1975), at 10-64.

[27] Kleinheisterkamp, *id.*, at 265 (quoting a proverb from colonial times: "The law is acknowledged but not enforced").

In 1524, Charles V created the Council of the Indies, which had jurisdiction over the colonies. Nine *audiencias* were set up during the 16th century to perform the functions of an appellate authority — that is, to review the decisions adopted by viceroys (as civil authorities) and captain-generals (as military authorities).[28] Institutions in the Portuguese empire in Brazil (which were consolidated after the *Treaty of Tordesillas* in 1493) were similar to those of Spanish colonies, and the *relações*, like the *audiencias*, were established to curb the excesses of the captain-generals' authority. Three centuries of Spanish and Portuguese domination in Latin America have demonstrated that distance — not only geographical, but also cultural and political — effected the development of a significantly different legal environment, which was the result of a context that was fundamentally different from that in Europe. The crown's difficulties in ruling an overseas empire and setting up a common legal system were compounded by the large expanse of the Latin American continent, which, in the early 19th century, was populated by only 21,760,000 inhabitants.[29]

Napoleon's invasion of the Iberian Peninsula ignited an independence movement that gave birth to new republics between 1810 and 1825.[30] It is interesting to note the extent to which the ideas of the French Revolution and the U.S. constitutional process of 1787 influenced these Latin American independence movements.[31] Such influence is apparent in the Argentine Constitution of 1853, which was modelled after the U.S. Constitution;[32] it included a system of checks and balances that were based on U.S. laws. Similarly, the Supreme Court of Argentina upholds the tradition of citing prior court decisions from the U.S. Supreme Court. As a note of curiosity, section 24 of the Argentine Constitution provides that the Argentine Congress shall promote the establishment of jury trials. Despite the clear language of the Constitution, jury trials were not provided for in Argentina's civil or criminal codes of procedure. The constitutional convention of 1853 also established that Congress was

[28] With regard to the development of law in Spanish colonies, see D. Clark, "Judicial Protection of the Constitution in Latin America" (1975) [hereinafter "Clark"] in J.H. Merryman, D.S. Clark & J.O. Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia* (Charlottesville: Michie, 1994) 351, at 351-99.

[29] Clark, *id.*, at 372-73.

[30] Brazil declared its independence in 1822. It remained a centralist empire until 1889, however, when it became a federal republic.

[31] See M. Schor, "Constitutionalism Through the Looking Glass of Latin America" (2006) 41 Tex. Int'l L.J. 2.

[32] Although the Argentine Constitution has been amended several times, its institutional design has, except for a few changes, retained its original features.

entrusted with the drafting of civil, commercial and criminal codes, among others, and this was interpreted as an adoption of French ideas. The Constitution of the Republic of Brazil of 1891 adopted a federal system of government that has, except for some amendments, remained in effect,[33] under the direct influence of the U.S. Constitution.

During the 19th and 20th centuries, Latin American countries followed the French tradition of written codes of law. With regard to procedural law, the countries in the region, as pointed out by Enrique Vescovi,[34] patterned their laws of civil procedure on the *Spanish Civil Procedure Act* of 1855.[35] In Argentina, 392 sections out of the 800 sections of the *Code of Civil and Commercial Procedure* of 1880 were modelled after the *Spanish Civil Procedure Act*. In Peru, the *Code of Civil Procedure* of 1912, in effect up until 1993, was framed after the Spanish *Civil Procedure Act* of 1881.[36]

Latin America's adherence to the civil law tradition is an assimilation effort that conceals significant issues. For reasons of brevity, I will only examine certain aspects of Latin America that will contribute to a better understanding of its current situation. For more than 300 years, Latin America was merely a colony separated by a long distance from central power. Its conceptions of the law and the practice of law were completely different from those that prevailed in Spain and Portugal.[37] The social problems that the law was meant to govern in Europe contrasted with those that existed in the colonies. The elements of a hierarchical society[38] were present in a context where power was divided between the king's delegates, who enjoyed a certain degree of autonomy, and the crown, which was as distant as it was purported to be centralized. To

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[33] See J.C. Barbosa Moreira, *Temas de Direito Processual* (São Paulo: Editora Saraiva, 2004), at 255 *et seq.* (c. "A importaçao de modelos jurídicos"); A. Pellegrini Grinover & K. Watanabe, "The Reception and Transmission of Civil Procedural Law in the Global Society — Legislative and Legal Assistance to Other Countries in Procedural Law: Brazilian Report" [hereinafter "Grinover and Watanabe"] in M. Deguchi & M. Storme, eds., *The Reception and Transmission of Civil Procedural Law in the Global Society: Legislative and Legal Education Assistance to Other Countries in Procedural Law* (Antwerpen-Apeldoorn: Maklu, 2008) 223, at 223-34.

[34] E. Vescovi, *Elementos para Una Teoria General del Proceso Civil Latinoamericano* (México D. F.: UNAM, 1978), at 1-23.

[35] While a new *Civil Procedure Act* was enacted in Spain in 1881, the *Civil Procedure Act* of 1855 was more influential.

[36] J. Monroy Gálvez, *Teoria General del Proceso* (Lima: Palestra, 2007), at 118-24.

[37] J. Prats i Català, *Liderazgos, Democracia y Desarrollo: La Larga Marcha a Través de las Instituciones* (Institut Internacional de Governabilitat de Catalunya, 2000).

[38] Here, the term "hierarchical society" is used in the sense that Mirjan Damaška has given to it. See M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986).

overcome these difficulties in the new nations of Latin America, the independence movement replicated the enlightenment ideals of codification and a constitutional, republican framework, in which the system of checks and balances was supported by a strong belief in the judges' ability to achieve an equal distribution of power. Codification of laws in the countries of the region was merely an attempt to overcome lawlessness, rather than an expression of confidence in the law. The adherence to a constitutional framework similar to that in the United States was not a vote of confidence in judges as agents of the balance of powers, but the adoption of an institutional system that would enable both the attainment of economic development and the respect of essential liberties. Every nation in the region sought the best possible balance in the adoption of their legal systems. Civil law and common law exerted a simultaneous influence on Latin America, and the nations each adjusted such rules and provisions to their own circumstances and idiosyncrasies.

The adoption of codes of procedure that were based on the Spanish law of civil procedure of the 19th century can be explained by reference to the formalities that were used in the conduct of proceedings up until the time the new nations were created. These formalities included close ties with Spain, the use of a language that was very similar to that used in the Spanish courts, and a certain judicial conservatism in both judges and lawyers (who were used to settling conflicts under rules of procedure that were similar to those that had been used during colonial times). As I have mentioned above, the organization of these codes of procedure, which date back to the 19th century, blindly follows the medieval tradition of colonial times.

IV. THE MODEL CODE OF CIVIL PROCEDURE FOR IBERO-AMERICA AND ITS INFLUENCE ON THE PROCESSES OF REFORM

During the second half of the 20th century, the deficiencies in the model of civil procedure that Latin America had inherited prompted the search for alternatives that were capable of bringing about change. The consensus among legal scholars about the need to review the guidelines that had inspired the codes of procedure of the countries in the region led the Ibero-American Institute of Procedural Law to develop a draft set of basic standards in 1970. These standards were followed in 1982 by a

Model Code for Ibero-America.[39] The drafting of the Model Code was entrusted to Professors Adolfo Gelsi Bidart, Enrique Vescovi and Luis Torello. The Preamble to the Model Code recites that it is an attempt to modify the situation that had been created by the legislation then in force in the region. This legislation was characterized by proceedings in which the dominant figures were acts reproduced in writing — "in writing to a despairing degree",[40] as Eduardo J. Couture would say — slow, sluggish and far removed from reality. The Model Code encouraged the judge to direct the proceedings and to participate actively during the evidentiary stage. Along these lines, it provided for a preliminary hearing that was primarily aimed at attempting to reach a settlement, clarifying the purpose of the proceeding and determining the manner in which the evidence was to be submitted.[41]

Although the Model Code did not use the expression "case management", the scope that it provided for in its definition of the preliminary hearing warrants a connection with this concept. This is especially evident with regard to the emphases that the Model Code placed on the direct contact of the judge with the parties and his or her active role in directing the proceedings. Particularly noteworthy among the principles that underpin the Model Code are the principle of judge-directed proceedings,[42] and the rule that the parties are bound by a duty of good faith and loyalty from a procedural point of view.[43] The Model Code also provides for a conciliation stage, which is designed as a phase that precedes the proceeding itself.[44]

In Uruguay, the *General Code of Procedure* was enacted in 1989. It is, for the most part, based on the Model Code, and it also contemplates a

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[39] See Instituto Iberoamericano de Derecho Procesal [Ibero-American Institute of Procedural Law], *El Código Procesal Civil Modelo para Iberoamérica: Historia, Antecedentes, Exposición de Motivos y Texto del Anteproyecto* (Montevideo: Fundación de Cultura Universitaria, 1988) [hereinafter "Model Code"]. For a deeper analysis of the Model Code, see S. Schipani & R. Vaccarella, eds., *Un "Codice Tipo" di Procedura Civile per l'America Latina* (Padova: CEDAM, 1990).

[40] E.J. Couture, *Estudios de Derecho Procesal Civil* (Buenos Aires: Ediar, 1948), 291 *et seq*.

[41] Proof of the traditional interest of legal scholars in the development of the common law and civil law systems is the quotation inserted by the authors of the Model Code when describing the *audiencia preliminary*, based on the preliminary hearing under U.S. law, and the reference to the evolution of the *Zivilprozessordnung* (1895) developed by Klein.

[42] Model Code, *supra*, note 39, s. 2.

[43] *Id.*, s. 5.

[44] *Id.*, ss. 263-267.

hearing-based type of proceeding under the direction of the judge.[45] The Uruguayan reform process was not a mere change in legislation. Rather, it developed in parallel to a broad dissemination of the new text, the active participation of various legal players, the establishment of a suitable infrastructure and an increase in the number of judges,[46] the latter being required to implement the reform. The average time required for the full cognizance of a case in Uruguay is estimated to be between 13 and 15 months.[47] Uruguay managed to get the activities of the judge and the parties to align in a direction that largely reduced the duration of the proceedings.

In Peru, a new *Code of Civil Procedure* was enacted under the reform of 1993. The Code adopted the principles of direct contact between the judge and the parties, conciliation, judicial economy and procedural expeditiousness. In this regard, it took the Model Code as one of its sources. The Peruvian Code provides that the judge must ensure the valid establishment of the proceeding by means of a ruling that is designed to cure defects that might result in a declaration of nullity and, also, to correct other errors. After making this ruling, the judge must summon the parties to a conciliation hearing; at this hearing, the matters that are at issue may be defined and the conduct of the evidentiary stage may be agreed upon.[48] Under the old Code of 1912, the average length of a case was 12 years. As a result of the reform, however, the average length was reduced to four years.[49] In assessing the impact of the Peruvian reform *vis-à-vis* the reform in Uruguay, it should be noted that the resources that were used — and the commitment to the reform that was assumed by both the state and civil society — were markedly less significant in the former case.

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[45] For a recent comment on how a preliminary hearing works in Uruguay, see J. Greif, *Derecho Procesal* (Montevideo: La Ley, 2009), at 63-79 (c. "La Audiencia Preliminar y el Despacho Saneador en el Centro de la Reforma").

[46] According to Uruguayan statistics for 2006, there was one judge for every 6,900 inhabitants, and each judge handled, on average, around 460 cases.

[47] See S. Pereira Campos, *El Proceso Civil Ordinario por Audiencias: La Experiencia Uruguaya en la Reforma Procesal Civil* (Montevideo: Amalio Fernandez, 2008); L.M. Simón, "El Código General del Proceso del Uruguay" (Organization of American States, 2002), online: Centro de Estudios de Justicia de las Americas <http://www.cejamericas.org/doc/documentos/ur_ref_jud.pdf>.

[48] Sections 468 through 472, *Code of Civil Procedure* (1993) of Peru. See also E.A. Rodríguez Domínguez, *Manual de Derecho Procesal Civil* (Lima: Grijley, 2005), at 213-18.

[49] See the statistics for 1997 in H. Eyzaguirre, "Marco Institucional y Desarrollo Económico: La Reforma Judicial en América Latina" in E. Jarquin & F. Carrillo, eds., *La Economía Política de la Reforma Judicial* (New York: Banco Interamericano de Desarrollo, 1997) [hereinafter "Jarquin & Carrillo"].

In Uruguay, there was a true process of reform, accompanied both by determined efforts to implement the changes and by strong commitments on the part of the government and the sectors of society that are connected to the judicial field. In contrast, the reform in Peru was saddled with institutional problems that lessened its effectiveness.

In Argentina, a federal country in which the provinces enact their own codes of procedure and autonomously organize the administration of justice, there has been a panoply of reforms.[50] Although the procedural laws in force in each province are, to a large extent, headed in similar directions, certain reforms — such as the judicial reform in Tierra del Fuego, whose legislation was patterned on the Model Code and underwent a consistent implementation process — have been particularly successful. The trend that may be observed in most provinces, and also in the federal system, is that proceedings have two main characteristics: (1) a lack of direct contact by the judge; and (2) a lack of consolidation of the procedural Acts. Although many of the reforms provide that a preliminary hearing must be held and that the judge must direct the proceeding by keeping in direct contact with the parties, the truth is that, in actual practice, the judge does not direct the proceeding, nor maintain contact with the parties. Although the laws have been modified in the ways noted above, the structure of a court of first instance has long remained unchanged. A court of first instance usually employs 10 or 12 people. This demonstrates that one of the characteristics of the administration of justice is the delegation of duties from the judge to his or her employees. There is a tendency not to consolidate procedural activities, but rather to delegate duties that should be discharged by the judge. It is true, however, that human resources and judicial structure vary from one province to another. In the Province of Buenos Aires, for instance, there is one civil judge for every 85,000 inhabitants. This lack of even the minimum resources necessary to provide judicial services lays bare the irrelevance of the regulatory problem.

In fact, where the reforms have only addressed regulatory issues, they have neglected structural and operational aspects. As such, it cannot be expected that the situation concerning the civil courts will effectively improve.[51] A study carried out by the World Bank in 2001 states:

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[50] One of the obstacles to an assessment of the length and the costs of a proceeding in Argentina is the lack of reliable statistical data.

[51] I have recently addressed the issue of the status of the reform process in Argentina. See E. Oteiza, "Argentina: El Fracaso de la Oralidad en el Proceso Civil Argentino" in F. Carpi & M.

> [O]ne of the major problems facing the Argentine courts … is the passive role assumed by judges in lawsuits. Despite the fact that, under the *Code of Civil Procedure*, judges can avail themselves of various means to handle cases in an active fashion, in many instances judges seem to be reluctant to do so. In addition, although the Code of Civil Procedure provides that the judge must participate in conciliation debates together with the parties (section 360) and that the judge has the power to participate in an active fashion and to speed up the proceeding, judges do not frequently use this freedom of action. Judges say that it is not up to them to have cases move forward within the system. There is a sort of widespread belief that it is the parties, rather than the judge, who should set the pace of a lawsuit. This allows the attorneys for the parties to exercise too much control over the judicial proceeding, which can lead to excessive delays.[52]

In the legal culture of Argentina, there is a deeply entrenched practice against the actual direction of the proceedings by the judge. The term "inquisitorial" can hardly be used to describe the position of the judge in the actual development of civil proceedings in Argentina. It could be said, rather, that proceedings are purely "adversarial", in view of the control that is exercised by the parties over the conduct of the case.[53] Thus, there is a contradiction in that, while laws establish that proceedings are "inquisitorial", they are, in practice, clearly "adversarial".

Particularly noteworthy is the adoption of class actions in Argentina. The 1994 constitutional reform established the constitutional protection of rights that affect the public interest (section 43), including, *inter alia*, the right to a healthy environment, and to equal treatment in consumer relations (sections 41 and 42, respectively). The Supreme Court of Argentina has handed down several landmark decisions in cases that affect the public interest, and two of these cases are related to the issues that are being examined here.

Ortells, *Oralidad y Escritura en un Proceso Civil Eficiente* (Valencia: Universitat de València - IAPL, 2009), at 413-39.

[52] M. Dakolias & L. Sprovieri, *Argentina: Evaluación del Sector Jurídico y Judicial* (Washington, DC: World Bank, 2002).

[53] The *Federal Code of Civil Procedure* of Argentina imposes upon the parties the duty of faithfulness, probity and good faith. However, there are no controls on ensuring effective compliance with this duty.

The first case is *Mendoza c. Estado Nacional*,[54] which examined the pollution of the Riachuelo, one of the watercourses that flow into the River Plate. Naturally, this case had multiple connotations, but I will only mention here that the Supreme Court acted as a court of first instance and effectively handled the proceedings. Over the two years that led to the conclusion of the case, which was particularly complex, the Supreme Court held a series of hearings for the assessment of the evidence. The public followed this case with interest.

The second case is *Halabi c. Poder Ejecutivo Nacional*,[55] in which the Supreme Court passed judgment upon the constitutionality of an Act that enabled the government to intervene in telephone and Internet communications. The highest judicial authority declared the Act unconstitutional because it constituted a breach of the right to privacy. The Court then described the minimum standards for collective interest actions, based on class actions and collective interest actions under the laws of Brazil.

Opinions continue to differ about whether or not Argentina's current procedural laws, and the conduct of cases by judges and lawyers, can be used to successfully conduct collective interest actions that will conclude within reasonable time frames, at reasonable costs, and with decisions that are based on true facts and proper applications of the law.

In 1973, Brazil adopted the *Código de Processo Civil*,[56] which, after major amendments, remains in effect today.[57] The current wording of the Code contemplates a hearing that is primarily aimed at attempting to reach a settlement, establish the factual matters that are in dispute, resolve any pending issues, determine the manner in which the evidence is to be submitted and schedule the hearings (section 331). José Carlos Barbosa Moreira notes the difficulty of attempting to assess the performance of civil procedure in Brazil in the absence of statistics that provide accurate figures about the duration of proceedings.[58] Candido

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[54] For the decisions of the Supreme Court of Argentina, see online: <http://www.csjn.gov.ar/jurisp/jsp/fallos.do?usecase=mostrarDocumento&falloId=3806> also in *Fallos de la Corte Suprema de Justicia de la Nación* (Buenos Aires: La Ley), 331:1676, 2008/7/23, decisions dated June 20, 2009 and July 8, 2008.

[55] The decision can be found at <http://www.csjn.gov.ar/jurisp/jsp/fallos.do?usecase=mostrarDocumento&falloId=4368>, also in *Fallos de la Corte Suprema de Justicia de la Nación* (Buenos Aires: La Ley), 332:111, decision dated 2009/02/24.

[56] The first Brazilian Code of Procedure dates back to 1939, despite the fact that the Republican Constitution was promulgated in 1891.

[57] With regard to the performance of the civil courts in Brazil, see S. Bermudes, "Administration of Civil Justice in Brazil" in Zuckerman, *Civil Justice, supra*, note 8, 347, at 347-62.

[58] J.C. Barbosa Moreira, "La Significación Social de las Reformas Procesales" in *Revista Peruana de Derecho Procesal* (Lima: Estudio de Bealunde & Monroy, 2008), vol. X, at 7-23

Dinamarco[59] outlines the difficulties that judges must face in the performance of their functions, where they are burdened with heavy case loads — an issue that is demonstrated by the fact that, in Brazil, there is only one judge for every 25,000 inhabitants.

Anglo-American law has influenced Brazilian civil procedure. I will only mention two representative examples. The first is the promulgation, in 1984, of the *Lei dos Juizados de Pequenas Causas*,[60] which was patterned on U.S. Small Claims Courts.[61] The 1988 Brazilian Constitution mandated that the Federal Union and its states should set up small claims courts, later known as special courts, for the conciliation, settlement and enforcement of small claims (*i.e.*, cases in which there are limited amounts in dispute). Special court proceedings are based on the principles of oral pleading, unwritten form, judicial economy and procedural expeditiousness.[62] Although this system looked promising at first, the courts eventually became increasingly congested. The primary purpose of small claims courts is to encourage people's access to the courts. This requires an adequate structure to manage a given case load. The secondary purpose of these special courts is the hearing and determination of class actions. In 1985, Brazil enacted the *Public Civil Action Act*,[63] which gave the Attorney General's Office, other governmental bodies and other associations legal standing to sue for the protection of environmental, historical or cultural rights. Those were the first steps toward the incorporation of class actions in Brazilian procedural laws. The 1988 Constitution adopted the collective interest protection principle for the protection of constitutional guarantees. The *Consumer Protection Code*, under which rights are classified into collective, diffuse and homogeneous individual rights, was enacted in 1990. In this way, class actions for

(stating that "[i]n Brazil it is very difficult to determine whether procedural reforms actually accomplish, in the legal practice, the legislative intent. This is no doubt mostly due to absence of statistical data. Court statistics are scarce in my country, and those available are not always reliable").

[59] C.R. Dinamarco, "El Futuro del Derecho Procesal Civil" in *XV Jornadas Iberamericanas de Derecho Procesal* (Bogotá: Universidad Libre, 1996), at 289-329 [hereinafter "Dinamarco"].

[60] Law 7244.

[61] With regard to the model used, see Grinover & Watanabe, *supra*, note 33; Dinamarco, *supra*, note 59.

[62] With regard to Brazil's special courts, see P.C. Pinheiro Carneiro, *Acesso à Justiça: Juizados Especiais Cíveis e Ação Civil Pública* (Rio de Janeiro: Editora Forense, 2000), at 105-74; C. Villadiego Burbano, "Estudio Comparativo: Justicia Civil de Pequeñas Causas en América" (2007), online: Centro de Estudios de Justicia de las Américas <http://www.cejamericas.org/doc/proyectos/Informe_pequenas_causas_CAROLINA_VILLADIEGO.pdf>.

[63] Law 7347.

damages and mass tort cases[64] were incorporated into Brazilian procedural laws. It remains to be seen whether or not this system works well. One of the problems that it may face is the absence of a proper legal proceeding to discuss the complex issues that are brought to the courts by the community that is affected by the collective interest.

We should note that Latin American laws of civil procedure frequently encourage the judge to actively direct and control the proceeding, but to do so in consultation with the parties. In general, judicial reforms have incorporated pre-trial hearings that attempt to reach a settlement. Should this endeavour fail, however, the judge may proceed, in consultation with the parties, to determine the parties' claims and continue with the prosecution of the case. Such schemes have been successfully implemented in Uruguay. They have not yet been successful, after countless stops and starts, in the other countries of the region.

Another issue is the adoption of collective interest actions. The courts have a leading voice in the discussion of public policy issues. The challenge here is to avoid frustrating the expectations of a reasonable debate by providing adequate solutions to overcome conflicts that have considerable social impact. The salient role of civil justice in the determination of collective interest cases may be a weighty factor that can make Latin American states focus more strongly on the establishment of legal rules through debate with regard to the scope of rights before the courts. That has led the Ibero-American Institute of Procedural Law to make a *Model Code for Collective Interest Actions*.[65]

V. CIVIL JUDICIAL REFORM: STRENGTHENING OF THE DEMOCRATIC PROCESS AND ECONOMIC DEVELOPMENT

The reforms that I have discussed above took place while concern was growing for the administration of justice from the "transnational constellation". The status of civil justice was seen from the standpoint of the consolidation of democratic governments, along with social and economic development. The situation in Latin America has been the focus of international attention in recent decades. It includes problems with regard to the continuation of governments and the difficulties that these governments

[64] See A. Gidi, *Class Actions in Brazil: A Model for Civil Law Countries* (2003) 51 Am. J. Comp. L. 311.

[65] See A. Gidi & E. Ferrer Mac-Gregor (coordinators), *Código de Procesos Colectivos: Un Diálogo Iberoamericano* (México D.F.: Porrúa, 2008).

face in their efforts to establish their economies in reasonable relationships for the exchange of goods. As experience has demonstrated, the actual circumstances in Latin America were highly complex, and solutions that were designed for a variety of other circumstances simply did not work when applied in the region. As a result, the forms of international cooperation with the region have gradually changed. The 1970s saw the burgeoning of the Law and Development[66] movement, sponsored by leading law schools such as Harvard, Wisconsin, Stanford and Yale. These schools believed that, to a large extent, the problems of the countries of the region could be overcome through the adoption of a U.S.-style legal system, along with changes in the way that law was taught (*i.e.*, through the incorporation of the case method). This approach was abandoned in the mid-1970s. Its detractors claimed that it was not capable of overcoming the tensions that it created in the societies on which it sought to have an impact. One of the proposals that was put forward by the movement called for a revitalization of the inter-relationships among the existing law schools; unfortunately, this effort was also abandoned. The loss of the Law and Development movement's credibility was one of the reasons why the levels of exchange between U.S. and Latin American law schools gradually fell.

The impact of the teaching of law and of law schools should not be minimized in the region. Latin America receives and develops particular ways of both conceiving and practising law that are influenced by both traditions. Law schools are one of the forums where the necessary legal reforms should be considered and drafted. Law schools also train the attorneys who will later have a quasi-monopolistic role as the players in the legal system. A careful determination of the incidence of both factors should conclude that one of the pillars of reform projects should be to provide for improved teaching of the law. The interaction of law schools in Latin America with their peers from other traditions, as well as with the various players in the domestic and international scenarios, would need to be reviewed once more, and in greater depth.

The 1990s saw the birth of the Rule of Law movement, the goal of which was to improve access to justice and to enhance the quality, efficiency and transparency of justice. Originally, particular attention was paid to government sectors, and some failures there demonstrated that

[66] For the development of cooperation systems, see L. Salas, "From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America" in P. Domingo & R. Sieder, eds., *Rule of Law in Latin America: The International Promotion of Judicial Reform* (London: Institute of Latin American Studies, 2001) 17, at 17-46 [hereinafter "Domingo & Sieder"].

the various manifestations of civil society needed to be taken into account. The World Bank and the Inter-American Development Bank were significant participants in the financing of projects. The volume of financial resources that was invested stands in stark contrast to the scant results that were achieved. This led to a focused attention on the strategies that were employed, which concentrated primarily on economic efficiency guidelines rather than on cultural, institutional and political problems.[67]

One of the main initiatives that was implemented by multilateral credit agencies was to sponsor ADR, including mediation. Projects were financed in 18 countries with a view to promoting the use of mediation. In 2002, the Inter-American Development Bank carried out a highly critical assessment of the result of law reform in connection with mediation. Despite the complexity of the region and the differences between its states, it was assumed that, since the problems in the administration of justice were difficult to resolve, an attempt to find a solution outside the system was a valid alternative. This prejudice led to parties being encouraged to settle their differences without the aid of the courts. This solution was clearly inadequate. Without a judiciary that is able to achieve its purpose, mediation can become a source of great inequity. In this situation, mediation does not help to strengthen respect for the law; in fact, it has the opposite effect.

In Argentina[68] and Peru,[69] mediation was introduced as a mandatory step prior to gaining access to the civil courts. The basic rationale for this, in both countries, was to ease congestion in the administration of justice. Mediation and other alternative dispute resolution mechanisms

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[67] From the vast bibliography on judicial reform, I will cite only W.C. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Westport: Praeger, 2000); L. Hammergren, *Envisioning Reform: Improving Judicial Performance in Latin America* (University Park: Pennsylvania State University Press, 2007); J.E. Vargas, ed., *Nueva Justicia Civil para Latinoamérica: Aportes para la Reforma* (Santiago de Chile: CEJA, 2003); Domingo & Sieder, *id*.; Jarquin & Carrillo, *supra*, note 49; E. Buscaglia, M. Dakolias & W. Ratliff, *Judicial Reform in Latin America: A Framework for National Development* (Stanford: Hoover Press, 1995); M. Dakolias, *Court Performance around the World* (Washington, DC: World Bank, 1999); and Inter-American Development Bank, *La Economía Política de la Reforma Judicial: Seminario Patrocinado por el Banco Interamericano de Desarrollo* (Montevideo: Banco Interamericano de Desarrollo, 1997).

[68] Act No. 24573 (1995) (in effect in the city of Buenos Aires); Act No. 13951 (2009) (in effect in the Province of Buenos Aires; will establish mediation from 2010). Considering the population of these two jurisdictions, half of the population will have to submit their cases to mediators as a prior requirement to actually filing their lawsuits.

[69] Act No. 26872 (1997) (establishing that mediation shall be mandatory within the jurisdiction of the departments of Lima and El Callao).

are instruments that can provide valuable results. The fact that they are supplementary to the process underscores the freedom of the parties to reach private agreements regarding their rights. Promoting their dissemination while the parties have the option of resorting to a relatively efficient system of justice is an option that must be examined in the specific context of the values and the culture of any given society. Detractors of ADR have emphasized that encouraging ADR could entail the privatization of a public scenario, while also limiting the development of the law that takes place through discussions between the parties. At the same time, ADR fails to protect those who are at a disadvantage; as a result, the agreements that are reached are unfavourable to them.[70]

There are many aspects of mediation that should be addressed in the Latin American context. A key issue, however, is the development of mediation in countries with judiciaries that are experiencing a severe efficiency crisis.[71] The problem lies in the fact that, where the response of the judiciary is inadequate, mediation is not actually an option that is available to whomever seeks to have a right respected.

VI. CONTEXT AND RELEVANCE

When discussing convergence, we cannot fail to notice the force of divergence. Globalization seems to give everything a uniform tint. When analyzed in depth, however, diversity gains significance. The tension between what is local and what is transnational emphasizes the differences. It cannot fail to cause amazement that, where both the civil law and the common law traditions have changed substantially, many of their archetypes are now merely remembrances of things past. Equivalently, it is unsurprising that there are still significant differences between them. Change is a cultural process consisting of gradual progress and adjustments.

Our era also emphasizes inequality. Various approaches may be proposed in connection with development and under-development; however, it is easy to see that, at the international level, equality among states is

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[70] See, *e.g.*, D.R. Hensler, "Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System" (2003) 108 Penn St. L. Rev. 165, at 170-85; H.T. Edwards, "Alternative Dispute Resolution: Panacea or Anathema?" (1986) 99 Harv. L. Rev. 668, at 675-82. See O. Fiss, *El derecho como razón pública* (Madrid: Marcial Pons, 2007), at 127-145.

[71] For a discussion of the problem of mediation in Latin America, see E. Oteiza, "ADR Methods and the Diversity of Cultures: The Latin American Case" in Cadiet, Clay & Jeuland, *supra*, note 15, 153, at 153-61.

undoubtedly relative. The crisis of justice is a phenomenon that occurs in practically all states. In some, however, there are more reasons for discontent than in others.

Societies seem to get closer and more distant at the same time — to become both similar and different. The challenge would seem to be to build on the common effort without losing one's own identity. Latin America has an identity that has remained in the semi-darkness of both a civil law tradition, which it timidly approached, and a common law tradition, where it sought to find answers. The fact that it did not try to find options of its own is, perhaps, one of the reasons why its institutions still show signs of weakness.

Efforts such as those made by Uruguay demonstrate that a strong commitment to judicial reform along suitable guidelines has a good chance of success. With an adequate workload, the courts can shorten process times and cooperate with the parties in the search for agreed solutions — a goal that encourages conciliation and that is in no way inconsistent with the alternative channel offered by mediation.

Similarly, transplants without regard to context call to mind Damaška's thought that, if imported rules are combined with native ones in disregard of the local context, unintended consequences are very likely to follow in the living law: "the music of the law changes, so to speak, when the musical instruments and the players are no longer the same."[72]

[72] M. Damaška, "The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments" (1997) 45 Am. J. Comp. L. 839, at 839-52.

The Future of the Categories, the Categories of the *Futur*

Soraya Amrani-Mekki[*]

I. INTRODUCTION

« L'idéaltype est une image mentale obtenue non par généralisation des traits communs à tous les individus mais par rationalisation utopique. On rassemble des traits plus ou moins épars ici et là, on souligne, on exagère : finalement on substitue un ensemble cohérent et rationnel à la confusion du reel »[1]. Les catégories sont des idéaltypes qui reposent nécessairement sur une certaine utopie mais qui ont la vertu de fournir une image rationnelle et cohérente. Leur pérennité suppose qu'il n'y ait pas une distorsion trop importante avec l'observation du réel. Le cas échéant, elles doivent évoluer ou disparaître.

Si le thème général de ce colloque invite à traiter des catégories de *common law* et de *civil law*, le thème particulier est celui du rôle des parties et du juge. Ce dernier amène alors à envisager d'autres catégories, celle de la procédure accusatoire opposée à celle de procédure inquisitoire. Il y aurait également une superposition des catégories de *common law* et de procédure accusatoire, d'une part, et de *civil law* et de procédure inquisitoire, d'autre part. Cette comparaison des États selon la répartition des rôles entre le juge et les parties serait d'ailleurs le point de départ « le plus apprécié »[2] des comparatistes. La procédure de *common law* serait laissée au pouvoir des parties, le juge étant passif. Cet effacement du juge refléterait l'effacement du rôle de l'État. La priorité est la protection de l'individu, ce qui serait le signe d'un système démocratique[3]. Au contraire, une procédure de *civil law* serait conduite par un

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[1] J. Grosclaude, *Préface à la sociologie du droit de Max Weber*, coll. « Quadrige », PUF, 2007, p. 16.

[2] R. Stürner, *Procédure civile et culture juridique*, *RIDC* 2004.4.797.

[3] M. Taruffo, « Recent and Current Reforms of Civil Procedure in Italy », dans N. Trocker et V. Varano (dir.), *The Reforms of Civil Procedure in Comparative Perspective*, G. Giappichelli Editore, Torino, 2005, p. 217 et suiv. : « […] the trust in individual self help rather than in the state as a provider a legal protection; the trust in lawyers rather than judges ».

juge inquisitorial[4], impliqué dans le procès comme l'est l'État providence dans la société civile. La priorité y serait, au contraire, la recherche de la vérité. La France offrirait l'archétype de la catégorie de procédure inquisitoire[5], caractérisée par l'égalité, la tradition, mais aussi l'étatisme[6].

Cette utopie rassurante est cependant largement remise en cause avec l'accélération, ces dernières années, du mouvement de réforme de la procédure civile. Les catégories de procédure accusatoire et de procédure inquisitoire sont relativisées au point de remettre en question l'un des éléments fondateurs de la distinction entre *common law* et *civil law* en procédure civile. Un excellent ouvrage de procédure civile comparée a ainsi conclu des rapports nationaux que le premier aspect qui s'en dégage est l'atténuation des différences qui permettent usuellement de classer les modèles procéduraux[7]. Faut-il s'en étonner alors que le caractère artificiel des catégories « est presque mécanique »[8]?

De nombreux écrits portent sur les différences qui s'estompent entre les cultures des pays, sur les types de procès qui tendent vers un modèle unique. La question se pose de savoir si les catégories qui permettaient de classer les pays au regard du rôle des parties et du juge résistent à ce mouvement[9]. En effet, l'art du juriste est celui de distinguer et les catégories juridiques sont « les rudiments de la science du droit » dont elles forment « la matière élémentaire »[10]. On ne pourrait pas plus se

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[4] M.R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Haven, Yale University Press, 1986. Pour M. Damaška, l'archétype du modèle inquisitoire serait le système maoïste.

[5] R. Martin, *Principes directeurs du procès*, JCL, Procédure civile, mai 2000 : « La procédure inquisitoire met l'accent sur l'atteinte à l'intérêt public, plus qu'à l'intérêt privé de la victime, et le juge y est chargé de poursuivre directement le crime, en recherchant lui-même la vérité. La France républicaine (et jacobine) a hérité de l'absolutisme royal une tradition inquisitoriale, qui subsiste encore pour l'instruction »; R. Martin, *Théorie générale du procès (Droit processuel)*, Éd. juridique et technique, 1984, spéc. n° 85.

[6] E. Jeuland, *Droit processuel*, 2e éd., coll. « Manuel », LGDJ, 2003, spéc. n° 12, p. 20 : « […] la passion française pour la vérité serait donc liée aux contradictions entre foi et raison qui paraissent assez caractéristiques de la culture française ». Voir cependant : X. Lagarde, *Réflexions critiques sur le droit de la preuve*, LGDJ, 1994. Pour l'auteur, la vérité ne peut être atteinte.

[7] N. Trocker et V. Varano (dir.), « Concluding Remarks », dans *The Reforms of Civil Procedure in Comparative Perspective*, *op. cit*., p. 243 et suiv., spéc. p. 244 : « […] the first point which comes out from the reports is that the reform movement had brought about an attenuation of the differences, according to which we were used to classify procedural models ».

[8] F. Gény, *Sciences et techniques*, t. III, Sirey, 1921, spéc. nos 179 à 191.

[9] N. Trocker et V. Varano (dir.), *op. cit*., spéc. p. 245 : « The distinctions are historically dated, they are not representative of deeply felt values, and they do not help us in solving the problems which we have to face, and even less so, in understanding other experience ».

[10] J.-L. Bergel, *Théorie générale du droit*, 3e éd., Paris, Dalloz, 1999, spéc. n° 180, p. 193. Voir cependant : R. Martin, *Théorie générale du procès (Droit processuel)*, Éd. juridique et technique, 1984, spéc. p. 113 : « […] elle correspond à une réalité indiscutable ».

passer de catégories juridiques que de juristes. En ce cas, si les catégories actuelles ont un futur incertain, il faut dépasser ce constat et deviner les catégories du futur, plus en adéquation avec la réalité des systèmes juridiques.

« Sur ce passé nous sommes appuyés, sur cet avenir nous sommes penchés; s'appuyer et se pencher ainsi est le propre d'un être conscient »[11]. C'est en suivant ces préceptes de Bergson que nous pouvons vérifier, en premier lieu, le futur des catégories (I) avant de tenter, en second lieu, l'esquisse des catégories du futur (II).

II. Le Futur des Catégories

Le futur des catégories dépend de leur force de résistance aux assauts du réel. Il faut éprouver les catégories juridiques en les confrontant au réel. Il s'agit, d'une part, de vérifier si leur existence est justifiée, s'il n'y a pas un vice congénital qui les affecte (1). D'autre part, il faut s'assurer de leur persistance car l'évolution des impératifs processuels peut venir les combattre de l'extérieur (2).

1. Existence des catégories

Que l'on parle de cultures, de modèles ou de systèmes, l'idée fondatrice est un rapport de la procédure à l'État[12]. Cependant, non seulement ce fondement reste à vérifier mais encore ses applications sont à relativiser.

a) Fondements

La construction des catégories fondées sur un rôle plus ou moins actif des parties et du juge est faussée. Tout d'abord, l'origine de toute procédure est de type accusatoire car la justice naît de l'organisation de la vengeance privée. « The first impulse of a rudimentary soul is to do justice by his own hand […]. A civil action in final analysis, then, is civilisation's substitute for vengeance »[13]. Les États évoluent et le besoin se

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[11] H. Bergson, *L'énergie spirituelle (1919)*, 7e éd., coll. « Quadrige », P.U.F., 2003, p. 6 et 7.

[12] W. de Vos, « French Civil Procedure Revisited » (1998) 9 Stellenbosch L. Rev. 217, spéc. 220.

[13] E. Couture, « The Nature of Judicial Process » (1950) 25 Tul. L. Rev. 1, 7. Voir également : J. Jolowicz, « Adversarial and Inquisitorial Models of Civil Procedure » (2003) I.C.L.Q. 281, spéc. 281 : « […] it is reasonable speculation that something more like the adversary system than the

fait sentir d'une organisation plus structurée du procès qui implique plus d'inquisitoire. Les dosages et les évolutions se font selon l'État considéré mais ne correspondent pas toujours à une conception politique du rôle de l'État. Il est ainsi remarquable que l'augmentation de l'office du juge s'est faite en Espagne au moment du passage à un État démocratique.

Ensuite, moins de juge ne veut pas dire forcément moins de réglementation. Il ne faut pas réduire l'intervention de l'État au seul juge en occultant la loi. Il est ainsi assez paradoxal que les pays de *common law* soient très rigoureux quant aux obligations de structuration des écritures alors que l'on a de la difficulté en France à les imposer[14].

Enfin, il faut avoir égard à la pratique. La répartition des offices du juge et des parties dépend également d'un rapport de force entre un législateur qui veut perfectionner son système et des Barreaux qui refusent toute augmentation du pouvoir du juge et des obligations des parties. C'est pourquoi toute étude des procédures ne peut se faire indépendamment de l'organisation des professions judiciaires. Ainsi, l'Italie a eu un Code de procédure civile assez moderne en 1942 avec des pouvoirs attribués au juge. En cette période troublée, il n'a pas été appliqué et a dû subir, sous l'influence des Barreaux, une contre-réforme en 1950. En France, cette résistance de la profession, largement représentée à l'Assemblée nationale, a nécessité une réforme de la Constitution pour placer la procédure civile dans le domaine réglementaire. C'est ce qui a permis une évolution des offices du juge et des parties lors de la rédaction du Nouveau Code de procédure civile.

Le lien politique entre État et procédure est ainsi parfois remis en cause. On utiliserait justement un vocable économique et non idéologique pour parler du développement du *case management,* des *managerial judges*[15]. C'est sans doute oublier un peu vite l'idéologie économique qui n'est pas très éloignée du politique. Le lien politique existe évidemment mais doit être manié avec prudence. L'origine historique des pays de *common law* explique le relatif effacement du juge. Même si la *common law* se civilise[16], elle demeure marquée par la présence du jury. Alors que celui-ci n'existe que rarement, il justifie toute l'architecture procédurale

inquisitorial emerged in primitive society as centralised power developed along with the will to prevent the violence that goes with help ».

[14] Voir notamment : J.-C. Magendie, *Célérité et qualité de la justice devant la Cour d'appel*, La documentation française, 2008, p. 63 et suiv.

[15] N. Trocker et V. Varano (dir.), *op. cit.*, spéc. p. 246 : « Which avoid any ideological implication, and belong rather to the business language ».

[16] H.P. Glenn, *La civilisation de la* common law, *RIDcomp*. 1993.559, spéc. p. 772.

au point que l'on a pu qualifier le système américain d'*insulated system*[17], plus éloigné du système anglais que ce dernier ne l'est des systèmes continentaux[18]. Les fondements idéologiques existent certainement mais non exclusivement. Au vrai, une société démocratique ne peut pas attribuer le procès exclusivement aux parties ou au juge car il véhicule tant les intérêts privés que l'intérêt général sous-jacent, même en procédure civile. « Le procès comme institution est situé au carrefour des chemins du droit public et du droit privé. Pour les parties, le procès est un instrument de satisfaction des droits privés. Pour l'État, c'est une forme de réalisation du droit »[19].

Si les bases de la construction des catégories sont ainsi fragilisées, il faut également relativiser ses applications.

b) Applications

Établir des catégories permet de classer, d'ordonner les choses, pour leur donner une cohérence. Cette opération de classification implique évidemment son auteur[20]. La procédure y est plus accusatoire ou inquisitoire que la sienne[21]. Il est ainsi patent que H.P. Glenn parle de civilisation de la *common law* alors que A. Garapon insiste sur l'influence de la *common law* en ces temps de mondialisation. « Le conflit entre les cultures judiciaires, cette "course aux armements" juridiques, est le plus souvent résolu au détriment de la culture civiliste et au profit d'un procès entièrement oral, contradictoire et accusatoire »[22]. Cette influence de la *common law* est d'ailleurs différemment reçue puisqu'on peut aussi

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[17] R.W. Millar, *Civil Procedure of the Trial Court in Historical Perspective*, New York, Law Center of New York University, 1952, spéc. p. 27.

[18] R. Stürner, *op. cit.*, spéc. p. 821 : « Les distinctions entre le procès américain et le procès moderne anglais sont plus importantes que celles entre le procès anglais et le procès continental de tradition romane ou germanique ». Voir également : D.A. Lapres, « Les anglo-saxons sont morts, longue vie aux anglo-normands! », *Gaz. Pal.*, 16-18 juin 2002.17-18.

[19] E. Couture, « Le procès comme institution », *RIDC* 1950.276.

[20] G. Rouhette, « La doctrine de l'acte juridique : sur quelques matériaux récents », dans *L'acte juridique*, Droits, 1988, n° 7, p. 29 et suiv.; voir aussi : E. Savaux, *La théorie générale du contrat : mythe ou réalité?*, t. 264, coll., Bibliothèque de droit privé, LGDJ, 1997, spéc. n° 376.

[21] Sur ce jeu de miroirs, voir : M. Foucault, *Les mots et les choses*, Paris, Gallimard, 1990.

[22] J. Allard et A. Garapon, *Les juges dans la mondialisation, la nouvelle révolution du droit*, Seuil et La république des idées, 2005, spéc. p. 43. Voir également : J.-M. Darrois, « Avocats d'affaire en France : une profession particulière? », dans *Débats de J.-M. Darrois et J.-F. Prat*, supplément au recueil n° 3, Paris, Dalloz, p. 7 : « Jadis on se référait à la loi et on supposait la bonne foi des parties. Aujourd'hui, les méthodes de travail anglo-saxonnes ont inversé les choses : on ne se réfère pratiquement plus à la loi et on suppose que le contradictoire sera de mauvaise foi. On essaie de prévoir tous les pièges qu'il pourrait tendre. »

bien s'insurger en revendiquant une exception culturelle française que céder à la tentation bien naïve d'associer américanisation du droit et modernité[23].

Tout dépend de la personne qui lit et interprète[24] la procédure. Le modèle français est ainsi classiquement présenté comme l'archétype de la procédure inquisitoire[25]. Pourtant, le Code de procédure civile de 1806 a posé une procédure de type accusatoire, selon laquelle le procès est « la chose des parties » et le juge, un « automate à qui on fournit tous les matériaux du procès pour retirer ensuite un jugement »[26]. Ce n'est qu'au XX^{e} siècle que les pouvoirs du juge ont augmenté pour opérer un équilibrage des rôles des parties et du juge. L. Cadiet parle ainsi de principe de coopération pour déterminer les rôles de chacun[27]. Il n'y a guère que depuis la nouvelle flambée des pouvoirs accordés au juge par le décret du 28 décembre 2005 que l'on se demande si la France a franchi le Rubicon pour passer à un modèle plus inquisitoire[28]. E. Jeuland, quant à lui, considère qu'il n'y a pas une mais trois conceptions du procès, « une conception déclarée tendant à réaliser un équilibre entre les parties et le juge, une conception managériale accentuant les pouvoirs du juge et une conception traditionnelle qu'il importe de réactualiser »[29].

La classification dans les catégories dépend également de l'objet classé. Les catégories sont d'autant plus relatives que l'objet classé est vaste. Les pays de *civil law* sont pluriels. Le classement manque de finesse lorsqu'il englobe les pays de *civil law*, sans distinguer les pays de procédure germanique et ceux de procédure romane[30]. La conception du procès diffère sensiblement entre les pays d'Europe du Nord et ceux de

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[23] L. Cadiet, « L'hypothèse de l'américanisation de la justice française », dans *L'américanisation du droit*, coll. « Archives de philosophie du droits », t. 45, Paris, Dalloz, 2001, p. 89 et suiv., spéc. p. 102.

[24] Voir notamment : S. Fish, *Quand lire c'est faire (l'autorité des communautés interprétatives)*, Les prairies ordinaires, 2007.

[25] W. de Vos, « French Civil Procedure Revisited » (1998) 9 Stellenbosch L. Rev. 217, spéc. 217.

[26] A. Tissier, *Le centenaire du Code de procédure et les projets de réforme, RTDciv.* 1906. spéc. 648.

[27] L. Cadiet et E. Jeuland, *Droit judiciaire privé*, 5^{e} éd., Litec.

[28] S. Amrani-Mekki *et al.*, « La procédure à son point de d'équilibre? Le décret n^{o} 2005-1678 du 28 décembre 2005 relatif à la procédure civile, à certaines procédures d'exécution et à la procédure de changement de nom », JCP, 2006, I 146.

[29] E. Jeuland, « La conception du procès civil dans le Code de procédure civile de 1975 », dans L. Cadiet et G. Canivet (dir.), *De la commémoration d'un Code à l'autre : 200 ans de procédure civile en France*, Litec, 2006, p. 101 et suiv., spéc. p. 110.

[30] R. Stürner, *op. cit.*, spéc. p. 798 : « Il s'avère quasiment impossible de réaliser un classement définitif des systèmes de droit du monde en cultures juridiques. »

l'Europe méditerranéenne car ils sont issus d'héritages culturels différents. Le contraste est ainsi frappant entre

> d'une part, l'approche néerlandaise, issue de la culture protestante de l'Europe du Nord, empreinte de pragmatisme, de rationalité statistique et appliquant depuis longtemps dans les administrations publiques les théories du new management, et, d'autre part, l'approche des pays de l'Europe méditerranéenne, dont la tradition judiciaire est celle de la théorie du juge naturel, du droit écrit, de la maîtrise de la conduite du procès civil confiée aux avocats ce qui peut aboutir à des procédures contentieuses à n'en plus finir[31].

Ainsi, en Allemagne, le nouvel article 139 ZPO impose un rôle accru au juge qui doit discuter avec les parties de la détermination des faits et de la loi applicable qu'il doit au besoin suggérer aux parties[32]. À l'inverse, l'Italie n'arrive pas à se défaire du principe que le procès est la chose des parties, au grand désespoir des observateurs qui assistent impuissants aux délais déraisonnables des procédures. L'Espagne, quant à elle, a récemment réformé sa procédure civile en adoptant les traits communs d'une procédure accusatoire avec le modèle de l'audience principale et le principe d'oralité, exacerbé par le principe d'*immediaccion*[33].

De nos jours, les catégories sont remises en cause non plus seulement en tant que telles mais du fait de l'évolution des règles procédurales qui fait douter de leur persistance.

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[31] J.-P. Jean, « De quelques principes directeurs pour faire progresser le débat sur l'évaluation et la qualité auprès des professionnels de la justice », dans M. Fabri *et al.* (dir.), *L'administration de la justice en Europe et l'évaluation de sa qualité,* coll. « Grands colloques », Montchrestien, 2005, p. 405 et suiv.

[32] La règle est la même en Autriche (§182a Satz 2 ZPO).

[33] Art. 137 LEC :

> Presencia judicial en declaraciones, pruebas y vistas. 1. Los Jueces y los Magistrados miembros del tribunal que esté conociendo de un asunto presenciarán las declaraciones de las partes y de testigos, los careos, las exposiciones, explicaciones y respuestas que hayan de ofrecer los peritos, así como la crítica oral de su dictamen y cualquier otro acto de prueba que, conforme a lo dispuesto en esta Ley, deba llevarse a cabo contradictoria y públicamente. 2. Las vistas y las comparecencias que tengan por objeto oír a las partes antes de dictar una resolución se celebraren siempre ante el Juez o los Magistrados integrantes del tribunal que conozca del asunto. 3. La infracción de lo dispuesto en los apartados anteriores determinará la nulidad de pleno derecho de las correspondientes actuaciones.

V. Cortes Dominguez et V. Moreno Catena, *La nueva ley de enjuiciamiento civil*, t.1, Pratica juridica, Tecnos, 2000, spéc. p. 234 : « El principio de immediacion significa que el juez se halla en contacto o communicacion directa con las partes u con los materiales del proceso, amedida que se van produciendo, sin que exista entre ellos elementos algunos interpuesto. »

2. Persistance des catégories

La survie des catégories est en jeu du fait d'une tendance à la globalisation des procédures civiles. Les procédures sont en quête d'efficacité. « While many are busy devoting their energies to promote or criticise it, the economic, social and political reality is faster and produces specific and practical results »[34]. Or, celle-ci amène tantôt à favoriser le caractère inquisitoire des procédures tantôt leur caractère accusatoire.

a) Faveur à l'inquisitoire

Common law et *civil law* se rapprochent car les deux systèmes poursuivent un but commun : celui de l'efficacité de leur procédure. La concurrence des procédures est en marche avec une évaluation des systèmes selon des indicateurs précisés par la Banque mondiale (rapport *Doing Business*[35]) ou par la Commission européenne pour l'efficacité de la justice[36]. Il en découle le souci de satisfaire aux critères d'évaluation et, partant, d'accélérer le cours des procédures. Cette quête n'est d'ailleurs pas uniquement économique puisqu'elle poursuit un autre but commun : celui de la durée raisonnable des procédures, critère du procès équitable[37]. De plus, l'efficacité de la procédure est liée au souci d'effectivité du droit. La procédure civile est un droit sanctionnateur qui permet la réalisation des droits substantiels. L'efficacité est une telle obsession qu'il a été envisagé d'en faire un principe directeur du procès civil[38].

Toutes les procédures marquent un mouvement vers un renforcement des pouvoirs du juge et, corrélativement, vers une augmentation des

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[34] A. Biondi, « Minimum, Adequate or Excessive Protection? The Impact of EC Law on National Procedural Law », dans *The Reforms of Civil Procedure in Comparative Perspective*, *op. cit.*, p. 233 et suiv., spéc. p. 234.

[35] Voir le rapport *Doing Business* de la Banque mondiale, <http:// www.français.doingbusiness.org>. Il mesure la législation des affaires dans 178 pays. C'est « un instrument d'évaluation et de comparaison des législations et réglementations qui affectent directement la croissance économique ». Le site Internet propose même un « simulateur de réformes : quel serait l'impact d'une réforme sur le classement du pays ? Changez la valeur des indicateurs dans cette feuille afin de connaître l'impact des réformes sur les classements. Cet exercice sous-entend que les autres pays ne réforment pas ».

[36] CEPEJ, *Un nouvel objectif pour les systèmes judiciaires : le traitement de chaque affaire dans un délai optimal et prévisible*, spéc. n° 6 : le texte évoque un « syndrôme de lenteur ».

[37] Article 6 §1 de la *Convention européenne des droits de l'homme*.

[38] B. Mathieu, *Essai sur le principe d'efficacité en droit judiciaire privé*, Thèse Aix en Provence, 1993; G. Canivet, « Du principe d'efficience en droit judiciaire privé », dans *Mélanges P. Drai*, *Le juge entre deux millénaires*, Paris, Dalloz, 2000, p. 243 et suiv.

charges processuelles imposées aux parties pour atteindre l'efficacité recherchée. Toute l'évolution de la procédure civile, depuis le XIX^e^ siècle, est ainsi marquée par une montée en puissance du juge qui s'est faite de manière plus ou moins rapide mais qui est commune. Il est ainsi remarquable qu'en Autriche, la durée satisfaisante des procédures a été justifiée en doctrine par les larges pouvoirs conférés au juge depuis longtemps. Ce pays aurait subi moins violemment et plus tardivement l'encombrement des juridictions. Que l'on parle de mise en état en France, de *prozeβprogramm* en Autriche ou de *case management* en Angleterre[39], l'idée est bien la même. Il faut faire face au contentieux de masse en permettant au juge de réguler les procédures[40].

Il ne s'agit pourtant que d'augmenter les pouvoirs du juge et non de consacrer une procédure inquisitoire. L'augmentation de l'office du juge ne lui donne pas un pouvoir exclusif sur le procès, signe d'un procès inquisitoire. Au vrai, les parties avaient seules la maîtrise du procès. L'augmentation des pouvoirs du juge le rend moins passif et rééquilibre les rapports de force. L'équilibre n'est pas le même selon le point de départ et la vitesse d'évolution du système. Il peut aussi différer largement selon les matières litigieuses. Quoi qu'il en soit, l'idée fondatrice est bien là d'une collaboration des parties et du juge. Pour preuve, la mise en état peut faire l'objet d'un calendrier fixé d'un commun accord des parties et du juge[41]. Il en est de même des procédures en Autriche, aux Pays-Bas ou au Japon[42]. Tous les acteurs du procès civil collaborent à la détermination du juste temps du procès.

Cette faveur pour l'inquisitoire peut également résulter de l'engouement pour les actions de groupe qui déferlent dans les pays de *civil law*. Celles-ci permettent de garantir l'effectivité du droit au juge. Les justiciables peuvent ne pas avoir accès individuellement au juge, principalement pour des raisons financières. Le développement des actions de groupe répond à cette nécessité en même temps qu'il poursuit

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[39] A. Adeline, « La montée en puissance de la justice étatique et du management judiciaire dans les pays anglo-saxons », dans P. Legendre (dir.), *Du pouvoir de diviser les mots et les choses*, Bruxelles, Amile Va, Balberghe Librairie et Yves Gevaert Éditeur, 1998, p. 159 et suiv.; R.-L. Marcus, « Malaise of Litigation Superpower », dans A.A.S. Zuckerman (ed.), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*, Oxford University Press, 1999, p. 71 et suiv., spéc. p. 101.

[40] J. Jolowicz, « Adversarial and Inquisitorial Models of Civil Procedure » (2003) I.C.L.Q. 281, spéc. 285: « Lord Woolf's objective was to cure the adversary system of the ills of excessive complication, cost and delay that it had developed ».

[41] En dernier lieu, CM 13 mars 2009, pourvoi n° 07-17670.

[42] Au Japon, le *planning of proccedings* participe de la même idée. Aux Pays-Bas, lorsque la tentative de règlement amiable échoue, les parties et le juge s'accordent sur le déroulement de la procédure à suivre.

une politique de régulation des comportements économiques. Les actions de groupe permettent aussi la représentation en justice d'intérêts collectifs. Il ne s'agit plus seulement de la protection de l'individu ou de l'État mais de classes intermédiaires. Il s'agit de faire du procès un lieu de débat public qui transcende les intérêts particuliers. Or, les actions de groupe ont pour effet mécanique d'augmenter les pouvoirs du juge. Dans les pays qui les connaissent, le juge est qualifié de « chef d'orchestre » [43]. La référence est d'ailleurs assez étonnante car elle renvoie aux propos tenus par les auteurs français sur le juge de la mise en état. Le fait est que le juge aurait, en l'occurrence, des prérogatives renforcées, et ce, à maints égards. Tout d'abord, il est maître de l'existence d'une action de groupe car il doit, en effet, statuer sur sa recevabilité. Les conditions de l'action en justice ne sont donc plus uniquement légales, l'action de groupe supposant un critère d'opportunité. Si on considère que l'action de groupe a principalement pour vertu d'ouvrir les portes du prétoire à des contentieux qui n'y parvenaient pas, alors la décision du juge est primordiale pour l'effectivité de l'accès au juge. Ensuite, le juge décide de l'efficacité de l'action de groupe. Dans les systèmes qui prônent un jugement de responsabilité avant la constitution du groupe, le juge est amené à décider de manière quasi objective de la responsabilité[44].

b) Faveur à l'accusatoire

Il serait pourtant faux de croire que l'efficacité se réduit à cette augmentation des pouvoirs du juge. Pour désencombrer les juridictions, leur permettre de se concentrer sur les affaires qui le mériteraient, la tendance est grande à vouloir déjudiciariser. Cette déjudiciarisation prend plusieurs formes dont celle des règlements amiables de résolution des litiges. La directive de l'Union européenne du 21 mai 2008 sur la médiation en matières civile et commerciale en est une parfaite illustration[45]. Les textes

[43] Formule du bâtonnier Allard qui qualifie le juge de « chef d'orchestre dans le déroulement du recours collectif » au Québec.

[44] S. Guinchard, *Une* class action *à la française?*, D.2005, p. 2180 et suiv., spéc. p. 2185. L'auteur propose d'« introduire une action déclarative en responsabilité pour préjudice de masse, avec obligation ou faculté (selon le cas) pour le juge de suspendre le procès une fois acquise cette déclaration, pour permettre aux autres victimes de se faire connaître et d'intervenir selon la technique de l'intervention volontaire ». C'est sans compter l'augmentation de ses pouvoirs en matière probatoire.

[45] Plus insidieusement, les travaux de la CEPEJ qui incitent à la détermination d'un temps prévisible des procédures mettent en place les conditions du recours à la transaction. Le temps prévisible fournit une information nécessaire au calcul économique des justiciables. Il y a aujourd'hui

abondent en France jusqu'à une toute récente tentative de reprise du droit collaboratif québécois en convention de procédure participative[46]. En Allemagne, le ZPO réaffirme l'importance d'une tentative de conciliation préalable. En appel, les juges laissent entendre l'issue probable du recours pour inciter à la transaction. Au Japon, largement inspiré du modèle allemand, l'*argument-settlement session*[47] a également un grand succès.

Or, ces modes alternatifs mettent en place des procédures accusatoires. Il s'agit de rendre aux parties le traitement du litige par la voie de l'accord. Le litige redevient la chose des parties hors ou dans le procès puisque les conciliations et médiations judiciaires se développent. Aux États-Unis, archétype d'une procédure accusatoire, 95 pour cent des litiges sont résolus par transaction. La lenteur et l'inefficacité de la procédure devant le juge y sont même considérées comme « the American advantage »[48] en tant que facteur d'incitation à la transaction. Or, celle-ci est un moyen de rendre les parties maîtresses du règlement de leur litige. On retrouve l'idéologie politique au fondement du système accusatoire. L'idée séduit dans les pays de *civil law*, même si la défection du système judiciaire peut être jugée dangereuse[49].

Si les catégories dépendent de leur auteur et de l'objet auquel elles s'appliquent, leur relativité pose la question de leur pérennité. Faut-il considérer que « la distinction entre accusatoire et inquisitoire doit être évitée »[50]? Elles semblent, certes, dépassées par le réel mais peut-on s'en passer ou suffit-il de les faire évoluer?

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une explosion des modes alternatifs de règlement des litiges qui les fait imploser de l'intérieur tant il devient difficile de les reconnaître et de les distinguer entre eux.

[46] La loi a été votée au Sénat le 11 février 2009. <http://www.senat.fr/seances/s200902/s20090211/s20090211009.html>.

[47] Y. Taniguchi, « Japan's Recent Civil Procedure Reform : Its Seeming Success and Left Problems », dans *The Reforms of Civil Procedure in Comparative Perspective*, *op. cit.*, p. 91 et suiv., spéc. p. 102.

[48] S.R. Gross, « The American Advantage: The Value of Inefficient Litigation » (1987) 85 Mich. L. Rev. 734.

[49] P.L. Murray et R. Stürner, *German Civil Justice*, Durham, N.C., Carolina Academic Press, 2004, chr. 11 (I) (4).

[50] F. Ferrand, « The Respective Role of the Judge and the Parties in the Preparation of the Case in France », dans *The Reforms of Civil Procedure in Comparative Perspective*, *op. cit.*, p. 7 et suiv., spéc. p. 11.

III. LES CATÉGORIES DU FUTUR

Les catégories doivent-elles évoluer pour survivre? Il faut le souhaiter car ce renouvellement (1) est un gage de survie des catégories juridiques qui demeurent indispensables (2).

1. Des catégories renouvelables

Si les catégories juridiques connues, celles de procédure accusatoire et de procédure inquisitoire, ne reflètent plus l'observation du réel, il ne faut pas pour autant en faire table rase. Il faut les conserver en les affinant car on peine à trouver des catégories substituables.

a) Catégories affinées

Les catégories évoluent car « le droit doit les absorber dans l'ordre juridique existant grâce aux institutions établies, parfois en les corrigeant ou en les complétant »[51]. La critique des catégories vient essentiellement du fait qu'elles ne peuvent embrasser toutes les procédures ni même toutes les phases d'un procès. En revanche, il est possible de conserver les catégories juridiques en les redistribuant à l'intérieur d'un système juridique. Les catégories de procédure accusatoire et de procédure inquisitoire ont encore droit de cité mais non uniformément appliquées aux systèmes de *common law* et de *civil law*. Autrement dit, il est difficile de se contenter d'une macrocomparaison des procédures, toujours artificielle[52].

L'affinement des catégories peut se faire, tout d'abord, en raison de leur objet. La tentation est grande alors de distinguer l'office des parties et du juge concernant le déroulement de l'instance et le traitement de la matière litigieuse.

Les pays de *civil law* mettent en place des procédures dans lesquelles les pouvoirs du juge sont importants. Cependant, pas plus que pour les procédures accusatoires, le principe du dispositif n'est remis en cause.

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[51] J.-L. Bergel, *op. cit.*, spéc. n° 197, p. 209.

[52] P. Gottwald, "Comparative Civil Procedure" (2005) 22 Ritsumeikan L. Rev. 23 et suiv., spéc. p. 28: « Macrocomparison may deal with the general style of the procedural system or of code of procedure. In this respect so-called *legal families* were distinguished or basic concepts of legal culture compared. »

Tous les pays de *civil law* connaissent le principe dispositif[53] qui est repris dans les règles transnationales de procédure civile (principe n° 10) et dans le Code modèle de procédure civile ibéroaméricain (art 1). Il signifie que seules les parties introduisent l'instance et qu'elles déterminent la matière litigieuse. Alors même qu'un juge a le pouvoir, voire le devoir, de relever d'office la règle de droit applicable, il ne le peut que dans le respect de ce principe dispositif qui « constitue le fondement incontesté de toutes les familles de droit processuel »[54]. L'erreur consiste le plus souvent à vouloir associer principe dispositif et procédure accusatoire pour dire que le procès est totalement la chose des parties. Au vrai, s'agissant du traitement de la matière litigieuse, les parties en ont bien la maitrise même si le juge a des pouvoirs pour en influencer le contenu. Les pouvoirs inquisitoriaux du juge portent plus évidemment sur le déroulement de l'instance. On dit même qu'il en a la direction. Aussi bien suffirait-il de distinguer instance et litige pour retrouver une ventilation entre accusatoire et inquisitoire. Parce que les parties occupent l'espace judiciaire, elles doivent respecter l'agenda du juge et le rythme qu'il impose. En revanche, parce que le procès a une matière constituée par les intérêts privés des parties, elles en gardent la maîtrise[55].

Cette distinction de l'instance et du litige est essentielle. Elle pourrait cependant à son tour subir des affinements dans la mesure où ce qui touche à l'instance a des répercussions sur le traitement du litige. Ainsi en est-il d'une ordonnance de clôture de la mise en état qui vise *a priori* uniquement l'instance mais qui empêche de nouveaux développements du litige. De plus, entre instance et litige, il faut laisser une place particulière à la preuve pour laquelle la répartition des rôles est particulière[56].

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[53] Art. 4 et 5 du Code de procédure civile français, art. 19 LEC espagnole, *dispositionsmaxime* ou *verhanlungsmaxime* allemand ou *lijdelijkheid van der rechter* hollandais.

[54] R. Stürner, *op. cit*., spéc. p. 800. Voir également: E.T. Liebman, « Fondamento del principio dispositivo » (1960) Riv. dir. proc. 551; P. Gottwald, K.H. Schwab et L. Rosenberg, *Zivilprozessrecht*, 15e éd., C.H. Beck 1993, §77.

[55] R. Verkerk, "Powers of the Judge: The Netherlands" dans C.H. van Rhee (dir.), *European Traditions in Civil Procedure*, Metro, Intersentia, 2005, p. 282 et suiv, spéc. p. 290. Voir également : R. Martin, *Principes directeurs du procès*, *op. cit.* :

> D'abord il importe de distinguer lorsque l'action du juge s'exerce sur les mécanismes de l'instance (délais, surveillance de l'échange des conclusions et de la communication des pièces) ou sur la constitution de la matière même du litige. Dans le premier cas la situation des parties n'est pas fondamentalement modifiée, que les règles soient posées par la loi et mises en œuvre par les avoués, ou qu'elles soient aménagées et appliquées par un juge.

[56] X. Lagarde, dans L. Cadiet (dir.), *Dictionnaire de la justice*, PUF, 2004, sous « Preuve » : « Le siège de cette matière se révèle être l'un de ceux où s'accusent le plus sensiblement les différences entre systèmes juridiques. »

L'affinement peut se faire à l'infini et il faut se demander à quel niveau de précision il est utile de s'arrêter.

L'affinement des catégories peut viser, ensuite, la matière litigieuse. La procédure civile n'est pas d'un bloc et elle se développe, heureusement, en fonction du litige. Il est ainsi admis en France qu'en matière gracieuse, l'absence de litige, et donc d'adversaire, évacue tout principe dispositif. Plus largement, on peut concevoir que l'implication du juge dépend des intérêts en cause. Il serait alors possible de distinguer entre contentieux subjectif et contentieux objectif. Les contentieux objectifs dépassent les intérêts des parties et supposent un interventionnisme exacerbé du juge, même sur la matière litigieuse[57]. En Espagne, alors que le principe dispositif est affirmé, il supporte quelques tempéraments « in areas where civil procedure is designed to protect not only individual rights, but also to further public policy goals » [58]. Les caractères des procédures semblent se mouler aux nécessités de l'espèce.

L'affinement peut, en outre, provenir de la distinction des instances. En effet, les règles de procédure ne sont pas les mêmes selon le degré de juridiction. Il est aisément compréhensible que les procédures soient plus inquisitoriales dans des procédures sur recours car les parties ont eu précédemment l'occasion de mener la procédure. Il s'agit désormais de juger le travail des juges, ce qui est sensiblement différent. Les procédures sur recours sont essentiellement écrites selon un rythme imposé aux parties.

Il serait enfin possible de distinguer l'application des catégories selon l'organisation judiciaire. On conçoit aisément que le rôle d'un juge unique n'est pas le même que celui d'une formation collégiale. Le juge unique est souvent un juge de l'urgence ou, au contraire, un juge de la durée qui s'implique plus en profondeur dans le traitement de l'affaire.

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[57] L. Cadiet, J. Normand et S. Amrani-Mekki, *Théorie générale du procès*, PUF, coll. Thémis, 2010, n° 99-100, p. 380-385 :

> Une procédure accusatoire marche de pair avec une analyse contractuelle de l'instance qui correspond surtout au contentieux subjectif. À l'inverse, une procédure inquisitoire favorise l'analyse institutionnelle de l'instance qui trouve à s'exprimer le mieux dans le contentieux objectif. Mais aucun modèle n'existe à l'état pur, de sorte que les catégories se mélangent : l'analyse institutionnelle, qu'il convient aujourd'hui d'appliquer à l'instance, vaut aussi pour les procédures de type accusatoire et le contentieux objectif n'est plus le pur procès traditionnellement fait à l'acte; les parties y ont droit de cité et les exigences du procès équitable le rapprochent nécessairement du contentieux subjectif. Il faut en définitive se défier des catégories.

[58] I. Dies-Picazo Giménez, « The Principal Innovations of Spain's Recent Civil Procedure Reform », dans *The Reforms of Civil Procedure in Comparative Perspective*, *op. cit.*, p. 33 et suiv., spéc. p. 40.

De même, il n'est pas possible de demander la même activité à des juges professionnels, à des juges non professionnels ou à un jury. La présence, même potentielle, d'un jury suppose un rôle plus effacé du juge. Paradoxalement, en France, les conseillers prud'hommes, qui ne sont pas des professionnels du droit, mènent une procédure clairement inquisitoire. Celle-ci est alors motivée par l'inégalité des rapports de force dans les contrats de travail. L'activisme du juge rétablit l'égalité des armes. Plusieurs facteurs interviennent donc dans la détermination du rôle plus ou moins appuyé du juge, lesquels supposeraient autant de sous-classifications. Toute catégorie générique, globale, a sa part d'abstraction nécessaire, connue et supportée. La question est de savoir si la généralisation ne trahit pas l'essence du système.

b) Catégories substituées

Il est possible de rechercher des catégories applicables aux procédures en dehors de la dichotomie accusatoire/inquisitoire. Un classement des systèmes procéduraux selon l'organisation des instances est séduisant. Trois catégories se dégageraient qui remettraient en cause la dichotomie *common law* et *civil law*. La première serait celle de l'audience principale commune aux pays de *common law* mais également à certains pays de *civil law*, comme l'Espagne[59] et l'Allemagne[60]. Une seconde catégorie est constituée de systèmes qui fonctionnent selon des audiences successives. Ce système est critiqué pour les lenteurs qu'il occasionne et il suscite, de la part des États qui l'adoptent, quelques propositions de réforme pour l'encadrer. Son défaut est en effet de traiter la matière litigieuse selon ce que le professeur Taniguchi a pu qualifier de *dentist method*[61]. Cette seconde catégorie regroupe des pays de *civil law*, comme l'Italie[62], la France, la Grèce ou le Japon. En France, de

[59] I. Dies-Picao Giménez, *op. cit.*, spéc. p. 43 : « The aim of the LEC is to concentrate the juicio to a single main hearing. »

[60] R. Stürner, *op. cit.*, spéc. p. 807 *:* « […] une victoire procédurale sur les barrières culturelles traditionnelles et grâce aux considérations pragmatiques procédurales d'une civilisation mondiale de la procédure qui s'est développée indépendamment des données nationales ».

[61] Y. Taniguchi, "Japan's Recent Civil Procedure Reform: Its Seeming Success and Left Problems", dans *The Reforms of Civil Procedure in Comparative Perspective*, *op. cit.*, p. 91 et suiv. Voir également: M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Haven, Yale University Press, 1986. « Since authority is hierarchically organized, it is possible for legal proceedings to be broken up into many successive stages. The idea of one crucial event, such as the trial in Anglo-American law, will be absent. »

[62] M. Taruffo, « Recent and Current Reforms of Civil Procedure in Italy », dans *The Reforms of Civil Procedure in Comparative Perspective*, *op. cit.*, p. 217 et suiv., spéc. p. 224. : « […]

récents travaux visent à instaurer un principe de concentration chronologique des conclusions au seuil de l'instance, qui permettrait une réduction sensible du nombre d'audiences[63]. En Italie, plusieurs tentatives, en 1950 puis en 1990, ont eu lieu pour instaurer un principe de concentration. Il a toujours cédé face aux résistances des Barreaux d'avocats qui l'ont qualifié d'atteinte au procès équitable[64]. Enfin, une troisième catégorie serait propre aux États-Unis qui distinguent la phase écrite d'information des parties et l'audience principale avec recherche des preuves. Elle est éminemment liée à l'existence potentielle du jury et place encore une fois cet État à part, comme *insulated system*.

Pour intéressantes qu'elles soient, ces catégories ne visent pas directement l'office des parties et du juge. Elles sont des catégories cumulatives car elles s'ajoutent à celles existantes. Elles ne s'y substituent pas. Elles prendraient le pas sur une catégorie dépassée sans la remplacer.

Cette disparition des catégories accusatoire et inquisitoire peut également se faire par la substitution d'un concept de procès commun. Il en est ainsi de la construction des règles transnationales de procédure civile pour lesquelles « nous ne cherchons pas un compromis ou une médiation entre les deux modèles essentiels, puisque nous ne croyons pas que ces deux modèles existent et qu'ils s'opposent de façon antithétique »[65]. Il en est de même du modèle imposé par l'usage des nouvelles technologies qui fournissent un outil commun de communication. Il est courant de superposer les catégories de procédure accusatoire et orale, d'une part, et de procédure inquisitoire et écrite, d'autre part. Or, les

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the development of the proceeding requires an excessive number of formal and bureaucratic passages and hearings with long intervals ».

[63] Voir, en ce sens : J.-C. Magendie, *Célérité et qualité de la procédure*, La documentation française, 2004, et *Célérité et qualité de la procédure en appel*, La documentation française, 2008. Pour l'heure, la concentration n'est imposée qu'à l'intérieur d'un même procès. Voir : A.P. 7 juillet 2006, *Césaréo*, rapp. cons. Charruault, concl. av. gén. Benmakhlouf; *Procédures* 2006, Repère 9, obs. Croze et n° 201, obs. Perrot; *D.* 2006, 2135, note Weiller; *Dr. & patrim.*, févr. 2007, 113, obs. Amrani-Mekki; *RTD civ.* 2006, 825, obs. Perrot; *Rev. huissiers* 2006, 348, obs. Fricero. L'arrêt impose aux parties d'invoquer tous les moyens au fondement de leurs demandes dans un seul et un même procès. Il y aurait autorité de la chose jugée si les parties introduisaient une nouvelle action fondée sur le même objet, même si le fondement juridique diffère. Il s'agit d'une position sévère de la France qui n'est pas commune aux pays de *civil law*.

[64] M. Taruffo, « Recent and Current Reforms of Civil Procedure in Italy », dans *The Reforms of Civil Procedure in Comparative Perspective*, *op. cit.*, spéc. p. 220.

[65] M. Taruffo, « La genèse et la finalité des règles proposées par l'American Law Institute », dans P. Fouchard (dir.), *Vers un procès civil universel? Les règles transnationales de procédure civile de l'American Law Institute*, éd. Panthéon-Assas, 2001, p. 19 et suiv., spéc. n°, 11 p. 20.

nouvelles technologies marquent une transcendance de l'écrit et de l'oral[66]. Il en découle l'idée que la technique prend parfois le dessus sur des catégories qui ne correspondent plus au réel. « 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 »[67]. Les nouvelles technologies remettent clairement en cause les procédures orales et écrites. Elles ont alors également une influence sur la répartition des rôles entre les parties et le juge car elles changent les manières de faire.

Toutefois, il ne s'agit alors plus de catégories juridiques puisqu'il n'est plus question d'opposition. Aucune autre catégorie ne semble pouvoir remplacer le classement selon la répartition des rôles des parties et du juge, qui reste indispensable.

2. Des catégories indispensables

Il est permis de douter de l'intérêt des catégories. « Just like any other abstract distinction, it must be avoided because it is useless as an instrument of analysis, and is not suited to understand meaningful aspects of the various systems »[68]. Le futur des catégories serait alors le néant. Pourtant, les catégories ont une utilité certaine. Ce qui pose question est, au vrai, moins leur utilité que la manière de les utiliser.

a) Utilité

Les catégories ont au minimum un intérêt pédagogique. Le classement schématique qu'elles facilitent permet une compréhension rapide des systèmes. Elles simplifient et clarifient les choses. Pour le comprendre, il suffit de se référer à l'adage *da mihi factum tibi dabo jus* qui traite justement de l'office des parties et du juge et qui est connu pour être aujourd'hui en partie erroné. Les parties interviennent en droit en proposant des fondements juridiques, en limitant l'office du juge ou en le libérant

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[66] S. Amrani-Mekki, « La oralidad secondaria, el proceso telematico », dans *Oralidad y escritura en un proceso civil eficiente*, Universitat de Valencia, Guada Impresores, 2008, p. 93 et suiv.

[67] G. Tarzia, « Harmonisation ou unification transnationale de la procédure civile » (2001) Rivista di diritto internazionale privato e processuale, n° 4, p. 869-884, n° 7, p. 878. Voir également : H. Rüssmann, « The Challenge of Information Society: Application of Advanced Technologies », dans *Civil Litigation and Other Procedures*, dans *Procedural Law on the Threshold of a New Millennium*, Wien, Manzsche Verlags- und Universitätsbuchhandlung, 2002, p. 205-249; R. Stürner, *Procédure civile et culture juridique*, *op. cit.*, spéc. p. 812 : « Ceci représenterait une contribution de la société mondiale de communication à la culture procédurale commune. »

[68] N. Trocker et V. Varano (dir.), *op. cit.*, spéc. p. 245.

du carcan des règles de droit. Le juge intervient sur les faits en posant des questions factuelles, en ordonnant, parfois d'office, des mesures d'instruction. Pourtant, l'adage est toujours enseigné dans les facultés de droit car il constitue ce point de départ de la compréhension de l'équilibre trouvé. « Les termes d'accusatoire et d'inquisitoire restent des concepts évocateurs qui permettent à l'étudiant, comme au chercheur, de se faire une idée immédiate de la procédure étudiée, même si l'image ainsi provoquée reste floue et incomplète »[69].

Les catégories ont, surtout, un intérêt scientifique. Celui-ci est d'abord historique. Les catégories permettent, en effet, de tracer l'évolution des systèmes juridiques. La France avait une procédure accusatoire, elle devient de plus en plus inquisitoire. L'observation est importante. Elle fixe un point de départ qui permet de mesurer le chemin parcouru. « Il est impossible de traiter le sujet sans tenir compte de l'évolution historique, de sorte que les cadres juridiques traditionnels se proposent néanmoins comme point de départ approprié »[70].

L'intérêt scientifique, ensuite, résulte de la rationalisation du droit qu'elles permettent. Elles lui donnent une cohérence au-delà des variétés techniques qui pourraient laisser l'image du chaos. Sans elles, tout n'est que confusion. « Le système des catégories juridiques permet de discipliner le désordre et l'incertitude des faits sociaux en les saisissant plus aisément sous une qualification claire et des règles déterminées »[71]. Elles permettent donc en ce sens une certaine simplification du droit, sa meilleure intelligibilité, ce qui est essentiel en matière de justice.

Elles assurent en outre une certaine sécurité juridique par la prévisibilité qu'elles permettent. Toute loi nouvelle doit être comprise à l'aune du système dans lequel elle s'insère.

Les catégories juridiques ont, enfin, un intérêt politique qui n'est pas négligeable et qui permet de fonder la légitimité de la doctrine, ce qui ne l'est pas moins. « […] La doctrine reflète une supériorité fondée sur le savoir que ceux-ci transmettent. Or ce savoir est source de pouvoir »[72]. Il est ainsi patent que l'une des querelles doctrinales les plus célèbres en France ait opposé F. Gény à R. Demogue à propos de la nécessité de tout ordonner. R. Demogue a développé dans ses *Notions fondamentales de*

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[69] C. Ambroise Castérot, dans L. Cadiet (dir.), *Dictionnaire de la justice*, *op. cit.*, sous « Accusatoire » et « Inquisitoire ».

[70] R. Stürner, *op. cit*., spéc. p. 799.

[71] J.-L. Bergel, *op. cit.*, spéc. n° 191, p. 204.

[72] P. Jestaz et C. Jamin, *La doctrine*, Paris, Dalloz, 2004, spéc. p. 256.

droit privé [73] l'idée d'un pragmatisme, largement reçu aux États-Unis[74]. Il s'opposait en cela à F. Gény qui redoutait l'ultra-réalisme de R. Demogue, source d'insécurité juridique. Ce faisant, F. Gény représentait une doctrine traditionnelle française menacée par les théories socialistes et par les écoles sociologiques de son époque.

Les catégories sont donc certainement utiles. Si elles sont aujourd'hui mises à mal, c'est peut-être du fait d'une mésentente sur l'utilisation qu'il faut en faire.

b) Utilisation

La méprise consiste peut-être à vouloir faire des catégories des finalités en soi. Elles n'ont pourtant pas qu'une fonction esthétique visant à exposer des systèmes bien ordonnés. Elles ne sont pas une finalité mais un instrument d'analyse. Preuve en est qu'elles ont étét utilisées par des sociologues tels que Max Weber. Or, la sociologie est exclusive de tout dogmatisme. Elle constate, elle observe pour expliquer le réel. « La sociologie du droit est une confrontation incessante d'idéaltypes s'enchevêtrant, se chevauchant, se combinant de façon parfois inattendue. » [75]

D'ailleurs, à vouloir y regarder de plus près, l'affinement tenté des catégories n'est au vrai qu'une utilisation de celles-ci. L'observation des systèmes permet d'appliquer les catégories d'accusatoire ou d'inquisitoire aux différents éléments du procès (instance, litige) ou encore à ses différentes phases (première instance, instance sur recours). L'opération de classification dans une catégorie est insuffisante à embrasser toutes les utilisations des catégories. Elles sont aussi pertinentes pour comparer, pour distinguer, pour comprendre.

Les catégories permettent ainsi de comparer les pays de *civil law* à ceux de *common law*. La remise en cause de la superposition *common law* / accusatoire et *civil law* / inquisitoire n'est pas une véritable altération des catégories mais, au contraire, participe de leur utilisation dynamique. Certes, ces catégories binaires, d'un côté, *common law* et *civil law*, de l'autre, accusatoire et inquisitoire, ne se superposent plus.

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[73] R. Demogue, *Notions fondamentales de droit privé*, Paris, Rousseau, 1911, spéc. p. 197-198 : « Est-il possible d'espérer que le cerveau humain soit un jour assez puissant pour réunir en un faisceau harmonieux les données sur lesquelles s'appuie le droit. Je ne le crois pas. Nous pouvons faire d'heureuses conciliations et même le caractère de milieu clos de toute société le facilite. Mais ayons conscience de leur imperfection. »

[74] D. Kennedy, « From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form" » (2000) 100 Colum. L. Rev. 94.

[75] Grosclaude, *op. cit.*, spéc. p. 16.

Cependant, là n'était pas leur seule raison d'être. Si elles peuvent se superposer, elles peuvent aussi se cumuler et/ou se hiérarchiser. C'est ainsi leur combinaison qui évolue avec le temps sous la pression du souci d'efficacité de la justice et l'ambition d'une harmonisation des procédures.

Le futur des catégories n'est donc pas celui d'une mort certaine bien que parfois annoncée. Au contraire, les catégories sont revitalisées par les nombreuses études visant à les relativiser.

Part IV
Country Studies from Beyond the Divide

Country Studies from Beyond the Divide: An Introduction

Thomas Main[*]

I. INTRODUCTION

This conference[1] could be playfully described as a reunion between the two ruling families of the law: the Romano-Germanic civil law family and the Anglo-American common law family. As they are old friends, familiar stories have been retold by one family to the other — both for the poignancy of reminiscence and for the acculturation of the next generation. Still subtle rivals, the families also each demonstrated pride in their singular history and achievements. And, as both friends and rivals, the group celebrated the marriages, the partnerships and the similarities that have bound them together — a long tradition of ruling families that desire international harmony, if not also the protection of the status quo.[2]

Yet this reunion was different. The gathering also included experts from Brazil, Canada, China, Croatia, Israel, Russia and South Africa. None of these seven countries is a close relative of either the civil law or the common law families. Indeed, each of these systems is arguably a distant relative of *both* of these traditions — or, perhaps, a relative of *neither*. Appropriately, then, the contributions of these experts were assembled in a panel entitled "Country Studies from Beyond the Divide". This panel, in turn, was divided in half, with the first group of commentators representing the classically "mixed jurisdictions", and the second group representing "jurisdictions in transition".

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[1] International Association of Procedural Law (IAPL), *Common Law – Civil Law: The Future of Categories / Categories of the Future* (2009 IAPL Annual Conference, Toronto, Canada: June 3-5, 2009). See IAPL 2009, online: <http://www.iapl2009.org/> [hereinafter "IAPL 2009"].

[2] Consider, *e.g.*, Victoria Adelaide Mary, The Princess Royal, and Frederick III of Germany.

II. MIXED JURISDICTIONS

The legal systems in South Africa, Israel and Canada are "mixed jurisdictions" that some assign to a "third legal family".[3] These jurisdictions are mixed because each system has some hybrid of civil law and common law. Of course, *every* legal system in the world may have some combination of indigenous and foreign elements; accordingly, the designation of a third legal family for certain mixed jurisdictions is controversial.[4] To be sure, there are some historical themes and contemporary characteristics that members of this family arguably share.[5] Yet, principally — and ironically — they are united by their uniqueness. In the family reunion metaphor, members of this third legal family may resemble each other only in that they are outsiders *vis-à-vis* the two ruling families. The viability of the "mixed jurisdiction" as a category was not broached at this conference. However, because the principal question that was addressed was the viability of the civil law and the common law categories, one might query whether these reports from the "mixed jurisdictions" are prophetic visions for other systems or merely fascinating anecdotes for examination.

In "Procedural Models and Fair Trial Rights",[6] Dean Pamela Schwikkard uses several features of South African criminal procedure to make a point of much broader applicability about the irrelevance of labelling a particular procedure as either inquisitorial or adversarial. She addresses "the anomaly that the adoption of inquisitorial features in some common law countries is seen as a panacea for inefficiencies and inequities, while the incorporation of adversarial elements is sought in certain

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[3] Greece, Louisiana, Puerto Rico, Scotland and The Philippines are other frequently named members of this family. The list could be longer (or shorter), depending on the contours of the classification.

[4] See generally Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge: Cambridge University Press, 2001), at 11 [hereinafter "Palmer"] (referring to the classification of a new family as a "delicate question"). Even if we set aside this controversy about whether or not the mixed jurisdictions are a family at all, there is another wave of controversy with regard to the designation of the "third" legal family. Socialism is also occasionally referred to as the third legal family; the same is true of Islamic law. See Rene David & John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of the Law* (London: Stevens Publishing, 1985); H. Patrick Glenn, *Legal Traditions of the World*, 4th ed. (New York: Oxford University Press, forthcoming in 2010). For a discussion of several different historical taxonomies, see Dmitry Maleshin, "Russian Civil Procedure: An Exceptional Mix" [hereinafter "Maleshin"] in Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories* (Markham, ON: LexisNexis Canada, 2010) [hereinafter "Walker & Chase"] 341.

[5] See generally Palmer, *id.*, at 76-80.

[6] In Walker & Chase, *supra*, note 4, 277.

inquisitorial jurisdictions in pursuit of the same goal of efficient justice".[7] With several illustrations (*e.g.*, the emerging duty that is being imposed on South African judges to assist unrepresented parties), Schwikkard demonstrates that the introduction of reforms can

> be viewed either as an introduction of inquisitorial elements (in that it requires a departure from the passive role that is classically assigned to judicial officers in adversarial proceedings), or as a mechanism that compensates for the inequality of arms, and is therefore essential for the functionality of the adversarial system.[8]

She argues that the important differences between procedural systems are revealed not by attaching the labels "civil law" (inquisitorial) or "common law" (adversarial), but rather by studying the force of different ideologies that animate procedural reforms within a system.

In "Civil Procedure in a Mixed System: Israel",[9] Professor Celia Fassberg offers insights that depart from some traditional characterizations of the Israeli procedural system. The conventional account holds that, although Israel is a mixed jurisdiction, its procedural law is fundamentally an adversarial, common law system.[10] After reviewing several recent developments, tracing some to formal amendments and others to jurisprudential shift, she concurs with those Israeli proceduralists who have noted that these changes have significantly undermined the adversarial nature of the system. Importantly, Fassberg goes one step further, and suggests that the adversarial model was never completely accepted in Israel and was, indeed, "not altogether congenial to either of the major religious models of litigation in Israel".[11] In support of this contention, she discusses the willingness of Israeli judges to initiate testimony, the resolution of cases on the basis of legal arguments that have not been raised by the parties, and judicial rhetoric that suggests an interest in the search for truth. Professor Fassberg also connects procedural developments to the evolution of substantive law and to the lateral recruitment (as opposed to the bureaucratization) of judges. Her account of this mixed jurisdiction is particularly fascinating because it emphasizes the

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[7] *Id.*, at 278 (citations omitted).

[8] *Id.*, at 284-85. A central premise of Dean Schwikkard's argument is that "adversarial fairness relies on an equality of arms". *Id.*, at 279.

[9] In Walker & Chase, *supra*, note 4, 295 [hereinafter "Fassberg"].

[10] Indeed, conventional wisdom holds that this is generally true in all the so-called "mixed jurisdictions". See Palmer, *supra*, note 4, at 449.

[11] Fassberg, *supra*, note 9, at 309.

importance of not only the *components* of the mix, but rather the *moment* and the *mode* of the mixture.

In "Rule-Making in a Mixed Jurisdiction: The Federal Court (Canada)",[12] Chief Justice Allan Lutfy and Emily McCarthy describe the flexibility and the adaptability of Canada's national trial court as part of a concentrated effort to respect divergent traditions and apply multiple sources of law. As illustrated metaphorically by a new coat of arms, the Federal Court undertakes to combine the rich traditions of law and equity, civil law and common law, laws emanating from the British tradition and First Nations laws, domestic and international law, multilingualism and multiculturalism. The core value that is symbolized by this combination is that this mixed jurisdiction is not bound by any particular procedural epistemology, but is, rather, trans-systemic. As the authors subtly acknowledge, the challenge that inheres in such a combination is a choice between a mosaic approach on one hand, which preserves all of the grand traditions, and a synthesis approach on the other, which is assimilative, and yet generative. The contemporary procedural regime encourages judges to "search out the best available options and adapt them to the reality of Canada's national, bilingual, multi-juridical trial court".[13]

III. JURISDICTIONS IN TRANSITION

As every legal system may be a more or less *mixed* jurisdiction, every legal system may also be in *transition*. This set of reports presents four countries with dynamic circumstances of particular significance. Importantly, these reports originate from three different continents, include three of the five largest countries in the world, and represent three of the 10 most populous nations. Moreover, they include countries at the heart of the rise and fall (and possible revival) of socialism — one of the most important legacies of the 20th century.

In "Brazil and Its European Influences",[14] Professors Ada Pellegrini Grinover and Kazuo Watanabe describe the transition of Brazil's classic Roman-German procedure into a more cosmopolitan procedural system. The authors record the transplantation of German, Italian, Anglo-Saxon, Japanese and American procedural reforms. The paper also includes two important observations about the generative nature of procedural reforms.

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[12] In Walker & Chase, *supra*, note 4, 313.
[13] *Id.*, at 332.
[14] In Walker & Chase, *supra*, note 4, 333.

First, the authors explain that the importation of the writ of *habeas corpus into* Brazil, in turn, ultimately beget the creation of an entirely new writ, *Habeas Data*, *by* Brazil. And second, the authors note that the adoption of procedural reforms by leading countries such as Brazil can increase the likelihood that the reform will be adopted elsewhere. "This strengthens the idea that, in contemporary society, the rate of exchange between different procedural systems seems to be increasing, with the result a growing homogeneity — not only among countries belonging to the same root, but also among different legal families."[15]

In "Russian Civil Procedure: An Exceptional Mix",[16] Vice-Dean Dmitry Maleshin demonstrates that the Russian procedural system is neither common law nor civil law, but rather a unique system that possesses exceptional features that do not exist in either of the traditional approaches. The author provides deep descriptions of four of these exceptional features: (1) the role of the judge in the process of proof-taking; (2) the role of the procurator in the civil process; (3) the review of judgments in the "supervisory" instance; and (4) the original status of judicial precedent. He then connects these distinctive features to a narrative of Russia's history and culture that includes a discussion of the country's duelling models of collectivism and individualism. Emphasizing the important connection between culture and procedure, the author suggests that a country's procedure "reflects and expresses a culture's metaphysics, values, psychological imperatives and history, and its economic, political and social organization".[17] This discussion includes comparative reference to Japanese, Chinese, African, Jewish and Islamic laws.

In "China's Developmental State and the Challenge of Formal Process: The Case of Counterfeit Medicine",[18] Professors Margaret Y.K. Woo and Yanmin Cai suggest that China may have a two-track approach to rendering justice.

> In ordinary litigation, Chinese reformers are urging an independent judiciary and formal procedures. In litigation that is viewed as more socially significant, Chinese dispute resolution is more informal than formal, more substantive-based than procedural-based, and with more intervention by the government than private party control.[19]

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15 *Id.*, at 340.
16 Maleshin, *supra*, note 4.
17 *Id.*, at 356.
18 In Walker & Chase, *supra*, note 4, 361.
19 *Id.*, at 376.

The paper focuses on the second track, illustrating recent reforms in Chinese civil procedure through the lens of a product liability action that involves the pharmaceutical Armillarisin A. First, they detect a trend involving the increased use of mediation — *especially* in cases of great public interest, and in actions that involve large numbers of people. A second trend regards the surrender of party control over matters such as the joinder of parties; all joint tortfeasors in a personal injury compensation case, for example, must be joined.[20] The third trend reveals how the courts are inclined to shape relief in order to ensure adequate compensation. The authors locate this discussion within the larger jurisprudential question with regard to the balance between formal procedure on one hand, and substantive justice on the other.

In "Survival of the Third Legal Tradition?"[21] Professor Alan Uzelac reports on the status of civil procedure in Croatia and other countries that were once members of the socialist law tradition. Rejecting the notion that these countries are in a period of transition to (or "back to") a substantially civilian model, the author demonstrates how legal institutions and lawyers in the socialist countries have a uniquely shared understanding of the law as an instrument of economic and social policy. Although "[t]he connection between law and politics has existed in every legal tradition … [only in the socialist tradition is it] self-understood that the law, lawyers and all legal structures only existed in order to serve and protect the ruling elites and their political ideologies (whether they wished to admit this or not)."[22] He argues that, because this instrumentalist approach is ideologically neutral, there persists a socialist law tradition even after the fall of socialism. Uzelac makes two additional important observations. First, he suggests that the foundations of the legal traditions reflect the ideology of the philosophy of the lawyers — judges, advocates and law professors — rather than the ideology of society at large. Second, he reveals a paradox about efforts to modernize the justice system: enthusiastic embrace of judicial independence has led to resistance by the judiciary to further changes. He thus predicts that a socialist legal tradition will endure, notwithstanding compelling fundamental reform efforts.

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[20] Of course a consequence of this second trend is that more cases fall within the scope of mediation contemplated by the first trend.

[21] In Walker & Chase, *supra*, note 4, 377.

[22] *Id.*, at 382.

IV. CONCLUSION

These seven country reports reflect a rich diversity of approaches and perspectives. This introduction concludes with a few questions that may urge a return to larger themes as you read each country report. Are "mixed jurisdictions" and "jurisdictions in transition" meaningful categories? Are they, at least, useful descriptors? Are the "mixed jurisdictions" any more mixed, or the "jurisdictions in transition" any more transitional than they are in other countries?

Are the categories "common law" and "civil law" useful for better understanding the mixed or transitional qualities of these countries? To what extent does the rhetoric of the traditional categories have either a positive currency or a negative toxicity in the procedural reform discourse? Is the invocation of the rhetoric accurate? Is the absence of the rhetoric ironic?

Are these jurisdictions developing a new blend of practices that is better described in ways other than the familiar categories?

Procedural Models and Fair Trial Rights

Pamela Schwikkard[*]

South Africa was colonized by first the Dutch and then the English; consequently, its legal system is an amalgam of both Roman-Dutch law and English law. The indigenous systems of law, although recognized, have been marginalized in legal discourse. Although South African lawyers, if asked, would describe the applicable rules of civil and criminal procedure as adversarial, these rules have a number of features that are more usually associated with civil law systems. This is far more pronounced in South African criminal procedure than in civil procedure, and it is for this reason that I have chosen to place emphasis on criminal procedure in this paper.

A substantially adversarial system was predominant during the Apartheid era, but with the transition to democracy and the adoption of the principle of constitutional supremacy and an entrenched Bill of Rights,[1] there is now a renewed interest in inquisitorial procedures as an effective means of ensuring justice. The South African Law Reform Commission has expressed a view, reflecting both the case law and academic writings, that, in certain circumstances, judicial activism is necessary in order to ensure a fair trial.[2]

The argument below is that neither civil law (inquisitorial) nor common law (adversarial) procedures are inherently better suited to promote particular values or efficiency. The articulated advantages and disadvantages of these two procedural models sometimes appear to arise out of generalized claims that do not always correspond to specific jurisdictional

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[1] See *Constitution of the Republic of South Africa, 1996*, No. 108 of 1996, ss 7-39 [hereinafter "Constitution"] (in particular, s. 35(3) provides detailed provisions that relate to pre-trial and trial fairness).

[2] South African Law Commission, *Project 73, Fifth Interim Report on Simplification of Criminal Procedure: A More Inquisitorial Approach to Criminal Procedure — Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of Trial* (2002), online: <http://www.doj.gov.za/salrc/reports/r_prj73_intrep5_2002aug.pdf> [hereinafter "Inquisitorial Report"].

experiences.[3] For example, proponents of either model (depending on the forum) may claim superiority in respect of levels of efficiency or fairness; conversely, law reformers of either model may seek to enhance efficiency or fairness by borrowing from the "other". This leads to the anomaly that the adoption of inquisitorial features in some common law countries is seen as a panacea for inefficiencies and inequities,[4] while the incorporation of adversarial elements is sought in certain inquisitorial jurisdictions in pursuit of the same goal of efficient justice.[5]

In inquisitorial systems, it is the neutrality of the investigating judge that ensures impartiality and the consequent protection of the accused from arbitrary action. This is bolstered by the requirement that guilt be proved irrespective of a "guilty plea"[6] and the system's intolerance of the concept of plea bargaining. It is the claim of neutrality, however, that is disputed by the critics of inquisitorial procedures. Adversarial unease arises, no doubt, from an inherent distrust of state authority,[7] which gives rise to the belief that fairness can only be ensured if the accused is represented by an independent advocate[8] and judged by a person whose state

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[3] See, *e.g.*, B. Swart & J. Young, "The European Convention on Human Rights and Criminal Justice in the Netherlands and the UK" in P. Fennell, *et al.*, eds., *Criminal Justice in Europe: A Comparative Study* (Oxford: Clarendon Press, 1995) 57, at 68 (giving examples of trial delays in both the United Kingdom and the Netherlands) [hereinafter "Fennell *et al.*, *Criminal Justice in Europe*"].

[4] See, *e.g.*, *The Criminal Justice and Public Order Act 1994* (U.K.), 1994, c. 33; *Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988*, 1988/1847 (N.I. 17), Order in Council (N.I.), revised; *The Criminal Evidence (Northern Ireland) Order 1988*, 1988/1987 (N.I. 20), Order in Council (N.I.), revised; *Criminal Justice (Scotland) Act 1995* (U.K.), 1995, c. 20. See generally A.T.H. Smith, "Criminal Law: The Future" (2004) Crim. L. Rev. 971, at 972 [hereinafter "Smith"].

[5] For example, Italy adopted a new code of criminal procedure in 1989 that was essentially adversarial in nature. See the *Codice di procedura penale* (enacted by Presidential Decree), Law No. 447 (September 22, 1988). See generally William T. Pizzi & Mariangela Montagna, "The Battle to Establish an Adversarial Trial System in Italy" (2004) 25 Mich. J. Int'l L. 429 [hereinafter "Pizzi & Montagna"]. See generally P. van Koppen & S. Penrod, "Adversarial or Inquisitorial: Comparing Systems" in P. van Koppen & S. Penrod, eds., *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (New York: Plenum, 2002) 1 [hereinafter "van Koppen & Penrod"].

[6] See generally M. Langer, "From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure" (2004) 45 Harv. Int'l L.J. 1 [hereinafter "Langer"].

[7] See, *e.g.*, C.M. Bradley, "The Convergence of the Continental and the Common Law Model of Criminal Procedure" (1996) 7 Crim. L.F. 471, at 472.

[8] *Id.*, at 473. See also Langer, *supra*, note 6, at 10. At this point, it is worth noting Langer's observation that

> … the adversarial and inquisitorial can be understood as two different structures of interpretation and meaning through which the actors of a criminal justice system understand both criminal procedure and their role within the system. Within these two procedural structures of interpretation and meaning or "procedural languages," the same terms or signifiers often have different meanings. For instance, in the adversarial system, the word

of mind has not been influenced by prior knowledge of the case. The claims of fairness that are made by the proponents of adversarialism, however, do not necessarily stand up to scrutiny either. As adversarial fairness relies on an equality of arms, fairness in most instances is going to be undermined by the inability of the accused to match the capacities of state resources. Furthermore, the partisan role of the parties carries the inherent danger of skewing the truth-seeking process.[9]

It is partially because neither system has an absolute claim to efficiency, in terms of resource costs or truth-seeking, that it is very difficult to find an operational system that is, in reality, either purely inquisitorial or purely adversarial.[10] In a number of traditional inquisitorial jurisdictions, for example, the role of the defence lawyer has been expanded,[11] and lay assessors have also been utilized (and, in some instances, rejected).[12] In all adversarial systems, trial by jury is either used in only a small percentage of trials or not used at all.[13] Exclusionary rules, albeit of varying form and scope, are to be found in both adversarial and inquisitorial jurisdictions.[14] In traditional adversarial jurisdictions, there are instances of increasing pre-trial disclosure obligations being placed on the accused and the prosecution.[15] Furthermore, there is a relaxation of the hearsay rule (an important departure from the primacy of cross-

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"prosecutor" means a party in a dispute with an interest at stake in the outcome of the procedure; in the inquisitorial system, however, the word signifies an impartial magistrate of the state whose role is to investigate the truth. The word "truth" also has a different meaning in each procedural structure of interpretation and meaning. In the adversarial system, even if the dispute is about "truth," the prosecution tries to prove that certain events occurred and the defendant participated in them, while the defense tries to question or disprove this attempt. The adversarial conception of truth is more relative and more consensual: if the parties come to an agreement as to the facts of the case, through plea agreements or stipulations, it is less important to determine how events actually occurred. In the inquisitorial structure of interpretation and meaning, "truth" is conceived in more absolute terms: the official of the state — traditionally, the judge — is supposed to determine, through an investigation, what really happened, regardless of the agreements or disagreements that prosecution and defense may have about the event.

[9] *Id.*, at 473. See also N. Jörg, S. Field & C. Brants, "Are Inquisitorial and Adversarial Systems Converging?" in Fennell *et al.*, *Criminal Justice in Europe*, *supra*, note 3, 41.

[10] See, *e.g.*, Pizzi & Montagna, *supra*, note 5; van Koppen & Penrod, *supra*, note 5.

[11] S. Field & A. West, "A Tale of Two Reforms: French Defense Rights and Police Powers in Transition" (1995) 6 Crim. L.F. 473.

[12] See generally J. Adler, *The Jury* (New York: Main Street Books, 1994).

[13] Consider, for example, South Africa and the Diplock trials in Northern Ireland. See J. Jackson & S. Doran, *Judge without Jury* (Oxford: Oxford University Press, 1995) [hereinafter "Jackson & Doran"].

[14] See, *e.g.*, C.M. Bradley, "The Emerging International Consensus as to Criminal Procedure Rules" (1992) 14 Mich. J. Int'l L. 171, at 174 [hereinafter "Bradley, 'Emerging'"].

[15] See, *e.g.*, R.S. Shiels, "Inquisitorial Themes" (2005) 23 Scots Law Times 133; Smith, *supra*, note 4, at 972.

examination); this flexibility is most apparent with respect to matters involving child justice and vulnerable witnesses.[16] The representation of victims' interests at trial, a feature traditionally associated with inquisitorial proceedings, has permeated adversarial jurisdictions.[17]

These are all general, derivative assertions, as there are no two adversarial or inquisitorial jurisdictions that have identical systems of criminal or civil procedure. This is further complicated by the "disparity between the law on the books and actual practice".[18] What all jurisdictions have in common are established and identifiable procedural systems, but the characteristics of each of these systems vary and with that variation comes a differing emphasis on particular adversarial or inquisitorial characteristics.[19] The shades of grey become even more gradated if it is acknowledged that, sometimes, neither the adversarial nor the inquisitorial labels are particularly useful descriptors. As Jackson notes, certain processes may best fit under the "managerial", or, alternatively, a "problem solving" umbrella. [20]

It has been pointed out by other commentators[21] that one of the difficulties with using these two models as vehicles of analysis is that it is not easy to identify the core features of either. Put differently, what criteria do we apply in order to determine whether a system is adversarial or inquisitorial? Damaška's distinction between *essentialia* and *naturalia* does not necessarily provide a complete answer.[22] Damaška identifies "procedural ideas"[23] that are inherent in both models — the *essentialia*

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[16] See, *e.g.*, I. Cordon, G. Goodman & S. Anderson, "Children in Court" in van Koppen & Penrod, *supra*, note 5, 167.

[17] See generally Pizzi & Montagna, *supra*, note 5, at 432.

[18] M. Damaška, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1973) 121 U. Pa. L. Rev. 506, at 509 [hereinafter "Damaška"].

[19] See J.A. Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52 Int'l & Comp. L.Q. 281, at 281 (noting that "[w]e must recognise that the most that can be said is that some systems are more adversarial — or more inquisitorial — than others. There is a scale on which all procedural systems can be placed, at one end of which there is the theoretically pure adversary system and at the other the theoretically pure inquisitorial").

[20] J. Jackson, "The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?" (2005) 68 Mod. L. Rev. 737, at 746 [hereinafter "Jackson, 'Effect'"]; J. Jackson, "Taking Comparative Evidence Seriously" in P. Roberts & M. Redmayne, *Innovations in Evidence and Proof* (Oxford: Hart Publishing, 2007) 291, at 310.

[21] See Pizzi & Montagna, *supra*, note 5, at 432 (noting that "[i]t is not always easy to categorize trial systems as 'adversarial' as opposed to 'inquisitorial' because there is no litmus test that can be applied to the features of a trial system to provide a definitive answer as to whether a trial system is adversarial or inquisitorial"). See also van Koppen & Penrod, *supra*, note 5; Jackson, "Effect", *id.*; and Langer, *supra*, note 6.

[22] Damaška, *supra*, note 18, at 506.

[23] *Id.*, at 563.

— and distinguishes these from the *naturalia*, which are rules that are not necessary in order to retain the identity of a particular model, but that simply cohere with a particular model as "a matter of natural choice".[24] For example, adversarial *essentialia* include a partisan prosecutor, an absolute right to silence and a passive umpire. In most adversarial systems, however, these *essentialia* are contested. Similarly, observations can be made about inquisitorial *essentialia*. These difficulties lose their importance if the models are understood as Weberian ideal types, with the appellation of "adversarial" or "inquisitorial" referring to an existing procedural system's proximity to that particular "ideal".

Fuller[25] identified party participation as an essential characteristic of adversarial systems. However, this is not a particularly useful feature to focus on in distinguishing between the two models, as both civil law and common law systems facilitate the defendant's participation in the proceedings, although participation occurs in different forms and degrees at different stages of the proceedings.[26] This commonality may be the magnetic thread that facilitates a high degree of convergence at the levels of both values and rules.[27]

A question that then arises is whether a particular procedural system's position on the adversarial/inquisitorial continuum is a determinant of that system's ability to promote trial fairness. An attempt is made, below, to answer this question by considering the impact of "inquisitorial" features on trial fairness in the South African criminal justice system.

In 2002, the South African Law Reform Commission published a report[28] recommending that certain inquisitorial elements be introduced into the primarily adversarial South African criminal justice system. The purpose of introducing such measures was twofold: first, to address the fair trial deficit that arises where there is a glaring disparity in the equality of arms between the accused and the prosecutor, due to the lack of representation of the accused; and, second, to improve trial efficiency. Efficiency, in this context, is a component of fairness, and section 35(3)(d) of the South African Constitution expressly provides that the

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[24] *Id.*, at 564.

[25] L.H. Fuller, "The Adversary System" in H. Berman, ed., *Talks on American Law* (New York: Random House, 1971) 30, at 41.

[26] Damaška, *supra*, note 18, at 570.

[27] Jackson, "Effect", *supra*, note 20. I. Dennis, "Rectitude Rights and Legitimacy: Reassessing the Privilege Against Self-Incrimination in English Law" (1997) 31 Isr. L. Rev. 24, at 48 (noting that "[r]espect for participation as a process value may be a significant component in the acceptability of decisions").

[28] See Inquisitorial Report, *supra*, note 2.

right to a fair trial includes the right of the accused "to have their trial begin and conclude without unreasonable delay".[29] In order to ensure consistency between fairness and efficiency, the Commission considered whether or not the introduction of "inquisitorial" elements conflicted with the fair trial rights that are protected under section 35 of the Constitution, and, more particularly, what role judicial officers should play in ensuring that the fair trial rights of the accused are complied with.

One of the obvious difficulties in evaluating inquisitorial and adversarial procedures in the context of a fair trial is ascertaining the content of the right to a fair trial.[30] The full ambit of the right to a fair trial remains elusive at both national and international levels. Section 35(3) of the South African Constitution[31] lists, in some detail, the features of a fair trial. It is clear that these listed characteristics do not constitute a closed list,[32] and also that many of the listed features are, of course, themselves open to interpretation.

For the purposes of assessing the constitutional fairness of the proposed South African reforms, the following features of the right to a fair trial are relevant: the right to be presumed innocent; the right to remain silent, and the right to testify during the proceedings; the right to not be compelled to give self-incriminating evidence; the right to adduce and challenge evidence; the right to be represented by a legal practitioner, the right to choose that practitioner, and the right — if substantial injustice would otherwise result — to have a legal practitioner assigned by the state and at state expense; and the right to a fair and public hearing before an impartial tribunal.[33] Given that the efficacy of adversarial systems is predicated on an equality of arms, it is difficult to escape a claim that the right to a fair trial requires an approximate equality of arms between the parties to the dispute, or to some form of compensation for any substantial disparity thereof.[34]

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[29] See Constitution, *supra*, note 1, s. 35(3)(d).

[30] D. Weissbrodt, *The Right to a Fair Trial under the UDHR and the ICCPR* (Nijhoff: London, 2001), at 111.

> The right to a fair trial has been a norm of international human rights law since at least the adoption of the Universal Declaration of Human Rights in 1948 and the codification of that right in the International Covenant on Civil and Political Rights in 1966. During that period of over fifty years a substantial jurisprudence has developed elaborating and interpreting the right to a fair trial.

[31] *Supra*, note 1.

[32] See *S. v. Zuma* (1995), 10 S.A.C.R. 568 (C.C.).

[33] Sections 34 and 35 of the *Constitution of the Republic of South Africa, 1996.*

[34] I. Dennis, "Human Rights and Evidence in Adversarial Criminal Procedure: The Advancement of International Standards" in J.F. Nijboer & J.M. Reintjes, eds., *Proceedings of the First*

The introduction of more inquisitorial elements into the South African criminal procedure was not such a radical proposal, as there were already a number of significant departures from the classic adversarial model. The jury system had been abolished in civil trials in 1927,[35] and in criminal trials in 1969.[36] The judges (in the higher courts) and the magistrates (in the lower courts) who preside over the court proceedings are — except in those rare instances when they are assisted by one or more assessors — the sole decision-makers. These presiding officers may be assisted by assessors when the charge is one of murder or where it is deemed "expedient for the administration of justice".[37] Additionally, lay assessors may be used in the lower courts. In the higher courts, judges may be assisted by assessors who have special skills or who are experienced in the administration of justice.[38] Although assessors are restricted to making determinations of fact, they are, unlike jurors, under the constant supervision of the presiding officer (*i.e.*, the judge or the magistrate) with whom they will make a joint deliberation. If the assessors disagree with the presiding officer, then they are required to give reasons for their decision.[39] The presence or absence of lay assessors has not, in itself, been considered as a determinant of trial fairness in South African constitutional jurisprudence.

Presiding officers are entitled to question the accused once the accused has pleaded either "guilty" or "not guilty" to the charge.[40] In the case of a "guilty" plea, judicial questioning is directed at establishing the correctness of the plea, and the plea will be changed to one of "not guilty" if it becomes apparent that the accused may have a valid defence. No constitutional issue arises here because the accused, by entering a

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World Conference on the New Trends in Criminal Investigation and Evidence (Koninklijke Vermande, Lelystad, 1997) 523, at 524. Dennis notes that:

> … fairness in adjudicative contexts consists partly of equality of treatment for the parties concerned, which presupposes an independent and impartial tribunal, and partly of informed participation in the process of the adjudicative decision. These broad principles of equality and informed participation are important not just instrumentally (because they tend to promote factually correct outcomes of decisions), but normatively because requirements of due process demonstrate respect for the dignity and rights of individuals.

[35] *Administration of Justice (Further Amendment) Act*, No. 11 of 1927, s. 3.

[36] *Abolition of Juries Act*, No. 34 of 1969.

[37] *Magistrates Court Act*, No. 32 of 1944, s. 93*ter*; *Criminal Procedure Act*, No. 51 of 1977, s. 45 [hereinafter "*Criminal Procedure Act*"].

[38] *Magistrates Court Act*, *id.*, s. 93*ter*; *Criminal Procedure Act*, *id.*, s. 45.

[39] See S.E. Van der Merwe, "An introduction to the history and theory of the law of evidence" in P.J. Schwikkard & S.E. Van der Merwe, eds., *Principles of Evidence*, 3d ed. (Cape Town: Juta & Co., 2009), at 13-14 [hereinafter "Schwikkard & Van der Merwe"].

[40] See *Criminal Procedure Act*, *supra*, note 37, ss. 112, 115.

plea of "guilty", is clearly abdicating his or her right to be presumed innocent; there is, therefore, no longer a contest between the state and the accused, and the accused cannot compromise him or herself further, as he or she has already admitted his or her guilt.

When an accused pleads "not guilty", the presiding officer may ask the accused if he or she wishes to make a statement that indicates the basis of his or her defence. If an accused does not make this statement to indicate the basis of his or her defence — or does so, but it is not clear from the statement the extent to which he or she denies or admits the issues that have been raised by the plea — then the court may question the accused in order to establish which allegations in the charge are in dispute. The court may question the accused in order to clarify any matter with regard to the defence statement itself, as well as the replies of the accused to any questions that have been directed at ascertaining which allegations are in dispute. It is clear that the accused is not obliged to answer any question put to him or her, and he or she must be advised of this right.[41] An accused person who does not have legal representation may find it extremely difficult to exercise this right in an alien and intimidating, adversarial court environment. Consequently, judicial questioning in the absence of legal representation may be challenged as effectively contravening the constitutionally protected right to remain silent. This would be consistent with Jackson's "participatory" model, which requires that participation take place on an informed basis.[42]

Although South African proceedings are predominantly driven by the parties, the inequality of the parties — which is usually due to indigence and the absence of legal representation — has imposed on the presiding officers an increasing duty to assist the unrepresented accused, by ensuring that they are aware of their rights and the appropriate court procedures. This is a duty that arises out of the judicial oath to uphold the Constitution and, specifically, the directive contained in section 39(2),[43] which requires all courts, when interpreting any legislation and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.[44]

This duty on presiding officers to assist the unrepresented accused may be viewed either as an introduction of inquisitorial elements (in that it requires a departure from the passive role that is classically assigned to

41 See generally Schwikkard & Van der Merwe, *supra*, note 39, at 140-42.
42 Jackson, "Effect", *supra*, note 20, at 740.
43 See Constitution, *supra*, note 1.
44 *Id.*, ss. 7-39.

judicial officers in adversarial proceedings), or as a mechanism that compensates for the inequality of arms, and is therefore essential for the functionality of the adversarial system. Alternatively, judicial activism in this respect may be viewed as necessary to meet the standards of fairness that are set by the participatory model. This is an example of the irrelevance of labelling as either "inquisitorial" or "adversarial" a particular activity or feature of process that serves to determine whether or not the requirements of a fair trial have been met.

The ability of presiding officers to assist many of the unrepresented accused who pass through the South African magistrates' courts is hampered, however, by misconceptions regarding their role as umpires, as well as by the absence of information concerning the trial.

One of the dominant features of adversarial proceedings is the emphasis on concentrated trial proceedings. Even though there is frequently a significant delay between the institution and the conclusion of proceedings in South Africa (as is the case in other common law jurisdictions), fact-finding usually occurs over an extremely short period of time — *i.e.*, during a trial. Such compressed proceedings intensify the need to limit the scope of the inquiry and, also, the volume of evidentiary material that is presented to the court — and this has influenced the law of evidence. Historically, it has also meant that very little emphasis has been placed on pre-trial disclosure; instead, the emphasis is on fact-finding through the examination and cross-examination of witnesses at the concentrated trial proceedings. Prior to the new constitutional dispensation,[45] the prosecution was able to deflect requests for pre-trial disclosure on the basis of "docket privilege", which effectively meant that statements that had been obtained by the prosecution for purposes of a criminal trial were, as a rule, privileged from disclosure. Related to this was a rule of practice that prevented the defence from interviewing potential state witnesses without the consent of the prosecution. After 1994, however, the Constitutional Court, finding that the blanket "docket privilege" unjustifiably infringed on the right to a fair trial, placed a general obligation on the prosecution to accede to the requests of the accused for access to witness statements, as well as to any other exculpatory material that was contained in the docket.[46] The Constitutional Court made it clear that an accused had a right to consult with state witnesses where such consultation

[45] See *Constitution of the Republic of South Africa Act*, *1993*, 200 of 1993 and the *Constitution of the Republic of South Africa*, *1996*.

[46] *Shabalala v. Attorney-General of the Transvaal* (1995), (2) S.A.C.R. 761 (C.C.).

was necessary in order to ensure the right to a fair trial. Again, this pre-trial disclosure may be viewed either as the introduction of an inquisitorial element, or, alternatively, as a necessary measure that ensures the equality of arms (given the disparity between prosecutorial resources and those available to the accused). Clearly, it can also be viewed as a prerequisite for informed participation.

High levels of crime — and, no doubt, the influence of the phenomenon of international policy convergence — have resulted in a call for a similar duty of pre-trial disclosure to be placed on the accused as well. One of the arguments in support of such a requirement, compelling the accused to make pre-trial disclosure, was that the pendulum had swung too far the other way, and the prosecution's obligation to disclose had placed it at an unfair disadvantage (this, too, can be viewed as an equality of arms argument). The arguments against placing such an obligation on the accused have been made frequently,[47] and have asserted that, depending on what form the requirement for disclosure takes, it may infringe upon the presumption of innocence and the right to remain silent. These arguments gain particular strength in the South African context, where, due to limited resources, many accused persons must go before the courts without representation, there is an absence of recording equipment in most police stations, and there is a significant level of illiteracy among the persons who work in the police service.

Influenced by the decisions of the European Court of Human Rights,[48] however, the South African Law Reform Commission concluded that such provisions were not clearly unconstitutional. Further, it recommended to the Minister of Justice that the *Criminal Procedure Act 1977*[49] be amended to include provisions that bear a striking resemblance to those contained in sections 34, 35, 36 and 37 of the English *Criminal Justice and Public Order Act 1994*.[50] These disclosure provisions require the accused to give notice of his or her intention to raise certain defences and to adduce expert evidence. More contentiously, the provisions allow the court to draw inferences from the failure of the accused to mention certain facts when questioned or charged, or when the accused has failed or refused to account for his or her presence at a particular place. There

[47] See, *e.g.*, S. Easton, *The Case of the Right to Remain Silent*, 2d ed. (Aldershot: Ashgate, 1998). See also P.J. Schwikkard, *The Presumption of Innocence* (Cape Town: Juta, 1999); P. Healy, "Risk, Obligation and the Consequences of Silence at Trial" (1997) 2 Can. Crim. L. Rev. 385.

[48] In particular, see *Murray v. United Kingdom* (1996), 22 E.H.R.R. 29 (E.C.H.R.).

[49] *Supra*, note 37.

[50] *Supra*, note 4.

has already been much international debate about the desirability of such provisions, both in principle and from a utilitarian point of view, and the compatibility of these provisions with the right to a fair trial is a topic on which there are reams of literature. Rather than go over that well-trodden ground, however, it is perhaps better to note that disclosure provisions of this nature may well be found to be compatible with the right to a fair trial, provided that there are appropriate safeguards — such as legal representation and reliable recording equipment. It will be the context in which the disclosure provisions are applied that will determine whether or not there has been compliance with fair trial rights.

The more interesting South African Law Commission proposals are those that impact on the role of judicial officers. These range from minor adjustments — such as making it peremptory rather than discretionary for a judicial officer to ask the accused whether or not he or she wishes to disclose the basis of his or her defence — to two entirely new provisions. The less contentious of these new provisions empowers the presiding officer, as well as the parties in the case of a criminal trial, to call a pre-trial conference. More contentious, however, is a provision that gives the presiding officer access to all of the material disclosed to the accused by the prosecution, with the exception of the accused's own statement. Any such documentation or material received shall not form part of the record and shall have no evidential value unless it has been properly admitted or proved.

The rationale of the pre-trial conference is to encourage pre-trial disclosure and to facilitate agreement on such matters "as may aid in the disposal of the trial in the most expeditious and cost effective manner".[51] The rationale for allowing the presiding officer access to the docket is to enhance judicial participation in the management of the trial so that trial efficiency is increased and any inequalities between the parties are compensated for — which, in turn, should contribute to more accurate fact-finding. At first glance, this appears to be a substantial departure from the passive and impartial role that has traditionally been assigned to presiding officers in adversarial trials. However, these provisions merely make it possible for presiding officers to exercise their existing powers in a more effective and fair manner. Furthermore, it is a mistake to equate passivity with impartiality. Depending on the circumstances, passivity might itself constitute an indicator of bias, particularly where there is

[51] SALC Draft Bill, Appendix A, s. 4.

inequality in arms.[52] The question in each case must be whether bias exists or is perceived to exist.

In a number of adversarial, common law jurisdictions — South Africa included[53] — presiding officers may call and question witnesses in order to ensure that a just decision is made in the case. South African case law makes it clear that it does not matter whether such an intervention is found to benefit the defence or the prosecution.[54] However, judicial officers must take care not to assume the role of the prosecution[55] or show bias in favour of the prosecution.[56] Unlike an investigating judge in an inquisitorial system, a presiding officer may not call witnesses from the outset, but may only do so in order to bring evidence before the court that has been admitted by mistake or that is necessary as a cure for a technical deficiency.[57]

In order to avoid perceptions of bias, presiding officers need to exercise a fine sense of judgment. The proposed amendment to allow judicial access to the docket is intended not to upset this fine balance, but to enable presiding officers to exercise their existing powers more confidently. As the Law Reform Commission has noted: "[i]t is not practically feasible for the judicial officer to intervene in the conduct of a trial if he or she has no, or little, knowledge of the ambit of the prosecution or defence case."[58] The Commission concluded that, since prosecutorial disclosure had been constitutionally mandated, "both the prosecution and the defence are fully aware of the nature of the evidence that will be advanced by the prosecution in advance of the commencement of the trial".[59] Consequently, there was no reason why the material should not

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[52] See Inquisitorial Report, *supra*, note 2, at para. 5.5. The report notes that:

> The use of these inquisitorial powers to the benefit of the accused has never been questioned. Indeed, in the case of the undefended accused it has been widely accepted that the judicial officer must be more interventionist, questioning state witnesses in order to establish the truth. In *S v Mosoinyane* [1998 1 SACR 583 (T) 595a-d] the court quoted with approval the following passage:
>
> > Participating in the testing of the State evidence does not *per se* compromise the court's impartiality. To the contrary, by remaining aloof where the accused is unable to test the State evidence, the judicial officer would actually be siding with the prosecution by letting the latter draw an unfair advantage from the accused's inept cross-examination.

[53] *Criminal Procedure Act*, *supra*, note 37, ss. 167, 186.

[54] See *R. v. Hepworth* (1928), A.D. 265 [hereinafter "*Hepworth*"]; *S. v. Gerbers* (1997), 2 S.A.C.R. 601 (S.C.A.) (571/95) [1997] Z.A.S.C.A. 48 (May 26, 1997).

[55] *S. v. Manicum* (1998), 2 S.A.C.R. 400 (N).

[56] *S. v. Matthys* (1999), 1 S.A.C.R. 117 (C).

[57] *Hepworth*, *supra*, note 54.

[58] Inquisitorial Report, *supra*, note 2, at para. 7.8.

[59] *Id.*, at para. 7.9.

be made available to the presiding officer. Access to the material would enable a presiding officer "to make an informed decision as to what evidence is available to the prosecution; the extent to which witnesses materially depart from previous statements, and the extent to which the power to call witnesses might usefully be exercised".[60]

The Commission, emphasizing that judicial access to the docket did not make the material contained in the docket admissible, concluded that such access to the docket prejudiced neither the prosecution nor the defence. It noted that the primary objection to this proposal was that a judicial officer might find it difficult to disabuse his or her mind of the material contained in the docket, but not admitted into evidence. Furthermore, it has been argued that giving presiding officers access to the docket might encourage them to adopt a prosecutorial role, or, at the very least, result in the perception that they are taking on such a role.

The test for bias in South African law does not require a finding that the presiding officer was, in actual fact, biased. It is sufficient if a reasonable person in the position of the party alleging the bias would have a reasonable suspicion, based on reasonable grounds, that the presiding officer might be biased.[61]

Since the presiding officer is only entitled to the same information that has been disclosed to the accused (except for the accused's own statement), judicial access to the docket does not, in itself, provide reasonable grounds for a suspicion of bias. The material contained in the docket is subject to the same rules of admissibility as any other evidence, and the accused will have an opportunity to challenge and counter any of the docket material that is admitted into evidence.

If a presiding officer were to assume a prosecutorial role, it would be appropriate for the defence to make a request for recusal, or, alternatively, to provide a ground for review. It is the conduct of the individual presiding officer that will be in issue. This is clear from a number of cases dealing with judicial impartiality.[62]

The Commission noted that because South African courts are unitary, and presiding officers must decide questions of both law and fact, judicial

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[60] *Id.*, at para. 7.10.

[61] *S. v. Roberts* (1999), 2 S.A.C.R. 243 (S.C.A.). This would seem compatible with the approach taken by the European Court. See generally S. Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention of Human Rights* (Leiden: Martinus Nijhoff, 1993), at 144. A.H. Robertson & J.G. Merills, *Human Rights in Europe*, 3d ed. (Manchester: Mancester University Press, 1993), at 144.

[62] South African cases in point include *S. v. Manicum*, *supra*, note 55; *S. v. Matthys*, *supra*, note 56; and *S. v. Rall* (1982), 1 S.A. 828 (A).

officers were used to disabusing themselves of evidence that, although it had come before them, must be excluded due to the application of the exclusionary rules.[63] It is questionable whether professional adjudicators are better equipped to disabuse themselves of unduly prejudicial evidence than lay adjudicators. Nonetheless, it would seem that the misuse of such information is guarded against through the requirement that reasons be given for factual conclusions. This protection is enhanced by the fact that both the prosecution and the defence are well aware of what materials are before the court. However, it is also clear that it is the unitary structure of the South African courts that allows a strong argument to be made that judicial access to the docket is compatible with the right to a fair trial. The requirement in a unitary court that the fact-finder must give reasons for his or her decisions acts as a safeguard against departures from impartiality. This would not hold true for a bifurcated court structure, in which jurors are not required to give reasons for their findings.

It therefore seems that, in South Africa, the introduction of procedures that may be viewed as having an inquisitorial character is not only compatible with fair trial rights, but also necessary, in certain circumstances, in order to make the goal of a fair trial attainable. This is not because inquisitorial procedures are necessarily more accommodating of fair trial rights, but because of the broader contextual considerations that are specific to South Africa — namely, the absence of a jury and the fact that many accused persons do not have legal representation.

The practical application of fair trial rights is going to be strongly influenced by value choice. A jurisdiction that is more concerned with legitimating decisions through accurate fact-finding rather than protecting individual rights from state intrusion is going to apply similar rules differently to a jurisdiction that views individual rights as its highest priority. A rule that excludes evidence on grounds of policy rather than reliability is more likely to be enforced in a rights-biased system than it is in a system that prioritizes accuracy in fact-finding.[64] For example, an American court is far more likely to exclude reliable but tainted evidence than an English court.[65] Both American and English criminal processes are strongly adversarial, so, presumably, it is not the procedural model

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[63] See Jackson & Doran, *supra*, note 13, at 116 (noting that there is no question of a jury being unduly influenced as a result of judicial intervention in a unitary court).

[64] Damaška, *supra*, note 18, at 579.

[65] See generally A. Choo & S. Nash, "Improperly Obtained Evidence in the Commonwealth: Lessons for England and Wales?" (2007) 11 Int'l J. Evidence & Proof 75 [hereinafter "Choo & Nash"].

itself that accounts for the distinction in the application of exclusionary rules. There are comparable variations in practice between civil jurisdictions as well. Consequently, it cannot be concluded that it is necessarily the type of procedural system that dictates the ambit of the application of fair trial rights.

Damaška refutes this and contends "that the continental non-adversary system of procedure is far more committed to the search for truth than is the Anglo-American adversary system".[66] He argues that the "contest" that underlies the adversarial model makes it inevitable that the final decision will be one "between the parties",[67] whereas the inquisitorial structure of an official inquiry unavoidably results in greater emphasis being placed on the ascertainment of facts.[68] An example that he uses to illustrate this point is the inquisitorial rejection of finality being reached on the sole basis of formal pleadings.[69]

Damaška identifies two ideological strands that correlate with the respective models. In adversarial jurisdictions, there is a distrust of public officials and a historical belief that it is necessary to have safeguards against the abuse of power — one such safeguard being the exclusionary rules of evidence. This makes it more likely that exclusionary rules that reflect policies condemning and guarding against abuse will be enforced in adversarial systems. This is even more likely where the particular jurisdiction subscribes to the principle of self-correction, which requires that any procedural unfairness will be corrected within the trial itself, even if this means the exclusion of relevant evidence. This ready exclusion of reliable evidence will inevitably impact negatively on the accuracy of the fact-finding.[70] On the other hand, an ideology that does not place the State in opposition to the citizen — *i.e.*, an ideology that views the parties as having reconcilable interests — is going to have considerably more faith in public officials, and, consequently, it will not prioritize a self-correcting system against abuse — and the result will be a greater reluctance to exclude reliable evidence.

Damaška aligns the latter of these approaches with the inquisitorial model.[71] He traces historical developments both in England and on the

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[66] Damaška, *supra*, note 18, at 580. *Cf.* A. Sanders & R. Young, *Criminal Justice*, 3d ed. (Oxford: Oxford University Press, 2007), at 14 (noting that "[i]n practice, there is no reliable evidence on which system is better at getting at the truth, nor is such evidence likely to be obtainable").

[67] Damaška, *id.*, at 582.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*, at 584.

Continent, focusing in particular on the ability of the jury to render, with impunity, decisions that are unsupported by the facts.[72] He concludes that "the idea that criminal proceedings could justifiably be used for purposes other than those of establishing the truth and enforcing the substantive criminal law is simply not part of the continental tradition".[73] However, Damaška does note that "the view of criminal procedure as much more than a device for the application of substantive law is stronger in America than it is elsewhere".[74]

Common law systems, like civil law systems, reflect considerable variations in practice; it is therefore difficult to make generalizations about adversarialism from a single jurisdiction. The development of exclusionary rules that are applicable to improperly obtained evidence is a relatively modern phenomenon in adversarial systems.[75] In many common law jurisdictions, improperly obtained evidence could, in theory, be excluded where prejudicial value exceeds probative value. However, such improperly obtained evidence has only been excluded in exceptional circumstances. Omitting the United States, this exclusionary rule has retained a significant element of discretion in its application in most common law jurisdictions,[76] and the basis of this discretion has been a concern for procedural fairness. Thus, in many common law jurisdictions, impropriety in obtaining evidence will not automatically lead to the conclusion that the admission of the evidence would render the trial unfair. In determining its admissibility, far more emphasis is placed on the reliability of the evidence than on its method of acquisition.[77] In evaluating Damaška's argument, it cannot be presumed that the assumptions that have been made in relation to the United States should hold true for all common law jurisdictions. The ideological differences with respect to the relationship between state and citizen may, for example, be significantly less extensive between common law and civil law countries in Europe than between civil law countries in Europe and the United States.

Damaška may be correct in respect of idealized models, but, in reality, ideologies — and their correlating procedures — are the products of a dynamic balance between competing ideological strands. If accuracy in

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72 Where the jury is not required to give reasons for its decision, this is a consequence.
73 Damaška, *supra*, note 18, at 586.
74 *Id.*
75 See generally Choo & Nash, *supra*, note 65.
76 See generally Bradley, "Emerging", *supra*, note 14.
77 Choo & Nash, *supra*, note 65.

fact-finding represents one ideological strand, and the primacy of individual rights another, it is unlikely that either one will ever exclusively dominate; consequently, there will always be the possibility of a degree of convergence. These tensions exist within both adversarial and inquisitorial systems, and it is possible that there are greater contextual and ideological commonalities between particular civil law and common law countries than there may be between countries sharing the same procedural model. For example, the United Kingdom, as a member of the European Union, may share, ideologically, more in common with a number of civil law countries than it does with the United States.

The foregoing inquiry into whether any one particular model is to be favoured as a vehicle for the protection of fair trial rights indicates that the categorization of a feature as inquisitorial or adversarial has little relevance in determining whether a trial is fair. Many of the requirements of a fair trial are embedded in both procedural models. The means of ensuring that those requirements are met, however, frequently differ between procedural systems, irrespective of their identity with a particular procedural model.

Civil Procedure in a Mixed System: Israel

Celia Wasserstein Fassberg[*]

I. INTRODUCTION

Mixed jurisdictions are traditionally thought of as systems that have components of both civil law and common law.[1] If the procedural traditions of the civil law and the common law are indeed converging,[2] it is, perhaps, not unreasonable to think that the experience of mixed legal systems might be useful. It is worth considering, however, just how useful the mixed experience might be. This is because, contrary to what one might expect, the *procedure* of most mixed systems is *not* mixed. With very few exceptions — and Quebec may be the only one — the procedure of mixed systems is predominantly common law.[3] It is also not the case that their substantive law is a happy mix of common law and civil law rules that co-exist indiscriminately — a situation that might provide inspiration for a procedural system made up of some common law rules or attitudes and some civil law rules or attitudes. Mixed systems tend to have very specific groupings of rules from each tradition: private law is

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[1] On the difficulty of defining mixed jurisdictions and on the broadening of the original perception, see Vernon Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge: Cambridge University Press, 2001) [hereinafter "Palmer, *Mixed Jurisdictions*"]; Vernon Palmer, "Two Rival Theories of Mixed Legal Systems" (2008) 12.1 Electronic J. Comp. L., online: <http://www.ejcl.org/121/art121-16.pdf>; Esin Örücü, "What is a Mixed Legal System: Exclusion or Expansion?" 12.1 Electronic J. Comp. L., online: <http://www.ejcl.org/121/art121-15.pdf>; and Colin B. Picker, "Beyond the Usual Suspects: Application of the Mixed Jurisdiction Jurisprudence to International Law and Beyond" (2008) 12.1 Electronic J. Comp. L., online: <http://www.ejcl.org/121/art121-18.pdf>.

[2] Mirjan R. Damaška provides many examples of these convergences in his contribution to this conference. See Mirjan R. Damaška, "The Common Law / Civil Law Divide: Residual Truth of a Misleading Distinction" in Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories* (Markham, ON: LexisNexis Canada, 2010) 3.

[3] Palmer, *Mixed Jurisdictions*, *supra*, note 1, at 65. Palmer distinguishes those systems that were once civilian in their procedures (South Africa, Puerto Rico and the Philippines) from those that were and remain somewhat mixed (Quebec and Louisiana), and again from those that were never civilian (Scotland and Israel).

typically codified (civilian) law, whereas public law and procedural law are based on the common law.[4]

These characteristics suggest that substantive law does not affect procedure,[5] since substantive civil law can be enforced by means of common law procedures. Since mixed systems differ from one another in their legal cultures and in their political cultures, this, in turn, suggests that procedural systems are not intimately related to the legal or political culture in which they function. If this is the case, then mixed systems would seem to support the view that procedural transplants are not problematic, that convergence is not disruptive, and that the common law / civil law divide in the context of procedural models is artificial, or exaggerated, or outmoded.

Israel is a mixed jurisdiction — or at least it is now. The Israeli experience does not support these propositions. It suggests that changes in substantive law do bring about changes in procedural models, most significantly at the levels of attitude and styles of thought, and that, in this connection, the common law / civil law divide is significant. It also suggests that while procedural models may be related to political culture, they are not necessarily a reflection and expression of the prevailing governmental structure of authority.

II. ISRAEL — A MIXED JURISDICTION

The state of Israel was established in 1948, when the British mandate over Palestine came to an end. Israel's common law heritage was formed during this period of British rule. Prior to the mandate, the area had been part of the Ottoman Empire. One of the first and most immediate concerns of the British mandatory government in Palestine in the 1920s and 1930s was to reform and reshape the major structural elements of the existing Ottoman legal system — a system that had been previously overhauled in the 19th century in the image of French law. Virtually all the civil law elements were removed in quick succession. The French-style diffuse court system was replaced by a typical common law structure of unified and centralized courts

[4] *Id.*, at 8. It is, of course, true that legal categories overlap and interact. Nonetheless, mixed systems do not provide a model for the fusion of rules from different sources any more than do unmixed systems, most of which also have areas of law that are based on historically or doctrinally disparate sources.

[5] For explicit exposition of this view, see Stephen Goldstein, "The Odd Couple: Common Law Procedure and Civilian Substantive Law" (2003) 78 Tul. L. Rev. 291, particularly at 299.

with relatively few judges;[6] the 19th century codes of civil and criminal procedure that had been more or less copied from French law were replaced by common law procedures and rules of evidence.[7] Judicial discretion and inherent jurisdiction were recognized and — as the doctrine of binding precedent was gradually adopted by the courts, along with its characteristic style of judicial rhetoric — the key position of judges as sources of law, and not simply as enforcers of law, was entrenched. Although no jury was ever introduced, the trial court became the final arbiter of fact (thus limiting appeals to questions of law) and the role of the judge in the resolution of disputes was transformed, as were the appointment and status of judges, the training of lawyers and their role in adjudication.[8] As a source for filling in *lacunae*, the English common law and equity became increasingly prominent in public and private substantive law too.[9] By the end of the three decades of British rule, much of the Ottoman system had been anglicized.

The first major piece of Israeli legislation absorbed all this into the law of the newly formed state.[10] Israeli law was thus born in the image of the English common law, and in its first two or three decades, Israel was a common law country. Although a little more relaxed than in England, most of Israeli law was case law; statutory interpretation was literal; judges were relatively restrained; decisions were case-specific and doctrinal; legal thinking was inductive.

But this did not last. From the early 1960s on, a massive project of codification was undertaken.[11] The model for this project was continental law, primarily German and Italian. The project was restricted to private

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[6] Among other things, recourse to the *cour de cassation* was replaced by the rare possibility of appeal to the Privy Council, and capitulations were abolished.

[7] See generally N. Bentwich, "The Legal System of Palestine Under the Mandate" (1948) 2 Middle East Journal 33 [hereinafter "Bentwich"]; Stephen Goldstein, "Israeli Law — 40 Years of Civil Procedure" (1990) 24 Isr. L.R. 789. Having transformed the legislature, the executive and much of the litigation system, the British created a mixed system in the traditional sense, leaving much of the existing civilian private and religious family law untouched. It was only later that the courts began to import the rules of the common law into the field of obligations.

[8] Bentwich, *id.*

[9] See *Palestine Order in Council 1922* (3 Laws of Palestine 2569), art. 46. This provision defined the relevant sources of law during the mandate, retaining existing law but establishing as a complementary source the English doctrines of common law and equity. Substantive law was further changed by legislation in the commercial and criminal areas that had been changed by the Ottomans in the 19th century and, towards the end of the mandate, in the area of torts.

[10] See *Law and Administration Ordinance 1948*, s. 11 (Iton Rishmi 2). This provision absorbed almost all of the existing law, including the reference to the doctrines of common law and equity in the case of a *lacuna.*

[11] On the codification of Israeli law, see, *e.g.*, A. Barak, "The Codification of Civil Law and the Law of Torts" (1990) 24 Isr. L.R. 628. This move is attributed largely to the influence of academics and individual officials in the Ministry of Justice who had received their legal training in Europe.

law and criminal law, leaving in place the common law rules and structures of public and procedural law.

Israel therefore differs from the usual mixed system model. Whereas the mixed system is traditionally a product of conquest, Israeli law became mixed by choice — by opting for the codification of some areas of law. Unlike the traditional model — where the common law is imposed on an existing civil law system, leaving private law largely intact as a fixed civilian element — the civil law features of Israeli law were imposed on a predominantly common law system, and displaced the existing common law rules of private and criminal law.[12]

III. THE BASIC ADVERSARY OR COMMON LAW PROCEDURAL MODEL IN ISRAEL

Because of the British mandatory legacy, Israeli civil procedure has always been characterized by many of the features that are associated with common law jury-trial adjudication. There was a clear distinction between the pre-trial stage and the trial: in the pre-trial stage, the parties controlled; they exchanged documents in order to identify the issues in dispute and prepare the ground for trial; the judge had virtually no role to play; and no information relevant to the decision was collected. Evidence was collected only at trial, presented by the parties orally, in pre-ordained and fixed orchestration, and the role of the judge was limited to deciding legal questions of admissibility and to occasional clarifications. As in other common law countries, there were also rules of *sub judice* and rules on admissibility of evidence, including the hearsay rule; the trial

[12] Furthermore, in contrast to other mixed systems, where a foreign system has been imposed on an "indigenous" system, neither of the elements in the Israeli mix — the common law and the civil law — is really of local origin. The common law element was imposed by the mandatory power and continued to serve as an external but formal source for filling *lacunae* until 1980. Mandatory law, including art. 46 of the *Palestine Order in Council 1922*, was absorbed into Israeli law by s. 11 of the *Law and Administration Ordinance 1948*. As a result, common law and equity continued to be used as a complementary source until art. 46 was revoked in the *Foundations of Law Statute, 1980* (Sefer Huqim 978). The civilian element was largely taken from German (and, to a lesser extent, Italian) law. As a result, neither of these two elements provides an intellectual source in any of the relevant local languages. Hebrew and Arabic are the official languages in Israel, but the common law element draws on English-speaking systems and the civil law element draws on sources written in German and Italian. On the linguistic aspect, see Celia Wasserstein Fassberg, "Language and Style in a Mixed System" (2003) 78 Tul. L. Rev. 151. Israeli law is also mixed in the sense that it is made up of rules deriving from a variety of national systems (French, Turkish, English, German and Italian) and religious systems (Jewish, Muslim, Druze and the various recognized Christian communities, which have courts with exclusive jurisdiction in marriage and divorce, and concurrent jurisdiction in other matters of personal status).

court was the final arbiter of fact, thereby limiting appeals to questions of law; and trial court decisions were enforceable in principle, regardless of the possibility of appeal.

Although many of these features are historically related to the presence of a jury, Israel never had a jury, either civil or criminal, and trial courts were typically run by single judges. This probably explains why the rule requiring concentrated trials has never been honoured.[13] Trials can take place over a period of many months and years, in instalments, with long gaps between one session and the next. This has become such a normal feature of litigation that, recently, when a trial court judge decided to schedule daily sessions in a high-profile trial, the defendant's lawyers resigned in protest. The absence of a jury probably also explains the erosion and lack of enforcement of rules of *sub judice* and the tendency to relax the rules of admissibility of evidence in favour of stressing the issue of their weight.[14] All in all, however, while Israeli judges have traditionally been more managerial and interventionist than their common law counterparts, Israeli civil procedure was clearly cast in the coordinate, rather than in the hierarchical,[15] model, as is generally the case in mixed jurisdictions.[16]

IV. Recent Developments in Israeli Civil Procedure

Israeli proceduralists have pointed out that recent developments in Israeli civil procedure have significantly undermined its adversarial nature.[17] These developments have occurred both through explicit changes in the rules of procedure[18] and through changes in the ways in which these rules are interpreted by the courts.

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[13] In both civil and criminal procedure, the rule requires that, from the moment at which evidence begins to be taken, the trial must be held on a daily basis. See *Rules of Civil Procedure, 1984* (Qovets Taqanot 4685), r. 152; *Criminal Procedure Statute [Consolidated Version] 1982* (Sefer Huqim 1043), s. 125.

[14] Parallel developments have taken place in public law litigation, where requirements of standing, ripeness, and so on — all of which restrict access to the court — have been virtually abolished in favour of allowing the court to decide on the merits.

[15] In the terms used by Mirjan R. Damaška. See Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven, Ct: Yale University Press, 1986).

[16] Palmer, *Mixed Jurisdictions*, *supra*, note 1, at 64.

[17] See, *e.g.*, Dudi Schwartz, *Civil Procedure* (Kiryat Ono: Ono Academic College, 2007) (in Hebrew) [hereinafter "Schwartz"]. For an enlightening discussion, see also Michael Karayanni, "Civil Pre-Trial Discovery in Israel: Trends" (2008) 38 Mishpatim 559 (in Hebrew).

[18] Israeli rules of civil procedure are not found in primary legislation. They are promulgated by the Minister of Justice, who now usually acts on the advice of specialist committees and commissions.

1. Changes in the Rules

The pre-trial conference has long been a part of the *Rules of Civil Procedure*.[19] It is, however, only in the last 20 years or so that it has been used on a routine basis. This procedure is explicitly designed to permit the trial judge to meet with the parties in advance — before the trial and before presentation of the evidence — in order to clarify the issues and the way in which they will be argued; the purpose is to simplify and expedite the procedure and to examine the possibility of a compromise. It is commonly understood in Israel that the prime purpose of the pre-trial conference is to try to remove the case from the docket by encouraging and initiating settlement.[20] But, at the very least, it is used as a way to focus the impending trial and impose some discipline on the mass of detail and argument that appears in the pleadings.

At this stage of the process, which often takes place in chambers rather than in a courtroom, judges have enormous powers, which can be exercised *sua sponte* and over the objections of the parties: after examining the pleadings, they can order that pleadings be amended and that anything irrelevant be expunged; they are supposed to clarify the issues that are really in dispute and draw up a final and exclusive list of the issues that will be argued; they can decide at this early stage whether or not additional information is necessary and should be required; they can rule on admissions, give preliminary relief, rule on whether questionnaires, disclosure or inspections should be ordered, and appoint expert witnesses. They can require that witnesses submit their testimony in writing with affidavits, prior to the trial and that factual issues be proven by written affidavits, and they are also free to deviate from the traditional order in which evidence is introduced. They can determine the methods of proof, rule on the admissibility of evidence and give instructions concerning the introduction of testimony given abroad or by experts, or by public officials. They can rule on the order in which questions of fact and law will be presented and argued, and they can define the stages of the argument. They can dismiss the claim if they think there is no cause of action, if it is subject to a statute of limitations, is barred by *res judicata* or is frivolous, and they can give judgment for the plaintiff if they see

[19] *Supra*, note 13. It was introduced in Israel on the basis of U.S. federal practice. See Stephen Goldstein, "Preliminary or Summary Proceedings: Scope and Importance" (Israeli Report), International Association of Procedural Law XII World Congress, at 3 [unpublished, on file with author] [hereinafter "Goldstein, Israeli Report"].

[20] See, *e.g.*, Schwartz, *supra*, note 17, at 326.

that the defendant has no defence. Indeed, they are given a general power to make any procedural order that will simplify the proceeding. Any decision taken in the pre-trial conference is virtually final. It cannot be re-opened at the trial, which proceeds according to the directions given at the pre-trial conference, and no question that might have been raised and decided at the pre-trial conference will be admitted at trial unless there is some special reason for doing so and it is necessary in order to prevent injustice.[21] A similar pre-trial proceeding has been introduced in criminal procedure.[22]

This pre-trial procedure is designed to promote efficiency — either by resolving the dispute through settlement or by focusing the trial — and, at least in principle, judges are not called upon to evaluate the information to which they have been exposed at this stage. Nonetheless, the active and initiating judge envisaged by these rules is very different from the traditionally passive and reactive common law judge, who is supposed to sit back and watch as the parties present their evidence in their own way, making decisions only when the parties request it. The routine exercise of such broad managerial powers clearly increases the involvement of judges and gives them the primary role in planning and running the course of the dispute. As a result, the principle of party prosecution is eroded and the distinction between the trial and pre-trial stages is blurred.[23] It is not surprising that this procedure has recently been described by the Supreme Court as one in which the adversarial system is shut out — where judges may and should take the initiative,

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[21] *Rules of Civil Procedure*, 1984, rr. 140-149.

[22] *Criminal Procedure Statute [Consolidated Version] 1982*, s. 143A. This can take place only if the defendant is represented and agrees to the procedure. Here, too, the aim is to clarify the position of the defendant, to try to reach agreement on the issues and dispense with evidence and to end the proceeding without trial. In the course of this procedure, the judge can, if the parties agree, see all of the evidence collected by the prosecution and the defence. If the criminal proceeding does not end at this stage, the case will be transferred to a different judge for trial, and the trial judge will have no access to the record of the preliminary hearing. Curiously, this is not the case in the normal civil pre-trial conference, even though it is clear that the judge cannot sensibly propose settlement without having some idea of the evidence that each party has. Similarly, despite the involvement of the judge in attempting to reach a settlement, failure in this enterprise is not regarded as a reason to disqualify the judge. See Yigal Mersel, *Judicial Disqualification Law* (Tel Aviv: Israel Bar Association, 2006) (in Hebrew), at 178*ff*. [hereinafter "Mersel"]. In the civil context, it is only in the pre-trial conference in the fast-track procedure (see *infra* note 47 and text) that the possibility of the creation of prejudice through pre-trial proceedings is contemplated. Even then, it is only recommended, and not required, that the trial judge not be the judge who ran the pre-trial conference.

[23] The fact that the pre-trial conference is often held in chambers instead of in full court also makes the proceeding look and feel far more like one of the many stages in a civilian proceeding, rather than the typical common law appearance in court for a trial.

and prepare the case for argument in a way that seems to them most appropriate to the purpose of expediting the process.[24]

The fast-track procedure introduced in 2001 — to which virtually all claims below the value of about US $10,000 are allocated (in the lowest magistrates' courts)[25] — demonstrates many of the same features. In normal proceedings, plaintiffs need only state the facts on which their claim is based; they are not required to state the legal basis for their claim, to disclose their evidence, or to supply it until trial, and there is a clear distinction between the pleadings and the trial. In the fast-track procedure, by contrast, the parties are required to attach to their pleadings the affidavits that attest to the facts claimed, legal references and citations to support their claim, and any expert testimony they wish to introduce, in writing. Anything they neglect to attach will usually not be admitted later on. At this early stage, plaintiffs must also attach a list of the documents relevant to the case that are in their possession.[26] The testimony of both parties' witnesses must be submitted in writing, with affidavits, no later than 45 days after the last pleading has been submitted, with a copy of the documents to which the testimony relates. Failure to do so will result in any omitted witnesses not being permitted to testify at trial. In order further to expedite the proceeding, the parties may submit, seven days before the date of trial, a summary of their pleadings and the legal references on which they rely. Trials in the fast track must be completed in one day or heard continuously, and a delay of more than 14 days will usually not be permitted.[27] During the trial, judges are explicitly permitted to cut short the examination of a witness at their discretion if they think that the questions are irrelevant or unnecessarily complicate the issue. Immediately after evidence has been taken, the parties sum up orally, and judgment must be given within 14 days. This

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[24] C.A. 96/3857, *Sagui v. Rogozin Industries Ltd.*, P.D. 52(2)706, 710-11 (1998). The Court stressed the power of the judge to give orders and interlocutory decisions on his own initiative, or (subject only to the right of the opposing party to respond) at the informal request of the parties (that is, orally, and not — as is usually required — in writing, with the support of affidavits).

[25] The rule refers to claims below 50,000 new shekels (NIS). Throughout, the court can reclassify the claim as an ordinary one if it seems unsuited to this procedure in view of the complexity of the case, the number of parties, the number of witnesses and the scope of the evidence, the number of expert witnesses, the effect of the decision on the public and the necessity, or not, of speed. At the request of one of the parties, the court can also transfer a case that is above the 50,000 NIS limit to the fast track.

[26] With a copy, or with an indication of where it can be obtained.

[27] As indicated above, the general rule that requires a continuous hearing once the court has begun to hear testimony is not observed. The fact that these rules on continuity in the fast-track procedure were introduced, despite the situation in normal procedures, suggests the importance attached to speed in this procedure.

judgment must be especially concise, unless the case raises issues of unusual importance.

Here, again, the distinction between the different stages of the proceeding is blurred, and the judge is far more active than in the familiar adversarial model. Furthermore, as can be seen in both the procedures described above, parties are required to disclose information quite early on, and written testimony is becoming a standard feature of modern procedure, replacing the primacy of oral testimony in the common law model. These developments are not restricted to the pre-trial conference and the fast-track procedure. The court now has a general power to require written testimony with affidavits prior to trial,[28] a general power to require additional information at any stage,[29] and a general power to require that the parties attach documents on which they wish to rely.[30]

2. Broad Systemic Principles

The effect of these rules on the nature of the proceeding and on the powers of the judge has been enhanced by a growing tendency among judges to subject rules of civil procedure to broad systemic principles, most of which are not specifically procedural in nature.

One major procedural principle, whose scope is increasing dramatically, is the judicially developed right of access to justice. This principle has been mentioned, if not always employed, in deciding whether or not to apply a wide range of procedural rules, many of which have traditionally been treated as relatively technical rules: rules relating to court fees, rules relating to security for potential damage caused to the opposing party by interim relief, rules of venue, rules relating to the right to representation, and rules concerning the possibility of appeal.[31] Principles less clearly related to procedure, such as the right to property and the right to freedom of movement, are increasingly being used in decisions about whether or not to give interim relief, such as temporary injunctions, and whether or not to issue orders preventing parties from leaving the country.[32]

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[28] *Rules of Civil Procedure*, rr. 143(5), 168.

[29] *Id.*, r. 65.

[30] *Id.*, r. 75. This rule applies earlier than the stage at which each party can normally require the other party to disclose (with the help of a court order, if necessary).

[31] Schwartz, *supra*, note 17, at 105*ff*.

[32] *Id.*, at 115*ff*.

An even broader principle that is now shaping judicial thinking about civil procedure is that of good faith. One of our procedural experts has recently catalogued the range of issues in which the principle of good faith has been used.[33] Among many other things, he demonstrates that it has been used to require full disclosure by all parties of all relevant facts early in the proceedings;[34] to prevent parties from relying on their opponent's procedural errors late in the proceedings;[35] to justify a refusal to entertain argument concerning a fundamental defect, such as the absence of subject matter jurisdiction;[36] and to permit judges to dismiss actions because of delay, even if those actions have been initiated within the limitation period.[37] He interprets its prevalence in recent years as promoting a general attitude of lenience and a culture of cooperation, rather than one of competition. Two recently introduced rules — one penalizing a party who does not comply with disclosure requirements (by making the undisclosed material inadmissible on his behalf),[38] and the other abolishing the age-old common law practice of putting forward alternative factual claims[39] — have also been justified in terms of the requirement of good faith.

This subjection of procedural rules to a variety of broad, systemic principles, whose application is a matter of judicial discretion in any individual case, also undermines the familiar image of the sharp distinction between pleadings and trial in the adversarial system and of the roles assigned in that system to the judge and to the parties. In the light of all of these developments, Israeli law seems far less committed to the adversarial system than it previously was.

V. DISCUSSION

Many of these Israeli developments find parallels in English law. The *English Civil Procedure Rules 1998*[40] adopted in the wake of the Woolf

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33 Schwartz, *supra*, note 17.

34 C.A. 218/85, *Arieh Insurance Co. v. Schtammer*, P.D. 39(2) 452 (1985).

35 C.A. 9542/04, *Rotem Insurance Co. Ltd. v. Nahum*, Pador (06)1, 93 (2006).

36 C.A. 1662/99, *Hizkiyahu Haim v. Eliyahu Haim*, P.D. 56(6) 296; Leave for C.A 11220/04 *Mockled (a minor) v. Eliyahu Insurance Co.* (Nevo, 2005).

37 C.A. 6805/99, *Talmud Hatorah Haklali v. Local Planning Committee*, P.D. 57(5) 433 (2001).

38 *Rules of Civil Procedure*, r. 114A.

39 *Id.*, r. 72(b).

40 S.I. 1998/3132 L.17.

Report[41] have many of the managerial features found in Israeli law, and they have been an explicit source of some of the recent Israeli legislative developments, such as the fast-track proceeding.[42] English law has a wide range of fundamental principles that relate to the provision of a fair trial. These principles are now being complemented by the *European Convention on Human Rights*,[43] which requires that English courts further subject their procedural rules to the principles of the Convention.[44] So, too, traditional doctrines of English law, such as estoppel, laches and abuse of process, express many of the ideas that are channelled through the good faith requirement in Israel.

It is thus tempting to think that Israel is as committed as ever to the adversarial, or common law, or coordinate model, and is either simply following the English lead or is subject to the same pressures that have fuelled similar changes in English law. Judicial rhetoric that expresses a commitment to the adversarial system provides some support for this view. The Israeli Supreme Court, for example, has held that the rule permitting judges to require written testimony in affidavits does not, of itself, constitute a deviation from the adversarial system. This is because the judge is free to require that such written testimony be submitted in the usual order in which testimony is given, and — unlike the material collected in the file by the instructing judge of the civil law — such testimony does not become evidence until the trial itself, where the parties may even choose not to introduce it as evidence.[45] So too, the Supreme

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[41] Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty's Stationery Officer, 1996), online: <http://www.dca.gov.uk/civil/final/index.htm>

[42] Stephen Goldstein, Israeli Report, *supra*, note 19, at 3. As Goldstein points out, the small claim track has existed for a long time in Israel, as the result of American influence, and the default multi-track system has close parallels in existing Israeli procedure (at 23, 25).

[43] *Convention for the Protection of Human Rights and Fundamental Freedoms*, E.T.S. 5, 213 U.N.T.S. 221 (1950).

[44] For the full panoply of these rights, see Adrian Zuckerman, *Civil Procedure* (London: LexisNexis U.K., 2003). In Chapter 2, for example, Zuckerman discusses the right of access to justice, the right to an independent and impartial tribunal, the right to a public hearing, the principle of equality, the right to representation, the right to be heard, the right to a reasoned decision and the right of access to evidence.

[45] Leave for C.A. 6283/93 D. Dani, *Building and Investment Ltd. v. V.A.T. Authority*, P.D. 48(1) 639 (1994). Nonetheless, the Supreme Court stressed that courts should develop guidelines for the exercise of judicial discretion, such as distinguishing cases in which judges should hear the evidence first-hand in order to determine the credibility of the witness, from those where credibility is not an issue, and treating both sides of a dispute equally except where a special justification might require taking witness statements from one party only (*e.g.*, because all of the relevant evidence is in that witness's hands). The concern for such guidelines suggests that this manner of preparing evidence does indeed cause some discomfort and arouses fear that judges cannot fail to be influenced by evidence to which they are exposed.

Court has held that the adversarial nature of Israeli procedure means that trial judges may not decide cases on the basis of issues that they, rather than the parties, have raised.[46] It has also been held that failure to reach a compromise that was suggested by the judge in a pre-trial conference does not justify disqualification of that judge, who has, presumably, already seen much of the evidence and, perhaps, has even formed an opinion. This is because, in the adversarial system, the formal view is that, until the trial, the judge has no proper basis for forming an opinion on the merits.[47]

Further support for this view might be found in the fact that two phenomena thought by Damaška to explain the widespread change in coordinate systems outside the United States are also found in Israel: namely, a massive increase in caseload and the increasingly important social role of litigation.[48] These factors create a growing concern for efficiency, which promotes a more active judicial role in proceedings. Damaška notes that the decline in the use of juries is facilitating this trend. Israeli procedure has never included a jury; as a result, one of the prime practical and psychological factors inhibiting the procedural leadership of the judge has never been part of Israeli legal culture. Taken together, all this suggests that Israel's position in relation to other common law systems has not really changed.

At the same time, however, it is not insignificant that Israeli judges have always intervened in procedure more than their English counterparts.[49] A telling example is a case decided in 1961, only 13 years after the establishment of the state of Israel, in which the Supreme Court was offered the opportunity to uphold the fundamental adversarial principle that proof should be offered by the parties and not solicited by the judge — and rejected it.[50] The facts were quite trivial. A driver was convicted

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[46] Leave for C.A. 5127/06, *Amran v. Trustee for Property* (Nevo, 2006) [hereinafter "*Amran*"]. In this case, the issues were determined by the judge in the pre-trial proceedings, and he did not give the parties an opportunity to argue the points. Therefore, while it looks like a decision that upholds the adversarial system, its strength is somewhat diminished by the fact that it really looks to fairness and legitimate expectations. On the general attitude of Israeli courts to the question whether judges are restricted to party arguments, see *infra*, note 53 and text.

[47] See Mersel, *supra*, note 22, at 178*ff*. (on the requirement that the criminal pre-trial judge not try the case itself, and on the recommendation in the pre-trial of the fast-track procedure).

[48] Damaška, *supra*, note 2, at 9-10. Damaška notes the growing governmental role in society as an additional factor. He also notes the declining role of the jury outside the U.S. On the rise of the social role of the Israeli Supreme Court, see Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Tel Aviv: Ma'agalei Da'at, 1993) (in Hebrew) [hereinafter "Mautner"].

[49] Goldstein, Israeli Report, *supra*, note 19, at 3.

[50] C.A. 153/60, *Theodore Scheffer v. A.G.*, P.D. 15, 263 (1961) [hereinafter "*Scheffer*"].

of a traffic offence: overtaking when the road was not clear and creating the danger of a serious accident. No accident had in fact occurred and the only reason the driver was charged appears to have been that a policeman was driving behind him at the time of the alleged offence. The driver appealed on the ground that the trial judge convicted him only after himself initiating the testimony of a witness who had not been called by either of the parties, after both the prosecution and the defence had presented their cases. The appellant argued that, although there was a provision in the prevailing rules of procedure that allowed the judge to call a witness at any stage of the proceeding, this rule was either void or not applicable on the facts of the case.

All of the Supreme Court judges agreed that the judicial authority to initiate testimony did exist. They differed, however, on the question whether or not it had been appropriate for the trial judge to use this authority in the circumstances of the case. The minority judge insisted that the adversarial system did not permit such action, except in very limited and exceptional cases, and that, on the facts of this case, the trial judge should have given judgment after hearing the parties' evidence, on the basis of the burden of proof. The majority held that, even in the adversarial system, there are exceptional cases in which judges are permitted to call witnesses on their own, and they preferred this flexible view that they attributed to Wigmore[51] to the strict view that they attributed to English law. They were explicitly guided in this decision by their perception that the duty of the judge is to reach the truth independently. This position put them squarely in the category of those who, according to the minority judge, are motivated by distrust of the adversarial system as a system designed for reaching the truth. The minority judge preferred to limit the extent of the powers given to the judge in this regard, in order to protect the adversarial system from those whom he described as its "enemies".[52] The use of such strong language suggests that there was significant opposition to the adversarial system at the time.

A further example of the greater willingness of Israeli judges to intervene in the construction of a case can be found in the long-standing

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[51] *Wigmore on Evidence*, vol. 10 (1940 ed.), para. 2484, cited in *Scheffer*, *id.*, at 269.

[52] It is interesting that the minority judge, who supported the adversarial system, was Witkon J., a judge trained primarily in Germany (and then in England), while the majority decision was written by the President of the Supreme Court, Agranat J., whose legal training was in the United States. In a different debate, concerning the relative virtues of the doctrine of binding precedent, Witkon J. opposed adoption of the doctrine and preferred to release judges from the shackles of prior decisions.

willingness of Israeli courts — and, in particular, of the Supreme Court — to deviate from the adversarial system with respect to legal questions.[53] At least from the mid-1970s onward, courts have decided cases on the basis of legal arguments that were neither raised by the parties nor presented to them for argument, just as they have frequently ignored arguments that have been raised by the parties. This phenomenon is quite common; it can be found in private law, in public law, and even in criminal law, and it arouses very little comment.

These two factors suggest that, despite the familiar coordinate institutional structure of procedural authority inherited from the mandate, the principles of adversarial justice were never universally held in Israel; that they have always encountered mistrust and opposition; and that there is significant support for the ideological position that judicial activism is the best path to what is regarded as the ultimate aim of litigation, namely, identification of the truth.

This attitude has now been expressed quite explicitly in recent rhetoric of the Supreme Court which is quite at odds with the contemporaneous rhetoric in support of the adversarial system. It has been persuasively shown that the recently introduced rule penalizing parties for failing to comply with the rules concerning discovery — which incorporates principles of good faith and procedural fairness — is difficult to reconcile with the rhetoric of the Supreme Court justifying early discovery procedures.[54] This rhetoric stresses that the purpose of the civil process is the search for truth and not simply the resolution of a dispute between individual parties. It has been held, for example, that the civil process as a whole — and, more specifically, the giving of testimony and the disclosure of information — serve a social interest in revealing the truth and guaranteeing the proper working of society, and not simply an individual interest.[55] This rhetoric expresses a view of the civil process and its judge that is far removed from the traditional adversarial model, which features a neutral umpire who chooses between competing versions of the truth. The perception, and self-perception, of judges as referees, rather than as actors responsible for accurate decisions — one of the few aspects that Damaška stresses as crucial in continuing to characterize coordinate systems[56] — is thus absent, or, at the very least, weakened, in Israel. As a

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[53] Notwithstanding the decision cited above, in *Amran*, *supra*, note 46.

[54] Michael Karayanni, "Civil Pre-Trial Discovery in Israel: Trends" (2008) 38 Mishpatim 559 (in Hebrew).

[55] Leave for C.A. 6546/94, *Bank Igud le'Israel v. Azulai*, P.D. 49(4) 54 (1995).

[56] Damaška, *supra*, note 2, at 17.

result, it seems reasonable to characterize Israel's position as further removed from the adversarial system than that of its common law parent and common law siblings. Why should this be the case?

In my view, the lean towards a more judge-centred model is not surprising. My late colleague, Steve Goldstein, suggested that the common law procedural model was retained from mandate law because many of those who were responsible for shaping Israel's early legal institutions had escaped totalitarian régimes, and they perceived it as a guarantee of civil liberties and a protection against the excesses of state intervention.[57] It is far more likely that this model was preserved as a result of expediency — the entire system was geared towards it, and the cost and the difficulty of changing it at that early stage were too high. To the extent that there was any ideological support for the adversarial system, or any emotional identification with it, these are likely to have been limited only to a small group of intellectuals, including a professional élite that, in any case, had vested interests in the existing system and a pragmatic conservative approach to its preservation.[58] In addition, while the construction of Israeli civil society was not dominated by religious circles or considerations, religion has always been a factor in Israeli political, social, cultural and legal life, and the adversarial system is not altogether congenial to either of the major religious models of litigation in Israel: Jewish or Islamic law.[59]

Nonetheless, it is suggestive that the Israel of 1948 opted formally for the adversarial model, while the Israel of today is shifting away from it. In its early years, the state of Israel was centralistic and bureaucratic, and government was heavily involved in all aspects of life. The governing ethos of Israeli society was egalitarian, socialist and cooperative — not liberal or *laissez-faire*. Elitism and competitiveness, both of which are associated with the adversarial model of litigation as a contest, were

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[57] See, *e.g.*, Stephen Goldstein, "Israel" in Palmer, *Mixed Jurisdictions*, *supra*, note 1, at 453.

[58] Although it is tempting to generalize — either to a whole society made up largely of immigrants from oppressive régimes, or to all immigrants from such régimes — it is not at all clear that people who have suffered under totalitarian régimes seek social frameworks that promote civil liberties and freedom. In the modern Israeli experience, immigrants from Arab countries and immigrants from the former Soviet Union have tended to favour authoritarian, strong-man politicians, rather than liberal democratic parties.

[59] Religious courts are part of the territorial legal system in Israel, as they were in the Ottoman Empire. Even among secular people whose religious identity has been treated as a factor of political or legal significance, it is not unlikely that a folk-cultural image of litigation would be shaped, at least in part, by religious traditions.

anathema.[60] This may go part of the way towards explaining Israeli ambivalence towards the adversarial model. More significantly, the most recent and explicit moves towards active judicial involvement in the process have come just at the time when Israeli society is undergoing rapid privatization, and *laissez-faire* economics are taking government out of people's lives and away from their claims for help and support. These phenomena suggest that the procedural models do not echo and reflect the structure of governmental authority, but rather counterbalance it. Thus, the earlier, adversarial procedural culture served as a shield against the excesses of centralized governmental authority and a guarantee of individual liberty, while the more interventionist procedural culture that accompanies the dismantling of the structure of state authority is serving as a shield against the excesses of *laissez-faire* individualism.

This suggestion relates the significant changes in Israeli procedural culture to parallel changes in Israeli substantive law and legal culture, and, in turn, to its mixité.

The decline of rules and the ascent of broad principles in Israeli procedural law is not an isolated phenomenon. It occurred in substantive law too, and it can be traced directly to the moment at which Israel became a mixed system. The codification of private law (and later, of criminal law) signalled a sea change in Israeli legal thinking at all levels. The new code-like laws required deductive thinking from a few broad principles, rather than inductive thinking from a mass of cases; they used abstract concepts and required systematic reasoning and systemic coherence, rather than casuistic sophistication. The generations of academics, judges, lawyers and students who have been trained since the mid-1970s were imbued with a view of law that is totally different from that of their predecessors. The use of the principle of good faith, which was introduced in the *Contract (General Part) Law 1973*[61] on the model of German law, is symptomatic. In the course of the last 35 years, it has spread like wildfire throughout private law, and beyond — to public law and now, also, to procedural law. It dominates all legal discourse.

At around the same time that codificatory thinking became the fashion, Israel also embarked on the process of enacting constitutional laws. The enactment of constitutionally guaranteed fundamental rights that can be interfered with only for an appropriate purpose and only to the extent

[60] It is noteworthy that, in contrast to the American experience, very few lawyers were involved in the leadership of the Zionist movement or in the constitutive moments of early statehood.

[61] Sefer Huqim 694.

required[62] produced a flood of bombastic judicial rhetoric that pronounced a constitutional revolution and gave the courts enormous powers to intervene in the substance of administrative acts, legislation, parliamentary activity and more, in order to protect the basic principles on which the rights were founded. Both the codificatory move and the constitutional move have been described as a major shift in Israeli legal thinking — from rules to principles and values. This shift has been explained as an attempt to protect the individual from the excesses of a society in which individuals are increasingly left to take care of themselves.[63]

The process of codification was an explicit civilian influence. The process of constitutionalization, while also apparent in Europe, was explicitly influenced more directly by Israel's new common law partners: the United States and Canada.[64] Together, these two movements, each inspired by a different legal source, transformed Israeli law from a system that had valued procedural justice and relatively restrained judges to a system that now valued substantive justice and elevated the judge to the role of its agent.

I have argued elsewhere that the mixed nature of Israeli law has produced a comparatively unfettered judiciary.[65] Since we have no constitutional court, ordinary courts have the power to engage in constitutional discourse. Since we have codes, judges have learned to interpret the concise, abstract laws broadly, through the use of analogy. Whereas common law judges are at least formally limited by the strictures of *stare decisis*, Israeli courts pay relatively little attention to the distinction between the *ratio decidendi* and the *obiter dicta*, and are untroubled by the question whether a previous case is really a precedent. They feel far less bound by previous case law and far freer to innovate, in the knowledge that they are contributing potentially valuable *dicta* that will almost inevitably be relied upon in the future. Similarly, whereas civilian courts are naturally limited by the fact that their judges are professional members of a closed bureaucratic group who are trained to think in disciplined, traditional ways — as well as by the fact that their decisions should not, and do not, formally make law — Israeli judges receive no

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[62] *Basic Law: Human Dignity and Freedom* (Sefer Huqim 1391) and *Basic Law: Freedom of Occupation* (Sefer Huqim 1454) (which do not justify interfering with pre-existing legislation) both limit the infringement of many basic rights in these terms.

[63] Mautner, *supra*, note 48.

[64] Israeli constitutional discourse borrows significantly from many sources, but those of the United States and Canada are most apparent.

[65] *Supra*, note 12.

collegial training, they are recruited from the legal profession and they are bred in an environment where the court makes law, unmakes law and remakes law, and is seen as the ultimate bastion of freedom and justice, the final arbiter of truth. As a result, the sense that judges are barely limited, if at all, is almost universal.

It is no surprise that once judges have acquired broad interpretive powers, law-making powers and powers of judicial review in order to control substantive law and legal outcomes, it should also be seen as appropriate that they should have broad powers to intervene in procedure in order to protect the individual from the excesses of rampant individualism. In such a system, it is almost impossible for judges to remain passive in the process; judicial passivity would be an anomaly requiring explanation. Thus, while the caseload and the proliferation of lawyers in a litigious population are important factors, the move away from adversarial procedural models is probably more than simply expedient. It seems reasonable to conclude that this move has ideological underpinnings, that it is dictated by the prevailing style of substantive legal thought and that it is a reaction against the prevailing political culture.

VI. CONCLUSION

Theories of convergence in procedure and the proliferation of international uniform procedural standards suggest that procedural models are not very different from one another, that they are not culturally shaped and that they are not necessarily related to structures of state authority. The traditional view — that mixed systems have common law procedures, implying, as it does, that substantive law does not affect procedure, would seem to support these propositions.

The Israeli case demonstrates that, at least to the extent that substantive law (whether private or public), engenders a particular style of thought, it can affect procedure because it affects the perception of the role of the judge. It thus supports Damaška's views that the distinction between procedural models is still significant — expressing itself primarily in different perceptions of the role of the judge in the process[66] — and that differing procedural cultures will apply similar procedural rules and mechanisms in different ways and with different results. It also demonstrates, however, that procedural structures can counterbalance, rather than reflect, structures of governmental authority.

[66] Damaška, *supra*, note 2.

Rule-Making in a Mixed Jurisdiction: The Federal Court (Canada)

The Hon. Allan Lutfy[*] and Emily McCarthy[**]

I. INTRODUCTION

In 2007, the Chief Herald of Canada granted the Federal Court a new coat of arms. The process leading up to this grant required the members of the Court to identify the attributes that they felt best symbolized the Court. The result is a unique set of symbols that makes reference to the past, the present and the future, and reflects the position of the Federal Court as a truly Canadian court of first instance.

The colours used in the coat of arms are taken from the black and gold robes that are worn by the judges of the Court. The scrolls placed in the middle of the shield represent the various sources of law that are applied by the Court, including the Constitution of Canada, treaties with Aboriginal peoples, international agreements and statutory law. The ribbon that ties the scrolls together symbolizes the way in which all of these various sources are combined into the judgments of the Court. The Crown is made of intertwined maple leaves and fleurs-de-lis, representing the common law and the civil law. The mythical creatures supporting the shield, namely the flying sea caribou, make reference to Aboriginal traditions, equality between the sexes and the three traditional jurisdictions of the Court: air, sea and land. The whole is supported by a wavy checkerboard, which refers to the antecedents of the Court in the Exchequer Court of Canada, and also to the three oceans that border Canada, setting the limits of the Court's national jurisdiction.

The motto of the Court is "Droit, Equity, and Admiralty" — three concepts drawn from the Court's statutory mandate as a court of law, equity and admiralty. The use and placement of the French term "droit" emphasize both the importance of the rule of law and the bilingual nature of the Court and its judges.

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[**] Legal Counsel to the Federal Court.

This symbol of the Court has been described by Professor Nicholas Kasirer as a concrete illustration of the principles of trans-systemic law that have been applied in the judgments of the Court, albeit at times unconsciously, for the past century. Civil law confronts common law, and each tradition is interpreted in the light of the other; concepts in either tradition are used in order to solve issues in the most just manner. The coat of arms also refers to the increasingly important influence of international law and Aboriginal law in the judgments and procedures of Canada's national trial court.

II. THE HISTORY OF BIJURALISM IN CANADA

1. The Origins

As the symbols in the coat of arms indicate, the tradition of bijuralism in Canada is not new.[1] Indeed, Canadian bijuralism dates back to the Treaty of Paris,[2] which was signed in 1763. Prior to that treaty, the colony of New France was administered according to French civil law, primarily in accordance with the Coutume de Paris. Procedure before tribunals was regulated by the Royal Ordonnance of 1667.[3]

In Article IV of the Treaty of Paris (1763), France ceded New France to the British Crown. The colonial government of the time, primarily military, imposed English criminal, civil and administrative law on the former French colony.[4]

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[1] Canada's bijuralism extends beyond procedural law. In 1997, the Canadian Department of Justice launched an initiative entitled "The Harmonization of Federal Legislation with Civil Law of the Province of Quebec and Canadian Bijuralism". This initiative was, in part, a response to Quebec's adoption of a new civil code in 1994. What started out as a small project to evaluate the interaction between Quebec's new civil code and federal law ultimately evolved into a series of projects that produced a number of changes in federal law. This harmonization project, now in its second decade, is ongoing, and it appears to be unique among the world's mixed jurisdictions.

[2] *Treaty of Paris (1763): The definitive Treaty of Peace and Friendship between his Britannick Majesty, the Most Christian King, and the King of Spain* (Paris, February 10, 1763) [hereinafter "Treaty of Paris"].

[3] *L'Ordonnance de Louis XIV, Roi de France et de Navarre, du mois d'Avril 1667* [hereinafter "Royal Ordonnance of 1667"]. For the full text of the Ordonnance, see *Édits, Ordonnances Royaux, Déclarations et Arrêts du Conseil d'État du Roi Concernant le Canada*, vol. 1 (Quebec: La Presse a Vapeur de E.R. Fréchette, 1854), at 106-230.

[4] See Treaty of Paris, *supra*, note 2, art. IV.

> His Most Christian Majesty renounces all pretensions which he has heretofore formed or might have formed to Nova Scotia or Acadia in all its parts, and guaranties the whole of it, and with all its dependencies, to the King of Great Britain: Moreover, his Most Christian Majesty cedes and guaranties to his said Britannick Majesty, in full right, Canada,

In 1774, the *Quebec Act*[5] reinstated French civil law as the law governing private disputes in what was then known as Canada. British common law principles of criminal and administrative law were overlaid on the French civilian system. Courts based on the English common law system were established to hear both civil and criminal cases, which resulted in the hybrid legal system that continues today.[6]

2. The Codification of Civil Law and Procedure

The first codification of Quebec civil law came into force on July 1, 1866. The code was based in part on the 1804 Napoleonic Code,[7] but, as commentators have noted, it reflected the cultural and legal particularities of 19th century Quebec, as well as commercial expediencies.[8] The *Civil Code of Lower Canada*[9] was drafted simultaneously in French and English, with both versions being equally authoritative. This may be one of the earliest examples of simultaneous bilingual legislative drafting.

A *Civil Code of Procedure*[10] was enacted on June 28, 1867, one year after the coming into force of the CCLC. Prior to the CCP of 1867, civil

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> with all its dependencies, as well as the island of Cape Breton, and all the other islands and coasts in the gulph and river of St. Lawrence, and in general, every thing that depends on the said countries, lands, islands, and coasts, with the sovereignty, property, possession, and all rights acquired by treaty, or otherwise, which the Most Christian King and the Crown of France have had till now over the said countries, lands, islands, places, coasts, and their inhabitants, so that the Most Christian King cedes and makes over the whole to the said King, and to the Crown of Great Britain, and that in the most ample manner and form, without restriction, and without any liberty to depart from the said cession and guaranty under any pretence, or to disturb Great Britain in the possessions above mentioned. His Britannick Majesty, on his side, agrees to grant the liberty of the Catholick religion to the inhabitants of Canada: he will, in consequence, give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish church, as far as the laws of Great Britain permit. ….

[5] *The Quebec Act, 1774 (An Act for making more effectual Provision for the Government of the Province of Quebec in North America)* (U.K.), 14 Geo. III, c. 83.

[6] As an interesting historical footnote, French civil law regulated the affairs of what we now know as Ontario until the *The Constitutional Act, 1791 (An Act to repeal certain Parts of an Act…)* (U.K.), 31 Geo. III, c. 31 separated Upper and Lower Canada. Between 1792 and 1794, the legislative assembly of Upper Canada passed laws that adopted English law in all legal procedures. There appears to have been no lasting impact of this period of civil law on the common law of Ontario.

[7] *Code Civile des Français (Code Napoléon)*, France (entered into force March 21, 1804).

[8] W. Tetley, "Nationalism in a Mixed Jurisdiction and the Importance of Language (South Africa, Israel and Québec/Canada)" (2003) 78 Tul. L. Rev. 175.

[9] *An Act respecting the Civil Code of Lower Canada*, Stat. Prov. Can. 1865, c. 41 [hereinafter "CCLC"].

[10] *An Act respecting the Code of Civil Procedure of Lower Canada*, Stat. Prov. Can. 1866, c. 25 [hereinafter "CCP"].

procedure in Quebec had been regulated at certain times by martial law and at other times by the French Royal Ordinance of 1667,[11] in combination with the local laws that were in force during that period. However, individual courts established their own rules of practice, which incorporated many elements of common law procedure.[12] A quote attributed to the Honourable Tessier refers to Quebec (Canadian) procedural law as being: "composée de fragmens [*sic*] épars empruntés diverses législations, et modifiées à chaque instant par la législature provinciale, selon les l'exigence des temps et des lieux, ou plutôt suivant le caprice des Législateurs".[13] The state of civil procedure at this time has been characterized as "un droit exclusivement écrit, formulé en trois lieux différents, sans cesse remis en chantier sans que l'on ait jamais entrepris de lui insuffler une logique durable, et qui souffrait en conséquence d'un manqué d'homogenénéité".[14]

It appears that the 1867 CCP was not well received in Quebec. This was due, in part, to the celerity with which the first codification of Quebec procedural law was brought into force and the absence of a coherent approach to the various sources of law that it codified. Indeed, commentators have noted that some of the articles set out in the CCP were, at times, contradictory. J.-M. Brisson has characterized the 1867 CCP as being a compilation of the existing laws on procedure without any attempt to rationalize or reconcile the existing French civil procedure rules with the common law of procedure (which was adopted in subsequent rules of procedure that were established by various common law courts and the Acts concerning procedure that were enacted by the colonial legislature).[15]

After it came into force, the 1867 CCP was the subject of a number of statutory interventions, and these led to the conclusion that the Code required revision. A commission was established and a new code came into force in 1897.[16] A further revision was conducted in 1966.[17] The latest revision of the CCP was begun in 2002.

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[11] *Supra*, note 3.

[12] J.-M. Brisson, *La formation d'un droit mixte: l'évolution de la procédure civile de 1774 à 1867* (Montréal: Les éditions thémis, 1986), at 60-61.

[13] *Id.*, at 32-33.

[14] *Id.*, at 33.

[15] *Id.*, at 155-61.

[16] *Id.*, at 18-20.

[17] *Code of Civil Procedure*, R.S.Q. c. C-25, 1966, c. 21.

3. Civil Law and the Courts after Confederation

In 1867, with the enactment of the *British North America Act*,[18] the Dominion of Canada, which consisted of a confederation of existing British colonies, came into existence. Provinces were given legislative authority over matters concerning property rights, civil rights, and the administration of justice in the province.[19] Legislative jurisdiction over criminal law and procedure was given to the Parliament of Canada. The power to appoint judges of the superior courts of inherent jurisdiction in each province was reserved to the Governor General of Canada.[20]

Since the BNA was to be "a Constitution similar in principle to that of the United Kingdom",[21] the superior courts of each province were to be the courts of inherent jurisdiction in both civil and criminal matters. Parliament was, however, given the power to establish other courts, for the better administration of the laws of Canada.[22]

4. Canada's National Court of First Instance

Not long after Confederation, in 1875, Parliament established the Exchequer Court of Canada pursuant to section 101 of the BNA.[23] The modern-day Federal Court is a continuation of the original Exchequer Court and its successor, the Federal Court of Canada (Trial Division), and is, today, Canada's national court of first instance. As such, it is charged with applying both common law and civil law in the official language that is chosen by the litigants.

Unlike the inherent jurisdiction of the superior courts of each province, the Federal Court is a statutory court. Section 3 of the *Federal Courts Act*[24] establishes the Federal Court as a superior court of record with civil and criminal jurisdiction. While its substantive jurisdiction is limited by section 101 of the BNA, its geographic jurisdiction covers all 10 provinces and three territories.[25]

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[18] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter "BNA"].

[19] *Id.*, s. 92(13), (14).

[20] *Id.*, s. 96.

[21] *Id.*, preamble.

[22] *Id.*, s. 101.

[23] *An Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*, S.C. 1875 (38 Vict.), c. 11.

[24] R.S.C. 1985, c. F-7.

[25] For the provisions of the *Federal Courts Act* that grant jurisdiction, see *id.*, ss. 16-26. These provisions contain no geographic limitation. As the Supreme Court of Canada discussed in *ITO* —

Although the primary source of the Federal Court's jurisdiction is found in the *Federal Courts Act*, its jurisdiction, which is also found in many other federal statutes, includes: judicial review of federal administrative actions, intellectual property, claims against the Crown, Aboriginal law, maritime law and national security law.[26]

Due to the national extent of the Court's jurisdiction and the inevitability that issues governed by provincial private law would arise in litigation before it, there has always been an interaction between the common law and the civilian tradition of Quebec in the Federal Court and its predecessors. Indeed, Professor Lemieux has noted that the Court is one of very few courts of first instance that apply two legal traditions. "Ce qui particularise la Cour fédérale et la Cour de l'Échiquier avant elle, c'est qu'elle tient compte de la dualité juridique en première instance …."[27] The jurisprudence of the Court conveys the importance of this dynamic interaction between two legal systems. Judges from both civil law and common law traditions have applied concepts from each system in order to interpret and expand on concepts in the other tradition.[28] Rules of procedure have been imported from one system where gaps in procedure have been found in the other. Indeed, the Court not only must apply the civil procedure of Quebec, but, at times, must look also to the procedures that are in force in the other provinces.[29]

The national jurisdiction of the Court is reflected in a number of statutory and regulatory provisions that regulate procedure in the Federal Court; these include, in particular, the *Federal Courts Act*, the *Canada Evidence Act*,[30] the *Immigration and Refugee Protection*

International Terminal Operators Ltd. v. Miida Electronics Inc., [1986] S.C.J. No. 38, [1986] 1 S.C.R. 752 (S.C.C.), the jurisdiction of the Federal Court is limited in terms of subject matter, and the applicability of "federal law" to a particular case or controversy. Furthermore, s. 18 of the the *Federal Courts Act* grants exclusive jurisdiction to the Federal Court over any federal board or tribunal with respect to administrative law remedies, such as *certiorari* and *mandamus*. See also *White v. E.B.F. Manufacturing Ltd.*, [2001] F.C.J. No. 1073, 2001 FCT 713, at para. 11 (F.C.T.D.) (where Dubé J. discusses the national scope of injunctive relief issuing from the Federal Court).

[26] *Federal Courts Act*, *id.*, ss. 16-26. For a list of the statutes that grant or confer jurisdiction on the Federal Court, see Federal Court (Canada), "Legislation Conferring Jurisdiction on the Federal Court of Appeal and the Federal Court" (August 2006), online: Court Processes and Procedures <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Jurisdiction_legislation>.

[27] Denis Lemieux, "La Dualité Juridique Au Sein de la Cour Fédérale" in *Federal Court of Canada — 25th Anniversary Symposium* (Ottawa: Federal Court of Canada, 1996) 61, at 63 [hereinafter "Lemieux, 'Dualité'"].

[28] See, *e.g.*, *Olympia & York Developments Ltd. v. Canada*, [1980] F.C.J. No. 199, [1981] 1 F.C. 691 (F.C.); *Steen v. Canada*, [1986] F.C.J. No. 557, [1987] 1 F.C. 139 (F.C.); *Mart Steel Corp. v. Canada*, [1974] F.C.J. No. 26, [1974] 1 F.C. 45 (F.C.).

[29] See *Federal Courts Rules*, SOR/98-106, r. 4.

[30] R.S.C. 1985, c. C-5.

Act,[31] the *Income Tax Act*[32] and the *Federal Courts Rules* (or "Rules").[33] It is also reflected in the composition of the Court, where 10 of the judges of the Court are to be appointed from among Quebec jurists. The law permits any person who is a member of a provincial bar to practise before the Federal Court.

Several sections of the *Federal Courts Act* refer the Court directly to provincial procedural law. With respect to pre-judgment interest and interest on judgments, sections 36 and 37 require the Court to apply the laws that are in force in the province from which the cause of action originally arose. A similar provision, relating to prescription and the limitation of proceedings, is found in section 39. Section 53(2) relates to the admissibility of evidence. It gives the Federal Court the discretion to admit evidence that would otherwise be inadmissible, pursuant to section 40 of the *Canada Evidence Act*, if such evidence would be admissible in a similar matter in a superior court of a province. Finally, section 56 also refers the Court to provincial rules in relation to the issuance of process against the person or the property of any party in a province.

Similarly, section 40 of the *Canada Evidence Act* provides:

> 40. In all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this Act and other Acts of Parliament, apply to those proceedings.

The *Crown Liability and Proceedings Act*[34] requires any court that is seized of a claim against the Crown to look at the limitation period of the relevant province.[35]

In matters of interpretation of statutes before the Federal Court, sections 8.1 and 8.2 of the *Interpretation Act*[36] provide:

> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference

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31 S.C. 2001, c. 27.
32 R.S.C. 1985, c. 1 (5th Supp.).
33 *Supra*, note 29.
34 R.S.C. 1985, c. C-50.
35 *Id.*, s. 32.
36 R.S.C. 1985, c. I-21.

> must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
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> 8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

If the *Federal Courts Rules* or an Act of Parliament do not provide for a particular procedural matter — that is, where there is a "gap" in the rules — Rule 4 gives the Court the power to look to the procedure of the superior court of the province to which the proceeding most closely relates. This rule may not be used to amend the rules of the Federal Courts,[37] nor may it be used to import a substantive right and thereby extend the jurisdiction of the Court.[38]

A more recent amendment to the *Federal Courts Rules*, which is found in Rule 55, may provide the Court with more latitude in applying or referring to procedural rules in provincial superior courts. The current version of Rule 55 gives the Court discretion to vary any rule where special circumstances exist in a specific proceeding. Although this rule has not yet been used to import provincial procedure, it may have the potential to overtake the "gap rule" as the primary mechanism whereby this Court looks to provincial practice.

It is therefore apparent that the Federal Court is, by nature, a court that must review and interpret the common law and Quebec law on an ongoing basis. A detailed review of the history of the interplay of the common law and the civil law in the Federal Court, as well as in its predecessors, is found in the two comprehensive papers written by Professor Lemieux.[39]

III. THE APPROACH OF THE FEDERAL COURTS RULES COMMITTEE TO PROCEDURE AND PRACTICE

The practice and procedure of the Federal Court is a product of this rich, national, bijural and bilingual jurisdiction.

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[37] *R. v. CAE Industries Ltd.*, [1977] S.C.J. No. 15, [1977] 2 S.C.R. 566 (S.C.C.).

[38] *Sea Pics Adventures (1995) Inc. v. Astrolabe Marine Inc.*, [1997] F.C.J. No. 130, at para. 8 (F.C.).

[39] Denis Lemieux, "Contribution de la Cour Fédérale au Droit Civil" in *The Federal Court of Canada — An Evaluation*, 2d ed. (Ottawa: Federal Court of Canada, 1981), 140; Lemieux, "Dualité", *supra*, note 27.

In the absence of specific statutory provisions that address procedure before the Court, the *Federal Courts Rules* regulate the practice and procedure before the Federal Court and the Federal Court of Appeal. Subject to the approval of the Governor in Council, the Rules Committee may make general rules and orders for regulating the practice and procedure in the two courts.[40]

1. Composition and Regulatory Processes of the Rules Committee

The Rules Committee is a statutory body that is established by section 45.1 of the *Federal Courts Act*.[41] It is composed of the Chief Justices of both courts, three judges of the Court of Appeal, five judges and a prothonotary of the Federal Court, the Chief Administrator of the Courts Administration Service,[42] five members of the bar of any province (who are each designated by the Attorney General after consultation with the Chief Justices) and a representative of the Attorney General.

Subsection 45.1(2) provides that the members of the bar, designated by the Attorney General, should be representative of the different regions of Canada and have experience in fields of law over which the Court has jurisdiction. In practice, the members of the committee who are selected from the bar have consistently represented Western Canada, Ontario, Quebec and Atlantic Canada. They have also represented the main practice areas of the Court, including intellectual property litigation, admiralty law, administrative law, Aboriginal law and immigration law. The committee also works with two consultants — one from a common law tradition and another from the Quebec civilian tradition. It should also be noted that, in making judicial designations to the Committee, the Chief Justices attempt to ensure that the judicial members also reflect the bijuridical and bilingual jurisdiction of the Court.

The Committee consults widely with the parties and the profession before recommending any changes to the Rules. In general, the Committee publishes a discussion paper outlining the changes that are under consideration and seeks the input of the profession on these proposed changes. This is further supplemented by discussions at Bench and Bar

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[40] *Federal Courts Act*, *supra*, note 24, ss. 46(1), 46(2).

[41] *Id.*, s. 45.1.

[42] On July 3, 2005, with the coming into force of the *Courts Administration Service Act*, S.C. 2002, c. 8, the Courts Administration Service replaced the Registry of the Federal Court of Canada. Pursuant to s. 7, the Chief Administrator is responsible for the day-to-day administration of the Court and Registry services.

liaison committees. Any comments that are received are considered by the Committee, which then decides whether or not to proceed with the amendments. If a decision to proceed is made, the committee prepares drafting instructions that are forwarded to the legislative drafting section of the Department of Justice, which then prepares an initial draft for review by the Committee. If the Committee is satisfied with the draft, it is examined by editors and jurilinguists before being blue-stamped and sent to Part I of the *Canada Gazette* for pre-publication. Another 60 days is given to the public to comment on the proposed regulation. The Committee studies any comments that are received before making a final decision to implement the proposed rules.[43]

2. Recent Changes to the Federal Courts Rules

Over the past 20 years, the Rules Committee has implemented substantial changes to the *Federal Courts Rules*. In 1993, the Committee undertook a revision of the former Rules that culminated with the coming into force, in 1998, of the current rules. The revision modernized the *Federal Courts Rules* by, among other things, implementing case-management mechanisms, simplifying procedure and expanding the jurisdiction of Federal Court prothonotaries.[44] In 2002, the Rules were amended to permit class actions in the Federal Court.[45]

More recently, the Committee has reviewed the rules that regulate offers to settle, expert witness evidence, case management, class actions and summary judgment.[46] The composition of the Committee lends to it a great deal of strength in undertaking such reviews. The Committee has drawn on the expertise of its members and consultants whenever it has considered amendments to the existing rules. The perspectives and the experiences of a variety of provincial jurisdictions are reviewed and evaluated in order to ensure that the Rules respect the trans-systemic mandate of the Court and are drafted in a way that prioritizes the

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[43] *Federal Courts Act*, *supra*, note 24, s. 46(4).

[44] A prothonotary is a judicial officer appointed pursuant to the *Federal Courts Act*, *id.*, s. 12. He or she has the jurisdiction set out in the *Federal Courts Rules*, *supra*, note 29, r. 50, and may hear most motions, act as a case management judge and hear trials where the damages that are sought amount to less than $50,000. Prothonotaries case manage over 90 per cent of Federal Court files under case management.

[45] SOR/2002-417, s. 13.

[46] Amendments to the summary judgment rules that establish a summary trial proceeding were pre-published in the *Canada Gazette*, Part I, vol. 143, No. 4 — January 24, 2009, and came into force December 10, 2009 (SOR/2009-331).

goals set out in Rule 3 — namely, "the just, most expeditious and least expensive determination of every proceeding on its merits".[47] The Committee also draws inspiration from Aboriginal law and foreign jurisdictions, the latter of which include, primarily, Australia and the United Kingdom. The Committee is not limited by concepts of common law or civil law; it seeks to ensure proportionality in litigation by using the best procedures available.

3. A Case Study: The Reinstatement of Representative Proceedings

The approach that is taken by the Committee is illustrated by the recent amendments to reinstate representational proceedings and extend the class action rules to applications in the Federal Court. The 2002 amendments to the Rules, which allowed the certification of class actions, repealed former Rule 114, which had regulated representative proceedings in the Federal Court. At the time, it was thought that proceedings that would have formerly been brought as representative actions would instead be brought as class actions, thereby benefiting from the expanded protections set out in the new Rules. Existing representative proceedings were converted into class actions in several instances.[48]

Several years after the repeal, however, members of the Aboriginal litigation bar requested that the Committee consider reinstating the former Rule 114. They submitted that there is no need to certify an Indian band, which is a recognized entity in Canadian law and which represents the interests of a particular group. They also pointed to the existence of *sui generis* rights that are held by a community and must be asserted communally.[49] The addition of the certification process to an already complex and lengthy litigation — before proceedings could be brought by a representative plaintiff — was not in the best interests of justice

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[47] *Federal Courts Rules*, *supra*, note 29, R. 3.

[48] In *Dene Tsaa First Nation v. Canada*, [2004] F.C.J. No. 664, 2004 FC 550 (F.C.) [hereinafter "*Dene Tsaa*"], Hugessen J. continued a representative proceeding that had been filed before November 2002 as a class action, but dispensed the parties from compliance with the rules on certification. See also *Gill v. Canada*, [2005] F.C.J. No. 286, 2005 FC 192 (F.C.) [hereinafter "*Gill*"].

[49] *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.); *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507 (S.C.C.). With respect to the latter, see Rule 68 — *Expedited Litigation Project Rule*, B.C. Reg. 177/2005, s. 41(j). British Columbia's ongoing rules "renovation", in draft Rule 8-3, does provide for joint experts. See also *R. v. Marshall*, [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533, at 546-47 (S.C.C.); *R. v. Sundown*, [1999] S.C.J. No. 13, [1999] 1 S.C.R. 393, at para. 36 (S.C.C.).

because it increased the costs of litigation and precluded the recovery of such costs.

A subcommittee was struck to consider the request. It reviewed the reasons for the repeal of Rule 114 and the concerns of the Aboriginal litigation bar before determining that representative proceedings should be reinstated.

A review of the nature of Aboriginal and treaty rights in Canada demonstrates that they are, for the most part, *sui generis* rights that are held communally and that arise, at times, from an agreement that was entered into by a band or a nation with the Crown in right of Canada. These rights are transmitted to individuals because of their membership in a particular band or nation, but are not held by these individuals in an individual capacity. Thus, membership in the group is the *sine qua non* of exercising or enforcing the right.

Governance of a band or a nation is regulated by either customary law or the *Indian Act*.[50] Thus, members of First Nations communities belong to a (generally) identifiable group, they are seeking to enforce a communal right, and the capacity to opt out from the litigation — due to the nature of the right at issue — is problematic at best.

Several decisions of the Federal Court and one from the Manitoba Court of Queen's Bench address whether a class action, a representative proceeding or the naming of a band is the most appropriate procedural mechanism when litigating communal, *sui generis* rights. In the majority of these decisions, the relevant Court determined that it was more appropriate to proceed by way of a representative proceeding than by way of a class proceeding (and, hence, without the formalities of certification).[51] One of the most frequently made observations is that the right to opt out of a class proceeding is difficult to reconcile with the communal, *sui generis* rights at issue in these types of proceedings.[52]

That said, there remained a possibility that other groups would be able to assert a communal interest in litigation — possibly in the context of labour litigation or litigation involving unincorporated associations. Indeed, the most recent representative proceeding that has been filed in the Federal Court is an application by the AGLRP[53] Retired Fishermen for Tax Fairness Association Corporation, which seeks to review a

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[50] R.S.C. 1985, c. I-5, ss. 74-86.

[51] *Soldier v. Canada (Attorney General)*, [2006] M.J. No. 90, 2006 MBQB 50 (Man. Q.B.); *Dene Tsaa*, *supra*, note 48; and *Gill*, *supra*, note 48.

[52] *Gill*, *supra*, note 48, at para. 13.

[53] The Atlantic Groundfish Licence Retirement Program.

decision of the Minister of National Revenue pursuant to the fairness provisions of the *Income Tax Act*.[54]

Having reviewed the jurisprudence, other domestic and international legislation, and the submissions of the various interested parties, the subcommittee determined that Rule 114 should be reinstated, but should not be limited in its application to the context of Aboriginal litigation.

Once the decision to reinstate representative proceedings was made, the subcommittee addressed the question of whether such a proceeding should be considered as an exception to the class proceeding rules (which would remain as the default procedure), or whether the Rules should provide for a parallel representative proceeding route.

The merits and limitations of both approaches were evaluated. Research into the state of representative proceedings in other jurisdictions — including British Columbia, Quebec,[55] the United Kingdom and Australia — was undertaken. After much discussion, the subcommittee recommended that a mechanism similar to that found in article 59 of the Quebec *Code of Civil Procedure*[56] be added to the rules.

Article 59 provides:

> 59. A person cannot use the name of another to plead, except the State through authorized representatives.
>
> Nevertheless, when several persons have a common interest in a dispute, any one of them may appear in judicial proceedings on behalf of them all, if he holds their mandate. …
>
> 59. Nul ne peut plaider sous le nom d'autrui, hormis l'État par des représentants autorisés.
>
> Toutefois, lorsque plusieurs personnes ont un intérêt commun dans un litige, l'une d'elles peut ester en justice, pour le compte de toutes, si elle en a reçu mandat. …

Article 59 requires that a person who seeks to bring a representative proceeding must obtain a "mandate" (*i.e.*, power of attorney) from those whom he or she intends to represent. This obviates the need to certify a class, since the extent of the powers that are delegated to an individual by way of a mandate is specifically defined in the *Civil Code of Québec*.[57]

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[54] Federal Court file T-56-09: an application by an association of retired fishermen to judicially review a fairness decision of the Canada Revenue Agency that was directed to proceed as a representative proceeding.

[55] Of significance, the research showed that 25 years after the enactment of class action legislation, no Aboriginal class proceeding had been successfully certified in Quebec.

[56] R.S.Q. c. C.-25.

[57] S.Q. 1991, c. 64, arts. 2130-2185.

In the Federal Court, however, there are no provisions like those of the *Civil Code of Québec* that relate to the establishment of a "mandate" or "power of attorney". Thus, with a view to the specific instances in which such a rule might be used (*i.e.*, where a group is asserting a common issue that relates to a collective interest), the Rules Committee chose to adopt a rule that presumes that an individual is entitled to act in a representative capacity — provided that the criteria set out in Rule 114(1) of the *Federal Courts Rules* are met.

114(1) Despite rule 302, a proceeding, other than a proceeding referred to in section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that

(a) the issues asserted by or against the representative and the represented persons

(i) are common issues of law and fact and there are no issues affecting only some of those persons, or

(ii) relate to a collective interest shared by those persons;

(b) the representative is authorized to act on behalf of the represented persons;

(c) the representative can fairly and adequately represent the interests of the represented persons; and

114(1) Malgré la règle 302, une instance – autre qu'une instance visée aux articles 27 ou 28 de la Loi – peut être introduite par ou contre une personne agissant à titre de représentant d'une ou plusieurs autres personnes, si les conditions suivantes sont réunies :

a) les points de droit et de fait soulevés, selon le cas :

(i) sont communs au représentant et aux personnes représentées, sans viser de façon particulière seulement certaines de celles-ci,

(ii) visent l'intérêt collectif de ces personnes;

b) le représentant est autorisé à agir au nom des personnes représentées;

c) il peut représenter leurs intérêts de façon équitable et adéquate;

d) l'instance par représentation constitue la façon juste de procéder, la plus efficace et la moins onéreuse.

(d) the use of a representative proceeding is the just, most efficient and least costly manner of proceeding.

The Court retains the discretion, of its own accord or upon motion, to determine whether the representative plaintiff meets the requirements to act as a representative plaintiff:

114(2) At any time, the Court may	114(2) La Cour peut, à tout moment :
(a) determine whether the conditions set out in subsection (1) are being satisfied;	a) vérifier si les conditions énoncées au paragraphe (1) sont réunies;
(b) require that notice be given, in a form and manner directed by it, to the represented persons;	b) exiger qu'un avis soit communiqué aux personnes représentées selon les modalités qu'elle prescrit;
(c) impose any conditions on the settlement process of a representative proceeding that the Court considers appropriate; and	c) imposer, pour le processus de règlement de l'instance par représentation, toute modalité qu'elle estime indiquée;
(d) provide for the replacement of the representative if that person is unable to represent the interests of the represented persons fairly and adequately.	d) pourvoir au remplacement du représentant si celui-ci ne peut représenter les intérêts des personnes visées de façon équitable et adéquate.

To address the concerns that were raised by the Supreme Court of Canada in *General Motors of Canada Ltd. v. Naken*[58] — namely, that the rights of the represented litigants must be sufficiently protected — the amended rule also provides discretion to the Court to require that notice be

[58] [1983] S.C.J. No. 9, [1983] 1 S.C.R. 72 (S.C.C.).

given, to impose conditions on any settlement process and to replace the representative plaintiff. The rule also makes an order in a representative proceeding binding on all parties, and requires Court approval for a discontinuance or settlement.

Thus, the existence of *sui generis* communal rights at common law, in the context of Aboriginal litigation, prompted the Rules Committee to adopt an approach taken in Quebec civil procedure and to tailor it to fit the reality of the Court's national jurisdiction. The reinstated rule was drafted so that it could apply to any group of litigants who might wish to litigate a communal right — a clear example of consultative, category-transcending, rule-making in action.

IV. ONGOING PROJECTS OF THE COMMITTEE

1. Expert Witnesses in the Federal Court

In 2007, a subcommittee of the plenary Rules Committee began examining the rules that govern expert witnesses in the Federal Court. Although expert witnesses are predominantly called to testify in actions, some applications — particularly those arising under the *Patented Medicines (Notice of Compliance) Regulations*[59] — involve substantial amounts of expert evidence in affidavit form.

The subcommittee identified two primary issues of concern in its Discussion Paper[60] of May 2008. The first related to the expert's independence, or lack thereof, and the impact of this factor on the quality of the evidence proffered. The second issue related to the proliferation of expert evidence before the Court, and the impact that this was having on the length and cost of litigation.

The subcommittee reviewed the existing provisions of the *Federal Courts Rules* in light of the initiatives that were being taken in other jurisdictions with respect to expert witnesses, and recommended that innovations — such as concurrent expert evidence, expert conferences

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[59] SOR/93-133.

[60] See Anne Mactavish *et al.* (Subcommittee of the Federal Courts Rules Committee), "Expert Witnesses in the Federal Courts: A Discussion Paper of the Federal Courts Rules Committee on Expert Witnesses" (Ottawa: Federal Court of Canada, 2008), online: Federal Court (Canada) — Court Process and Procedures — Rules <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Rules> (in English), <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_fr/Rules> (in French) [hereinafter "Discussion Paper"].

and single joint experts — could be added to the *Federal Courts Rules*.[61] Similar amendments in relation to single joint experts and expert conferences have been proposed to the Quebec *Code de procédure civile*.[62] Under British Columbia's *Expedited Litigation Rules*,[63] there is provision for the appointment of a "single joint expert".[64]

The subcommittee also concluded that a Code of Conduct for expert witnesses would assist in ensuring that all experts are aware of their overriding obligation to the Court. The proposed draft rules require that all experts read and agree to be bound by the proposed Code before their evidence will be admissible.

These amendments are in draft form and the proposed draft rules were pre-published in the *Canada Gazette* in the fall of 2009.[65]

2. Best Practices in Relation to the Evidence of Elders

Methods of best practice in relation to the testimony of Aboriginal elders are also being studied by members of the Federal Court Indigenous Bar Liaison Committee. The traditional role of an expert in court proceedings is being addressed in consultation and conversation with elders, the Department of Justice and members of the Indigenous Bar Association. This discussion raises a number of interesting and complex questions about the role of Aboriginal elders as experts. In particular, it considers how the use of oral histories and tradition as evidence not only challenges the traditional rules of evidence, but also questions the appropriateness of using these rules in the adjudication of claims that have

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[61] These new rules will complement existing Rule 52, which permits the Court to name an assessor to assist the judge in "understanding technical evidence or provide a written opinion in a proceeding".

[62] *Code of Civil Procedure*, R.S.Q. c. C-25, a. 47. See also *Rules of practice of the Superior Court of Québec in civil matters*, R.R.Q., 1981, c. C-25, r. 8 (*Code of Civil Procedure*), rr. 18.1, 18.2, 19:

> 18.1. The parties may at any time jointly request the Court to appoint a joint expert.
>
> 18.2. The party who produces an expert report must at the same time produce its author's curriculum vitae, a statement of account to date and the expert's current fee schedule for the expert's presence at a trial on the merits.
>
> 19. At any stage of the proceedings, a judge may, even on his own initiative, order the experts who have prepared contradictory reports to meet in the presence of the parties or their attorneys who wish to attend to reconcile their opinions or to identify the matters on which they disagree. Within the time fixed by the Judge, they shall report the result of their meeting to the parties and file it of record.

[63] Rule 68 — *Expedited Litigation Project Rule*, *supra*, note 49.

[64] *Id.*, s. 41(j).

[65] See *Canada Gazette*, Part I, Vol. 143, No. 42 — October 17, 2009.

arisen from the assertion of constitutionally protected Aboriginal rights.[66] These issues have been considered in the jurisprudence and this committee is attempting to adapt the practice of the Court to encompass the reality of Aboriginal litigation in the 21st century.[67]

3. Discovery in the Federal Court

A final example of how the Federal Court is moving toward a less categorical approach to procedure can be found in the context of discovery practices. Recently, Justice Roger Hughes has characterized discovery in Canada as "unique".[68]

Prior to the amendments that were made to the *Federal Courts Rules* in 1998, the Federal Court of Canada applied the "train of inquiry" approach that had been set out in *Cie Financière et Commerciale du Pacifique v. Peruvian Guano Co.*[69] for the purpose of determining whether or not a document was relevant and subject to discovery. In *AstraZeneca Canada Inc. v. Apotex*, Hughes J. observed:

> Rule 222(2) of the *Federal Court Rules* has changed the definition of "relevance" in respect of a document for production purposes. It states:
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> | | |
> |---|---|
> | 222(2) For the purposes of rules 223 to 232 and 295, a document of a party is relevant if the party intends to rely on it or if the document tends to adversely affect the party's case or to support another party's case. | (2) Pour l'application des règles 223 à 232 et 295, un document d'une partie est pertinent si la partie entend l'invoquer ou si le document est susceptible d'être préjudiciable à sa cause ou d'appuyer la cause d'une autre partie. |

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[66] See s. 35 of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

[67] See, *e.g.*, *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 82 (S.C.C.).

[68] *AstraZeneca Canada Inc. v. Apotex Inc.*, [2008] F.C.J. No. 1696, 2008 FC 1301, at para. 4 (F.C.) [hereinafter "*AstraZeneca*"].

[69] (1882), 11 Q.B.D. 55 (C.A.), as cited in *AstraZeneca*, *id.*, at para. 9.

> While some decisions of this Court appear to have overlooked this Rule or applied it as *Peruvian Guano* would have looked at a matter, it is clear that the Rule is intended to bring to bear a more issue-oriented test of relevance and avoid the "train of inquiry" cases that have served to expand discovery with little or no effect on matters that are ultimately presented to the trial judge. ...[70]

This trend towards simplifying discovery was iterated by Hughes J. in a recent motion, in which he upheld a prothonotary's decision to preclude questions of "tenuous relevance" that "would not advance" the parties' legal position, nor be "useful".[71]

A recent practice direction, aimed at streamlining complex litigation, and, in particular, reducing the delay caused by discovery, was issued by the Court on May 1, 2009.[72] It reminds parties of the flexibility inherent under the case management rules. There is hope that this direction will permit complex litigation to be heard within two years of the filing of the statement of claim.

V. CONCLUSION

The Rules of the Federal Court consist of a flexible framework that can be adapted to the specific needs of the parties. Rules permitting the Court to modify, analogize and dispense with compliance allow the Court to act in accordance with the principle of proportionality in whichever jurisdiction it finds itself in. Flexibility, innovation and proportionality are the goals of the Court in establishing rules of procedure.

As Canada's court of first instance, the Federal Court confronts the categories of both the civil law and the common law on a regular basis. It is also increasingly asked to consider the rights and requirements of First Nations law, as established by section 35 of the *Constitution Act, 1982*. The Court has, in the context of its Rules, done away with categorizing particular approaches as either civil law or common law. Much like the mythical and imaginary creatures that support its coat of arms, the Federal Court attempts, through its procedure, to ensure that its Rules — and

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[70] *AstraZeneca*, *supra*, note 68, at paras. 10-11.

[71] *Apotex Inc. v. GlaxoSmithKline Inc*., [2009] F.C.J. No. 480, 2009 FC 378, at paras. 5, 21-22 (F.C.).

[72] See Allan Lutfy, "Notice to the Parties and the Profession: Streamlining Complex Litigation" (Ottawa: Federal Court of Canada, 2009), online: Federal Court (Canada) — Court Process and Procedures — Notices to the Parties and Legal Profession <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Notices> (in English), <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_fr/Notices> (in French).

its practice thereof — are a hybrid of the best of all categories. The Rules are not bound by a particular procedural epistemology; they search out the best available options and adapt them to the reality of Canada's national, bilingual, multi-juridical trial court.

Brazil and Its European Influences

Ada Pellegrini Grinover and Kazuo Watanabe*

I. INTRODUCTION

Brazil was colonized by Portugal and, without any doubt, adopted the Roman-German system of procedural law. When it became a Republic in 1890, however, Brazil was influenced by the Anglo-Saxon legal system, and, more precisely, by that of the United States of America, in relation to its political format (federation) and the model given to the Federal Supreme Court, as well as in adopting one sole system of jurisdiction (without an administrative jurisdiction) and also in acquiring the procedural-constitutional instruments of freedom protection (writs). Therefore, the Brazilian procedural system of today, although faithful to the Roman-German tradition, adopts several common law institutions.

II. THE BEGINNING OF THE BRAZILIAN SYSTEM: THE PORTUGUESE INFLUENCE AND THE INFLUENCE OF THE ROMAN AND CANON LAWS THEREOF

Since its discovery by Portugal in 1500, and until the proclamation of its independence in 1822, Brazil was part of the kingdom of Portugal. Portuguese laws were therefore in force in the Brazilian territory. When Brazil was discovered, the so-called Ordenações Afonsinas were in force; they were enacted in 1456, and were replaced in 1514 by the Ordenações Manuelinas. Subsequently, in 1603, the Ordenações Filipinas were enacted.

Enrico Tullio Liebman makes an important remark about the law under the Ordenações. He says that, despite the comprehensiveness of the rules, the intention of the legislator was not to regulate, with such provisions, all concrete cases that could be verified in practice. Along with the aforementioned rules, the Canon and Roman laws (to which the Ordenações

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acknowledged effectiveness "due to good grounds") continued to be in force in a subsidiary manner, in the respective sphere of authority.[1]

Brazilian private and procedural law, as stated by Liebman, has been developed since the 15th century — *i.e.*, since the reception of Roman law by the Ordenações from Portugal — and have not separated themselves from this model, receiving little influence from external sources (even from French law, which was of foremost importance to modern European laws).[2]

Upon Brazil's political emancipation in 1822, the Brazilian government adopted certain measures to provide Brazil with its own laws, but that occurred very slowly. In this sense, the Ordenações Filipinas, which were enacted in 1603, were in force in Brazil until the start of the modern codification. The first *Brazilian Civil Code* was enacted only in 1916, and it was replaced in 2002 by the *Civil Code* that is now currently in force. The *Commercial Code* is older, as it was enacted in 1850.

In the civil procedural sphere, the first nationalization initiative occurred upon the enactment of the *Criminal Procedural Code* in 1832, which brought, as an attachment, temporary provisions "about the administration of the civil courts". This first regulation of the civil procedure was surprisingly advanced for the period because, in seeking a fast and inexpensive model of justice, the legislator tried to conceive of a less complicated process that would be unfettered by useless acts and formalities, or excessive appeals. Regretfully, however, this trend of simplification and abbreviation in our civil procedure did not continue.

In 1850, the same year of the enactment of the *Brazilian Commercial Code*, Regulation 737 became effective, but it regulated procedure only on commercial matters. Civil procedure continued to be ruled by the Ordenações Filipinas. Regulation 737 was extended to the civil procedure only in 1890, on account of the first Republican government. After the *Republican Constitution of 1891*, when both the Union and the member states had powers to legislate civil procedure, Brazil adopted the dual court system. Upon the enactment of the *Constitution of 1934*, the exclusive authority of the Union to legislate on matters of civil procedure was re-established, and this system has remained in force to this day. In 1939, Brazil's first *Code of Civil Procedure* was enacted.

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[1] Istituti del diritto commune nel processo civile brasiliano, in Problemi del Processo Civile, Morano Editore, at 490/516.

[2] Op. et loc. cit.

III. The 20th Century and the Beginning of the 21st Century

By the middle of the 20th century, the Brazilian procedural law system had been strongly influenced first by Italy and Germany, and, afterwards, by other European countries. It consolidated its adoption of the Roman-German procedural laws, but also sought, in some aspects, inspiration in the Anglo-Saxon laws.

1. The Italian and German Influences on the Doctrine

Upon the arrival and residence in São Paulo of the Italian procedural law expert Enrico Tullio Liebman during the Second World War, the Brazilian procedural law absorbed and drafted the modern achievements of the Italian and German civil procedural law. It was then that the scientific phase of procedural law started in Brazil, in which the great procedural rules and fundamental concepts were created. Authors such as Chiovenda, Redenti, Carnelutti, Calamandrei and Liebman — jointly with German experts in procedural law, such as von Bülow, Schwartz, Hellwig and Rosenberg — left their indelible mark on the Brazilian procedural legal system.

2. The Italian Influence on the *Code of Civil Procedure* of 1973

The *Code of Civil Procedure of 1973*, which replaced the *Code of 1939*, was drafted by Alfredo Buzaid — a direct follower of Liebman — and it introduced the fundamental categories that had been defined by Italian procedural laws: ordinary lawsuits (processo de conhecimento), foreclosure lawsuits (processo de execução), provisional remedies (cautelar), procedural requisites, and conditions for the action and its merits; third party intervention and litisconsortium; judgment and *res judicata*; and several other institutions that were based on the Italian doctrine. The *Code of 1973* remains in force, but, as of the 1990s and until the current date, several important amendments have been introduced in order to augment the effectiveness of the procedure.

3. The Anglo-Saxon Influence

However, as previously mentioned, the Brazilian procedural system was also influenced by the common law system.

(a) Writs

As was the case in the First Republic (1889), Brazilian constitutional law has incorporated procedural instruments for the protection of freedom. These somehow correspond to the writs of the Anglo-Saxon system, despite the fact that they have received a particular treatment. The traditional *habeas corpus* (protecting the freedom of movement), and, shortly after, the writ of *mandamus* (for the protection of certain rights other than freedom of movement), and, subsequently — with the *Constitution of 1988* — new constitutional-procedural instruments such as the Habeas Data (protecting privacy against computer data) and the Writ of Injunction (offsetting the lack of laws concerning fundamental rights) created in the Brazilian procedural law system fast and effective instruments for the protection of freedom.

(b) Small Claims

Federal Law No. 7.244 of 1984 created the so-called "Small Claims Courts", which included innovations that applied a new strategy to deal with small conflicts in particular interests. The purpose was to expedite these proceedings, and make them less formal. Simplicity, oral pleading, fast and economic procedure, and gratuitousness were the criteria adopted by the law, which is strongly based on settlement. After the *Constitution of 1988*, which referred to small claims as "civil cases of less complexity", Law No. 9.099 of 1995 replaced the former Small Claims Courts with the "Special Civil and Criminal Courts", and broadened their authority within the civil sphere. These courts adopted the Anglo-Saxon system to judge small claims, and the Japanese settlement goal is based on the Japanese system.

(c) Class Actions

Brazil was influenced by Rule No. 23 of the U.S. *Federal Rules of Civil Procedure* ("FRCP") of 1966, and was a pioneer within the civil law sphere in the creation of a microsystem of collective proceedings that sought the protection of trans-individual interests or rights ("diffuse" and "collective"): first, in view of Law No. 7.347 of 1985, which protected the aforesaid interests or rights, in their indivisible dimension, at the environmental and consumer levels; and, subsequently, through the *Consumer Protection Code* (Law No. 8.078 of 1990), which improved

the legal provisions by reaching all issues and broadening comprehensiveness through the introduction of the category of "homogeneous individual" rights or interests, which corresponds to the class actions for damages (or mass tort cases) of item b.3 of Rule No. 23 of the U.S. FRCP.

However, there are important differences between the mechanisms developed to defend such rights in the Brazilian and the U.S. systems, respectively. The "adequacy of representation" is defined by objective requirements of a legal nature; the opt-in and opt-out criteria of the common law system are no longer applied; and the *res judicata erga omnes* complies with the so-called *secundum eventum litis* criterion (*i.e.*, the *res judicata* reaches all persons — but only to benefit, and not against individual claims). Other new introductions to the Brazilian system include the standing to sue, which is not applied to individuals; the control of the Public District Attorney's Office, whenever it is not that of the plaintiff; the powers of the judge, which are less comprehensive than the powers of the U.S. judge; the simplification of the notification system (in view of the non-existence of the opt-out criteria); the connection and restraint system between collective actions; and collective actions in comparison to individual claims. In short, it is a microsystem that, although inspired by U.S. class actions, has found its own solutions — which are more appropriate to, and adequate for, the civil laws and peculiarities of Brazil.

(d) Injunctions

Another influence of the common law system on the Brazilian legal system manifests itself in a technique that is similar to the U.S. injunction. After the Republic was established, and since the creation of writs (such as the *Habeas Corpus* and the Writ of *Mandamus*),[3] Brazilian judges have been making use of court orders. However, what was missing was a generic provision that allowed the issuance of court orders outside the scope of freedom protection. In 1994, the *Code of Civil Procedure* was amended with regard to affirmative or negative covenants (with an amendment that had, in the way of a predecessor, the provisions in the Brazilian microsystem of class actions),[4] providing for specific performance (rather than monetary remedy). The judge determines

[3] As mentioned above, in Part III.3(a).
[4] As mentioned above, in Part III.3(c).

compliance with the obligation in kind under the penalty of imposition of a daily fine (the so-called astreintes of the French system), or upon concrete measures capable of leading to a practical result that corresponds to the required compliance with the obligation (*i.e.*, as a search and seizure, an undoing of works or an impediment to a harmful activity).

Concerning the affirmative and negative covenants (article 461 of the *Code*), specific performance came to include the obligation to deliver a certain thing (article 461-A), following the same system. The innovation was so important that it reinforced in the Brazilian system the understanding that, along with the pure adverse judgment — *i.e.*, demanding an execution action — there was also the adverse injunctive judgment, in which judgment would be enforced in the ordinary phase, in compliance with the judge's order. Additionally, the expression "judicial orders" was included in the Brazilian *Code of Civil Procedure*, in which article 14, as amended, referred to non-compliance as an "act against the exercise of the jurisdiction", subject to sanctions.[5]

However, although the roots of the judicial orders of the Brazilian system are found in the injunctions of the common law, certain influences in its evolution should not be disregarded, namely: the Italian experience (with the restraining action, typical of negative covenants) and the French experience (with the alternative adoption of the astreintes system). Once again, the Brazilian procedural system was inspired with the laws of other countries, but found an original and unique solution to the matter.

(e) Contempt of Court

After the publication of the *Code of Civil Procedure of 1973*, which is concerned with ethical principles and abuse of process, the Brazilian procedural system became familiar with several provisions that punished the malicious abuse of legal process (litigância de má-fé) and non-compliance with the decisions rendered by the judge. However, the contempt of court concept, associated with the idea that the use of media capable of rendering effective the decisions rendered is inherent in the existence of the Judiciary Branch, was only included in the *Code of Civil Procedure* upon the amendment of article 14 by a law published in 2001. The expression "contempt of court" — understood as the performance of any act that tends to offend a court upon the administration of justice or to lower its authority

[5] For these sanctions, please refer to Part III.3(e) "Contempt of Court".

or dignity, including non-compliance by a party with a certain order — acquires specific characteristics in the Brazilian legal system. In article 14, item V, the parties (and the ones taking part in the proceedings) have the obligation, among others, to properly comply with judicial orders and not to hinder the enforcement of these orders, whether in an anticipatory or a final nature. The penalty, in case of breach of the aforesaid obligations, is provided in the provision's sole paragraph (excepting attorneys, who are exclusively subject to the Brazilian Bar Association's Charter and to the application of a pecuniary fine only, without prejudice to the applicable criminal and procedural penalties).

(f) ADR

In the past, mediation and settlement played a very important role in Brazil. The *Imperial Constitution of 1824* expressly provided that no action could be filed without evidence that a settlement had previously been attempted. The ordinary law excluded the urgent cases, in which a settlement could be attempted after the necessary initial measures were taken. To promote settlements, the Brazilian legal system developed the role of the peace judge.

However, the role played by the peace judge became less and less important, and today the peace judge only performs ceremonies of marriage. The Constitution provides that the ordinary laws may attribute to the peace judge the capacity to perform settlement functions, but this measure has, thus far, not been adopted. Some states created the position of the lay judge, who not only assists the judge in the proceedings, but also performs settlement functions.

The processes of mediation and settlement were better organized only upon the approval of the *Small Claims Court Law* in 1984. Today, under the provisions of the Brazilian *Code of Civil Procedure*, which provides for the processes of settlement and mediation, some Brazilian states, such as São Paulo, have tried to use more intensely alternative means of dispute resolution.

In addition, a bill of law that aims to regulate the processes of mediation and settlement in a more comprehensive manner is currently in process at the National Congress.

IV. CONCLUSION

One can conclude that the reception of foreign civil procedural laws has always been strong in Brazil, even if this is not especially unusual in a country that belongs to the New World. However, as of the 1970s, not only was this warm reception strongly intensified, but the Brazilian system also started to transmit its own laws to other countries — basically, those belonging to the Latin American community. This strengthens the idea that, in contemporary society, the rate of exchange between different procedural systems seems to be increasing, with the result a growing homogeneity — not only among countries belonging to the same root, but also among different legal families.

Russian Civil Procedure: An Exceptional Mix[†]

Dmitry Maleshin[*]

I. INTRODUCTION

There is a large variety of legal systems. According to the classical point of view, there are three dominant legal systems: civil law, common law and socialist law.[1] Nowadays, socialist law — in its pure sense — no longer exists. Moreover, there is a notion that it never existed as a separate legal system, but was rather a member of a civil law family.[2] Some authors add Islamic,[3] customary, religious and other legal systems to the variety. In 1929, a map of the laws of the world, featuring 16 different legal systems, was proposed.[4]

We accept the notion that all legal systems are derived from either the common law or the civil law.[5] There are also mixed jurisdictions. They have some identifiable characteristics. First, they should be built upon dual foundations that are composed of common law and civil law materials. Second, such a mixture should rely, for the most part, on a combination of the basic elements from each tradition. An occasional transplant from another tradition will not create a truly mixed jurisdiction.

[†] This report is based on the ideas articulated in Dmitry Maleshin, "The Russian Style of Civil Procedure" (2007) 21 Emory Int'l L. Rev. 543.

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[1] John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford: Stanford University Press, 1985), at 1 [hereinafter "Merryman"]; A.G. Chloros, "Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Thought" in C. Varga, ed., *Comparative Legal Cultures* (New York: New York University Press, 1992) 83 [hereinafter "Varga"].

[2] John Quigley, "Socialist Law and the Civil Law Tradition" (1989) 37 Am. J. Comp. L. 781.

[3] S. Vago, *Law and Society* (New Jersey: Pearson Prentice Hall, 2003), at 12-18 [hereinafter "Vago"].

[4] J.H. Wigmore, "A Map of the World's Law" (1929) 19 Geographical Review 114; F.P.W., "The Legal Systems of the World" (1931) 13 J. Comp. Legis. & Int'l L. 310, at 311.

[5] See, *e.g.*, A.T. Von Mehren & J.R. Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law* (Boston: Little Brown, 1977), at 3.

Third, the structure of a mixture generates specificity: private law is created on the basis of the civil law tradition and public law finds its roots in the common law tradition.[6]

The civil law tradition includes legal systems that were developed under the influence of Roman law. They are codified systems. By contrast, the common law tradition is based on case law, which relies on precedents. They differ from each other in their respective concepts, substances, structures, vocabularies, methods of legal reasoning, legal educations and so on.

Civil procedure has also traditionally been divided into civil law and common law procedural systems.[7] While the distinction between the two systems is not as strong today as it has been in previous centuries,[8] it still exists, along with the controversial features that are associated with each tradition. Under the first system, the two adversarial parties take charge of most of the procedural action; under the second system, officials perform most of the activities.[9]

The main attributes of the classic common law procedural system are: (1) civil juries; (2) pre-trial conferences; (3) party-controlled, pre-trial investigations; (4) trials that are designed to be "concentrated courtroom dramas that provide a continuous show", (5) passive judges; (6) class actions; and (7) party-selected and paid experts.[10]

On the other hand, the main attributes of the civil law procedural system are: (1) the absence of civil juries; (2) a lack of distinction between

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[6] V.V. Palmer, ed., *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge: Cambridge University Press, 2001), at 7-10.

[7] See, *e.g.*, Oscar G. Chase & Helen Hershkoff, eds., *Civil Litigation in Comparative Context* (New York: Thomson/West, 2007), at 3.

[8] Harold Jacob, *Courts, Law and Politics in Comparative Perspective* (New Haven: Yale University Press, 1996), at 4 [hereinafter "Jacob, *Perspective*"].

[9] See, *e.g.*, Oscar G. Chase, "American 'Exceptionalism' and Comparative Procedure" (2002) 50 Am. J. Comp. L. 277, at 281-82 [hereinafter "Chase, 'Exceptionalism'"]; *The New Encyclopædia Britannica*, 15th ed., vol. 7 (Chicago: Encyclopædia Britannica, 1994), at 921 [hereinafter "*Britannica*"]; Geoffrey C. Hazard, "From Whom No Secrets Are Hid" (1989) 76 Tex. L. Rev. 1665, at 1672-74; Sir Jack I.H. Jacob, *The Fabric of English Civil Justice* (London: Taylor & Francis, 1987), at 7; Sir Jack I.H. Jacob, *The Reform of Civil Procedural Law and Other Essays in Civil Procedure* (London: Sweet & Maxwell, 1982), at 24; D. Epstein, J.L. Snyder & C.S. Baldwin, eds., *International Litigation: A Guide to Jurisdiction, Practice and Strategy* (Ardsley: Hotei Publishing, 2002), at 3, 6-3, 8; and J. Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (The Hague: Martinus Nijhoff Publishers, 1998), at 2.

[10] See, *e.g.*, Geoffrey C. Hazard & Michele Taruffo, *American Civil Procedure: An Introduction* (New Haven: Yale University Press, 1993), at 19-22, 86-104; James Fleming, Geoffrey C. Hazard & John Leubsdorf, *Civil Procedure* (London: Little, Brown, 1992), at 4-10 [hereinafter "Fleming, Hazard & Leubsdorf"]; J.A. Jolowicz, *On Civil Procedure* (Cambridge: Cambridge University Press, 2000), at 175-82.

the pre-trial and trial phases; (3) active judges; (4) judicial proof-taking and fact-gathering; (5) judicial examination of witnesses; and (6) court-selected experts.[11]

There are also some mixed jurisdictions in the area of civil procedure, including, for example, the Japanese,[12] Chinese[13] and Philippine[14] systems.

The goal of this report is to show the reader that the Russian style of civil procedure is not simply a continental or Anglo-Saxon system that possesses only classical civil and common law features, but rather a unique system that possesses exceptional features that do not exist in either of the two traditional approaches. To support this contention, I will outline the differences between modern Russia's system of civil procedure and the two most widespread procedural systems — the common law and the civil law. Additionally, I will discuss the origins of these differences.

II. CIVIL LAW PROCEDURAL FEATURES

Before addressing the first question of "what continental attributes exist in Russian civil procedure?" it is necessary to note that, historically, Russia has adhered to the continental legal family,[15] and this includes the civil procedure thereof. At the same time, however, there were periods when Russia moved away from the classical continental model of civil procedure.

In the 18th and 19th centuries, the Russian tsar legislation regulated civil procedure in an inquisitorial manner. Lately, however, there has been a move away from this kind of adjudication. Some proceduralists of that

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[11] See, *e.g.*, Merryman, *supra*, note 1, at 111-23; John H. Langbein, "The German Advantage in Civil Procedure" (1985) 52 U. Chi. L. Rev. 823, at 824, 826, 835; H. Kotz, "Civil Justice Systems in Europe and the United States" (2003) 13 Duke J. of Comp. & Int'l L. 61 at 66, 68; and C. Elliott & C. Vernon, *French Legal System* (Harlow: Longman, 2000), at 129.

[12] See Yasuhei Taniguchi, "The 1996 Code of Civil Procedure of Japan — A Procedure for the Coming Century?" (1997) 45 Am. J. Comp. L. 767; H. Matsumoto, "The Reception and Transmission of the Law of Civil Procedure in Japan — The Experience in Japan" in Masahisa Deguchi & Marcel Storme, eds., *The Reception and Transmission of Civil Procedural Law in the Global Society: Legislative and Legal Educational Assistance to Other Countries in Procedural Law* (Antwerpen: Maklu, 2008) 137, at 142-43.

[13] Margaret Y.K. Woo & Yaxin Wang, "Civil Justice in China: An Empirical Study of Courts in Three Provinces" (2005) 53 A. J. Comp. L. 911.

[14] E.A. Tan, "Special Features of Comparative Procedural Law in the Philippines" (1998) 3 Zeitschrift für Zivilprozeß International 424, at 424-25.

[15] See, *e.g.*, Merryman, *supra*, note 1, at 3; J. Guigley, "Socialist Law and the Civil Law Tradition" (1989) 37 Am. J. Comp. L. 781.

time noted that the 1864 Russian *Code of Civil Procedure* ("1864 Russian Code") was one of the best in Europe.[16] Some of its procedural elements had been influenced by the French Code. During the Soviet era, judges became much more active than they had been before the 1917 Revolution, and more than most of Russia's European neighbours were using a civil law procedural system. This model of adjudication was fairly labelled "a radical Communist solution" by Professor Mauro Cappelletti.[17]

Today, the Russian Code contains the following features of the continental system:

- The process is mainly manned by the judge.
- There is no civil jury.
- There is no class action.
- Experts are selected by the court.

At the same time, the contemporary Russian style cannot be called a "pure" continental model of civil procedure because it also has features of the common law procedural system, as well as some other original and exceptional features of its own.

III. COMMON LAW PROCEDURAL FEATURES

What common law features exist in the Russian system? There were two periods in the history of Russian civil justice when non-continental features were introduced into the civil procedure, and these can be noted in the 1864 Russian Code and the 1995 amendments to the 1964 Soviet Code.

One of the main ideas behind the procedural reforms in Russia was to establish the adversarial principle in Russian procedure. The adversarial nature of proceedings is a leading characteristic of the common law legal system.[18] It was the goal of the 1864 reform, as well as that of the

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[16] See, *e.g.*, E.A. Nefediev, *Учебник русского гражданского судопроизводства* [*Handbook on the Russian civil procedure*] (Москва: Типография Императорского Московского Университета, 1909), at 30.

[17] Mauro Cappelletti, "Social and Political Aspects of Civil Procedure — Reforms and Trends in Western and Eastern Europe" (1971) 69 Mich. L. Rev. 847, at 879 [hereinafter "Cappelletti, 'Aspects'"]. Professor Mirjan Damaška also emphasizes that "[t]he Soviet civil judge was expected to take vigorous control over the case". Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to Legal Processes* (New Haven: Yale University Press, 1986), at 202.

[18] Fleming, Hazard & Leubsdorf, *supra*, note 10, at 4.

1995 amendments, to include this characteristic in the Russian process. As a result, the 1864 Soviet Code forbade the court from collecting proof. The court was passive in Russia from 1864 to 1917.

In the 1990s, there was a remodelling of the Soviet civil procedure that was continental in its basis. The changes, however, did have some common law orientation. The 1995 amendments to the 1964 Soviet Code reintroduced the adversarial character to the civil procedure. This came about when the 1993 Russian Constitution[19] proclaimed the principle of adversarial procedure in the civil process; as a consequence, amendments were subsequently introduced to the Soviet Code in 1995. These amendments revoked the rule that required the court to engage in the process of proof-taking without the initiative of the parties. As a result, the emphasis in the process of proof-taking was shifted from the purview of the court to the purview of the parties. The functions of the court were thus reduced to a minimum in the 1995 *Arbitrazh Procedural Code*. The courts no longer had the right to demonstrate their initiative in the process of proof-taking, and, in the absence of such judicial intervention, the determination of all of the circumstances of a case became dependent upon the full participation of the parties. The part played by the court was thereby reduced to the unbiased guidance of the process. The 1995 amendments were effective until the adoption of the new code in 2002.

Under the 2002 *Code of Civil Procedure* ("2002 CCP"), the Russian civil procedure now has fewer common law features than it had under the 1995 amendments. At the same time, it still retains some common law elements. To begin with, the court is not obliged to collect the evidence.[20] Further, the trial process includes a preliminary, pre-trial session that is conducted mainly by the opposing parties.

IV. EXCEPTIONAL PROCEDURAL FEATURES

What are the exceptional features that are unique to the Russian civil procedure system? There are several distinctive features of Russian civil procedure that do not exist in other procedural systems. They include:

- the role of the judge in the process of proof-taking;

[19] Constitution of the Russian Federation (adopted on December 12, 1993; came into force December 25, 1993) [hereinafter "Constitution"].

[20] The present role of the judge in the process of proof-taking is the result of an exceptional provision of the new Russian civil procedure, and this will be discussed below.

- the role of the procurator in the civil process;
- the review of judgments in the "supervisory" instance; and
- the original status of judicial precedent.

Additionally, there are other unique features, such as the structure of the judicial system, which includes arbitrazh courts and courts of general jurisdiction,[21] and the specificity of the cassational instance, in which both questions of law and questions of fact may be reviewed.[22] These features are key elements of the Russian civil procedure system and I will elaborate on them now.

The role of the judge is "undoubtedly the central problem of any system of civil procedure".[23] During the drafting of the 2002 CCP, there was a lot of discussion about what role the court should play in establishing the facts of a case and in the process of proof-taking. In Russia, this question has always been controversial. As a result of the discussion, the 2002 CCP moved slightly away from the principle of court passivity (with respect to proof-taking) that had been established by the 1995 amendments. The enforcement of the 1995 amendments had highlighted the danger that would arise if a court were to refuse to collect evidence: such inaction could prevent the court from reaching an objective truth in the case before it. Because a party is not always able to present the evidence that is necessary to support its case, the effect of the 1995 amendments was to force the courts to issue judgments on bases of insufficient evidentiary proof. In many instances, the result was a judgment based on an incomplete understanding of the real situation. As a consequence, the real protection of rights could not be achieved. During the drafting of the 2002 CCP, most of the district courts reported to the Drafting Committee that the 1995 changes did not work well enough.

Today, the court and each of the disputing parties share an active role in the process of proof-taking. The allocation of this principle in the legislation is a complex problem from a law-making point of view, and it has become the main challenge for the authors of the CCP. This principle

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[21] Arbitrazh (commercial) state courts should be distinguished from arbitral tribunals, which also exist in Russia. Arbitrazh (commercial) courts are charged with settling economic disputes and are courts of general jurisdiction that deal with disputes between individual citizens. Therefore, two kinds of adjudicative procedure exist in Russia: arbitrazh and civil procedure. The first is regulated by the *Arbitrazh Procedural Code*, and the second by the CCP.

[22] This is in contrast to many European civil law countries, where courts of cassation usually decide only questions of law.

[23] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford, New York: Clarendon Press, 1989), at 252.

is stipulated in the 2002 CCP in the following manner: the court should determine which circumstances are important for the case and which of the parties should provide the proof. As a rule, the parties bear the responsibility for presenting the law and the facts. In a case where it is difficult for the parties to obtain and present the necessary proof, however, the judge can participate in the process of proof-taking. Therefore, the capacity of the court to play an active role is greater under the new 2002 CCP than it was under the 1995 amendments. However, the court does not perform the function of investigator in civil cases in the same way that it did under the 1964 Soviet Code. The substance and the conceptual framework of the 2002 CCP generate a harmonic combination of adversarial principles that are based on the principles of party initiative and active court investigation. I believe that this combination, which has been compiled from different judicial models, is well suited to the unique culture of Russia and that it serves to successfully protect the rights of the Russian people.

The next exceptional feature of Russian civil procedure is the role of the procurator. The procurator is a unique element of the Russian legal system,[24] established by Peter I in 1722.[25] Under the imperial 1864 Russian Code, the procurator could take part in a case, although the number of cases that he could participate in was limited. It was not only in Russia that he played a huge role in Soviet civil procedure, but also in other socialist countries.[26]

The 1964 Soviet Code granted the procurator a wide range of authority. He or she was simultaneously a participant in the case and a supervisor of the court's activities. He or she had the ability to initiate adjudication in order to protect the rights of any person. Additionally, the procurator could intervene in the process at any stage, if necessary, in order to protect the interests of the public or of individuals and, to this effect, he or she could give opinions concerning the case as a whole. The procurator's purpose in civil proceedings was to ensure that all judicial acts were lawful and well grounded. The tremendous power of the

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[24] See Harold J. Berman, *Justice in the U.S.S.R.: An Interpretation of Soviet Law* (Cambridge: Harvard University Press, 1963), at 238.

[25] See William E. Butler, *Russian Law* (Oxford: Oxford University Press, 2003), at 25.

[26] See, *e.g.*, R. Mańko, "Is the Socialist Legal Tradition 'Dead and Buried'? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure" in T. Wilhelmsson, E. Paunio & A. Pohjolainen, eds., *Private Law and the Many Cultures of Europe* (The Hague: Kluwer Law International, 2007) 83, at 92-94; J.S. Stalev, *Българско гражданско процесуално право* [*Bulgarian Civil Procedural Law*], (София: Наука и Изкуство, 1979), at 375-80.

procurator in the Soviet civil process was a moot point and, for this reason, many proceduralists have been critical of the role.[27]

Under the 2002 CCP, this role was modified and limited, although the procurator can still participate in a case. Today, he or she has the right to initiate a case only to protect public interests or the interests of individuals who are unable to apply to the court themselves because of illness, age, disability or another valid reason. A procurator who initiates a case is entitled to all of the procedural rights and duties of the plaintiff, albeit with two exceptions. The procurator has neither the authority to make an amicable settlement, nor the responsibility to pay court expenses. If the procurator changes his or her mind after filing a petition for the protection of another person, the case will still be considered. By 2004, 5,990 cases had been initiated in the arbitrazh courts by procurators. Of those, 510 (or 8 per cent) were resolved in favour of the procurator.

Another exceptional feature of Russian civil procedure is the supervisory proceeding. Review by the way of supervision is a special procedure that allows additional re-examination of judgments that have already entered into legal force. It stems from legislation in the Russian Empire that was effective from the 17th through to the 19th centuries.

During the Soviet era, the right to apply to the supervisory court belonged only to a limited number of officials, such as chief judges, their deputies, the Procurator General and his deputies. The participants in the case had no such right. In 1980, 8,618 decisions were revoked by way of this method. In contrast, approximately 12,500 decisions were revoked through supervisory proceedings in 1989.

In modern Russia, review by way of supervision is regulated in a different manner. It is stipulated in the Constitution and the new 2002 CCP. It exists in addition to instances of appeal and cassation, and it allows re-examination of judgments that have already entered into legal force, including judgments that have been decided on cassational appeal. The right to apply to the court of supervision belongs only to the participants of the case and any other persons whose rights were abused by the judgment. A procurator who participated in the case is also entitled to apply to the court of supervision. Appeals via supervision may be considered only by a presidium of the Supreme Court, by a military assembly of the Supreme Court, by a judicial tribunal of the Supreme Court (for civil

[27] See, *e.g.*, C. Osakwe, "The Public Interest and the Role of the Procurator in Soviet Civil Litigation: A Critical Analysis" (1983) 18 Tex. Int'l L.J. 37, at 87-89; J.N. Hazard, *The Soviet System of Government* (Chicago: University of Chicago Press, 1980), at 208-209.

cases), by a presidium of a military court or by a presidium of the Supreme Court of the "subject" (state) within the Federation. It is possible to appeal to a court of supervision within one year from the day that a judgment enters into legal force. Cases are considered in the court of supervision for no longer than one month, except in the case of the Supreme Court, where cases may be considered for two months.

When reviewing a case by way of supervision, the court considers only questions of law on the basis of the materials that are available in the case. Although a supervisory court may refuse to accept the findings of fact that were made by lower courts, it has no power to establish new facts or to consider new evidence. As a general rule, the court verifies "the correctness of the application and interpretation of norms of material law and norms of procedural law by the courts of first and cassational instance", but only within the limits of the arguments that are contained within the appeal. In the interest of legality, however, the higher court also has the discretionary option to go beyond the limits of the appeal.

A court of supervisory review may render a new judgment when it is not necessary to consider additional facts or evidence. This method is used by courts of general jurisdiction to consider some 300,000 appeals every year. In 1996, 15,215 decisions were abolished in this way. In 2002, 20,270 decisions were overturned by supervisory review, and this accounted for one-third of all abolished decisions. In contrast, 17,482 decisions were abolished in 2004 through supervisory review (after the adoption of the 2002 CCP), accounting for one-fifth (20 per cent) of all abolished decisions. The Russian Supreme Arbitrazh Court receives about 20,000 appeals every year for supervisory review. In 2004, it received 19,935 appeals, but only 240 of them reached a trial session.

The possibility that a judgment that has already entered into legal force can be re-examined is therefore a moot point. One might wonder whether or not this possibility conflicts with the principle of *res judicata*. On this matter, there are two points of view. Some scholars believe that the facility of supervisory review represents an additional opportunity to correct improper decisions and rectify judicial errors.[28] Others do contend, however, that there is, indeed, a conflict with the principle of *res judicata*. In this context, the positions of the European Court of Human Rights ("ECHR") may be interesting. In *Ryabykh v. Russia*,[29] the ECHR

[28] See, *e.g.*, M. Treushnikov, *Grajdaski Process* [*The Civil Procedure*] (Москва: Городец, 2006), at 552 [hereinafter "Treushnikov"].

[29] Application no. 52854/99 (Strasbourg: July 24, 2003), online: <http://sutyajnik.ru/rus/echr/judgments/ryabykh_eng.htm> [hereinafter "*Ryabykh*"].

simultaneously maintained two different positions on the Russian supervisory review procedure. On one hand, it held that review by way of supervision conflicts with the principle of *res judicata*.[30] On the other hand, the ECHR held that supervisory review does not infringe *res judicata* because it is used to rectify judicial errors.[31]

Another exceptional feature of Russian civil procedure is the original status of judicial precedent as a source of Russian civil procedural law. Classical civil tradition recognizes only statutes, regulations and customs as sources of law.[32] Historically, judicial decisions are conceived to be a source only of common law.[33]

In Russia, there is no rule that either rejects or acknowledges judicial precedent as a source of law. As a result, there are two notions in the Russian legal doctrine on this matter: judicial precedent could be or could not be a source of law.

In fact, judicial precedents comprise:

- rulings of the Constitutional Court;
- "guiding explanations" of the supreme courts; and
- ordinary judicial decisions.

Because the legal force of each of these kinds of precedent is different, each of them should be considered differently in terms of being a source of Russian civil procedural law.

The constitutional court could declare that a statute is unconstitutional. As a result, other courts would not be able to apply this statute. Therefore, where courts apply the rulings of the constitutional court, they are effectively using judicial precedent.

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[30] *Id.*, at paras. 52, 55-57. See also *Pravednaya v. Russia*, application no. 15242/04 (Strasbourg: April 2, 2009), online: <http://ius.info/EUII/EUCHR/dokumenti/2009/04/CASE_OF_KUZMINA_v._RUSSIA_02_04_2009.html> [hereinafter "*Pravednaya*"], at para. 25.

[31] *Ryabykh*, *id.*, at para. 52; *Pravednaya*, *id.*, at paras. 25, 28.

[32] See, *e.g.*, Merryman, *supra*, note 1, at 23. At the same time, precedents have recently become very important in some countries of civil law jurisdiction. See, *e.g.*, W. Wiegand, "Americanization of Law: Reception or Convergence?" in L.M. Friedmann & H.N. Scheiber, eds., *Legal Culture and the Legal Profession* (Boulder: Westview Press, 1996), at 147. In Germany, precedents are considered to be an independent source of law. See R. Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (Oxford: Oxford University Press, 2001), at 178. In France, many academics accept the creative, normative role of the judiciary. See, *e.g.*, M. de S.-O-l'E. Lasser, "Judicial (Self-) Portraits: Judicial Discourse in the French Legal System" (1995) 104 Yale L.J. 1325, at 1351-55.

[33] See, *e.g.*, R. Pound, *The Spirit of the Common Law* (Boston: Beacon Press, 1999), at 182; B. Bix, *Jurisprudence: Theory and Context* (London: Sweet & Maxwell, 2003), at 145-49; R. Cross & J.W. Harris, *Precedent in English Law* (Oxford: Oxford University Press, 1991), at 3.

"Guiding explanations", which are made by supreme courts, stem from the Soviet era, when these courts were required to fill gaps in the legislation. In contemporary Russia, the principles of judicial independence and of judicial subordination only to the law are stipulated in the Constitution. As a consequence, courts are forbidden from taking into account the "guiding explanations" of higher courts. In actual fact, however, they often cite these "explanations" in their judgments. Moreover, such "explanations" are published cumulatively in book form[34] and electronically.

Ordinary judicial decisions are not as popular in Russian legal practice as the "guiding explanations" are. Nonetheless, they are also taken into account by lawyers, advocates and, sometimes, even judges. Moreover, they are also published.[35]

In summary, I would like to point out that, even though there is no formal rule that either rejects or acknowledges it, judicial precedent is not ignored by Russian judicial practice.

V. CULTURAL AND HISTORICAL BACKGROUND

In my opinion, Russia's unique type of civil procedure stems from two sources — historical events and Russian culture. As I have discussed above, there were different periods in Russia's history when lawmakers introduced continental or Anglo-Saxon features of civil procedure. For example, the passive court of the common law was introduced in the 1864 Russian Code. The Soviet civil procedure should be viewed as a radical solution to the continental model. Then, in 1995, common law passivity was reintroduced, although it only remained in effect until 2002.

One should dwell on the questions of the cultural aspect and the cultural background of Russian civil procedure. These phenomena could be defined as a fusion of collective and individualistic views. To this effect, there are two widespread cultural models: the first one is based on individualism, and the other on collectivism.[36] Collectivism is defined as a

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[34] See, *e.g.*, *Сборник постановлений Пленумов Верховного Суда СССР и РСФСР (Российская Федерация) по гражданским делам* [*Collection of Decrees of Plenums of the Supreme Courts of the USSR and RSFSR (Russian Federation) with Regard to Civil Cases*] (Москва: Городец, 2001).

[35] *Судебная практика по гражданским делам* [*Judicial Practice with regard to Civil Cases*] (Москва: Городец, 2004).

[36] See, *e.g.*, D.G. Myers, *Social Psychology* (New York: Worth, 2001); M. Calenkamp, *Individualism versus Collectivism* (Rotterdam: Filosofische Studies, 1993); and M.H. Thompson, "Individualistic and Collectivistic Liberty" (1940) 37 J. Philosophy 14, at 382-86.

moral principle that asserts the priority of the group over that of the individual, or as a social organization in which the individual is considered subordinate to a social collectivity, such as the state or the nation.[37] Individualism is defined as a moral principle that stresses the self-directed, self-contained and comparatively unrestrained individual or social organization, the latter of which exists, in large measure, to serve and protect the individual.[38] In such a case, society becomes the background to the interests of individuals.[39] In collectivism, the law aims to protect the interests of society as a whole and to achieve common goals, while the law of individualism primarily protects the interests of individual members of society. The latter is focused on achieving individual goals.[40] This problem was a moot point one century ago.[41] It has become important in modern times as a result of the process of globalization.

Law is a form of social control.[42] However, it is not the only one; there are some other non-legal and informal mechanisms of social control. There is a widespread notion that law is more effective, for the purpose of control, in societies that have complex social structures. Following this point of view, perhaps we can make the inference that law is not an effective means of control in less "civilized" societies. The reality for many — if not all — nations, however, is that law is not necessarily as effective as other mechanisms of social control. Certain mechanisms, such as shaming or open disapproval, could be more effective in some societies. For example, in Japan and other Asian countries, law is less effective in social regulation than non-legal mechanisms are. Nevertheless, we would never consider these countries to be non-"civilized", as they are among the world's most industrialized nations. In truth, their systems of non-legal social control discourage antisocial conduct more effectively than any legal system could. Sometimes, however, a legal

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[37] See Graig Calhoun, ed., *Dictionary of the Social Science* (Oxford: Oxford University Press, 2000), at 78; *The Encyclopedia Americana — International edition*, vol. 7 (1997), at 239 [hereinafter "*Americana*"]; and *Britannica*, *supra*, note 9, vol. 3, at 453.

[38] See Calhoun, *id.*, at 228; *Americana*, *id.*, vol. 15, at 69; *Britannica*, *id.*, vol. 6, at 295.

[39] See J. Crittenden, *Beyond Individualism: Reconstructing the Liberal Self* (Oxford: Oxford University Press, 1992), at 77.

[40] See, *e.g.*, P. Sandevoir, *Introduction au Droit* (Paris: Dunod, 1991); J.-L. Bergel, *Theorie Generale du Droit* (Paris: Dalloz, 1985).

[41] See, *e.g.,* F. Cosentini, *La Societe Future, Individualisme ou Collectivisme?* (1905).

[42] R. Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1925); Vago, *supra*, note 3, at 4, 19; H. Cairns, *The Theory of Legal Science* (New York: The University of North Carolina Press, 1941), at 22.

conquest has proven to be the best way to destroy the power of a previous regime of elites.[43]

The problem is that some societies are more adaptive and, hence, more amenable to legal regulation than others are. From my point of view, contemporary law — as a form of social control — has been created in the political, economic and social circumstances of European culture. Due to the expansion of Western civilization (based largely on its technological advantages) throughout history, Western values and laws have now become widespread as both institutions and influences that extend around the world. It is necessary to note, however, that reception of these laws, as a form of social control, has rarely been voluntary. In most cases, Western laws have been imposed on other nations through the use of external force, and this is especially true in many instances of common law reception.[44] In other cases, "civilized" governors of continental law have facilitated a more internal adoption of Western norms (in order to more gradually and quietly usurp the local traditions).

Legal regulation is often treated by the original members of these societies as an alien element of social control.[45] Although these indigenous majorities tend to merely acknowledge the existence of legal regulation, they also attempt, as far as it is possible, to avoid any contact with the legal system. Regardless of whether they are innocent or guilty, they consider it better not to be involved at all in the legal process. This reaction implies the degree of fear and the lack of confidence that these people have with respect to legal regulation.

Under these circumstances, it is obvious that law — as a form of social control — is more effective in the societies where it was created than in those where it was imposed or implanted as an alien element. Nevertheless, it remains widespread as the main mechanism of social control throughout the modern world. In some countries it is effective, while in others it is not. Law should reflect the social, economic and political climate of a society. The law of one society differs from that of another by legal culture.[46]

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[43] Lawrence M. Friedman, *Legal Culture and Social Development* (1969) 4 Law & Soc'y Rev. 29, at 43 [hereinafter "Friedman"].

[44] See, *e.g.*, Jeannine M. Purdy, *Common Law and Colonized Peoples* (Aldershot: Ashgate, 1997).

[45] See O. Oloruntimehin, "The Status of Informal Social Control and Dispute Resolution — An Analysis of African Societies" in L. Sebba, ed., *Social Control and Justice* (Jerusalem: Magnus Press, Hebrew University, 1996), at 332-42 [hereinafter "Oloruntimehin"].

[46] Vago, *supra*, note 3, at 3.

I believe that the Russian culture contains elements of both cultural models: collectivism and individualism. Consequently, it cannot be adequately related to only one of them.[47] In different periods of history, the Russian legislature has rotated through diametrically opposed views when referring Russia to one or the other of these cultural types. Hence, rules of law were based either on individualism or on collectivism. Neither the former nor the latter perfectly correspond with the moral spirit of Russian society. Hence, newly introduced legal norms could rarely garner the support of Russian society, and the result was a low level of compliance with law and order.

Many scholars have noted a general and persistent disrespect for the rule of law in Russia.[48] I believe, however, that the reason for this phenomenon is not an unwillingness on the part of Russia's citizens to obey the rules of law, but rather a conflict that arises between the legislation and the reality of social relations within Russian society. The law is not a simple matter of export and import. When establishing norms, it is always necessary to take into account the cultural specificity of a society. As Montesquieu noted, "laws should be in such compliance with features of nation for which they are made, that only in very rare cases laws of one nation might become applicable for another".[49] It has been noted by many researchers that there is a strong connection between culture and law,[50] and especially between a nation's culture and its civil procedural law.[51] This has become especially important in the modern era, when

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[47] See Dmitry Y. Maleshin, "Some Cultural Characteristics of the New Russian Code of Civil Procedure of 2002" (2005) 10 Zeitschrift für Zivilprozess International 385; Dmitry Y. Maleshin, "O Novo Código De Processo Civil Russo de 2002" (2005) 121 Revista de Processo 159.

[48] See K. Hendley, "Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law" (1999) 8 E. Eur. Const. Rev. 89, at 94; K. Hendley, "'Demand' for the Law in Russia — A Mixed Picture" (2001) 10 E. Eur. Const. Rev. 72; V.A. Tumanov, "О правовом нигилизме" ["On the Legal Nihilism"] (1989) Советское государство и право № 10 [Soviet State and Law] 21.

[49] Montesquieu, *De l'esprit des loix, ou du rapport que les loix doivent avoir avec la Constitution de chaque Gouvernement, les Meurs, le Climat, la Religion, le Commerce, &c: à quoi l'Auteur a ajouté des recherches nouvelles sur les Loix Romaines touchant les successions, sur les Loix Françoises & sur les Loix Féodales* (M.DCC.XLIX).

[50] See, *e.g.*, R.C. Post, "Fashioning the Legal Constitution: Culture, Courts and Law" (2003) 117 Harv. L. Rev. 4, at 52-56, 80-86; D. Nelken & J. Feest, eds., *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001), at 4.

[51] For work reflecting this approach, see Oscar G. Chase, *Law, Culture, and Ritual: Disputing Systems in Cross-Cultural Context* (New York: NYU Press, 2005) [hereinafter "Chase, *Culture*"]; Oscar G. Chase, "Culture and Disputing" (1999) 7 Tul. J. Int'l & Comp. L., 81; Oscar G. Chase, "Some Observations on the Cultural Dimension in Civil Procedure Reform" (1997) 45 Am. J. Comp. L. 861; Michele Taruffo, "Transcultural Dimensions of Civil Justice" (2000) 23 Comp. L. Rev. 1; S.N. Subrin, "Discovery in Global Perspective: Are We Nuts?" (2002) 52 DePaul L. Rev. 299, at 312; Thomas O. Main, *Global Issues in Civil Procedure* (New York: Thomson/West, 2006),

globalization and the creation of a multi-polar culture are important and defining phenomena.

The tasks of the modern Russian legislator are to conduct detailed research of the moral ideals of Russia's citizens and then to create rules of law that reflect the demands of both Russian society as a whole and its individual members. Thus, Russian law should take into account both individualistic and collectivistic traditions, as well as ideals and moral views that exist in Russian society. This means that, in the process of drafting legal regulation, a "golden mean" between two moral traditions should be found.

The same principle should also be taken into account in the lawmaking of civil procedure. The norms that are successful throughout much of Europe do not work properly in Russia.[52] The 1864 Russian Code was one of the best of the European codes, but it was unsuccessful in Russia.[53] Twenty years after its adoption, a special drafting committee was established to prepare a new code.

The Soviet civil procedure was continental in a radical sense, but the laws worked primarily on paper. One of the reasons for this failure was the general Soviet approach to the law, in which non-legal regulation was overwhelming.[54]

As for the common law initiatives of the 1990s, it is necessary to observe that most of the 1995 amendments to the CCP did not work well enough.[55] In Russia, the court could not remain passive because of the widespread, collective views of Russian society. Therefore, the common law model — at least in regard to the role of the judge — is unworkable in Russia. As a result, the judge's role was changed in the 2002 CCP.

The Russian example is not one of cultural influence on the civil process. There are several ways in which culture can affect the law and, specifically, the law of civil procedure. First of all, not all societies use a formal legal system in the Western style. Traditional societies rely mostly on custom. Second, law is inseparable from the interests and goals of

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at 5. The importance of this issue was also emphasized during several conferences. See, *e.g.*, XII World Congress on Procedural Law (Mexico: September 2003); Colloquium of the International Association of Procedural Law (New Orleans: Tulane University, October 1998); Colloquium of the European University Institute (Badia Fiesolana: May 1977). See Mauro Cappelletti, ed., *New Perspectives or a Common Law of Europe* (Leyden: Sijthoff, 1978).

[52] See, *e.g.*, H.J. Berman, *Justice in the U.S.S.R.: An Interpretation of Soviet Law* (Cambridge: Harvard University Press, 1963), at 216.

[53] See Cappelletti, "Aspects", *supra*, note 17, at 875.

[54] C. Sypnowich, *The Concept of Socialist Law* (Oxford: Oxford University Press, 1990), at 155.

[55] See Treushnikov, *supra*, note 28.

concrete peoples. Therefore, respect for the law by members of a society should be based on a clear understanding of the nature of the legal practice.

In Western societies, it is assumed that legal behaviour is the measure of moral behaviour. The subject of this assumption is different in collectivistic societies. There is a very significant gap between the law and reality in many collectivistic societies. Japan is a good example of a collectivistic society. The Japanese tradition, which emphasizes the ascendancy of the collective interest over the interests of individual members, takes its root from Confucian thought. This primacy of collective interests is one of the most important pillars of Japanese society.[56] In China, the term "rule of law" had — at least until the end of the 19th century — a negative connotation.[57]

Dispute resolution is a reflection of the culture in which it is embedded.[58] It reflects and expresses a culture's metaphysics, values,[59] psychological imperatives and history, and its economic, political and social organization.[60] Western society is litigation-oriented. In contrast, traditional and collectivistic societies do not make use of a formal dispute-resolution mechanism. They prefer to rely upon conciliation or mediation by moral or divine authority.

In Japan, the rates of litigation and adjudication are extremely low. The main reason for this is the cultural impetus to minimize the use of law.[61] The total number of judges has not increased since 1890 (when there was one judge for every 22,000 people), so that there is now only one judge for every 60,000 persons. Disputes are generally settled out of court. The Japanese prefer conciliation and mediation, which agree with Confucian thought. Reputation is one of the mechanisms of social control. To lose face in Japan is to lose the trust and the cooperation of others and to invite social ostracism — a personal and social disaster that is comparable to imprisonment in Western societies.[62] Litigation divides the parties definitively into a winner and a loser. In contrast, conciliation

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[56] C. Kim & C.M. Lawson, "The Law of the Subtle Mind: the Traditional Japanese Conception of Law" in Varga, *supra*, note 1, 282, at 282 [hereinafter "Kim & Lawson"].

[57] Dorothy H. Bracey, *Exploring Law and Culture* (Long Grove: Waveland Press, 2006), at 35 [hereinafter "Bracey"].

[58] Chase, *Culture*, *supra*, note 51, at 2.

[59] Chase, "Exceptionalism", *supra*, note 9, at 278.

[60] W.L.F. Felstiner, "Influences of Social Organization on Dispute Processing" (1974) 9 L. & Soc. Rev. 63.

[61] Kim & Lawson, *supra*, note 56, at 275, 290-94.

[62] D. Black, *Sociological Justice* (Oxford: Oxford University Press, 1989), at 85.

teaches both parties what their duties are in order to restore harmony between them. For these reasons, litigation is not popular in Japan.

The same situation seems to exist in China. Three philosophical traditions affect legal regulation in China: the Confucian, the Legalist and the Buddhist traditions.[63] According to Confucian ethics, disputes should be settled privately, involving no third party. If the disputants should bring their problem to court, the assumption is that both of them are stubborn, uncompromising people who are unable to sacrifice their personal interests for the peace of the community. Therefore, judicial proceedings are unpleasant for most people and many try to avoid them.[64]

In African societies, 60 per cent of all disputes are settled through informal means, such as third-party mediation by members of the family, friends, neighbours, ward heads, chiefs, *etc*.[65] There are several reasons for this. First, people are intimidated by the legal process — perhaps even frightened by it — and therefore try to avoid it. Second, the legal process is too time-consuming. Third, most people have no confidence in the legal system. In some countries, dualistic systems exist. Native ethnic groups settle disputes through the use of customs that differ from the formal law that is applied at the centre.[66]

Both Jewish and Islamic laws allow judges to abstain from pronouncing judgment in certain cases. In Jewish law, the judge must, as a rule, reach the proper decision in accordance with his responsibility towards God, but without fear of the consequences of his decision. When a judge is suspicious of the plaintiff's intentions, the judge should refrain from judgment. The same rule exists in Islamic law: when a judge feels unable to come to a correct decision on the basis of the evidence that has been offered, the judge is allowed to abstain from the judgment.[67]

Therefore, culture is one of the most important factors that determine the specificity of civil procedure. The best example of this reciprocal influence is Russian civil procedure.

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[63] L.T. Lee & W.W. Lai, "The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist", in Varga, *supra*, note 1, at 225-47.

[64] Bracey, *supra*, note 57, at 35.

[65] Oloruntimehin, *supra*, note 45, at 338.

[66] Friedman, *supra*, note 43, at 31.

[67] A.M. Rabello, "Non Liquet: From Modern Law to Roman Law" in A.M. Rabello & A. Zanotti, eds., *Developments in European, Italian and Israeli Law* (Milan: A. Giuffre, 2001) 333, at 361-62.

VI. CLOSING REMARKS

Pure civil law or common law procedural constructions do not work properly in Russia. One of the reasons for this is the unique composition of Russian culture. As a result, Russian civil procedure consists of both continental and Anglo-Saxon features of civil procedure. This phenomenon is further explained when one looks at the history of Russian civil procedure and the varying degrees of success that different approaches have obtained. Additionally, Russian civil procedure contains specific, exceptional features that are not found in civil law or common law procedural models. Therefore, I would like to conclude that Russian civil procedure does not relate to either the civil law or the common law procedural systems, but should instead be viewed as a specific, exceptional procedural system.

It should be noted that similar civil procedural outlines exist in most of the countries of the former Union of Soviet Socialist Republics ("USSR"). The civil procedural laws in these countries share very similar historical and cultural backgrounds. Moreover, I would bet that a similar cultural framework exists in other countries of middle Eurasia, as well as some nations in Latin America (where pure civil law and common law procedural constructions are also unsuccessful). I therefore think that, in today's world, it is better to distinguish not only between civil law and common law procedural systems, but also between other exceptional models. The recent evaluation of the two aforementioned "classical" types of civil procedure supports this contention. It is obvious that these models do not exist today, at least not in their classical sense.[68] The many changes to the basic principles of each tradition in countries throughout the world, combined with the overall blending of their characteristics, has led to a profound divergence from their respective theoretical forms. An excellent example of this can be found in the recent comparative assessment of the role of the judge in each system.

The role of the courts in civil process is increasing on a global scale and this is having an impact on most procedural systems. The frontier between the two classical models of civil procedure has become blurred, and it now appears possible that a united procedural system could be emerging. At the same time, some distinctive and unique procedural systems still persist. The Russian system is one of them. A comparison of the various Russian civil procedures of historic times with that of the

[68] Jacob, *Perspective*, *supra*, note 8, at 4.

modern day demonstrates how legislative efforts have sought to converge the classical systems in order to generate the best possible solution for the Russian people: a unique system that is specially suited to the distinct culture of Russia. Today, as a global, unified approach to civil procedure is being developed, the Russian experience may be both enlightening and helpful for many countries that are developing both national and international rules of civil procedure.

China's Developmental State and the Challenge of Formal Process: The Case of Counterfeit Medicine

Margaret Y.K. Woo* **and Yanmin Cai****

I. INTRODUCTION

Civil litigation is conventionally understood as falling within one of two models — that is, the adversarial or the inquisitorial models of procedure. Even as the divide between these two traditional, contrasting models is eroding, it is important to recognize that there are other models, including one exemplified by the developmental state. The developmental state is characterized by deep state involvement in economic development and, in the case of China, state involvement in guiding the litigation process and the resolution of major disputes.

Free market reformers have long argued that the freedom of the market leads to greater economic wealth and freedom in the political realm, and that a legal system that is established to support such markets will also, inevitably, lead to rule of law and a more democratic state. A democratic state, they argue further, gives voice and promotes greater inclusiveness, not only in lawmaking, but also in law enforcement. The United States, for example, with its historic distrust of government authorities, has entrusted private civil litigants with the role of enforcing legal norms. With this broad, public function for civil litigation, American civil procedure has developed to accommodate easier access to courts for individual citizens and to provide greater autonomy to plaintiffs through liberal pleading rules, generous discovery provisions, and easy joinder of parties and claims.

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To what extent does China challenge the above assumptions about law, markets and democracy? For one, China's transition to a vibrant economy — with an admirable nine per cent annual growth — has been accomplished less through the "shock therapy" of a free market, and more through carefully calibrated reforms with strong central control; in other words, through a strong developmental state. A developmental state is characterized by the use of state interventionist measures to foster development. In its economic success, the Chinese state retains substantial discretion and control over the form and the manner of development.[1] In its legal reforms, the developmental state also retains substantial control over legal institutions, including the process of litigation.

In recent years, China has experimented with participatory law-making by opening up its laws for citizen participation and comment. As the rate of civil litigation has increased dramatically in the most recent decades, China has also had an increase in private citizen law enforcement. Importantly, China now faces the dark side of economic development, with incidents of consumer fraud — ranging from contaminated milk to pharmaceutical poison to lead in children's toys — that all point to a greater need for consumer remedies and greater public protection. Within this environment, will China also lower its barriers to courts, and procedurally provide for the enforcement of laws through private civil litigation? Or will it instead reassert the authority of the state in order to guide the resolution of such important disputes?

Through the analysis of one recent pharmaceutical injury case, this paper analyzes the progress of Chinese civil litigation and predicts the role of civil litigation in China's developing economy. Its thesis is that, while ordinary litigation will likely be litigated by private parties and adjudicated by the courts in China, litigation of greater public significance will follow the "new developmental state" model with greater state involvement. This will be reflected in the civil procedure rules that are adopted and adapted to accommodate state intervention. In other words, civil litigation and procedure will follow two tracks, depending upon the scope and the importance of the subject matter. It is essentially a "one country, two systems" phenomenon, transported to the legal arena.

In particular, how cases of "public significance" make their way through the courts and the political process is indicative of the role that law plays in China today. The pharmaceutical injury case that is discussed

[1] For discussions of the developmental state, see Amiya Kumar Bagchi, "The Past and Future of the Developmental State" (2000) VI Journal of World-Systems Research 398.

below reveals three strategies for cases that are viewed by the Chinese state as socially significant: (1) state-based mediation as the preferred method of dispute resolution; (2) state control over the acceptance of cases; and (3) state involvement in litigation, from the shaping of the parties and the issues in a lawsuit to the crafting of the remedy. Through such procedural mechanisms as joinder of parties and burden of proof, one can tease out the delicate balance between the rights and the obligations of the involved parties *vis-à-vis* the new developmental state.

II. THE ARMILLARISIN A CASE

In April 2006, patients in the Third Affiliated Hospital of Sun Yat-sen University[2] ("the Hospital") in Guangzhou City suffered from acute renal failure shortly after taking Armillarisin A injections. These injections were produced by Qiqihaer the Second Pharmaceuticals Limited ("Qiqihaer Pharmaceuticals"), and distributed by Guangdong Medicines and Health Products ("Guangdong Medicines") under an agreement with another distributor, Jinhengyuan ("Jinghengyuan"). After a preliminary diagnosis, the Hospital stopped the use of this medicine and reported what they had found to the Centre for ADR Monitoring, that is, the institution monitoring the quality and the safety of medicine in China. The central government and the local government promptly formed, respectively, an investigation team and an expert panel. The panel agreed with the Hospital's suspicions and concluded that the Armillarisin A injections had produced a non-negligible effect on the patients with acute renal failure and neurologic lesions. The Centre for ADR Monitoring issued an order to stop the nationwide distribution of Armillarisin A medications.[3]

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[2] The Hospital was given an award by the Guangdong provincial government and the central government for its great contribution to fighting severe acute respiratory syndrome ("SARS") in 2003. The Chinese President, Hu Jintao, gave an instruction about a doctor of the Hospital, Deng Lianxian, who died of an infection while trying to save a patient suffering from SARS. In an interview in August 2007, conducted by the author about the cases of fake medicine, the director said that, while what they faced with SARS was a challenge of blood and death, what they faced in these lawsuits was a challenge of disgrace and forbearance.

[3] The Health Department of Guangdong Province formed expert panels on May 26, 2006 and July 12, 2006, respectively. A preliminary diagnosis was made after a series of tests on each patient that had taken Armillarisin A medications. On May 22, 2006, the Health Department made a request to the State Council and the Ministry of Health, asking that more experts be sent to diagnose the patients. The State Council assigned the Ministry of Health, the State Food and Drug Administration and the Chinese Medical Association to the job on May 27, 2006. Together, they formed an investigation team, into which they then proceeded to invite leading experts.

On July 19, 2006, the standing committee of the State Council, presided over by Prime Minister Wen Jiabao, concluded that this accident was caused by quality control personnel at Qiqihaer Pharmaceuticals, who had used fake pharmaceutical materials during the production process.[4] A criminal prosecution was launched, during which one of the defendants made the surprising admission that Qiqihaer Pharmaceuticals had bribed officials[5] to obtain a Good Manufacturing Practice ("GMP") certificate.[6]

In addition to the criminal prosecution, 61 patients asserted claims that they had been harmed by injections of the counterfeit medicine. Reflective of the dependence on the developmental state, injured parties from the contaminated medicine turned first to the government, rather than to the courts, for relief. About 60 of the injured patients sought relief from the provincial government, which, in turn, formed a coordinate team to mediate the claims. The team eventually asked the Hospital to compensate the patients. Over 40 patients settled with the Hospital.

III. THE MEDIATING STATE

This use of mediation, and, in particular, state-led mediation, represents but the latest turn in judicial policy reform in China.[7] Undeniably, mediation has had a prominent place in China since the early days of the People's Republic. The Maoist legal system exhorted judges to "rely on the masses, investigate and research, taking mediation as the principal method, and solve

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[4] See The CCTV News Report on July 19, 2006, online: <http://news.xinhuanet.com/video/2006-07/19/content_4856999.htm>. A transcript of the report may be found online: <http://www.yjjw.gov.cn/ReadNews.asp?NewsID=1223>. This case was also on the Internet at many sites, including: <http://news.xinhuanet.com/life/2006-07/21/content_4863864.htm>; <http://www.gov.cn/jrzg/2006-07/20/content_341034.htm>; <http://www.caijing.com.cn/2009-03-10/110116934.html>.

[5] See 余亚莲 (Yu Yalian), 曹晶晶 (Cao Jingjing). 二药假药案被告称厂方花10万购买GMP认证 *Southern Metropolitan Daily* (August 9, 2007); *Xinkuaibao Newspaper* (August 9, 2007), online: <http://www.chinalnn.com/Article/showPrint.asp?InfoID=26137>.

[6] "GMP" stands for Good Manufacturing Practice, a monitoring system that is meant to ensure the quality and the safety of products that are sold in the Chinese market. As a mandatory standard, it applies to the food and the medicine industries, and it requires manufacturing enterprises to maintain facilities in good condition, to use a reasonable production process, and to employ consistent quality control and a strict examination system.

[7] For a good discussion of the new emphasis on mediation, see Fu Hualing & Richard Cullen, "From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China" in Margaret Woo & Mary Gallagher, eds., *Chinese Justice* (forthcoming).

disputes where they arise".[8] Its emphasis was persuasion and education of disputants, rather than legal adjudication of their disputes.[9]

The 1980s and 1990s saw reform in Chinese civil justice. The judiciary became more professionalized and the civil justice system became more formalized, with an emphasis on adjudication over mediation. The 1982 *Code of Civil Procedure*[10] demoted mediation from "the principal method" of dispute resolution to a method that was "emphasized".[11] Further reforms resulted in the 1991 *Civil Procedure Law*,[12] which emphasized adjudication, voluntariness and party autonomy in civil cases. With an emphasis on party autonomy in civil cases, there was a corresponding shift in the burden of proof from the judges to the litigants. In many ways, Chinese legal reforms took on the patina of the adversarial system and an independent civil litigation process. Chinese citizens flocked to the courts and litigation rates rose dramatically in the 1990s.

But formal adjudication did not, to some eyes, provide an effective forum for the resolution of disputes in a realm of growing social conflict. As the economic boom in China continues to generate increasing disparities of power and income, recent years have seen greater social unrest, increased letters of complaint, and rising numbers of petitions (a method for seeking the review of a case after its final appeal) to governmental entities and courts. In 2005, President Hu Jintao called for the construction of a "harmonious society" in an effort to stem the tide of social unrest. Xiao Yang, then president of the Supreme People's Court ("SPC"), followed suit, and gave strong direction to Chinese courts to "mediate cases that could be mediated, adjudicate cases that should be adjudicated, combining mediation with adjudication, concluding the case and ending the dispute concurrently".[13] His message was that the ultimate goal is to end disputes — and adjudication is merely one avenue.

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[8] For a good discussion of the Maoist approach to "mass line" mediation, see Stanley B. Lubman, *Bird in a Cage: Legal Reforms in China After Mao* (Stanford: Stanford University Press, 1999), at 41-42.

[9] For a classic article on mediation during the Mao era, see Jerome A. Cohen, "Chinese Mediation on the Eve of Modernization" (1966) 54 Cal. L. Rev. 1201.

[10] Zhonghua Renmin Gongheguo Minshi Susong Fa (Shixing) [Civil Procedure Law of the People's Republic of China (For Trial Implementation)] (adopted March 8, 1982), translated in *Laws of the PRC, 1979-1982* (Foreign Languages Press, 1987), at 259-95.

[11] See Article 102, which specifies that if no agreement is reached through conciliation, "the people's court shall proceed to trial and not prolong the case with further conciliation efforts". *Id*., at 276-77.

[12] Zhonghua Renmin Gongheguo Minshi Susongfa [Civil Procedure Law of the People's Republic of China] (adopted April 9, 1991), translated in *The Laws of the People's Republic of China 1990-1992* (Foreign Languages Press, 1993), at 185-240.

[13] In 2002, the SPC, with the MOJ, passed *Opinions of the Supreme People's Court and the Ministry of Justice on Further Strengthening the Work of People's Mediation in the New Era*.

More significantly, in 2006, the Supreme People's Court selected particular categories of cases for enhanced mediation. These categories include: cases of great public interest that require the collaboration of the government and other relevant departments; class actions that involve a great number of people; complicated cases in which the parties' relationship is very tense and, according to evidence, neither party has a stronger case; cases involving matters that are not governed by any legislation; very sensitive cases and cases of great social concern; and reviews of petitions and retrials.[14] Since 2006, the Supreme People's Court acknowledged its retreat from a decade-long path of civil justice reform (which had been aimed towards adjudication), and a return to mediation — with an endorsement of enhanced mediation for cases of "great social concern".

What is interesting is that, while Chinese mediation is commonly used for family and neighbourhood disputes — as these are cases that require the personal knowledge or the special understanding of mediators such as the local residence or mediation committee — litigation is preferred for arm's-length economic disputes that involve tort, property or commerce.[15] Yet, for cases of mass torts at least, it is now the strategy of mediation — and, this time, mediation by the government and its relevant departments — that dominates, rather than class action and court adjudication. Indeed, class action and joint tort litigation are generally discouraged, both by a Chinese court's refusal to accept such cases and the imposition of stricter requirements for lawyers in taking on these cases. Instead, for mass torts cases, mediation happens with or without the request of the parties and by governmental departments, rather than through the "neutrality" of a formal court process.

In the Armillarisin A injection cases, it was the Guangdong provincial government that stepped in to establish a mediation working group (composed of members of the provincial ministry of justice, the public health division, the public security division, and the letters and petitions division). It directed the Hospital to mediate with and compensate the victims. This was done even though the Hospital might not have been the

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See《最高人民法院、司法部关于进一步加强新时期人民调解工作的意见》中办发(2002)23号, Zuigao renmin fayuan, sifabu guanyu jinyibu jiaqiang xinshiqi renmin tiaojie gongzuo de yijian, Zhongfaban (2002) No. 23., online: <http://sfj.luzhou.gov.cn/ReadNews.asp?NewsID=547>.

[14] 肖扬 (Xiao Yang), Zuigao Renmin fayuan guanyu kaizhan guifan sifa xingwei zhuanxiang zhenggai qingkuang de baogao [Report of the SPC on the situation of Launching Rectification and Reform to Regulate Judicial Behavior], online: <http://cms.npc.gov.cn:87/servlet/PagePreviewServlet?siteid=1&nodeid=1482&articleid=353846&type=1>.

[15] Aaron Halegua, "Reforming the People's Mediation System in Urban China" (2005) 35 Hong Kong L.J. 715, at 720.

party that caused the injury. The concern of the government was to compensate and restore the victims, rather than an adjudication of right from wrong, and the Hospital was in the best position to provide such compensation. Under these circumstances, the Hospital had no choice but to enter into negotiations with the victims.

This bifurcated process strategy (that is, to steer major cases towards mediation) was also utilized for other major cases, such as those arising out of the Szechuan earthquake, and again, in the Sanlu milk contamination cases. In both of these latter incidents, Chinese courts again refused to accept the resulting litigation, and, instead, relied on the executive branch to step in to negotiate, mediate, and, ultimately, broker settlements. In the Sanlu contaminated milk powder incident, for example, the estimated 300,000 injured victims had their claims similarly, quickly and quietly resolved through apology and financial compensation. The entire mediation was accomplished in less than a year, starting in September 16, 2008, when the state inspection services announced that contaminated milk had been sold, through to December 2008, when the criminal prosecution of the relevant parties took place (during which the former chairwoman of Sanlu pleaded guilty),[16] and ending with the announcement of compensation on January 8, 2009. By January 24, 2009, more than 262,662 families had accepted compensation (29,000 yuan for the death of a child, 4,400 yuan for children suffering from serious injuries, and 300 yuan for less serious cases). According to the Supreme People's Court, more than 95 per cent of the injured families have now accepted this compensation. Throughout the government's mediation, Chinese courts remained closed to the injured parties. Chinese scholars tout the completeness of this resolution: for the victims' families; for the companies involved, which have avoided bankruptcy; and for society at large, for which the disruption of economic and social stability has been mitigated.[17]

In sum, the 1980s and 1990s saw civil courts reformed and formal processes implemented in order to encourage the use of adjudication. This may have been done in recognition of the greater numbers of commercial disputes that were growing among strangers as a result of market reforms

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[16] Edward Wong, "Milk Scandal Yields Cash for Parents" *The New York Times* (January 17, 2009), at A10.

[17] See 范愉, 群体性侵害事件的多元化解决—三鹿奶粉事件与日本C型肝炎诉讼案的比较研究> 法学家 2009年第二期 (总第113期), Fan Yu, "Quntixing qinhai shijian de duoyuanhua jiejue-Sanlu naifen shijian yu Riben Cxing ganyan susongan de bijiao yanjiu" *Faxuejia* 2009, no. 2 (no.113). [Fan Yu, "Resolution of Group Torts: A Comparative Study of the Sanlu Milk Powder Incident and the Japanese Hepatitis B Litigation", Law Studies 2009, no. 2 (no. 113), online: <http://www.law.ruc.edu.cn/jurist/ShowArticle.asp?ArticleID=17363>.

and, also, because of the demands these disputes might place on the courts. In those years, Chinese courts were given greater breathing space to decide cases between two private parties, independent of central government dictates. There were even nascent efforts by the SPC to reinterpret national legislation to assist courts in dealing with complicated civil cases. In the more recent, more conservative trend focusing on maintaining social harmony, mediation has been re-emphasized, and the SPC, in a series of judicial interpretations, has steered particular, "socially significant" cases outside the courts, towards resolution through mediation. Chinese scholars and judges are rediscovering the virtues of mediation, including its efficiency, its cost effectiveness and its humanity.

IV. SHAPING THE LAWSUIT

Where mediatory justice fails, litigation begins. If litigation is accepted in socially significant cases, the Chinese state remains involved, both to shape the issues and to ensure that the appropriate parties are included and brought into the litigation. In the case of the Armillarisin A injections, 11 patients and their families did not settle their claims through government-sponsored mediation, and instead filed lawsuits against the Hospital. The other 10 patients and their families stayed on the sidelines, but kept a close eye on the ongoing trials. Although the plaintiffs' claims for relief were based on personal injuries caused by counterfeit medicine, they named the Hospital, rather than the pharmaceutical manufacturer, as the defendant in their lawsuits.[18]

The Hospital naturally insisted, in response, that it had purchased, examined and used Armillarisin A in accordance with the law and, therefore, it legally bore no liability. The Hospital also pointed out that it was the first to discover the problem with the medication and that it had reported its concerns promptly, thereby reducing the risk of further, nationwide injuries. According to the Hospital, the producer and the sellers of the product, not the Hospital, should be responsible for the damages to the plaintiffs. The Hospital then applied to the Court for permission to join

[18] The attorney who represented the plaintiffs explained to the court, and in media interviews, why they were suing only the Hospital. For one thing, Qiqihaer Pharmaceuticals had already been fined 19,200,000 yuan by the Food and Drug Administration in Heilongjiang Province, and the persons in charge had been prosecuted. As a result, the company was not in a position to provide compensation. Additionally, since there was no direct relationship between the plaintiffs and the pharmaceutical sellers, joinder of these defendants would lead to a protracted litigation that, ultimately, would not result in timely compensation to the plaintiffs.

the manufacturer, Qiqihaer Pharmaceuticals, and the distributors, Jinhengyuan, and Guangdong Medicines, as defendants in the lawsuits.

The Court initially agreed to order the producer, Qiqihaer Pharmaceuticals, to be joined, but refused to join Jinhengyuan and Guangdong Medicines to the lawsuits. In its Notification to the Hospital, the Court explained that

> [a]lthough Jinhengyuan and Guangdong Medicines are the sellers of Armillarisin A injections, they have no direct interests in this set of cases and shall not be the subjects of these necessary joint lawsuits. Furthermore, the plaintiffs did not consent to making the two sellers defendants.[19]

The Hospital filed an application to the Court for a reconsideration of this decision. In June 2007, the Court agreed, and it duly ordered that the two sellers also be joined as defendants. The plaintiffs' attorney disagreed with the Court's decision, arguing that the plaintiffs had the right of action, which included the right to determine which defendants to sue, and that both the Hospital's application of joinder and the Court's decision to grant it therefore compromised those rights. In an interview, the plaintiffs' attorney explained that such a joinder would lead to protracted litigation that would ultimately obstruct timely compensation to the plaintiffs.

This ability of the Chinese court to bring in new defendants without the consent of the plaintiffs speaks to the perennial tension between the preference for substantive justice and respect for party autonomy. Every legal system must address the right of the defendants to join interested persons in an action when the plaintiff has not brought suit against them. To what extent should a court order that the absent parties be joined? Should the Court obtain consent from the plaintiffs before the order is issued? With respect to the Chinese legal system, how the Court answered these questions in the Armillarisin A case is revealing about its views towards party autonomy.

In the United States, party autonomy is strong, albeit not unlimited. The plaintiff is "the master" of his or her litigation, and it is only in limited circumstances that the defendant and/or the Court can reshape the litigation. The *Federal Rules of Civil Procedure*[20] lay out the limited circumstances

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[19] A copy of the Notification of the Court to the Hospital is on file with the author Cai Yanmin.

[20] The *Federal Rules of Civil Procedure* can be found online: <http://www.uscourts.gov/rules/index.html> [hereinafter "Federal Rules"].

under which absent parties may be joined by the defendant. Under Rule 19(a), a person will be joined as a co-defendant by the Court upon request by the defendant *only* if: (1) in that person's absence, the Court cannot accord complete relief among the existing parties; or (2) disposing of the action in the person's absence may impair or impede a person's ability to protect the interest, or leave an existing party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. This rule, however, prevents the joinder of an absent party simply because the absent party is, in the defendant's view, the more appropriate party. If a defendant believes it is not responsible, the defendant's role is to deny and defend against the plaintiff's claim, but not necessarily to substitute parties.

The American Federal Rules also allow the defendant a limited right to bring in a third party under Rule 14, but only as a third party defendant *vis-à-vis* the defendant (not as a co-defendant *vis-à-vis* the plaintiff) if this third party owes a duty to the defendant. For example, if a defendant has entered into a contract with a third party to pay any liability that the defendant may owe to the plaintiff (*i.e.*, an indemnity agreement), then the defendant may bring a third party claim, under Rule 14, against the third party, asking that, if the defendant should be held liable to the plaintiff on the plaintiff's claim, the third party be ordered to pay whatever amount the defendant has been ordered to pay to the plaintiff. In that instance, however, the claim is that of the defendant who is seeking indemnification from the absent third party. In the United States, unless a defendant can meet the requirements of Rule 19 or Rule 14, an absent party may not be joined, over the plaintiff's protest, as a co-defendant on the plaintiff's claim. An absent party may not be joined just because the defendant thinks that the absent party is the true "guilty" party.

In contrast, joinder of defendants appears to be less restrictive in China. It seems to be less dependent on the will of the plaintiffs, and more to do with the perceptions of efficiency and substantive justice. Rule 119 of the Chinese *Civil Procedure Law*[21] states simply that, "[i]f a party who must participate in a joint action fails to participate in the proceedings, the people's court shall notify him to participate." This rule appears to provide the court with the discretion to join necessary parties with or without a request from the litigants. When a defendant

[21] Zhonghua Renmin Gongheguo Minshi Susongfa [Civil Procedure Law of the People's Republic of China] [amended in 2007], R. 119.

requests joinder, the court may order this joinder if, after its investigation, it finds that the request has a legitimate basis.[22]

Chinese scholars have attempted to provide further guidance by explaining that a necessary "joint action" arises when there are one or more claims that involve common rights and obligations, and several parties must initiate or respond to this lawsuit together. A determination that the claims should be tried as "necessary joint actions" means that the court cannot adjudicate them separately.[23] Of particular importance to the present case, perhaps, is the explanation of the Supreme People's Court that, in personal injury compensation cases, all joint tortfeasors — that is, all tortfeasors who intentionally or unintentionally jointly caused harm — shall be made defendants when the plaintiff sues only part of them.[24]

In the Armillarisin A cases, the ultimate decision to allow joinder of the defendants appeared to be based, in part, on the fact that the pharmaceutical producers and sellers were the real parties in interest.[25] The counterfeit medicines were under the control of the pharmaceutical producers and the distributors before being used by the plaintiffs. The Hospital had pointed out that, pursuant to Chinese laws and regulations, both the producers and the sellers had the obligation to maintain the quality of pharmaceuticals during the distribution, and, thus, the injuries caused by the counterfeit medicines in the market were due to the failures, by both the producers and the sellers, to fulfil these obligations.[26] In this way, the Hospital argued that the producers and sellers were the true interested persons in this series of cases.

The Hospital also maintained that there might even be two results — that is, if the litigation were to proceed between the victims and the Hospital, and the Hospital was then to proceed in a separate litigation against the manufacturer and distributors. If the plaintiff won in the first case and

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[22] Article 57, Zui Gao Renmin Fayuan Guanyu Shiyong Minshi Susongfa Ruogan Wenti de Yijian (Opinions on Questions of Applying Civil Procedural Law by the Supreme Court).

[23] Zhang Wusheng & Duan Housheng, *Biyao Gongtong Susong de Lilun Wuqu yu Zhidu Chonggou* (*Understanding and Reconstructing Necessary Joint Actions*), 1 Science of Law 112 (2007).

[24] Article 5, Zui Gao Renmin Fayuan Guanyu Shenli Renshen Sunhai Peichang Anjian Ruogan Wenti de Jieshi (the Explanation of Applying Law in Trial of Personal Injury Cases by the Supreme Court).

[25] An obligor refers to a natural person, legal person or other organization that shall bear the liability to compensate for damage accidents. Huang Songyou, Zui Gao Renmin Fayuan Renshen Sunhai Peichang Sifa Jieshi de Lijie yu Shiyong (Understanding and Applying the Explanation of Personal Injury Compensation by the Supreme Court) 24 (2000).

[26] See generally the second part of this article.

then the Hospital lost in the second case, the Hospital would incur full liability for compensation to the victims.

Rather than dismissing the case against the Hospital, however, the Court kept the Hospital in the case and joined all of the possible defendants. Viewing this case as one that constituted a necessary joint action, the Court concluded that the existing defendant had the right to demand joinder of the other parties, and that the Court could make the other parties defendants, even without the consent of the plaintiffs, on grounds of just adjudication. The Court reasoned that it could fully adjudicate responsibly only if all of the possible obligors were joined to the lawsuits. If other required persons were absent, and the Court determined liability merely on the basis of the plaintiffs' claims, the Court feared that the Hospital would face a substantial risk of unfairly taking full responsibility for the plaintiffs' injuries.

In sum, the Court shaped the litigation in its view of substantive justice, resolving the disputes between the plaintiffs and all of the potential obligors, and awarding all of the damages caused by the counterfeit medicines, in a single adjudication. By applying joinder of parties and ensuring that all of the interested persons were brought into the action, the Court could find the facts, determine the obligors and find their respective liabilities. In this way, substantial justice would be more efficiently done, even if the litigation were to proceed in a manner that was different from that which had initially been anticipated by the plaintiffs.

V. SHAPING THE RELIEF

The Court in the Armillarisin A cases, once it had determined to include by joining all of the possible defendants, then proceeded to hold all of these defendants liable for the injuries sustained by the plaintiffs. This ruling could be said to afford relief against all of the responsible parties, and, also, to ensure that each of them played a role in addressing the plaintiffs' injuries. One can see, however — and the Hospital has so argued — how this ruling went beyond the requirements of China's product liability laws in an attempt to resolve the dispute.

Under Chinese law, pharmaceutical producers and sellers are responsible for maintaining the quality of medicine that is mandated by law. Article 41 of the 2000 *Product Liability Law*[27] specifies that producers are

[27] 中华人民共和国产品质量法 2000 (Zhonghua Renmin Gongheguo Chanpin zhiliangfa 2000), online: <http://www.chinawater.net.cn/guifan/cpjlf.htm>.

liable for the injuries that are caused by their defective products, unless they can prove that: (1) they did not put defective products into circulation; (2) defects that were later found did not exist at the time that the products were put into circulation; or (3) for scientific or technological reasons, the defects could not have been detected at the time that the products were put into circulation. Article 42 of the same Act provides that sellers will be liable for injuries that are caused by defective products, unless they can prove that: (1) they are not at fault for the damages that are caused by the defective goods; and (2) they can identify the producer and the other suppliers of the product. Furthermore, article 35 of the *Pharmaceutical Administration Regulations*[28] requires a pharmaceutical wholesale enterprise to conduct a quality examination of the medicines that are purchased for the first time from a pharmaceutical producer.

These statutes imposed the burden on the pharmaceutical producer and the sellers to prove that they had carried out their respective responsibilities and obligations with regard to the Armillarisin A. In the present case, the manufacturer, Qiqihaer Pharmaceuticals, did not respond or appear in court, let alone provide evidence that the company had satisfied the requirements of article 41 of the *Product Liability Law*. Jinhengyuan, which bought the medicine directly from Qiqihaer Pharmaceuticals, admitted in court that, because of inexperience, it had not conducted a quality examination of the medicine. The other pharmaceutical seller, Guangdong Medicines, signed a sales contract with Jinhengyuan, but received the medicine directly from Qiqihaer, and admitted that at the point of receipt, it only examined such items as outer packages and sales documents.

Understandably, the Court found the manufacturer, Qiqihaer Pharmaceuticals, liable for failing to satisfy the requirements of article 41 of the *Product Liability Law*, and the distributors, Jinhengyuan and Guangdong Medicines, liable as wholesale enterprises that should have followed article 35 of the same Act (*i.e.*, to conduct quality examinations on the medicine). The Court's ruling was premised on the idea that, if any of the above enterprises had carried out their responsibilities of quality control, the counterfeit medicine would never have entered the market. Hence, it would not have been available for the Hospital to acquire and use. In short, the tragedy would never have happened.

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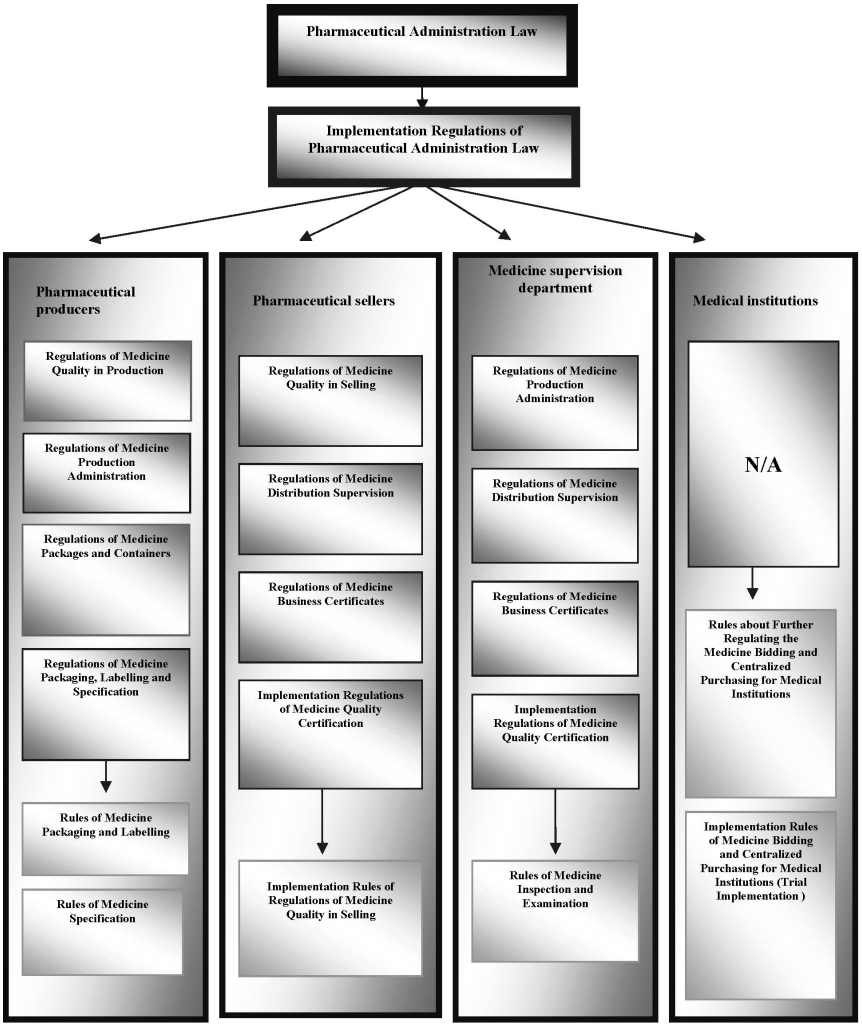
[28] 中华人民共和国药品管理法2001 (Zhonghua Renmin Gongheguo Yaopin Guanlifa 2001) online: <http://www.sda.gov.cn/WS01/CL0064/23396.html>.

Using the following chart, the Hospital argued strongly that it did not have the same responsibility for quality control that the manufacturer and the distributors did. Its only obligation was to follow the administrative regulations for public bidding. Since Guangdong Medicines had won the public bidding for Armillarisin A, which had been organized by the provincial government, all of the hospitals in the province had to purchase the medicine from Guangdong Medicines.



Interestingly, however, the Court rejected the Hospital's argument and imposed joint liability on the Hospital, together with the manufacturer and the distributors of Armillarisin A. The Court appears to have imposed liability on the basis of the principle that the acts of all four of the defendants had combined to produce a single injury to each plaintiff, and these acts were so closely connected that it was impossible to ascertain what share of the damage each defendant had inflicted.[29] It is unclear, however, what act of the Hospital can be pinpointed as unlawful or so closely connected to the actions of the manufacturer or those of the distributors, respectively, so as to constitute liability.

Instead, the ruling may reflect the fact that, given the criminal prosecution of the manufacturer and the relatively smaller sizes of the distributor companies, the Hospital was the sole defendant that was financially capable of providing relief to the plaintiffs. In this way, the ruling could be seen as an attempt to provide substantive justice for the injured plaintiffs. Significantly, the plaintiffs even admitted in court that they never blamed the Hospital for the medical services that the victims had received, and that their claims were based on the infringement of product quality.[30] The Hospital has appealed this judgment of the first instance.

VI. CONCLUSION

In recent decades, China has reformed its courts and its legal procedures as fundamental to securing the rule of law. For a time, it had adopted elements of the adversarial system, including party responsibility and plaintiffs bearing the burden of proof. Similar to the path that it has taken in its economic development, however, the Chinese state has and will continue to proceed cautiously, and carve its own path in legal reforms. Where

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[29] See 最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释> 法释[2003]20号, Zui Gao Renmin Fayuan Guanyu Shenli Renshen Sunhai Peichang Anjian Shiyong falü Ruogan Wenti de Jieshi [Explanation of Applying Law in Trial of Personal Injury Cases by the Supreme Court], Fa shi [2003] no. 20. art. 3, online: <http://www.law-lib.com/law/law_view1.asp?id=81918>:

> Under any of the following circumstances, the acts of these persons constitutes joint infringement: 1) two or more persons cause personal injuries with common intention or negligence, or 2) their separate actions cause a single injury without common intention or negligence. They shall hold joint liability according to Article 130 of *General Rules of the Civil Law*.

[30] See generally reports about the appellate cases published on *Nanfang Daily*, *Guangzhou Daily*, *Yangcheng Evening News*, *Southern Metropolitan Daily*, *Information Times* in August 2008.

it has embarked on "socialism with Chinese characteristics",[31] we may now be witnessing "rule of law with Chinese characteristics". In ordinary litigation, Chinese reformers are urging an independent judiciary and formal procedures. In litigation that is viewed as more socially significant, Chinese dispute resolution is more informal than formal, more substantive-based than procedural-based, and with more intervention by the government than private party control. It is a two-track approach to rendering justice.

The issue of how to balance formal procedure with substantive justice is a perennial question for any legal system. For example, in connection with the most recent nomination of a Supreme Court justice, U.S. legal scholars are also revisiting the delicate balance between law and justice. In the nomination of Justice Sotomayor to the Supreme Court, one of the concerns expressed by conservative members of the Senate Judiciary Committee was that Justice Sotomayor may have placed her interest in racial equality above and beyond upholding the formality of law. Indeed, as Lon Fuller observed in the Harvard Law Review in 1978, "jurisprudence which generates outcomes offensive to justice doesn't deserve the name of law. It may come fully equipped with procedures, tests, distinctions and all the other marks of law, but it isn't law because, at its heart, it isn't good."[32] Another way of putting this would be to say that it is not really law if it is merely legal. In the same way, it may well be that, if it is merely formal, it may not be justice. China, for significant cases, is attempting to navigate the harshness of formal process, but whether this results in greater justice is yet to be determined.

[31] Deng Xiaoping introduced "Socialism with Chinese Characteristics" as China's theory of development. This theory was recently reaffirmed when the Central Party Propaganda Department in a series of articles known as "The Six Why's" — one of which includes the question: "Why only socialism with Chinese characteristics can develop China." See "The Six Whys" [Liuge Weishenme], China Central Television, June 9, 2009.

[32] Lon L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353.

Survival of the Third Legal Tradition?

Alan Uzelac[*]

I. INTRODUCTION: SOCIALIST LEGAL TRADITION WITHOUT SOCIALISM

The famous 1969 book by John Henry Merryman[1] starts with a chapter on three legal traditions. In the very first sentence, Merryman claimed that: "[t]here are three highly influential legal traditions in the contemporary world: civil law, common law, and socialist law."[2] While writing mainly on civil law systems (and demonstrating how they contrast with the common law tradition), he provided only a few remarks on the (then) "young, vigorous legal tradition" of socialist law.[3]

It was stated that socialist law stems from civil law, that it "still displays its essentially hybrid nature", and that understanding civil law is essential to an understanding of socialist law.[4] Yet, to both Merryman and other comparative lawyers, it was perfectly clear — until the fall of the Iron Curtain in the 1990s — that socialist law is a tradition that is neither a subspecies of civil law, nor some kind of counterpart of the common law tradition. It was unequivocally classified as a *third legal tradition*.

In a nutshell, the features of the socialist legal tradition were described as follows: it is based on the view that the purpose of all law is instrumental — that is, that the law must serve economic and social policies. The systems of that tradition attempt to overcome socially and economically unjust ideals of bourgeois law, insofar as they clearly state their ideological basis (unlike other legal traditions, which allegedly hide it). Finally, in such a tradition, law is ultimately conceived as a tool of

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[1] John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2d ed. (Stanford: Stanford University Press, 1985) [hereinafter "Merryman, *Civil Law Tradition*"].

[2] *Id.*, at 1.

[3] *Id.*, at 4.

[4] *Id.*, at 3-4.

leading political elites (or, to express it in the terms of the Marxist doctrine, of "classes").

Since the fall of the Soviet Union, most comparative lawyers have changed their perspective. Merryman himself has reduced his typology from three traditions to two traditions, stating that "[u]ntil the fall of the Soviet empire, Soviet-style Marxist-Leninist 'Socialist Law' was treated as a separate group, but today these legal systems appear to be rejoining the Civil Law world."[5]

Such an attitude was quite understandable. The very notion of "socialist" law created a link between a specific type of regime, including the ideology of this regime, and its legal tradition. One could easily conclude, therefore, that, with the fall of the (Soviet-type) regime and the abandonment of its (Marxist-Leninist) ideology, the tradition of "socialist law" had come to an end. Such an outside impression was reinforced by the self-understanding of the post-Communist societies that had generally rejected their heritage of socialism and Marxism. Within the ex-socialist (Eastern) societies, the new ideology was to "back to normality" (*i.e.*, they claimed that, after a period of being astray, they were now happily returning to the Western tradition of once-despised bourgeois capitalism which they, allegedly, had belonged to long before the Communists had grasped political power). Of course, that was not instantly possible. Thus, a new term for a mixed form of "old" and "new" features has been produced — the notion of the "countries in transition". This term of transition was applicable to all sectors of society, including law. Allegedly, the "socialist legal tradition" was rapidly fading, and if anything peculiar remained in a particular former socialist legal order, it was attributed to the not-yet-fully-completed transition process — the unfinished return to the cradle of its original, generally civil law, tradition.[6]

In my opinion, this perception was — and still is — oversimplified. Now, two decades after the beginning of the "transition", some features of the "old" tradition have proven to be surprisingly resilient

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[5] John Henry Merryman, *The Loneliness of the Comparative Lawyer and Other Essays in Foreign and Comparative Law* (The Hague: Kluwer Law International, 1999), at 8 [hereinafter Merryman, "*Loneliness*"].

[6] Recent scholarship has questioned the accuracy of such a statement, proving that the bourgeois concepts of private property (as expressed in the respective Civil Codes) were perceived as foreign and something of an irritant in some Central and Eastern European ("CEE") countries until the mid-20th century. See Dalibor Čepulo, "Tradicija i modernizacija: 'iritinatnost' Općeg građanskog zakonika u hrvatskom pravnom sustavu" [Tradition and Modernization: "Irritability" of the Austrian Civil Code in Croatian Legal System] in Igor Gliha *et al*., eds., *Liber amicorum Nikola Gavella* (Zagreb: Pravni fakultet, 2007), at 1-50.

and unaffected by change. The essence of a "transition" requires that it cannot last indefinitely. It is therefore legitimate to ask whether the comparativists' obituary for the socialist legal tradition has been premature.

Has the "socialist legal tradition" survived? In order to answer this question, it must first be qualified. To begin with, it depends on the reply to the question of whether or not the socialist legal tradition can exist without the socialist ideology and the socialist state. If both notions are interpreted in their customary sense — that is, of general adoption of Marxist-Leninist doctrine and the state being based upon the principles of socialism (*e.g.*, representation of the interests of the working class) — I claim that it is possible. Of course, it may seem contradictory to speak about the non-socialist (and pronouncedly anti-Communist) countries as the countries of the living socialist legal tradition, but the whole problem there may be in the wrong choice of terminology. Neither the notion of the common law tradition, nor that of the civil law tradition, is based dominantly upon a particular political philosophy or ideology; neither is more or less "bourgeois" or "capitalist". They each describe a specific blend of features, or, as Merryman stated, "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught".[7] Even as such, Merryman's definition can be taken to be too abstract and too broad, as the most pronounced elements that he presents as the salient features that divide the civil law and the common law are mainly of a technical nature: the preference for judge-made law (*stare decisis*) versus the preference for legislative statutes and/or executive action; the preference for jury trial and lay participation versus the use of professional jurists; the preference for collections of court decisions versus the use of academic writings and systematic treatises and/or codifications. The leading authors on civil / common law distinctions were legal historians, not political scientists.

II. THE OVERARCHING PRINCIPLE: THE INSTRUMENTALIST APPROACH TO LAW

If there is an element of ideology or philosophy in the foundations of the legal traditions, it is the ideology or philosophy of the lawyers — that

[7] Merryman, *Civil Law Tradition*, *supra*, note 1, at 2.

is, of the judges, the advocates and the law professors — and not the ideology of society at large. The ruling ideologies have a natural impact on the specific ideology of jurists, but this particular ideology can still be different, and sometimes even significantly different. This is particularly true for the socialist legal tradition, even during the period when it undoubtedly existed, at the peak of the bipolar world of East and West. No matter how much the Soviet doctrine insisted on adding socialist attributes to existing legal notions, thereby creating idioms such as "socialist legality", "socialist law", or "socialist justice", this ideological content was only the tip of the iceberg; the real functions of the law and the legal institutions (*i.e.*, courts and tribunals) were more affected by the features that could exist independently from the ideological labels that had been accepted by the ruling elites. We have to be reminded of an early negative socialist approach to legal concepts. According to that approach, all law, just like the bourgeois states that had created it, was (viewed as) a relic of capitalism, and, like capitalism, it had to be gradually abolished. History has demonstrated that this approach was partly right — socialist lawyers were never fully "socialist" in essence; they were only putting a thin layer of ideological justification on their actions in order to assure their own ideological legitimacy in the eyes of the political regime. In the course of time, however, legal institutions and lawyers in the previously socialist countries have developed a specific blend of features that has a "uniquely shared something"[8] which creates the notion of "legal tradition". Yet this "uniquely shared something" was not socialist in essence, and, as a result, it could also survive the fall of socialism.

Hence the term "*socialist* legal tradition" might have been a false pick in the first place. Even Merryman's list of characteristic features of the socialist legal tradition may reveal elements that are separable from the socialist/Marxist ideology in its conventional meaning.

The very first and fundamental element of the socialist legal tradition — "the socialist's attitude … that all law is an instrument of economic and social policy" — is, in fact, ideologically neutral. Economic and social policy can be defined by the regimes of different ideological origins. Even the very first definition of law (a part of the introductory course at every law school in socialist countries), which provided that law is "the

[8] *Id.*

will of the ruling class",[9] was only slightly adapted after the introduction of the multi-party democracies.[10] In the new situation — in which the law was still defined, conceived and exercised as the will of the ruling political elites — it was no less instrumental in its nature than it had been before.

Over time, this instrumentalist conception of law has produced a number of distinct features in socialism, in the respects of both routines and practices, as in the respects of values and attitudes. In the following text, I will briefly outline or "sketch" some of these features in post-socialist legal systems, focusing on how society (and legal professionals) understand the role of the legal process, on how law is being applied in practice, and on the procedural practices and routines that are more or less different and distinct from the legal traditions of both common law and civil law.

I will mainly be using examples from the jurisdiction that is most familiar to me. This does not mean that my assessments would not be applicable to other countries that once belonged to the circle of socialist one-party regimes. The former Yugoslavia was among the most liberal and progressive of the ex-Soviet countries. It is therefore safe to assume that the features of the socialist legal tradition that I identify in the former Yugoslavia are rooted even deeper in the other jurisdictions.[11]

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[9] See *Pravni leksikon* [Legal Lexicon] (Beograd: Savremena administracija, 1964), at 692; *Pravna enciklopedija*, vol. 2 [Encyclopaedia of Law] (Beograd: Savremena administracija, 1985), at 1234. The doctrinal concepts of the Marxist-Leninist theory of law were spread by Soviet textbooks that were broadly translated in the other countries of the Communist block, in particular by Sergej Aleksandrovich Golunskiy & Mikhail Solomonovich Strogovich, *Teoriiya gosudarstva i prava* [Theory of Law and State] (Moscow: Iuridicheskaya izd., 1940). See also Hugh W. Babb (trans.), *Soviet Legal Philosophy* (Cambridge: Harvard University Press, 1951).

[10] So, *e.g.*, even long after the fall of the one-party socialist political regime, the leading textbooks hardly changed their definition of law.

[11] Yet it is also true that the relatively soft nature of the political regime could have dimmed, even further, the connection between particular elements and the fact that they were developed during the dominance of Marxist-Leninist ideology. Thus, many phenomena that are very peculiar to the "third tradition" were wrongly believed to be normal everywhere. For an example, see *infra*, note 14.

III. FUNDAMENTAL FEATURES OF THE THIRD LEGAL TRADITION: POLITICAL EXPECTATIONS OF COMPLIANCE AND THE STRATEGY OF AVOIDANCE OF FINAL ADJUDICATION

1. Legal Process as the Tool for the Protection of the Interests of Political Elites

The connection between law and politics has existed in every legal tradition. Only in one, however, was it self-understood that the law, lawyers and all legal structures only existed in order to serve and protect the ruling elites and their political ideologies (whether they wished to admit this or not). In the socialist times, it was an overt starting point that law had to serve the interests of the proletariat, formulated though the leadership of the Communist Party. Legal professionals, especially judges and law professors, had to be skilful technicians who would always find an adequate legal form and justification for the desired (and already known) outcome. It should come as no surprise, therefore, that those who were the most successful under that definition could be readily adopted by the new political elites when they came to power after the fall of Communism.

The declarative adoption of the principles of the separation of powers and the independence of the judiciary brought very little change. When important political goals and "higher interests" were concerned, it was considered rather normal that law would have to bend to politics. In the former Yugoslavia (and today's Croatia), there is a straight line between Josip Tito's statement directed to judges that they "should not keep to the black letter law like a drunken man to a fence",[12] Franjo Tudjman's statement that the principal task of Croatian judges is to serve the "national interests",[13] and a very recent statement by the Croatian Prime Minister that condemned a judge for a premature verdict.[14] The latter is

[12] One of the very few of Tito's citations (attributed to his reactions to the liberal and nationalist movement in Yugoslavia in 1971) that survived his political heritage and became notorious in the political culture of Croatia. See <http://www.moljac.hr/biografije/tito.htm>.

[13] See more on Tudjman's relationship to the Croatian judiciary in Alan Uzelac, "Role and Status of Judges in Croatia" in Paul Oberhammer, ed., *Richterbild und Rechtsreform in Mitteleuropa* (Vienna: Manz, CILC, 2000), at 23-66 [hereinafter "Uzelac"].

[14] In May 2009, when a court sentenced a Member of Parliament (and well-known local politician) for war crimes, the authoritative Prime Minister Sanader, because of his fear that the sentence might have an impact on the results of the local elections, angrily criticized the court for its inappropriate timing. He repeatedly stated that pronouncing a prison sentence for a politician eight days before a local election was "against democratic standards", and that "no court in the world would do such a thing". Since the old (*i.e.*, socialist) perception of law as the instrument of political power continued to permeate the public mind, these statements by Prime Minister Sanader (who has

also paradigmatic for the false presentation (even if based on true beliefs) that legal instrumentalism is the global standard.[15]

2. Fear of Decision-Making: Evading Responsibility to Pass Final Judgments as a Guiding Principle of Socialist Justice

On the other side of the spectrum, another salient feature developed as a spontaneous reaction of legal professionals to the political and public perception of their role and status during the socialist times. To be an obedient tool in the hands of political power-holders was not an easy job, especially if, at the same time, the law and its lawyers were still on the list of antiquated bourgeois mechanisms that would eventually die out and disappear with the further development of Communism. The key players could change, and poorly protected, dependent judges who only fulfilled their expected role when ruling in favour of the old elites could fall as collateral victims of the altered political circumstances. This was a situation in which a decision that had once been desirable could become undesirable, and the safest way to go forward was to make no decision at all — at least not a decision that would finally settle the issue at stake.

Therefore, most of the socialist judiciary has developed, over time, numerous methods aimed at evading responsibility for decision-making. Unlike the heroic figure of the common law judge, who strives to contribute to legal history through prudent, brave and well-reasoned judgments, socialist judges, in the fear of eventual retribution, always desired to remain as anonymous as possible. In this respect, they were akin to their counterparts from civil law traditions. This went even further, however: a safer alternative to an anonymous decision was no decision at all, and, hence, no settlement of the issue for which to bear responsibility, either one way or the other.

The first method that judges employed in order to achieve this strategy was to further strengthen one of the virtues of civil law world: the virtue of judicial formalism, which holds that, whenever possible, cases should be decided on mere formal grounds, without entering into their merits. Hence, various formal objections and trivial procedural issues were always welcome as a means to dismiss a case on formal grounds, or

an international reputation as a democratic reformist) did not invoke much public opposition. The initial statement, pronounced on May 9, 2009 at a ceremonial highway opening, was reported in all national newspapers and news portals. See, *e.g.*, *Vjesnik*, May 11, 2009, at 3.

[15] *Id.*

as a trigger to transfer the case to some other authority (or to a less fortunate colleague).

Indeed, this was not always possible; there was, however, a cure for that, too. If a judge felt uncomfortable with some case, there were ample opportunities to postpone, protract and/or prolong it. Some of these opportunities were even offered by the parties themselves. Non-appearance at scheduled court hearings, various objections and proposals that needed lengthy examination, failure to submit briefs within the set deadlines, requests for more time — all of these and more were met by the judge with great benevolence as a chance to adjourn the hearing, gain time and — who knows? — perhaps find a way to get rid of the case.

Further on, the collection of evidence was an inexhaustible source, if needed, for delays. Under the official procedural doctrine, it was the sacred duty of the judge to find "material truth".[16] Correct fact-finding was the principal task of the court; if the parties failed to submit relevant evidence, it was not the end, but the beginning, of the judicial quest. While searching for evidence, the judge could follow the proposals of the parties, or find facts *sua sponte*. In practice, it meant that every new evidential proposal of a party could (and even should) lead to an adjournment. If parties were lacking in imagination, the judge could order some more evidence *ex officio*, gaining again at least several months of time. If some issues required the opinion of an expert (and it was always on the safe side to ask for an expert opinion, even for the simplest and most obvious cases), the court-appointed expert had to be engaged. Such experts were not well known for their speed, and it was rarely required of them to deliver their opinions in a short (or even a well-defined) period of time.

After closure of the hearings, decisions were rarely pronounced publicly. Rather, as the judicial job was mainly conceived of as a judgment-writing job, the closure of the hearing would only mark the start of the period within which a judge would study the file, deliberate on the issues and eventually draft the judgment — a process that regularly lasted for months, and, in some cases, even for years.[17]

Even if an occasional judgment were to be passed on the merits and communicated to the parties, this was not the end of the process. During

[16] For an extensive analysis, see Alan Uzelac, *Istina u sudskom postupku* (Zagreb: *Pravni fakultet*, 1997).

[17] The exact data for the socialist period is unknown, but it was revealed that, in 2000, the average time spent on writing simple civil judgments in a Zagreb court was 119 days (10 times more than the official maximum limit).

socialist times, the right to appeal was skilfully raised by socialist lawyers to something of an absolute — even constitutional — right.[18] This was met with approval by the political potentates, because they wanted to maintain yet another layer of control over the process, and the right to appeal could neatly deal with the possibility of any judicial decisions that were not in conformity with their expectations. Yet it was also a comfortable way for judges to remove from themselves the pressures of deciding (and thereby settling) an issue, as their non-final judgments were regarded as only provisional in nature. At least in civil cases, the appealed judgments were never enforceable until the higher court had decided upon them, and this appeal process could also last several years. When in charge of the case, the appellate judges also had several strategies for avoiding finality and enforceability. One of the most common of these tactics was the remittal of the case to the lower court for retrial — something that would send it back to square one again. This merry-go-round could go on as long as was needed, preferably until the pressing social need for a decision ceased to exist.

3. The Social Status of the Socialist Judiciary: Low, but Comfortable

The foregoing description of the former socialist judiciary is, of course, somewhat exaggerated. After all, not all of the cases had the potential to be politically sensitive or complex. On the contrary, matters of true importance were not handled at all by the courts. The big decisions were reserved for the higher echelons of the political elites and were handled, therefore, by the executives of the Communist Party. In the same way, economically important disputes could hardly arrive at the courts, as trade and industry in the socialist world was nationalized, and the vast majority of companies were owned by the state. In the context of international trade, eventual disputes were handled by international commercial arbitration or by political negotiations. There were some limited exceptions, such as in the former Yugoslavia, for example, where the doctrine of self-management and social ownership gave more autonomy to economic players, but proper adversarial litigation was not very popular; here, the political elites propagated agreed solutions, often silently

[18] See the Yugoslav Constitution (1974), art. 215 (*Službeni list SFRJ* — Off. Gaz. 9/1974). The text of this provision has been rewritten into the new constitutions of the successor countries. See, *e.g.*, the Croatian Constitution, art. 18 (*Narodne novine* — Off. Gaz. 56/90, 135/97, 8/98, 113/00, 124/00).

mediated by the Communist Party.[19] From time to time, the internal or external political battles would require court action, which was designed to display the winners and condemn the losers. However, depending on the intensity of the conflicts and the nature of the regime (*i.e.*, harsher or softer), this happened only periodically, more or less often, and required the engagement of only a small number of party-loyal legal professionals. What remained were many petty cases, from minor crimes to neighbourhood disputes. As private ownership was restricted, civil cases regularly dealt with smaller amounts and objects of limited value.

In this environment, the judiciary obviously did not enjoy a very high social esteem, as the importance of its work was marginal. Monitoring the course of judicial processes, an outside observer could hardly notice the difference between the judiciary and any other clerical position in the state administration. Even the status of judges was practically the same. According to the political doctrine of the unity of state power, the executive and the judicial branch of the government were responsible to the legislature;[20] this meant that judges were elected to a timely and limited mandate by Parliament.[21] Judges had to be "politically suitable",[22] meaning that, in practice, there were checks of their political and personal backgrounds when they were elected, and also that there were methods to remove them if they began acting in ways that could be regarded as politically improper. The remuneration of judges and other

[19] In Yugoslavia, for example, many issues had to be arranged by so-called "self-managed agreements" (*samoupravni sporazumi*), which were concluded between companies that were called "self-managed associations of associated labor" (*samoupravna organizacija udruženog rada*).

[20] The doctrine of the unity of state power was inferred from the Marxist-Leninist doctrine on the dictatorship of the proletariat as the transitional stage between the capitalist class society and the classless Communist society. It was imported to all countries of the former socialist bloc. In former Yugoslavia, see *e.g.*, Jovan Đorđević, *Politički sistem* [Political System] (Beograd: Savremena administracija, 1980), at 582-84; Veljko Mratović, Nikola Filipović & Smiljko Sokol, *Ustavno pravo i političke institucije* [Constitutional Law and Political Institutions] (Zagreb: Pravni fakultet *et al.*, 1986), at 390.

[21] In federate states, such as the former SFRJ (Socijalistička Federativna Republika Jugoslavija), judges were also elected by various municipal, regional or provincial assemblies (depending on the rank of the court for which the judge was being elected).

[22] The condition of "moral and political suitability" was among the legal requirements under the Law on Regular Courts; see arts. 11, 75 and 87 (Zakon o redovnim sudovima, *Narodne novine* — Off. Gaz. 5/77, 17/86, 27/88, 32/88, 16/90, 41/90, 14/91 and 66/91). It was abandoned in 1990 (see amendments published in Off. Gaz. 16/90), only one month before the Communist Party lost in the first democratic elections. See more in Alan Uzelac, "Zavisnost i nezavisnost: Neka komparativna iskustva i prijedlozi uz položaj sudstva u Hrvatskoj" [Dependence and Independence: Some Comparative Experiences and Proposals Regarding the Status of Croatian Judges], Zbornik Pravnog fakulteta u Zagrebu, 42:4 (Suppl. 1992), 593, at 583-87.

legal professionals in state service was rather moderate, just like the pay of most of the state bureaucrats.

That said, it also has to be stated that the judicial job in socialism was regularly not an uncomfortable job, especially to those who could adapt to the requirements. In the living social memory of common people, the word "judge" still sounded important. The universities and law schools still taught that judicial positions represented the peak of a legal career. In the circles of regular court-goers, judges were still admired as powerful figures who deserved their respect, admiration and occasional gifts. On the other hand, judicial actions were often reduced, in practice, to mere paperwork. Nonetheless, the more insignificant the judicial functions were, the more comfortable the judicial job would become.

The need for a speedy resolution of a case was relative to the importance of the case. Most of the cases were not too important, so the pressure for a timely decision was not particularly strong. Also, the pressure from beneath was relatively weak. The socialist judiciary preferred unrepresented parties, often with very little legal knowledge. On the other hand, the "socialist" layer that had been placed over the constructions of civil law origin had created complex mixtures that were non-transparent and confusing, and this made for cases appropriate to the slow and thorough treatment of the sophisticated legal professional. When lawyers represented the parties in a case, they did not attempt to speed the judges, as they also benefited from the slow pace of the process.

Therefore, the judicial job was not an unpopular job. The number of judges differed among the different socialist countries. In some countries, especially within the inner circle of the Soviet empire, these numbers were suppressed and rather low. On the other hand, the self-managed Yugoslavia had maintained the profession of lawyers as private professionals, and the ratio of judges was much closer to the (relatively high) average numbers found in Austria and Germany. The legal occupation functioned in many families as a family business. The judicial job was typically reserved for the family member who took care of the household and the children, while the bread-winning spouse would work as a private lawyer. This led to a feminization of the judiciary. In Croatia in the early 1990s, for example, about two-thirds of the judges of the lower courts were women.[23]

[23] See Uzelac, *supra*, note 13, at 23.

IV. OLD AND NEW TOGETHER: NEW BLEND, OLD TRADITION

When the change arrived in the 1990s, it seemed that the courts and the judiciary would have a new start. In fact, all of the "socialist" labels were removed, and the references to Marxist-Leninist doctrine were deleted. This was not difficult because, as has been described previously, the socialist legal world was, by its nature, not socialist. The instrumentalist approach was easily adaptable to any new doctrine; so, on that account, no dramatic change of paradigm was needed.

The change of ideology did, of course, have an imminent impact on the change of attitude towards the law, the justice system and the judiciary. The political acceptance of the separation of powers doctrine gave some additional weight to judges, although "the independence of the judiciary" continued, in political practice, to be more a phrase than a reality. This newly gained importance was, in some respects, readily embraced by the judiciary; with it, demands for better pay and improved conditions of work became louder, and did, in fact, have some practical effect in most countries. The nature of the judicial job, however, and the salient features of the past tradition did not change — both the instrumentalist approach and the fear of final decision-making survived.

What had really changed was the social context in which the legal infrastructure operated. Under the new circumstances, courts became removed from the shade of the relatively unimportant decision-making in petty cases. With the privatization of economic resources and the pluralization of political life, a growing number of important social issues began to arrive at the courts.

The result was massive inefficiency: court backlogs and judicial delays started to accumulate throughout the countries of the former Socialist bloc. The length of the proceedings was among the most visible symptoms of residual similarity to the legal systems of the third (*i.e.*, socialist) legal tradition. This inefficiency was especially manifest in the context of new political associations. In the past two decades, practically all of the countries in Central and Eastern Europe have joined the Council of Europe;[24] membership represents adherence to democracy and the rule of law. It also implies membership in the *European Convention on Human Rights*[25] and submission to the jurisdiction of the European Court

[24] Currently, the only exception is Belarus.

[25] *Convention for the Protection of Human Rights and Fundamental Freedoms*, E.T.S. No. 005, 213 U.N.T.S. 221, signed in Rome on November 4, 1950, entered into force on September 3, 1953; see <http://www.conventions.coe.int> [hereinafter "ECHR"].

of Human Rights.[26] From the very first cases that were brought before that Court, it became evident that a large majority of the former socialist countries had a serious problem with one right in particular: the right to a trial within a reasonable time. Soon, the "new members" of the Council of Europe flooded the dockets of the Strasbourg Court, overshadowing the previous record-holder in ineffective adjudication, Italy.[27]

One may argue that it is only natural that the transitional judiciaries have had difficulties with their transformation and that such delays are an inevitability, albeit a temporary one, under these circumstances. Yet several facts speak against this explanation. The first is connected with the length of the adjustment period. Two decades may seem to be a bit too long, especially if we keep in mind that some of the most fundamental reforms in history were introduced within time frames of months and years, rather than decades.[28] The other fact is that changes in the judicial sector were not proportionate to the changes in the rest of the society. For instance, it can be stated that the issue of Soviet-era delays and backlogs was even more present in some of the most successful of the transition countries, among which are some that have entered the European Union as the most progressive reformist nations (*e.g.*, Slovenia or Poland). The third fact is that this period did not go without attempts to reform the system. On the contrary, strategies for the reform of the judiciary, twinning projects with the most advanced countries of the West, international study visits and international legal assistance projects were so numerous that they practically became a new, propulsive industry. The effect, however, in spite of this massive engagement of resources, was rather moderate.[29]

Indicatively, the rare exceptions — that is, the former socialist countries that experienced fewer problems with judicial ineffectiveness — were connected to cases of a sort of "colonization" of the judicial sector.

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[26] The European Court of Human Rights, with a seat in Strasbourg, was established by art. 19 of the ECHR. From the entry into force of Protocol 11 (ETS No. 155) on November 1, 1998 the member states of the Council of Europe accept without exceptions the right of individuals claiming to be victims of a violation of the Convention to apply directly to the Court.

[27] For example, the countries with the highest number of cases before the European Court of Human Rights in 2008 were Russia, Turkey, Romania and Ukraine. Italy held fifth place, followed by Poland and Slovenia.

[28] Consider, for example, the introduction in Austria of a modern and speedy civil procedure, based on the procedural model of Franz Klein, at the end of the 19th century.

[29] For example, in 2002, the public spending per capita for courts in Croatia was the same as — or higher than — it was in France. According to data collected by the European Commission for the Efficiency of Justice ("CEPEJ"), the countries with the highest number of judges relative to the number of inhabitants are Slovenia and Croatia (up to 50 judges per 100,000 in 2006). See *European judicial systems. Edition 2008 (data 2006): Efficiency and quality of Justice* (Strasbourg: Council of Europe, CEPEJ, 2008), at 40 and 110.

These were the countries in which the whole judicial sector was either replaced by "imported" personnel or put under a strong program of tutelage from the outside.[30] Additionally, it seems that the salient features of the socialist legal traditions were even better at continuing to hold strong within the more developed ex-socialist jurisdictions, where the Communist regime had been softer and legal professionals were more influential and more numerous (*e.g.*, Slovenia and Croatia, which are the most developed parts of the former Yugoslavia). From this, we can conclude that the survival of the third legal tradition is not just a temporary, transient phenomenon.

Although the two aforementioned features of the third legal tradition are, perhaps, the most fundamental, there are a number of other features that are typical and characteristic. In the following text, I will first enumerate and, without entering into details, then briefly explain nine mutually intertwined elements that create a specific procedural blend, especially in the context of civil procedure. They are:

(1) deconcentrated proceedings, and a lack of trial in the proper sense;

(2) orality as a pure formality;

(3) excessive formalism;

(4) the pursuit of material truth;

(5) lack of planning and procedural discipline;

(6) appellate control as an impersonal and anonymous process;

(7) multiplicity of legal remedies that delay enforceability;

(8) endless cycles of remittals; and

(9) disproportionate efforts for reaching ephemeral and socially insignificant results.

The style of proceedings that were inherited from the socialist times, comprising in these nine elements, continued to live and develop despite the eventual (and in fact rather frequent) changes of procedural legislation. In any event, the new procedural laws were not so difficult to

[30] Examples include East Germany, in which most of the legal professionals (including the members of the legal academia) were transferred over from the western part of the country after the reunification or *Wende*, and Bosnia, where the international protectorate led to intensive control of the actions of the local courts, including the importation of foreign judges at the highest level. In both cases, the problems relating to the length of proceedings were virtually eradicated.

circumvent. Even during the Soviet era, some of the Central and Eastern European countries (such as the former Yugoslavia) had, essentially, a form of civil procedural law that was based on the foundations of oral, imminent and concentrated proceedings. The law that was in actual practice, however, was never interpreted or applied in this way. The ideal of a concentrated oral trial that would be managed by an active judge was turned into a travesty. Admittedly, the oral hearings did take place and they were regularly among the necessary procedural requirements. Yet these oral hearings were, in fact, only an opportunity to exchange documents and new evidentiary proposals. For example, in the typical course of a civil case, the oral hearings would last only about 15 minutes, and would then be adjourned for several months or even years.[31] At the oral hearing, it was regarded as impolite to enter into oral arguments (although this was occasionally tolerated if, for example, a lawyer needed to impress his or her client). In most cases, the parties would barely say a few words during the hearing, and the whole encounter between them and the court would be dominated by the judge's dictation of the protocol to the court typist. Therefore, most lawyers regarded (and still regard) their in-person appearances at hearings to be a waste of time. In order to collect their fees, firms generally tend to send only their most junior associates (who regularly know little or nothing about the case) to the hearings. For legal practitioners who cannot afford the luxury of employed interns, or who have too many hearings to cover, it has been a very normal and natural practice to appear at the hearing only to kindly ask the judge to note the lawyer's presence in the protocol and then to request permission to leave in order to appear at another hearing (or even several of them) scheduled in the same court at the same time. This same practice is still very broadly in use in most of the Croatian courts.

In the life of a civil case, it was not unusual to hold 10 or more such hearings within a period of several years. This style of proceeding, called a "piecemeal trial" by Mirjan Damaška,[32] is, in fact, no trial at all. Nonetheless, it continues to live and is still regarded as normal — a vivid proof of the vitality of the third legal tradition.[33]

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[31] See, *e.g.*, *supra*, note 17.

[32] Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), at 51.

[33] According to the review conducted by a U.S. expert team in 2000 in the largest Croatian court, there were, on average, about 3.4 hearings per "trial" (but sometimes up to 20), and these hearings were held approximately 145 days apart. See National Center for State Courts, International Programs Division, *Functional Specifications Report for Computerization in Zagreb Municipal*

Why do hearings regularly need to be adjourned? The answer can be found in the well-established habits of the (previously) socialist judiciaries: excessive formalism, a lack in procedural discipline and an adherence to the material truth doctrine continue to play the most important roles. If court summonses have not been served onto all of the invited parties in a formally impeccable way, it is a reason for adjournment; if they have been served without fault, but some of the invited choose to not appear anyway, it is a reason for adjournment;[34] if an invited party requests time for the submission of further briefs, it is a reason for adjournment. Now, even if the hearing has commenced and evidence has been presented, a party could still come up with a new proposal for the taking of evidence, and it would again be a very good reason for adjournment. The adjournments can continue as long as any of the parties have new suggestions and proposals (*i.e.*, until the imaginations of each of the actors run dry of inspiration).

It is rather interesting to note that it is only within the third legal tradition that judicial activism has been regarded as an element that delays the proceedings; it is also only within this environment that the peculiar strengthening of the adversarial principle and the active roles of the parties, aforementioned, has been regarded as the optimum means to achieve faster proceedings and less delay.[35] The rationale, although diametrically opposed to the trends in the Western world, is, in fact, correct: it is an attempt to empower judges to use the right to decide on the basis of burden of proof rules, instead of allowing endless, unsuccessful attempts to find certainty based on the evidence that is taken *sua sponte.* Still, the result of the reforms has been rather moderate.[36] The rare judges who use burden of proof rules in an attempt to speed up the process thereby expose themselves

Court of the Republic of Croatia (Zagreb: USAID Project #801 AEP-I-00-00-00011-00, September 2001), at 13.

[34] From time to time, under very strict and limited conditions, the court could enter a default judgment; this default judgment, however, could then lead to a successful motion for *restitutio in integrum* which, in most cases, the court would also tend to be generous about granting.

[35] In the same way, the limitation of the judge's powers to take evidence *ex officio* was a decisive element in the changes introduced by the amendments to the Croatian *Code of Civil Procedure* of 2003 (Off. Gaz. 117/03) [hereinafter "CCP"] in an attempt to accelerate civil proceedings. See Alan Uzelac, "The Rule of Law and the Croatian Judicial System: Court Delays as a Barrier on the Road to European Accession" in Justin Orlando Frosini, Michele Angelo Lupoi & Michele Marchesiello, eds., *A European Space of Justice* (Ravenna: Longo Editore, 2006) 87.

[36] In Croatia, for example, the judiciary found that the way to get around the ban on evidence *ex officio* was to suggest to the parties which evidentiary proposals they should raise, and thereby maintain the "material truth" approach.

to the risk of having their judgments quashed by the higher courts for "improper fact-finding".

The higher courts themselves are another story. Their way of work has not been changed in the new social circumstances beyond the collapse of the Communist regimes; rather, it has been reinforced. The unlimited right to appeal has continued to exist as one of the postulates of the legal system, and it applies to even the smallest and the most trivial of cases. The appellate courts have continued to decide such appeals with the same bureaucratic passion for slow process and excessive formalism. As the courts and their actions became more exposed to public criticism, the instinctive response was to strengthen the anonymity and impersonal nature of the decision-making. As a result, it became impossible in some types of cases for the parties and their lawyers to approach the court of appeal in person, let alone to see the faces of the judges who were in charge of their appeals.[37]

Being separated, in this way, far from the parties and the reality of a case, the appellate judges concentrated mainly on its technical details. Even their very distance from the case served as a good excuse to avoid the responsibility for final decision-making. Such appeals were therefore remitted to the lower courts for re-examination as often as possible,[38] and, frequently, the only justification that was given was that the first-instance court should try harder to look for additional evidence in order to find the "material truth". The same case could be returned to the lower courts several times over, in a process that could create an "endless cycle of remittals".[39] While the appeal was pending, the execution was, of course, automatically stayed. This created the impression that a non-final judicial decision is, as expressed by the spokesperson of the largest appellate court in Croatia, a "legal nothing".[40] Thus, the avoidance of

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[37] Through the 2003 amendments to the CCP, *supra*, note 35, the public hearings in litigious civil cases — which were, in practice, extremely rare — were abolished completely.

[38] According to Croatian Ministry of Justice statistics (Statistički pregled 2008 [Statistical Survey], <http://www.pravosudje.hr>, at 4/7), the ratio between cases at appeal that were remitted and those that were finally decided by the appellate courts is 3.5 to 1 (data for successful appeals in 2006-2008 period).

[39] In several judgments of the European Court of Human Rights in respect of various countries of Central and Eastern Europe, this was described as a systemic problem — a "serious deficiency in the judicial system". See A. Grgić, "The Length of Civil Proceedings in Croatia: Main Causes of Delay" in Alan Uzelac & C.H. van Rhee, eds., *Public and Private Justice* (Antwerpen/Oxford: Intersentia, 2007) 158, at 158-59.

[40] In a communiqué of May 3, 2007, Judge Krešimir Devčić, who acted as the spokesman for the County Court, reacted to a newspaper article that analyzed several judgments of Judge Marijan Garac in which he had consistently refused to convict suspects for organized crime. He stated that non-final judgments that were subsequently quashed by the Supreme Court "in their totality do

responsibility for final decision-making, this time at the higher level of judicial hierarchy, has continued to mark the legal landscape of the countries of the third legal tradition to this day.

V. WHY WILL IT NOT FADE AWAY? CONCLUDING REMARKS ON THE VITALITY OF THE THIRD TRADITION

My description of the main features of the third legal tradition is not a flattering one. In any case, it is questionable whether this attitude about the nature and the role of law and lawyers fulfils the expectations of those whose interests they are bound to protect. Indeed, the level of trust that is enjoyed by the courts and the judiciary in Central and Southeastern European countries is rather low.[41]

Still, the third tradition has shown, thus far, that it is astonishingly vital, as it has hardly changed in spite of various reform projects. If some change has occurred, it has not been substantial — *plus ça change, plus c'est la même chose*. Why is this? An interesting paradox could be noted here — the fact that the very attempts to bring the justice system closer to the Western rule of law standards have actually strengthened the status quo.

One Western standard that the judiciaries of the socialist legal tradition have most readily embraced is that of judicial independence. This standard was developed further, beyond the guarantees of independent decision-making in individual cases. The element that the judicial elites of the post-Communist countries were particularly keen about was that of organizational autonomy and self-management of the judicial branch of government. It was perfectly compatible with the Soviet-era tradition in which legal professionals formed a closed circle of individuals with the same interests (often familially interconnected); it was also a magic wand that could assist in the continuation of the old attitudes and practices by creating a protective veil against any public criticisms (even legitimate ones).

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not exist as a relevant fact". For "referring to a non-existent legal argument", the judge publicly invited the state attorney to commence a criminal action against the journalist and the journal that had published the comment. The original article was published in *Globus* of May 4, 2007, no. 856, at 38-42; the communiqué delivered to the journalists was referred to in several newspapers, see, *e.g.*, online: <http://www.jutarnji.hr/sud-trazi-kazneni-progon-novinara-globusa-zbog-clanka-o-sucu-garcu/172994/>; for reactions of the Croatian Journalists' Association see online: <http://www.hnd.hr/hr/novine/show/51633/>; the full text of the communiqué is in the archives of the author.

[41] In Croatia, for example, the courts are consistently among the least trusted social institutions, and the judiciary sector constantly occupies the highest places on the index of perceived corruption.

Thus, the judiciaries of the third legal tradition — often with the generous help of Western partners — have formed impenetrable barriers to substantial changes. First, the current judicial elites, who are mostly inherited from the socialist period, have taken full control of the process of appointments to the judicial and prosecutorial posts by adopting the system of appointment (in which a body composed mainly or exclusively of judges or prosecutors has a decisive or exclusive role in the recruitment of magistrates). Such bodies, usually called High Judicial Councils (or the like), have spread fast throughout all of the Central and Eastern European countries, securing control by ensuring that only those who meet the expectations of the traditional elites will be appointed to high judicial posts.

Second, there are new professional associations of judges that have started to operate as specific trade unions. They uncritically protect every member of the profession, and they silence any critical analysis of judiciary and judicial decisions, while invoking judicial independence wherever reforms that could compromise their status are announced.

Third, the political leverage of legal professionals (and, in particular, judges) has also increased, because judicial decisions now play a part in political games (and also because judges are occasionally engaged as the controllers of the general and local elections). As a result, some of those who belong to the judicial oligarchies are, again, neatly incorporated into the structures of political power. Further on, the professional legal elites began to be increasingly engaged in the drafting of the new legislation. As a consequence, the traditional influences of law professors and experts from the executive are constantly under attack, and are claimed to be excessively theoretical and too far separated from practice. In fact, by controlling the drafting process, the judicial elites can effectively prevent the changes that could jeopardize their status and power. Even in the executive branches of governments, in the ministries of justice, it has become customary to employ a significant number of judges and prosecutors on temporary bases. This results in a situation where the projects prepared by the executive are no longer written from the perspective of the public good, but are instead the products of, to put it mildly, a double loyalty.

Finally, the most recent development is related to the establishment of the number of professional schools for judges, lawyers, prosecutors and notaries. Again, it is almost exclusively the representatives of the old judicial elites who educate (or socialize) the prospective candidates for judicial functions. This has the effect of excluding even the option to

hear (let alone be influenced by) a range of open and critical discussions that are coming from legal academia.[42] Taking all of these developments into consideration, we can safely assume that the survival of the third legal tradition is cemented for at least the next couple of decades, in spite of the ever-louder public criticisms and ever-stronger international pressures against it.

Here, at the very end of this paper, I would like to take a look at the foregoing developments from a different, slightly more optimistic perspective. The two great legal families of civil law and common law are undoubtedly converging.[43] In certain aspects, it is not even clear whether their differences are still significant for any practical purpose. In another text, I have expressed the view that, at least for Europe, the dichotomy between civil law and common law has ceased to be the most important point of systemic divergence.[44] Instead, it was submitted that another division, between Mediterranean and Northern European countries,[45] now plays a much more prominent role. Thus, the countries of the third legal tradition may also be subject to another convergence — a convergence of the ex-socialist legal tradition and the part of the civil law tradition that, in my submission, forms the circle of "Mediterranean systems". In this way, we may be invited to find new categories for the future: the categories that will again frame the most fundamental differences of legal systems in the form of a bipolar opposition. This, however, is a topic for another essay.

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[42] In Croatia, this process started with the establishment of the Judicial Academy (which, in fact, is an organizational unit of the Ministry of Justice, with no academics in the permanent staff or teaching force). It has continued with the announcements of the Notarial Academy and the Attorneys' Academy, both of which are planned as extensions of their respective professional organizations.

[43] See John Henry Merryman, "On the Convergence (and Divergence) of the Civil Law, and the Common Law" in Merryman, *Loneliness*, *supra*, note 5, at 17.

[44] See Alan Uzelac, "Reforming Mediterranean Civil Procedure: Is There a Need for Shock Therapy?" in C.H. van Rhee & Alan Uzelac, eds., *Civil Justice between Efficiency and Quality: From Ius Commune to the CEPEJ*, Ius Commune Series (Antwerp/Oxford/Portland: Intersentia, 2008) 71.

[45] This division is a model, not a factual description. The labels used here do not necessarily correspond to geographic locations of individual justice systems.

Part V
International Harmonization Projects and Developments

International Harmonization Projects and Developments: An Introduction

Valerie Oosterveld[*]

The process of globalization and internationalization has given rise to a range of developments in the form of programs or projects for, or trends toward, legal harmonization. In a number of situations, the desire to facilitate cross-border dealings has had an important impact upon the local legal standards and practices in the respective places concerned. In other situations, local legal institutions have had a broader impact as a result of being drawn into international regimes and protocols. The papers in this section all discuss ways in which procedures, whether international, regional or domestic, have demonstrated trends toward convergence. This convergence tends to broadly combine common and civil law approaches, sometimes with a distinct outcome that can be labelled *sui generis*.

Eva Storskrubb, an Associate with Dittmar & Indrenius in Helsinki, begins this discussion by examining the emergence over the past century of civil procedural convergence within Europe.[1] She analyzes European Union-inspired cross-border procedural instruments to enhance judicial cooperation. This harmonization began with measures that were enacted to address, *inter alia*, service of documents, cross-border taking of evidence, and cross-border recognition and enforcement of judgments in a decentralized manner, with direct contact between lower courts. It expanded to cover legal aid issues, payment orders, small claims and alternative dispute resolution. In addition, the European Judicial Network and the European Judicial Training Network have been created. While all of these measures are meant to promote harmonization and a level legal "playing field", their application is also reliant on a decentralized model, which naturally raises the risk of diversity or fragmentation in application. Even so, the application of these various measures is likely to forge

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[1] Eva Storskrubb, "What Changes Will European Harmonization Bring?" in Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories* (Markham, ON: LexisNexis Canada, 2010) [hereinafter "Walker & Chase"] 403.

a mutual experience and inter-country dialogue, which may spill over into purely domestic procedures.

Dr. Rolf Stürner, Director of the Institute for German and Comparative Civil Procedural Law and a member of the full-time faculty at Freiburg University, continues this theme of harmonization in his paper.[2] He served as Co-reporter for the first joint project of the American Law Institute ("ALI") and the United Nations Institute for the Unification of Private Law ("UNIDROIT") — the *Principles and Rules of Transnational Civil Procedure*.[3] In his paper, Dr. Stürner examines these *Principles* and their influence on the private enforcement of European Competition Law. He explains that, in 2005, the European Commission ("EC") published a Green Paper on *Damages Actions for Breach of the EC Antitrust Rules*.[4] The *Green Paper* attempts to retain the advantages of private enforcement of competition law, such as well-organized compensation for victims of violations, deterrence of wrongdoers and cost-shifting from the claiming party to the wrongdoing defendant. It also seeks to avoid the main disadvantage of the U.S. system — the importation of a litigation culture with social costs that outweigh the benefits of private law enforcement (including the very broad and costly American discovery practice). The European Commission thus proposes ways to limit disclosure in order to be more in line with European civil and common law practice. These limits reflect a strong similarity to the ALI/UNIDROIT *Principles*. The *Principles* were designed to strike a compromise between the Anglo-American and continental procedural cultures, which is precisely what the *Green Paper* attempts to do.

Before turning to the last paper in this section, it is important to note the pioneering work of distinguished members of the International Association of Procedural Law ("IAPL" or "Association") that relates directly to the idea of balancing procedural traditions. This includes, notably, the work of Professor Marcel Storme (the immediate past-President of the Association) and the Working Group for the Approximation of the Civil

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[2] Rolf Stürner, "The ALI/UNIDROIT *Principles of Transnational Civil Procedure* and Their Influence on Future Private Enforcement of European Competition Law" in Walker & Chase, *id.*, 421.

[3] *Principles of Transnational Civil Procedure*, online: <http://www.unidroit.org/ english/principles/civilprocedure/main.htm> [hereinafter "Principles"]. See also ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge: Cambridge University Press, 2006).

[4] Commission of the European Communities, *Green Paper — Damages Actions for Breach of the EC Antitrust Rules {SEC(2005) 1732}*, (2005) COM/2005/0672 (Brussels: December 19, 2005) [hereinafter "Green Paper"].

Procedural Law in Europe,[5] and also the work of Professor Geoffrey Hazard (past-President of the American Law Institute), who headed the ALI/UNIDROIT project on *Principles and Rules of Transnational Procedure*.[6] Professor Storme's work led to a proposal that was submitted to the European Commission for a directive on the approximation of laws and rules of the Member States of the European Union on civil procedure. Although procedural law — including judicial organization, jurisdiction and rules of procedure — was once largely excluded from the scope of European Community law, it is now thought that further integration between the European Union Member States requires the harmonization of rules on procedural law, as alluded to by Ms. Storskrubb and Dr. Stürner in their papers. The ALI/UNIDROIT project drew on the recognition of the need for a definitive set of transnational rules of procedure, in order to facilitate dispute resolution in transnational commercial transactions by reducing the uncertainty for parties that were litigating in unfamiliar legal systems and by promoting transparency of procedure.

Fausto Pocar, judge of the Appeals Chamber and former President of the International Criminal Tribunal for the former Yugoslavia (ICTY), is the final commentator in this section on the theme of legal convergence. In his paper,[7] he explores a somewhat different aspect of the theme of harmonization: the creation of an international criminal procedural law. Judge Pocar begins by explaining that the first set of *Rules of Procedure and Evidence*[8] drafted by the judges of the ICTY largely reproduced the procedures of accusatorial systems. However, even from the beginning, the *Rules* deviated from this common law framework: they did not provide for jury trials, there were no technical rules governing the admissibility of evidence, the Tribunal judges could order the production of additional or new evidence *proprio motu*, there were no provisions for plea-bargaining, and the right of appeal was more extensive in scope than is usual in common law systems.

Within this framework, the *Rules* were amended over the years to include features more typical of a civil law system. For example, the

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5 Marcel Storme, *Rapprochement du droit judiciaire de l'Union européenne* [*Approximation of Judiciary Law in the European Union*] (Boston: Martinus Nijhoff, 1994).

6 *Supra*, note 3.

7 Fausto Pocar, "Common and Civil Law Traditions in the ICTY Criminal Procedure: Does Oil Blend with Water?" in Walker & Chase, *supra*, note 1, 437.

8 United Nations, International Criminal Tribunal for the former Yugoslavia, *Rules of Procedure and Evidence*, online: <http://www.icty.org/sid/136> [hereinafter "*Rules*"].

bifurcated structure of proceeding — with the first part of the criminal proceeding focused on culpability, and the second part on sentencing in the event of a conviction — was replaced with a unified structure, in which the Trial Chamber rendered a single, combined verdict with a sentence. In addition, the *Rules* were modified to introduce a pre-trial judge, who had powers to manage the parties in their pre-trial preparations. Third, the Trial Chamber was provided with powers to reduce the scope of an accused's indictment in the interest of a fair and expeditious trial. Fourth, the ability to submit certain evidence in writing was introduced. Fifth, the Trial Chamber was provided with the ability to take judicial notice of facts that had been adjudicated in previous cases before the ICTY. Sixth, the ICTY Appeals Chamber was provided with certain powers that related to the consideration of appeals that are not usually seen within common law traditions. Judge Pocar ends by noting that the procedure of the ICTY has combined common and civil law features in a sophisticated and thoughtful arrangement that is distinctly different from any domestic criminal procedural system.

These three papers raise important questions regarding the harmonization of procedural laws. For example, is it possible to adopt procedures that merge or reflect both continental and Anglo-American approaches to procedure, while still retaining domestic traditions and practices? Is it possible to rely upon decentralized procedural convergence to achieve actual harmonization? What lessons can be learned from the achievements of the ALI/UNIDROIT *Principles*? What changes will European procedural harmonization bring? How might harmonized standards influence other areas of procedure (*e.g.*, in European Union Competition Law)? And, does the ICTY's experience demonstrate that harmonization is possible in both public and private law? For some of these questions, time will provide us with the answer. For others, the answers will only come if the European Union remains on the path to further and deeper procedural convergence.

What Changes Will European Harmonization Bring?

Eva Storskrubb[*]

I. INTRODUCTION

In the past century, Europe witnessed several modern strands and levels of civil procedural convergence. One significant strand comprises the national level procedural reforms — across the civil law and common law divide — that strive towards the same goal: efficiency. Case management, managerial judges, allocation of resources and the creation of separate procedural rules based on the complexity or the monetary importance of the matter are all elements of what is, arguably, a mutual, current quest for procedural efficiency.[1] Another important strand comprises the constitutional reforms on both the intergovernmental and national levels, including, in particular, article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*[2] and the case law of the European Court of Human Rights with regard to the right to a fair trial; these, together, have forged a mutual European standard for civil proceedings.[3] In addition, the Council of Europe, through various

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[1] A.A.S. Zuckerman, "Justice in Crisis: Comparative Dimensions of Civil Procedure" in A.A.S. Zuckerman, ed., *Civil Justice in Crisis — Comparative Perspectives of Civil Procedure* (Oxford: Oxford University Press, 1999) 3, at 47-48; C.H. van Rhee, "Introduction" in C.H. van Rhee, ed., *European Traditions in Civil Procedure* (Antwerpen - Oxford: Intersentia, 2005) 3, at 19-22; and N. Trocker & V. Varano, "Concluding Remarks" in N. Trocker & V. Varano, eds., *The Reforms of Civil Procedure in Comparative Perspective* (Torino: G. Giappichelli Editore, 2005) 243, at 250-55. For illuminating thoughts on procedural efficiency from across the divide within this book, see also Mirjan Damaška, "The Common Law / Civil Law Divide: Residual Truth of a Misleading Distinction" [hereinafter "Damaška"] in Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories* (Markham, ON: LexisNexis Canada, 2010) 3; Loïc Cadiet, "Avenir des categories, categories de l'avenir : perspectives" [hereinafter "Cadiet"] in Walker & Chase, *id*., 635.

[2] Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, signed on November 4, 1950, European Treaty Series No. 005, art. 6, "ECHR" available from the Council of Europe treaty database, online: <http://conventions.coe.int/Default.asp>.

[3] K. Kerameus, "Procedural Implications of Civil Law Unification" in Hartkamp *et al.*, eds., *Towards a European Civil Code* (Nijmegen, Ars Aequi Libri: Kluwer Law International, 2004)

projects, is working towards achieving access to justice for litigants across Europe.[4] At the beginning of the 20th century, it was nevertheless evident that modern civil procedures were grappling with the tension between the two identified themes of convergence — that is, trying to balance procedural efficiency and procedural guarantees of a fair trial.[5]

A further level of convergence has also developed in the second half of the past century, on the supranational level within the European Union. The European Court of Justice has, in a wealth of case law, emphasized the right to an effective remedy, which, in turn, has influenced particular national procedures in relation to, for example, time limits, admissibility of certain forms of evidence, neutrality of expert witnesses and the method for apportioning costs of the proceedings.[6] This case law has precipitated a debate with regard to procedural harmonization, in which most commentators seem to agree that there is, within the European Union, no absolute national procedural autonomy.[7] In addition, the Storme Group's Report on the approximation of the laws of procedure

145, at 154-55; E. Storskrubb & J. Ziller, "Access to Justice in European Comparative Law" in F. Francioni, ed., *Access to Justice as a Human Right* (Oxford: Oxford University Press, 2007) 177, at 178-79.

[4] The Council of Europe has published Recommendations, *inter alia:* Recommendation No. R (81) 7 of the Committee of Ministers to Member States on Measures Facilitating Access to Justice (adopted on May 14, 1981); and Council of Europe, Recommendation No. R (84) 5 of the Committee of Ministers to Member States on the Principles of Civil Procedure Designed to Improve the Functioning of Justice (adopted on February 28, 1984) both available online: <http://www.coe.int/t/dghl/cooperation/cepej/textes/ListeRecRes_en.asp>. In addition, the Council's Commission for the Efficiency of Justice ("CEPEJ") has created a Framework Programme, "A New Objective for Judicial Systems: The Processing of Each Case Within an Optimum and Foreseeable Timeframe" CEPEJ (2004) 19 REV 2, and subsequently in 2007 set up a centre for judicial time management (SATURN Centre — Study and Analysis of judicial Time Use Research Network): information available online: <http://www.coe.int/t/dghl/cooperation/cepej/Delais/default_en.asp>. CEPJ has also set up a scheme for an ongoing evaluation of judicial systems, "Evaluation of European Judicial Systems", online: <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp>.

[5] Cadiet, *supra*, note 1.

[6] The case law commenced in 1976 and it is still evolving. See Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landswirtschaftskammer fur das Saarland*, [1976] E.C.R. 1989. For an overview, see, *e.g.*, P. Craig & G. De Búrca, *EU Law — Text, Cases and Materials*, 3d ed. (Oxford: Oxford University Press, 2002); R. Crauford Smith, "Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection" in P. Craig & G. De Búrca, *The Evolution of EU Law* (Oxford: Oxford University Press, 1999) 287, at 287-320; and M. Dougan, *National Remedies Before the Court of Justice, Issues of Harmonisation and Differentiation* (Oxford and Portland Oregon: Hart Publishing, 2004).

[7] See, *e.g.*, C.N. Kakouris, "Do the Member States Possess Judicial Procedural 'Autonomy'?" (1997) 34 C.M.L. Rev. 1389, at 1389-1412; W. Van Gerven, "Of Rights, Remedies and Procedures" (2000) 37 C.M.L. Rev. 501, at 501-36; J. Delicostopoulos, "Towards European Procedural Primacy in National Legal Systems" (2003) 9 Eur. L.J. 599; and Dougan, *id.*, at 4-14.

has launched a debate with regard to civil procedural harmonization within the European Union.[8]

The latest development within the European Union has been the creation of a broad legislative package of cross-border procedural instruments. This package falls within the auspices of the policy area of judicial cooperation in civil matters, under the umbrella political project of the Area of Freedom, Security, and Justice. The generic civil procedural measures of the policy area form the focus of this paper and will be presented in Part II.[9] In addition, the most recent measures will be examined in Part III. The ethos behind the policy area echoes the procedural trend and the desire for procedural efficiency. The balance between the two identified themes of convergence, however, is also, arguably, an important issue within the policy area. Hence, current central questions in relation to its application — which I will raise in Part IV — are whether the policy area manages to achieve efficiency and, if so, whether it achieves it at the cost of the fundamental guarantees of a fair trial.[10] The answers to these questions will also affect the evaluation of the current contribution of the policy area to procedural harmonization in Europe, which I will undertake in Part V.

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[8] M. Storme *et al.*, eds., *Approximation of Judiciary Law in the European Union* (Dordrecht/Boston/London: Kluwer and Martinus Nijhoff, 1994). For the debate, see, *e.g.*, P.H. Lindblom, "Harmony of the Legal Spheres, A Swedish View on the Construction of a Unified European Procedural Law" (1997) 5 E.R.P.L. 11; P. Legrand, "Against a European Civil Code" (1997) 60 Mod. L. Rev. 44; K. Kerameus, "Procedural Unification: The Need and the Limitations" in I. Scott, ed., *International Perspectives on Civil Justice: Essays in Honour of Sir Jack I. H. Jacob Q.C.* (London: Sweet & Maxwell, 1990) 47; and K. Kerameus, "Political Integration and Procedural Convergence in the European Union" (1997) 45 Am. J. Comp. L. 919.

[9] The scope of "generic civil procedural measures" excludes measures specifically on choice of law, family law, insolvency law, compensation to crime victims and contract law that also form part of the policy area. See E. Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (Oxford: Oxford University Press, 2008), at 7 [hereinafter "Storskrubb, *Civil Procedure*"].

[10] Storskrubb, *Civil Procedure*, *id*., at 77-91, 278-83. Due to the limited remit of this paper, I will not be dealing with other crucial issues of the policy area, such as the constitutional and regulatory issue of competence, the remit of competence, subsidiarity and forms of governance. See Storskrubb, *Civil Procedure*, *id.*, at 71-77, 272-78.

II. JUDICIAL COOPERATION IN CIVIL MATTERS

1. Initial Action

When the Treaty of Amsterdam,[11] signed by the EU Member States in 1997, entered into force in 1999, judicial cooperation in civil matters was created as a new, specific policy area under the legal basis that had been elaborated in new articles 61 and 65 of the EC Treaty. The legal basis for the policy area is now after the entry into force of the Lisbon Treaty slightly amended and located in Article 81 of the *Treaty on the Functioning of the European Union*.[12] Initially, the generic measures enacted in the policy area dealt with traditional aspects of private international law or civil procedural cooperation: the "Service Regulation"[13] that regulated the cross-border service of documents; the "Evidence Regulation"[14] that regulates cross-border taking of evidence; and the "Brussels I Regulation"[15] that regulates international jurisdiction, as well as cross-border recognition and enforcement of judgments. These measures clearly strive to move away from the previous intergovernmental style of judicial cooperation with central authorities towards a decentralized model with direct contact between the lowest courts.[16] In addition, these measures strive to achieve simplification, modernization, and efficiency through streamlined standard forms, deadlines, use of information technology, and limited opportunities and grounds for rejection or appeal.[17] Minimum standards and

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[11] *Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts*, [1997] O.J. C 340/1.

[12] *Consolidated version of the Treaty on the Functioning of the European Union*, [2010] O.J. C83/47. For a review of the amendments to the legal basis, see G.R. de Groot & J.J. Kuipers, "The New Provisions on Private International Law in the Treaty of Lisbon" (2008) 15 Maastricht Journal 1.

[13] EC, *Council Regulation (EC) 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters*, [2000] O.J. L 160/37 [hereinafter "EC Reg. 1348/2000"]. This has since been replaced by EC, *Council Regulation (EC) 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) 1348/2000*, [2007] O.J. L 324/79 [hereinafter "EC Reg. 1393/2007"] (applicable from November 13, 2008).

[14] EC, *Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*, [2001] O.J. L 174/1 [hereinafter "EC Reg. 1206/2001"].

[15] EC, *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2001] O.J. L 012/1 [hereinafter "EC Reg. 44/2001"].

[16] See, *e.g.*, EC Reg. 1393/2007, *supra*, note 13, art. 4.

[17] See, *e.g.*, *id.*, art. 7, Annexes I.

mutual recognition are central elements of the measures. In the second Service Regulation, for example, postal service via registered letter (and acknowledgement of receipt) is an accepted means of service, and it can therefore be considered a mutual minimum standard.[18] Also, under the Evidence Regulation, requests can only be refused under limited circumstances, and Member States have to accept other forms and methods of taking evidence, if possible.[19] Finally, under the Brussels I Regulation, grounds for the refusal of enforcement are limited.[20]

2. Novel Legislative Agenda

Following the first legislative projects, the "Legal Aid Directive",[21] which regulates legal aid applications in cross-border matters, and the "Enforcement Order Regulation",[22] which regulates a simplified system of recognition and enforcement for uncontested claims, were enacted.[23] Although legal aid and enforcement are not necessarily novel institutions in the international procedural sense, these particular measures were innovative because the Legal Aid Directive now provides a more specific and holistic legal aid scope than previous international measures had.[24] Further, the Enforcement Order Regulation abolishes the *exequatur* procedure.[25]

Subsequently, in the latest phase of legislative measures for the policy area, the "Payment Order Regulation",[26] the "Small Claims

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[18] *Id.*, art. 14. Note that in the initial Service Regulation, EC Reg. 1348/2000, *supra*, note 13 (which has been repealed), postal service was allowed, but Member States could specify the conditions under which service was effective in their own, domestic systems. Now, in the revised Service Regulation, a mutual minimum standard has been introduced.

[19] EC Reg. 1206/2001, *supra*, note 14, arts. 10(3)-(4), 15.

[20] EC Reg. 44/2001, *supra*, note 15, arts. 34, 35.

[21] EC, *Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes*, [2003] O.J. L 026/41 [hereinafter "EC Dir. 2002/8/EC"].

[22] EC, *Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims*, [2004] O.J. L 143/15 [hereinafter "EC Reg. 805/2004"].

[23] B. Hess, "Nouvelles techniques de la coopération judiciaire transfrontière en Europe" (2003) 92 Revue Critique de Droit International Privé 215, at 223 (noting a second generation of measures).

[24] See, *e.g.*, EC Dir. 2002/8/EC, *supra*, note 21, art. 7.

[25] EC Reg. 805/2004, *supra*, note 22, art. 5.

[26] EC, *Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure Regulation*, [2006] O.J. L 399/1 [hereinafter "EC Reg. 1896/2006"].

Regulation",[27] and the "ADR Directive"[28] have been enacted. These measures are all novel in the international procedural context. The Payment Order Regulation creates a new, uniform and optional procedure that allows creditors to recover uncontested claims in cross-border matters through a system that is intended to be, if possible, electronic.[29] The Small Claims Regulation creates a new, uniform and optional — and, as main rule, written — procedure for claims in cross-border matters with a value of less than 2,000.[30] Once a decision is obtained through either of these procedures, it may be enforced automatically in all European Member States without a formal recognition procedure.[31] The ADR Directive imposes an obligation on the Member States to encourage mediation, and it aims to ensure the enforceability of agreements that result from mediation, the confidentiality of mediation, and the elimination of obstacles to mediation, such as party concerns about limitation or prescription periods.[32]

Decentralization and direct channels with standardized procedural forms, specific deadlines, and information technology services are again being introduced in an attempt to achieve efficiency and keep costs low.[33] The introduction of, ostensibly, simplified procedural mechanisms is coupled with the idea that litigants can avail themselves of these tools without counsel.[34] A further feature is the obligation upon courts and Member States to cooperate with each other and to provide information on procedures to one another through the Internet. The purpose of this obligation is to support access to proper information for and about litigants.[35] Finally, mutual recognition and minimum standards are also introduced in these later measures. In particular, the Payment Order and Small Claims Regulations introduce minimum protective guarantees, which, if present, will ensure that the mutual recognition of judgments

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[27] EC, *Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure Regulation*, [2007] O.J. L 199/1 [hereinafter "EC Reg. 861/2007"].

[28] EC, *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*, [2008] O.J. L136/3 [hereinafter "EC Dir. 2008/52/EC"]. This Directive was preceded by an earlier initiative developed by a group of stakeholders with the assistance of the European Commission launched at a conference in Brussels on July 2, 2004, the European Code of Conduct for Mediators, available online: European Judicial Network in Civil and Commercial Matters <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>.

[29] See, *e.g.*, EC Reg. 1896/2006, *supra*, note 26, Recital 11, arts. 1-3, 7(5).

[30] See, *e.g.*, EC Reg. 861/2007, *supra*, note 27, arts. 1-3, 5.

[31] EC Reg. 1896/2006, *supra*, note 26, arts. 18-22; *id.*, arts. 20-23.

[32] EC Dir. 2008/52/EC, *supra*, note 28, arts. 4, 6, 7, 8.

[33] See, *e.g.*, EC Reg. 1896/2006, *supra*, note 26, arts. 1(a), 7, 12(1), 16(4), Annexes I-VII.

[34] See, *e.g.*, EC Reg. 861/2007, *supra*, note 27, Recital 15, arts. 10-12.

[35] See, *e.g.*, EC Dir. 2008/52/EC, *supra*, note 28, art. 9.

will be a reality in Europe, without any possibility of *exequatur* in the Member State of enforcement.[36]

3. Overarching Projects

Parallel to its specific measures, the policy area has also generated general and overarching instruments that aim to support the judicial co-operation system.[37] The most prominent of these is the creation of the European Judicial Network ("EJN").[38] The EJN has functioned since December 2002, and it has organized several meetings of its contact points and other involved parties in order to foster mutual trust; facilitated co-operation in actual cases; and launched a successful website.[39] The EJN has recently been reformed and among the most important changes are the inclusion of the legal profession as a member of the Network and the addition of further information tasks for the Network.[40]

Additionally, in 2000, an external initiative that was adjacent to the policy area established an informal network of national judicial training agencies. This network was thereafter incorporated under Belgian law as the European Judicial Training Network ("EJTN").[41] Within the auspices of the independent EJTN, a website has been developed for the purpose of providing access to information. Through the EJTN, judges and

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[36] EC Reg. 1896/2006, *supra*, note 26, art. 19; EC Reg. 861/2007, *supra*, note 27, art. 20.

[37] Among the supporting measures, funding for research and other projects has been regulated. See EC, *Council Regulation (EC) 743/2002 of 25 April 2002 establishing a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters*, [2002] O.J. L 115/1. This was replaced by EC, *Decision 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 establishing for the period 2007-2013 the Specific Programme 'Civil Justice' as part of the General Programme 'Fundamental Rights and Justice'*, [2007] O.J. L 257/16. See H. Hartnell, "EUstitia: Institutionalizing Justice in the European Union" (2002) 23 Nw. J. Int'l L. and Bus. 65, for an early view of the importance of the overarching measures.

[38] EC, *Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters*, [2001] O.J. L174/25 [hereinafter "EC Decision 2001/470"].

[39] For the mentioned website see European Judicial Network in Civil and Commercial Matters, online: <http://ec.europa.eu/civiljustice/index_en.htm>. On the tasks of the EJN see EC Decision 2001/470, *id*., art. 5; see also Commission of the European Communities, *Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters* COM(2006)203 (Brussels: May 16, 2006).

[40] EC, *Decision 568/2009/EC of the European Parliament and of the Council of 18 June 2009 amending Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters*, [2009] O.J. L168/35.

[41] See European Judicial Training Network ("EJTN"), "Welcome from the EJTN Secretary General", online: <http://www.ejtn.net/www/en/html/index.htm>.

prosecutors can participate in training programs in other Member States. Additionally, a specific exchange program has been created so that judges and prosecutors can experience other institutions and cultures. Finally, meetings between training authorities are held in order to foster better practices.[42] The EJTN sees the elaboration of a mutual European training standard as an important goal.[43] The European institutions and, in particular, the Commission of the European Communities ("Commission") have acknowledged that judicial training has become a major source of support for the implementation of legislation and the fostering of mutual trust.[44]

III. RECENT DEVELOPMENTS

1. Judicial Training

Subsequent to the Commission's efforts to highlight judicial training, the Council of the European Communities ("Council") has, in 2008, adopted a Resolution that states that the national training bodies remain the key vehicles for imparting a common European judicial culture.[45] According to the Resolution, the Member States should take concrete action to, *inter alia*: incorporate European law into their national training programs; promote knowledge of the official languages of the European Union among judges and judicial staff; foster knowledge of the legal systems of other Member States; and support the learning of European e-justice tools. In addition, the Member States should adopt common

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[42] G. Charbonnier, "Nouveaux défis pour la justice en Europe : Développement d'une culture judiciaire européenne" in W. Heusel, ed., *The Future of Legal Europe: An Emerging European Judicial Culture? Contributions to the panel discussion "The Future of Legal Europe: New Challenges for Justice in Europe"* (2008) 9 ERA Forum 109, at 115-16 .

[43] *Id.*, at 116.

[44] Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament — The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice*, COM(2005)184 (Brussels: May 10, 2005), at 26, and Commission of the European Communities, *Communication from the Commission to the European Parliament and the Council on judicial training in the European Union* COM(2006) 356 final (Brussels: June 29, 2006). Note that the Lisbon Treaty, when it enters into force will include judicial training in the legal basis for judicial cooperation in civil matters. See EC, *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007*, [2007] O.J. C 306/1, at 62-63, art. 65(2)(h).

[45] *Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the training of judges, prosecutors and judicial staff in the European Union*, [2008] O.J. C299/1.

European training programs, the content of which should be determined by the EJTN and the implementation of which should be assured by the EJTN and its members. The emphasis on the roles of the national bodies shows a further degree of regulatory decentralization that is probably occasioned by the differing national systems, sensitivity at harmonizing such a fundamental legal institution and budgetary constraints. Nevertheless, the Resolution lays a formidable burden of action on the Member States, with the threat of potential coordinated action after four years if the results have not been satisfactory.

2. Electronic Justice Strategy

In 2008, the Commission published a Communication "Towards a European e-Justice Strategy", in which it emphasizes the importance of information and communication technologies in supporting judicial systems.[46] One of the major aims of the proposed strategy is to create a European e-justice portal that provides access to information, references to existing sites, and direct access to certain European procedures.[47] In addition, the aim is to promote e-justice as a means to ensure effective judicial cooperation, by, *e.g.*, facilitating videoconferencing, creating automated translation tools and generating a database of legal translators and interpreters.[48] The European Parliament is in general supportive of the e-justice initiative although it has among others noted that the work should be more citizen-focused and has *inter alia* proposed that all future legislation in the civil law field should use online application forms and that two portals should be created: one for citizens and a separate, secure one for judges, officials and practitioners.[49] The European Council has subsequently adopted an extensive e-justice action plan for the years 2009-2013, in which it among other matters welcomes the initiative to create a portal.[50]

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[46] Commission of the European Communities, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee — Towards a European e-Justice Strategy* COM(2008) 329 (Brussels: May 30, 2008).

[47] *Id.*, at 5-7.

[48] *Id.*, at 8-9.

[49] P6_TA(2008)0637, *European Parliament resolution of 18 December 2008 with recommendations to the Commission on e-Justice* (2008/2125(INI)).

[50] Council Multi-annual European E-justice Action Plan 2009-2013, [2009] O.J. C75/1, at paras. 8 and 30.

3. Discussion Forum

Another initiative of the Commission in 2008 was its creation of a Justice Forum for discussing EU justice policies and practice.[51] According to the Commission, an open and regular dialogue between all actors of the justice systems will foster mutual trust, improve mutual recognition and enhance access to justice. The Commission acknowledges that the legislative program has, in the field of justice, been drawn up largely without input from practitioners, at least thus far. To this effect, the Forum is specifically intended to form a channel of communication between the EU authorities and the practitioners who can contribute to both the *ex ante* phase of evaluation (at the policy design stage) and the *ex post* phase of evaluation (*i.e.*, of implemented legislative measures).[52] In addition, the Forum should, according to the Commission, contribute to the global assessment of the functioning of the policy area, and also create a dialogue that strengthens mutual trust and cooperation with the Council of Europe.

4. Effective Enforcement of Judgments

During 2008, the one specific procedural measure that was launched within the policy area was the *Green Paper on the transparency of debtors' assets*.[53] This measure was launched in order to support the effective enforcement of judgments in the European Union. It is solely a consultative document, meant to precede any future legislative proposal. It followed the *Green Paper on the Attachment of Bank Accounts*,[54] and it is a seemingly natural continuance of all of the preceding measures of the policy area that have been implemented in order to speed up international enforcement or abolish the *exequatur* procedure. Proper enforcement and execution procedures remain unregulated on the European level, but the ultimate success of all of the enacted enforcement measures depends, in

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[51] Commission of the European Communities, *Communication from the Commission on the creation of a Forum for discussing EU justice policies and practice*, COM(2008) 38 (Brussels: February 4, 2008). The forum was launched on May 30, 2008. See online: <http://ec.europa.eu/justice_home/news/information_dossiers/justice_forum/index_en.htm>.

[52] *Id.*, at 2.1, paras. 9-15.

[53] Commission of the European Communities, *Green Paper — Effective enforcement of judgments in the European Union: the transparency of debtors' assets*, COM(2008)128 (Brussels: March 6, 2008).

[54] Commission on the European Communities, *Green Paper — On improving the efficiency of the enforcement of judgments in the European Union: The Attachment of Bank Accounts*, COM(2006) 618 (Brussels: October 24, 2006).

the end, on effective execution.[55] However, it has also been noted that there is a great diversity between the execution procedures of Member States, and that harmonization could raise difficult issues of principle.[56] Therefore, the Commission seems to envisage legislative measures that support execution proceedings, such as bank account attachment, and measures that increase the transparency of assets. These latter measures, as such, also raise difficult questions, but they are more limited.

5. Defining Future Priorities

At the end of 2008, the Commission carried out a public consultation with the aim of defining the future priorities of the policy area.[57] At that stage the policy area had received impetus from two successive multi-annual programs of the European Council: the so-called Tampere Conclusions and the Hague Programme.[58] Both have set out priorities and listed initiatives. At the time the Hague Programme was close to its end and it was natural to consider the future direction of the policy area. In its public consultation, the Commission posed only a pair of questions in relation to civil justice: *"Do you think more should be done at the European level to improve effectiveness of justice in the Member States?"* and *"Do you think more should be done on the European level to secure and improve enforcement of claims aboard?"*[59] Slightly over half of the responses were positive for both specific questions.[60] Regardless of the potential critique that can be levelled against the consultation itself, or of the issue of its political value and legitimacy, the questions themselves foreshadow the Commission's vision of direction of civil justice,

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[55] The Commission has been aware of these issues already. See Commission of the European Communities, *Proposal for a Council act establishing the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in the Member States of the European Union*, COM(1997) 609, [1998] O.J. C33/20.

[56] See P. Kaye, *Methods of Execution of Orders and Judgments in Europe* (Chichester: John Wiley & Sons, 1995); W. Kennett, "Enforcement of Judgments — Chronique" (1997) 5 E.R.P.L. 321, at 432-33.

[57] European Commission, Directorate General Freedom, Security and Justice consultation, online: <http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0001_en.htm>.

[58] European Council Conclusions Nr 200/1/99 available online: <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm>; and The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, [2005] O.J. C53/1.

[59] Consultation "Freedom, Security and Justice: What will be the future?", Questionnaire, available online: <http://ec.europa.eu/justice_home/news/consulting_public/0001/consultation_questionaire_en.doc> questions 6.3 and 6.4.

[60] Consultation "Freedom, Security and Justice: What will be the future?", Results available online: <http://ec.europa.eu/justice_home/news/consulting_public/0001/contributions/consultation_results_en.pdf> at 10.

which, apparently, focuses on the improvement of effectiveness and enforcement. In the new multi-annual Stockholm Programme of the European Council for the period 2010-2015, the implementation and evaluation of enacted measures as well as their streamlining is, however, emphasized. Hence, the focus is not so much on new procedural measures for civil justice but more on consolidation and creating supportive systems, for example in the field of e-justice. The goal of efficiency can also subtly be seen behind these aspirations.[61]

IV. IMPACT

1. Initial Application

For some of the measures that were initially enacted within the auspices of the policy area, the Commission has carried out statutorily mandated, empirical follow-up work in relation to each measure's respective application. Therefore, studies have been conducted by external contractors on the application of among others the Service and Evidence Regulations, as well as the Brussels I Regulation.[62] The Commission has published its own reports in relation to the applications of the Service, Evidence and Brussels I Regulations and the EJN, respectively.[63] On a general level, aside from the particular conundrums and issues that have

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[61] Council Document 5731/10 *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, 2.12.2009, available at <http://register.consilium.europa.eu/pdf/en/10/st05/st05731.en10.pdf> [hereinafter "Stockholm Programme"].

[62] For all studies, see online: <http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm>.

[63] Commission of the European Communities, *Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Regulation (EC) 1348/2000 on the service in the Member States of Judicial and Extrajudicial documents in civil or commercial matters,* COM(2004)603 (Brussels: October 10, 2004) [hereinafter "COM/2004/0603"]; Commission of the European Communities, *Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters*, COM(2006)203 (Brussels: May 16, 2006); and Commission of the European Communities, *Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*, COM(2007)769 (Brussels: December 5, 2007) [hereinafter "COM/2007/0769"]. Commission of the European Communities, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* COM(2009) 174 (Brussels: April 21, 2009).

been identified for each particular measure, the studies show that the measures have, to some extent, contributed to achieving efficiency in judicial cooperation. However, the results also show that there is still a running-in phase, that there is divergence in application between Member States, and that there is room for improvement in the general knowledge of the measures, as well as in their technical and practical application.[64] One study even goes so far as to say the there is "currently little harmonisation and optimisation in its application", and that "there are notable lacunae or inefficiencies in the Regulation's harmonising objective …".[65] In its reports, the Commission emphasizes that there is a need for further training and dissemination of information in order to improve the functioning of the measures.[66] The lack of a statutory follow-up procedure and, also, of an empirical review of the application of the Enforcement Order Regulation are regrettable, since its enactment has raised crucial questions in the literature with regard to fundamental procedural rights.

In addition, several of the more recently enacted measures have not been applied for long. The Payment Order and Small Claims Regulations have been applicable for slightly over one year, and the implementation period for the ADR Directive has not yet expired. Hence, it is still impossible to gather any empirical data on their application. Thus, a holistic understanding of the changes that have been brought by the policy area — both as a whole and regarding its potential harmonizing effects — is, in this sense, premature. A tentative preliminary analysis, however, can be made. Such a preliminary analysis must necessarily be reviewed in light of subsequent practice and application.

2. Preliminary Issues

The crucial features of the policy area include: decentralization; ostensible simplification of procedures; emphasis on practical tools, including those that involve new technologies; and attempts to increase the amount and the flow of available information, cooperation and

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[64] Mainstrat, *Study on the application of Council Regulation (EC) No 1348/2000 on the service of judicial and extra judicial documents in civil or commercial matters* (May 2004), at 6-7; and Mainstrat, *Study on the application of Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters* (March 2007), at 6 and 44 [hereinafter "Mainstrat, *Evidence Regulation Study*"], both available online: <http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm>.

[65] Mainstrat, *Evidence Regulation Study*, *id*., at 39.

[66] COM/2004/0603, *supra*, note 63, at 8; COM/2007/0769, *supra*, note 63, at 7.

accessibility. These features are intended to introduce positive and welcome improvements for litigants, and they have, as I have noted above, already done so to some extent. However, the most notable feature — decentralization — brings with it a risk of diversity in, or fragmentation of, the manner(s) in which measures are applied. This risk arises from, among other causes, the divergent resource levels and the inconsistent abilities of the relevant actors throughout the different national localities.[67] Successful application depends upon the efforts that are made by private and public actors, and, therefore, it also relies heavily on national exigencies, resources and procedures — and this invariably means that there will be different treatments of like cross-border cases, despite the aim of a level playing field.[68] Following from diversity, there is a degree of inherent, total complexity that may hamper legal certainty for litigants and may obstruct harmonization.

In addition, mutual recognition, with its ancillary minimum procedural standards, is a central feature of the policy area. This feature is intended to introduce efficiency, and it will undoubtedly do so to some extent. However, it is being introduced through a multitude of different and, sometimes, completely novel procedures. It functions to limit the possible mechanisms through which one might ascertain, in practice, whether or not the rights of the defence have been protected.[69] If the court of origin is allowed to scrutinize its own procedural standard, this might represent something of a toothless protection for the defendant.[70] In addition, if there is only a schematic review (*i.e.*, in terms of shallow scope and limited applicability), without safety valves, then possibilities of abuse and injustice will persist towards defendants who are not at liberty to choose the form of procedure. Furthermore, because there are only

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[67] See, *e.g.*, Hess, *supra*, note 23, at 222-23, 226-27; D. Mougenot, "Le règlement européen sur l'obtention des preuves" (2002) Journal des Tribunaux 17, at 21.

[68] See J. Castellain, "La transmission sécurisée et la signification des actes" in J. Isnard & J. Normand, eds., *Nouveaux droits dans un nouvel espace européen de justice : Le droit processuel et le droit de l'exécution* (Paris: Éditions Juridiques et Techniques, 2002) 77, at 78 [hereinafter "Isnard & Normand"]; P. Girard-Thuilier, "La communication trans-frontière des juges" in G. Barrett, ed., *Creating a European Judicial Space, Prospects for Improving Judicial Cooperation in Civil Matters in the European Union* (Köln: Budesanzeiger, 2001) 59, at 62; G. Kodek, "The Impact of the European Convention on Human Rights and Fundamental Liberties on Enforcement Practices" in M. Andenas, B. Hess & P. Oberhammer, eds., *Enforcement Agency Practice in Europe* (The British Institute of International and Comparative Law, 2005) 303, at 361 [hereinafter "Ardenas, Hess & Oberhammer"].

[69] T. Andersson, "Harmonization and Mutual Recognition: How to Handle Mutual Distrust" in Andenas, Hess & Oberhammer, *id.*, 245, at 248-49.

[70] See, *e.g.*, B. Hess, "Le projet anglo-germano-suédois de titre exécutoire européen : Conditions nécessaires à la suppression de l'exequatur" in Isnard & Normand, *supra*, note 68, at 125.

limited possibilities for opposition by the defendant at the stage of recognition and enforcement of judgments, the protection of the defendant is diminished.[71] In addition, service by registered mail might be uncertain in a cross-border context.[72] Finally, other procedural standards, aside from the rights of the defence, may also be affected when the enacted procedures are applied, and there is a risk that the schematic nature of some of the measures will fail to facilitate opportunities for review of the affected standards.[73]

3. Future Developments

The measures that are envisaged on e-justice and the creation of the Justice Forum, as well as the resolution on judicial training, demonstrate that there is a drive within the policy area to address the issues of diversity and fragmentation, and to try, by such further overarching ancillary structural means, to generate uniform, practical implementation and efficiency. In addition, the Forum and the mandate for action in judicial training demonstrate an attempt to generate mutual trust and greater widespread participation among the relevant actors in the policy area. These measures cannot directly address the fundamental rights concerns about the implementation, but they can indirectly contribute to the debate.

The Forum is specifically intended to discuss fundamental rights issues, and it is proposed that the Fundamental Rights Agency should participate in the Forum. The attempt to find the structural means to support harmonization and the increased awareness of fundamental rights mirror what is happening in the current debate on the harmonization of criminal law, in which the issue of mutual trust is, perhaps, more

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[71] R. Perrot, "L'efficacité des procédures judiciaires au sein de l'Union européenne et les garanties des droits de la défense" in M.-T. Caupin & G. De Leval, eds., *L'Efficacité de la Justice en Europe* (Brussels: Larcier, 2000) 417, at 425-26.

[72] G. Tarzia, "Exigences et garanties de l'exécution transfrontalière en Europe" in M. Bandrac *et al.*, *Justice et droits fondamentaux. Etudes offertes à Jacques Normand* (Paris: Litec; Editions du Juris-Classeur, 2003) 449, at 457-58; J.P. Correa Delcasso, "Le titre exécutoire européen et l'inversion du contentieux" (2001) 53 Revue International de Droit Comparé 61, at 79.

[73] H. Tagaras, "The European Enforcement Order (Regulation 805/2004)" (Paper presented at the EIPA Seminar, November 11-12, 2004, Luxembourg), at 19; C. Baker, "Le titre exécutoire européen. Une avancée pour la libre circulation des décisions?" (2003) La Semaine Juridique Édition Générale 985, at 990-92 ; N. Fricero, "La consécration européenne du droit à l'exécution" in J. Isnard & J. Normand, eds., *L'aménagement du droit de l'exécution dans l'espace communautaire : bientôt les premiers instruments* (Paris: Éditions Juridiques et Techniques, 2003) 61, at 71-77; and G. Cuniberti, "The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court Avoidance, and Efficiency" (2008) 57 I.C.L.Q. 25, at 45.

openly considered to be a crucial factor.[74] The Stockholm Programme also emphasizes the importance of fundamental rights and will together with these measures hopefully influence a dialogue between and sustained effort of the institutions and the relevant local actors in relation to fundamental rights, and thereby have a positive impact on both a practical and a cultural level of the policy area.[75]

V. CONCLUSIONS REGARDING HARMONIZATION

Within the European Union, the policy area of judicial cooperation in civil matters has created a harmonized, supranational procedural system for what has traditionally been called international procedural cooperation. This procedural system does not directly entail the harmonization of national, domestic civil procedures, and it has not taken the form of a grand, holistic procedural codification.

Nevertheless, it is possible, and even likely, that the policy area will affect national civil procedures, albeit perhaps in a piecemeal and random fashion. Ostensibly, the measures of the policy area regulate only cross-border cooperation structures, rather than specific national procedures. As such, the policy area can be seen to hinder true harmonization and to create a double standard.

However, the very first measure, *i.e.*, the Service Regulation, has already occasioned a discussion on what should constitute acceptable standards for the service of documents. This amounts to a mutual dialogue that, although it is currently limited to cross-border concerns, has the potential to spill over into domestic, national considerations.[76] In addition, the later measures of the Payment Order and Small Claims Regulations have specifically included procedures — not only cooperation mechanisms — that are harmonized and, thus, intended to be uniformly applied across national jurisdictions, albeit only in cross-border cases. The application of these measures will forge a mutual experience and generate a dialogue that has the potential of spill over into domestic cases. Such pressure for reform

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[74] A. Suominen, "Ömesidigt erkännande av rättsliga beslut som hörnsten i det europeiska straffrättliga samarbetet" (2006) 140 Tidskrift utgiven av Juridiska Föreningen i Finland 607, at 610-12; F. Frände, "Towards a Harmonized Criminal Justice System in the EU" in Frände *et al.*, *In the Footsteps of Tampere — Justice in the European Union* (Helsinki: University of Helsinki, 2006) 35, at 49 [hereinafter "Frände *et al.*"].

[75] Stockholm Programme, *supra*, note 61, at 22-23.

[76] For a discussion of spillover in the field of private law, see, *e.g.*, W. Van Gerven, "Bringing (Private) Laws Closer to Each Other at the European Level" in F. Cafaggi, ed., *The Institutional Framework of European Private Law* (Oxford: Oxford University Press, 2006) 37, at 65-67.

may arise, in particular, in Member States where no equivalent domestic procedure yet exists. In addition, it is possible that the policy area might even have a harmonizing influence beyond the borders of the European Union, on the multi-national scene. The European Union has joined — and is now a member of — the *Hague Conference on Private International Law*.[77] It is probable that its participation will directly influence the dialogue on a global level. It is therefore relevant to gauge the changes that are being brought by the new European policy, from the perspectives of both the domestic and the global levels of procedure. In addition — and this was raised in the debate during the 2009 annual conference of the International Association of Procedural Law[78] — convergence or harmonization should not be an end in itself, unless there are legitimate reasons for treating it as such.

Since its creation, the policy area has been groundbreaking in both its legislative breadth and its legislative reach. From the perspectives of traditional international civil procedure and procedural harmonization, the policy area has introduced interesting new methodologies. These include, however, some features that are worth our concern because they put into doubt the potential success of the policy area and raise doubts about the beneficial nature of any effects of harmonization. At present, the policy area has, due to the diversity throughout its decentralized structure, failed to reach its harmonizing potential. In addition, the combined efforts to emphasize efficiency as a paramount goal and to introduce mutual recognition have generated a tension with respect to fundamental procedural rights. This needs to be reviewed, and, if necessary, a new balance should be sought that includes fundamental guarantees of a fair trial. It is notable that, in the previous debate (*i.e.*, of the 1990s) about procedural harmonization in Europe, several commentators favoured a more decentralized and flexible approach, which involved the development of common procedural rules or procedural standards, and emphasized the importance of simultaneously developing a common legal culture and an educational infrastructure, while fostering a discussion on the fundamental principles of procedure.[79]

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[77] See online: <http://www.hcch.net/index_en.php>.

[78] International Association of Procedural Law ("IAPL"), *Common Law — Civil Law: The Future of Categories / Categories of the Future* (2009 IAPL Annual Conference, Toronto, Canada: June 3-5, 2009). See online: <http://www.iapl2009.org/> [hereinafter "IAPL 2009"].

[79] P.H. Lindblom, "Harmony of the Legal Spheres, A Swedish View on the Construction of a Unified European Procedural Law" (1997) 5 E.R.P.L. 11, at 26, 45-46; J. Niemi-Kiesiläinen, "International Cooperation and Approximation of Laws in the Field of Civil Procedure" in V. Heiskanen & K. Kulovesi, eds., *Function and Future of European Law* (Helsinki: Helsinki Univer-

Now that a decentralized model with a broad corpus of measures has been enacted on the European, supranational level, an emphasis on consolidation and, in particular, on fostering a discussion about the fundamental principles has been advocated as the way forward.[80] A hope was noted during the enriching debate at the IAPL 2009 conference that comparative interchanges and dialogue, among proceduralists and relevant actors from across the divide of potentially "mixed" systems, will foster an osmotic process that leads to best practices and convergence from the bottom up. This part of the discussion echoes the governance debate in the European Union, which should increasingly be raised also in the procedural arena.[81] Recent developments and policy documents of the policy area provide evidence of a further emphasis on overarching and horizontal measures of consolidation, and even of discourse. A further emphasis on deepening and developing the current measures as a means to ensure effective implementation is also apparent. However, in the long run, the salient question to answer will also be whether mutual recognition and minimum standards are enough. The analogies from the European Union's internal market history show that they might be replaced, in the end, by a more detailed and specific form of harmonization. Therefore, the final chapter of the post-modern, European procedural novel remains unwritten.

sity Press, 1999) 249, at 254-56; K. Kerameus, "Procedural Harmonization in Europe" (1995) 43 Am. J. Comp. L. 401, at 405; H. Kötz, "A Common Private Law for Europe: Perspectives for the Reform of Legal Education" in B. De Witte & C. Forder, eds., *The Common Law of Europe and the Future of Legal Education* (Deventer: Kluwer Law, 1992) 31, at 34-36; and P. Biavati, "Is Flexibility a Way to the Harmonization of Civil Procedural Law in Europe?" in F. Carpi & M. Lupoi, eds., *Essays on Transnational and Comparative Civil Procedure* (Torino: G. Giappichelli Editore, 2001) 85, at 100-101.

[80] E. Storskrubb, "Steering the Tide — The Mid-Term Perspective for Civil Justice" in Frände *et al.*, *supra*, note 74, 1, at 30-33.

[81] See Storskrubb, *Civil Procedure*, *supra*, note 9, at 74-77.

The ALI/UNIDROIT *Principles of Transnational Civil Procedure*[†] and Their Influence on Future Private Enforcement of European Competition Law

Rolf Stürner[*]

I. INTRODUCTORY REMARKS

1. Private Law Enforcement, Disclosure and Competitive Society in the United States

Private law enforcement and disclosure are twin sisters. The origin of their modern form is American. At the end of the 19th century — and during the Depression of the 1920s and 1930s — there was a heightened awareness of the need to restrict the power of big commercial trusts to make big business decisions that might generate adverse consequences for others.[1] It was the strategy of the New Deal to place primary reliance on administrative boards or agencies when trying to protect the weak from the strong. At the same time, however, the *Federal Rules of Civil Procedure*[2] and the practices of the various state courts developed provisions that empowered private litigants and their lawyers to conduct discovery. Discovery strengthened the effectiveness of private law enforcement.

[†] The author was Co-Reporter of the United Nations Institute for the Unification of Private Law ("UNIDROIT") for this first joint project of UNIDROIT and the American Law Institute ("ALI"). For the history of this project, see Stürner, *The Principles of Transnational Civil Procedure*, *infra*, note 13, at 203 *et seq*. See also ALI/UNIDROIT, *Principles*, *infra*, note 11.

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[1] Paul D. Carrington, "The American Tradition of Private Law Enforcement" in Stiftung Gesellschaft für Rechtspolitik, Trier & Institut für Rechtspolitik an der Universität Trier, eds., *Bitburger Gespräche Jahrbuch 2003* (München: Beck, 2003), at 33 *et seq.* [hereinafter "Carrington"].

[2] *Rules of Civil Procedure for the United States District Courts* (effective September 16, 1938). Online: U.S. Courts — Federal Judiciary Rulemaking <http://www.uscourts.gov/rules/CV2008.pdf> (with a historical note on the original rules of 1938) [hereinafter "U.S. Rules"].

Public law enforcement by federal agencies was not a total failure. Nevertheless, beginning in the 1960s, there was more and more of a decrease in the significance of close regulation of businesses by public institutions. Americans did not trust their government. The triumphal march of private law enforcement began, giving rise to the promulgation of discovery rules; access to government information for private law enforcers; class actions; and the aggregation of small claims, which prevented businesses from profiting as a result of causing small harms. In the words of Paul D. Carrington, one of the great and missionary protagonists of private law enforcement,

> the cornucopia of procedural … rights have been fashioned over two centuries to enable American courts to perform an important political role as managers of a vast array of social issues. To that end, rules of procedure are designed to draw socially significant disputes into court.[3]

According to this statement, private law enforcement and private prosecution through private disclosure have been successful and have promoted social and economic progress.[4] Private law enforcement seems to be a form of coronation in competitive societies that provides guarantees of growth in productivity and of improvement in the standard of living of citizens.[5]

2. European Legislative Initiatives to Improve Private Enforcement of Competition Law

In 2005, the Commission of European Communities ("European Commission" or "Commission") published a Green Paper entitled *Damages Actions for Breach of the EC Antitrust Rules* ("Green Paper").[6] This publication was followed by a White Paper in 2008.[7] Then, in spring 2009, the European Commission drafted an unofficial proposal for a Directive[8] on rules governing damages actions for infringements of articles 101 and

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[3] Carrington, *supra*, note 1, at 38.

[4] Carl T. Bogus, "Why Lawsuits Are Good for America: Disciplined Democracy, Big Business and the Common Law" (New York: New York University Press, 2001), at 141 *et seq*.

[5] For a rather critical view, see Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2001), at 229 *et seq*.

[6] Commission of the European Communities, *Green Paper — Damages Actions for Breach of the EC Antitrust Rules {SEC(2005) 1732}*, (2005) COM/2005/0672 (Brussels: December 19, 2005).

[7] Commission of the European Communities, *White Paper — Damages Actions for Breach of the EC Antitrust Rules {SEC(2008) 404-406}*, (2008) COM/2008/165 (Brussels: April 2, 2008).

[8] Commission of European Communities, Unofficial Draft, Spring 2009, No. 2 [hereinafter "*Unofficial Directive Draft*"].

102 of the European Treaty.[9] According to the opinion of the Commission, the "full effectiveness" of European antitrust law and "in particular the practical effect of the prohibitions laid down therein, requires that any individual can claim compensation before national courts for the harm caused to him by an infringement of these provisions".[10] The draft of the Directive contains guidelines for the improvement of group actions and representative actions of "qualified entities", which are designated by a Member State; guidelines for disclosure of evidence (discovery, exceptions and privileges, and sanctions); guidelines for the passing-on defence; and guidelines for the binding effects of decisions by national courts and authorities. Until now, it has been very uncertain whether and how this Directive will come in force. Nevertheless, the draft's chapter on disclosure is of special interest because it shows remarkable similarity to proposals and solutions of the ALI/UNIDROIT *Principles of Transnational Civil Procedure*,[11] which have been designed to strike a compromise between the Anglo-American and continental procedural cultures.

3. The European Commission's Philosophy: Reception of American Advantages Only and Avoidance of American Disadvantages

The European Commission's philosophy, as articulated in the introduction of a working paper that was annexed to its Green Paper in 2005,[12] is to profit from the advantages — while avoiding the disadvantages — of the present American private law enforcement machinery. According to the Commission's analysis, the advantages of private enforcement of competition law include: well-organized compensation for the victims of violations; deterrence of wrongdoers; bringing competition law closer to the citizen; clear shifting of cost from the claiming party to the wrongdoing defendant; furtherance of European competitiveness; and improvement of the standard of living of citizens. The big disadvantage

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[9] *Treaty on the Functioning of the European Union* [hereinafter "European Treaty"] (formerly arts. 81 and 82 of the *Treaty establishing the European Community* (Nice consolidated version)).

[10] *Unofficial Directive Draft*, *supra*, note 8.

[11] ALI/UNIDROIT, *Principles of Transnational Civil Procedure*, online: <http://www.unidroit.org/english/principles/civilprocedure/main.htm>. See also ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge: Cambridge University Press, 2006) [hereinafter "ALI/UNIDROIT, *Principles*"].

[12] Commission of the European Communities, *Commission Staff Working Paper — Annex to the Green Paper — Damages Actions for Breach of the EC Antitrust Rules {COM(2005) 672 final}*, (2005) SEC/2005/1732 (Brussels: December 19, 2005), s. 1(B) *et seq*. in Jürgen Basedow, ed., *Private Enforcement of EC Competition Law* (Alphen aan den Rijn : Kluwer Law International, 2007), at 269 *et seq.*

that the Commission seeks to avoid is the importation of a litigation culture, such that the social costs outweigh the benefits of private law enforcement. This is a very clear allusion to the very broad and, sometimes, exaggerated U.S. discovery practice. Is it really a realistic expectation to develop a European fabric of disclosure and private law enforcement that is better than the American original?

4. European Fears and Continental European Administration of Justice

The topic of this contribution does not aim to give a full judgment on the advantages and disadvantages of private law enforcement in competition law. The remark of the working paper, however — that the costs of social litigation should not outweigh the benefits of private law enforcement — accurately characterizes the basic problem of the U.S. model. Private disclosure, as a predominant feature of this model, is one of the main sources of European fears. This is not only because of the immense costs that private disclosure may cause in many cases. Europeans may be also or even more afraid of the social consequences of private prosecution and investigation.

In the traditional European point of view, the administration of justice is the primary responsibility of the state and its judges. Civil litigation should be neither a well-produced drama, nor a battle between adversaries. The judge is not an umpire who controls the correctness of a party's disclosure activities only when the opposing party calls upon him to do so. From the very beginning, the judge determines the adequacy and the proportionality of discovery measures *ex officio*, and this is considered to be an effective and preventative protection from the embarrassment and the annoyance of the procedural activities of an aggressive opponent.[13] The differences between the Anglo-American and the continental procedural models involve not only a question of differing procedural craftsmanship. They mirror different models of society.[14]

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[13] See Rolf Stürner, *The Principles of Transnational Civil Procedure: An Introduction to Their Basic Conceptions* (2005) 69 RabelsZ 201, at 203, 226 *et seq*., 232 *et seq*. [hereinafter "Stürner, *Principles*"].

[14] On this topic, see M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), *passim*; Oscar G. Chase, *Law, Culture, and Ritual* (New York: New York University Press, 2005), at 47 *et seq*., 72 *et seq*.; and Rolf Stürner, *Procedural Law and Legal Cultures* in P. Gilles & T. Pfeiffer, eds., *Procedural Law and Legal Cultures* (Baden-Baden: Nomos, 2004) 9. For the French version of the latter, see

Avoiding social costs means making only small and cautious steps that serve to supplement the existing system of public enforcement by administrative boards and agencies. This is the solution, and it harmonizes with the structure of the traditional and the modern European civil procedures. With their limited scopes for discovery and disclosure, these procedures simply do not permit private "fishing expeditions" that are uncontrolled, costly and profitable.

II. The Structure of the Proceeding, the Preconditions of Discovery and the Taking of Evidence

1. European Fact Pleading and American Notice Pleading

All codes of civil procedure in the continental tradition have in common the practice of a comparatively strict fact pleading. This requires (1) the assertion of detailed and particularized facts; and (2) the proffering of exactly specified means of evidence during the pleading phase of the proceedings.[15] In contrast, American civil procedure does not, in principle, require the assertion of detailed facts and the presentation of individualized means of evidence during the pleading phase.[16] The pre-trial phase that follows is designed for the collection of facts and the means of evidence. Its purpose is to enable the parties to prepare their information perfectly for the trial before the judge. As a consequence, strict individualization of relevant facts and detailed specification of the means of evidence for these individualized facts is not a precondition for commencing fact-finding procedures in the United States. A party who is without a completely developed case may initiate a legal dispute on the basis of a more general suspicion or conjecture. As a rule, "fishing expeditions" are permitted.[17] They comprise the purpose of pre-trial disclosure.

Rolf Stürner, *Procédure Civile et Culture Juridique* (2004) 4 Revue Internationale de Droit Comparée 797.

[15] For details, see Stürner, *Principles*, *supra*, note 13, at 201, 232-37.

[16] For a detailed description and analysis, see J.H. Friedenthal, M.K. Kane & A.R. Miller, *Civil Procedure*, 3d ed. (St. Paul, Minn.: West Group, 1999), at 243 *et seq*. For a short overview in German, see Rolf Stürner, "Die verweigerte Zustellungshilfe für U.S.-Klagen oder der 'Schuss übers Grab'" (2006) 61 JZ 60, at 62-64.

[17] See *Hickman v. Taylor*, 329 U.S. 495, at 507 (1947).

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation.

According to the continental procedural tradition of strict fact pleading, however, the judge will only order the taking of evidence on relevant, particularized facts that have been asserted by the parties to the litigation. Strict relevancy requirements limit the scope of fact-finding procedures at a relatively early stage of the dispute. Strictly speaking, the disclosure of new facts and new means of evidence (*i.e.*, that have not already been asserted or offered by a party during the pleading phase) is unknown to the continental procedural model. Fact pleading, with an offer of the specified means of evidence, is followed by the taking of the evidence through and before the judge, and this may happen during a preparatory or instructing phase, or in a final, main hearing.[18]

The modern English procedure is becoming increasingly approximate to this continental conception, although judicial control of relevancy is not as strict during the English pre-trial stage as it is on the continent.[19] It should be noted, however, that the term "fact pleading", as it is used in traditional common law countries, covers a relatively broad scale of particularization of the asserted facts and the offers of evidence. The requirements for a very heightened fact pleading, *i.e.*, of specific details, may sometimes meet the standards and the expectations of even European continental courts and European procedural codes. However, "fact pleading" may be also construed in a very liberal manner to require only "enough facts to state a claim to relief that is plausible on its face".[20] This form of plausibility does not permit a test of strict relevancy, as it is a precondition for the taking of evidence in traditional civil law systems. As a consequence, the furtherance of a really helpful discussion and, ultimately, a mutual understanding will require a more detailed description of the different techniques of pleadings. The concepts of "fact pleading" and "notice pleading" alone are far too broad.

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[18] For the three structural models (the Italian-canonical procedure, with its sequence of hearings before the instructing judge; the Anglo-American trial model; and the modern main-hearing model) see Stürner, *Principles*, *supra*, note 13, at 201, 223-26, 341 *et seq*.; ALI/UNIDROIT, *Principles*, *supra*, note 11, principle 9.

[19] See Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003), paras. 10.57-10.77, at 253 *et seq*. [hereinafter "Andrews"].

[20] See, *e.g.*, *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) [hereinafter "*Twombly*"] (a consumers' class action, based on an alleged cartel conspiracy; see, further, the references within this case). A very heightened standard of fact pleading is one of the control measures that the U.S. legislature included in the *Private Securities Litigation Reform Act of 1995*, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.). See *Tellabs v. Makor Issues and Rights Ltd.*, 127 S. Ct. 2499 (2007) [hereinafter "*Tellabs*"] (a case concerning alleged fraud on the markets).

2. Unknown Facts and Means of Evidence in the Spheres of the Opponent or of Third Persons — The Solution of the Principles

If a pleading party does not have sufficient knowledge of the necessary facts, then his or her pleading will fail to provide the presentation of these facts and the offer of the means of evidence at the required standard of detail. This is especially true where the relevant facts have occurred in the spheres of the opponent or of third persons. Situations like this often arise when claims are based on the infringement of competition rules — for example, in a case of alleged conspiracy for the purpose of a cartel agreement. The American procedural system enables the claimant to initiate disclosure without specific knowledge of the particulars or of the individualized means of evidence,[21] and it requires nearly unlimited cooperation from the opponent and third persons. As a consequence, it delivers efficient tools for private investigation in cartel cases or other types of competition cases where secrecy is a characteristic feature.

The *Principles of Transnational Civil Procedure*, which were accepted with unanimous approval by the ALI and UNIDROIT in 2004,[22] attempt to strike a compromise between the continental system of strict fact pleading and the American style of disclosure. The principles insist[23] that rigid fact pleading is the appropriate instrument for the purpose of avoiding excessively broad discovery, and it therefore requires the presentation of relevant facts in reasonable detail and a description of the available evidence with sufficient specification. When a party "shows good cause for its inability to provide sufficient specification of relevant facts or evidence",[24] however, the court may permit more general factual contentions or an offer of evidence that is not exactly specified (*e.g.*, by reference to a class of documents that are under the control of either the opponent or a third person), giving "due regard to the possibility that necessary facts and evidence will develop later in the course of the proceeding".[25] In competition cases, the court has a discretionary capacity, which may be exercised according to the circumstances of each individual case, to grant a reduction of the burden to assert detailed facts and to offer specified evidence.

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[21] This is still correct after *Twombly*, *id.* (with its "plausibility" test).

[22] See ALI/UNIDROIT, *Principles*, *supra*, note 11; Stürner, *Principles*, *supra*, note 13, at 201-54, 341-50.

[23] ALI/UNIDROIT, *Principles*, *id.*, principle 11.3.

[24] *Id.*

[25] *Id.*

In this way, a reasonable and appropriate solution may be reached in order to avoid the excesses of both of the traditional legal systems. These excesses are, first, the tendency of the American procedure towards an overbroad and costly discovery process as a profitable market for law firms, and, second, the danger of a premature termination of fact-finding in the continental tradition. It is remarkable that even the ALI, which is dominated by American lawyers, and the American Bar Association, accepted this solution as a helpful compromise. Whether or not most of the U.S. Supreme Court's recent decisions[26] meet the requirements of specification that are demanded by the *Principles of Transnational Civil Procedure* may be debatable. In any case, a remarkable approximation to their standards of specification seems to be evident.

The reduction of specification that is achieved by the *Principles* does not constitute a real break in continental procedural principles. The conception of "good cause", which is a prerequisite for evidence taking in the absence of exact specification, is not unknown to French and German courts. They permit limited forms of "fishing expeditions", if "faits sérieux" and "fait avec fondement",[27] or "besondere Anknüpfungspunkte" and "Anhaltspunkte"[28] justify exceptions from the requirement of specification. This limited kind of disclosure is the most natural thing in the modern English civil procedure, where reform has reduced traditional disclosure to a more reasonable scope.[29]

3. The Adoption by the European Commission's Draft

When a party is unable to give specific particulars or to offer specific means of evidence, the unofficial draft of the European Commission's Directive strikes a compromise, according to the example that was established by the *Principles*, between fact pleading and notice pleading. The text of article 7(1) and (2) of this draft provides that:

> 1. Where a claimant has presented reasonably available facts and evidence showing plausible grounds to suspect that it, or those it represents, suffered harm through infringement of Article 81 or 82

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[26] See especially *Twombly*, *supra*, note 20.

[27] See Gilles Goubeaux & Philippe Bihr, "Preuve" in *Encyclopédie Dalloz, Répertoire de Procédure Civile* (Paris: Dalloz, 1979), no. 91 *et seq*., at 104; without these references the comments of Frédérique Ferrand, "Preuve" in Serge Guinchard, ed., *Encyclopédie Dalloz, Répertoire de Procédure Civile* (Paris: Dalloz, 2006), no. 92 *et seq*.

[28] See, *e.g.*, BGH 17.10.1996, Neue Juristische Wochenschrift [NJW] 1997, 128 (129).

[29] For details, see Andrews, *supra*, note 19, paras. 26.01 *et seq*., 21.19 *et seq*., at 595 *et seq*.

> of the Treaty by the defendant, Member States shall ensure that national courts order evidence to be disclosed by the other party or by a third party, subject to the conditions set out in this Directive. Member States shall ensure that the right to disclosure of evidence is available also to defendants in actions for damages.
>
> 2. National courts shall order the disclosure of evidence referred to in paragraph 1 where the party requesting disclosure has
>
> (a) shown that evidence lying in the control of the other party or a third party is relevant to substantiate its claim or defence;
>
> (b) specified either pieces of this evidence or as precise and narrow categories of this evidence as it can on the basis of reasonably available facts; and
>
> (c) shown that it is unable, applying reasonable efforts, to produce these.

It is not without good reason that article 7 of the European Commission's Directive and principles 11.3 and 16.2 of the ALI/UNIDROIT *Principles* employ the same solution to bridge the gap between the fact pleading model and the disclosure model. The European Commission's Green Paper refers explicitly to the "limited discovery" model of the ALI/UNIDROIT *Principles* when it prepares and discusses the details of the future Directive.[30] As a consequence, article 7 of the future Directive can be regarded as a form of direct reception and implementation of the solution that had previously been established by the ALI/UNIDROIT *Principles*. If the draft Directive is enacted, it will provide remarkable encouragement to all of the proceduralists who work in the field of harmonization through guidelines or principles. This is largely because the issue of sufficient preconditions for full disclosure is one of the most disputed topics in comparative civil procedure.

[30] See *Commission Staff Working Paper — Annex to the Green Paper {COM(2005) 672 final}*, SEC/2005/1732, *supra*, note 12, para. 61, in Jürgen Basedow, ed., *Private Enforcement of EC Competition Law* (Alphen aan den Rijn : Kluwer Law International, 2007), 269 *et seq*., 288 [hereinafter "Basedow"]; Friedrich W. Bulst*, Of Arms and Armour: The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law*, 2008 Bucerius L.J. 81, at 91.

III. THE SCOPE OF THE TAKING OF EVIDENCE

1. Full Access to All Means of Evidence

Full access to all of the means of evidence that are under the control of the opponent or a third party is, in principle, the modern procedural standard for nearly all of the procedural cultures of the continental tradition.[31] For the Anglo-American legal family, free access to all means of evidence has been taken for granted throughout the last century.[32] In the last several decades, many continental legislatures have initiated procedural improvements that facilitate such access to the means of evidence. This is not a step towards an adoption of American-style discovery, however.[33] It is not the limitation of access to the means of evidence that is the decisive factor in the development of a reasonable limitation on the processes of disclosure and evidence-taking. Rather, it is, as I have demonstrated above, sufficient *specification* of the facts and the means of evidence that will result in an efficient procedure. Only the court may reduce this standard of specification (*i.e.*, in special cases that require a discretionary override of the norm for the sake of fairness). To this effect, the *Principles of Transnational Civil Procedure* provide for full access to evidence, "including testimony of parties and witnesses, expert testimony, documents and evidence derived from inspection of things and entry upon land".[34] Although nearly all of the European procedural cultures converge in this principle, some differences and questions persist in a detailed comparative analysis.

Although article 7(5) of the European Commission's draft Directive demands that all of the means of evidence be made available, some leeway

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[31] For France, see *Nouveau Code de Procédure Civile*, art. 11 [hereinafter "NCPC"]; *Code Civil*, art. 10. For Italy, see *Codice di Procedura Civile* [hereinafter "CPC Italy"], arts. 117, 118, 167, 183, 210 *et seq*., 228 *et seq*., 232 *et seq*. For Spain, see *Ley de Enjuiciamiento Civil 2000* [hereinafter "LEC 2000"], arts. 301, 307, 316, 328, 329, 355 *et seq*. For Germany, see *Zivilprozessordnung* (as amended 2002) [hereinafter "ZPO"], §§ 138, 141, 142-144, 371, 422, 423, 445 *et seq*. See also Peter L. Murray & Rolf Stürner, *German Civil Justice* (Durham, N.C.: Carolina Academic Press, 2004), at 239 *et seq*. (c. 7 sec. L). For an overview, see Heinrich Nagel & Ena-Marlis Bajons, eds., *Beweis — Preuve — Evidence: Grundzüge des zivilprozessualen Beweisrechts in Europa* (Baden-Baden: Nomos Verlagsgesellschaft, 2003), at 817 *et seq.* (with national reports and summary).

[32] Robert W. Millar, *Civil Procedure of the Trial Court in a Historical Perspective* (New York: Law Center of New York University for the National Conference of Judicial Councils, 1952), at 201 *et seq*.

[33] See Stürner, *Principles*, *supra*, note 13, at 234.

[34] ALI/UNIDROIT, *Principles*, *supra*, note 11, principle 16.1.

is preserved for national regulations.[35] Principle 16 of the ALI/UNIDROIT *Principles* offers a more progressive solution, especially for the examination of parties and experts. It is regrettable that the draft of the Directive does not completely adopt this principle's solution.[36]

2. Automatic Exchange or Court Order?

Most countries provide for the automatic production of documents and tangible objects that a party wishes to present as evidence when that party sustains the burden of proof and possesses or controls the means of evidence.[37] The production of evidence that is in the possession or control of the opponent party, however, can only be compelled by the timely request of the other party or by a court order.[38]

In comparison, English (*i.e.*, common law) civil procedure requires an exchange of documents (and, also, of lists of documents) that may be relevant to the case as a whole. This transaction occurs independently of any considerations with regard to the burden of proof.[39] The common law's automatic exchange does not harmonize with the principle, under strict fact pleading, that demands specification of the means of evidence. The specification method enables the court to efficiently determine whether or not the factual and evidentiary relevancy of an item falls within the reasonable limitations that are set by the scope of disclosure and evidence-taking. As a result, the *Principles of Transnational Civil Procedure* do not propose an automatic exchange.[40] Parties are free to exchange documents voluntarily, and the same is true for production by third parties. However, when the opponent or a third party refuses to cooperate voluntarily, a relevancy test and a court order seem to be

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[35] See *Unofficial Directive Draft*, *supra*, note 8, art. 7(5).

> Evidence within the meaning of this Directive includes all types of evidence admissible before the national court seized, in particular documents and all other objects containing information irrespective of the medium on which the information is stored. It also includes, to the extent and in the form permitted under applicable national rules, the hearing of witnesses, parties, experts and other third parties.

[36] See Rolf Stürner, *Duties of Disclosure and Burden of Proof in the Private Enforcement of European Competition Law*, in Basedow, *supra*, note 30, 163, at 180.

[37] See, *e.g.*, ZPO, *supra*, note 31, §§ 131, 420; CPC Italy, *supra*, note 31, art. 163(3)(5); NCPC, *supra*, note 31, arts. 132-137; and LEC 2000, *supra*, note 31, arts. 399(3), 282.

[38] See, *e.g.*, ZPO, *id.*, §§ 142, 421; CPC Italy, *id.*, art. 118; NCPC, *id.*, art. 138; and LEC 2000, *id.*, art. 328.

[39] See Andrews, *supra*, note 19, para. 26.19, at 601; *Civil Procedure Rules 1998* (U.K.), S.I. 1998 / 3132 (L.17), Rule 31.6; online: Ministry of Justice <http://www.justice.gov.uk/civil/procrules_fin/stat_instr.htm> (the rule for "standard disclosure").

[40] ALI/UNIDROIT, *Principles*, *supra*, note 11, principle 16.2(1).

indispensable. To this effect, the European Commission's draft Directive strictly requires a court order to control the relevancy of the evidence and the appropriateness of the demand for production.[41] This requirement is in complete correspondence with the ALI/UNIDROIT *Principles*.

IV. PROTECTION OF CONFIDENTIALITY AND SANCTIONS

The protection of confidentiality and, especially, of business secrets is one of the most difficult problems of competition cases. Parties or third persons may claim their "business secret" privilege in order to refuse to cooperate with another party's request to produce documents, records or books for inspection. Protection from public access can be achieved easily through ordering a private hearing.[42] Additionally, in the case of either complete or partial public access to records,[43] protection can be obtained through a protective order,[44] which will place limitations on public access.

If litigants or third parties in a lawsuit are business competitors, a court's order to keep sensitive facts or means of evidence confidential[45] may not suffice for the protection of a secret. Even disclosure that is limited to only the lawyers of the excluded parties, and restricted from the parties themselves,[46] may be too dangerous from the point of view of the party or the third person that is claiming the recognized privilege. Another solution that is becoming increasingly accepted in many legal cultures[47] is to require full disclosure to the court or to the experts only. In this way, a party's sensitive information is protected from the opponent and other parties, who will have no rights of direct access or inspection. The court then prepares a general and cautious description of the disclosure's result, and this is designed to meet the basic

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[41] *Unofficial Directive Draft*, *supra*, note 8, art. 7(2), (3).

[42] See, *e.g.*, ALI/UNIDROIT, *Principles*, *supra*, note 11, at principles 20.1(2), 20.3.

[43] For a survey on the publicity of court records in Europe, see Stürner, *Principles*, *supra*, note 13, 201 *et seq*., 246.

[44] See A. Miller, "Confidentiality, Protective Orders, and Public Access to the Court" (1991) 105 Harv. L. Rev. 427.

[45] See, *e.g.*, *German Judicature Act* (*Gerichtsverfassungsgesetz*), § 174(3).

[46] See Rolf Stürner, *Die Aufklärungspflicht der Parteien des Zivilprozesses* (Tübingen: Mohr, 1976), at 223-24 [hereinafter "Stürner, *Aufklärungspflicht*"].

[47] See Astrid Stadler, *Schutz des Unternehmensgeheimnisses im deutschen und US-amerikanischen Zivilprozess und im Rechtshilfeverfahren* (Tübingen: Mohr, 1989), at 222 *et seq*., 254 *et seq*.; Gerhard Wagner, Zeitschrift für Zivilprozessrecht [*ZZP*] 108 (1995), 193, at 210 *et seq*. See also *German Antitrust Act* (*Gesetz gegen Wettbewerbsbeschränlungen, GWB*), §§ 71(1)(2)-(4), 72(2) (the effect of these provisions, however, is not very clear).

requirements of natural justice — the "principe du contradictoire" (that is, the right to be heard).[48]

This very limited form of disclosure, filtered through the court, may be appropriate and well justified in cases where a party that has the burden of proof has applied for the cooperation of its opponent or a third party, while the latter has claimed a recognized privilege. The claimed privilege could be used to block virtually any form of evidence, without actually abandoning the principle of full disclosure and, hence, cooperation. However, the consequence might mean a significant compromise to the fairness of the process for the party that is sustaining the burden of proof.

Alternatively, if the party that has the burden of proof requires the same protection for its own trade or commercial secrets, then the opponent's right to due process of law might be infringed to a degree that cannot be justified by the other party's interest of secrecy. Thus, the court has to balance the interests of both parties.[49] Only where a party's interest to maintain full confidentiality clearly outweighs the other party's procedural rights will the previously described protection of confidentiality through limited disclosure be found a reasonable measure.

The ALI/UNIDROIT *Principles* do not provide or develop conflict of laws rules for matters of privilege. They give effect to all privilege, but they do not provide absolute protection of privilege, such as that for trade secrets.[50] "Parties and third parties, however, have the right to a court order protecting against improper exposure of confidential information."[51] When drawing negative inferences from a party's failure to cooperate, a court may "consider" whether a privilege justifies a party's failure to disclose, taking into account the circumstances of the case and of the disclosure that is being demanded by the court.[52] The requirement of the "recognition" of privilege is, however, much more rigorous when a

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[48] See Stürner, *Aufklärungspflicht*, *supra*, note 46, at 223 *et seq*.; *id*., in Reinhard Greger, ed., *Neue Wege zum Recht: Festgabe für Max Vollkommer zum 75. Geburtstag* (Köln: Verlag Dr. Otto Schmidt, 2006), 201, at 214 *et seq*. (sub VI 3); Leo Rosenberg, Karl Heinz Schwab & Peter Gottwald, *Zivilprozessrecht*, 16th ed. (München: C.H. Beck, 2004), at 800, § 115 c. V 3; and Federal Supreme Court (Bundesgerichtshof), Entscheidungen des Bundesgerichtshofs in Zivilsachen (Decisions of the Federal Supreme Court in Civil Matters) BGHZ 150, 377 (387) (for pre-action disclosure in cases of infringement of intellectual property).

[49] See, *e.g.*, German Constitutional Court (Bundesverfassungsgericht, BVerfG) Neue Juristische Wochenschrift ["NJW"] 1994, 2347; German Constitutional Court, Entscheidungen des Bundesverfassungsgerichts (Decisions of the German Constitutional Court) BVerfGE 91, 176, 181 *et seq*.

[50] ALI/UNIDROIT, *Principles*, *supra*, note 11, principle 18.1.

[51] *Id.*, principle 16.5.

[52] *Id.*, principle 18.2.

court exercises its authority to impose sanctions, such as fines or imprisonment, that are designed to compel direct disclosure.[53]

In some respects, the draft of the European Commission's Directive is more detailed than the *Principles*, although the provisions of the former on the protection of confidentiality (and the related sanctions) seem to reflect the differentiating solutions of the latter and to take them as an example. For the protection of confidentiality, the draft Directive prefers a limited and protected form of disclosure. According to article 7(3)(d), Member States "shall provide for effective measures so that national courts can protect confidential information to the greatest extent possible whilst ensuring that relevant evidence containing such information is available in the action of damages".[54] Sanctions shall ensure compliance with a court's disclosure order, as well as with a court's order to protect confidential information.[55] On the one hand, courts shall give "full effect to all legal privileges and other rights not to be compelled to disclose evidence that exist under the law of the European Union".[56] On the other hand, "the sanctions available to national courts shall include … the possibility to draw adverse inferences such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part".[57]

V. FINAL REMARK

Worldwide harmonization of civil procedure needs time, tolerance and patience. The same is true for European harmonization of procedural law. Nevertheless, the small and modest steps of national legislatures that generate harmonizing effects are gradually changing our legal reality. They are more important than great ideas that have no chance for realization.

Another question will be whether or not the conception of private law enforcement will lose significance during the coming decades. The deterrence effects of private law enforcement — and, with it, the threat of public disclosure — have not been strong enough to prevent financial markets from outsourcing bad risks and shifting them to market participants who were unable to analyze or bear these risks. Private law enforcement against defendants who are bankrupt or nearly bankrupt —

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53 *Id.*, principle 18.3. Stürner, *Principles*, *supra*, note 13, at 201 *et seq*., 243 *et seq*.

54 *Unofficial Directive Draft*, *supra*, note 8, art. 7(3)(d).

55 *Id.*, art. 9(1)(a), (c).

56 *Id.*, art. 8(3).

57 *Id.*, art. 9(2)(2).

and, as a consequence, partially owned by the state — may no longer represent a powerful tool.

Western civilization should learn a lesson from this and become aware of the fact that private law enforcement, although it may provide a supplemental function, can never replace reasonable preventive regulation.[58] As a consequence, a globalized civilization should maintain the right balance between the differing American and European experiences, as well as the experiences of hybrid procedural cultures, with respect to disclosure procedures. Harmonization of the law is not only a way to simplify commerce and the exchange of goods and ideas. It is also a process for the reconsideration of the fundamental principles of human and social justice.

[58] Most recently, the U.S. Supreme Court seems to have placed some emphasis on the supplemental character of private actions to enforce federal antifraud securities laws. In its point of view, however, these cases are an *essential* supplement to criminal prosecutions and actions brought by public authorities. See *Tellabs*, *supra*, note 20.

Common and Civil Law Traditions in the ICTY Criminal Procedure: Does Oil Blend with Water?

His Excellency Judge Fausto Pocar*

I. INTRODUCTION

While the distinctions between common law and civil law traditions are certainly to be regarded as the *summa divisio* in comparative criminal procedure, it is broadly accepted that neither the inquisitorial nor the accusatorial system exists in a "pure form". Rather, national criminal procedures may only be predicated in terms of "dominant models".[1] In particular, international scholars have argued in recent years that criminal procedures of Western jurisdictions have reached a point of convergence in which national systems from one tradition have adopted features from others such that the gulf between the systems is no longer as deep as it once was.[2]

Nevertheless, scholars are also aware that the convergence of domestic procedural systems often closely recalls the dynamic described in the "Zenon paradox": the fast Achilles, in his attempt to reach the turtle, covers every second half of the distance between them; Achilles, however, will never reach the turtle, as he will never cover the entirety of the

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1 V.V. Palmer, "Mixed Legal Systems … and the Myth of Pure Laws" (2007) 67 La. L. Rev. 1205, at 1208-1209; K. Ambos, "International criminal procedure: 'adversarial', 'inquisitorial' or mixed?" (2003) 3 Int'l Crim. L. Rev. 1, at 4 [hereinafter "Ambos"]; and A. Orie, "Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC" in A. Cassese, P. Gaeta & J.R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 1439, at 1441 [hereinafter "Orie, 'Accusatorial v. Inquisitorial'"].

2 F. Tulkens, "Main Comparable Features of the Different European Criminal Justice Systems" in M. Delmas-Marty, ed., *The Criminal Process and Human Rights: Toward a European Consciousness* (Dordrecht, The Netherlands: Martinus Nijhoff, 1995) 5, at 8. For additional references, see further Orie, "Accusatorial v. Inquisitorial", *id.*, at 1441-42; P. Robinson, "Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY" (2005) 3 J. Int'l Crim. Justice 1037, at 1040 [hereinafter "Robinson, 'Rough Edges'"].

distance separating them. That is to say that international scholars are aware that differences between juridical cultures often play such a significant role in defining the identity of a procedural system that, even when a domestic system positively adopts features belonging to a different procedural tradition, the result of such an operation is often a "re-interpretation" rather than pure "plagiarism".[3] In other words, although most of the modern legal systems have attributes of both the civil law and the common law traditions, they are usually based *predominantly* on one or the other.

In this framework, the procedure of the International Criminal Tribunal for the former Yugoslavia ("ICTY" or "Tribunal") is to be regarded as completely *sui generis*: it combines features of the common law and civil law systems in an arrangement distinctly different from any domestic procedural system.[4] In analyzing this particular hybrid system, one

[3] One of the clearest and most famous examples in this respect is provided by the Italian experience. Since the approval of the *codice di procedura penale* of 1989 [hereinafter "cpp"], Italy purports to have an adversarial system. In particular, the two parties are vested with investigative functions and are assigned an obligation to present their cases at trial before a judge who is envisaged to have the "referee role" proper to the common law tradition. Yet, for example, the pre-trial judge may order the prosecutor to carry out further investigations if he or she is not satisfied that the information collected is complete, or may even order the prosecutor to present his or her case notwithstanding the prosecutor's decision not to prosecute the accused (cpp, art. 409). Ample room is left for the "*parte civile*" to intervene in the proceedings (see, *e.g.*, cpp, arts. 410, 493). In practice, judges often exercise the power to call additional witnesses on their own, and are inclined to intervene frequently in the questioning of witnesses. Finally, the prosecutor has ample right to appeal against convictions (cpp, art. 593). For the Norwegian criminal procedure, see W.T. Pizzi, "The American 'Adversary System'?" (1998) 100 W. Va. L. Rev. 847, at 848-49. Pizzi observes that Norway is considered to be an adversarial system in many respects. For example, prosecution and defence are responsible for presenting the evidence, and there is an occasional jury trial. Yet Norway's trials have features that seem inconsistent with an adversarial system: relaxed rules of evidence, a strong preference for narrative testimony, mixed panels of judges and citizens for the vast majority of cases, considerable authority vested in judges to intervene or even take over the questioning of witnesses and broad appellate review of both convictions and acquittals. The defendant, as is generally true on the Continent, is always asked to respond to the charges at the start of the trial before any witnesses are called.

[4] O.G. Kwon, "The Challenge of an International Criminal Trial as Seen from the Bench" (2007) 5 J. of Int'l Crim. Justice 360, at 361-62 [hereinafter "Kwon"]; G.A. Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings* (Deventer, The Netherlands: Kluwer, 2005), at 10-13; P.C. Keen, "Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal Tribunals" (2004) 17 Leiden J. Int'l Law 767, at 811; S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003), at 22; Ambos, *supra*, note 1, at 6; D.A. Mundis, "From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence" (2001) 14 Leiden J. Int'l Law 367, at 367; G. Boas, "Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility (2001) 12 Crim. L. F. 41, at 41-42 [hereinafter "Boas"]; G.K. McDonald, "Trial Procedures and Practice" in G.K. McDonald & O.S. Goldman, eds., *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (The Hague,

cannot look solely at one of the two procedural traditions. Rather, any analysis must take into account the perspective of both. A synthesis between common law and civil law systems has been reached — their convergence has been completed; Achilles, somehow, has managed to touch the turtle.

In considering the position of the ICTY *Rules of Procedure and Evidence*[5] in the framework of the above-mentioned *summa divisio*, this paper will focus on the factors conducive to the blending of the common law and civil law legal traditions in the procedure of the ICTY, and will analyze the results of such a process. Is it a clash or a sophisticated compromise? Does it do the bare minimum in amalgamating the systems or does it capture the best of both worlds?

II. ICTY PROCEDURES AS INITIALLY SET OUT

The first version of the ICTY RPE largely reproduced the typical features of accusatorial systems. In the system envisaged by the first set of RPE,[6] the Office of the Prosecutor is in charge of initiating the investigations and collecting the evidence in support of its case, while the burden of gathering exculpatory evidence is on the defence. No room is left for a pre-trial judge to direct the investigations. Rather, judges are only involved in the investigative phase if and when an arrest warrant or another order supporting the investigation is needed, or when they must review indictments submitted by the Prosecution — confirming or dismissing each count, depending on whether or not a *prima facie* case exists. While the parties are bound by strict rules on disclosure that permit full knowledge of the materials gathered by the opposite party, no dossier containing witness statements or other case-related documents is provided to judges. In this way, the strict division between "mere information" and "evidence" typical of the common law system is preserved. As for the actual trial, the presentation of the case is the task of the parties, and evidence is presented in the classical common law sequence of examination, cross-examination, rebuttal and rejoinder. Further, trial proceedings are organized according to the typical, bifurcated structure of the common law, which consists of a first part that

The Netherlands: Kluwer Law International, 2000), at 556; and P. Robinson, "Ensuring Fair and Expeditious Trials at the ICTY" (2000) 11 E.J.I.L. 569, at 569, 588.

[5] ICTY.org, Rules of Procedure and Evidence, online: <http://www.icty.org/sid/136> [hereinafter "RPE"].

[6] *Id.*

focuses on culpability, and, in the case of a conviction, a subsequent part that focuses on sentencing. If a plea of guilty is entered by the accused, only sentencing hearings will follow, and no trial proceedings will take place. No trials *in absentia* are allowed. Finally, the position of the defendant at trial oscillates between the two poles of (1) self-representation; and (2) the prohibition on giving statements at trial, if not as a witness in his or her own case.

III. THE INFUSION OF CIVIL LAW FEATURES INTO A COMMON LAW FRAMEWORK

Notwithstanding this clear common law imprint on the first version of the RPE, there were at least five important deviations from the model typical of adversarial systems. First, there was no provision of a jury as a finder of fact.[7] Second, no technical rules were set out governing the admissibility of evidence.[8] Third, provisions were made for the Tribunal to have the option of ordering the production of additional or new evidence *proprio motu*.[9] Fourth, no space was given to the practice of plea-bargaining or the tool of granting immunity, each of which is widely used in the common law system. And, finally, the right of appeal presented an extensive scope unknown to the common law tradition, providing that

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[7] Most likely, the drafters of the ICTY Statute considered the practical difficulties and the factual and legal complexity of the cases to be an obstacle to anything but a bench trial. See Orie, "Accusatorial v. Inquisitorial", *supra*, note 1, at 1473. Moreover, it would be difficult to establish the criteria for appointing jurors. Where would a jury be drawn from? The Hague? The world in general? The former Yugoslavia? The ethnicity of the accused? The residence of the accused?

[8] United Nations, General Assembly Security Council, 49th Session, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, A/49/342-S/1994/1007 (1994), online: <http://www.icty.org/x/file/About/ReportsandPublications/AnnualReports/annual_report_1994_en.pdf>. The First Annual Report justified this choice in the following terms (at para. 72):

> This Tribunal does not need to shackle itself to restrictive rules which have developed out of the ancient trial-by-jury system. There will be no jury sitting at the Tribunal, needing to be shielded from irrelevancies or given guidance as to the weight of the evidence they have heard. The judges will be solely responsible for weighing the probative value of the evidence before them. Consequently, all relevant evidence may be admitted to the Tribunal unless its probative value is substantially outweighed by the need to ensure a fair trial (r. 89) or where the evidence was obtained by a serious violation of human rights (r. 95).

See also Boas, *supra*, note 4, at 73; Robinson, "Rough Edges", *supra*, note 2, at 1039.

[9] The declared purpose of this rule was "to enable the Tribunal to ensure that it is fully satisfied with the evidence on which its final decisions are based". *Id.*, at para. 73.

both the accused and the Prosecution could appeal on matters of both law and facts.[10]

Furthermore, since 1993, the RPE have been amended 42 times pursuant to Article 15 of the ICTY Statute.[11] In the course of this process of evolution, the Tribunal has adopted a number of features typical to civil law: from the envisagement of a significant role for the judge prior to the commencement of the trial to the introduction of mechanisms for tendering and admitting written, rather than oral, evidence; and from the renouncement of a bifurcated structure of proceedings to the shift of the position of the defendant at trial towards alignment with the civil law tradition. At least three factors, briefly analyzed below, are key reasons for this discernible shift towards the civil law model.

1. The Factual and Legal Complexity of the Cases Before the Tribunal

One of the most noted weaknesses of the adversarial model is its tendency towards lengthy proceedings. This tendency results from the requirement that all evidence be scrutinized orally through examination and cross-examination. The problem of length is exacerbated in international criminal trials, where the complex crimes being dealt with are framed within complex historical and political fact patterns and involve, between victims and perpetrators, hundreds of people.[12]

To a large extent, the evolutionary process of the ICTY procedures has been driven by the need to avoid excessively long proceedings. Two kinds of measures have been adopted, over time, to rectify this situation. On one hand, judges have been provided with more authority to control the proceedings in order to ensure the expeditious conduct thereof. On the other hand, the rules on evidence have been amended in order to admit and encourage the presentation of written — rather than oral — evidence.

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[10] This choice, however, was made already by the drafters of the ICTY Statute. See *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on May 25, 1993, U.N. Doc. S/RES/827 (1993), art. 25 [hereinafter "ICTY Statute"]; see also *id.*, at para. 4.6.

[11] *Id.*, art. 15.

[12] Kwon, *supra*, note 4, at 364.

2. The Specificities of Substantive International Criminal Law

One of the typical features of the substantive international criminal law is the distinction between "base crime" (*e.g.*, a murder) and the so-called "chapeau element" (*e.g.*, the "spread and systematic attack against the civilian population" in the case of crimes against humanity). The chapeau element attracts a specific offence within the domain of international criminal law and, ultimately, within the jurisdiction of international criminal tribunals.

Another typical feature of substantive international criminal law is that modes of responsibility are far more complex than their equivalents in domestic criminal law. Considering the distance of the accused from the base crime, the crucial issue for the prosecution at trial is to prove the "link" between the accused and the single offences, according to such theories of liability. Besides this, each of the base crimes charged in the indictment against the accused must, of course, be proved beyond a reasonable doubt.

Since the factual bases for many cases at the Tribunal overlap, it became clear, even after the first cases before the Tribunal, that there would have been a great deal of repetition of the same evidence establishing base crimes from trial to trial. One of the goals of the amendments to the RPE was to set up mechanisms to avoid the need to repeat the presentation of the same evidence before the Tribunal, without, of course, jeopardizing the fairness of the trial.[13] Such a challenge is unknown to national jurisdictions, where each case is characterized by its unique factual background.

3. Judges' Legal Background

Judges of international criminal courts naturally bring with them distinct cultural and legal backgrounds. The existing and unavoidable differences between the education and legal experience of international judges have influenced the ICTY procedures in two different ways. On the one hand, these differences have conditioned the interpretations that judges give to certain procedural rules. On the other hand, they have led to a tendency to amalgamate, through amendment after amendment to the RPE, the different legal traditions to which the judges belong. Where the common law model showed its weaknesses, civil law-educated

[13] *Id.*, at 363.

judges were ready, on the basis of the experiences acquired in their own domestic systems, to propose civil law-oriented amendments. Unlike in domestic systems, where, on the basis of unfamiliarity, the legislature tends to resist the temptation to import "foreign" legal solutions, the variety of the backgrounds of ICTY judges has been instrumental in the creation of a truly international model of criminal adjudication that does not prefer one legal tradition over another.[14]

IV. DO FEATURES FROM DIFFERENT LEGAL TRADITIONS FIT WELL TOGETHER?

Some criticism has been made concerning the results of the progressive amendments to the RPE.[15] It has been observed, for example, that the choice to depart from the common law's purely oral approach to proceedings has not been counterbalanced by the central role that, in civil law systems, is attributed to the investigative judge who offers guarantees of impartiality that are absent in the Prosecutor. It is argued, in other words, that an unsophisticated blending of common law and civil law features in the procedure of the *ad hoc* international Tribunal has resulted in an undue dilution of the rights of the accused. It is further argued that this has occurred in the framework of trials where fairness is second to expeditiousness. Others have claimed that attribution to judges of an increased role in managing the proceedings unduly overlaps with the Prosecutor's discretion. Finally, it has been observed that, as it is very difficult to bridge the philosophical conflicts between the inquisitorial and accusatorial traditions, international criminal procedure should "go strongly in one direction or the other, rather than trying to blend procedure from the two traditions".[16]

I am not inclined to agree with such positions. Neither as a scholar, nor as an insider, have I ever observed any confirmation of these theses in practice. An overall look at the ICTY RPE and an attentive analysis of

[14] An analysis of the case law from which r. 92*ter* of the RPE originates is particularly interesting in this respect, as it presents visible traces of the contributions that have been provided by judges who come from different legal backgrounds. On this point, see Kwon, *supra*, note 4, at 366-68.

[15] For a general criticism on the adoption of a blended procedural system in international criminal proceedings, see W. Pizzi, "Overcoming Logistical and Structural Barriers to Fair Trials at International Tribunals, in Fairness and Evidence in War Crimes Trials" (2006) 4(1) Int'l Commentary on Evidence [hereinafter "Pizzi, 'Overcoming'"]. See also Robinson, "Rough Edges", *supra*, note 2; S. Bourgon, "Procedural Problems Hindering Expeditious and Fair Justice" (2004) 2 J. Int'l Crim. Justice 526 [hereinafter "Bourgon"].

[16] Pizzi, "Overcoming", *id.*, at 2.

its practice would confirm, rather, that this blending of different traditions has not led to a violent clash, but to an overall good compromise: a system of procedure specifically tailored to the peculiar features of international criminal law, and nevertheless consistent — although with at least one regrettable exception — with the highest international standard of a fair trial.

This section will analyze some features of the ICTY RPE that exemplify the hybrid nature of the procedure that is currently in force. An overall appreciation of the RPE system would require that attention be paid to a multiplicity of details; however, reasons of brevity will allow only a few questions to be addressed. The first three issues considered below aim to demonstrate how importing civil law features into a common law framework did not result in an incoherent system. The subsequent two issues highlight how efforts to introduce civil law measures in order to guarantee judicial expediency were tempered with instruments aimed to safeguard the rights of the accused. Finally, the last two issues represent problems that arose from the difficulty of reconciling common law and civil law views on appeal: while one has been successfully resolved by the jurisprudence of the Tribunal, the other remains open to debate.

1. Unified Structure of the Proceedings

Rule 87(C)[17] was introduced in 1998 in order to replace the bifurcated structure of the proceedings with a unified one, where a Trial Chamber renders a single combined verdict, including sentence, and there is no need for a separate sentencing hearing. The departure from the common law tradition on this point did not produce any disharmony in the Tribunal's system. The bifurcated structure of the proceedings in common law jurisdictions is a consequence of the presence of a jury as the finder of fact: the purpose of such a solution is to purify the evidence presented to the jury from any unnecessary information concerning the character of the accused, in order to avoid a scenario in which fact-finding becomes polluted by the jurors' degree of sympathy toward the personality of the accused. As the ICTY benches are composed of professional judges, there is no reason to keep fact witnesses and character witnesses separate; professional judges are, by definition, able to discern between the different factors relevant to the different findings. In

[17] RPE, *supra*, note 5.

addition, the unified proceedings have saved a significant amount of time and resources. In fact, witnesses are normally sources of information on facts relating to both culpability and sentencing, and a non-bifurcated structure allows for such witnesses to give evidence only once, rather than twice.[18]

2. The Introduction of a Pre-trial Judge

In 1998, the pre-trial stage of the proceedings was modified with the introduction of a pre-trial judge.[19] Although such a figure corresponds to a feature typical of the inquisitorial tradition, the ICTY pre-trial judge cannot be compared with a *juge d'instruction*, as he has no task in investigating the case, but rather serves chiefly as a manager of the parties in their trial preparation in order to better ensure the expeditiousness of the trial proceedings. Among the instruments available to the pre-trial judge, there are the possibilities of coordinating the communications between the parties, ensuring that they promptly comply with their disclosure obligations, and ordering them to file briefs containing information about the nature of the case that they intend to present — including the factual and legal issues that they want to raise in their case, the list of witnesses whom they intend to call, and the exhibits that they intend to present, as well as a summary of the facts on which each witness will give evidence. This information allows the pre-trial judge to take action that will assist in accelerating the course of the trial. The most significant of such possible actions (which have been enhanced through a series of amendments) will be considered in the following paragraph.

The presentation of pre-trial briefs and witness and exhibit lists is not comparable to the creation of the dossier typical to the civil law tradition. The briefs give general information on the cases of the parties, but the exact content of the evidentiary materials is only presented in lists and summaries for the pre-trial judge, and it thereby remains unavailable to the pre-trial Chamber. In this way, the clear-cut distinction between mere "information" and proper "evidence" is preserved. While, admittedly, the advanced knowledge of the general coordinates of the parties' cases is "likely to stimulate the judges to participate more in questioning of

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[18] *Contra*, A. Cassese, Rules of Procedure and Evidence (as of 10 June 2009): Explanatory Memorandum by the Tribunal's President, at 18, online: <http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/RulesRegulations/Explanatory_memorandum_En.pdf>.

[19] RPE, *supra*, note 5, r. 65*ter*.

witnesses",[20] the pre-trial judge's role, overall, is to gather the information that is necessary for a more efficient judicial control over the conduct of the trial without substantially affecting the dominant roles of the parties involved.[21]

3. Judicial Control over the Counts of the Indictments

Rule 73*bis*(D) and (E),[22] as amended in 2006 and clarified by the case law, provides that a Trial Chamber, in the interest of a fair and expeditious trial, has four options for direct or indirect action in reducing the scope of an indictment: (1) it can invite the Prosecution to reduce the number of counts charged; (2) it can fix the number of crime sites; (3) it can fix the number of incidents; and (4) it can direct the Prosecution to select the counts upon which to proceed.[23]

This new rule represents the final outcome of a series of measures introduced over time into the RPE in order to reduce the size of cases. First, in 1998, a provision was introduced that obliged the Prosecution to estimate the length of its case-in-chief and the number of witnesses that it intended to call. It also provided that the pre-trial judge could formally encourage the prosecutor to shorten the estimated length of its case and reduce the number of witnesses. Pursuant to an amendment dated 2001, the pre-trial judge faculty of "inviting" the Prosecution to reduce its case turned into the power to authoritatively determine the number of witnesses the Prosecution may call and the time available to it for the presentation of evidence.

However, since the first cases before the Tribunal, it appeared clear that the most effective solution to the problem of lengthy proceedings would be to intervene in the length of indictments by reducing the number of counts included therein and focusing cases on the most important charges against the accused. Over time, it also became clear that the Prosecution was not inclined to voluntarily reduce the size of its indictments, and that judicial impulse toward the reduction of counts in the indictments would be essential.[24]

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[20] Orie, "Accusatorial v. Inquisitorial", *supra*, note 1, at 1471.

[21] *Id.*, at 1465; Ambos, *supra*, note 1, at 11.

[22] RPE, *supra*, note 5.

[23] See, *e.g.*, *Prosecutor v. Milutinović*, IT-05-85-T, Decision on Application of Rule 73*bis,* International Criminal Tribunal for the former Yugoslavia (ICTY), July 11, 2006, at para. 6.

[24] See Kwon, *supra*, note 4, at 374, referring to the Final Report of the Working Group on Speeding Up Trials, February 13, 2006, at 5.

It has been argued that the introduction of Rule 73*bis*(D) and (E) resulted in an unusual and contradictory picture: at the moment of the confirmation of the indictment, the pre-trial judge declares that a *prima facie* case exists against the suspect. Subsequently, however — but still before the trial, and independently from a new evaluation on the merits — a Trial Chamber decides that some of the charges are to be dropped, with the only aim being to comply with the Tribunal's deadlines. It is also claimed that this course of action should be undertaken, if it is undertaken by anybody, by the Prosecution rather than by the Trial Chamber.

However, at least two points stand against these criticisms.

First, it is indisputable that the nature of international criminal law is such that, often, the scope of the crimes with which an accused is charged is so extensive as to be unmanageable. The scope of the crime basis is sometimes absolutely enormous — especially when it comes to the most senior leaders, who, allegedly, controlled large parts of the disputed territory for long periods of time or directed entire war operations. Concentrating on each and every incident may risk prolonging, for an extended period, the moment of declaring the individual responsibility of the accused for the atrocities committed. Considering the specific aim of the ICTY to restore peace to the former Yugoslavia and the principle of an expeditious trial, it is clear than an extensive delay is not a desirable option. If it is true that justice not only must be done, but also must be seen to be done, it is also true that justice must be done early enough to be seen by those who are waiting for it. The problem of lengthy indictments is one that *must* be dealt with.

As to the distribution of tasks between the Prosecution and the Chamber in defining the size of the proceedings, it is probable that a direct intervention of judges on these issues would be unnecessary if the Prosecution had shown, over time, a higher degree of sensitivity to the exigencies of expeditious trials. In any event, the current distribution of tasks does not affect the divisions of roles between Chamber and Prosecution, but rather helps to preserve it. In other words, relieving the Prosecution of the task of presenting indictments of reasonable size allows the Prosecution, if it so wishes, to play its role of party to the proceeding — in which it is committed to the mission of proving the responsibility of the persons accused for all of the crimes that they have allegedly committed — until the very end. The responsibility of reducing the scope of the indictments will fall, therefore, to the Chambers, in a manner fully consistent with the Chambers' crucial role in managing the proceedings before them.

4. Use of Written Evidence

Common law jurisdictions traditionally prefer oral testimony over written for two main reasons. First, oral evidence respects a party's right to cross-examine a witness of the other party, which is considered fundamental in the common law's method for discovery of the truth: that is, the clash between two opposite viewpoints, not only on the general issue of guilt, but also on each single piece of evidence. Second, more than reasonable doubts about the reliability of statements taken by the parties in view of the trial lead adversarial systems to be traditionally suspicious of written statements.[25]

The original set of RPE included a disposition providing that "witnesses shall, in principle, be heard directly by the Chambers".[26] The desire to expedite the trial process led progressively to an increasingly broad admission of written testimonies. In 2000, the above-mentioned disposition was deleted from the RPE and replaced by a general provision on rules of evidence, which stated that "a Chamber may receive evidence of a witness orally or, where the interests of justice allow, in written form".[27] In addition, a much more detailed disposition was introduced, Rule 92*bis*, which allows written witness statements to be admitted as long as they do not go to the "acts and conduct of the accused".[28] This rule addresses the situation of an accused charged with crimes that were not committed by him as the direct perpetrator, but rather by others who were under his control. The provision assumes a special meaning in light of the substantive features of international criminal law, recalled above, where the distinction between the so-called "crime base" and the so-called "linkage element" is particularly relevant. With the view to speeding up trials, Rule 92*bis* lists some illustrative examples for the possible use of written evidence: cumulative evidence to which prior live witnesses have testified; relevant historical, political or military background; statistical and demographic surveys; victim impact statements; and sentencing evidence.[29] On the

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[25] J. Jackson, "Finding the Best Epistemic Fit for International Criminal Tribunals" (2009) 7 J. Int'l Crim. Justice 17, at 31 [hereinafter "Jackson"], referring to A. Stein, *Foundations of Evidence Law* (Oxford: Oxford University Press, 2005), at 190-91.

[26] RPE, *supra*, note 5, r. 90.

[27] RPE, *id.*, r. 89.

[28] *Id.*, r. 92*bis*.

[29] See United Nations, General Assembly Security Council, 56th Session, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, A/56/352-S/2001/865 (2001), online: <http://www.icty.org/x/file/About/ReportsandPublications/AnnualReports/annual_report_2001_en.pdf>.

other hand, this rule also lists some factors militating against the admission of written evidence in lieu of oral evidence, including: an overriding public interest in an oral presentation; the fact that the objecting party can demonstrate that the nature and source of the written evidence renders it unreliable, or where its prejudicial effect outweighs its probative value; and any other factor that makes it more appropriate for the witness to be subjected to cross-examination.

It is particularly important to note that paragraph (E) of Rule 92*bis* requires the Trial Chamber to decide whether the witness should appear for cross-examination. Cross-examination is therefore not automatically granted to a defendant on the written evidence presented by the Prosecution. Conversely, cross-examination is allowed if the Trial Chamber determines that the statement is relevant to a "live" or "disputed" issue.

Some scholars argue that, since judges do not have a full knowledge of the facts of the case (unlike in civil law systems, ICTY judges do not have a rich dossier of the case), they may err in exercising their discretion when allowing cross-examination pursuant to Rule 92*bis*(E). Further, it is pointed out that the lack of cross-examination is not counterbalanced by the civil law judges' role in questioning witnesses. These scholars argue that, in the procedural system of the Tribunal, cross-examination is virtually the only method by which prosecution evidence can be challenged. Finally, it has been observed that there is not always a clear-cut distinction between evidence "which goes to the acts and conduct of the accused"[30] and evidence which does not.[31]

I do not find particular merit in these concerns.

First of all, even though judges do not possess a "rich dossier" of the case, they do have information on the cases that enables them to properly exercise their discretion to allow cross-examination pursuant to Rule 92*bis*(E). As recalled above, after the introduction of a pre-trial judge in 1998, judges have at their disposal, since the very early stages of the proceedings, the pre-trial briefs and the summaries of each witness's testimony.

Second, the notion that the lack of cross-examination is not counterbalanced by the civil law judges' role in questioning witnesses is not

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The Eighth Annual Report states that the purpose of r. 92*bis* was "to facilitate the admission by way of written statements of peripheral or background evidence while protecting the rights of the accused". *Id.*, at para. 51.

[30] RPE, *supra*, note 5, r. 92*bis*.

[31] For these criticisms, see Robinson, "Rough Edges", *supra*, note 2, at 1042-46; Bourgon, *supra*, note 15, at 532.

conclusive. ICTY judges do have the right to question witnesses at any stage, pursuant to Rule 85(B).[32] Further, the matter at issue is the admission of written evidence: there is no reason for considering judges' power to question witnesses, since 92*bis* witnesses, by definition, are not present in court.

Third, the ICTY case law, based on Article 21(4)(e) of the Statute[33] and Rule 89(B)-(D),[34] has developed strict standards to ensure a fair trial for the accused. These standards also restrict the use of written testimony. They are not supplanted or modified by Rule 92*bis*. The admission of evidence is not unlimited, but depends on the relevance and the "probative value" of the evidence.[35] The probative value, in turn, depends on the reliability of the evidence.

Last, but not least, evidence of any kind must be excluded "if its probative value is substantially outweighed by the need to ensure a fair trial",[36] or if it is obtained by methods which cast "substantial doubt on its reliability".[37]

In addition, practical data are to be taken into consideration; written evidence only supplements *viva voce* evidence, and did not become the main thrust of the Prosecution's evidence.

Finally, it might be true that the border between evidence relating to general matters and evidence relating to the acts and conduct of the accused may be blurred in specific cases (for example, with regard to the responsibility of the superior). However, if the relevance of a written statement to proving the individual guilt of the accused may not be immediately clear to a judge at the moment that the statement is admitted into evidence, or when the decision on allowing cross-examination is taken, it will certainly become clear at the moment of the evaluation of evidence, when the full picture is finally available to judges. On the basis of human rights instruments, such as Article 14(3)(e) of the *International Covenant on Civil and Political Rights*[38] and Article 6(3)(d) of

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32 RPE, *supra*, note 5.

33 ICTY Statute, *supra*, note 10.

34 RPE, *supra*, note 5.

35 *Id.*, r. 89(C).

36 *Id.*, r. 89(D).

37 *Id.*, r. 95.

38 G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976 [hereinafter "ICCPR"]. Article 14(3)(e) provides: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

the *European Convention of Human Rights*,[39] the jurisprudence of the Tribunal has clearly stated that, while it is not necessary that the accused be able to examine all witnesses against him, convictions cannot be substantially based upon the statements of witnesses whom the defence was unable to cross-examine.[40] In short, live testimony remains indispensable to prove the individual guilt of the accused.[41]

Prior to considering the next example, let me just recall that Rule 92*ter*,[42] introduced in September 2006, allows the admission of written evidence under different conditions from those provided under Rule 92*bis*. It is noteworthy that evidence admitted under Rule 92*ter* may also include evidence that goes towards the proof of the acts and the conduct of the accused as charged in the indictment. In these cases, however, the witness who provided the statement must be present in court; the witness is to be available for cross-examination and any questioning by the judges; and the witness has to attest that the written statement or transcript accurately reflects that witness's declaration, and what the witness would say if examined. In other words, when evidence provided in writing has a direct impact on the responsibility of the accused, cross-examination is a plain and simple right of the accused.

5. Judicial Notice of Adjudicated Facts

Rule 94(B),[43] introduced in 1998, allows a Trial Chamber to take judicial notice of facts adjudicated in a previous case before the Tribunal. The purpose of such a rule is clearly to reduce the need for repetitive testimony in successive cases, which — as recalled above — would increase the length of the proceedings. The rule on judicial notice of

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[39] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11, which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998 respectively [hereinafter "ECHR"]. Article 6(3)(d) provides: "Everyone charged with a criminal offence has the following minimum rights ... [T]o examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

[40] See, *e.g.*, *Prosecutor v. Galić,* Case No. IT-98-29-A, Decision on interlocutory Appeal Concerning Rule 92*bis*(C) (June 7, 2002).

[41] One commentator has observed, for example, that "so long as tribunals are sensitive to the requirement that convictions are not based substantially upon uncross-examined evidence, they are unlikely to fall foul of human rights law". Jackson, *supra*, note 25, at 30-31. See also Boas, *supra*, note 4, at 81.

[42] RPE, *supra*, note 5.

[43] *Id.*

adjudicated facts allows a Trial Chamber to dispense with evidence on the crime base. In so doing, all trial resources may be focused on the matters actually in dispute. A secondary meaning underpinning the rule is connected with the idea of "creating historical record", which is sometimes (but disputably) regarded as falling within the typical aims of an international criminal tribunal.

The rules provide a different regulation of the judicial notice of facts of common knowledge and the judicial notice of adjudicated facts. In relation to facts of common knowledge, while they must be judicially noticed, the Trial Chamber retains discretion to reject a purportedly adjudicated fact on any ground (including that it may prejudice the accused or the interest of justice). Further, while facts of common knowledge cannot be rebutted at trial, the jurisprudence of the Tribunal has evolved in the sense that adjudicated facts only create a presumption that may be rebutted at trial.

In its first applications, Rule 94(A)[44] was interpreted as providing that judicial notice of adjudicated facts — like judicial notice of facts of common knowledge — established the facts definitively, and the facts would not, therefore, be refutable at trial.[45] Such a position could leave room for concerns on whether a right balance had been struck between the need for an expeditious trial and the need to guarantee the rights of the accused. Indeed, as some have pointed out, the accused in a previous proceeding may have sought to actively lay the blame on the individual who then appears as the accused in a second proceeding. Thus, the fact that the possibility to challenge prosecution evidence was granted within the framework of the first proceeding does not necessarily imply that the rights of the second accused are respected, as the accused in the first case may have had no interest in defending the interests of the accused in a second case.[46] It is clear that, without the necessary precautions, taking judicial notice of facts that have previously been adjudicated could endanger the rights of the accused. The natural consequence of this first interpretation of Rule 94 was the tendency of the Trial Chambers to limit judicial notice only to background facts, or facts of a historical nature,

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[44] *Id.*

[45] See, *e.g.*, *Prosecutor v. Milošević,* Case No. IT-02-54-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Relevant to the Municipality of Brčko (June 5, 2002), at paras. 3-4.

[46] P. Wald, "The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court" (2001) 5 Wash. U. J. L. & Pol'y 87, at 111; Kwon, *supra*, note 4, at 369-70.

while rejecting the rest, and, in particular, those facts concerning the acts and the conduct of the accused.

In October 2003, however, the Appeals Chamber reversed this position, holding that the judicial notice of adjudicated facts establishes a "well founded presumption"[47] in favour of the moving party that the fact is accurate; as a consequence, that party does not need to prove the fact at trial, but the other party may put forth evidence to rebut it.[48] In so doing, the Appeals Chamber widened the possibility for future Chambers to take judicial notice of adjudicated facts. Trial Chambers have, indeed, made much more frequent use of Rule 94(B) since 2003, with significant benefits for the pace at which trials are conducted.

In sum, judges of the Tribunal have shown an ability to use the procedural instruments available in order to increase the speed of proceedings, but only to the extent that these instruments are consistent with fair trial principles. They have refrained from pursuing expeditiousness when it could have given rise to doubts in respect of the rights of the accused, and they have otherwise ensured the expeditiousness of proceedings when this could be done without any kind of (certainly unacceptable) collateral damage.

6. Convictions Entered for the First Time on Appeal

Article 25 of the ICTY Statute[49] allows both the defendant and the Prosecutor to appeal a trial judgment on matters of law and fact. It has been observed that the drafters of the Statute went beyond the examples provided by national jurisdictions.[50] In common law systems, courts cannot reverse judgment of acquittals, as the question of guilt must always be put to a trier of fact. In the case of an appellate review of a conviction from the trier of fact, the conviction will only stand if both the trial court and the appellate court concur that the accused is guilty beyond a reasonable doubt.[51] A conviction entered for the first time on appeal, especially if grounded on errors of fact, would be considered an inadmissible

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[47] *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts (October 28, 2003), at 4.

[48] *Id.*, at para. 4.

[49] *Supra*, note 10.

[50] M.C. Fleming, "Appellate Review in the International Criminal Tribunals" (2002) 37 Texas Int'l L.J. 111, at 118-21, 139 [hereinafter "Fleming"].

[51] *Id.*, at 139.

example of double jeopardy.[52] Alternatively, in civil law systems, appellate courts are often allowed to reverse acquittals, but the decision by the appellate court is usually subject to an appeal to the Supreme Court on matters of law.[53] Significantly, the lack of adequate reasoning to support a finding of guilt is often considered a matter of law: thus, in practice, supreme courts are left enough room to also question unreasonable factual findings.

Further, in the civil law tradition, appeals consist of a full re-hearing of the case. This means that the appellate court is usually in a position to closely scrutinize the evidence supporting the Prosecution's case (including ample possibilities for the admission of fresh evidence) without being limited to a "second-hand" analysis of the evidence on the trial record. Conversely, an appeal in the common law tradition does not usually entail a new hearing of the case (*e.g.*, a trial *de novo*), but is limited to the review of the record of the trial court in search of errors claimed by the appellant.[54] This puts the common law appellate courts in an uncomfortable position as far as the finding of facts is concerned, because the appellate courts have a greater distance from the available evidence than the trial chambers. Such a position clearly militates against the possibility of reversing an acquittal based on an error of facts in order to replace the acquittal with a conviction.[55]

Rule 111 of the RPE,[56] concerning the appellant's brief, indicates that the appeal is not a trial *de novo.* Pursuant to Rule 115,[57] the parties may apply to present additional evidence in exceptional cases. In addition, the basic structure of the ICTY proceedings is not three-fold, but two-fold, as the Appeals Chamber is the highest court in the ICTY jurisdiction, and no judicial body is vested with the powers typical of a supreme court. These two elements suggest that the ICTY Appeals Chamber is not in a position to enter convictions on appeal after having reversed a judgment of acquittal.

The case law of the Tribunal could have promptly clarified the borders of the Appeals Chamber's powers in the case of the Prosecution's appeals against acquittals, based on the Statute, the RPE, international

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52 See, *e.g.*, *id.*, at 127-31.
53 Orie, "Accusatorial v. Inquisitorial", *supra*, note 1, at 1456.
54 *Id.*, at 1455-56.
55 Fleming, *supra*, note 50, at 139.
56 *Supra*, note 5.
57 *Id.*

human rights standards and general principles of law.[58] However, to this date, the Appeals Chamber has omitted to do so, thus leaving room for an oscillating jurisprudence on this crucial issue.[59] In some instances, the Appeals Chamber — after having found that the sentence imposed did not adequately reflect the gravity of the crimes and the level of culpability — remitted the determination of sentence to the Trial Chamber[60] by expressly arguing that this would enable the preservation of the accused's right of appeal.[61] In another group of cases, the Appeals Chamber — after finding an error of law on the part of the Trial Chamber — simply pronounced that the Trial Chamber's findings were erroneous and noted in the disposition that the Trial Chamber had incorrectly disallowed the conviction, rather than entering a new conviction against the accused.[62] Conversely, in other instances, the Appeals Chamber proceeded to enter a new conviction on appeal and/or to increase the sentence imposed by the Trial Chamber, thus depriving the accused of the right to appeal the conviction.[63]

Reconciliation between the view of the common law and civil law traditions would have been possible if due weight had been given to the

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[58] See V. Morris & M. Scharf, *An Insider's Guide to the International Tribunal for the Former Yugoslavia* (New York: Transnational Publishers, 1995), at 295-96. See also *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A (May 26, 2003), Separate Opinion of Judges Meron and Jorda [hereinafter "*Rutaganda* Appeal Judgment"]. In the context of the *Rutaganda* Appeal Judgment, Meron and Jorda observed in their separate opinion that the absence of any right to appeal a conviction entered for the first time by the Appeals Chamber, save in the case where the matter is remitted to the Trial Chamber, "is likely to infringe upon the fundamental principle of fairness recognized both in international law and many national legal systems". They noted that, as the sentence was not being increased, it was not necessary to fully determine, on that occasion, the compliance of the Appeals Chamber's approach with this "fundamental principle of fairness". Nevertheless, they considered that "given the importance of the issue raised, it is absolutely necessary for the Appeals Chamber to deal with it in the future, in order to find solutions consistent with fundamental principles of fairness and due process" (at 1). The Appeals Chamber has not yet addressed the above-mentioned issue.

[59] For an overview, see Bing Bing Jia, "The Right of Appeal in the Proceedings Before the ICTY and ICTR" in G. Venturini & S. Bariatti, eds., *Liber Fausto Pocar. Diritti individuali e giustizia internazionale* (Milan, Italy: Giuffrè, 2009) [hereinafter "Venturini & Bariatti"].

[60] See *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment (February 20, 2001), at 310-11 [hereinafter "*Čelibići* Judgment"]; *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (July 15, 1999), at 144 [hereinafter "*Tadić* Judgment"].

[61] *Čelibići* Judgment, *id.*, at 310-11.

[62] See, *e.g.*, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment (March 22, 2006), at 144; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment (April 19, 2004), at 87 and paras. 219-29; *Prosecutor v. Martić,* Case No. IT-95-11-A, Judgment (October 8, 2008).

[63] See, *e.g.*, *Prosecutor v. Kupreškić*, Case No. IT-95-16-A, Judgment (October 23, 2001), at 172 [hereinafter "*Kupreškić Appeal Judgment*"]; *Tadić* Judgment, *supra*, note 60, at 144. See also *Rutaganda* Appeal Judgment, *supra*, note 58, at 168-69; *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgment (May 20, 2005), at 125-26 [hereinafter "*Semanza* Judgment"]; *Prosecutor v. Mrkšić and Sljivančanin*, Case No. IT-95-13/1-A (May 4, 2009) [hereinafter "*Mrkšić and Sljivančanin* Judgment"].

need for the ICTY to respect the highest standards of a fair trial, as enshrined in the ICCPR. Article 14(5) of the ICCPR,[64] as interpreted by the Human Rights Committee, eliminates any doubt that an accused's right to appeal against conviction also entails the right to appeal a conviction entered for the first time on appeal.[65] The ICTY practice could comply with this internationally recognized standard by interpreting Article 25 of the Statute[66] in a sense more favourable to the accused, and recognizing that, in the case of the Prosecution's appeals against acquittals, only two avenues are open before the Appeals Chamber: the Appeals Chamber may remit the case to a Trial Chamber for further proceedings pursuant to Rule 118(C);[67] or it may pronounce the Trial Chamber's findings to be erroneous and simply note that the Trial Chamber incorrectly disallowed the convictions, thereby correcting an error of law or fact without entering a new conviction or sentence. To do otherwise would be to contravene the accused's right to appeal.[68]

7. Introduction of New Evidence on Appeal and Standard of Review

According to the standard set in the *Aleksovski* Appeal Judgment,[69] the Appeals Chamber may overturn a Trial Chamber's finding of fact only where it has occasioned a miscarriage of justice — that is, when the evidence relied upon could not have been accepted by any reasonable tribunal, or where the evaluation of the evidence is wholly erroneous. The jurisprudence of the Tribunal has always been consistent on this point.

However, when the presentation of additional evidence is allowed in the course of the appeals proceedings, pursuant to Rule 115 of the RPE, the individuation of the *criteria* governing the application of the

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[64] *Supra*, note 38.

[65] HRC, Communication No. 1095/2002, *Gomaríz v. Spain* (August 26, 2005), at para. 7.1; HRC, Communication No. 1073/2002, *Terron v. Spain* (November 5, 2004), at para. 7.4; HRC, Communication No. 836/1998, *Gelazauskas v. Lithuania* (March 17, 2003), at para. 7.2; see also HRC, Communication No. 75/1980, *Finali v. Italy* (March 31, 1983), at para. 12.

[66] *Supra*, note 10.

[67] RPE, *supra*, note 5.

[68] For further discussion on this subject, see *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment (November 30, 2006), Partially Dissenting Opinion of Judge Pocar, at 187, para. 2; *Semanza* Judgment, *supra*, note 63, Dissenting Opinion of Judge Pocar; *Rutaganda* Appeal Judgment, *supra*, note 58, Dissenting Opinion of Judge Pocar; *Mrkšić and Sljivančanin* Judgment, *supra*, note 63, Partially Dissenting Opinion of Judge Pocar. See also R. Nieto-Navia, "The Application by the ICTY/ICTR Appeals Chamber of Article 14(5) of the International Covenant on Civil and Political Rights in Sentencing Proceedings" in Venturini & Bariatti, *supra*, note 59.

[69] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment (March 24, 2000).

Aleksovski standard are not so obvious. The jurisprudence of the Tribunal has shown, over time, different approaches towards the definition of the standard to be applied in such cases. The different positions adopted by the Appeals Chamber may be considered as reflecting the different understandings of common law and civil law lawyers on the role and the meaning of an appeal.

In the course of the *Kupreškić* appeal proceedings,[70] the defence submitted that the Appeals Chamber should adopt the test existing in most common law jurisdictions, namely: "might or could the additional evidence have caused the Trial Chamber to have arrived at a different verdict"?[71] If the answer is "yes", the Appeals Chamber would allow the appeal, quash the conviction and consider whether to order a retrial. This, the defence submitted, was to be considered consistent with the rule relating to review proceedings, which provides that where a new fact has been discovered after judgment, the Chamber rendering the original verdict determines whether that new fact *could* have been a decisive factor in reaching a different verdict, and, if so, reviews the judgment and makes a further judgment.[72] The Prosecution noted that the Appeals Chamber is not bound by jurisprudence from national jurisdictions, and submitted that the standard for allowing an appeal where additional evidence has been admitted should be that "[t]he additional evidence must be sufficiently compelling that when assessed in light of all the evidence in the record on appeal, and if believed, it would have tilted the balance in favour of another verdict if it was made available before the Trial Chamber".[73] In reply, the defendants cautioned against accepting such a "would" standard, which could result in injustice in cases that were not crystal clear. Numerous cases from various jurisdictions were cited in support of both tests.

Having considered the submissions of the parties, the Appeals Chamber decided against importing tests from domestic jurisdictions. In the *Kupreškić* Appeal Judgment,[74] the test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber was formulated in the following terms: "has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the

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70 See *Kupreškić* Appeal Judgment, *supra*, note 63.
71 *Id.*, at para. 73.
72 RPE, *supra*, note 5, r. 117.
73 *Kupreškić* Appeal Judgment, *supra*, note 63, at para. 74.
74 *Id*.

evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings"?[75] In framing the test in this manner, the Appeals Chamber relied as guidance on Rule 117(A),[76] which provides that "[t]he Appeals Chamber shall pronounce judgment on the basis of the record on appeal together with such additional evidence as has been presented to it".[77]

In the *Blaskić* Appeal Judgment,[78] the Appeals Chamber considered that, in light of the peculiarities of the case, a further examination of the existing standards of appellate review was necessary.[79] The Appeals Chamber reiterated that an appeal is not a trial *de novo*, and confirmed the validity of the *Kupreškić* standard. However, it also noted that the Appeals Chamber in *Kupreškić* did not determine whether it was satisfied *itself*, beyond a reasonable doubt, as to the conclusion reached — and, indeed, it did not need to be, because the outcome in that situation was that no reasonable trier of fact could have reached a finding of guilt.

That said, the Appeals Chamber pointed out that, if, in a given case, the outcome were that a reasonable trier of fact could reach a conclusion of guilt beyond reasonable doubt (that is, when the Appeals Chamber is itself seized of the task of evaluating trial evidence and additional evidence together, and, in some instances, in light of a newly articulated legal standard) "it should, in the interests of justice, be convinced itself, beyond a reasonable doubt, as to the guilt of the accused, before confirming a conviction on appeal".[80] The Appeals Chamber underscored that, in such cases, if it were to apply a lower standard, then the outcome would be that neither in the first instance, nor on appeal, would a conclusion of guilt based on the totality of evidence relied upon in the case, assessed in light of the correct legal standard, be reached by either Chamber beyond a reasonable doubt.[81]

In light of this reasoning, the Appeals Chamber set out the following standard, to be applied when the Appeals Chamber is confronted with an alleged error of fact, additional evidence has been admitted on appeal

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[75] *Id.*, at para. 75.

[76] RPE, *supra*, note 5.

[77] *Kupreškić* Appeal Judgment, *supra*, note 63, at paras. 73-76.

[78] *Prosecutor v. Blaskić,* Case No. IT-05-14-A (July 29, 2004), at para. 8 [hereinafter "*Blaskić* Appeal Judgment"]. For further discussion, see L.E. Carter, "The Importance of Understanding Criminal Justice Principles in the Context of International Criminal Procedure: The Case of Admitting Evidence on Appeal" in Venturini & Bariatti, *supra*, note 59.

[79] *Id.*

[80] *Id.*, at para. 23.

[81] *Id.*

and there is no error in the legal standard applied in relation to the factual finding. There are two steps involved.

> (i) The Appeals Chamber will first determine, on the basis of the trial record alone, whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If that is the case, then no further examination of the matter is necessary as a matter of law.
>
> (ii) If, however, the Appeals Chamber determines that a reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt, then the Appeals Chamber will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.[82]

V. CONCLUSION

The evaluation of international criminal proceedings must keep in mind the fact that two seemingly opposite exigencies must be reconciled: respect for the highest fair trial standards and the effectiveness of international criminal justice, which is heavily dependent on the ability of international criminal tribunals to serve justice in a timely and expeditious manner. For this reason, procedure in international criminal law may seem like an impossible task, for how can oil ever blend with water? The flexibility shown by the ICTY in borrowing concepts from both the adversarial and inquisitorial legal traditions should be regarded as an attempt to strike a balance between these two needs within a legal context that, for its novelty and complexity, presented challenges unknown to any domestic system in the world. The success of the model proposed by the ICTY further demonstrates that, perhaps, the oil/water dichotomy is no longer useful and that the two factors of fairness and expeditiousness are not the polar opposites that they initially seemed to be. It also shows that, through a clever combination of features of the common law and civil law traditions, these factors *can* be combined. The success of this development has been confirmed (and further elaborated) by the drafters of the rules of evidence and procedure of the International Criminal Court, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon.

As I anticipated, a full evaluation of the ICTY RPE would require a detailed analysis of a multiplicity of interconnected profiles, which was

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[82] *Id.*, at para. 24.

not possible here. However, the series of examples considered above may already provide a taste of the fact that, within the framework of the ICTY RPE, the blending of the civil law and common law traditions has been carried out in a thoughtful manner, which has aimed to address problems specific to the trying of international crimes, and with a full awareness of the need to address the tension between strict adherence to human rights standards and the efficiency of international criminal justice. I can conclude by noting that, while oil and water may never mix in the science lab, human rights and efficient justice *can* be mixed, and to successful effect, in the courtrooms of international criminal tribunals like the ICTY.

Part VI
Convergence in Other Contexts

Convergence in Other Contexts: An Introduction

Erik S. Knutsen* **and Sean Rehaag****

I. INTRODUCTION

Suppose that convergence in the common law and the civil law worlds is not evident in specific procedural texts. Might convergence nonetheless be apparent in the final processes or the end results of dispute resolution in civil justice systems? In other words, is convergence being measured from the wrong end? And what exactly does one mean by "convergence" to begin with?

In the quest to determine whether or not the divide between the common law and the civil law procedural traditions is shrinking, the following articles address a similar theme: the current modalities of thinking about the separateness between the common law and the civil law may not be entirely helpful when one wishes to understand procedural reforms in any specific country. Instead, one must look first to the country in question and consider its culture, its traditions, and the values that are embedded in its domestic litigation system. If this is right, then discussions about moving beyond the traditional common law / civil law divide must be replaced with detailed analyses of why, from a domestic perspective, a certain country has undertaken procedural reforms that may or may not appear, at first glance, to embody a trend towards convergence.

II. CONVERGENCE AT THE INTERSTICES OF SUBSTANCE AND PROCESS

Process and substance are, of course, interdependent and interrelated. Moreover, process and substance intersect in distinct ways in particular legal traditions, in particular countries, and even in particular types of litigation and areas of law. As the papers in this section all demonstrate,

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in attempting to assess the phenomenon of so-called convergence between common law and civil law traditions, serious attention must be accorded to these specific interstices.

In "It's the Law! Applying the Law Is the Missing Measure of Civil Law / Common Law Convergence",[1] James Maxeiner challenges the general theme of convergence by bringing attention to the complex relation between substance and process. Specifically, he argues that there is little indication of convergence between how each legal tradition approaches the application of its laws to the facts of particular cases. Maxeiner begins by noting both the central importance and the challenges of applying the law to the facts. He then suggests that one such challenge is the necessary interdependence between factual findings and determinations of which substantive legal rules apply. Maxeiner next reviews civil procedure in Germany and the United States. He argues that German civil procedure — and, in particular, the "relationship technique" — provides courts with the tools to deal flexibly and effectively with the necessary independence between fact-finding and the application of the law. Civil procedure in the United States, in contrast, maintains a sharp separation between fact-finding and the application of the law. In Maxeiner's view, this separation, which finds its roots in the division of labour between juries and judges, produces needless delays and expenses for the legal system in the United States. Moreover, so long as the legal system in the United States continues to insist on the distinction between fact-finding and application of the law, convergence between the civil law and the common law systems will be limited.

Then, in "Evidentiary Provisions of the People's Courts and Transition of the Judges' Role",[2] Baosheng Zhang and Hua Shang highlight the significance of paying attention to the intersection between evidentiary law and procedural law, especially in the context of the ongoing reforms in China. Zhang and Shang argue that reforms to China's evidentiary procedures integrate features of both the common law and the civil law traditions. For example, while Chinese judges historically played a central role in litigation that appears to be in keeping with the civil law tradition, recent changes in the Supreme People's Court appear to give litigants prominence in the process, with judges playing a somewhat more passive role that is more familiar to the common law world —

[1] In Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories* (Markham, ON: LexisNexis Canada, 2010) [hereinafter "Walker & Chase"] 469.

[2] In Walker & Chase, *id.*, 491.

although the power of judges to investigate and collect evidence, where it is needed, remains. Similarly, model uniform evidentiary rules that are currently undergoing pilot project testing in several Chinese courts draw on both common law and civil law norms: respecting civil law norms, such as direct oral testimony, on the one hand, and common law norms, such as rules about hearsay and opportunities for cross-examination, on the other. Zhang and Shang conclude that China's reforms to evidentiary rules, and, by extension, its reforms to the role of judges in litigation, draw on both common law and civil law traditions, and take from each only those specific procedures that are particularly well adapted to China's unique circumstances.

Finally, in "The Experience of the Holocaust Cases",[3] Burt Neuborne discusses the need for workable procedural frameworks for civil litigation that involves breaches of substantive customary international law. In particular, Neuborne notes that, while international criminal law procedures have been established to punish individuals who are guilty of egregious violations of human rights norms, there is not yet a parallel mechanism for international civil litigation for the purpose of providing victims of those human rights violations with compensation from companies that have benefited from their mistreatment. By drawing on the examples of the Swiss bank and German slave labour litigation, which involved victims and descendants of victims of the Holocaust, Neuborne argues that, in the absence of such a mechanism, litigation brought in United States courts has been the next best alternative. In his view, the reason that U.S. courts represent the next best alternative is not due to the superiority of U.S. substantive law (because, in these cases, foreign substantive law applied). Rather, U.S. courts represent the next best alternative because of sound procedural rules, including general jurisdiction, broad discovery rules and aggregate litigation procedures. According to Neuborne, the importance of these procedures carries significant implications for those who would prefer to establish an international forum for civil litigation for victims of egregious human rights violations, rather than to continue to rely on the next best alternative.

III. CONVERGENCE IN "DISPUTE RESOLUTION" PROCESSES

In terms of end outputs of procedural processes, there appear to be some boundaries between the common law and the civil law traditions. The articles here remind us that simply codifying rules in a common law

[3] In Walker & Chase, *id.*, 507.

jurisdiction does not automatically produce a civilian jurisdiction. One must look at process, and, ultimately, results. Movement in one jurisdiction toward the legal traditions of the other may instead be signalling something else that the world has not yet described — a convergence not of procedure, but, instead, of values like efficiency or fairness. Regardless, the apparent movements of a country towards the opposite tradition in the world of civil procedure might simply signal, perhaps, a greater attempt by that country to situate its procedural mechanisms in its own changing litigation landscape.

In "Exceptionalism and Convergence: Form versus Content and Categorical Views of Procedure",[4] Richard Marcus challenges the traditional allure of a categorical approach to forms of procedure that classifies them as either "common law" or "civil law". To Marcus, content matters more than form. Questions about whether the two forms of procedure are converging into an international amalgam need to give way to the more fundamental concern of whether or not content is converging. Marcus surmises that American exceptionalism has kept content convergence at bay in the United States, at least for the present and foreseeable future. If other countries adopt American forms of procedural mechanisms for discovery or for enabling mass litigation, the measure for Marcus of convergence is how those procedures will enable substantive convergence in the legal rights that are exercised because of the procedures, respectively. Marcus concludes that the internationalization of procedural law does little to move the substantive law toward a more global scope, so long as countries like the United States operate in an insular fashion with regard to the development of legal doctrine.

This same American exceptionalism may be at the heart of Peter Murray's critique of the unregulated nature of American court-annexed mediation services in "Mediation and Civil Justice: A Public-Private Partnership?"[5] For Murray, the incorporation of private, for-fee mediators into the publicly funded and publicly administered justice system creates an unsolvable conflict of values. There is no oversight of the private mediators, no accountability of mediators and mediated results, and, unlike a written and public court judgment, no mechanism through which to value a mediated settlement — that is, to determine whether or not it is a "good" settlement. Murray uses, as a foil for his arguments, the German mediation experience with special public servant judges as mediators.

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4 In Walker & Chase, *id.*, 521.

5 In Walker & Chase, *id.*, 539.

The German system keeps the mediator in the public sphere, accountable and free from the economic pressures of private mediators. Murray concludes his analysis with suggestions for a public-private partnership that would incorporate public mediators into the public civil justice system. Such suggestions would, according to Murray, increase accountability within the system not only for the behaviour of mediators, but also for settlement results, and all toward protecting the best interests of the litigants in the public justice system.

Edward F. Sherman, in "Judicial Supervision of Fees in Aggregate Litigation: The American *Vioxx* Experience as an Example for Other Countries",[6] queries why processes behind American aggregate litigation are not imported by other countries around the world. Often, notes Sherman, this is because other countries perhaps fear the entrepreneurial nature of American litigation. The challenges of lawyer fee arrangements in aggregate litigation has led to "fee policing" by American courts. In some instances, this has led to courts rewriting private fee agreements between lawyers and their clients, in order to somehow alter the compensation that the attorney expects to receive. This growing phenomenon may, perhaps, be a warning to other jurisdictions that may wish to utilize an American model in aggregate litigation. Using the example of the Vioxx pharmaceutical liability litigation, Sherman demonstrates that, even if global settlements that extend across jurisdictional lines are managed by a panel of judges, judicial supervision of attorney fees can still be problematic. For Sherman, altering the private fee arrangement between the lawyer and the client seriously alters the lawyer-client relationship in ways that are, as yet, unexplored, even in America. In this way, the Vioxx litigation outlines some of the procedural problems of American-style aggregate litigation. With respect to attorney fee arrangements in particular, jurisdictions that are moving toward adding aggregate litigation procedural mechanisms may need to examine how they will resolve this pressing question.

Déirdre Dwyer's solution to the categorization conundrum between common law and civil law systems is to classify procedure analytically, instead of categorically, or into "family trees". In "Categories of English Civil Procedure",[7] Dwyer details the recent changes to England's civil procedure landscape, particularly with the 1999 introduction of the *Civil*

[6] In Walker & Chase, *id.*, 557.
[7] In Walker & Chase, *id.*, 571.

Procedure Rules 1998.[8] Dwyer notes that one may be tempted to think that the codification of procedure is a movement away from England's common law roots, and toward a more civilian tradition. However, much that is contained in the *Civil Procedure Rules* is found elsewhere in the common law world. The differences between Fast Track and Multi Track cases in England perhaps even prompt the necessity of a third category of English civil procedure — something that is not quite common law and not quite civil law. This problem of categorization leads Dwyer to consider various procedural models of a more descriptive nature. In the struggle to fit England into a dyadic categorical approach, Dwyer prefers a qualitative and descriptive label that is grounded in function rather than in the differences between the common law and the civil law traditions.

IV. CONCLUSION

Whether in substance or in process, convergence between the common law and the civil law procedural worlds is certainly something more than a common law world that is enacting codified procedural rules or a civil law world that is allowing broad discovery and aggregate litigation. Asking the convergence question requires one to move beyond the procedure, to the substantive legal rights that are at stake in litigation. Procedure has, perhaps, become an internationally portable backdrop, upon which each jurisdiction can then craft its own unique twist. For example, discovery in action in Germany is not the same discovery as discovery in action in the United States. Nor, perhaps, should it be. Evidence law in action in China is not the same as evidence law in action in Canada. Nor, perhaps, should it be. A focus solely on procedural mechanisms, without acknowledging the culturally based landscape of the litigation values of specific countries, misses the point. This is because the process of litigation is dynamic, even if written procedural rules attempt to apply some predictable foundation to the operation of the process. This is likely because the governance of human interaction, the true subject of civil litigation, is as regional and nuanced as the world itself.

[8] (U.K.), S.I. 1998/3132, L.17, online: Ministry of Justice <http://www.justice.gov.uk/civil/procrules_fin/stat_instr.htm>.

It's the Law! Applying the Law Is the Missing Measure of Civil Law / Common Law Convergence

James R. Maxeiner[*]

I. INTRODUCTION: IT'S THE LAW! (AT LEAST, ITS APPLICATION)

Law — or rather the application of law — is the category of common law and civil law systems of civil procedure that is missing in the conference program.[1] The previous session addressed "Getting Straight to the *Facts*"[2] and "Getting *Results*".[3] Facts and results are fine, but what of *law* and its application? Should applying the law not have pride of place in systems of civil justice? Should it not be *the* measure of convergence? It is *application* of the *law* to the *facts* that determines what the *results* are. Until the consequences of applying law to facts are comparable, claimed convergence among legal systems is cosmetic.

In announcing the conference program, Professor Chase asks "whether, in view of the ongoing procedural reforms, the age-old categories of

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[1] International Association of Procedural Law (IAPL), *Common Law – Civil Law: The Future of Categories / Categories of the Future* (2009 IAPL Annual Conference, Toronto, Canada: June 3-5, 2009). See IAPL 2009, online: <http://www.iapl2009.org>.

[2] Session III, "Changing Roles of Participants", Part A: "Witnesses and Counsel: Getting Straight to the Facts", *id.* (June 4, 2009) (emphasis added). For the papers prepared by the speakers during this session, see David Bamford, "The Continuing Revolution: Experts and Evidence in Common Law Litigation" in Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories* (Markham, ON: LexisNexis Canada, 2010) [hereinafter "Walker & Chase"] 161; Emmanuel Jeuland, "Changing Roles of Witnesses and Counsel in Civil Law Countries and, in Particular, in France (Le changement de rôle des témoins et des conseils dans quelques pays de droit civil et, en particulier, en France)" (in French) in Walker & Chase, *id*., 193; and Ian Binnie, "The Changing Role of the Expert Witness" in Walker & Chase, *id*., 179.

[3] Session III, "Changing Roles of Participants", Part B: "Judges and Parties: Getting Results", *id.* (June 4, 2009) (emphasis added). For the papers prepared by the speakers during this session, see Judith Resnik, "Managerial Judges, Jeremy Bentham and the Privatization of Adjudication" in Walker & Chase, *id*., 205; Eduardo Oteiza, "Civil Procedure Reforms in Latin America: The Role of the Judge and the Parties in Seeking a Fair Solution" in Walker & Chase, *id*., 235; and Soraya Amrani-Mekki, "The Future of the Categories, the Categories of the *Futur*" in Walker & Chase, *id*., 247.

common law and civil law, continue to be relevant … ".[4] I submit that categories of common law and civil law will continue to be relevant until common law systems apply law to facts routinely and not exceptionally, while doing so efficiently and not expensively. So long as common law systems make the separation of law and fact more important than bringing them together, we shall not see convergence.

I have stated my claim more broadly than I intend. While our program speaks generally of common law and civil law, I restrict my claim to the two legal systems that I know first-hand: American common law and German civil law. My claim may also apply to other common law systems, such as those of English-speaking Canada and England, or to other civil law systems, such as those of Quebec and France, but I do not assert that it does.

This paper consists of three further parts: Part II addresses the centrality of the application of the law to civil procedure. It points out an infrequently recognized obstacle to correct and efficient application of law: the interdependency of determining the rules and finding the facts. Part III introduces the method that German civil procedure uses successfully in order to apply law to facts: the *Relationstechnik* (or "*relationship technique*"). It works. It is a method to strive for. Part IV concludes the paper by noting that American civil procedure lacks a method for dealing satisfactorily with the interdependency of determining rules and finding facts, and speculates whether such a method is possible.

II. APPLYING LAW TO FACTS AND THE CONVERGENCE OF SYSTEMS OF CIVIL PROCEDURE

Applying law to facts is fundamental to rational systems of civil procedure. Civil lawsuits resolve disputes between parties by determining the legal rights and the legal duties of the parties.[5] If there were no civil

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[4] Letter from Oscar Chase to members of the American Society of Comparative Law, online: <http://www.comparativelaw.org/iapl09.pdf>.

[5] See, *e.g.*, Paul D. Carrington, "Virtual Civil Litigation: A Visit to John Bunyan's Celestial City" (1998) 98 Colum. L. Rev. 1516, at 1522-23 ("It is sometimes assumed that the business of courts is merely dispute resolution, by whatever means may be effective to bring repose. … I assume that this pre-Enlightenment purpose will not become the norm, and that we will continue to expect courts to decide cases by applying law to fact"); Oscar G. Chase, "Reflections on Civil Procedure Reform in the United States: What has been Learned? What has been Accomplished?" in Nicolò Trocker & Vicenzo Varano, eds., *The Reforms of Civil Procedure in Comparative Perspective* (Torino: G. Giappichelli, 2005) 163, at 165; Peter L. Murray & Rolf Stürner, *German Civil Justice* (Durham: Carolina Academic Press, 2004), at 575 [hereinafter "Murray & Stürner"] (the "primary

lawsuits, private parties might use self-help to realize their rights and to resolve their disputes. The stronger, rather than the righteous, would prevail. To preserve peace and right, modern legal systems prohibit self-help, except in limited cases. Instead, they seek the correct application of the law to the facts of each case.

Primitive legal systems emphasized dispute resolution. Legal process — not substantive law — determined legal rights. As Professor Resnik has observed, this was a matter of *rites* instead of *rights*.[6] Primitive systems accepted methods of dispute resolution, such as trial by ordeal or trial by battle, which were unrelated to parties' rights. At least since the 18th century Enlightenment, however, modern systems of civil procedure have rested on the idea that the outcomes of legal disputes should be determined according to substantive law and not by the combative skills of the parties (or their representatives).

1. The Importance of Applying Law for Legal Systems

Lawsuits take place within legal systems. The importance of legal procedures transcends individual cases.[7] Most of the time, people apply the law to their own lives, outside of lawsuits. They can do this when the law fulfils a guidance function. People will follow the law because it expresses their sense of justice and because they believe that the law will be enforced for all. This kind of self-application is essential to well-functioning states. For every instance of the application of the law in a lawsuit, there are millions of instances of individuals applying the law to themselves in the absence of lawsuits.[8]

When there is a generally accepted method of applying the law, and the rules are determinant and the facts are known, different people looking at the same rules should reach the same conclusions. In such cases, people can conduct their lives within the rules, confident that they will

purpose" of civil justice is "vindication of private rights"); Leo Rosenberg, Karl-Heinz Schwab & Peter Gottwald, *Zivilprozeßrecht*, 16th ed. (Munich: Beck, 2004); Manfred Wolf, *Gerichtliches Verfahrensrecht* (Reinbek bei Hamburg: Rowohlt, 1978), at 10 ("die Prüfung und Feststellung der materiellen Rechtslage").

[6] See Resnik, *supra*, note 3.

[7] As Thomas W. Shelton, the "godfather" of the Federal Rules of Civil Procedure, colourfully put it: "judicial procedure is to the substantive law what the arteries are to the human body; that the latter is worthless without the former". Thomas W. Shelton, *The Spirit of the Courts* (Baltimore, MD.: J. Murphy Co., 1918), at 17.

[8] See James R. Maxeiner, "Legal Indeterminacy Made in America: American Legal Methods and the Rule of Law" (2006) 41 Val. U. L. Rev. 517, at 523-24 [hereinafter "Maxeiner"].

not be disturbed by assertions from the government or from third parties that their conduct is outside the law. They can rely on rules. If, however, application of the law is erratic and unpredictable — if application is divorced from the rules of law — people cannot safely rely on the law, even if the rules themselves appear determinant.

Where it is the application of the law to the facts — and not a matter of procedure — that determines right, law will guide the process. Facts material to the law's application are appropriate for the process; facts immaterial to law's application have little place in the process. Legal process imposes on parties the power of the state to probe their lives. Unbounded legal process can place unacceptable burdens on the participants in the process.

2. The Process of Applying Law to Facts

Applying law to facts requires determining and interpreting applicable rules, finding material facts, and then applying these rules to the facts that have been found. It brings law and facts together.

Each of these steps presents difficulties. Even in systems where the law is codified and well organized, determining the applicable rule is not simple. Even where the only law that one is concerned with is a code itself, specifying the applicable rule requires constructing a legal norm from the many provisions of the code; it requires sophistication and skill to identify which sections of the code are applicable to the current case, as well as talent in putting together the norm to be applied to the facts. That norm may then require interpretation.

In a similar way, finding the facts is not necessarily a simple exercise either. Even in uncomplicated cases, evidence may be difficult to obtain or to evaluate. Documents may have disappeared; witnesses may be forgetful. Even where cases are uncomplicated and evidence-taking is unproblematic, finding the facts in the context of a lawsuit can be challenging. The parties with knowledge are more interested in victory than in the correct finding of the facts.

Once the law has been determined and the facts found, the determined law is applied to the found facts. That is ordinarily a syllogistic process: the legal rule is the major premise and the facts found are the minor premise. The facts are subsumed logically under the legal rule to reach the correct legal consequence. Each element of the major premise

of the norm must be fulfilled by a particular fact of the minor premise. If one fails, application of the norm fails.

Syllogistic law application enables self-application; it permits legal systems to respond to the need identified by H.L.A. Hart "for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues".[9] Although not without detractors, syllogistic law application dominates daily practice in both the United States and Germany. No competing theory better describes what it means to apply rules to facts in ordinary cases.[10]

3. Back-and-forth in Applying Law: The Interdependency of Rules and Facts

Applying a rule to the facts is considerably more challenging than is generally realized in the United States. Bringing rules and facts together depends on determining rules that are applicable to the facts and finding facts that are material to the applicable rules. No longer is it believed that the applicable rule can simply be read from statutes or precedents. Instead, it is necessary to search statutes and cases for rules, compare rules to facts, revisit statutes and cases in light of the facts found, and examine the facts again, in light of the rules. This process of going back and forth was identified in the first part of the 20th century, but, to this day, it is only occasionally noted.[11]

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[9] H.L.A. Hart, *The Concept of Law*, 2d ed. (New York: Oxford University Press, 1994), at 130.

[10] Arthur Kaufmann, *Das Verfahren der Rechtsgewinnung. Eine rationale Analyse*: *Deduktion, Induktion, Abduktion, Analogie, Erkenntnis, Dezision, Macht* (Munich: Beck, 1999), at 2-6, 29-30, 54-62 (reviewing criticisms and discussing alternatives to deduction); Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (New York: Oxford University Press, 2005), at 32-33, 43-47 (the legal syllogism is "central to legal reasoning"). For a discussion with further citations, see Maxeiner, *supra*, note 8.

[11] See Jesse Franklin Brumbaugh, *Legal Reasoning and Briefing: Logic Applied to the Preparation, Trial and Appeal of Cases, with Illustrative Briefs and Forms* (Indianapolis: The Bobbs-Merrill Company, 1917), at 364-67; Thomas A. Mauet, *Pretrial*, 7th ed. (New York: Aspen Publishers, 2008), at 21 ("This process, going back and forth between investigating the facts and researching the law, is ongoing and is how you will develop your 'theory of the case'"); Oskar Hartwieg & H.A. Hesse, *Die Entscheidung im Zivilprozeß: Ein Studienbuch über Methode, Rechtsgefühl und Routine in Gutachten und Urteil* (Königstein/Ts.: Athenäum, 1981), at 78-79 (*Die Lehre vom Pendelblick*); Dieter Stauder & David Llewellyn, "Oskar Hartwieg's Thoughts on the English Legal System" in D. Vaver & L. Bently, eds., *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (New York: Cambridge University Press, 2004) 47, at 51; Herbert Schöpf, *Die Wechselbeziehung zwischen Sachverhalt und Normenordnung bei der Rechtsanwendung* (Diss. Erlangen under Reinhold Zippelius, 1971), Friedrich-Alexander Universität, Erlangen-Nürnberg.

Determining the applicable rules and finding the material facts are therefore *interdependent* inquiries: until one knows which rules are applicable, one cannot know which facts are material. But until one knows the facts, one cannot know which rules are applicable. Settle the applicable rules too soon, and facts may be overlooked which would change the results if other rules were thus applied. Fail to settle the applicable rules soon enough, and the process may detour to find facts that are not material under the rules that are actually applied.[12]

The complexity of the task is exacerbated by the nature of the rules applied. Rarely does the determinative rule consist of just one syllogism. Usually, it consists of many syllogisms working together. Thus, going back and forth requires one to hold subsidiary rules in the ready, in case facts are found that call for their invocation.

III. THE GERMAN RELATIONSHIP TECHNIQUE OF APPLYING LAW TO FACTS

The German Federal Minister of Justice boldly asserts that "'Made in Germany' is not just a quality seal reserved for German cars or machinery, it's equally applicable to German law."[13] And what is it a quality seal for? She says that it guarantees "fair laws and an efficient judiciary", "just solutions", that "[e]veryone has access to law and justice, independent of their financial means", and courts that "decide without delay".[14] Even discounting for the tendency of lawyers to promote their own systems and solutions, this is a remarkable claim of success. She is not alone in her praise for the German system of civil procedure. It has won praise from international groups and it serves, not infrequently, as a model for other systems.[15]

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[12] Arthur T. von Mehren conceived of this problem in terms of concentration and surprise at trial. See Arthur T. von Mehren, "The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks", in Norbert Horn, ed. *Europäisches Rechtsdenkens in Geschichte und Gegenwart*: *Festschrift für Helmut Coing zum 70. Geburtstag*, vol. 2 (Munich: Beck, 1982), at 361 *et seq*. [hereinafter "von Mehren"], relevant parts substantially reproduced in Arthur T. von Mehren & Peter L. Murray, *Law in the United States*, 2d ed. (Cambridge: Cambridge University Press, 2007) [hereinafter "von Mehren & Murray"].

[13] Brigitte Zypries, "Law – Made in Germany: global effektiv kostengünstig", online: <www.lawmadeingermany.de>, at 3 [hereinafter "Zypries"].

[14] *Id.*

[15] The Global Competitiveness Report 2008-2009 of the World Economic Forum ranks the German legal system among the top five systems in the category of "Efficiency of Legal Framework". It ranks the U.S. system 28th. *Id.*, at 5. See generally Walther J. Habscheid, ed., *Das deutsche*

What are the quality controls of German justice? One is its method of applying law to facts, the *Relationstechnik*, or "relationship technique". That technique is, in substance, what it was when it was first adopted as the approach to be used throughout the newly united Germany in the *Code of Civil Procedure* of 1877.[16] A professional judiciary applies professionally drafted rules to facts using the "relationship technique" in order to produce professionally justified judgments. Thus, German procedure brings law and facts together through the "relationship technique".

The foregoing syllogism is the basis of the "relationship technique": the legal rule is the major premise, the facts are the minor premise and the judicial decision is the logical conclusion. The "relationship technique" is taught by the courts to all German jurists, whether they become judges or lawyers.[17] It has been proven through more than a century of judicial practice.

1. The Major Premise: The Statute as Norm

The statute is *the* fundamental concept of all German law. German statutes take the form of syllogistic norms. The major premise is that a legal consequence prescribed by statute applies when a generally described state of facts is present. The minor premise is that a particular state of facts fulfils the statutorily prescribed state of facts.

Moreover, while it is the plaintiff's responsibility to plead the facts, it is up to the judge to know the law and to identify the applicable legal rule. In Germany, as in other civil law countries, the maxims *jura novit curia* (the court knows the law) and *da mihi factum, dabo tibi ius* (give me the facts, I will give you the law) apply. So long as there is any legal rule that would support relief on the facts alleged, the judge is to direct the service of the complaint. The plaintiff's incorrect choice of rule is of no moment.

The individual elements that are required by statute in order to establish a claim are the "spectacles" through which the judge views

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Zivilprozeßrecht und seine Ausstrahlung auf andere Rechtsordnungen (Bielefeld: Gieseking-Verlag, 1991).

[16] Compare Hermann Daubenspeck, *Referat, Votum und Urtheil*, 1st ed. (Berlin: F. Vahlen, 1884), with its current version, Winfried Schuschke, Sattelmacher/Sirp, *Bericht, Gutachten und Urteil*, 34th ed. (Munich: Valhlen, 2008).

[17] In an idealized form, students learn it early, in law school, as part of legal methods. A basic text on German legal methods has recently been translated into English. See Reinhold Zippelius, *Introduction to German Legal Methods*, 10th ed., trans. by K.W. Junker & P.M. Roy (Durham: Carolina Academic Press, 2008).

the case. What the judge can see through the spectacles matters; everything else is immaterial.[18]

Well-drafted statutes coordinate with each other well. Well-drafted statutes are clear about who may invoke them and what the consequences of their invocation are. Well-drafted statutes, to the extent possible, require that judges find objective facts rather than make subjective valuations. Well-drafted statutes do not expect judges to make political or other social policy decisions. While well-drafted statutes often require judges to evaluate individual equities and to find subjective facts (such as a party's state of mind), they minimize, to what extent they can, the use of such determinations. When they cannot avoid such determinations, they guide the judge's deliberations by setting boundaries and by giving examples.

A well-drafted statute is no accident. Most modern legal systems have a central office that is responsible for the technical quality of statutes. In Germany, preparation and perpetuation of good legislation is *the* raison d'être of the Federal Ministry of Justice. The Ministry engages some of the best-qualified jurists of the land in that work: former appellate judges.

2. The Minor Premise: Facts and the Process to Find Facts

The relationship technique guides legal process without straitjacketing it. The relationship technique avoids two extremes of civil procedure: a single-issue focus and a lack of focus altogether. It narrows the issues without cutting off the right to be heard. The "golden rule" of German civil justice is that there are no surprise decisions.[19] Here, we discuss four of the ways in which the relationship technique guides process: (1) pleading; (2) deferred decision-making; (3) case-structuring; and (4) focused evidence-taking.

(a) Pleading

The plaintiff begins a lawsuit by filing a complaint with the court. Before the court serves the complaint on the defendant, it assigns the

[18] Joachim Hruschka, *Die Konstitution des Rechtsfalles: Studien zum Verhältnis von Tatsachenfeststellung und Rechtsanwendung* (Berlin: Duncker & Humblot, 1965), at 22-24.

[19] Helmut Rüßmann, "Grundregeln der Relationstechnik", online: <http://ruessmann.jura.uni-sb.de/zpo2004/Vorlesung/relationstechnik.htm>.

case to a judge. This judge then makes a preliminary review of the complaint for procedural prerequisites and other patent deficiencies. Already, even at this stage, the relationship technique anticipates the judgment that is to come. The plaintiff must plead a case that has a plausible chance of success. While the plaintiff need not plead the legal basis on which the complaint rests, the plaintiff must plead facts upon which relief could be granted. Moreover, the plaintiff must plead the proof that the plaintiff intends to rely upon in order to prove the factual assertions (*i.e.*, the plaintiff must "substantiate" the factual allegations of the complaint). A properly substantiated complaint includes all of the material documents in the plaintiff's possession, designates all of the material documents in the possession of other parties, and identifies the testimony on which the plaintiff plans to rely. It should state the facts so exactly that, based on the information provided, the court could potentially determine that the claimed legal relief should be granted.

If the judge should have concerns about whether or not the procedural prerequisites have been met, or whether or not the complainant has sufficiently substantiated the factual allegations, then he or she is to direct the plaintiff to clarify the point before dismissing the case.[20]

Once the judge directs service and the defendant is served, the defendant is required to answer the complaint. The defendant's answer is subject to requirements similar to those that govern the complaint: its content must be true, complete, specific and substantiated.

(b) Deferred Decision-making

The German system masters the interdependency problem through the relationship technique. The relationship technique makes determinations of applicable rules and findings of material facts concurrently, rather than consecutively. It finds facts "just in time"; it limits consideration of facts to the material facts in the dispute. It routinely and efficiently applies law to facts in formal judgments.

German judges defer the final decisions of individual aspects of cases until they are prepared to decide the case as a whole. German judges decide no issues before their time.[21] The critical moment in a

[20] See Michael Bohlander, "The German Advantage Revisited: An Inside View of German Civil Procedure in the Nineties" (1998) 13 Tul. Eur. & Civ. L.F. 25, at 33; Murray & Stürner, *supra*, note 5, at 210.

[21] Paul Masson, advertising slogan: "Paul Masson [or "We"] will sell no wine before its time."

German lawsuit is the last oral hearing when the court conclusively and finally applies the law to the facts that it has found. German parties do not have to commit, irrevocably early in the lawsuit, to a single legal claim or group of claims.

While judges are authorized to reject evidence for being offered too late — and often do precisely that — their enthusiasm for such measures, which can serve to expedite the process, is tempered by their ever-present duty of elucidation under section 139 of the *Code of Civil Procedure*. This provision assures the right of parties to be heard, which is guaranteed by article 103 of the *German Constitution*. Section 139 is a far-reaching prescription, requiring judges to thoroughly discuss all aspects of a case with the parties involved. It rules out the possibility of one party surprising the other with an unexpected witness, fact or claim (a tactic known, colloquially, as "trial by ambush" in American law). Further, section 139(2) requires that the judge call to a party's attention — and then give that party an opportunity to comment on — any non-trivial issue that the party has apparently overlooked or considered insignificant, or any point of fact or law upon which the judge's understanding and the party's understanding differ.

(c) Case-Structuring

Coincident with the preliminary review, the judge determines how the case is to proceed further — that is, whether the case will use additional written proceedings or a so-called early first hearing. The judge's choice is purely pragmatic: the judge selects the method that he or she believes is the one that is likely to be more efficient, *i.e.*, which method is more likely to simplify and hasten the framing of the material and dispute issues. A party dissatisfied with this choice may request that the judge use the other method, in which case the party should state why the other method would be more efficient. The judges with whom I have spoken have told me that most judges prefer early oral hearings in contested cases.

Prior to the first hearing or the exchange of further written pleadings (whichever the case may be), the judge is required to prepare for the future proceedings. These preparations may include: (1) directing the parties to supplement their pleadings; (2) directing government authorities to provide information and documents; (3) ordering the personal appearance of the parties; (4) summoning witnesses named by a party to

the hearing; and (5) ordering the production of documents or other materials, and making premises and other items available for observation. Sometimes, these preparations make it possible to resolve the entire case at the first hearing.

At this stage, the judge structures the lawsuit without making any final decisions on the case. The judge works with the parties to identify those issues that are both material to the plaintiff's claims and in dispute. Such early structuring of the case, through issue framing, plays an important role in keeping German civil justice proceedings within bounds. It identifies the legal rules that are under consideration for application, the elements of those rules, and the evidence that will be necessary in order to establish the elements of the rules. For each party, the judge points out any weaknesses in the party's claim and then inquires how the party plans to revise it.

Structuring the case and framing its issues serves not only to guide the judge in subsequent considerations, but also helps the parties to reach a settlement more expeditiously and reasonably. The parties can see which rules will determine the decision and which facts are needed. Some judges have informed me that they consider this structuring stage of the process to be one of their most important judicial duties.

To an American accustomed to formal exchanges between the judge and counsel, the early first hearing to clarify issues is remarkable. By American standards, these hearings are interactive, cooperative and informal.[22] They resemble American pre-trial conferences more than American trials. They differ from American pre-trial conferences, however, in several important ways. What is most remarkable from an American perspective is the roles of the parties. Typically, the judge summons the parties themselves to the early first hearing and speaks directly with them.

This kind of hearing is neither an American-style discovery nor an American-style trial.[23] Its focus is on identifying the material issues of fact that are actually in dispute between the parties; it is not about uncovering unknown facts or proving known ones, and it is not concerned with

[22] Murray and Stürner describe these hearings at length. See Murray & Stürner, *supra*, note 5, at 256-59.

[23] See, *e.g.*, Thomas D. Rowe, Jr., "American Law Institute Study on Paths to a 'Better Way': Litigation, Alternatives, and Accommodation: Background Paper" (1989) 1989:4 Duke L.J. 824, at 854, n. 109 (incorrectly characterizing the hearing).

the possible presentation of a narration later.[24] The judge probes the potential claims and the facts that are needed to support them. In essence, the judge turns to the party and the party's attorney, and asks: "now, on this issue, are you seriously going to dispute the fact?"

What prevents the party or the party's attorney from responding with: "so let the other side prove it"? Section 138 of the German *Code of Civil Procedure* imposes a duty of cooperation on the parties with respect to clarifying the issues in the case. Section 138(1) requires the parties to completely and truthfully give their declarations concerning factual circumstances; section 138(2) requires that they state their positions with respect to the facts asserted by the opponent. These discussions are *not* evidentiary. They do *not* constitute taking the testimonies of the parties. They amount to a clarification of the factual assertions of the parties that are necessary for the eventual application of the law to the facts. Section 138(3) provides that an asserted fact will be treated as admitted if the other party is silent and fails to contest it. Section 138(4) provides that only in limited circumstances will a declaration of a lack of knowledge serve to put a matter into dispute. Moreover, section 138(2) is interpreted to require that a mere denial of a fact is not sufficient to put that fact into dispute. In most cases, a party must explicitly contest the fact that has been asserted. If the contended fact is known or could be known to the contending party, then that party must substantiate its contrary contention with the facts that are known to it. If one party, in the course of the hearing or the pleadings, admits to a fact that has been asserted by the other party, then there is no need to prove that fact. In relatively short order, the judge can inform the parties of the applicable legal rules and then obtain their agreement on which matters of fact are material to those rules and are in dispute.

(d) Focused Evidence-taking

Thanks to case-structuring, many cases conclude without the oral testimony of witnesses ever being necessary. Where witness testimony is taken, framing the issues helps to focus and expedite the testimony.

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[24] *Cf.* Frederick D. Wells, "A Justice Factory" in *Justice Through Simplified Legal Procedure* (1917) 73 Annals Am. Acad. Pol. & Soc. Sci. 196, at 202:

> The court could practically say: "Now on this issue are you seriously going to dispute the fact? As a reasonable man, are you denying it?" If he answers "Perhaps it is so, but, let the other side prove it," it ought to be possible for the court to throw his technical objections out of the window.

When it comes to taking the testimony of witnesses, German civil justice is just-in-time justice. The judge takes evidence only at the request of a party and only after the judge so orders.[25] The judge is to order the taking of evidence only when it is necessary to convince him or her of either the truth or the untruth of a particular fact that is disputed by the parties and that is material to the decision of the case. Thus, the judge should not take evidence to prove undisputed facts, facts generally known to the judge, facts presumed by statute to be true until the contrary is proven, favourable facts established by the other party's submissions, disputed material facts that have been established by undisputed facts, disputed facts for which the judge is already convinced of the truth without needing to take evidence and facts that are not necessary for the judgment (*e.g.*, when two alternatives for granting relief are allowed and one is already acknowledged).

The judge's control over the taking of evidence does not, however, prevent the parties from insisting on the taking of evidence that they believe is relevant to deciding material issues in the dispute. German judges have told me that a sure way to bring about a reversal on the appeal of a lower court judgment is through a judge's rejection of an application to take evidence without strong justification. Such a refusal violates the judge's section 139 duty of elucidation.

3. The Logical Conclusion and Its Validation: The Judgment

While statutes guide the application of law, judgments validate the correct application thereof. They allow for the kind of "output" control that was discussed earlier at the conference. Judgments have four parts: (1) a caption that identifies the parties and the lawsuit ("*Rubrum*"); (2) a statement of the decision and of the relief ordered ("*Tenor*"); (3) a *Tatbestand*;[26] and (4) the grounds for the decision ("*Entscheidungsgründe*"),

[25] John Langbein has written eloquently of this German advantage in civil procedure. See John Langbein, "The German Advantage in Civil Procedure" (1985) 52 U. Chicago L. Rev. 824. His main theme is that "by assigning judges rather than lawyers to investigate the facts, the Germans avoid the most troublesome aspects of our practice" (at 824). His article led to a flurry of discussion that has continued over the course of 20 years. A recent review can be found in Bradley Bryan, "Justice and Advantage in Civil Procedure: Langbein's Conception of Comparative Law and Procedural Justice in Question" (2004) 11 Tulsa J. Comp. & Int'l L. 521, at 523.

[26] *Tatbestand* is a legal term that has no single English translation. Depending on the context in which it appears, a different English translation is appropriate. In this essay, *Tatbestand* refers to a specific part of a German judgment that is so designated. There is no formal counterpart to the *Tatbestand* in an American judgment. To avoid inducing a false understanding, it is left here in the

hereafter referred to as the "justification". All four parts are subject to strict rules concerning style. The first two parts need no explanation; the last two do.

The *Tatbestand* is a short statement that summarizes the parties' legal claims and respective assertions of fact. It is *not* a finding of facts and, thus, it is not an analogue to the findings of fact in an American bench decision. The *Tatbestand* should include: the subject matter of the lawsuit; a sketch of the facts, but only in as much detail as is necessary to clearly establish the subject of the lawsuit; the evidence that has been offered by the parties; the applications of the parties; the relevant history of the lawsuit; and specific references to the file. It should *not* include: facts that are not necessary to the decision of the case; party statements that have been made previously in the proceedings, but are no longer relevant; the legal arguments of the parties; statements of the law; or normative evaluations of the facts.

The justification applies the law to the facts. It determines the facts of the *Tatbestand* and subsumes them under the abstract elements of the applicable rules. The process of applying the law to the facts is not a mechanical act of mindless processing, but a mindful act of creative evaluation.

The justification follows a format that, in clarity and brevity, facilitates understanding. It begins by stating the result of the lawsuit and by identifying the determinative legal rule. It confirms or denies that the plaintiff's claim is permissible under procedural law and well founded in substantive law. For example, a typical justification might begin: "the plaintiff's action is, in all respects, permissible and well founded. Pursuant to § 488, Paragraph 1, Sentence 2 of the Civil Code, the plaintiff has a right arising from the loan agreement of December 12, 2007 to repayment of the loan of 75,000."

The justification then systematically addresses the applicable rule, its elements, and, if the judgment denies the plaintiff's claims, all of the rules that might support any of the claims. For each element of the rule, as far as it is necessary to do so, the justification clarifies the legal definition of the element as it relates to the particular case. Here, the justification may interpret the applicable statute, but only to the extent that it is directly relevant to a determination of whether the facts in the

original German. Readers should note that this meaning is different from the *Tatbestand* of German criminal law, which might be translated as "elements of the offence".

present case fulfil the elements of the statutory norm. Abstract discussions of law have no place.

The justification then tells the factual story of the case. It focuses on only those facts that are material to deciding the case. Immaterial facts have no place in the justification, except where they are necessary in order to understand the court's decision. The justification starts from the undisputed facts. Where facts are disputed, the justification evaluates the evidence that leads the court to decide as it does. The justification does not discuss the burden of proof, other than with respect to the material facts that are in dispute.

Once the justification has clarified the material and disputed facts, it subsumes those facts under the identified and clarified rule.

The judgment certifies that the procedure has fulfilled constitutional guarantees, which include the guarantees that every exercise of state power has been justified by and grounded in statute, and that the parties have each been heard and have received equal treatment under the law. The judgment is an act of an impartial and impersonal public authority that furnishes the official and objective interpretation and application of the law.[27] It helps parties to understand why the court decided as it did. Ideally, it convinces the losing parties that the outcome is legally correct; at a minimum, it demonstrates that the process was rational.

IV. CONCLUSION: COMMON LAW PROBLEMS AND CONVERGENCE

If "'Made in Germany' is a seal of quality for German cars and German law",[28] "made in America" might be a quality seal for American car companies and American civil procedure. American civil procedure works about as well as American car companies: sometimes it produces good results, but the overall venture needs help.

In March 2009, a committee of the American College of Trial Lawyers, a professional association of self-proclaimed elite trial lawyers, reported that the American civil justice system is "in serious need of repair".[29] The objective of "the just, speedy, and inexpensive determination

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[27] See Reinhard Zimmermann, "Characteristic Aspects of German Legal Culture" in Mathias Reimann & Joachim Zekoll, eds., *Introduction to German Law* 1, 2nd ed. (The Hague: Kluwer Law International, 2005), at 26-27.

[28] Zypries, *supra*, note 13, at 3.

[29] American College of Trial Lawyers, *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* (Denver: Institute for the Advancement of the American Legal

of every action and proceeding … is … not being met".[30] American procedure takes too long, costs too much, discourages too many meritorious lawsuits, and encourages too many frivolous ones.[31]

The cause of the problem, according to the elite trial lawyers, is that lawsuits do not routinely reach "early identification of the contested issues to be litigated".[32] Lack of issue identification leads to a "lack of focus" in subsequent proceedings and to "nightmares" for the parties.[33]

The solution to the problem, according to the elite trial lawyers, is that "[j]udges should have a more active role at the beginning of the case in … the direction and timing of the case all the way to trial."[34] The system of notice pleading should be replaced by fact-based pleadings that would "define the issues of fact and law to be adjudicated".[35]

In other words, America's elite trial lawyers recommend abandoning the "notice pleading" that was adopted in the *Federal Rules of Civil Procedure* of 1938. Evidently, they would replace it with something along the lines of the fact pleading that notice pleading had replaced. A recent decision of the United States Supreme Court, *Bell Atlantic Corp. v. Twombly*,[36] seems to go in a similar direction.

1. Common Law Problems in American Civil Procedure

American systems of civil procedure aspire to facilitate application of the law. Their implementation of syllogistic application of legal norms, however, has been beset with persistent and recurrent problems. No satisfactory solution has been reached. Although alternatives to syllogistic application of legal norms have been tried, they have not found general acceptance.

System, University of Denver, 2009 [March 11, 2009; revised March 20, 2009]), online: <http://www.du.edu/legalinstitute/pubs/ACTL-IAALS%20Final%20Report%20Revised%204-15-09.pdf>, at 2.

30 *Id.*, at 3.

31 *Id.*, at 2:

> Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*, at 5.

36 550 U.S. 544 (2007) [hereinafter "*Twombly*"].

American difficulties in implementing syllogistic law application are attributable, in part, to failures to overcome the problem posed by the interdependent relationship between the tasks of determining the applicable law and finding the relevant facts. As we have seen, German civil procedure addresses this problem by deferring the final choice of the law — and its application — until the very end of the process of finding the facts. This works because the process of finding the facts is directed by judges. In the United States, problems peculiar to common law methods (and, in particular, the historic form of the common law trial and the unsystematic nature of common law rules) create impediments to such an approach that are not present in Germany.

The historic common law trial was a concentrated presentation by the parties to the court, rather than episodic conferrals of the parties with the court. Preparation for an efficient trial required prior identification of the issues to be tried. It was a two-step process. First, the parties ascertained the subject that must be decided upon; then, and only then, did parties present their cases to the court, in one continuous presentation that was without substantial interruption. The less clearly the issues for trial were identified beforehand, the more demanding, difficult and even dangerous (in the sense of risking the case) the preparation for trial would become. The parties had to prepare, not for the trial of one issue, but for the trial of all conceivable issues.[37]

The court of the historic common law trial consisted of two decision-makers: the judge and the jury. Each of these decision-makers had a separate responsibility. In order to permit the proper exercise of those responsibilities, the historic trial was thought to require a strict separation of the decision-makers' respective roles.[38] The classic division of the received English model applied in America: judges determined issues of law, while juries found questions of fact.[39]

This classic formulation — where judges determine the law, and juries find the facts — has, however, left unanswered the question of which decision-maker is to apply the rules that have been determined to the

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[37] On the nature of the common law trial as a concentrated proceeding, see von Mehren, *supra*, note 12.

[38] The possibility that those responsibilities might be exercised jointly, rather than severally — along the lines of the mixed benches of professional judges and lay assessors common in civil law systems — has received almost no serious consideration in the United States.

[39] Sir Edward Coke, *The First Part of the Institutes of the Laws of England; or, a Commentary Upon Littleton* [lib 2, cap 12 § 234 at 155(b)], Charles Butler, ed., 13th ed. (London: Printed for J. & W.T. Clarke, 1823).

facts that have been found.[40] Historically, that question has been answered variously, with considerable consequences for the application of law. The problem has proved intractable.

The historic common law trial found substantive law in the forms of action. These rigid forms addressed only a few specific fact situations, the origins of which lay, even for the 19th century, in the distant past. The forms of action were not modern legal norms, and they had not been written to abstractly cover classes of cases that might not all be specifically described. These rigid forms were not created as a system, but as individual, particular solutions. As a consequence, the forms of action were not as a body seamless, but full of gaps. To fill in these gaps, common law courts resorted to legal fictions and tortured analogies. To provide justice where gaps remained, the chancellor created jurisdiction in equity. From this unsystematic lot of forms, however, parties — not judges — had to choose the law that would govern their cases. An incorrect choice meant dismissal; little in the system helped to guide the choice.

American systems of civil procedure have taken common law problems as given, and have been structured accordingly. Whether they are based on common law pleading, fact pleading, or notice pleading, certain structural components of American systems of civil procedure all share the same approaches:

(1) They provide for the application of law as a two-stage process. In the first stage, the subject of the decision is ascertained. In the second stage, the matter is decided.

(2) They provide for decisions on the issues that have been presented by parties, rather than for the application of norms. Parties have principal responsibility for the selection of the law and the identification of the disputed issues of law or fact. Together, the parties frame the issues to present to the court for its part: the decision-making. Courts only decide on the issues that the parties present. As a consequence,

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[40] Charles Frederic Chamberlayne, *A Treatise on the Modern Law of Evidence* (Albany, NY: Matthew Bender & Co., 1911), §§ 68, 116, 119-120:

> Who should apply rule of law? … [Determination of right or liability requires that] (1) a rule of law must be formulated and announced; (2) the ultimate facts must be ascertained; (3) the rule of law must be applied to these ultimate constituent facts. … Only as to who is entitled to take the third step — that of applying the rule of law to the constituent facts — is there confusion among the authorities and lack of symmetrical and scientific development in the law of evidence.

it is the parties more than the courts that are responsible for syllogistic application of norms to cases.[41]

(3) They are concerned with separating issues of law from questions of fact in order to permit judges to determine the former and juries to find the latter.

(4) They apply unsystematic and uncertain law, which they allow lawyers to expand. Lawyers educate courts in applicable law. They are licensed to argue for "extending, modifying, or reversing existing law or for establishing new law".[42] The civil law maxim *jura novit curia* (the court knows the law) does not apply.

(5) As consequence of the foregoing, American systems, compared to the German system, place less importance on the results of applying the law to the facts, and more importance on the choice of the law applied, the allocation of decision-making and the presentation of the facts.

2. Can Common Law Problems Be Overcome? Can There Be Convergence with Civil Law?

We are unlikely to see convergence in the application of the law between German and American systems of civil procedure any time soon, unless substantial changes are made in *American* procedures. It is unlikely that the German system — which has proven successful — will change any time soon. It is more likely that the American system — which has undergone many unsuccessful reforms — might make yet further reforms. Americans have put up with three generations of failure of notice pleading and discovery; there are signs that they might not tolerate another.[43]

A restoration of fact pleading, such as that proposed by the American College of Trial Lawyers and hinted at by the United States Supreme

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[41] This division of responsibility seems inconsistent with Principle 22 of the *ALI/UNIDROIT Principles of Transnational Civil Procedure* [As Adopted and Promulgated by the American Law Institute at Washington, D.C., U.S.A., May 2004, and by UNIDROIT at Rome, Italy, April 2004] (Cambridge, Mass.: Cambridge University Press, 2006), at 42. The comment to that principle states, at 43, that "[i]t is universally recognized that the court has responsibility for determination of issues of law and of fact necessary for the judgment."

[42] U.S. *Federal Rules of Civil Procedure*, Rule. 11(b)(2).

[43] *Cf. Buck v. Bell*, 274 U.S. 200 (1927), at 208 (*Per* Holmes J.: "Three generations of imbeciles are enough").

Court in the *Twombly* case,[44] would not fix what ails the American system. It would reprise two centuries of failure to solve the problem of the interdependency between the determination of applicable law and the finding of relevant facts.[45] Learning from foreign experiences is, for the American legal system, no longer merely desirable — it is imperative.

Two measures that could help to fix the American system and move it in the direction of convergence with German civil justice are:

(1) concurrent, instead of sequential, determinations of the rules, the findings of fact, and the application of the rules to the facts;

(2) judicial application of norms that have been selected by the judge, rather than determinations by the court of the issues that have been presented by the parties.

An objection that may be raised is that both of these measures are impossible. The jury trial and, above all, the concentration of proceedings that the jury trial seems to demand, preclude them.

Such an objection denies the imaginative forces behind American civil justice and the capability of American systems to try new approaches. American proceedings today are very different from what they were in 1937, the year before the *Federal Rules of Civil Procedure* came into force, or in 1847, the year before the *Field Code of Civil Procedure* took effect.

There are possibilities that place judges in charge of applying the law to specific facts that they have relied upon the juries to find (*e.g.*, special verdicts and jury interrogatories). For the immediate future, we can see possibilities for summoning a jury together, remotely and intermittently, using the Internet.

Americans would do well to conceptualize civil procedure inclusively — that is, as a whole — including the pre-trial and trial stages. German procedure has no trial; it has proceedings that, from the first, are oriented toward an application of the law to the facts. German procedure is concerned with determining legal rights and deciding disputes.

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[44] *Supra*, note 36.

[45] See von Mehren & Murray, *supra*, note 12, at 171:

> [A]ll pleading approaches to the problem of surprise have certain serious disadvantages. … An approach to issue-framing and notice-giving that depends essentially on the pleading process is inherently both complex and rigid. … [T]he pleading approach to the surprise problem seems too technical and arbitrary to be acceptable except on a *faute-de-mieux* basis.

It is what American procedure should be, in Clark's words: the "handmaid of justice".[46]

[46] Charles Edward Clark, *Procedure — The Handmaid of Justice: Essays of Charles E. Clark*, C.A. Wright & H.M. Reasoner, eds. (St. Paul: West Pub. Co., 1965).

Evidentiary Provisions of the People's Courts and Transition of the Judges' Role

Baosheng Zhang* **and Hua Shang****

I. INTRODUCTION

Since 2001, evidence law has become an increasingly important topic in China. It has arisen from the rapid development of the rule of law and from policies that promote fairness during trials. "In one sense, the law of evidence is the most important and most fundamental aspect of any system of litigation; indeed, it is the bedrock of the rule of law."[1] Evidence law and procedure "is the core of the judicature".[2] This paper explains how elements of evidentiary rules and procedures from both civil law and common law traditions are being integrated into Chinese judicial practice. Part II provides an overview of the evidentiary provisions of the Supreme People's Court ("SPC"). Part III explores the dynamic role that judges now play — a role that is the result of reforms in evidentiary rules and procedures.

II. EVIDENTIARY PROVISIONS OF THE SUPREME PEOPLE'S COURT

Evidentiary provisions include, primarily, rules that are promulgated by the Supreme People's Court, and, secondarily, rules that are implemented by local people's courts. These provisions are driven by three forces: (1) legislation that arises from new developments in Chinese laws; (2) considerations for increased fairness in trial procedures, which

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1 Ronald J. Allen, "The Jurisprudential and Political Foundation of Criminal Procedure" (2007) 15 Evidence Science 162.

2 See Jiang Wei, "The Jurisprudential Analyses of Certain Basic Matters Concerning Evidence Law" (2002) 1 China Legal Science 24.

is a consequence of China's progress in democracy and human rights; and (3) an increased commitment to academic research.

1. Legislation

From the legislative perspective, the enactments of various evidentiary provisions by people's courts originated in amendments that were made to the Chinese Criminal Procedure Law of 1979.[3] In March 1996, the Chinese National People's Congress made important modifications to the 1979 CPL, including a reformation of criminal trial procedures of the first instance. This enhanced the legitimacy and the legality of the evidence-collection process, clarified the burden of proof for prosecutors and removed from the judge's role exclusive responsibility for the collection of evidence. Further, the modified law provided rules for cross-examination, established the verdict form of "acquittal of suspicious crime"[4] and outlined lawyers' rights to collect evidence and examine case files.[5] These reformations provided greater balance between defence lawyers and prosecutors, and this indicated a trend away from the previous, mostly inquisitional system, toward a new, more adversarial system.

In two respects, this reform reflects a compromise between two legal traditions. First, litigants play increased roles in discovery and in the collection of evidence, which are characteristics of the common law legal system. The trial investigation is mainly conducted by defence lawyers and prosecutors, and this diminishes the judge's role in gathering evidence. Second, the reform effort maintains some characteristics of the civil law system; for example, trial judges retain their authority to collect, inspect and evaluate the evidence. During trial, judges can question the defendant, as well as both lay and expert witnesses.

In order to advance the reform of criminal procedural law, the Supreme People's Court commenced trial reform efforts in July 1996. The evidence and discovery rights of lawyers are provided in *The SPC Judicial Interpretation for the Execution of Criminal Procedural Law*[6] of 1998. Under *The SPC Specific Provisions on the Reforms of Civil and*

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[3] "The Chinese Criminal Procedure Law" (1979) 8 People's Judicature 1 [hereinafter "1979 CPL"].

[4] "The Chinese Criminal Procedure Law" (1996) 2 Gazette of the Supreme People's Court of the People's Republic of China 39.

[5] Fan Chongyi & Luo Guoliang, "After the Modification of the Criminal Procedural Law: The Changes and Development of Evidential System" (1999) 4 China Criminal Science 51.

[6] "The SPC Judicial Interpretation for the Execution of Criminal Procedural Law" (1998) 3 Gazette of the Supreme People's Court of the People's Republic of China 101.

Commercial Trial Process[7] of 1998, the improvement and perfection of evidence rules and procedures is deemed to be the focus of the civil trial process reform. Under this interpretation, "80% of [the] contents are matters concerning reformation of evidence system",[8] and the burden of proof that is sustained by the litigants is given special prominence. Additionally, the reforms have improved the abilities of the court to investigate and to collect evidence, as well as to establish time limitations for the production of evidence.[9] As a result, the dominant roles of both the litigants and the trial judge have begun to merge.[10]

At the level of the people's court, legislative enactments have improved evidence procedures further. *Specific Provisions on Evidence in Civil Actions of the SPC*[11] came into force on April 1, 2002. The PECA consists of six sections and 83 articles. The *Specific Provisions on Evidence in Administrative Actions of SPC*[12] became law on October 1, 2002. The PEAA provides: specific burden of proof requirements; time limitations for the production of evidence; the scope of the court's power to investigate — and collect — evidence, including witness testimony, and to exclude illegal evidence. It also clarifies the standard of proof for civil actions and clarifies the judge's role with respect to his or her independent evaluation of the evidence. The PEAA has six sections and 80 articles.

2. Fairness

In the absence of final legislative action, some provincial people's high courts (*e.g.*, Shanghai in 1998, Hunan in 2001, Beijing and Hubei in 2005, and Sichuan in 2006[13]) have, since 1998, issued evidentiary rules

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[7] "The SPC Specific Provisions on the Reforms of Civil and Commercial Trial Process" (1998) 3 Gazette of the Supreme People's Court of the People's Republic of China 89.

[8] Zhang Weiping, "The Probing of Trends of the Civil Evidential Reform" (1999) 5 Studies in Law and Business 16.

[9] See Jiang Wei, Shan Guojun & Xu Hui, "The Reviews and Perspectives of the 1997 Annual Civil Procedural Law Researches" (1998) 1 Jurists Review 81.

[10] See Huang Songyou, "The Procedural Model: The Construction of System and Theoretical Bases" (2007) 4 Chinese Journal of Law 3.

[11] "Specific Provisions on Evidence in Civil Actions of the SPC" (2002) 1 Gazette of the Supreme People's Court of the People's Republic of China 22 [hereinafter "PECA"].

[12] "Specific Provisions on Evidence in Administrative Actions of SPC" (2002) 4 Gazette of the Supreme People's Court of the People's Republic of China 132 [hereinafter "PEAA"].

[13] See Baosheng Zhang, *Uniform Provisions of Evidence of the People's Court: Proposal for Judical Interpretations and Drafting Commentary* (Beijing: China University of Political Science and Law Press, 2008), at 421 [hereinafter "Zhang, *Uniform Provisions of Evidence*"].

in response to certain misjudgments. In 2005, the misjudgment of an accused murderer was disclosed.[14] In December 2005, the *Specific Regulations on Criminal Evidence of Hubei* [Province][15] introduced some innovations, such as, among other provisions, "acquittal of suspicious crime",[16] "the presumption of innocence",[17] and "human rights protection".[18]

3. Research

With respect to increased academic research, the study of evidence law has experienced three stages of development. The first was the restarting stage for evidence research, from 1978 to 1985. The second stage, from 1996 to 2000, saw penetration into other fields of study. The third stage commenced in 2001 and has extended to the present day. This latter stage includes topics such as: the presumption of innocence;[19] the prohibition of inquisition by torture;[20] the burden of proof for civil cases;[21] oral testimony of witnesses during trial;[22] discovery;[23] and multidisciplinary evidence research.[24]

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[14] After 11 years, his "previously killed wife" suddenly reappeared. See zhaopei, "10 big words in 2005", online: <http://www.zhaopei.com/en/6765.html>.

[15] <http://www.fl168.com/News/200605/2203.html> [hereinafter "RCE of Hubei"].

[16] *Id.*, art. 9.

[17] *Id.*

[18] *Id.*, art. 4. See Chen Guangzhong & Zhang Xiaoling, "On the Application of Unlawful Evidence Preclusion Rule in China" (2005) 1 Political Science and Law 101.

[19] Ning Hanlin, "Regarding Innocent Presumption" (1982) 4 Chinese Social Science Digest Political 83.

[20] See Xu Dantong, "The Guaranteed Legislations against Inquisitions by Torture" (Treatise presented at the 1999 Annual Conference of the National Procedural Law Society, July 11, 1999, Shanghai).

[21] See Huang Jincai, "The Reconsideration of the Rule of Burden of Proof Distributions" (1997) 11 Law Science [*Fax*ue] 36.

[22] See Long Zongzhi, "The Explanation and Analyses of the Three Peculiar Phenomena of Chinese System of Producing Testimony" (Treatise presented at the 2000 Annual Conference of the National Procedural Law Society, May 11, 1999, Yichang).

[23] Xia Youzhu, "The Disclosure of Evidence and Judicial Practice" (Treatise presented at the 1999 Annual Conference of the National Procedural Law Society, July 11, 1999, Shanghai).

[24] See He Jiahong, "The Perspectives of the Chinese Evidential Studies" *Procuratorial Daily* (September 2, 1999). See also Long Zongzhi, "The Jurisprudence and the Construction of 'A Grand Evidential Studies'" (2006) 5 Chinese Journal of Law 82.

III. TRANSITION OF THE JUDGES' ROLE

How a specific system actually works, of course, depends on the levels of knowledge and experience that are held by the persons who are operating it.[25] Accordingly, China's judges have had to adapt to their new roles during the reform efforts. This section focuses on four aspects of the judicial transition: (1) the "active" neutral role of judges; (2) burden of proof innovations; (3) fact-finding and balancing values; and (4) discretionary decision-making authority.

1. The "Active" Neutral Role of Judges

In the common law system, the litigants play a dominant role in driving the trial process.

> Such trials are typically conducted with a jury, so the judge's role often is to supervise these proceedings rather than actually render a decision on the merits of the case. This function includes such tasks as applying rules of evidence, instructing juries, and maintaining order in the court.[26]

In the inquisitorial system, however, "the adjudicative tribunal often involves itself actively in investigation, and controls the trial process much more than the litigants do".[27] The latter model, therefore, provides an active role for the judge, and this can facilitate enhanced efficiency at trial. The disadvantage is that the judge takes on a greater, if not disproportionate, workload. In recent years, the role of the judge in China has represented a convergence of the judicial roles in the common law and the inquisitorial traditions, respectively.

Formerly, judges in China played a predominant role during trials. Presently, the reform of criminal and civil procedures has given a more active role to the litigants, and this has diminished the judge's predominance. For example, PECA provides that: "Where any party cannot produce evidence or the evidence produced cannot support the facts on which the allegations are based, the party concerned that bears the burden of proof shall undertake unfavorable consequences."[28] PECA also

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[25] Csaba Varga, ed., *Comparative Legal Cultures* (Aldershot: Dartmouth, 1992), at 7.

[26] Reter G. Renstrom, *The American Law Dictionary* (Santa Barbara: ABC-Clio, 1991), at 89.

[27] Ronald J. Allen, Richard B. Kuhns & Eleanor Swift, *Evidence*: *Text, Problems, and Cases* (Austin: Aspen Law & Business, 2002), at 92.

[28] PECA, *supra*, note 11, art. 2.

states that: "The application of the parties concerned and the agents *ad litum* thereof to the people's court for investigating upon and collecting evidence shall be filed at no later than seven days prior to the expiration of the term for producing evidence."[29] Thus, the judge's role in the collection of evidence has been diminished. In the wake of these reforms, the judge is now more of a neutral decision-maker. Stated differently, the judge now takes a more passive role, and makes verdicts according to law.[30]

In the light of this new, more passive role, the evidence provisions of the people's court emphasize new judicial functions. For example, PECA provides that the people's court shall inform the relevant (*i.e.*, concerned) parties of (1) the requirements for the production of evidence; and (2) the corresponding legal consequences, so that these parties may, within a reasonable period of time, produce evidence actively, completely, correctly and honestly.[31] Any party that cannot, due to objective reasons, independently collect evidence may request the people's court to assist in this process. Further, PECA authorizes the court to investigate and collect evidence,[32] and provides that:

> [I]n any of the following circumstances, the parties may plead to the people's court to investigate and collect evidence: 1) the evidence applied for investigation and collection are the archival files kept by relevant organs of the state and must be accessed by the people's court upon authority; 2) the materials that concern state secrets, commercial secrets or personal privacy; 3) Other materials that cannot be collected by the parties concerned or the agents ad litum thereof due to objective reasons.[33]

These provisions point to the dynamic functions of the judge. For example, the judge can guide parties to produce relevant evidence, but this function — so long as there is a reasonable process in place — does not disturb the judge's neutral status.[34]

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[29] PECA, *id.*, art. 19.

[30] For a similar description, see PEAA, *supra*, note 12, art. 4. See also *Gazette of the Supreme People's Court of the People's Republic of China*, no. 4 (2004) [hereinafter "Gazette 2004"].

[31] PECA, *supra*, note 11, art. 3.

[32] *Id.*, art. 2.

[33] *Id.*, art. 17. See Gazette 2004, *supra*, note 30, at 19. For relevant cases, see Yi Chang & Jianhua Wang, eds., "Li Yuanqing v. Li Huaijun: Cause of Maintenance Dispute" in Yi Chang & Jianhua Wang, eds., *The Theoretical Analyses and Precedents of Civil Evidence*, vol. 2 (Beijing: People's Court Press, 2007), at 698 [hereinafter "Chang & Wang, *Theoretical Analyses*"].

[34] For similar provisions, see PEAA, *supra*, note 12, arts. 8, 9, 22, 23.

Similar articles exist in localized provisions that relate to criminal law and procedures. For example, the *RCE of Hubei* [Province], which became law in 2006, authorizes investigatory officials to collect relevant evidence.[35] Meanwhile, article 29 of the same provision authorizes the courts to investigate and probe evidence in the criminal process.[36] If necessary, the people's court can obtain evidence from the procuratorate, the police and the national security office ("NSO"). Should the people's courts discover new evidence, they should deliver the information to the parties in a timely manner. Newfound evidence must be delivered to the trial court, become part of the record, and be made available for cross-examination, to which it is subject.

As I have discussed, above, the role of the Chinese judge is undergoing a subtle change. Judges are gradually becoming "active", albeit neutral, decision-makers. This change allows litigants to become more actively involved in the trial process, and it also allows for fairer trial proceedings.

2. Burden of Proof

In society, one of the key roles of the judge is to resolve disputes.[37] Judges make binding verdicts and judgments, and thereby settle the disputes between litigating parties.

Not only must judges perform this dispute-settling role, but they must also ensure fairness and efficiency throughout the judicial process. This has implications for the distribution of the burden of proof. The *Civil Procedural Law* provides that the party who puts forward a claim is required to produce evidence in support of that claim.[38] This provision establishes the general principle of "whoever made the claim should also produce evidence in support of it". PECA provides further details for the distribution of the burden of proof.[39] These provisions are positive developments that help to ensure the fair resolution of disputes, the protection of the parties' lawful interests and the achievement of social justice.[40]

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[35] RCE of Hubei, *supra*, note 15, art. 10.

[36] *Id.*, art. 29.

[37] Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), at 88 [hereinafter "Damaška"].

[38] "The Chinese Civil Procedural Law" (1991) 2 Gazette of the Supreme People's Court of the People's Republic of China 3.

[39] PECA, *supra*, note 11, arts. 5, 6.

[40] For relevant cases, see "The Probing on the Burden of Proof for Debt Disputes", *The People's Court Daily* (February 23, 2005).

Furthermore, PECA amended the burden of proof distributions for eight tort actions, including, for example, patent infringement actions and medical malpractice claims.[41] These amendments are concerned with the introduction of an inversed burden of proof distribution, which means that, in special types of actions, the burden of proof is shifted to the defendant.[42]

Additionally, PECA provides:

> Where there are no explicit statutory provisions and it is not possible to define who shall be responsible for producing evidence according to the present provision or other judicial interpretations, the people's court may determine the burden of proof according to the principle of fairness and the principle of honesty and credit.[43]

This establishes a basic guiding principle for judges: they are to use their own discretion when determining whether and how to (re-)distribute the burden of proof. When making decisions on such matters, judges should generally consider the parties' respective abilities to produce evidence in conformity with fairness.

Similar provisions exist in the articles of criminal laws in local courts. For example, the *RCE of Hubei* [Province] states that the prosecution must shoulder the burden of proof in criminal cases. The defendant has no obligation to prove his or her innocence. Courts cannot make unfavourable judgments against those suspects or defendants who cannot prove they are not guilty.[44]

3. Fact-finding and Balancing the Values

In the common law system, litigation is considered to be a contest under strict legal rules. As such, it is a mechanism that focuses on process and efficiency.[45] In contrast, the civil law system might sacrifice some efficiency in order to focus on the substantive rules or the outcome. In July 2002, an English judiciary report emphasized that the judicial system "should not become the games of utilizing delays and the obstructing

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41 PECA, *supra*, note 11, art. 4.

42 See Yi Chang & Jianhua Wang, eds., "Wang Rongli v. Qinghe Hospital for the Cause of Medical Malpractice" in Chang & Wang, *Theoretical Analyses*, *supra*, note 33, at 219.

43 PECA, *supra*, note 11, art. 7. See Gazette 2004, *supra*, note 30, at 19.

44 RCE of Hubei, *supra*, note 15, arts. 8, 9.

45 Damaška, *supra*, note 37, at 91.

tactics of criminal convictions".[46] At the same time, civil law countries have demonstrated trends that focus on process and efficiency.

In China, one of the judge's main tasks is to accurately discern the facts. While trying a case, however, the judge must maintain a balance between the values of accuracy, fairness, consistency and efficiency. When these values are in conflict, the judge should weigh them, ascertain their degrees of seriousness and decide accordingly.[47]

Chinese trial judges are now in the process of transitioning to the new tasks that are required of them under the new reforms. For example, PECA provides that the parties to litigation shall submit evidentiary materials to the people's court within the time period that is prescribed for producing evidence; in case any party fails to submit evidence during this time period, that party shall be deemed to have given up the right to produce evidence.[48] Evidentiary materials that are submitted by the parties beyond the time period shall not be cross-examined during the court hearing, unless both parties agree. In short, PECA requires the parties to produce their evidence within the time limitation; otherwise, the evidence will be deemed by the court to be unacceptable.[49]

Although this might improve judicial efficiency, it might, at the same time, exclude the opportunity for a more complete record of evidence for the impending trial. Because of this potential pitfall, PECA has defined a few types of "new evidence" in order to clarify the parties' rights to produce new evidence during the trial.[50] These provisions allow the judge to balance the competing values of efficiency and fairness during the fact-finding process.[51]

PECA provides that, during the trial, when one party acknowledges the other party's admission of facts, then the latter need not produce the evidence[52] (the only exception to this rule arises in a case that involves an identity relationship). This provision potentially reduces expenses and

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[46] The Supreme People's Procuratorate, transl., *Justice for Everybody* (Beijing: China Prosecution Press, 2003), at 18.

[47] See Baosheng Zhang, "The Theoretical Systems and Value Bases of Evidence Rules" (2008) 2 Chinese Journal of Law 122.

[48] PECA, *supra*, note 11, art. 34.

[49] *Id.*, art. 34.

[50] *Id.*, arts. 41, 43, 44. See Gazette 2004, *supra*, note 30, at 19. For a related case, see Yi Chang & Jianhua Wang, eds., "Factory of Plasticized Steel Construction Materials v. The Decoration Materials Corporation Ltd., for the Cause of Purchase Contract Disputes" in Wang & Chang, *Theoretical Analyses*, *supra*, note 33, at 625.

[51] For similar prescriptions, see PEAA, *supra*, note 12, arts. 1, 7, 52. See also Gazette 2004, *supra*, note 30, at 132.

[52] PECA, *supra*, note 11, art. 8.

improves judicial efficiency. Once admission has been made, it will generally bind both the parties and the court. The party that makes the admission cannot withdraw it. It should be noted, however, that the effect of an admission is simply to exempt the opposite party from the burden of proof, and this alone does not abandon the fact-finding objective. If the beneficiary voluntarily relinquishes that interest, then the trial court should respect the will of that party, and allow the opposite party to withdraw the admission.

In addition, if there is enough evidence to prove that the admission was made against the will of the party who (allegedly) made it, and the admission does not actually conform to reality (*e.g.*, the admission has been made under coercion), then a withdrawal of the admission should be allowed. PECA does provide for and describes the process for the withdrawal of an admission. If a party withdraws his or her admission before the end of the trial examination, and obtains the consent of the opposite party to do so, or shows convincing evidence of coercion or a seriously misunderstood admission, the substance of which is demonstrably contrary to reality, then the burden of proof for the opposite party cannot be exempted.[53] This rule of admission also reflects the role of the judge as both a fact-finder and a balancer of competing values.[54]

Additionally, PECA provides: "If the acquisition of the evidence has infringed upon the lawful rights and interests of the other persons or violated any prohibitive provisions of the law, the evidence shall not be admitted."[55] This provision authorizes the judge to exclude illegally obtained evidence. The judge must balance conflicting, competing values as he or she evaluates the extent of the infringement on the interests of the accused (or the affected party) against the substantive value of the evidence in relation to its contribution to a complete factual record. In other words, this provision forces judges to balance the value of the evidence with various competing values.[56]

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[53] *Id.*, art. 8(4).

[54] For a relevant case, see "While Deciding Civil Actions, the Rule of Admission Should Be Accurately Applied", *The People's Court Daily* (June 5, 2002).

[55] PECA, *supra*, note 11, art. 68. See Gazette 2004, *supra*, note 30. See also Yi Chang & Jianhua Wang, eds., "Xie Jiandong v. Ren Summing and Wang Weiyong, for the Cause of Disputes Regarding Ship Partnership Agreements" in Chang & Wang, *Theoretical Analyses*, *supra*, note 33, at 863.

[56] For a relevant case, see "Zhong Xiaomei's Appeal Against Huangheqing, for the Cause of Service Contract Disputes" in chinalawinfo, "Peking University Center for Legal Information," online: <http://law1.chinalawinfo.com/newlaw2002/slc/slc.asp?db=fnl&gid=117501588>. For similar provisions, see PEAA, *supra*, note 12, arts. 57, 58. See also Gazette 2004, *supra*, note 30, at 132.

Similar examples exist in other sources of law in China. For example, the *RCE of Hubei* excludes illegally obtained evidence, providing that:

(1) After the investigation, if the statement of the victim, the witness testimony, or the confession of the suspect or the defendant are obtained by certain unlawful measures, such as inquisition by torture, inducement, deceit, medicine-taking, hypnosis, *etc*., then this evidence cannot be used to decide a case.

(2) If the aforementioned evidence is obtained by those unlawful means, then the relevant facts should be given to support the claim. Under these circumstances, the relevant police and procuratorate services must investigate further. If they cannot provide a reasonable rationale for including any items of evidence that have been obtained by illegal means, then those items of evidence cannot be used for proof.

(3) If investigators use certain methods, such as inducement, entrapment, or other means that are deemed sufficient to cause a criminal suspect or a defendant to commit a crime, then any evidence that is so obtained should be excluded.[57]

These rules require criminal judges to protect human rights and to safeguard procedural fairness.

4. Discretionary Decision-making Authority

Trial judges can only make findings of fact, based on the evidence that is available, in regard to past events. Each case presents unique circumstances. The evidentiary rules of the two prominent legal systems — the common law and the civil law — offer limited discretion to judges. This discretion allows judges to become better prepared for complex evidentiary issues, and assists them in the decisions that they must accordingly make.[58] Judges therefore need discretionary decision-making authority, but this authority requires limitations. Otherwise, absolute discretion will lead to judicial abuses.

Based on these considerations, PECA provides: "Trial judges shall, in accordance with the lawful proceedings, apply logical reasoning and rules of experience to verify all the evidence objectively and justly, weigh the relevancy and probative value of the evidence, and provide

[57] RCE of Hubei, *supra*, note 15, art. 32.

[58] See Jonason Cohen, "The Liberty of Proof" (1997) 3 Global L. Rev. 3.

reasons for their ratification."[59] This provision advances the principle that, while investigating and evaluating evidence, judges should abide by lawful proceedings and base their decisions on the evidence that has been provided. It also emphasizes that judges should use their experience, make independent decisions that are based on the evidence, and disclose how they formed their decisions.[60]

PECA lists evidence that cannot be used to determine the facts of a case.[61] This list includes: (1) testimony that is made by an immature person (*e.g.*, who is under the age of majority or otherwise incapacitated); (2) suspicious or otherwise unreliable video and audio materials; (3) document copies or duplicates that cannot be compared with the originals; and (4) the testimony of a witness who refuses to attend the trial without reasonable cause.[62] These four circumstances cannot independently provide or be deemed to be the bases for case decisions; the law does not allow the judge to use discretion in these situations. Under these conditions, therefore, the judge must strictly abide by and apply the rules.

Furthermore, PECA provides that the ascertainment of case facts shall be based on evidence,[63] and this requires judges to make decisions based on statutory evidence. This provision deters judges from abusing their discretion. Similarly, PECA provides that judgments in the people's courts should explain the reasons why the judge has chosen to accept or to exclude certain evidence.[64] As for the evidence that is admitted by all of the litigants, the reasons for its acceptance or exclusion cannot be expounded in the judgment.[65] Requiring thorough reasoning and logic discourages judges from making irrational or inconsistent decisions. This, in turn, enhances judicial authority, and thereby provides judges with the capacity to convince litigants and the public at large to accept their judgments as binding resolutions of the disputes that come before them.[66]

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[59] PECA, *supra*, note 11, art. 64. See Gazette 2004, *supra*, note 30. See also Yi Chang & Jianhua Wang, eds., "Mr. Qin v. Mr. Tang, for the Cause of Contract Assignment Disputes" in Chang & Wang, *Theoretical Analyses*, *supra*, note 33, at 49.

[60] For similar provisions, see PEAA, *supra*, note 12, art. 54.

[61] PECA, *supra*, note 11, art. 69.

[62] *Id.*, art. 69. See Gazette 2004, *supra*, note 30.

[63] PECA, *id.*, art. 63. See Yi Chang & Jianhua Wang, eds., "Xichuan Pharmaceutical Group Corporation Limited of Nanyang City v. Song Changxian, for the Cause of Loan Disputes" in Chang & Wang, *Theoretical Analyses*, *supra*, note 33, at 1.

[64] PECA, *id.*, art. 79.

[65] See Gazette 2004, *supra*, note 30.

[66] For similar provisions, see PEAA, *supra*, note 12, arts. 53, 71. See also Gazette 2004, *supra*, note 30, at 132.

Similar provisions are found in provincial sources. For example, in criminal cases, the *RCE of Hubei* specifies the principle of independent evidence evaluation, providing that, while abiding by legal provisions, people's courts, the procuratorate, and the police should base their decisions on their estimations of the evidence and the facts, and not on any elements outside the case.[67] The *RCE of Hubei* also requires that people's courts, the procuratorate and the police should base their factual considerations on evidence.[68] Further, it provides the standard of proof for judges who are dealing with criminal cases: only when the facts meet a clear and convincing standard, and there is sufficient evidence to support these facts, can a people's court find a defendant guilty.[69] In summary, while the evidential provisions of the people's court emphasize the rules that judges must observe, these provisions also enhance judicial discretion.

IV. THE FUTURE TREND OF DEVELOPMENT

China's development of the procedural system, including the processes of evidence production and collection, is occurring contemporaneously. As discussed in this paper, the development of China's evidentiary system demonstrates an integration of elements from both the common law and the civil law traditions.

As the pace of Chinese judicial reform intensifies, the Chinese are gradually accepting the notion of a legal action as a contest between parties who use adversarial evidence. Instances of trial misjudgment point to faults in the collection, the presentation and the evaluation of this evidence. Currently, one-fourth of the provincial people's high courts of China have issued local evidentiary rules, partially in response to the need for a set of basic, functional requirements for trials. However, these local rules contain inconsistencies, inaccurate wordings and a deficiency of scientific understanding. These shortcomings create inconsistencies throughout the country, and they also hinder China's objective of a unified evidentiary system.[70]

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[67] RCE of Hubei, *supra*, note 15, art. 6.

[68] *Id.*, art. 1.

[69] *Id.*, art. 30.

[70] Fang Baoguo, "Recent Events: Regarding the Local Criminal Evidence Rules of China" (2007) 3 Political Science and Law Tribune 41.

Justice Shen Deyong of the China Supreme Court stated that:

> The articles of many laws, regulations and judicial interpretations are inconsistent, and do not operate in a harmonized manner. To some extent, that situation creates chaos in the application of evidentiary rules in the trial. For instance, witnesses refuse to appear at trial, repeated and serious flaws exist in forensic identifications and examinations, insufficient laws to guide the application of electronic evidence, etc. The reformation and improvement of the evidence system has become an important and urgent task of current Chinese judicial reform.

Justice Shen believes that, in the realm of intensified evidentiary legislation, there are two alternatives to choose from: (1) modification of the relevant evidentiary articles in the procedural laws; or (2) the drafting of an independent, comprehensive evidence code.[71]

In August 2006, with the support of the China Supreme Court's research office, the Institute of Evidence Law and Forensic Science of the China University of Political Science and Law undertook the task of drafting the *Uniform Provisions of Evidence of the People's Court: A Proposal for Judicial Interpretations*.[72] Currently, the draft is being tested as part of a pilot program in seven local courts. The draft emphasizes the values of accuracy, relevance, fairness, harmony and efficiency as the bases for the new evidentiary provisions. It outlines the procedures for proving facts, including production, examination, evaluation and ratification. The draft incorporates the experiences of the evidence rules in the civil law and the common law traditions, as well as the experience of Chinese trial judges, and thus creates a comparatively unified system of evidence. While adhering to the foundations of the civil law tradition's rules of evidence (*i.e.*, rules of lawful evidence, judgments based on evidence and direct oral testimony), the draft also incorporates the hearsay rule, cross-examination rules and other norms from the common law tradition.

V. CONCLUSION

The distinguished Chinese legal scholar, Professor Jiang Wei, has remarked that it would be irrational for China to choose, exclusively, either the civil law or the common law approaches. Rather, China should

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[71] See Chief Justice Xiao Yang, "China Intensifies Its Efforts for the Reformation of Evidential System" (May 30, 2006) in Xiao Yang, "The Central People's Government of the People's Republic of China", online: <http://big5.gov.cn/gate/big5/www.gov.cn/jrzg/2006-05/30/content_295901.htm>.

[72] Zhang, *Uniform Provisions of Evidence*, *supra*, note 13.

consider its own special circumstances and adopt the beneficial characteristics of each system.[73] In the future, we can expect Chinese evidentiary provisions to have a mixture of elements from both the civil law and the common law traditions. This might be considered as proof of a harmonization of the two prominent Western legal systems in contemporary China.

[73] Jiang Wei, "The Jurisprudence Analyses on Certain Basic Matters Concerning Evidence Law" (2002) 1 China Legal Science 24.

The Experience of the Holocaust Cases

Burt Neuborne[*]

I. INTRODUCTION

It has been almost 60 years since Nuremberg. While an international consensus now exists that tyrants who violate core provisions of customary international law by committing genocide and crimes against humanity should be tried before an international criminal tribunal, we have only just begun to think about how to deal with the aiders and abettors who make a tidy profit by turning the victims into slave labourers, or by selling guns, poison gas and barbed wire to the genocidal tyrants. While I do not believe that criminalizing economic support for tyrants is useful or appropriate unless the economic support is purposefully aimed at advancing a tyrant's genocidal enterprise,[1] the law cannot simply ignore economic aiders and abettors. No tyrant has ever succeeded in enslaving or exterminating a victim population without the economic support of ordinary citizens who profit from the criminal enterprise. At a minimum, therefore, it is crucial to develop a transnational consensus that economic aiders and abettors of great evil hold their ill-gotten gains in constructive trust for the victims.

The major obstacle to the evolution of such an international consensus is not substantive. Although most of us agree that economic aiders and abettors of genocide and crimes against humanity should not be permitted to enrich themselves unjustly at the expense of the victims, we lack a transnational procedural consensus on how to impose and enforce a civil liability designed to recapture the unjust profits for the benefit of the victims. Since 1996, I have been involved in litigating cases against Swiss banks and German corporations in United States courts seeking to

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[1] See *In re South African Apartheid Litigation*, 617 F.Supp.2d 228, 2009 WL 960078 (S.D.N.Y. April 8, 2009) (requiring purposeful or knowing behaviour by an economic aider and abettor).

recover unjust profits on behalf of Holocaust victims.[2] The causes of action arose in Europe more than 50 years ago during the Nazi era. More than 80 per cent of the surviving victims reside outside the United States. The defendants are Swiss or German corporations. None of the acts underlying the claims took place in the United States. The cases are governed by Swiss, German or customary international law.[3] Why should a U.S. judge be empowered to resolve them? Could there be a clearer example of aiding and abetting American judicial imperialism?

After due consultation with counsel, I plead guilty, but offer a plea in mitigation. While a U.S. court provided only a second- or third-best forum, pending the emergence of credible procedures in alternative fora, the U.S. court was the only game in town.

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[2] The Holocaust-era litigation has generated a substantial literature. For books on this subject, see J. Authers & R. Wolffe, *The Victims' Fortune: Inside the Epic Battle Over the Debts of the Holocaust* (New York: HarperCollins, 2002) (a useful narrative of the Swiss bank litigation); M. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (New York: New York University Press, 2003) (the best single account of the litigation); S. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II* (New York: Public Affairs, 2003) [hereinafter "Eizenstat"] (an indispensable account of the diplomatic background to the Berlin Agreements); and M. Bazyler & R.P. Alford, eds., *Holocaust Restitution: Perspectives on the Litigation and Its Legacy* (New York: New York University Press, 2006) (reflective essays by many of the key participants). For early articles, see Michael Bazyler, "Nuremberg in America: Litigating the Holocaust in United States Courts" (2000) 34 U. Rich. L. Rev. 1; Burt Neuborne, "Preliminary Reflections on Aspects of the Holocaust Era Litigation" (2002) 80 Wash. U.L.Q. 795.

[3] The recent Holocaust-era litigation has spawned numerous reported cases. For the principal Swiss bank citations see, *e.g.*, *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d 139 (E.D.N.Y. 2000) (upholding the fairness of the settlement under Rule 23(e) of the *Federal Rules of Civil Procedure*); *In re Holocaust Victim Assets Litigation*, 225 F.3d 191 (2d Cir. 2000) (upholding the definition of settlement classes); *In re Holocaust Victim Assets Litigation*, 413 F.3d 183 (2d Cir. 2001) (upholding the Special Master's proposed allocation formula); *In re Holocaust Victim Assets Litigation*, (HSF), 424 F.3d 132 (2d Cir. 2005) (upholding the "Looted Assets" class *cy-près* the allocation formula; rejecting a challenge to the structure of the settlement); *In re Holocaust Victim Assets Litigation*, 256 F.Supp.2d 150 (E.D.N.Y. 2002) (directing banks to pay additional compound interest of U.S. $5 million on funds held in an escrow account). For principal citations in the German litigation, see, *e.g.*, *In re Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429 (D.N.J. 2000) (approving the dismissal, with prejudice, of 49 Nazi-era cases pending against German industrial defendants, in return for the creation of a 10.1 billion Deutschmark ("DM") foundation); *In re Austrian & German Holocaust Litigation*, 250 F.3d 156 (2d Cir. 2001) (mandating the dismissal, with prejudice, of Nazi-era cases pending against German banking defendants, in return for the creation of a DM 10.1 billion foundation); *Gross v. German Foundation Industrial Initiative*, 499 F.Supp.2d 606 (D.N.J. 2007), affd 549 F.3d 605 (3d Cir. 2008), cert. den. 129 S. Ct. 2384 (2009) [hereinafter "*Gross*"] (holding Berlin Agreements judicially unenforceable); *Burger-Fischer v. Degussa*, 65 F.Supp.2d 248 (D.N.J. 1999) ["*Burger-Fischer*"] (dismissing claims); and *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424 (D.N.J. 1999) [hereinafter "*Iwanowa*"] (dismissing claims).

II. THE SWISS BANK CASES

In the early 1930s, after Switzerland made it a crime to disclose information about Swiss bank accounts, money poured into Swiss banks from frightened depositors all over Europe. When the Gestapo sought to infiltrate the Swiss banks in order to stop the outflow of German-Jewish wealth, Swiss bankers responded by erecting a complex wall of secrecy. In the wake of the Holocaust, in the greatest double-cross in banking history, the Swiss bankers used that wall of secrecy to block recovery of Holocaust-era deposits by heirs of the victims. In January 1997, at the Court's invitation, I agreed to serve as co-counsel in several cases against the three largest Swiss banks: UBS, Swiss Bank Corp., and Credit Suisse. The original complaints alleged that Holocaust victims had deposited huge sums in Swiss banks in the years leading up to the Second World War, and that the accounts had never been returned to their true owners. Amended complaints repeated the core bailment allegations, and argued that Swiss banks had aided and abetted Nazi barbarity by knowingly financing slave labour facilities for German corporations, and knowingly disposing of stolen property looted by the Nazis. The core bailment theory was supplemented by allegations that the banks had held themselves out as safe havens, and had received the accounts with knowledge of the plight of the depositors, establishing the elements of a constructive trust. As constructive trustees, the post-war banks had a fiduciary duty to seek out the accounts' owners, rather than to wait passively for the owners to reappear.

My first task was organizational. Two competing groups of lawyers were jockeying for "lead counsel" status, a court-appointed position that assures tactical control over the litigation. I recommended a 10-person Executive Committee to run the cases, with one bloc getting five seats, the other bloc four seats and the tenth seat going to me. I threatened to deadlock every 5-4 vote unless the two blocs worked together. Whether I would have carried out this bluff is an interesting question, but I was never put to the test. As soon as each bloc realized that it could not oust the other, each wheeled and attacked the Swiss banks, instead of attacking each other.

The success of the Swiss Bank Executive Committee in providing dedicated legal representation masks the first important procedural issue. Although both the Swiss and the German cases were nominally brought by approximately 10 to 15 named survivors, the lawyers actually ran the show. An important question for transnational discussion is who speaks

for the victims in such cases? Should the victims be viewed as an ephemeral political unit? What if they are too demoralized or scattered to function politically? Should the choice of spokesperson be left to self-identification? To entrepreneurial lawyers? To a government? Can a mass action on behalf of the victims be structured to achieve the necessary moral and political legitimacy that will allow a small number of representatives to speak for all of the victims? Closely connected is the question of whether, and how, the lead players — both the lawyers and the victims — should be compensated.

Whoever speaks for the victims, the second procedural question is where such an action should be brought. In both the Swiss and the German cases, general jurisdiction over foreign defendants resulted in the exercise of extraterritorial power over Holocaust claims by U.S. courts. Was there a better geographical forum? Should we establish an international civil analogue to the Rome tribunal in order to hear claims for compensation that arise out of systemic violation of core principles of customary international law? If domestic courts are to retain exclusive or concurrent jurisdiction, should a defendant's unrelated activity in a jurisdiction give rise to general *in personam* jurisdiction over foreign defendants? Should a form of universal civil jurisdiction be recognized over alleged aiders and abettors of great evil?

The third procedural issue involves access to the necessary information. Factually, the Swiss bank cases were a nightmare. The plaintiffs did not know which Swiss bank had been used to open a particular account, and they usually lacked documentary proof of an account's existence, size and whether it had been paid to someone else. While the banks professed willingness — and, indeed, enthusiasm — about paying the true owner of any account, they required documentary proof that an account existed and had not been paid out to someone else. Such proof could only be supplied by access to the banks' records. If the Swiss bank case had arisen in any other country, two things would have happened. Since long-dormant accounts would have escheated to the state as abandoned property, the plaintiffs' claims would have been matched against lists maintained by the governments. To the extent that accounts had not escheated, the banks' records would be consulted to ascertain to whom the claimed accounts belonged. Switzerland is, however, the only developed country without an abandoned property/escheat law. Thus, not only was there no list of abandoned accounts, the banks had a huge economic incentive to deny the existence of the Holocaust-era accounts because they would get to keep the money. For me, one lesson of the Swiss litigation

is the need for transnational norms that govern the abandoned property of victims in order to assure that no local incentive exists to seize and hold such lost assets.

As the litigation developed, two additional motives surfaced: the Swiss wartime practice of transferring Jewish-owned bank deposits to the Reichsbank on the basis of coerced authorizations; and the fact that when, after the war, the true owners failed to appear, many accounts were simply appropriated by faithless intermediaries. Since no one in the Swiss banking and legal community wanted those stories to be told, the banks, at every stage of the litigation, invoked Swiss privacy laws to block access to their records. The argument, similar to the argument that is currently being made in response to a U.S. Internal Revenue Service civil subpoena that seeks the names of possible tax cheats, was that it is unfair to require a Swiss bank to provide information when that would subject the corporation to criminal prosecution in its home country.

Instead of submitting to discovery, Swiss banking authorities authorized the banks to make their books available to a commission (the International Commission of Eminent Persons, or "ICEP"), which was headed by Paul Volcker. Under Volcker, the ICEP conducted an audit, and identified approximately 35,000 unclaimed accounts as probable or possible Holocaust accounts. While the Volcker audit was better than nothing, the auditors saw only what the banks let them see. To make matters worse, Volcker discovered that all records for over two million accounts had been completely destroyed, and that the transactional records for the remaining four million accounts open during the relevant period had also been destroyed, making it impossible to track payments and ascertain the size of the accounts. I urged the District Court to use its discovery power under Rule 26 of the *Federal Rules of Civil Procedure* ("FRCP") to order the banks to turn over the surviving information, regardless of Swiss law. Concerned over the scope of his power to order discovery that would violate Swiss criminal law, Korman J. declined. After the settlement, and faced with the need to establish a credible bank account claims program, I once again unsuccessfully urged the Court to order the banks to publish the names of the 36,000 account-holders who had been identified by the Volcker audit, and to provide claims officials with unfettered access to the banks' records during the claims process. The banks finally agreed to an Internet publication of 24,000 of the 36,000 accounts, and to limited access to specific account records by court-appointed claims officials operating in Zurich.

The experience of the Swiss bank cases demonstrates that, at a minimum, any tribunal that is charged with the responsibility for dealing with mass human rights abuses must have power to get at the facts, regardless of the laws of particular countries that are designed to keep the information secret.

On August 2, 1997, we argued against the banks' dismissal motions for more than eight hours. Judge Korman treated the contending lawyers like scorpions in a bottle, waiting for us to exhaust ourselves to the point where settlement was possible. After a year, he convened the parties for 13 days of skilfully supervised negotiations in his chambers, culminating in a U.S. $1.25 billion settlement. Participation in the settlement was limited to the members of five groups of victims — Jehovah's Witnesses, Jews, Sinti-Roma, gays, and the disabled — who bore the brunt of the Nazi race laws. Claims programs were established for bank accountholders, slave labourers and refugees. It proved impossible to operate a claims program for owners of looted assets that had been fenced through Switzerland because insufficient information existed. Instead, the looted assets class was administered *cy-près*, with payments made to impoverished survivors throughout the world as the next best thing to an actual claims program.

As Lead Settlement Counsel, I functioned as General Counsel to the settlement, defending it against attack, and aiding the class members in filing claims. Under the unique circumstance of the Holocaust, I believed that it was preferable for a single lawyer to represent the interests of all victim-class members during the post-settlement phase, despite the obvious tension between and among the categories of victims. I represented the entire class in the Rule 23(e) FRCP fairness hearing, since no conflict existed at this stage. All class-members shared a common interest in maximizing the fund, and I had no financial interest in having the $1.25 billion settlement approved because I had waived my fees for obtaining it.

I attempted to deal with the serious intra-class conflicts inherent in the allocation process by adopting what I called a "pre-commitment strategy". All class members were informed that they would be eligible to participate in a carefully described allocation process that would take place before a neutral Special Master. The Special Master, after hearing from all concerned persons, would recommend an allocation plan, which would be reviewed by the supervising District Judge. Class members who did not wish to pre-commit to the outcome of such an allocation process were given the opportunity to opt out. If, however, a class member failed to opt out, I warned that he or she would be bound by the

outcome of the allocation process, and that I would enforce the outcome of the fair allocation plan against dissenting class members. The allocation process worked well, but, as I feared, once the allocation program had run its course, a few disappointed class members never forgave me for enforcing the results of the allocation process against them.

Judge Korman estimates that U.S. $1.29 billion will be distributed to the class, with all fees and costs paid from interest on the settlement fund. As of June 30, 2009, approximately $553 million has been distributed to Swiss bank account-holders; more than $288 million to slave labourers; $205 million to impoverished victims; approximately $12 million to refugees; $10 million to Yad Vashem, in order to complete a full list of victims; $1.3 million to holders of Swiss insurance policies; and $375,000 to the named plaintiffs in gratitude for their courage. Legal fees have totalled approximately $10 million.[4]

The administration of the Swiss settlement fund raises a number of procedural questions for transnational discussion: Was the pre-commitment strategy fair? Was it appropriate for a single lawyer to attempt to represent the entire settlement process? Should each contending faction have had separate counsel? Was the bank account claims process adequate? Should the court have required full access to the surviving bank records notwithstanding Swiss privacy law defences? How should the transaction costs have been supervised? Was it worth it to have carried out an expensive individualized claims process, or should everything have been distributed *cy-près*? Was the $10 million in lawyers' fees justified?[5]

III. THE GERMAN SLAVE LABOUR CASES

During the Second World War, German industrial giants that used slave and forced labour booked massive profits. After the war, German industry argued that compensation of involuntary labourers was a governmental responsibility. The German government argued that it was a private responsibility. When individual suits for compensation were first brought against German industry in the late 1940s and early 1950s, the international community, anxious to foster West German industrial

[4] The Swiss bank case maintains a website containing all relevant documents, including the opinions accompanying each bank account award. See <http://www.swissbankclaims.com>.

[5] I received a court-awarded fee of approximately $3.1 million for my post-settlement work as Lead Settlement Counsel.

recovery, adopted the *London Debt Agreement of 1953*,[6] which deferred German industrial liability until the adoption of a peace treaty that would end the Second World War. No such treaty was ever signed. On March 13, 1996, the German Federal Constitutional Court held that the *2+4 Treaty of 1991*,[7] which regularized Germany's border with Poland, was a *de facto* peace treaty ending the Second World War, and, thus, lifted the bar on litigation.[8]

In the wake of the German decision, more than 60 cases were filed against German corporate defendants in U.S. courts, many of which sought class action status. In August 1998, German industry formed a coalition of 12 major companies (which eventually grew to 17), to seek "legal peace" in the United States in return for the creation of a German Foundation designed to compensate the victims. In September 1998, they met with Stuart E. Eizenstat, then the Assistant Secretary of State, and urged legislation or an Executive Agreement that superseded the victims' legal claims in return for the creation of a 1 billion Deutschmark ("DM") German Foundation. Eizenstat refused to supersede the victims' legal rights, but offered to foster face-to-face negotiations between the victims and the German companies seeking "legal peace" in return for a "fair price".

Meanwhile, in the pending litigation, plaintiffs argued that German law required German companies to compensate their workers. Judge Greenaway, the presiding judge in *Iwanowa*, ruled that German law-based compensation claims were barred by a two-year statute of limitations that had run in the interval between the signing of the *2+4 Treaty of 1991*, and the filing of the *Iwanowa* complaint in 1997. We settled before an appeals court could get its hands on Greenaway J.'s mechanical application of an outdated German decision.

The second source of law was customary international law forbidding slavery and involuntary servitude. Since all agreed that the running of the various statutes of limitations were tolled during the *London Debt Agreement* suspension period, the international law claims were timely. Unfortunately, Debevoise and Greenaway JJ. ruled in *Iwanowa* and the companion case, *Burger-Fischer*, that the *2+4 Treaty* had impliedly extinguished plaintiffs' international law claims by failing to make specific

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[6] *Agreement on German External Debts*, February 27, 1953, 4 U.S.T. 444, 333 U.N.T.S. 3 [hereinafter "*London Debt Agreement*"].

[7] *Treaty on the Final Settlement With Respect to Germany*, September 12, 1990, 29 I.L.M. hereinafter "*2+4 Treaty of 1991*"].

[8] *Krakauer v. Federal Republic of Germany*, Federal Constitutional Court., BvL 33/93 (March 13, 1996) [hereinafter "*Krakauer*"].

provision for reparations. The victims immediately appealed to the Third Circuit. An effort by Justice Department lawyers to file an *amicus curiae* brief rejecting the District Court's erroneous reading of silence in the *2+4 Treaty* was suppressed by Secretary Eizenstat, who saw the District Court opinions as leverage to force the victims to settle for a reasonable sum.

The two cases had a devastating effect on the victims' bargaining position. Unlike Korman J., who sat on the legal issues in the Swiss case for a year and then fostered an excellent settlement, the two New Jersey federal judges dismissed the plaintiffs' complaints in the midst of the intensive settlement negotiations that had been fostered by Secretary Eizenstat. Weakened by the District Court opinions, but helped by President Clinton's personal involvement, the victims eventually settled for DM 10.1 billion (more than U.S. $5.2 billion as of July 2000). The substantive financial bargain was codified in the *Joint Statement of Principles*,[9] signed on July 17, 2000, which committed the German government and the German companies to pay DM 10.1 billion to a German Foundation named "Remembrance, Responsibility and the Future", in return for dismissal, with prejudice, of the 60 U.S. cases. A degree of preclusion against future cases was assured by an *Executive Agreement Between Germany and the United States*,[10] which committed the Executive Branch to seek dismissal of future Holocaust-era litigation against German companies. Distribution was handled by an act of the German Parliament that created the German Foundation "Remembrance, Responsibility and the Future", and bound it by law to distribute the settlement funds in accordance with the negotiated formula that had been set forth in the Joint Statement.

The German Foundation was up and running by August 30, 2000. On August 21, 2000, the United States nominated me to the German Foundation's Board of Trustees, with a special responsibility to represent the interests of the victims. I served two occasionally tumultuous four-year terms. The German government's DM 5 billion contribution was paid in two equal tranches before the end of the year. German industry's payment was delayed by fund-raising difficulties, and by a stubborn refusal

[9] Joint Statement on the occasion of the final plenary meeting concluding international talks on the preparation of the Foundation "Remembrance, Responsibility and the Future" [hereinafter "Joint Statement"]. The Joint Statement is described in *American Insurance Assn. v. Garamendi*, 539 U.S. 396 (2003) [hereinafter "*Garamendi*"].

[10] Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation "Remembrance, Responsibility and the Future" [hereinafter "Executive Agreement"], 39 Int'l Legal materials 1298 (2000).

by Kram J. to permit dismissal of three cases against German banks. The Second Circuit was forced to issue a writ of *mandamus* on May 17, 2001, that commanded her to permit dismissal. The German companies transferred DM 3.4 billion to the Foundation on June 20, 2001. The balance, including DM 100 million in interest, was paid in instalments over the next six months. My efforts to require additional interest payments occasioned by the delay failed when U.S. courts held the Berlin Agreements judicially unenforceable.

As of August 2008, the German Foundation had distributed $6.6 billion to more than 1.5 million people with remarkable efficiency. Approximately 75 per cent of the funds went to Slav forced labourers who had been ignored during the reparations period. Administrative costs for the operation of the Foundation over its eight-year life were capped at DM 200 million. Fees to the American lawyers were capped at DM 120 million, and were allocated by Ken Feinberg and Nicholas deB. Katzenbach, pursuant to an innovative process that invited each lawyer to describe the value of the work of other lawyers, but forbade them from talking about themselves.[11]

IV. SECOND THOUGHTS

Counting earned interest, the Swiss bank and German slave labour cases have resulted in the distribution of just under $8 billion to more than 1.66 million victims, or their families, throughout the world. While the Holocaust litigation has been an undoubted financial success, there should be no confusion about the relationship of the litigation to any idea of justice. Justice for Holocaust victims lies beyond human agency. Moreover, even as a matter of dollars and cents, the sums paid to slave labourers or to other victims do not approach adequate compensation. For example, each surviving slave labourer received a total of $9,000 from the German Foundation and the Swiss settlement for years of inhuman treatment.

In fact, the cases raise a host of questions for transnational consideration.

First, should the issues have been left to non-judicial resolution? Without political and diplomatic backing,[12] I do not believe that either set of cases would have succeeded. The counter-factual is whether or not the

[11] I was awarded DM 10 million (U.S. $5.2 million).

[12] The contribution of Stuart E. Eizenstat, first as Assistant Secretary of State, and then as Deputy Treasury Secretary, was enormous. See Eizenstat, *supra*, note 2.

victims would have done better if the courts and the lawyers had stayed out of the way.

Nothing that American judges actually did during the litigation would cause one to believe that courts were crucial to the victims' success. While Korman J. adroitly managed the end-game settlement negotiations in August 1998, and presided over the multi-year administration of the Swiss bank settlement with distinction, he never tested his judicial power. He never issued a decision to uphold the victims' legal claims. Perhaps most importantly, both before and after the settlement, he declined to require access to the banks' records, all but neutralizing one of the most important advantages of a U.S. judicial forum — broad discovery.[13] On the other hand, Korman J.'s shrewdness, commitment and unassailable integrity resulted in an excellent settlement, and a tolerably fair claims process, without risking prolonged and unpredictable litigation.

The judicial behaviour of Greenaway and Debevoise JJ., who erroneously dismissed the victims' claims on the merits in the midst of settlement negotiations, makes Korman J. look heroic. Judge Debevoise returned for an encore in 2007 and ruled that the financial promises in the Berlin Agreements[14] were judicially unenforceable, leaving an additional DM 250 million in potential interest unpaid.[15] Judge Kram's stubborn refusal to permit the German Foundation to come into being until she was the subject of a writ of *mandamus* cost the victims a year's worth of interest on the settlement award.

Unfortunately, the track record of the diplomats and the politicians does not look any better. From 1953 to 1996, the diplomatic community was content to subordinate the legal rights of the German slave labour victims to West German economic recovery. Moreover, the international community had known about the Swiss bank accounts since the end of the Second World War. Every time diplomatic pressure was used in an

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[13] See *Garamendi*, *supra*, note 9. In *Garamendi*, the Supreme Court construed the Berlin Agreements to pre-empt efforts by California to require public disclosure of the unpaid policies as a condition of doing business in California.

[14] The term "Berlin Agreements" refers to three documents signed in Berlin on July 17, 2000: (1) Joint Statement on the occasion of the final plenary meeting concluding international talks on the preparation of the Foundation "Remembrance, Responsibility and the Future" ("Joint Statement"); (2) Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation "Remembrance, Responsibility and the Future" ("Executive Agreement"), 39 Int'l Legal materials 1298 (2000); and (3) the German Foundation Law establishing the German Foundation "Remembrance, Responsibility and the Future" (enacted by the Bundestag on August 12, 2000).

[15] *Gross*, *supra*, note 3.

effort to force Switzerland to deal with the bank account issue, Switzerland flexed its economic muscles and the issue went away.

In retrospect, for all its faults, I believe that the relatively level playing field associated with the rule of law did create the only environment in which weak victims could challenge Swiss banks and German companies with a semblance of credibility. The banks' willingness to deal seriously with the Swiss bank account issue did not surface until credible class action legal claims had been filed in a United States court. German industry ignored the slave labour issue for a half-century, until the avalanche of class action litigation that followed *Krakauer*. However, fear alone did not bring the defendants to the table. As the rulings of Greenaway and Debevoise JJ. demonstrate, if the defendants had fought the legal battle, I am not sure that they would have lost. What interested the defendants most was the chance to bring contentious political and social issues to a final resolution. Closure was what the lawyers — and the courts — were really selling.

The Swiss bank case was a classic Rule 23 FRCP class action, in which the nation of Switzerland bought, for a fixed price, legal peace from further Holocaust-era claims. The key to the bargain was the power of a U.S. court to issue an order that was binding on all class members, now and forever. The German settlement was more complicated because the German defendants refused to participate in a Rule 23 class action. Closure in the Berlin Agreements was provided by the Executive Agreement between Germany and the United States. Thus, courts and the rule of law provided a structured matrix within which the negotiations leading to closure could take place in the Swiss setting, and a background threat that was capable of inducing negotiation and political action, as in the German slave labour process.

The litigation delivered an additional, unexpected benefit. In a diplomatic setting, victims beg governments and powerful private entities to redress a past wrong. They speak in the voice of supplication and charity. In a legal setting, victims speak in the voice of rights and obligation, demanding that defendants comply with a legal mandate. Rights-talk restores dignity to the victims by forcing powerful defendants to confront them as equals.

Assuming that judicial proceedings are useful, why use U.S. courts? As *Iwanowa, Burger-Fischer* and *Gross* illustrate, it cannot be because U.S. judges are inherently friendly to victims. Indeed, the very availability of a U.S. court, premised on general jurisdiction, is controversial. All things being equal, I would support limits on general jurisdiction in an

international context. But all things are not equal. Alternative fora that are capable of asserting specific jurisdiction usually lack the two procedural tools that are needed to permit victims to mount a credible legal challenge to great injustice: broad discovery and the capacity for mass litigation.

In a world where assertions of economic privacy shield vast amounts of data from public view, it is impossible to mount credible human rights claims against powerful private defendants that are charged with aiding and abetting the systematic violation of customary international law, in the absence of access to the information that is needed to prove the claim. Adequate discovery rules hold out the prospect that powerful defendants will be unable to control the flow of legally relevant information. The success of Swiss banks in asserting national privacy laws to trump efforts to obtain information needed for everything from Holocaust cases to the enforcement of the tax laws of the United States and the European Union, respectively, demonstrates the power of such an informational trump. In most jurisdictions, however, it is not necessary to invoke extraordinary conceptions of privacy as a trump. There simply are no effective discovery mechanisms. Without those mechanisms, it would be futile to seek judicial relief because, without the potential for access to the facts, there is no credible judicial threat.

The capacity for mass adjudication is the second precondition to the effective use of a judicial forum in human rights settings. No single case can pose a threat large enough to gain the attention of a powerful defendant. In the same way, no single case can attract the entrepreneurial lawyers that are necessary in order to prosecute the action effectively. Equally important is that, without the ability to litigate *en masse*, it becomes impossible for the victims to peddle finality to the defendants. While mass adjudication poses difficult questions about who speaks for the victims, how principles of representative legitimacy and faithful agency can be maintained, and how the process is funded and compensated, if there is no capacity for mass adjudication, we can forget about using courts as vehicles for real-world solutions to large-scale human rights abuses. Thus, I do not apologize for using general jurisdiction to force Swiss banks and German companies into U.S. courts. When alternative fora emerge with the potential for broad discovery and mass adjudication, there will be time to rethink United States judicial imperialism in human rights cases.

The final question is what an ideal transnational forum might look like. National courts may well evolve the discovery and mass adjudication

techniques that are needed in order to position themselves as genuine alternatives to a U.S. forum. But should we be relying solely on national courts to mete out civil justice to aiders and abettors of great evil? We agree that the tyrant should be tried before an international criminal tribunal. Should we not be considering a parallel international civil tribunal that will have worldwide compensatory jurisdiction over massive human rights abuses? It is long past time for the international community to move towards a set of common procedural norms that will enable the emergence of multiple credible fora in human rights cases on both national and transnational levels.

Exceptionalism and Convergence: Form versus Content and Categorical Views of Procedure

Richard Marcus*

I. INTRODUCTION

Great divides are tempting organizing techniques. The Cold War prompted alignments along a political Great Divide. Centuries before that, the Pope divided up the New World between Spain and Portugal. Meanwhile, Europe was divided between Protestant and Catholic states. As this sampler of divides suggests, they can produce tensions or result from them.

The great divide between civil law and common law jurisdictions is another example. As an organizing technique, it had — and continues to have — many advantages. One may even argue that there are crucial differences in the analytical techniques that are employed by those who are trained in common law approaches and those who are trained in civil law approaches.[1] For some time, however, we have seen that — with respect to a variety of important legal topics — it is possible to bridge this divide and develop harmonious, perhaps harmonized, solutions to common issues.

It is time to focus on whether or not we are finally reaching the point where a similar harmonization is happening with procedure. The traditional view has been that procedure is too intimately bound up with the political and social arrangements of different nations, precluding a genuine harmonization of its features. Certainly the procedural arrangements that have typified common law and civil law systems have differed in important ways. And a number of those differences have largely been

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1 See Helena Whalen-Bridge, "The Reluctant Comparativist: Teaching Common Law Reasoning to Civil Law Students and the Future of Comparative Legal Skills" (2008) 58 U. Legal. Ed. 364 (describing the difficulties that arise when teaching those who are trained in the civil law method to appreciate the way in which the common law approaches legal issues). For a more general consideration of these issues, see Mirjan Damaška, "A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment" (1968) 116 U. Pa. L. Rev. 1363.

erased by developments in the last 50 years or so. Civil law systems have moved toward principles of orality and a single, continuous "trial". Common law systems have demoted the "trial" and emphasized judicial control of litigation, along with enhanced reliance on written materials rather than live testimony in court.

Together, these developments raise the question of whether or not the world is preparing to move beyond the civil law and common law categorical approaches to procedure, and into what Winston Churchill might have called "broad, sunlit uplands" of convergence in procedure.[2] It is surely an alluring vision, only somewhat tarnished by the disappointments of the last 20 years in the "new world order" after the fall of the Berlin Wall.[3]

I think that the categorical approach was always somewhat overstated. Modern responses to similar procedural difficulties have produced similar solutions on both sides of the divide that have led to a form of convergence. Nonetheless, I think that this convergence on matters of form conceals such a wide divergence on matters of content that we cannot confidently predict that all will soon join together on those broad, sunlit uplands. At least from an American perspective, it seems that those differences in content loom much larger than the similarities in form. I fear that this is another example of American exceptionalism, but, given the long reach of American litigation, this exceptionalism still matters.

II. THE DIFFICULTIES WITH A CATEGORICAL APPROACH TO MODERN PROCEDURAL PROBLEMS

For academics, it is attractive to conceive that there should be an "ideal" version or vision of procedure that would be suitable to all. That ideal could flow from one's worldview — hence the divergent "civil law" and "common law" worldviews. A major difficulty with this Great Divide categorical approach is that it obscures what may be the more significant differences between national legal systems and, consequently, procedural systems. That is, of course, the enduring challenge

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[2] I have in mind Winston Churchill's speech of June 1940, in which he forecast that defeating the Nazi peril would lead the world into "broad, sunlit uplands", while failing to overcome this peril would lead to an era of darkness. Winston Churchill, "Their Finest Hour" (Speech to Parliament, June 18, 1940).

[3] For an early and sobering assessment of the "new world order" on one set of procedural issues, see Richard L. Marcus, "Retooling American Discovery for the Twenty-First Century: Toward a New World Order?" (1998) 7 Tul. J. Int'l & Compar. L. 153.

to procedural harmonization. I offer it as a reason for distrusting the conventional categories.

Over two decades ago, Professor Damaška offered a different categorical approach to procedural arrangements in his wonderful book *The Faces of Justice and State Authority*.[4] In his view, legal systems could be divided into two categories — "reactive" and "activist". From this division, much flowed. But it was not a division particularly attuned to the conventional distinction between civil law and common law nations. Instead, it bespoke differences in attitude toward the vigour of governmental involvement in directing citizen behaviour, and the design of procedure for the purpose of accomplishing those larger goals. Those who espoused liberty might favour a reactive approach, while those who wanted an intrusive government would likely be activist in attitude.

Although it is sometimes tempting to say, for example, that the English are keenly interested in individual liberty (recall Churchill's sunlit uplands), it is difficult to support the view that attitudes toward individual liberty explain the divergence between common law and civil law systems. To the contrary, it seems that other forces explain the importance that is attached to individualism or collectivism in a procedural system.

The European experience within the "civil law" mode illustrates this divergence. As Professor van Rhee's 2005 collection, *European Traditions in Civil Procedure*,[5] illustrates with regard to the French code of 1806,[6] "its procedure reflected the liberal attitude of the nineteenth century, with its emphasis on the individual responsibility of the citizens, citizens who were deemed to be reasonable men who would litigate against each other from a position of equality."[7] The Austrian code devised in 1895 by Klein,[8] on the other hand, enhanced the judge's responsibility and downplayed the authority of the parties and the lawyers. As van Rhee explains in regard to Klein's approach, "legal practice and procedural culture are important issues when it comes to establishing the merits of a particular procedural model."[9] The point here is that this critical divergence of procedural arrangements occurred within the

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[4] Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986).

[5] C.H. van Rhee, ed., *European Traditions in Civil Procedure* (Oxford: Intersentia Antwerpen, 2005) [hereinafter "van Rhee"].

[6] *Code de Procédure Civile*, La loi du 14 avril 1806 (France).

[7] van Rhee, *supra*, note 5, at 6.

[8] *Code of Civil Procedure* (Austria, 1895), RGBI No. 113/1895.

[9] van Rhee, *supra*, note 5, at 7.

heartland of the European "civil law" world. Using a categorical model would not have suggested this discrepancy of view.

The common law world is similarly riven with differences of this sort. One key component is the right to trial by jury, which originated in England (although it was transplanted there from the Continent) and was later installed in the United States through its Constitution.[10] Curiously, although the jury trial remains vibrant in the United States, it began to disappear from England in the late 19th century. Why? "Jury trial declined because it was not being asked for."[11] Within the heartland of the "common law" world, this key procedural feature has had radically different fates.

Damaška was seemingly depicting a wider span of division than the one between contemporary civil law and common law systems; his probable models for the "activist" state are based on the Soviet sphere, and, therefore, on something that largely passed from the scene a few years after he wrote. Additionally, it is likely that the substantive legal provisions of the various countries of the "civil law" and "common law" categories actually resemble one another fairly fully. Yet differences persist on how to enforce them.

But those differences do not necessarily flow from the common law / civil law divide. On this point, consider the recent work of Christopher Hodges on the emerging interest in Europe in class and representative actions.[12] This work surveys the various techniques that have been adopted in different European jurisdictions for the purpose of dealing with the problems of enforcing competition and consumer protection laws — tasks that could be accomplished by some sort of class action or aggregate litigation method. One recurrent theme that runs throughout this work is that Europeans deplore the American class action. Another is that Europeans are comfortable with the enforcement of consumer and competition protections through actions by public officials. Presently, however, there are substantial differences among European nations with respect to how collective actions (which are also surveyed by Hodges) should be handled. The key point is that there is no dividing line between "common law" and "civil law" attitudes on these questions. All — whether English common law adherents or continental civil law actors — deplore the U.S.

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[10] *Constitution of the United States of America*, *Bill of Rights*, amends. VI, VII [hereinafter "U.S. Constitution"].

[11] Adrian Zuckerman, *Civil Procedure* (London: LexisNexis Butterworths, 2003), at 357, n. 15.

[12] Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Oxford: Hart Publishing, 2008) [hereinafter "Hodges"].

class action and are collectively moving toward some alternative method of enforcing legal provisions. Why?

> A dispute resolution system should reflect the nature and values of its society. Discussions of European society frequently stress social solidarity and cohesion. It is no accident that Europe is considered to be less litigious than the United States. This does not mean that rights or injuries should be ignored, but it does imply that approaches to rectifying problems may prefer to be responsive and informal.[13]

Maybe U.S. resistance is the more significant obstacle to convergence than the general division between common law and civil law systems.

III. AMERICAN EXCEPTIONALISM: VALUES BEYOND CATEGORICAL IMPERATIVES

With the end of the Soviet empire, one sort of "activist" state that was portrayed by Damaška passed largely from the scene. But as Hodges' work emphasizes, the challenge of American exceptionalism stands in the way of universal convergence.[14]

It is easy to tick off the distinctive features of American civil litigation. Relaxed pleading makes it easier to commence litigation and, once litigation is commenced, often makes it more diffuse than litigation in most other legal systems. Broad discovery builds on that diffuse base and often intrudes extensively and expensively into the affairs of many others — including parties and non-parties alike. The parties are allowed to hire and present expert witnesses on a variety of topics. The right to trial by jury requires fairly elaborate rules on the admissibility of evidence, and also constrains judicial resolution of a case before there is a full-dress single-event trial. Many American substantive legal rules invoke reasonableness criteria that are thought best applied in a common-sense manner by juries. The "loser pays" attitude that prevails in almost all of the rest of the world differs from the American insistence that, usually, a prevailing litigant must nonetheless pay a lawyer to prevail.

As with Klein's 19th century explanation for his Austrian code,[15] it is valuable to recognize that there is some method to the U.S. madness.

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[13] *Id.*, at 249.

[14] For further discussion of some of these points, see Richard L. Marcus, "Putting American Procedural Exceptionalism into a Globalized Context" (2005) 53 Am. J. of Comp. L. 709.

[15] van Rhee, *supra*, note 5, at 11.

Professor Kagan has explored American "adversarial legalism" by emphasizing its "deeply entrenched political roots", which give the United States "the most politically and socially responsive court system in the world".[16] He explains that:

> American adversarial legalism, therefore, can be viewed as arising from a fundamental tension between two powerful elements: first, a *political culture* (or set of popular political attitudes) that expects and demands comprehensive governmental protection from serious harm, injustice, and environmental dangers — and hence a powerful activist government — and, second, a set of *governmental structures* that reflect mistrust of concentrated power and hence that limit and fragment political and governmental authority.
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> Adversarial legalism helps resolve the tension. In a "weak," structurally fragmented state, lawsuits and courts provide "nonpolitical," nonstatist mechanisms through which individuals can demand high standards of justice from government.[17]

Hodges embraces a very similar view in his study of European group actions, eschewing the common law and civil law categories:

> The US enforcement system is almost the mirror image of the European approach. In the United States, the norm is "private enforcement," which exceeds public enforcement by a ratio of nine to one in competition cases. In contrast, competition enforcement in Europe has always been through public entities, as has consumer protection.
>
> There is a profound distinction between the US and European approaches to the balance that is struck between public and private law remedies and procedures. In the United States, the Constitution and individuals have, from the origins of the country, placed enormous emphasis on the ability for individuals to assert their individual rights, and have distrusted distant powers.[18]

It is easy, of course, to trace back this view of American legalization of disputes to de Tocqueville[19] in order to prove the early roots of some features of this attitude. And the connection to procedural provisions goes back almost to the beginning in some features. The right to trial by jury was not in the original U.S. Constitution, but was included in the

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[16] Robert Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge: Harvard University Press, 2001), at 6, 16.

[17] *Id.*, at 15-16.

[18] Hodges, *supra*, note 12, at 196.

[19] See Alexis de Tocqueville, *Democracy in America* (1835) (London: Penguin Classics, 2003).

Bill of Rights[20] that was adopted a few years later. The non-professional judiciary upon which the United States relies, and its 19th century openness to lawyers with modest or minimal formal training, combined with the jury trial to foster enthusiasm for this project.

But key elements of the American procedural framework arose more recently — largely due to the adoption, in 1938, of the *Federal Rules of Civil Procedure* ("Federal Rules"),[21] which sought to avoid decisions that were based on the pleadings and replace them with merits decisions that were based on evidence that had been obtained through broad, pre-trial discovery. More recent yet were the 1966 changes to the federal class-action rule,[22] which ushered in an era of what came to be called public law litigation. In 1976, Professor Chayes gave voice to this shift:

> Perhaps the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies. The shift in the legal basis of the lawsuit explains many, but not all, facets of what is going on "in fact" in federal trial courts.[23]

In the same vein, in 1979, Professor Fiss urged that the core purpose of litigation in America should be seen as the enforcement of public values, not private dispute resolution.[24]

Perhaps a common law arrangement is best suited to such a role for litigation, but it is certainly not the only one. To the contrary, the singular feature of this attitude is that it resembles Damaška's view of the "activist" state. To the extent that this view depicts, in significant part, the experience of the Soviet world, it hardly depends on either a common law or an adversarial system arrangement. And a common law arrangement surely does not lead inevitably to this sort of role for litigation. There is no significant body of work of which I am aware that suggests that England, Australia, Canada or any other common law country has exalted private litigation to a similar role, and Hodges' recent work suggests the opposite.

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[20] U.S. Constitution, *supra*, note 10, amends. VI, VII.

[21] *Rules of Civil Procedure for the United States District Courts* (effective September 16, 1938) online: U.S. Courts — Federal Judiciary Rulemaking <http://www.uscourts.gov/rules/cv2008.pdf> [hereinafter "Fed. R. Civ. P."].

[22] *Id.*, Rule 23.

[23] Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281, at 1282 [hereinafter "Chayes"].

[24] Owen Fiss, "Foreword — The Forms of Justice" (1979) 93 Harv. L. Rev. 1.

What this means is that ideas for procedural change must take account of what might be called the political content of that change, at least in the United States. The right to jury trial, of course, remains politically sacrosanct in America. To take another example, broad American discovery — deplored in most of the rest of the world — can be viewed as similarly bound up with the overall enforcement arrangement upon which the United States relies:

> Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy. Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with the subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.[25]

IV. CRISIS AND PROCEDURAL REFORM: THE INSIGNIFICANCE OF HARMONIZATION

Perhaps many academics find the prospect of harmonization between common law and civil law procedure entrancing. It is unlikely that many politicians are similarly entranced. To the contrary, at least in the common law world, it seems that some sort of crisis or failure explains procedural reform efforts. In England, the *Judicature Acts* of the 19th century were an effort to overcome what were viewed as the failings of a system in which outcomes seemed to depend more on the lawyers' expertise in pleading than on the merits of the cases. Lord Woolf's reform effort, a decade ago, was prompted by concerns about the huge cost of litigation (higher than anywhere in the world, he announced in 1995, except California).[26] Justice Jackson has recently completed a study of the

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[25] Paul Carrington, "Renovating Discovery" (1997) 49 Ala. L. Rev. 51, at 54.

[26] See Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty's Stationery Office, 1995), at 11-12 (asserting that the cost of litigation was "higher in the UK … than in any other country in which we operate in the world, except, possibly, the State of California". For a more general discussion, see Richard L. Marcus, "'Deja Vu All Over Again?' An American Reaction to the Woolf Report" in A.A.S. Zuckerman & Ross Cranston, eds., *Reform of Civil Procedure* (Oxford: Oxford University Press, 1995) 219.

English cost system and the ways in which it seems to have frustrated Lord Woolf's efforts to reduce the cost of litigation in England.[27]

The American experience has recently been similar. It has seemed that crisis rhetoric is constantly raised as a stimulus to change. As I have suggested on other occasions, this may be because it is difficult to attract attention for procedural reform without citing a crisis.[28] Certainly some sort of crisis rhetoric explains most American reforms that have happened. Thus, Congress enacted the *Private Securities Reform Act*[29] in 1995 to address what it said was a crisis in securities fraud class action litigation, and, 10 years later, it adopted the *Class Action Fairness Act*[30] of 2005 to address other concerns that it regarded as approaching crisis proportions.

Frankly, it is difficult to imagine that harmonization of procedures will assume similar importance among those with the authority to make procedural revisions in America any time soon. It may be that, within Europe, given the various political arrangements by which a continent-wide structure is emerging, such an impulse is more probable.[31] Indeed, we are told that article 6 of the *European Convention on Human Rights*[32] is already, by its own force, requiring revision of the procedural arrangements of member states.[33] But beyond that sphere, it is hard for an outsider to imagine that procedural harmonization *per se* will carry the day in many places.

To the contrary, the ALI/UNIDROIT project[34] emphasized the delicacy of such efforts. Thus, in proposing procedural convergence it is focused only on commercial disputes between actors in different nations,

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[27] See the Rt. Hon. Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009), online: Judiciary of England and Wales — Review of Civil Litigation Costs <http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf>.

[28] See Richard L. Marcus, "Of Babies and Bathwater: The Prospects for Procedural Progress" (1993) 59 Brook. L. Rev. 761, at 762-67.

[29] 109 Stat. 737 (codified in various sections of Title 15, United States Code).

[30] 119 Stat. 4 (codified in various sections of Title 28, United States Code).

[31] At least one paper for this conference suggests otherwise. See Andrés de la Oliva Santos, "Spanish Civil Procedure Act 2000: Flying Over Common and Civil Law Traditions" in Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories* (Markham, ON: LexisNexis Canada, 2010) 63, at 69-70: "Given my participation in the drafting of the [*Spanish Civil Procedure Act* of 2000], I can assert without fear of contradiction that the said changes were not a result of a desire to converge Spanish civil justice with procedural models from the common law realm."

[32] Council of Europe, *The Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, November 4, 1950), CETS No. 005 (entered into force September 3, 1953).

[33] See Neil Andrews, *English Civil Procedure* (Oxford: Oxford University Press, 2003), c. 7 (describing the impact of art. 6 on English procedure).

[34] *ALI/UNIDROIT Principles of Transnational Civil Procedure* (Philadelphia: The American Law Institute, 2004).

and, even then, it consciously rejects the American attitudes toward pleading and discovery, and does not include trial by jury. Perhaps the rest of the world is receptive to procedural change in the absence of crisis, but, for America, such change often depends on rhetoric, if not proof, of crisis.

Indeed, procedural change itself is often portrayed as creating or threatening a crisis of its own. Thus, when a minor modification of the scope of discovery for the American federal courts was proposed in 1998, a member of the Committee of Rules of Practice and Procedure denounced it as the "most radical change" in 60 years of experience under the Federal Rules. Time has shown how overblown this prediction was. Similarly, when the *Class Action Fairness Act*[35] was under consideration in Congress, many predicted that it would end class actions in state courts. A recent and careful study of class actions in California state courts, however, has shown that, although there was a decline in the number of filings in 2005 (when the Act was passed) the rate of class action filings in California state courts has risen regularly since 2000, and the post-Act filing level was higher than the rate in 2000-2002.[36] This sort of "reality check" does not prevent rhetorical bombast from being deployed against procedural reform. The point is not that recent procedural reforms have all been benign,[37] but that the bombast often far outstrips the real issues involved. Under these circumstances — *i.e.*, in the absence of a crisis — there is presently no significant prospect that harmonization of procedures, whether with the "common law" or the "civil law" world, will be a project likely to carry much weight in the United States.

V. FOCUSING ON THE CONTENT RATHER THAN THE FORM

The main focus of this paper is on the greater importance of the content, compared to the form, of procedural arrangements. Thus, one could invoke various developments that involve the form of procedural arrangements as signals that there is a convergence between the "common

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[35] *Supra*, note 30.

[36] Hilary Hehman, *Findings of the Study of California Class Action Litigation 2000-2006: First Interim Report* (San Francisco: Administrative Office of the Courts, Office of Court Research, 2009), online: <http://www.courtinfo.ca.gov/reference/documents/class-action-lit-study.pdf>, at 4.

[37] For example, the *Class Action Fairness Act*, *supra*, note 30, bristles with problems of application. See Richard Marcus, "Assessing CAFA's Stated Jurisdictional Policy" (2008) 156 U. Pa. L. Rev. 1765, at 1782-88 (analyzing the difficulties of applying the Act).

law" and the "civil law" procedural arrangements. Although saying that there has been a convergence is true, it seems to me that — at least from an American perspective — the huge differences in content matter far more than the modest convergence in form.

Certainly, there have been some notable points of convergence in matters of form. The American case management movement has developed broad momentum since emerging in a few metropolitan federal district courts in the 1960s and 1970s, and significant aspects of case management are written into the Federal Rules.[38] Chayes saw such aggressive judicial action as a central consequence of the emergence of what he called public law litigation — where "[t]he judge is the dominant figure in organizing and guiding the case."[39] In some ways, this development resembles the judicial role one finds more frequently in civil law systems, where the judge has traditionally played a more active role. The traditional American judge was portrayed in 1975 by (Judge) Marvin Frankel, who wrote that "[t]he ignorance and unpreparedness of the judge are intended axioms of the system."[40] He added:

> The ignorant and unprepared judge is, ideally, the properly bland figurehead in the adversary scheme of things. Because the parties and counsel control the gathering and presentation of evidence, we have no fixed, routine, expected place for the judge's contributions.[41]

In the last 30 years, it has seemed that Chayes's vision has predominated — at least as a matter of form — much more strongly than Judge Frankel's. Has this meant that the adversarial system has declined?

When one looks at content, it is not so clear that we have seen such a dramatic shift in the generally passive role of the American judge. To the contrary, it seems that we have seen the American judge become more active because we have equipped the lawyers with such expanded powers in the last half-century; somebody had to rein them in.[42] Although the rules now prescribe quantitative limits for some kinds of discovery, and

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[38] See, *e.g.*, Fed. R. Civ. P., *supra*, note 21, Rule 16(b).

[39] Chayes, *supra*, note 23, at 1284.

[40] Marvin Frankel, "The Search for Truth: An Umpireal View" (1975) 123 U. Pa. L. Rev. 1031, at 1042.

[41] *Id.*

[42] See Richard Marcus, "Reining in the American Lawyer: The New Role of American Judges" (2003) 27 Hast. Int'l & Compar. L. Rev. 3. For another dissection of these points, see Thomas Rowe, "Authorized Managerialism Under the Federal Rules — And the Extent of Convergence with Civil-Law Judging" (2007) 26 Swn. Univ. L. Rev. 191 (concluding that, although managerial judging moves away from the classic adversarial model, it also remains significantly different from civil law systems).

lawyers may go beyond these limits only by stipulation or with judicial authorization, the lawyers remain free to pursue discovery within those limits as they please. And the willingness of judges to resolve disputed merits issues while they manage cases has not significantly increased. Indeed, it was only a federal rule amendment that ensconced, in detail, their obligation to confront such issues in at least one important sphere — namely, with regard to the approval of proposed settlements in class actions.[43] It may well be that the American conception of the "inquisitorial" judge of the continent[44] is overstated. Nonetheless, the content of the change in judicial behaviour in the United States seems closely related to the judicial appreciation that, otherwise, lawyers would be unchecked in their use of vast, new powers, which have no parallel in other legal systems.

Somewhat similarly, the "convergence" that might currently be seen by some in class or aggregate litigation seems to look on examination as something that is not significant.[45] More than 40 years ago, the American class action became an engine of remarkable social and economic power. The 1966 revision of the federal class action rule[46] was intended, in large measure, to empower the courts to implement an aggressive strategy of social change through litigation. That procedural change contributed greatly to the emergence, a decade later, of the "public law litigation" phenomenon that Chayes has described. The small claims class action, meanwhile, became a very forceful device for achieving law enforcement goals against alleged malefactors. There are certainly legitimate criticisms of the American class action experience, which undoubtedly has, on occasion, enriched lawyers who have filed dubious suits and thereby mulcted companies that had really done nothing wrong. It has, however, surely been a forceful device.

The European approach to such issues seems worlds away, even if the forms that have been adopted bear some similarity to the American solution. For example, the 1966 approach in the United States adopted an "opt-out" method for "common question" class actions.[47] We are told that the European reaction to this arrangement is that it improperly overrides

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[43] See Fed. R. Civ. P., *supra*, note 21, Rule 23(e) (specifying that judges are to review and evaluate proposed settlements of class actions).

[44] See, *e.g.*, John Langbein, "The German Advantage in Civil Procedure" (1985) 52 U. Chicago L. Rev. 823.

[45] See Hodges, *supra*, note 12 (reporting on this phenomenon).

[46] Fed. R. Civ. P., *supra*, note 21, Rule 23.

[47] *Id*.

an individual's control of a claim, so that only an "opt-in" method would work.[48] Frankly, regarding a consumer's "right" to control a $5 claim as important enough to defeat class action status seems bizarre. When the opt-in method was proposed as an alternative in the United States in the late 1990s, it was roundly denounced as draining the force from class actions; an opt-in class action would be such a feeble device that it could not meaningfully be compared to the opt-out variety. This comparison underscores, but understates, the difference between the U.S. and the European content of class action procedures. In the United States, the opt-out procedure is only permitted in "common question" class actions that seek damages.[49] For other class actions — particularly those like civil rights class actions that seek injunctive relief for the class — there is no provision in the rules even for notice, much less a right to opt out.[50] In 2001, it was suggested that the class action rule be changed in order to direct the judge to give some notice to class members of the pendency of the case (not including a right to opt out). But even that proposal was rejected after objections were made to the effect that even a notice requirement would unduly hobble the use of class actions to effect social change. Whatever convergence there has been is vastly overshadowed by the divergence that remains.

The handling of American discovery provides a fertile example of convergence that really does not converge. In 1996, for example, Japan introduced the opportunity to engage in some discovery.[51] Additionally, in 2002, Germany introduced provisions that authorized the court to order a party to produce documents or other records that any of the parties referred to during the proceedings.[52] Against a background where compelled

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[48] See, *e.g.*, Astrid Stadler, "Aggregate Litigation — Group/Class Actions in Germany" (preliminary version of a paper prepared for the Conference of the Association of International Procedural Law, Faculty of Law, Oxford University, March 18-21, 2009), at 11. With regard to class actions seeking small damages, Stadler explains that they "would work only on an opt-out basis, which does not seem acceptable in terms of individual rights of the victims". Whether or not this attitude is universal on the Continent may be debatable. See Andrea Giussani, "Enter the Damage Class Action in European Law: Heading Towards Justice on a Bus" (2009) 28 C.J.Q. 132, at 136, n. 10 (suggesting, with examples, that the supposed European antipathy towards opt-out class actions is not nearly as universal as some contend).

[49] See Fed. R. Civ. P., *supra*, note 21, Rule 23(c)(2)(B)(v) (providing that, in Rule 23(b)(3) class actions, class members must be allowed to exclude themselves).

[50] See *id.*, Rule 23(b)(2) (class actions for injunctive relief).

[51] See, *e.g.*, Carl Goodman, *Justice and Civil Procedure in Japan* (Oxford: Oxford University Press, 2004), at 283-88 (describing Japanese process as "loosely copied from the *Federal Rules of Civil Procedure* provisions dealing with interrogatories").

[52] See Gerhard Walter, "The German Civil Procedure Reform Act 2002: Much Ado About Nothing?" in Nicolò Trocker & Vicenzo Varano, eds., *The Reforms of Civil Procedure in Compara-*

disclosure of evidence is forbidden and there is an insistence that the pleadings include the evidence that is being relied upon, these developments might be cited as examples of a move by "civil law" jurisdictions toward the American model. In a sense, one could say that they are — as a matter of form. But they are such cautious moves that, as a matter of content, they are worlds apart from American practice. Thus, with respect to Japan, we are told that even this small opportunity to request information from an adversary has been entirely ineffective because there is no enforcement mechanism. And in Germany, the power of the court to order disclosure only applies when a requesting party refers with precision to a specific document. Even then, a counter-argument might be raised to the effect that parties have a right to refuse to turn over documents that will show that they should be held liable.

To American eyes, these measures are so small as to seem meaningless. We have long since put to rest the notion that a party may refuse to produce harmful (*i.e.*, self-incriminating) information.[53] Even very small changes that might be said to move the American handling of discovery toward the "civil law" skepticism about required disclosure of information excite huge opposition.[54] Despite that hoopla, the scope of change in 2000 has produced almost no effect. Consider the following description of American federal-court discovery by a federal judge in 2008:

> Even after the 2000 amendments to Rule 26, it is well established that courts must employ a liberal discovery standard in keeping with the spirit and purpose of the discovery rules. Accordingly, discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought has no possible bearing on the claims and defenses of the parties or otherwise on the subject matter of the action.[55]

Meanwhile, a whole new area of discovery has opened up — namely, e-discovery, which is the pursuit of electronically stored information for

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tive Perspective (Torino: G. Giappichelli, 2005) 67, at 76 (describing the enhanced power to order production of evidence in the new German code as "close to revolutionary").

[53] See *Fisher v. United States*, 425 U.S. 391 (1976) (holding that a subpoena for documents does not raise issues under the Fifth Amendment right against self-incrimination merely because the documents may incriminate).

[54] This is suggested by the experience, in 2002, with the change to the scope of discovery. See the text preceding note 35, *supra*.

[55] *Wrangen v. Pennsylvania Lumbermans Mutual Insurance Co.*, 593 F.Supp.2d 1273, at 1278 (S.D. Fla. 2008). See also Thomas Rowe, "A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery" (2001) 69 Tenn. L. Rev. 12 (finding that the change of the rule, in defining the scope of discovery, produced very limited changes in actual decisions).

use as evidence in litigation. There are already law school casebooks about this subject,[56] and vendors that offer e-discovery response services to law firms are forecast to take in $4 billion in revenues in 2009. Therefore, although one can say that the forms of the changes to American practice and the forms of the changes to practice in Japan and Germany show some convergence, the content of the actual practice is so different in each of these nations that real convergence seems as remote as ever.

A primary explanation of this divergence between convergence in form and convergence in content is the distinctive private enforcement feature of American civil litigation, which was introduced in Part III, above. At times, American procedural reforms come up against counterpressure from this source. A prime example is the Supreme Court's 2007 decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[57] which dealt with the pleading requirements of the *Private Securities Litigation Reform Act.*[58] That legislation responded to "crisis" concerns about securities class actions by imposing a variety of procedural requirements on such cases. To prevail in such claims, plaintiffs must prove *scienter*. The PSLRA requires that a complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind [*scienter*]."[59] It also directs that plaintiffs be allowed no discovery until they have satisfied this standard in their pleading.[60]

The PSLRA pleading requirements and discovery stay seem, therefore, to represent convergence. Many civil law regimes require plaintiffs to plead both factually specific allegations and evidentiary materials, and permit only limited production of information thereafter. In essence, the PSLRA places a similar hurdle in front of plaintiffs pursuing claims of securities fraud. In its opinion, however, the Court did not begin with the PSLRA's pleading and discovery provisions, but rather by emphasizing that it "has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought by the Department of

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[56] See Shira Scheindlin & Daniel Capra, *Electronic Discovery and Evidence* (Eagen, Minnesota: West, 2008).

[57] 551 U.S. 308 (2007) [hereinafter "*Tellabs*"].

[58] Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of Title 15 and Title 18, United States Code) [hereinafter "PSLRA"].

[59] *Id.*, 15 U.S.C., §78u-4(b)(2).

[60] *Id.*, 15 U.S.C., §78u-4(b)(3) ("all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss").

Justice and the Securities and Exchange Commission (SEC)".[61] It thus invoked the very private enforcement impulse that so distinguishes American civil litigation. This is hardly a sign of convergence. Indeed, some regard this particular manifestation of the private enforcement impulse as overreaching: "[t]he broad reach of U.S. securities laws has been criticized as a form of legal and economic imperialism."[62]

What makes the Supreme Court's invocation of private enforcement in construing the PSLRA so striking is that it was the courts that had *created* the whole private enforcement regime in the first place. Congress had never authorized private suits as a means to enforce the securities fraud laws (not, at least, until 1995, when it adopted the PSLRA in order to rein in such suits). Instead, it created the Securities and Exchange Commission, a governmental agency, to enforce these laws. Only judicial action "implied" a private right of action to sue for violation of the regulatory regime.[63] When Congress finally acted to constrain these suits, however, the Court treated its own impulse toward private enforcement as an important factor weighing against unduly strict interpretation of the procedural requirements that had been explicitly imposed by Congress.

The Court's attitude jibes with the views of academics and regulators:

> [T]he Reform Act [PSLRA] is likely to allow only the more flagrant and obvious cases of securities fraud to proceed past a motion to dismiss, while being overinclusive in its elimination of cases where it is more difficult to identify, and therefore to plead, fraud. Presumably, the SEC, with its limited resources, pursues the flagrant and obvious cases of securities fraud. Arguably, however, the more difficult to identify frauds are precisely the ones that the plaintiffs, who function as private attorneys general, pursue. Indeed, the Commissioner of the SEC has stressed that private mechanisms are important to the enforcement of the [Securities] Acts. Because the plaintiffs lack access to the information the Reform Act requires them to plead at the motion-to-

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[61] *Tellabs*, *supra*, note 57, at 313. Notably, the SEC itself appears to subscribe to the Supreme Court's attitude about its ability to enforce the antifraud law. Joanna Chung, "SEC to Enlist Help on Fraud" *Financial Times* (April 1, 2009), at 15: "Mary Schapiro, the new chairman of the US Securities and Exchange Commission, is looking to addressing the agency's limited resources by enlisting more private sector help to uncover fraud." See also Elizabeth Chamblee Burch, "Securities Class Actions as Pragmatic Ex Post Regulation" (2008) 43 Ga. L. Rev. 63 (lauding many of the features of securities fraud class actions as the means to enforce securities fraud provisions).

[62] Pamela Rogers Chepiga & Lanier Saperstein, "Trends in Global Securities Litigation" (June 3, 2009) 42 Ref. of Secur. & Commod. Lit. 139, at 139.

[63] The antitrust laws are different; in that case, Congress did explicitly authorize private suits by those who are injured due to violation of those laws.

> dismiss stage, however, the strict application of the heightened-pleading standard is likely to result in unredressed fraud.[64]

When plaintiffs can satisfy the pleading requirements, moreover, the ban on discovery ends, so that the "convergence" resulting from the legislation is really only a delay. Indeed, it might even mean that cases are strengthened:

> Though lax pleading requirements made the nuisance value of a suit much more difficult to address through pretrial motions, it must also be understood that the Reform Act's heightened pleading standard credentials suits that survive pretrial motions so that [they] will have a greater settlement value than such suits had on average before the Reform Act. … [C]ounsel should feel more confident in the case after satisfying the new pleading requirements than the counsel who had previously had to know less and plead less to withstand a challenge to the pleadings.[65]

In sum, even where there has been seeming convergence, the distinctive American commitment to private enforcement means that the actual content of American litigation is likely to be different from that of most other systems. It is true that some handling of summary judgment in the United States seems to have curtailed the divergence between American willingness to leave things to the jury and the inclination in other systems to have the judge decide.[66] Overall, however, it seems that finding convergence depends on exalting similarities of form over great differences in content.

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[64] Hilary Sale, "Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 and '34 Act Claims" (1998) 76 Wash. U. L. Rev. 537, at 564.

[65] James Cox, "Making Securities Fraud Class Actions Virtuous" (1997) 39 Ariz. L. Rev. 497, at 520.

[66] A striking example is *Scott v. Harris*, 127 S.Ct. 1769 (2007), in which the Court held that a videotape of a high-speed police pursuit of the plaintiff, who was injured when his car was rammed by the police, precluded submission of the case to a jury. The majority of the Court, over a strong dissent, concluded that no reasonable jury could find that the plaintiff had been in control of his car and that ramming him was therefore use of excessive force. For a challenge to the Court's decision, see Dan M. Kahan, David A. Hoffman & Donald Braman, "Whose Eyes are You Going to Believe? *Scott v. Harris* and the Perils of Cognitive Illiberalism" (2009) 122 Harv. L. Rev. 837 (arguing that submitting the case to a jury might have led to a different result).

VI. CONCLUSION

Optimists may see international procedural convergence as inevitable and irresistible. Certainly, one can make a good case for believing that such convergence would be desirable. As people and institutions from different countries increasingly interact and, as a consequence, have disputes, a shared set of procedures would be valuable. It would be one way for the world to move forward onto broad, sunlit uplands.

I began by acknowledging that I speak mainly of American exceptionalism, not of the common law / civil law divide. In terms of procedure, that divide may be easing. Indeed, at least in regard to group or class actions, that divide may not even exist when one surveys and evaluates European reactions, as Hodges has recently done. But it does seem to me that optimists may be tempted to overemphasize the recent evolution in procedure as an indication of genuine convergence between America and the rest of the world. Although there has surely been convergence in some matters of form — a good example of which would probably be judicial management of litigation — it is much less clear that the content of this convergence is really significant. What is clear is that the seeming convergence that has resulted from changes to some non-American legal systems — such as the introduction of something like discovery in Japan or Germany — depends on provisions that are so different in content from the American version that they are insignificant as evidence of meaningful convergence. Perhaps the American embrace of private enforcement of law, which began in the mid-20th century, will fade in the 21st. For the present, however, although American procedure may be closer to that of the rest of the world than it was a generation ago, it is not much closer.

Mediation and Civil Justice: A Public-Private Partnership?

Peter L. Murray[*]

I. INTRODUCTION

For the last 30 years in the United States and for the last 10 years in England, Germany, Italy and other continental systems, various forms of mediation have increasingly been incorporated into the processes of civil justice. Inter-party mediation by neutral third parties to facilitate settlements of civil disputes has become more and more commonplace in all public processes of dispute resolution. This mediation can take several forms, ranging from informal efforts by the trial judge to encourage parties to settle the pending dispute, to highly formalized settlement proceedings that are conducted by private professional mediators who are retained by the parties or appointed by the court.

To date, court-annexed mediation has met with a generally enthusiastic reception by parties, courts, lawyers and academics. There is an abundant literature that documents the value of mediation techniques in the facilitation of case settlement, both anecdotally and statistically.[1] The predominant tone of the academic literature to date praises mediation for its flexibility, its maintenance of party autonomy, its ability to save the costs of contested proceedings, and its value in the termination of disputes by agreement.[2] Court decisions, on the other hand, are discounted

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[1] See, *e.g.*, Oscar Chase, *Law Culture and Ritual: Disputing Systems in Cross-Cultural Context* (New York: NYU Press, 2005), c. 6; Owen Fiss & Judith Resnik, *Adjudication and Its Alternatives: An Introduction to Procedure* (Rochester: Foundation Press, 2003); Thomas Hitter, "What Is So Special About the Federal Circuit? A Recommendation for ADR Use in the Federal Circuit" (2004) 13 Fed. Cir. B.J. 441, at 443 [hereinafter "Hitter"]; and F. Neate, "Mediation: A Constructive Approach to Dispute Resolution" in *Global Reflections on International Law, Commerce and Dispute Resolution* (Paris: International Chamber of Commerce, 2005) 557.

[2] See, *e.g.*, Leonard L. Riskin, "Mediation and Lawyers" (1982) 43 Ohio St. L.J. 29, at 34 [hereinafter "Riskin, 'Mediation and Lawyers'"] ("Mediation offers some clear advantages over adversary processing: it is cheaper, faster, and potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants"); Leonard L. Riskin, "Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed" (1996) 1 Harv. Negot. L.

as expensive, delayed, and, often, insufficiently adapted to the parties' real needs.[3]

The American civil justice system, with its high level of adversity and its expensive cost profile, based on the jury trial model, has offered particularly fertile ground for the growth of alternative dispute resolution (ADR) and the incorporation of this ADR into public justice processes. Incorporation of ADR modalities in civil justice processes has proceeded more slowly in Europe. In some legal cultures, such as that of Germany, judges have traditionally exercised a mediatory function in order to encourage settlements at various points during the course of the litigation, and thereby to reduce the need for additional settlement facilitation services.[4] In other countries, it has taken time for an entrepreneurial ADR culture and industry to develop. However, at the present time, various forms of alternative dispute resolution services, primarily in the form of mediation, are beginning to appear on a regular basis in civil litigation in many civil law, as well as common law, jurisdictions.[5]

As mediation has become more ubiquitous in American civil justice, and more seriously considered in other countries, the initial unconditional enthusiasm with which it was regarded has become tempered: concerns have been expressed, based on both systemic considerations and observations of how ADR functions in practice.[6] Some of these concerns have been based on the private entrepreneurial nature of the

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Rev. 7, at 18 [hereinafter "Riskin, 'Understanding Mediators' Orientations'"] (describing problem definition as "[t]he focus of a mediation — its subject matter and the problems or issues it seeks to address"); and Lukasz Rozdeiczer & Frank E.A. Sander, "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach" (2006) 11 Harv. Negot. L. Rev. 1, at 33-34 (advocating mediation as a starting point in resolving disputes because of its flexibility and likelihood to lead to settlement).

[3] See Hitter, *supra*, note 1, at 444; Riskin, "Mediation and Lawyers", *id.*, at 34.

[4] See, *e.g.*, Peter L. Murray, "ADR und die Amerikanische Ziviljustiz" in Peter Gottwald, ed., *Aktuelle Entwicklungen des Europäischen und Internationalen Zivilverfahrensrechts* [*Current Developments of European and International Civil Procedure Law*] (Bielefeld: Gieseking, 2002) 25 [hereinafter "Murray, 'ADR und die Amerikanische Ziviljustiz'"]; Jan Malte von Bargen, *Gerichtsinterne Mediation* (Tübingen: Mohr Siebeck, 2008) [hereinafter "von Bargen"].

[5] See, *e.g.*, Hiram E. Chodosh, "The Eighteenth Camel: Mediating Mediation Reform in India" (2008) 9 German L.J. 251, at 255-56; Stephen Higgs, "Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court" (2007) 37 Envtl. L. 61.

[6] See, *e.g.*, Laurie Kratky Doré, "Public Courts Versus Private Justice: It's Time to Let Some Sun Shine In on Alternative Dispute Resolution" (2006) 81 Chi.-Kent L. Rev. 463 [hereinafter "Kratky Doré"]; Deborah R. Hensler, "Suppose It's Not True: Challenging Mediation Ideology" (2002) J. Disp. Resol. 81; Carrie Menkel-Meadow, "Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts" (2009) 14 Harv. Negot. L. Rev. 195; Nancy A. Welsh, "The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?" (2001) 6 Harv. Negot. L. Rev. 1.

American ADR industry and its effect on institutions of public justice.[7] Others relate to the need of institutions of public justice to maintain accountability and transparency, while providing ADR practitioners with the conditions of confidentiality and flexibility that are needed to foster fruitful settlement activity.[8] The pooled perspectives of proceduralists from common law and civil law frames of reference may well be able to contribute to the development of solutions to these problems as they appear in their respective legal contexts.

II. PUBLIC AND PRIVATE MEDIATION SERVICES

The notion of using third parties to facilitate the consensual resolution of private disputes is as old as the hills, and it extends far beyond the purview of what is now considered to be civil justice. Various forms of mediatory activity can be found in many contexts of personal and economic interaction between the members of every human society. The forms of such facilitation, as well as the sources and the roles of the mediators and the parties, are almost infinite in variety. This paper is not intended to address this broad concept of mediation as a social or economic phenomenon. The focus of this discussion will be mediation in the context of those civil disputes that have been — or that are being — presented to a civil court that has the power to render a decision with respect to the subject matter of the dispute.

Mediation programs that are associated with institutions of civil justice are of two types. In a few cases in the United States, and more frequently abroad, mediation services are provided by functionaries in the court system who are paid by public funds and who do not receive compensation, directly or indirectly, from any private party. For instance, in many United States Courts of Appeals, appellate cases are diverted to mandatory mediation, which is provided by retired judges or other court appointees who do not perform mediation services on a private fee-for-services basis.[9] In some jurisdictions, domestic relations case managers

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[7] Peter L. Murray, "The Privatization of Civil Justice" (2008) 12 Zeitschrift für Zivilprozess International 283 [hereinafter "Murray, 'Privatization'"]; also available as Peter L. Murray, "The Privatization of Civil Justice" (2008) 91 Judicature 272.

[8] See, *e.g.*, Edward Brunet, "Questioning the Quality of Alternative Dispute Resolution" (1987) 62 Tul. L. Rev. 1 [hereinafter "Brunet"]; Judith Resnik, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1995) 10 Ohio St. J. on Disp. Resol. 211.

[9] For example, the First Circuit Court of Appeals mandates mediation of all civil appeals in a settlement program that is run by either a judge or a person who is appointed by the court. See United States Court of Appeals for the First Circuit, *Federal Rules of Appellate Procedure: First*

provide mediation services to parties in pre-divorce matters.[10] Public mediation in labour disputes has also been around for a long time.

In Germany, the *Zivilprozessordnung* (ZPO),[11] the German code of civil procedure, has long required judges to attempt to facilitate settlement discussions among the parties in all civil cases. Many German judges have no compunctions about discussing possible settlements of pending cases with the parties.[12] Most American judges have historically been reluctant to discuss concrete settlement terms of pending litigation with the parties and their counsel for fear of showing partiality or prejudging the case. German judges are required to communicate their tentative conclusions of fact and law to the parties before reaching a final decision, so that the parties can focus their arguments in the most effective fashion.[13] Thus, it may not be so remarkable for them to share their opinions about potential settlement scenarios as well.

In very recent years, a number of German pilot projects have augmented the trial judge's role in encouraging settlement by providing for court-annexed mediation services. Another judge of the court in which the case is pending provides these services.[14] This development recognizes the fact that, in some cases, parties might not be completely frank, nor ready to make concessions, when they are talking with the judge who will decide their case. The judges who provide mediation receive special

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Circuit Local Rules, r. 33, online: United States Court of Appeals for the First Circuit, online: <www.ca1.uscourts.gov/files/rules/rules.pdf>. The Second Circuit also utilizes mandatory mediation. Each case is randomly assigned to a circuit mediator who is employed by the court. See United States Court of Appeals for the Second Circuit, *Civil Appeals Management Plan*, at Part V (New York: U.S. Court of Appeals for the Second Circuit, 2007), online: United States Court of Appeals for the Second Circuit, Staff Counsel, online: <http://www.ca2.uscourts.gov/ staffcounsel.htm#Assignment>. For a comprehensive assessment of court-annexed mediation in the United States Courts of Appeals, see Shawn P. Davisson, "Privatization and Self-Determination in the Circuits: Utilizing the Private Sector within the Evolving Framework of Federal Appellate Mediation" (2006) 21 Ohio St. J. on Disp. Resol. 953.

[10] In the State of Maine, family law magistrates function in a mediative capacity when they work out provisions with the parties, pending divorce, for custody, support and living arrangements. See *Maine Rules of Civil Procedure*, M. R. Civ. P. 110A(a). In Delaware, divorce and child custody mediation is scheduled as a pre-trial conference with a court staff mediator, primarily to "attempt amicable settlement of all unresolved issues". See *Delaware Family Court Civil Rules*, Del. Fam. Ct. Civ. R., r. 16(a).

[11] Zivilprozessordnung [hereinafter "ZPO"].

[12] For a discussion of the case settlement function of German judges, see Peter L. Murray & Rolf Stürner, *German Civil Justice* (Durham: Carolina Academic Press, 2004), at 487-90 [hereinafter "Murray and Stürner"].

[13] ZPO, *supra*, note 11, §139(4); *id.*, at 166-77.

[14] For a comprehensive description and discussion of the various pilot projects for court-annexed mediation in Germany, see von Bargen, *supra*, note 4, at 70-114.

training for this function.[15] Although there has been some development of private mediation in Germany, it is significant that the judicial establishment is currently providing almost all of the court-annexed mediation.[16]

In the United States, however, private professional mediators, who generally function on a fee-for-services basis, provide the great bulk of mediation in civil justice contexts. For example, mediation has been required in most civil actions in the Maine Superior Court since 2002.[17] The parties may choose whomever they wish to mediate their controversy. Failure to agree on a mediator results in the appointment of a mediator from a list. All mediators are private professionals who charge on a fee-for-services basis. Whether the mediator is chosen by the parties or is nominated by the court, the parties must pay his or her fee, and they usually share this cost equally. If the mediation results in an agreement, the mediated disposition is accepted and incorporated into the court's final judgment without further examination by the trial judge. This pattern holds for the great bulk of court-annexed mediation programs in the United States.

The past 30 years have seen the development of a vibrant mediation profession, where a large and growing number of full and part-time mediators vie to provide mediation services on a fee basis in every one of the American states.[18] Until now, this profession has remained relatively unregulated. Recently, there has been some regulation of mediators'

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[15] The nature and extent of mediation training that is provided to participating judges varies among the various pilot projects. In all cases, it is substantial, generally of the order of 80-100 hours of training in the classroom and in simulated mediation proceedings. For descriptions of some of the training that is provided in some of the pilot projects, see von Bargen, *id.*, at 73, 75, 78, 80, 82, 87, 91.

[16] See von Bargen, *id.*, at 62 (noting that, although mandatory reference to private mediation has been tried in several German states, it has not been met with enthusiasm, ostensibly because of the additional cost and delay involved in scheduling and conducting the mediation, and in compensating the private mediator. See also Murray, "ADR und die Amerikanische Ziviljustiz", *supra*, note 4 (noting that the quasi-mediative role of German judges in encouraging settlement discussions in ordinary civil cases has impeded the growth of a private mediation industry).

[17] See M. R. Civ. P., *supra*, note 10, r. 16B (effective January 1, 2002). For a discussion of Florida's extensive mandatory court-ordered mediation program — which utilizes private, licensed mediators — see Sharon Press, "Institutionalization of Mediation in Florida: At the Crossroads" (2003) 108 Penn St. L. Rev. 43, at 55 [hereinafter "Press"].

[18] See, *e.g.*, Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges & Lawyers: A Joint Project of the Federal Judicial Center and the CPR Institute for Dispute Resolution* (Washington, DC: Federal Judicial Center, 1996), at 4 (describing mediation as "the primary ADR process in the federal district courts"); Press, *id.*, at 55 (observing that Florida's "'official' statistics only tell part of the story because court supported mediators and mediation programs exist alongside a thriving private mediator sector").

qualifications.[19] In many states, however, parties who are required, by court rule or by statute, to mediate their cases are entirely free to pick their mediator, regardless of objective qualifications or licence requirements.[20]

At the outset of the mediation movement in the 1970s, mediation was very much a part-time occupation that was undertaken by persons who relied on other activities as their primary sources of income. In recent years, however, the number of professionals who make their livings from mediation and other ADR services has grown. In addition, mediations are now frequently performed by lawyers in law firms that offer mediation services as part of their professional practice.[21] It is fair to say that there now exists a robust alternative dispute services profession, if not an industry, in the United States. Although this development is not as far advanced in Europe and East Asia, the trend seems to be somewhat in the same direction.[22]

III. PROBLEMS WITH THE PRIVATE MODEL

Even as privately provided mediation services have come to play an increasingly important role in the processes of American public civil justice, the enthusiasm with which mediation has been received has become tempered by some concern that certain attributes of private mediation

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[19] This has taken place under the auspices of private associations of mediators, as well as by statutory or court rule regulation. For instance, the Massachusetts Council on Family Mediation has adopted Standards of Practice for its members, as well as a procedure of certification of mediators in family law matters. See Massachusetts Council on Family Mediation, online: <http://www.mcfm.org>. For a discussion of the relationship of mediation to the regulated practice of law, see Jacqueline M. Nolan-Haley, "Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective" (2002) 7 Harv. Negot. L. Rev. 235.

[20] As I have noted above, this is true in the State of Maine. See M. R. Civ. P., *supra*, note 10, r. 16B(h). In Florida, the parties may agree upon a certified mediator or "a mediator who does not meet the certification requirements of these rules, but who, in the opinion of the parties and upon review by the presiding judge, is otherwise qualified by training or experience to mediate all or some of the issues in the particular case". *Florida Rules of Civil Procedure*, Fla. R. Civ. P. 1.720(f)(1)(B).

[21] See generally Bennett G. Picker, "ADR: New Challenges, New Roles and New Opportunities" (2001) 56 APR Disp. Resol. J. 20.

[22] In England, courts routinely encourage resort to mediation during litigation, and enforce their recommendations with stays pending mediation. See Neil Andrews, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England* (Tübingen: Mohr Siebeck, 2008), at 212-44 [hereinafter "Andrews"]. For a discussion of the growing importance of mediation in Germany, see von Bargen, *supra*, note 4, at 7-11. The European Commission has also embraced mediation, and it has proposed a directive on the topic. See Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters {SEC(2004) 1314}*, (2004) COM/2004/718 (COM(2004) 718 final), 2004/0251 (COD) (Brussels: October 22, 2004).

services may be compromising vital values of public justice.[23] Mediators perform important roles in facilitating settlements of cases that have been confided to public justice for resolution. The potential of economic influence on their function from repeat players, whose goodwill can enhance mediation fee income, is at serious odds with the ideal that public justice should be totally insulated from such considerations. Mediation processes are conducted in an atmosphere of confidentiality in order to foster frank interchange among the parties. However, shrouding these activities in secrecy compromises the transparency of public justice processes, and runs a risk that potential abuses in mediation processes may not easily be brought to light. Mediated settlements are routinely incorporated into court dispositions, and are given the force of *res adjudicata*, even though there is no judicial review of their procedural fairness or substantive quality. Is public justice rubber-stamping results that would not stand the test of justice at all? Without taking anything away from the value of mediatory techniques to promote the settlement of litigated disputes, these considerations may suggest that the ongoing incorporation of private mediation into public justice processes will require more care and thoughtfulness, in order to ensure that "justice" does not suffer.

1. Economic Influence and Impartiality

In order to promote settlement, a person who is acting as a mediator with respect to a matter in civil litigation exercises significant neutral power to structure and facilitate negotiations between the parties. While many mediators maintain that their role is purely facilitative, it is also clear that mediators' reactions to the parties' respective presentations, whether express or implied, can exercise subtle, but significant, pressures toward settlement on a particular basis.[24] Some mediators are more ready than others to give feedback on, and evaluations of, party positions.[25] However, all mediators have a certain amount of power to guide

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[23] See, *e.g.*, Murray, "Privatization", *supra*, note 7; Brunet, *supra*, note 8.

[24] See Riskin, "Understanding Mediators' Orientations", *supra*, note 2, at 27-28 (describing the mediator techniques associated with evaluative mediation as proposing a settlement, pushing parties to accept a settlement, predicting court or other outcomes, and assessing the strengths and weaknesses of each side's case).

[25] See Kimberlee K. Kovach & Lela P. Love, "'Evaluative' Mediation Is an Oxymoron" (1996) 14 Alternatives to High Cost Litig. 31; Lela P. Love, "The Top Ten Reasons Why Mediators Should Not Evaluate" (1997) 24 Fla. St. U. L. Rev. 937; and Robert B. Moberly, "Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?" (1997) 38 S. Tex. L. Rev. 669, at 675 (theorizing that "mediator evaluation can assist the parties in their self-determination efforts").

the parties in a particular direction — toward a resolution — whether they exercise this power consciously or not.

At the same time, it has become increasingly clear that mediators who rely on the provision of mediation services, either for a living or as part of a professional practice, are potentially subject to economic influences by parties or interests who are "repeat players".[26] Litigating parties who are required to participate in court-annexed mediation are almost always given the right to choose their mediators. A party that is frequently involved in litigation, such as a large corporate player or an insurance company, can be expected to exercise its right of choice in favour of mediators who have tended to facilitate results in previous cases that it has found to be particularly satisfactory. By the same token, it happens in many cases that a mediator who is economically dependent on a flow of business cannot help but be aware that one of the mediating parties is likely to be the source of much more future business than the other.[27] The results of this kind of subtle, but real, economic influence on private mediators are very hard to gauge. Recent studies have demonstrated a very marked influence of repeat players on private arbitrators.[28] While the influence of a mediator on a case result is subtler than the ability of an arbitrator to make an award, the notion that a mediator has a private economic interest in the outcomes of his or her mediation activity is inconsistent with the standards of absolute neutrality and impartiality that are associated with public justice. It has been observed that it is a little ironic to maintain a civil justice system that is fully insulated from

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[26] Marc Galanter famously summarized the advantages of repeat players. See "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law & Soc'y Rev. 95, at 98-103. These advantages include: (1) experience leading to changes in how the repeat player structures the next similar transaction; (2) expertise, economies of scale, and access to specialist advocates; (3) informal continuing relationships with institutional incumbents; (4) reputation and credibility in bargaining; (5) long-term strategies facilitating risk-taking in appropriate cases; (6) influence over rules through lobbying other use of resources; (7) playing for precedent and favourable future rules; (8) distinguishing symbolic and actual defeats; and (9) resources invested in getting rules favourable to them implemented.

See also Lisa B. Bingham, "On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards" (1998) 29 McGeorge L. Rev. 223.

[27] This structural incentive in private arbitration has been evident to observers of judicial and quasi-judicial institutions for some time. See, *e.g.*, Paul G. Carrington, "Self-Deregulation, A 'National Policy' of the Supreme Court" (2002) 3 Nev. L.J. 259; W. Mark C. Weidemaier, "Arbitration and the Individuation Critique" (2007) 49 Ariz. L. Rev. 69.

[28] For a well-documented study of this phenomenon in the credit card industry, see John O'Donnell *et al.*, "The Arbitration Trap; How Credit Card Companies Ensnare Consumers" *Public Citizen* (September 27, 2007). See also Carrie Menkel-Meadow, "Do the 'Haves' Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR" (1999) 15 Ohio St. J. on Disp. Resol. 19; Murray, "Privatization", *supra*, note 7.

economic influence, and then to permit the great bulk of its cases to be resolved under the auspices of private neutrals who are subject to the same economic influences from which we so rigorously insulate our judges.[29]

Party choice is not an adequate safeguard against this kind of economic interest. Parties likely to be disadvantaged by repeat-player bias of ADR neutrals have very little ability to get information about either the performance of mediators or the previous matters that they have mediated that involved the same parties or interests.[30] Only the repeat player can keep score on the mediators and the other professionals whose services it retains. In the absence of a comprehensive mediator disclosure regime, the one-shot player — typically the personal injury plaintiff, the consumer or the small commercial party — is at the mercy of the repeat player in the selection of mediators who may be subject to subtle economic interests to favour the repeat player's interests.

2. Opacity and Public Justice

Transparency and publicity have long been considered to be core elements of public justice, and fundamental guarantees of its fairness and regularity. In the United States, court records and proceedings are generally open to the public. Only in exceptional cases are courtrooms and court records closed and sealed — and for good cause (generally, in order to protect some highly vulnerable person or information). It is hard for an American jurist to think of civil justice other than as public justice.

The widespread incorporation of mediation as a mandatory element of civil justice systems is beginning to create a serious tension with the "public" aspect of public civil justice. Mediators insist that successful mediation requires an atmosphere of confidentiality, in order to induce the parties to speak out and interact with the mediator and each other in a free and untrammelled manner.[31] Traditional rules of evidence, which

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[29] See Murray, "Privatization", *id.*, at 300-303.

[30] ADR professionals have resisted required disclosure of prior engagements and participants. See Jay Folberg, "Arbitration Ethics: Is California the Future?" (2003) 18 Ohio St. J. on Disp. Resol. 343, at 347 [hereinafter "Folberg"].

[31] See, *e.g.*, Andrews, *supra*, note 22, at 232-40; Pamela A. Kentra, "Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct" (1997) BYU L. Rev. 715, at 722 ("Confidentiality lies at the heart of the mediation process. Mediation would not be nearly as effective if the parties were not assured their discussions would remain private."); Craig

deny evidentiary admissibility to settlement offers, as well as to discussions and conduct in the course of settlement negotiations, are seen as inadequate guarantees of the level of confidentiality that the mediators deem desirable. Mediators wish to be able to assure the mediating parties that what happens during the mediation will never come to light outside the mediation, either in the case being mediated or otherwise.

The mediators' campaign for the confidentiality of mediation proceedings has culminated in the *Uniform Mediation Act*.[32] Despite the generality of its title, this uniform law primarily regulates mediation confidentiality.[33] The Act creates a privilege for all statements that are made by any party or mediator in a mediation session, and it protects mediators from being called as witnesses — subject in each case to a relatively narrow range of exceptions.[34] Putting aside the logical incongruity of grouping mediation discussions on the same plane as lawyer-client, physician-patient, and priest-penitent confidences, the comprehensiveness of the UMA privilege raises real questions about the appropriateness of such a cloak of secrecy about a process that is a part of public civil justice.[35] To require a party who has sought public justice to participate in a proceeding that is conducted by a private, neutral mediator, and which is subject to a privilege that prevents subsequent judicial access to what happened there, can make the concept of public justice somewhat hollow.[36] Considering the relatively high success rate with which mediation produces case settlements, this means that, for many cases, the crucial, neutral intervention that results in the disposition of a case takes place behind closed doors, outside the purview of the public, and is protected from later public scrutiny by a comprehensive privilege.

The opacity problem is exacerbated by the fact that, generally, no record is made of what transpires in the mediation. The statements of the parties and the mediator to each other are not recorded in any way. No

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McEwen, "The Rule Moves Backward" (2009) 24 Maine Bar J. 44 [hereinafter "McEwen"]; and von Bargen, *supra*, note 4, at 342.

[32] The *Uniform Mediation Act* [hereinafter "UMA"], was adopted by the National Conference of Commissioners on Uniform State Laws in 2001. To date, 10 American jurisdictions have adopted the Act in whole or substantial part: District of Columbia, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington.

[33] See National Conference of Commissioners on Uniform State Laws, UMA, §§ 7-8.

[34] *Id.*, § 4.

[35] Professor Judith Resnik has written extensively about the significance of publicity and community presence of institutions of civil justice. See, *e.g.*, Judith Resnik, *The Processes of Law: Understanding Courts and Their Alternatives* (New Haven: Yale Law School, 2004); Judith Resnik, "Courts: In and Out of Sight, Site and Cite" (2008) 53 Vill. L. Rev. 771.

[36] See Kratky Doré, *supra*, note 6.

detailed report or protocol is made. Court rules that require parties to engage in mediation do not require that any record be made of the process. On the contrary, typical court rules for mandatory mediation provide that, if the mediation fails to produce an agreement, then the only report that shall be made is that no agreement was reached. In the same way, a report of a successful mediation is limited to describing the agreement that was reached.[37] Mediators are not required to keep any notes of the proceedings, and they routinely destroy any notes that they do make, in order to frustrate any potential efforts to make them witnesses.[38]

Acknowledging the importance of some kind of guarantee to negotiating parties that their offers and responses in a mediated negotiation will not later be used against them — *i.e.*, in the court case that is being negotiated — one can ask whether the degree of secrecy that is sought by the mediation industry is really needed in order to make mediation work. Certainly, the importance of maintaining confidence in the transparency of public justice should be given serious weight in considering mediators' requests for ever greater mediation secrecy.

3. Accountability of Mediators

Also fundamental to the theory and practice of mediation, even court-annexed mediation, is an almost total lack of judicial oversight over the mediation process or the results that it obtains. A party who enters into an agreement in a mediation proceeding has very little recourse if he or she later concludes that either the process, or the agreement, was unfair.

The fact that a party must agree in order to be bound by any mediation result provides the basic guarantee of the fairness of the process and of the agreement that is reached. If a party thinks that the process is not fair, or that the proposed agreement is not fair, then that party can withhold his or her agreement, and the mediation will be for naught.

The problem with this justification is that we know that parties come to mediation with different levels of sophistication and economic power. In domestic relations mediation, at any rate, a high percentage of the

[37] See, *e.g.*, M. R. Civ. P., *supra*, note 10, r. 16B(h); Fla. R. Civ. P., *supra*, note 20, r. 1.730.

[38] See, *e.g.*, Michael Creelman, "Mediators' notes of the mediation — a mediator's protective device", ADR Bulletin: Vol. 1: No. 8, Article 2 (1999), available at <http://epublications.bond.edu.au/adr/vol1/iss8/2/>.

parties are without counsel.[39] Under these circumstances, there is a certain risk that the results of the mediation may be something other than a fairly negotiated reflection of the shadow of the law. Although a very high percentage of American civil cases settle, with and without mediation, this is no particular guarantee that all of these settlements are good settlements.[40] Factors such as delay, disparate bargaining power and financial exhaustion can play big parts.

All of this suggests that mediated proceedings and settlements could well use some level of judicial review. Parties who claim that the process was unfair, or that the "agreement" was one-sided or even fraudulent, should be able to petition a court to re-examine the process and the agreement. As a matter of constitutional law, matters that are delegated to administrative agencies receive both procedural and substantive judicial review. Is there a good reason why civil justice matters that are resolved through mediation should not be subject to the same?

Mediators recoil from the suggestion that there might be anything wrong with their process, such that it would need review. "We are good people. All we want to do is help the parties reach agreement. We do not do anything wrong." Most judges are also good people who are doing their best to do justice. This does not mean that we do not need those judges to be accountable for their processes and the results thereof, so that the errors of good judges, and the misdeeds of not-so-good judges, can be corrected.

The lack of transparency or of any meaningful judicial oversight for mediation processes is entirely appropriate when mediation is being employed by private parties in an effort to reach an agreement outside of courtroom litigation. The result of such a process is a simple contract. Court proceedings would be required for either party to obtain enforcement of the agreement. Most objections to the process through which the agreement had been reached could be raised with the court at the time that its enforcement might be sought. In many cases, the court could also gauge the appropriateness of the result that was embodied in the agreement, by comparing it with the pre-existing positions of the parties. The

[39] See Steven K. Berenson, "A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court" (2001) 33 Rutgers L.J. 105, at 105.

[40] See Marc Galanter & Mia Cahill, "'Most Cases Settle': Judicial Promotion and Regulation of Settlements" (1994) 46 Stan. L. Rev. 1339 (summarizing and critiquing available analysis of settlement quality).

mediation and its results would be subject to at least mediate judicial oversight.

In most cases, however, court-annexed mediation results in an immediate court judgment that can be enforced without further judicial proceedings. The results of the mediation are proffered to the court for incorporation into a public judgment, whether of dismissal or to grant relief, that binds the parties and is immediately enforceable. Following the mediation, there is neither time nor opportunity for a party who has concerns about the process, or second thoughts about the fairness of a mediated agreement, to raise these issues with any court. Unless some form of court scrutiny of mediated settlements is built into the process, court-annexed mediation is subject to less court oversight and judicial review than purely private mediated agreements that are reached outside the context of judicial proceedings.

IV. A PUBLIC MODEL FOR COURT-ANNEXED MEDIATION

Making mediators public employees, and subjecting them to the same kind of conflict of interest regulations that apply to judges, can solve some of the problems that are inherent in the private mediator model. Under models offered by the German civil justice system, judges function in a mediatory capacity when they discuss settlement possibilities with counsel in cases that are before them. In recent years Germany has been experimenting with programs that refer civil cases to specially trained mediation judges for settlement facilitation.[41] This program provides a good example of the possibilities and the limitations of a public mediation model.

It has long been known that German judges routinely discuss opportunities for the settlement of cases before them with counsel for the parties and with the parties themselves. The ZPO requires the judge to "be mindful at all stages of the proceedings of the potential for an agreed disposition of the legal dispute or individual issues thereof".[42] The ZPO requires the judge to raise the prospect of settlement in his or her discussions with counsel, *sua sponte*, at a "settlement conference" ("*Gütertermin*") before the plenary hearing in the case,[43] and also authorizes the judge to refer

[41] For a comprehensive description of several pilot projects functioning as of 2008 in the various German states, see von Bargen, *supra*, note 4, at 70-114.

[42] ZPO, *supra*, note 11, § 278(2).

[43] *Id.*

the parties to another judge for settlement discussions, and even to propose that the parties engage in out-of-court settlement discussions with a mediator or other settlement facilitator.[44]

A German judge can be quite specific in discussing settlement options in his or her own case, even to the point of proposing specific settlement terms based on his or her appreciation of the case at the time. This facility complements the judge's duty to give the parties "hints and feedback" ("*Hinweise*") on the judge's appreciation of the issues in the case as it develops. On the other hand, the deciding judge must exercise a certain restraint when he or she pushes for particular settlement profiles, in order to avoid undermining the parties' beliefs in his or her judicial impartiality.[45]

In recent years, German judges in a number of model projects in various German states and appeals court regions have been making greater use of the authorization in the ZPO that allows them to refer civil cases to other judges for settlement facilitation.[46] The common element in these projects is a systematic referral of civil cases to specially trained mediation judges, prior to the plenary hearing, for settlement facilitation. Although there has been a hefty debate about the extent to which mediatory judicial activity is a part of the core function of justice, a systematic evaluation of these programs has reached a positive result.[47] "Court-internal mediation" is a core function of justice that ought to be provided to all citizens who have civil controversies in the public courts. There remain concerns about the financing of this additional judicial function and ongoing issues about the training and the assignments of mediation judges. It is significant that the impartiality and immunity to economic considerations of these judicial mediators is not an issue.

German court-internal mediation also provides parties with a higher degree of transparency and judicial oversight than is available to parties in the United States. Although court-internal mediations are not open to the public in Germany, the judge dictates or drafts minutes of the proceedings in the same manner as other judicial proceedings.[48] As a matter of practice, mediation judges exercise a degree of discretion in drafting or dictating these minutes. Sometimes, they omit specific mention of

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[44] *Id.*, §278(3).

[45] See Murray & Stürner, *supra*, note 12, at 489-91.

[46] For a comprehensive description of these programs as of 2008, see von Bargen, *supra*, note 4, at 70-114.

[47] See *id.*, at 363-66.

[48] For the requirement that judicial proceedings be minuted, see ZPO, *supra*, note 11, § 159.

statements that were made in an atmosphere of confidence.[49] By the same token, a party can file a miscellaneous appeal (*Beschwerde*) against any prejudicial action that it perceives has been taken by a mediating judge, to the same extent that such an appeal might be raised against a deciding judge.[50] Mediating judges are liable for mistakes and misconduct to the same extent that other judges are in their exercise of judicial functions.[51]

Although the predominant model for court-annexed mediation in the United States involves the use of private mediators, there are a few examples of public mediators. The most well-known example is the use of public mediators in United States Courts of Appeals. In several circuits, retired judges serve as mediators in programs of compulsory mediation of civil appeals.[52] Most, if not all, of these mediators are insulated from the economic considerations that affect mediators in private practice. Their prior judicial service, and their sense of fairness and due process, may also serve as some guarantee of regularity and consistency in their processes, even though there is no built-in judicial oversight or transparency in the program.

V. MAKING A PUBLIC-PRIVATE PARTNERSHIP WORK

One can say that permitting private professionals, paid by the parties, to exercise significant neutral roles is theoretically irreconcilable with our basic concepts of public civil justice. Although the potential for economic influence in mediated decisions may be less well-defined than in private arbitral determinations, any mediator who commences a mediation is aware, at some level, that one of the parties may be more likely than the other to bring future cases to him or her. The influence of this awareness, often not even consciously articulated, cannot be underestimated.

A model similar to the German model — which uses specially trained judicial personnel to perform mediation of cases in the public justice system — is the only system that can really guarantee against the

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[49] See von Bargen, *supra*, note 4, at 332-33.

[50] See ZPO, *supra*, note 11, § 569; Murray & Stürner, *supra*, note 12, at 403.

[51] See *Bürgerliches Gesetzbuch*, § 839 [hereinafter "BGB"]; von Bargen, *supra*, note 4, at 340-41.

[52] For example, the First and Fourth Circuits utilize former state court judges as mediators. See Robert J. Niemic, *Mediation & Conference Programs in the Federal Courts of Appeal: A Sourcebook for Judges and Lawyers* (Washington: Federal Judicial Center, 1997), at 10, online: <http://www.fjc.gov/public/pdf.nsf/lookup/mediconf.pdf/$File/mediconf.pdf>.

adverse influence of economic considerations on mediator function. It is not likely, however, that the American legal culture, which is notoriously stingy when it comes to investment in public justice resources, will embrace such an investment in public neutrals. The question, therefore, is whether or not there are measures that can address this issue and make the public-private partnership work better.

Here are some suggestions:

1. All mediators who mediate cases that are already within the civil justice system should be registered with the court and made subject to some degree of court oversight and disciplinary authority. This will enable the court to keep track of their mediated outcomes and any complaints, and to prescribe standards of conduct, qualifications and continuing education.[53]

2. Records of mediations, including the names of the parties, the counsel and the mediators involved, as well as the outcomes (settled or not settled), should be maintained by the court, and made available for the parties to use in connection with choosing a mediator.[54]

3. Mediators should be required to disclose, before the outset of mediation, any prior cases that they have mediated with either party and/or with counsel for either party.[55]

4. Mediators should be required to maintain a summary record of the mediation, and this should be filed with the court. The record could be sealed, but made available in appropriate cases — *i.e.*, where the

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[53] Many states already provide lists of civil mediators, who register with the court and meet certain qualifications. See *e.g.*, "Indiana Rules of Court: Rules for Alternative Dispute Resolution", online: <http://www.in.gov/judiciary/rules/adr/index.html#_Toc202589225>. In Florida, the parties may agree upon a certified mediator or "a mediator who does not meet the certification requirements of these rules, but who, in the opinion of the parties and upon review by the presiding judge, is otherwise qualified by training or experience to mediate all or some of the issues in the particular case". Fla. R. Civ. P., *supra*, note 20, r. 1.720(f)(1)(B).

[54] California has sought to address the problem of repeat-player arbitration and its effect on impartiality of arbitrators by enacting a code of ethics for arbitrators. Under this code, an arbitrator would be required to disclose not only his or her relationship to the parties, which has been traditionally disclosed, but also the number of cases that he or she has previously handled that involves either of the parties to the present claim. See Folberg, *supra*, note 30; *California Code of Civil Procedure*, § 1281.85 (West Supp. 2002) [hereinafter "Cal. CCP"].

[55] See UMA, *supra*, note 32, s. 9. This section requires mediators to disclose any "facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation". This is a step in the right direction, but it may not go far enough because it does not require mediators to disclose whether or not they have previously mediated for any of the parties.

results of the mediation, or the conduct of the parties or the mediator, is being challenged.

5. Mediation proceedings should not be privileged. Statements in mediation should be barred from admissibility in any trial between the parties on the issue being mediated.[56]

6. Mediated results should be subject to at least some level of judicial review at the time that the mediated agreement is incorporated into a binding court judgment or final settlement of a court proceeding.[57]

7. Mediators should be subject to discipline and liability for malfeasance and negligence in the performance of their mediation functions, to the same extent that other professionals are so held accountable.[58]

These measures may be greeted with hostility by private mediators. However, to the extent that these mediators are fulfilling roles in the public justice system, such a regimen represents the minimum that is consistent with the values, as we understand them, of public justice. Party agreement is too fallible to be relied upon as the sole guarantor of regularity and consistency in mediation functions, which are otherwise opaque, unaccountable and subject to the economic considerations of their private practitioners. Good policy demands something more rigorous if this partnership is to retain the character of public justice.

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[56] The debate about the nature and extent of mediation confidentiality, privilege and the non-admissibility of statements in mediation continues without any end in sight. Compare McEwen, *supra*, note 31, with Peter Murray, "No, It's Really Not So Bad" (2009) 24 Maine Bar J. 45 (where the respective authors debate the necessity and policy wisdom of a partial privilege covering "confidential communications" between a party and a mediator). See also Jonathan Reitman, "Bumps in the Road of Maine's New Rule of Evidence 514" Maine Lawyers Review 16:22 (November 20, 2008), at 16.

[57] See Brunet, *supra*, note 8, at 53.

[58] See, *e.g.*, Arthur Chaykin, "Mediator Liability: A New Role for Fiduciary Duties?" (1984) 53 U. Cin. L. Rev. 731 (proposing to use fiduciary obligations as a means of constraining mediators' behaviour); Amanda K. Esquibel, "The Case of the Conflicted Mediator: An Argument for Liability and against Immunity" (1999) 31 Rutgers L.J. 131.

Judicial Supervision of Attorney Fees in Aggregate Litigation: The American *Vioxx* Experience as an Example for Other Countries

Edward F. Sherman[*]

I. INTRODUCTION

Expansive procedural devices for aggregating like cases — such as consolidation[1] and class actions[2] — are unique features of American law. Other countries have eyed the American approach to "aggregate litigation" with both interest and suspicion. There is recognition that the traditional single-party model of adjudication is not well suited to modern-day situations in which the claims of many individuals arise from the same basic conduct of a defendant, whether this conduct involves defective products, environmental hazards or wrongful business conduct. Other countries have been troubled, however, by what they consider to be the excesses of American class actions and "entrepreneurial litigation". Horror stories about an overly litigious society, entrepreneurial plaintiff attorneys, runaway jury verdicts, abusive class action practices and the legal blackmail of meritless suits — which drive up the costs of

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[1] *Federal Rules of Civil Procedure*, r. 42(a) [hereinafter "Fed. R. Civ. P."] ("If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay").

[2] *Id.*, rr. 23(a), (b). Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b) lists three types of class actions, the most used of which is (b)(3):

> the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods for fair and efficiently adjudicating the controversy.

business — are well known abroad.[3] Nevertheless, experimentation with aggregate procedures has quickened in other countries, and the United States is no longer alone in allowing a form of class, representative or group litigation, nor in consolidating similar litigation.[4]

Aggregation of cases has a direct impact on the relationship between client and attorney, and also on the fee arrangements between them. Large numbers of lawyers are likely to be involved, and many functions that are traditionally handled by an individual attorney have to be delegated to groups or committees within a consortium of the attorneys whose cases have been aggregated. Individual clients also become part of an aggregate group, which is represented by layers of attorneys rather than by each of their individual attorneys.[5] As a result, clear lines about

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[3] An Australian proposal for representative proceedings commented:

> A major reason for the Australian reticence about class actions is the horror stories from the United States. A *Fortune* magazine headline says it all — *Lawyers from hell: slip up and guys like these will bankrupt your company.* A picture is painted of aggressive plaintiff lawyers conjuring massive class claims based on spurious product faults, ruining a company financially with no social benefit. The lawyers are regarded as the villains, often being the main financial beneficiaries of the litigation. … The poor reputation of the US procedure has prompted many commentators in Australia to deliberately use the term "representative proceeding" rather than class action.

See *Proposal for a New Supreme Court Rule on Representative Proceedings in NSW to the Supreme Court Rule Committee* (Sydney: Centre for Legal Process of the NSW Law Foundation and Public Interest Advocacy Centre, 1998), at 12, cited in Edward F. Sherman, "Group Litigation under Foreign Legal Systems: Variations and Alternatives to American Class Actions" (2002) 52 DePaul L. Rev. 401, at 403, note 7.

[4] See Antonio Gidi, "Class Actions in Brazil: A Model for Civil Law Countries" (2003) 51 Am. J. Comp. L. 311 (providing an account of 15 years of experience with a class action statute that reflects both civil law and American influences); 3 Commission of Inquiry into the Affairs of the Masterbound Group and Investor Protection in South Africa (2003), at 651-953 (2003) (recommending class actions); Thomas D. Rowe, Jr., "Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions" (2003) 13 Duke J. Comp. & Int'l L. 125; and Edward F. Sherman, "American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems" (2003) 215 F.R.D. 130 (discussing developments in the European Community, Germany, United Kingdom, Sweden, Australia and Canada). The Supreme Court of Indonesia and Indonesian Center for Environmental Law held an international conference on class action procedures and their implementation in the Indonesian courts in Jakarta on February 18-20, 2002. On April 26, 2002, the Chief Justice of the Indonesian Supreme Court issued *Regulation Number 1 of 2002 Concerning Class Action Procedures*, which permitted:

> filing a claim in which one or more persons representing a class files a claim having questions of fact or law in common among class representatives and class members concerned, for himself/herself or themselves and at the same time representing a large group of people.

See *Indonesian Supreme Court Regulation Number 1* (2002), art. 1 [hereinafter "Indon. Sup. Ct. Reg. No. 1"].

[5] Professor Judith Resnik has noted that there now exist layers of lawyers, such that "[c]lients had lawyers but those lawyers were no longer their only lawyers, nor were those lawyers necessarily allowed to speak to the court on behalf of 'their' clients." Judith Resnik, "Money Mat-

attorney compensation for service to an individual client may be blurred, as a consortium of lawyers takes on the class, group or consolidated representation.

American courts are now grappling with issues of attorney representation and compensation that arise out of the changed attorney-client relationship in aggregate litigation. Little attention has been given to these issues in other countries, which are not yet as advanced in aggregate litigation, and whose concerns have tended to focus on how to limit the size and the scope of cases in order to prevent them from becoming unmanageable and unfair. In addition, most other countries have eschewed entrepreneurial conduct by attorneys and contingent fees. These features of American practice have made representation and compensation issues more pressing in the United States. Nevertheless, the growing experience of American courts in dealing with these issues should be of interest to other countries, as they move towards greater aggregate litigation themselves.

II. JUDICIAL SUPERVISION OF ATTORNEY REPRESENTATION AND COMPENSATION IN THE UNITED STATES

American courts in individual cases have little authority over the conduct of attorney representation and compensation. Rules of professional conduct in each state govern attorney performance and fees. Violations of those rules are within the purview of the state bar disciplinary apparatus, and a court in an individual case is not empowered to supervise those matters unless there is a direct violation of proper procedures before it. The terms of representation and compensation are established by contract between the attorney and the client, and they are not generally available for review by the court. A judge in an individual case will often not know the terms of the representation in the attorney-client contract, and will never have occasion to consider them. The computation and collection of the attorney's fee at the end of the litigation usually takes place without any involvement of the court. Only if there is a dispute over the attorney's fees might a court be called upon for review, either on a motion to the original court or in a separate action (possibly in another court).

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ters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation" (2000) 148 U. Pa. L. Rev. 2119, at 2152.

An exception to the "judicial hands-off" character of attorney fees may arise if a prevailing party seeks the recovery of an attorney's fees in a case. The "American rule", that each party must bear his or her own attorney's fees, is contrary to the "loser pays" rule in most other countries.[6] However, there are exceptions to this rule if fee-shifting is provided for in a statute,[7] or if a "common fund" is created by the litigation for the benefit of other persons[8] (which is a feature of class actions and aggregate litigation, but not of most individual cases). In those situations, the trial court is called upon to determine the amount of the attorney's fees.

There is another situation in which an American court might have supervisory authority to review attorney's fees: when there is a contingent fee contract. A sizable percentage of American lawsuits are undertaken by attorneys on the basis of a contingent fee agreement; under this contractual agreement, it is only if the plaintiff wins that the attorney will be entitled to his or her fee — which is most often a specified percentage of the client's recovery.[9] "Contingency fee agreements are of special concern to the courts", and, thus, are subject to heightened review.[10] The inherent power of a court, generally, to enforce the professional responsibility of lawyers and to regulate the bar has been said to include the specific right to review the reasonableness of contingency fees.[11] A court's power to regulate contingency fees stems from a law-

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[6] See Edward F. Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice" (1998) 76 Tex. L. Rev.1863, at 1863-68.

[7] Many federal statutes, in such areas as antitrust, securities fraud, and civil rights, provide for fee shifting. See Federal Judicial Center, *Manual for Complex Litigation, Fourth* (Washington: Federal Judicial Center, 2004), § 4.11 [hereinafter "*Manual for Complex Litigation, Fourth*"] (describing grounds for fee awards).

[8] See *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).

> [Class members'] right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs.

See also *Trustees v. Greenough*, 105 U.S. (15 Otto) 527 (1882) (premising recovery of attorney's fees on a theory of unjust enrichment).

[9] See John Leubsdorf, "The Contingency Factor in Attorney Fee Awards" (1981) 90 Yale L.J. 473.

[10] *Allen v. United States*, 606 F.2d 432, at 435 (4th Cir. 1979).

[11] See, *e.g.*, Task Force on Contingent Fees of the ABA's Tort Trial & Insurance Practice Section, "Contingent Fees in Mass Tort Litigation" (2006) 42 Tort Trial & Ins. Prac. L.J. 105, at 127 ("[A] court that exercised inherent power to prevent a violation of the lawyers' professional responsibility to charge only reasonable rates would be acting within the parameters of inherent authority as described by the Supreme Court").

yer's ethical duty to charge a reasonable fee,[12] and, thus, a court's power to monitor contingency fees for reasonableness has been recognized.[13] The Fifth Circuit recognized a court's jurisdiction to regulate contingency fees in *Hoffert v. General Motors*,[14] where the district court, *sua sponte*, limited the contingency fee of plaintiffs' counsel to 20 per cent despite a 40 per cent contingent fee contract.[15] Nevertheless, there is still disagreement about the scope of a court's review power, and it is urged that deference should be given to the right of attorneys and clients to contract for a particular fee percentage.[16]

III. SUPERVISION OF ATTORNEY'S FEES IN CLASS ACTIONS

There is much greater judicial supervision of attorney's fees in American class actions. First, class action settlements must be approved by the court.[17] A high percentage of cases that are certified as class actions are settled, and settlements generally provide for the payment of attorney's fees to plaintiff's counsel (stated either as an amount or as a percentage, or left up to the judge to determine). Judges have been ad-

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[12] American Bar Association, *Model Rules of Professional Conduct* (American Bar Association, 2002), r. 1.5(a). Contingency fees, in particular, are subject to a reasonableness standard. See, *e.g.*, r. 1.5(a), comment 3.

[13] See, *e.g.*, *Karim v. Finch Shipping Co.*, 374 F.3d 302, at 309 (5th Cir. 2004) (emphasis in original):

> [T]his appeal does *not* present the issue of a federal court's well-recognized power, in general, to reform contingent fee contracts. Indeed, this power is reflected in the contingent fee contract's providing a fixed percentage for counsel, "or as allowed by law".

Rosquist v. The Soo Line R.R., 692 F.2d 1107, at 1111 (7th Cir. 1982); and *International Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, at 1277 (8th Cir. 1980).

[14] 656 F.2d 161 (5th Cir. 1981).

[15] *Id.*, at 164-66.

[16] See *Memorandum in Support of Motion for Reconsideration/Revision of Order Capping Contingent Fees and Alternatively for Entry of Judgment*, *In re: Vioxx Prods. Liab. Litig.* Civil Action No. 2: D5-MD-01657-EEF-DEK (U.S. Dist. Ct. E.D. La.) (December 10, 2008) at 21 [*Memorandum*]:

> The Task Force on Contingent Fees of the American Bar Association's Tort Trial & Insurance Practice Section confirms that no empirical evidence of a market failure for attorney's fee contracts exists in mass tort litigation that is not a class action. … Each plaintiff in a non-class MDL possesses the opportunity at the outset of his case to seek and hire an attorney who offers the best combination of quality, efficiency, price, and record of success. Courts should enforce fairly-negotiated fee contracts that at inception take into account the possibility of MDL proceedings and factor in whatever efficiencies they may bring.

[17] Fed. R. Civ. P., *supra*, note 1, r. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."); Fed. R. Civ. P., r. 23(e)(2) ("If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.").

monished by rule and case law to provide an intensive review of attorney's fees, since the payment of attorney's fees generally reduces the recovery for class members. Second, in the rare case in which a class action is actually tried — and there is a litigated, as opposed to settled, judgment — the court does not have the express power to supervise the amount and the payment of attorney's fees, but it can, in reality, play that role.[18] Class actions often involve statutory exceptions to the American rule, and these exceptions authorize fee-shifting to the prevailing party; as a result, the court will determine the amount of the fee. In addition, when certifying the class, the court must determine that "the representative parties will fairly and adequately protect the interests of the class",[19] and that might well include a review of the reasonableness of a contingent fee contract.

Class actions are a paradigm for judicial supervision of attorney's fees in American aggregate litigation. However, not every aggregate litigation can qualify as a class action. It is in such cases that there has been uncertainty about a court's power to reject or "cap" attorney's fees despite a contingent fee contract. The *Vioxx* litigation provides an interesting case study of the emerging procedural practice and the issues of representation and compensation that arise from aggregate litigation.

IV. THE *VIOXX* LITIGATION

Between 1999 and 2004, some 105 million prescriptions for Merck Inc.'s popular pain-killing drug, Vioxx, were written, and the drug was taken by some 20 million persons.[20] It was removed from the market in 2004, after evidence surfaced that it increased the risk of heart attacks and strokes. Thousands of individual suits and numerous class actions were filed against Merck in state and federal courts throughout the country, alleging product liability, tort, fraud and warranty claims.

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[18] Robert Klonoff, *Class Actions and Other Multi-Party Litigation: Cases and Materials* (St. Paul: West Group, 1999), at 200:

> Regardless of whether a fee agreement exists, the amount of attorneys' fees in class actions must ultimately be determined by the court. This is true whether the case goes to trial or results in a settlement. Courts have generally used two methods to set the amount of fees to be awarded to class counsel: the percentage of the fund method and the "lodestar" approach.

[19] Fed. R. Civ. P., *supra*, note 1, r. 23(a)(4).

[20] *In re: Vioxx Prods. Liab. Litig.*, 574 F. Supp.2d 606 (E.D. La. 2008) [hereinafter "*In re: Vioxx* (2008)"].

On February 16, 2005, the Panel on Multidistrict Litigation transferred suits that had been filed in federal courts against Merck, representing the claims of over 4,000 plaintiffs (a figure that ultimately increased to some 20,000), to the U.S. Court for the Eastern District of Louisiana. The Multidistrict Litigation ("MDL") device — which was created in the 1960s, in response to the crisis caused when electrical equipment price-fixing cases flooded the federal courts[21] — permits a panel of federal judges to transfer cases that are pending in federal courts with "common questions of fact" to a single federal judge "for coordinated or consolidated pretrial proceedings".[22] Coordinated discovery was the principal benefit; it ensured that all like cases could share the discovery that would be rationally scheduled, and wasteful repetition could thereby be avoided. Over the years, however, the "transferee judge" to whom such cases were transferred came to assert a more prominent managerial role over the litigation, making dispositive pre-trial rulings on motions that involved class certification[23] and that encouraged settlement.[24] As a result, the MDL has become a principal form of aggregate litigation, enabling the federal court system to transfer and consolidate like cases before a single judge, whose principal responsibility is to accomplish a settlement.[25]

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[21] See 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure*, 3d ed. (Eagan, MN: West Publishing Co., 1998), § 386.

[22] 28 *United States Code* (2000), § 1407 [hereinafter "28 U.S.C."].

[23] Stanley A. Weigel, "The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts" (1978) 78 F.R.D. 575, at 577:

> It is generally accepted that a transferee judge has authority to decide all pretrial motions, including motions that may be dispositive, such as motions for judgment approving a settlement, for dismissal, for judgment on the pleadings, for summary judgment, for involuntary dismissal under Rule 41(b), for striking an affirmative defense, for voluntary dismissal under Rules 41(a) and to quash service of process.

See also John G. Heyburn II, "A View from the Panel: Part of the Solution" (2008) 82 Tul. L. Rev. 2225.

[24] See Richard Nagareda, *Mass Torts in a World of Settlement* (Chicago: University of Chicago Press, 2007), at ix (the "endgame of mass tort litigation is a global settlement"). The Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) — which requires transferee judges to return all of the cases to their original courts upon the completion of the pre-trial proceedings if a settlement has not been reached — prevents the use of MDL for trial consolidation of all such cases. However, few cases are, in fact, returned. Today, creative approaches by transferee judges are giving new importance to the MDL device for resolving all of the litigation with finality through settlement.

[25] Federal Judicial Center, *Manual for Complex Litigation, Third* (Washington: Federal Judicial Center, 1995), § 31.132:

> One of the values of multidistrict proceedings is that they bring before a single judge all of the cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. Experience shows that few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. In managing the litigation, therefore, the transferee judge should take appropriate steps to

The *Vioxx* transferee judge, Judge Eldon E. Fallon, set about bringing the *Vioxx* litigation to a stage where settlement was possible. He oversaw coordinated discovery and ordered "bellwether trials" of a handful of selected cases.[26] Out of the hundreds of attorneys who had individual cases, a small number were appointed to serve in such positions as Lead Counsel, Plaintiff's Liaison Counsel, Plaintiffs' Steering Committee and Negotiating Plaintiff Counsel. Judge Fallon denied the plaintiffs' motion for a class action for damage claims on the ground that the conditions and the circumstances that surrounded the taking of the drug by each person were so individualized, and based on potentially differing state laws, that the requirement of a "predominance of common questions" could not be met.[27]

V. THE *VIOXX* GLOBAL SETTLEMENT

At the court's encouragement, negotiations with the defendant Merck took place over an extended period. Settlement was complicated because an even larger number of *Vioxx* cases were pending in state courts (some 30,000), and the federal transferee court had no jurisdiction over them. However, representative counsel from the state cases were included in the negotiations, and, on November 9, 2007, a global settlement was announced between Merck and the Executive Committee of the Plaintiffs' Steering Committee in the federal MDL, and also the representatives of plaintiffs' counsel in the coordinated proceedings in the three state courts where most of the state cases were pending (New Jersey, California and

make the most of this opportunity and facilitate the settlement of the federal and any related state cases.

[26] Bellwether trials are trials of individual cases that are selected by the judge, in consultation with counsel, in order to provide each side with a realistic view of how a jury would decide a range of cases within the aggregated litigation, and, thus, to assist them in reaching a settlement amount for all of the cases. For a description of the process in the *Vioxx* cases, see Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, "Bellwether Trials in Multidistrict Litigation" (2008) 82 Tul. L. Rev. 2323; Edward F. Sherman, "The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible" (2008) 82 Tul. L. Rev. 2205.

[27] *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (2006). This was consistent with his earlier denial of certification in a similar pharmaceutical mass tort case. *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133 (E.D. 2002) (finding that choice of law rules required application of potentially conflicting laws of the 50 states in which the class members ingested the drug and lived, creating manageability and predominance problems). See also *In re Baycol Prods. Litig.*, 218 F.R.D. 197, at 205 (D. Minn. 2003) (finding individual issues such as injury, causation, learned intermediary defense, and comparative fault prevented predominance). However, he deferred ruling on class claims by "third-party purchasers" (such as medical insurers) and for "medical monitoring", claims for which were not included in the settlement of damage actions.

Texas).[28] Merck agreed to pay $4.85 billion, pursuant to a complex administrative and claims procedure.[29] Judge Fallon, sitting with the coordinated proceedings judges from New Jersey and California, received the agreement in open court. The agreement settled the claims in all *Vioxx* cases that were then pending in federal and state courts, and established an administrative framework to oversee the settlement. Judge Fallon was Chief Administrator of this framework, and he appointed Special Masters.[30] The claims process was to be administered by a private claims consultant company.

This was a unique approach to resolving the problem of related cases pending in both federal and state courts. It could only have come about through coordination and collaboration between the representatives of the federal and state plaintiffs' counsel, as well as between Fallon J. and the state court judges. One reason for its success — in contrast to the asbestos global settlement, which the U.S. Supreme Court had struck down in *Amchem*[31] — was its limited scope. It applied only to pending cases that had been filed by persons who claimed to have suffered injuries from taking the drug. Unlike asbestos, a drug like Vioxx has a short latency period; there was, therefore, virtually no likelihood that, at the time of the settlement, persons who had taken the drug had not yet manifested injury. Unlike a class action settlement, it was limited to pending cases, and it did not attempt to settle cases that had been filed after the date of the settlement. Merck ran the risk of having to try or settle new cases that might be filed after the date of the settlement, but, because of the short latency period and the passage of some three years since the drug had been taken off the market, it was not expected that the number of such suits would be large. In order for Merck to have the security of settling most of the likely claims against it, the agreement required 85 per cent of the plaintiffs in pending cases to enrol in the settlement in order for it to take effect.[32] This is a common provision in global settlements, and it

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[28] Together, the MDL and three state coordinated proceedings included more than 95 per cent of the plaintiffs in the *Vioxx* cases.

[29] See "Analysts See Merck Victory in Vioxx Deal" *New York Times* (November 10, 2007), at B1.

[30] *Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto*, art. 8 [hereinafter "*Settlement Agreement*"], online: <http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf>.

[31] *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994), revd *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997).

[32] *Settlement Agreement*, *supra*, note 30, art. 11.

was not a problem here, since more than 95 per cent of the plaintiffs ultimately enrolled in the settlement.[33]

VI. THE *VIOXX* CAPPING OF ATTORNEYS' FEES

As often occurs in settlements of aggregate litigation, the allocation of the plaintiffs' attorneys' fees, among the large numbers of attorneys who had individual cases, was an issue. The settlement agreement provided for a Fee Allocation Committee of plaintiffs' attorneys to make recommendations to the judge about the fees that were to be paid to individual attorneys and the amount of fees that should be deposited in a Common Benefit Fund.[34] Before the allocation of fees was finally made, however, Fallon J., acting *sua sponte*, entered an order that capped all contingent fees at 32 per cent. As a result, no attorney who had represented a *Vioxx* claimant could collect more than 32 per cent of the claimant's settlement award.[35] Judge Fallon claimed inherent judicial equitable authority to examine fee arrangements, and, particularly, contingent fee arrangements "where there is a built in conflict of interest",[36] and "where the claimants in a particular case are vulnerable".[37] He also based his authority on the responsibility of a judge in an MDL proceeding to ensure that claimants are properly compensated, as well as on the powers that had been granted to him as "Chief Administrator" under the settlement agreement. Citing case law and state statutes that limited contingent fees, he determined that 32 per cent was a reasonable percentage. He noted that "this reduction will not result in a paltry award", since 32 per cent of the settlement fund of $4.85 billion would be $1.55 billion for all attorneys.[38] A group of five attorneys, primarily from Texas and Louisiana (called the *Vioxx* Litigation Consortium, or "VLC"), who had contingent fee contracts with their individual clients in excess of 32 per cent (many of them at 40 per cent), challenged this order.

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[33] See Parker Waichman Alonso LLP, "Vioxx Settlement Gaining Ground, with 95 Percent of Plaintiffs Signing On" (January 22, 2008), online: <http://www.yourlawyer.com/ articles/read/13728>; Associated Press, "Merck Says 44,000 Sign for Vioxx Settlement: Drug Giant Sees This as a Sign that the Deal is on Track to Go Forward" (March 3, 2008), online: <http://www.msnbc.msn.com/id/23452135/>.

[34] *Settlement Agreement*, *supra*, note 30, arts. 9.2.4, 9.2.5.

[35] *In re: Vioxx* (2008), *supra*, note 20, at 617.

[36] *In re: Vioxx Prods. Liab. Litig., Order & Reasons*, MDL No. 1657 (E.D. La., Aug. 3, 2009), at 7 [hereinafter "*In re: Vioxx, Order & Reasons*"].

[37] *Id.*, at 19.

[38] *In re: Vioxx* (2008), *supra*, note 20, at 618.

In a motion for a rehearing, the VLC attorneys argued that the court lacked the authority to supervise, and particularly to cap, contingent fees. They pointed out that this was not a class action, where a court must approve a settlement, and that the MDL statute has no comparative requirement:

> Class action rules do not become applicable simply because a large number of cases settle. Individual differences remain, not only as to the characteristics of each individual claim, but also as to the relationship between each plaintiff and his attorney.[39]

The policy reasons for court review of attorneys' fees in class actions, they argued, did not apply to this case, transferred and consolidated under MDL: "Unlike a class action, there are no 'nonparty' or 'absentee' plaintiffs in this MDL. Each plaintiff is personally represented by the attorney of his choice."[40] The terms of a contingent fee, they maintained, are particularly a matter for the attorney and the client. Imposition of this cap was therefore unreasonable, and it could ultimately lead to a situation in which clients would be unable to engage skilled attorneys willing to take the risk of financing a long and difficult piece of litigation.

This raises a question about whether or not the analogy to a class action is valid or necessary for an MDL judge, in a consolidated action, to command the authority to supervise and review attorney's fees. When he invoked the court's equitable powers to review the *Vioxx* Resolution Program, Fallon J. used the phrase "quasi-class action" to describe MDLs.[41] Other courts have used the "quasi-class action" analogy to confer equitable authority to review attorneys' fees[42] (and a number of states have imposed contingent-fee-capping statutes).[43] They point out that policies

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[39] *Memorandum*, *supra*, note 16, at 7.

[40] *Id.*

[41] *In re: Vioxx* (2008), *supra*, note 20, at 612.

[42] *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174 (D. Minn., March 7, 2008), at 17-19 [hereinafter "*In re Guidant* (WL 682174)"], amended in part by *In re Guidant*, 2008 WL 3896006 (D. Minn., August 21, 2008) (capping contingent fees at 20 per cent subject to appeal to a special master for an upward departure based on certain factors); *In re Zyprexa Prods. Liab. Litig.,* 424 F. Supp.2d 488, at 491 (E.D.N.Y. 2006) [hereinafter "*In re Zyprexa*"] (capping contingent fees at 35 per cent, with departure in either direction based on unique facts of a given case); and *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, MDL No. 926, 1994 WL 114580, at 4 (N.D. Ala. 1994) (capping contingent fees at 25 per cent of a $4.2 billion settlement fund). For an opposing view of judicial supervision of attorney's fees, see Charles Silver & Gregory Miller, "The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal" (2010) 63 Vand. L. Rev. 107.

[43] See *New Jersey Rules of Court*, r. 1:21-7 [hereinafter "N.J. R. Ct."] (an attorney in a products liability action "shall not contract for, charge, or collect a contingent fee in excess of the following: (1) 33 1/3 % on the first $500,000 recovered; (2) 30% on the next $500,000 recovered;

that support the monitoring of contingent fees in class actions also apply to MDL consolidations that have a large number of plaintiffs who are subject to one settlement matrix, use court-appointed special masters to help administer the settlement, create a large escrow fund and involve other court interventions.[44] The argument is that the MDL form of aggregate litigation has so altered the traditional single-party lawsuit through a high degree of court supervision and aggregate procedures, that judicial supervision of attorneys' fees, à la class actions, is authorized.

The MDL statute itself provides some support for this position. It directs the MDL panel to centralize cases only when it is possible to strike a balance between efficiency and fairness.[45] Since the Panel exerts no oversight once the cases have been transferred, it is up to the transferee judge to use equitable authority to ensure that the aggregate procedures achieve the proper balance. The transferee court is encouraged to be innovative, as "the complexity, diversity, and volume of mass tort claims require adapting traditional procedures to new contexts".[46] Thus, the argument is that, whatever the strength of the class action analogy, consolidated MDL cases warrant judicial supervision of attorneys' fees in order to protect the interests of the claimants against undue erosion of their recoveries by excessive attorneys' fees.

Judge Fallon saw the interests of the claimants to be adverse to those of their attorneys with respect to the attorneys' fees. "District courts," he said, "necessarily retain the authority to examine attorney fees *sua sponte* because the attorneys' interests in this regard are in conflict with those of their clients."[47] Interestingly, Fallon J. appointed the Tulane Law School Civil Litigation Clinic "to represent the interests of claimants whose settlement awards would be affected by the Court's Capping Order", and denied the objection by the VLC.[48] Two other MDL cases have also premised judicial review of contingent fees on the proposition that plain-

(3) 25% on the next $500,000 recovered; (4) 20% on the next $500,000 recovered"); *California Business and Professional Code*, § 6146(a) [hereinafter "Cal. Bus. & Prof'l Code"] (providing a sliding scale framework for limiting contingent fees in actions against healthcare providers); and *Texas Labour Code Annotated*, § 408.221 [hereinafter "Tex. Lab. Code Ann."] (limiting contingent fee arrangements in worker's compensation lawsuits to 25 per cent of the plaintiff's net recovery).

[44] See *In re Guidant* (WL 682174), *supra*, note 42, at 18; *In re Zyprexa*, *supra*, note 42, at 491.

[45] 28 U.S.C., *supra*, note 22, § 1407(a).

[46] *Manual for Complex Litigation, Fourth*, *supra*, note 7, § 22.1.

[47] *In re: Vioxx* (2008), *supra*, note 20, at 612.

[48] *In re: Vioxx, Order & Reasons*, *supra*, note 36, at 10.

tiffs' counsel have a built-in conflict of interest.[49] The VLC attorneys saw a court's legitimate concerns as much more limited, pointing out that two circuit court cases that had permitted courts to monitor contingent fees had been in the context of seamen and children — groups of people who required special protection.[50] They cited a Fifth Circuit case that reversed a sanction against attorneys, focusing on the language that the court had used to explain that a federal court's inherent powers consist of those "necessary" for the courts to manage their affairs, and extend only to litigation before the court — or, in the case of a sanction, to disobedience of the court's orders.[51]

If the mix of inherent judicial powers, analogy to class actions, the MDL statute, and the altered status of the attorney-client relationship under MDL consolidation is enough to justify Fallon J.'s capping order, the question is how far that authority should go. Is it present in all MDL consolidations (even though the statute does not specifically provide for it)? Is it present in all consolidated cases, since they necessarily involve replacement of the primary representation of the individual's attorney with an altered aggregate form of representation? Or is it present only in some MDL and ordinary consolidation cases, in which there are either special concerns over a conflict of interest between attorneys and clients, or special needs for a more expansive form of case management?

These questions could be answered in the appeal to the Fifth Circuit. On a motion for reconsideration, Fallon J. had rejected the argument that "[b]ecause the *Vioxx* MDL consists of diversity jurisdiction cases for all fifty states … the court should have undertaken a separate analysis of reasonableness for each and every state."[52] He did, however, amend his fee-capping order, in light of the large number of claims (over 50,000 in all 50 states), to provide that "certain rare circumstances might exist

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[49] *In re Guidant* (WL 682174), *supra*, note 42, at 18; *In re Zyprexa*, *supra*, note 42, at 491-92. See also *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, at 87, 90, note 62 (lst Cir. 1969) (holding that a court has the authority to examine contingency fee contracts in order to ensure that it is not an unwitting accessory to excessive, unreasonable fees being charged).

[50] *Karim v. Finch Shipping Co.*, *supra*, note 13; *Rosquist v. The Soo Line R.R.*, *supra*, note 13.

[51] *Memorandum*, *supra*, note 16, at 9, citing *F.D.I.C. v. Maxxam, Inc.*, 523 F.3d 566 (5th Cir. 2008).

[52] *In re: Vioxx, Order & Reasons*, *supra*, note 36, at 22. Judge Fallon stated (at 23):

> Because the attorneys in this case benefited greatly from the efficiency provided by the MDL structure, the justice mandate of the MDL statute requires that the claimants receive a similar benefit, in the form of reasonable attorneys' fees. Furthermore, the claimants' attorneys were all tasked with navigating their clients through an identical settlement matrix and in accomplishing this they all faced similar challenges, regardless of in which state their fee arrangement was consummated. Accordingly, the MDL statute's mandate of fairness requires a uniform, consistent result for all attorneys and their clients.

which would warrant a departure, in either direction, upwards or downwards, from the universal fee cap". As a result, attorneys could, by the middle of the next month, file an objection that would be set for hearing with a special master, in order to take evidence and make recommendations to the court. The VLC attorneys chose not to do so, and filed an appeal in the U.S. Court of Appeals for the Fifth Circuit[53] as a final collateral order.[54] The VLC attorneys ultimately dropped their appeal to the capping order.[55]

VII. CONCLUSION

Aggregate litigation — whether in class actions or in the consolidation of individual cases — invariably has an impact on the individual attorney-client relationship. What was once understood between the attorney and the client with respect to the attorney's responsibilities and expected functions may be altered as committees of attorneys assume principal roles in the litigation. Nevertheless, in consolidated cases, the individual attorney-client relationship remains, with attorneys continuing to perform services on behalf of their individual clients (which may or may not ultimately benefit the aggregate of plaintiffs). The fact that cases must be transferred back to their original courts for individual resolution under MDL signifies that the individual attorney-client relationship remains. However, such a return of cases to their original courts is rare, and once there is a settlement in the MDL court — as there was in *Vioxx* — the aggregate interests take on special importance. The experience of the *Vioxx* consolidated MDL case, with its unique global settlement, which extended across jurisdictional lines, and with Fallon J.'s capping order for contingent fees, provides a crucible for testing the parameters of judicial supervision in aggregate litigation. If the capping order is upheld on appeal, it will confirm greater judicial authority over attorney representation and compensation in the management of aggregate litigation.

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[53] *In re: Vioxx Prods. Liab. Litig., Amended Notice of Appeal*, MDL No. 1657 (E.D. La., September 21, 2009).

[53] *Id.*, at 19.

[54] See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

[55] Appellants' Joint Motion for Voluntary Dismissal, No. 09-30927 (5th Cir. January 8, 2010).

Categories of English Civil Procedure

Déirdre Dwyer*

I. INTRODUCTION

The question of effective procedural categorization is of academic interest. The theme of the International Association of Procedural Law ("IAPL") conference in 2009 was, after all, "Common Law — Civil Law: The Future of Categories / Categories of the Future".[1] The conference "consider[ed] whether, in view of the ongoing procedural reforms, the age-old categories of 'common law' and 'civil law' continue to be relevant and, if not, whether new categories are emerging or whether, indeed, such categories will have a role to play in the future".[2] These questions may also be of very real practical importance, as the way in which we categorize procedural systems may fundamentally affect how we understand the underlying dynamics of those systems, and, in turn, how we approach reforming them.

In this paper, I assess the relevance of "the age-old categories of common law and civil law"[3] to our understanding of recent changes in civil procedure in England and Wales ("England"). England is singled out for analysis for two reasons. First, England is the originator of common law procedure, and is also jointly responsible for its close relative, "Anglo-American" procedure. Second, the marked changes in the rules and the culture of litigation that were intended by the *Civil Procedure Rules*[4] (also known as the "Woolf Reforms") may be seen as a blurring of the common law / civil law boundaries. How the CPR have changed

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1 International Association of Procedural Law ("IAPL") (2009 IAPL Annual Conference, Toronto, Canada: June 3-5, 2009), online: <http://www.iapl2009.org/> [hereinafter "IAPL 2009"].

2 Letter from Oscar G. Chase to the Members of the American Society of Comparative Law: The American Society of Comparative Law ("ASCL"), online: <http://www.comparativelaw.org/iapl09.pdf>.

3 *Id.*

4 *Civil Procedure Rules 1998* (U.K.) (S.I. 1998/3132 L.17), online: Ministry of Justice <http://www.justice.gov.uk/civil/procrules_fin/index.htm> [hereinafter "CPR"].

English civil litigation in practice over the last decade was the subject of a recent major conference, held in London in December 2008.[5]

I begin by considering why we should want to categorize procedural systems, and, in particular, I consider the utility of genealogical, geographical, functional and analytical approaches to procedural categorization.[6] As the focus here is on English civil procedure, particular attention is paid to the accuracy and the utility of the "common law" and "Anglo-American" categories.

I then outline some of the intended and actual changes to English civil process under the CPR. I also consider whether the changes from the former *Rules of the Supreme Court*[7] to the CPR — as well as variations between different types of proceeding under the CPR — mean that it is no longer meaningful, functionally or analytically, to make use of a single category of "common law".[8] Similar difficulties with the use of broad-brushstroke categories in other areas of procedural reform are introduced, including, principally, harmonization projects within the European Community and the civil costs review that has recently been undertaken in England.

Finally, I propose that the current common law / civil law categories should be abolished — except, possibly, for defined genealogical purposes — and that a new set of functional / analytical categories should be developed. Although this development is not undertaken here, some starting points are suggested from the existing literature.

II. THE USE OF CATEGORIES IN CIVIL PROCEDURE

1. The Why and the How of Categorization

It is useful for us to think in terms of categories. Like cases, for example, should be treated in a like manner. Similarly, if we identify groups that are comprised of things that are generally alike in the world, then we can expect to treat the members within each of these groups in a like manner. This is true, at least, for the purpose for which the "category", as a concept, came into being. When we use categories in the

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[5] See Déirdre Dwyer, ed., *The Civil Procedure Rules Ten Years On* (Oxford: Oxford University Press, 2009) [hereinafter "Dwyer, *Ten Years On*"].

[6] See Part II, below.

[7] *Rules of the Supreme Court 1965* (S.I. 1965/1776 L.23) [hereinafter "RSC"].

[8] See Part III, below.

study of procedural systems, doing so should confer some benefit to us — even if that benefit is as simple as saving ink or breath. When we consider, as the IAPL 2009 conference has encouraged us to do, whether particular categories are relevant, we are faced with two immediate difficulties: first, what do we mean when we say that something falls into a "category", and, second, what do we mean by "relevant"? The latter of these questions may be more straightforward to answer than the former.

There appear to be two principal ways in which we can understand the term "category". The classical view, developed from Plato and Aristotle via Frege, is that categorization correctly involves grouping objects together, based on their similar properties.[9] In this way, properties are both necessary and sufficient for the establishment of membership within a particular category. This classical view is problematic, however, and Wittgenstein has highlighted as much in relation, for example, to the category of "game".[10] Wittgenstein observes that we seem to be able to recognize a category of "game", and demonstrates that we can, indeed, identify things that some games have in common with other games. There seems, however, to be no single thing that all games have in common. Rather, "the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail".[11] A similar approach, based on prototype theory, was developed in cognitive science.[12] Under prototype theory, some members of a category are more "central" than others (*i.e.*, they are "prototypes"), with the result that not all members of a category equally exhibit the defining characteristics of that category.

At the outset, we should therefore consider, when we say that a number of systems are "common law", whether all of these systems possess the same necessary and sufficient features of the category, as classical theory requires, or whether there is a central case of common law procedure (*i.e.*, a prototype), around which orbit other procedural systems that are similar enough to fall recognizably into the same category. This may not be a question that has actively engaged many

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[9] See, *e.g.*, Plato, *Πολιτικος* [*The Statesman*]; Aristotle, *Κατηγορίαι* [*Categories*]; G. Frege, *Die Grundlagen der Arithmetik* [*Foundations of Arithmetic*] (Breslau: W. Koebner, 1884).

[10] L. Wittgenstein, *Philosophical Investigations*, trans. by G.E. Anscombe (Oxford: Basil Blackwell, 1953).

[11] *Id.*, at 66.

[12] See, *e.g.*, E. Rosch, "Natural Categories" (1973) 4 Cognitive Psychology 328; G. Lakoff, *Women, Fire and Dangerous Things: What Categories Reveal About the Mind* (Chicago: University of Chicago Press, 1987).

proceduralists; my expectation, however, is that most would consider our procedural categories to be prototypical rather than classical.

When we ask whether or not a category is relevant, this entails that we are asking whether or not it is relevant *to* a particular purpose. I would suggest four purposes to which we might put a procedural category: genealogical, geographical, functional and analytical.[13] By "genealogical", I mean that the categories gain their meaning and their form principally from the ways in which they have developed over time and come down to us.[14] Similarly, we might talk about common law and civil law "traditions".[15] The advantage of a genealogical approach is that it helps us to capture the richness and the subtleties of meaning within a legal system. The limitation of the genealogical approach, however, is its empirical positivism. In describing the state of a procedural system as it is, and explaining how it has developed to be as it is, we may not fully address the question of why a procedural system is as it is, as opposed to being something different (*i.e.*, *why* it is not what it is not). There is a risk, therefore, that the forms taken by the law will be viewed as contingent, rather than as rational responses to the law's environment.

By "geographical", I mean that the categories appear to be based on the physical locations of the procedural systems in question, such as "Anglo-American", "Continental European", or "Western European". I must admit that these are categories that I, myself, tend to employ, and it is not always clear whether I am using them in a geographical or in a genealogical sense. It is admittedly more likely to be the latter, although it is also worth recognizing that the use of an ambiguous term tends to encourage the risk of ambiguous thought.

Additionally, it is not clear which legal systems should be included. Does "Anglo-American" mean just the United States and England? Or does it extend to all of the legal systems that are related to these two by genealogical descent, particularly via the British Empire and the Commonwealth? Do we really include India and Vanuatu when we say "Anglo-American", and what do we do with jurisdictions that have hybrid legal systems, such as South Africa and Mauritius? Presumably, we

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[13] Compare M. Damaška, *Evidence Law Adrift* (New Haven: Yale University Press, 1997), at 3 (on "historical" and "analytical and interpretive" approaches) [hereinafter "Damaška, *Evidence Law Adrift*"].

[14] For the concept of genealogy that is used here, see F. Nietzsche, *On the Genealogy of Morality* (1887), ed. by K. Ansell-Pearson, trans. by C. Diethe (Cambridge: Cambridge University Press, 1994).

[15] See, *e.g.*, P. Glenn, *Legal Traditions of the World*, 3d ed. (Oxford: Oxford University Press, 2007).

do not intend to include Mexico (or we might infer its exclusion) because, although it is American, its legal system is Spanish rather than English in origin. At the same time, we might intend to include (or infer the inclusion of) Canada or Malaysia. While the category "Anglo-American" may be problematic, potential oppositional categories, such as "Western European" or "Continental European", suffer from even greater vagueness. It is unclear what genealogical justification, if any, might be relied upon. The prevalence of the civil law in the medieval and early modern periods might be one justification, and the spread of the French Empire at the start of the 19th century another. It is also unclear which countries should fall within these categories. Like "common law" and "civil law", these are categories that are easy to use and that seem to convey some real meaning; but, again like "common law" and "civil law", these categories nevertheless seem to lack precision and explanatory power.

By "functional", I mean that the categories should provide to us information about the way in which the procedural system functions in the present. When we place two procedural systems into the same functional category, we are saying that there is something fundamentally more similar between these two systems than there is between either one of them and any third system in another category. Further, by "analytical", I mean that the categories should tell us something about *why* a procedural system takes the form that it does.

The categories that we currently use are not necessarily neatly classified as genealogical, functional or analytical. Hybrid categorization appears to be relatively common in comparative law. For example, the system developed by Zweigert and Kötz[16] divides contemporary legal systems into "families" on the basis of a combination of: (1) historical background and development; (2) predominant and characteristic mode of thought in legal matters; (3) especially distinctive legal institutions; (4) the kind of legal sources acknowledged and the ways in which they are handled; and (5) ideology.[17] This hybrid genealogical / functional approach allows us to identify eight legal families that we might well agree are credible candidates for the purpose of describing the world *as it is*. These eight families are Romanistic, Germanic, Nordic, Common

[16] See K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3d ed., trans. by T. Weir (Oxford: Oxford University Press, 1998) [hereinafter "Zweigert & Kötz"].

[17] *Id.*, at 68-72. On this taxonomic method, and the resulting eight legal "families", see W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009), at 77 [hereinafter "Twining, *General Jurisprudence*"].

Law, Socialist, Far Eastern, Islamic and Hindu. However, the multiple criteria that Zweigert and Kötz use for their classificatory schema produce a difficulty. Although their criteria may allow us to group legal systems together quite effectively, they do little to analyze and explain why these systems are the same. Zweigert and Kötz concur with Réné David in the view that comparative categories are purposive:

> "Legal families" do not exist like human families: the idea is used purely for explanatory purposes, to indicate the extent of difference and similarity in the various legal systems. It follows that all classifications have their utility: it all depends on the point of view adopted by the writer in question and the aspects of the matter which interest him most.[18]

The difficulty presented by Zweigert, Kötz and David's grand system of categorization, however, is that these "families" are rarely used just for the specific research questions for which they were created. When we use the categories "common law" and "civil law", for example, what is our purpose? What are the aspects of the matter that interest us most? The difficulty, and the potential danger, is that we use these terms because their loose definition makes them convenient. There are good reasons to consider English civil procedure and that of the United States to be quite distinct, based, in large part, around the organization of the legal professions and the cultures of litigation, respectively, in these two nations.[19] In turn, there are good reasons to break "Continental Europe" down into Romanistic, Germanic and Nordic categories, as, for example, Zweigert and Kötz do.

2. The Accuracy and the Utility of "Common Law" and "Anglo-American" Categories

An immediate problem with using the categories "common law" and "civil law" in order to describe systems of procedure is that — although everyone knows what you are talking about, and there seem, at least at first blush, to be few problems in identifying which systems are "common" and which are "civil" — it is not quite so straightforward to say

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[18] Zweigert & Kötz, *id.*, at 73, citing R. David and C. Jauffret-Spinosi, *Les grands systèmes de droit contemporains*, 9th ed. (Paris: Dalloz, 1988), at 22.

[19] See, *e.g.*, P. Atiyah & R. Summers, *Form and Substance in Anglo-American Law* (Oxford: Oxford University Press, 1987); D. Dwyer, *The Judicial Assessment of Expert Evidence* (Cambridge: Cambridge University Press, 2008), at 220-32, 341-52 [hereinafter "Dwyer, *Judicial Assessment*"].

what it is that defines these terms. If we are using "common law" and "civil law" in strictly genealogical senses, then our ability to define these categories carefully may seem to be of little practical importance (although it would be of historical interest). If our categories are functional or analytical, however, we need to understand what information our categories are conveying, and the purpose for which they are relevant. This degree of established definition and conceptual development is necessary if we are to be able to check that our categories are being accurately applied, and in order to make use of them.

What exactly is it that makes something a common law rather than a civil law procedure? On the basis that we might like to think that we know common law and civil law procedures when we see them, I have attempted to come up with the following definitional sketches. Producing these pen sketches is difficult because there are no common criteria against which to describe the two categories.

We might broadly say that, under common law procedure, a plaintiff issues a writ that specifies the cause of action in narrow terms. Each party comes to trial with little idea of what evidence and which legal arguments his or her opponent(s) might present. Nonetheless, each party has to be prepared to meet almost any eventuality. The case is heard at trial before a judge (who is a senior lawyer) and, when appropriate, a lay jury. Each party summonses witnesses to be examined orally (by counsel for each party). This oral examination includes cross-examination by the opposing party (that is, the party that did not call the witness). Where specialist evidence is required, parties may call experts as witnesses. There are highly developed rules of admissibility regarding evidence. There is no appeal process, in large part because there can be no appeal from the black-box decision of a jury.

In contrast, the plaintiff in civil law procedure makes a complaint that gives a narrative account of the wrong that has been committed or the right that should be enforced, the relevant legal principles and the supporting evidence. A judge, who may be a relatively junior lawyer, is involved from an early stage in the preparation of the case, which includes the composition of a dossier. This preparation is likely to also involve the submission of documents by both parties, and, possibly, a series of hearings at which the parties may produce witnesses whom the judge is to question. If specialist evidence is required, the court may appoint an expert to conduct an investigation. The quality of the evidence, such as whether or not it is hearsay, is determined on the basis of its weight, rather than on the question of its admissibility. There is no direct

equivalent of the common law trial; there is, however, a concluding hearing, which is held before one or more judges (who, in the case of the latter, sit as a panel). This concluding hearing is a formal handing over of the evidence and the submissions, rather than a hearing of the case. Finally, because there is a career judiciary, there is a developed appeals process.[20]

As this is a paper on English civil procedure, I shall consider some particular difficulties that arise with the use of "common law" as a category to describe the English procedural system from a genealogical perspective. Similar problems arise when the United States systems are described as "common law". In relation to the category of "civil law", the historical development of procedural systems in Western Europe — particularly since the start of the 19th century — has ensured that there is very little similarity between modern civil procedure and that of the Roman-canon courts in the heyday of civil law learning and practice, and very little homogeneity between modern civil law systems.[21] A proper consideration of the limitations of "civil law" as a category, however, is outside the scope of the present paper.

Up until 1875, common law procedure was only one of three main procedural systems in England and Wales. These three systems included: the common law (King's Bench, Common Pleas and Exchequer), equity (particularly Chancery) and civil law (Admiralty and Ecclesiastical law, including probate and divorce). Although equitable procedure was civil law in origin, it evolved in England under the common law influence.[22] Perhaps because we have tended to keep the label "common law" in order to describe our system in contrast to the "civil law", and because common law trappings, such as the jury and the cross-examination, were retained after 1875, we have tended to forget that England was not, historically, a uniquely common law jurisdiction.

Under the *Supreme Court of Judicature Acts* of 1873[23] and 1875,[24] common law procedure, and equitable procedure, came to an end in

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[20] See, *e.g.*, P. Schlosser, "Lectures on Civil-Law Litigation Systems and American Cooperation with those Systems" (1996) 45 U. Kan. L. Rev. 9.

[21] See, *e.g.*, C.H. van Rhee, ed., *European Traditions in Civil Procedure* (Oxford: Intersentia, 2005).

[22] M. MacNair, *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot, 1999). See also C. Langdell, "Discovery under the Judicature Acts, 1873, 1875, Part I" (1897) 11 Harv. L. Rev. 137.

[23] *Supreme Court of Judicature Act 1873* (U.K.), 36 & 37 Vict., c. 66 [hereinafter "*Judicature Act 1873*"].

[24] *Supreme Court of Judicature Act 1875* (U.K.), 38 & 39 Vict., c. 77 [hereinafter "*Judicature Act 1875*"].

England.[25] The view of Chancery lawyers was that the common law was now dead, if, indeed, it had not died long before.[26] Up until 1875, much of the procedural reform of the 19th century was concerned with giving common law courts access to the pre-trial evidence-gathering devices of discovery, while giving equity and civil law courts access to *viva voce* examination, including cross-examination. The *Rules of Court* of 1875[27] were a mixture of common law and equitable concepts, with the catch-all proviso that, where there was ambiguity, the rules of equity would prevail.[28] Actions were commenced by a document called a writ, but endorsed with a statement of the nature of the claim, which — in a manner similar to the former Bills of Chancery — produced the facts, rather than the law, on which the claim was based.[29] Discovery became available in all actions, and the right of Chancery courts to appoint their own experts, such as surveyors, was carried through. Further developments since 1875 — such as pre-trial case management, the exchange of witness statements and expert reports before trial, restrictions on oral evidence and the almost total abolition of the jury — mean that modern English civil procedure bears even less relation to the classical common law model.[30]

This brief historical excursus tells us that "common law" appears to be a very elastic term. It covers a wide range of procedural practices that have varied over time, and possibly even the practices of courts that were not actually common law! We may tend to use "common law" very loosely to describe a number of procedural systems, but there is actually very little information conveyed by the use of this term to describe the category. For this reason alone, I would suggest that we should investigate more accurate and informative categories. In the next section,

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[25] John Baker dates the end of the common law system less specifically — to the period between 1850 and 1890. See J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002), at 90-94.

[26] Birrell, for example, thought that the common law learning had come to an end with the New Rules of Pleading of Hilary Term, 1834 (Rules of the Judges made in conformity with (U.K.) 3 & 4 Will. IV, c. 42, s. 1). See A. Birrell, "Changes in Equity, Procedure and Principles" in W. Odgers, ed., *A Century of Law Reform* (London: MacMillan & Co., 1901) at 177-204 [hereinafter "Birrell"].

[27] *Judicature Act 1875*, *supra*, note 24, Sch. 1.

[28] *Judicature Act 1873*, *supra*, note 23, s. 25(II). This led Birrell to declare that "[l]ike truth, equity has finally prevailed, and by statute … . No triumph can be completer than this." Birrell, *supra*, note 26, at 96.

[29] *Rules of Court* 1875, Ords II-III.

[30] M. Lobban, "The Strange Life of the English Civil Jury, 1837–1914" in J. Cairns & G. McLeod, eds., *The Dearest Birthright of the People of England: The Jury in the History of the Common Law* (Oxford: Hart, 2002) 173; R. Jackson, "The Incidence of Jury Trial During the Past Century" (1937) 1 Mod. L. Rev. 132.

however, I suggest a further reason, namely, that the existing, recognized categories provide us with little or no assistance in describing and understanding procedural change. Rather, they encourage us to think of procedural systems in unnecessarily monolithic terms.

III. THE BREAKDOWN OF THE AGE-OLD CATEGORIES

1. Variations within English Civil Procedure

The CPR, which came into effect in April 1999, promoted active case management and pre-trial communication and cooperation between the parties. If we were to accept the utility of the existing "common law" and "civil law" categories for the purpose of functional description, then we might be tempted to see some signs that English civil procedure is shifting from a common law trend towards a more civil law approach to litigation. I am not going to deal comprehensively with the structure of the CPR reforms here, but I will highlight some key points that touch on the question of categorization, as well as reveal some difficulties.

One of the fundamental premises of the CPR is that the value (and the complexity) of a case guides its allocation to a track, which, in turn, affects the court resources that are allocated to the case. The effect of this simple principle has begun to result, almost, in the creation of three procedural regimes. Such internal variation becomes important when we consider the classification of English civil procedure. The CPR requires that cases be allocated to one of three tracks: Small Claims (legally and factually simple cases that are worth less than £5,000), Fast Track (cases that can be heard in one day, and are worth between £5,000 and £25,000),[31] and Multi Track (complex cases that are worth more than £25,000). The Small Claims Track and the Fast Track are both dealt with predominantly in the County Courts. Prior to 1999, these were the domain of the *County Court Rules*[32] rather than the RSC.

Small Claims proceedings are frequently conducted by the litigants in person, very rarely involve expert evidence and have minimal procedural formalities. Additionally, the rules of evidence do not strictly apply in Small Claims proceedings. I do not consider the Small Claims track

[31] The ceiling on the Fast Track was £15,000 until April 2009, when it was raised to £25,000. See *The Civil Procedure (Amendment No. 3) Rules 2008* (S.I. 2008/3327 L.29).

[32] *County Court Rules 1981* (S.I. 1981/1687 L.20) [hereinafter "CCR"].

any further here.[33] In both the Fast Track and the Multi Track, there is much more emphasis than there is under the CCR or the SCR on pre-action and pre-trial negotiation, exchange and "disclosure" (*i.e.*, old-style discovery and inspection) between the parties, and case management meetings and directions. Parties should comply with court directions; otherwise, they will be subject to penalties. Penalties are most likely to be expressed at the costs stage, although the judge also has the option to strike out proceedings in exceptional circumstances.[34] The court is able to direct what evidence it wishes to receive,[35] and also to limit evidence, including expert evidence.[36] The court may direct that evidence must be given by a joint expert, rather than by separate experts (*i.e.*, a different expert for each party). Full witness statements are to be exchanged in advance of the trial, and, because of these pre-trial statements, a witness who is called at trial does not give evidence-in-chief. He or she is, however, cross-examined. The parties are also required to submit "skeleton arguments" in advance of the trial. Skeleton arguments identify the points that are in issue, describe the nature of the arguments that relate to each issue, and include the legal authorities that will be relied upon. In the Chancery Division, for example, a skeleton argument should not normally exceed 20 pages of double-spaced A4 paper, and, in many cases, it should be much shorter.[37] The court may also direct, if it wishes, to hear some of the issues in advance of others, where deciding such issues may effectively decide the case.[38]

In the Fast Track and the Multi Track, therefore, there appears, on the face of the rules of the CPR, to be greater emphasis on: (a) party cooperation; (b) the front-loading of litigation activity (that is, to the start of pre-trial or even pre-action); (c) court involvement in preparing the parties for trial; (d) strict timetabling; (e) court-determined limits on evidence; (f) the impartiality of experts; (g) preparation of the judge and

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[33] Small Claims proceedings have received very little academic attention in England. They may come close to Bentham's idea of natural procedure, but they are also not free from difficulties (*i.e.*, in relation to whether litigants in person are treated fairly).

[34] The court has the option to attach to an order a threat of penalty for non-compliance. This is known as an "unless" order. See CPR, *supra*, note 4, r. 3.1(3).

[35] *Id.*, r. 32.1.

[36] *Id.*, r. 35.1.

[37] Her Majesty's Courts Service, *Chancery Guide*, ed. by Lawrence Collins (October 2009), at 135 (Appendix 7), s. 2(2), online: <http://www.hmcourts-service.gov.uk/cms/1231.htm>.

[38] The *White Book* suggests that: "Under the CPR, the early identification and resolution of issues likely to be dispositive of proceedings (whether by application for summary judgment or otherwise) is encouraged." *Civil Procedure: The White Book Service 2009* (London: Sweet & Maxwell, 2009), s. 15, para. 9 [hereinafter "*White Book*"].

the parties, in advance, for what will be presented at trial; (h) reduced time spent in the giving of evidence at trial; and (i) short trials. In addition, the use of evidence has already been significantly relaxed by the admission of hearsay and most instances of opinion evidence. Finally, in most case categories, a judge sits alone, without a jury.

As I mentioned above, it would be tempting to observe in these reforms some signs that English civil procedure is shifting from a common law approach towards a more civil law approach to litigation. There would be four principal difficulties with such an account, however. First, the two categories in question are so broad and amorphous that any development by a procedural system within one category could probably be accommodated within that category.

Second, these changes did not merely appear from out of nowhere in the late 1990s, but rather followed a line of development that began in England in the early 1970s — a line that has parallels elsewhere in the "common law" world. The *Civil Evidence Act 1972*[39] introduced requirements for greater pre-trial disclosure of evidence and expert reports, such that parties no longer came to trial with limited knowledge of what they would have to face and seek to rebut.[40] The CEA 1972 also relaxed the rule against evidence of opinion that is given by a non-expert.[41] Pre-trial disclosure of evidence developed in the 1980s — with the exchange of witness statements — in order to facilitate advance notice of the evidence that a witness would be giving at trial. The 1990s saw attempts at more active case management, as well as constraints on the excessive, partisan use of experts. Finally, the *Civil Evidence Act 1995*[42] abolished the common law rule against hearsay evidence in civil trials.

The idea, in the Anglo-American world, of greater pre-trial, judge-controlled case management dates to, at least, the U.S. *Federal Rules of Civil Procedure 1938*.[43] Judicial case management was not, exclusively, an English idea. One of the authors of the *Federal Rules*, Edson Sunderland, made reference to the recommendations of the English Peel Commission of 1936,[44] which were that greater use should be made of the "summons for directions" that had been introduced by the RSC in

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39 *Civil Evidence Act 1972* (U.K.), 1972, c. 30 [hereinafter "CEA 1972"].

40 *Id.*, s. 2.

41 *Id.*, s. 3.

42 *Civil Evidence Act 1995* (U.K.), 1995, c. 38 [hereinafter "CEA 1995"].

43 [Hereinafter "*Federal Rules*"].

44 *Report of the Royal Commission on the Despatch of Business at Common Law* (Cm 5065, 1936) [hereinafter "Peel Report"]. See E. Sunderland, "Discovery Before Trial Under the New Federal Rules" (1939) 15 Tenn. L. Rev. 737, at 753-55 [hereinafter "Sunderland"].

1883.[45] The summons for directions served as an opportunity for the master (a procedural judge) who was overseeing the case to hear all of the necessary pre-trial interlocutory applications on a single occasion. The Peel Commission recommended that greater use should be made of these hearings so that the court could identify the essentials of the dispute and arrange for proof of the necessary facts in the shortest and most economical manner.[46] While the Americans adopted pre-trial hearings that were similar to what the Peel Commission had suggested, English directions hearings remained rudimentary until the introduction of the CPR. The Americans also developed the docket system, in which a judge is assigned to a case throughout its history, and this has enabled greater judicial oversight of the parties' preparations. The English interest in greater judicial activism, party cooperation and expert impartiality is largely mirrored in Australia and Hong Kong.[47] Therefore, if we were to say that England is moving towards an increasingly "civil law" model, we might then need to conclude that the rest of the "common law" world is moving in the same direction with it.

The third difficulty with an assertion that English procedural law is converging with civil law norms is that some of the potentially more dramatic new rules under the CPR do not appear to actually have the effects in practice that it seems, on paper, they might be capable of producing. The most striking example is, perhaps, the use of an "unless" order under rule 3.1.[48] It appears that this provision was originally intended to facilitate the penalization of parties who failed to comply with timetabling and other directions through, principally, a conditional order.[49] This was intended to stop parties from delaying and otherwise avoiding case management directions, both of which had been problems under the RSC and the CCR. On the face of the CPR, a party who breaches a conditional order will be penalized. However, the Court of Appeal has taken the view that the penalty contained in a Rule 3.1 order

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45 Peel Report, *id.*, at 77-80; RSC 1883, Ord. 25.

46 *Id.*, at 77-80, cited in Sunderland, *supra*, note 44, at 754.

47 Hong Kong's *Civil Justice Reform* was implemented in April 2009 through amendments to existing procedural provisions. It is directly based on the approach taken by the CPR, albeit with modifications. See Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform: Final Report* (Hong Kong: 2004), online: <http://www.civiljustice.gov.hk/eng/archives_fr.html>; Herbert Smith, Gleiss Lutz & Stibbe, "The Civil Justice Reforms: 10 Issues You Will Need to Consider" (Hong Kong: Herbert Smith, June 6, 2008), online: Commercial Litigation e-bulletin <http://www.herbertsmith.com/NR/rdonlyres/3C8590FF-6A69-4B6F-9F96-7DBAC7E550E2/7565/0605CJR2.htm>.

48 CPR, *supra*, note 4, r. 3.1.

49 *Id.*, r. 3.1(3)(a).

is subject to further review under Rule 3.8,[50] which allows the defaulting party to apply for relief from sanctions.[51] In practice, issues are rarely separated out and addressed separately in order to simplify and shorten the trial process. The full extent of the powers for summary judgment has been put into question by a decision of the House of Lords in the multi-million pound *BCCI* litigation.[52] The power of the court to give directions on the evidence that it wishes to receive, under Rule 32.1, has almost never been used.[53] It appears that this provision has been interpreted as a case management measure for the purpose of restricting excessive evidence, rather than as a means to enable courts to become more active in directing evidence. The courts do not use their powers to instruct parties to provide information that is not reasonably available to their opponents,[54] and assessors (a form of court expert or adviser) are not used outside Admiralty, Patents and Costs hearings.[55]

The fourth difficulty — which is, perhaps, the most significant problem in a discussion about categorization — is that there are, in practice, noticeable differences between Fast Track and Multi Track proceedings. Fast Track proceedings are predominantly heard in the County Courts, where the CCR was previously used, and where solicitors conduct much of the litigation. Multi Track proceedings are heard in the High Court, where the RSC was previously used, and litigation must be conducted by barristers, or specially registered "solicitor advocates". The most likely reason for these differences is that the concept of track allocation carries with it the idea that more court resources, including judicial time, will be available to Multi Track cases.

In Fast Track cases, pre-trial case management directions are likely to be standardized, including the direction that only single, joint experts must be appointed. At trial, expert reports stand as evidence, and experts

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[50] See *Marcan Shipping (London) Ltd v. Kefalas*, [2007] EWCA Civ 463, at paras. 34-36.

[51] CPR, *supra*, note 4, rr. 3.8, 3.9. These provisions are also seen as a guarantee of the CPR's compliance with the Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 U.N.T.S. 221, art. 6 [hereinafter "European Convention"]. On this matter, see *Woodhouse v. Consignia plc*, [2002] EWCA Civ 275, [2002] 1 W.L.R. 2558, at paras. 42-43.

[52] See CPR, *id.*, r. 24; *Three Rivers District Council v. Governor & Co. of the Bank of England (No. 3)*, [2001] UKHL 16, [2003] 2 A.C. 1 [hereinafter "*BCCI*"]. See also H. Brooke, "Some Thoughts on the First Seven and a Half Years of the CPR" in Dwyer, *Ten Years On*, *supra*, note 5, at 457.

[53] K. Grevling, "CPR r 32.1(2): Case Management Tool or Broad Exclusionary Power?" in Dwyer, *Ten Years On*, *supra*, note 5, ch. 12.

[54] CPR, *supra*, note 4, r. 35.9.

[55] *Id.*, r. 35.15. See, *e.g.*, R. Jacob, "Experts and Woolf: Have Things Got Better?" in Dwyer, *Ten Years On*, *supra*, note 5, at 296.

are not usually called as witnesses, even when each party has produced its own report.[56] The claimant's opening statement may be dispensed with, or skeleton arguments may be used instead.[57] The court may also request that closing submissions be given in writing, with only oral summaries presented in court. When the frequent absence of oral submissions is combined with the absence of examination-in-chief of witnesses (which is made possible through the use of witness statements) and the power of the court to limit cross-examinations,[58] the Fast Track trial begins to resemble a civil law trial. In this respect, all of the work of developing and presenting evidence and arguments has been done, and the trial itself becomes the formal handing over of the case for judgment — that is, the very end of the process. The formal rules of evidence are often disregarded, partly because of the disproportionate expense of gaining a formal opinion from a barrister on the quality of the evidence.[59] Because only relatively simple cases of low value are handled on the Fast Track, the civil process begins to resemble an administrative process in many ways. Thirteen years ago, Woolf recommended that Fast Track cases should be dealt with by way of fixed costs;[60] this recommendation was repeated by Lord Justice Jackson in his review of civil litigation costs.[61]

In Multi Track cases, the greater availability of court — and (usually) litigant — resources appears to result in a more individualized form of pre-trial case management and a more traditional form of trial. However, there does not appear to have been an increased level of judicial intervention, at least in commercial litigation.[62] The failure of case management in the very high value *BCCI*[63] and *Equitable Life*[64] cases led to

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[56] CPR, *id.*, r. 35.5.

[57] M. Iller, *Civil Evidence: The Essential Guide* (London: Sweet & Maxwell, 2006), at 128 [hereinafter "Iller"].

[58] CPR, *supra*, note 4, r. 32.1(3).

[59] Iller, *supra*, note 57, at 468.

[60] Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty's Stationery Office, 1996), overview, para. 3, and ch. 4 [hereinafter "Woolf Report"].

[61] R. Jackson, "Review of Civil Litigation Costs: Final Report" (Norwich: The Stationery Office, 2009) [hereinafter "Jackson, 'Final Report'"], at 168.

[62] T. Parkes, "The Civil Procedure Rules Ten Years On: The Practitioners' Perspective" in Dwyer, *Ten Years On*, *supra*, note 5, at 440-42. See also Jackson, *id.*, at 416.

[63] *Supra*, note 52; *Three Rivers District Council v. Bank of England (Indemnity Costs)*, [2006] EWHC 816 [hereinafter "*BCCI Costs*"]. See A. Zuckerman, "A Colossal Wreck — the BCCI-Three Rivers Litigation" (2006) 25 C.J.Q. 287.

[64] A. Verity, "Where Equitable Life Went Wrong" *BBC News* (March 9, 2004), online: <http://news.bbc.co.uk/1/hi/business/3547441.stm>.

revised guidelines, on a trial basis, from the Commercial Court Long Trials Working Party on the Conduct of Litigation in the Commercial Court.[65] One example of the tendency of courts to simply accept the wishes of the parties under Multi Track case management is the continued allowance of party experts, rather than joint experts, largely on the basis that the cost of the former is proportionate to the value of the case, and the parties are willing to pay. A Multi Track trial begins and ends with speeches from counsel. Experts, usually party experts, will be examined in court. Examination-in-chief of witnesses is done by witness statement, as in the Fast Track. Because they are drafted at considerable expense to cover almost any evidentiary eventuality at trial, these statements can be substantial, and can be supported by appended exhibits.[66] In his Preliminary Report, Lord Justice Jackson appeared to prefer the option of resurrecting the possibility of examination-in-chief of witnesses in Multi Track cases, in order to both reduce the excessive cost of witness statements and allow the judge to form a better opinion of the witness. In his Final Report, however, Jackson concluded that the abuse of witness statements should be curtailed, rather than their general use be restricted.[67] If the Jackson Review does result in fixed costs, these are unlikely to apply to Multi Track cases, at least at the upper end. The overall picture of Multi Track litigation therefore reveals that — with the exception of the front-loading of litigation activities — relatively little has changed in the overall character of litigation since the introduction of the CPR.

Thus, we appear to have two diverging forms of procedure within English civil litigation (three if we include Small Claims). In the Fast Track procedure, the trial itself seems to be diminishing in importance, as it becomes a proceeding akin to the formal handover of submissions and evidence that are already available to the court. In the Multi Track procedure, however, there is relatively little substantive change from the days of the RSC. We might therefore need to consider whether or not we should categorize Fast Track and Multi Track proceedings in the same way. The CPR has now merged High Court procedure with that of the County Courts, but, rather than facilitating procedural convergence, it may actually have created greater divergence. At the same time, the specialist

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[65] P. Aikens, "Report and Recommendations of the Commercial Court Long Trials Working Party" (London: Judiciary of England and Wales, December 2007).

[66] R. Jackson, "Review of Civil Litigation Costs: Preliminary Report" (Norwich: The Stationery Office, 2009) [hereinafter "Jackson, 'Preliminary Report'"], at 401*ff*.

[67] Jackson, "Final Report", *supra*, note 61, at 376.

lists within the High Court — such as the Patents, Admiralty, Commercial, Mercantile, and Technology and Construction Courts — are each producing their own Guides and Practice Directions. As a consequence, the overall sense is of greater functional specialization and divergence within the English civil justice system.

The fact that there is significant variation in the procedure(s) within England should make us stop and ask ourselves whether or not we are guilty of a variation of what William Twining has called the "country and western" problem of comparative law.[68] By "country and western", Twining means the habit of only comparing legal systems at the level of the state, and, even then, only the legal systems of Western states. Here, it would appear that by categorizing civil procedure at the level of the state — for comparative purposes — we are missing important information about the way in which litigation functions in actual practice. This specialization and divergence cannot be captured by the "age-old" categories.

2. Procedural Harmonization Within the European Community

While the "common law" and "civil law" categories may not enable us to adequately describe the changes and the variations that are developing within English civil procedure, their monolithic nature may also be hindering our ability to analyze and assess options for procedural reform, both within the European Community ("EC") and domestically, in England.

EC law contains provisions for the harmonization of civil procedure. Of particular importance is article 65(c) of the consolidated *Treaty Establishing the European Community*.[69] For the purpose of furthering the "Single Market",[70] article 65(c) provides for "eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States". To this effect, a number of minor procedural measures have been implemented that concern, for example, the taking of evidence in other

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[68] W. Twining, "Globalisation and Comparative Law" in W. Twining, *Globalisation and Legal Theory* (Evanston: Northwestern University Press, 2000), at 174.

[69] *Treaty Establishing the European Community* (consolidated version), March 25, 1957, C 325 Official Journal of the European Union 33 (December 24, 2002), online: <http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf> [hereinafter "EC Treaty"].

[70] *Id.*, art. 94 (providing that: "The Council shall … issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market"). This provision is concerned principally with substantive law. See also J. Bridge, "Procedural Aspects of the Enforcement of European Community Law through the Legal Systems of the Member States" (1984) 9 Eur. L. Rev. 28.

Member States,[71] the enforcement of remedies and transnational small claims litigation.[72] Procedural harmonization, however, does not appear to be a policy interest of the current Directorate General for Justice, Freedom and Security within the European Commission.[73] Nonetheless, there is a special procedure for the enforcement of intellectual property law,[74] and the Directorate General for Competition Law is currently considering whether or not to harmonize procedures for the enforcement of competition law by private individuals and companies before the domestic courts.[75] When we come to analyze the possible needs for procedural harmonization and assess the consequent proposals, the current "common law" / "civil law" categories prove unhelpful. They suggest incommensurability and/or incompatibility, when what we need is a realistic assessment of the feasibility of reform. In consequence, we therefore tend to either suggest that harmonization would be extremely difficult (*i.e.*, because of the profound differences between common law and civil law procedures), or abandon the "age-old" categories altogether. This suggests that a more nuanced approach to functional and analytical categorization is required — one that will allow us to see the likely effects of minor changes within a procedural system, or of imports or transplants from another system.

3. The Challenges of the English Civil Costs Review of 2009

A similar need for a more nuanced approach can be seen at the level of domestic reform — rather than at the level of international harmonization —

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[71] EC, *Council Regulation (EC) 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters*, [2001] O.J. L 174/1. This supersedes the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, March 18, 1970, 847 U.N.T.S. 241.

[72] See, *e.g.*, C. Crifò, *Cross-Border Enforcement of Debts in the EU* (London: Kluwer Law International, 2008); E. Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (Oxford: Oxford University Press, 2008).

[73] *Communication from the Commission to the Council and the European Parliament: The Hague Programme: Ten Priorities for the Next Five Years: The Partnership for European Renewal in the Field of Freedom, Security and Justice*, COM (2005), 184 (final). For an earlier EC-commissioned examination of possible procedural harmonization, prepared by the Working Group for the Approximation of Civil Procedure Law, see M. Storme, ed., *Approximation of Judiciary Law in the European Union* (Dordrecht: Martinus Nijhoff, 1994) [hereinafter "the Storme Report"]. On the history of the Storme Report, see R. Verkerk, "What is Judicial Case Management? A Transnational and European Perspective" in C.H. van Rhee, ed., *Judicial Case Management and Efficiency in Civil Litigation* (Antwerp: Intersentia, 2008), at 27, 28-29; M. Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Oxford: Hart, 2004), at 94-112.

[74] EC, *European Parliament and Council Directive (EC) 2004/48/EC of 29 April 2004 on the Enforcement of Intellectual Property Rights*, [2004] O.J. L 157, [2004] O.J. 195 (corrigendum).

[75] *White Paper: Damages Actions for Breach of the EC Antitrust Rules*, COM (2008), 165 final.

in relation to the review of civil costs that has recently been undertaken by Lord Justice Jackson in England.[76] Although it may still be too soon to pass judgment on the significance or the success of Lord Woolf's reforms,[77] what is already clear is that the reforms have not brought the problems of costs under control, and, indeed, they may have exacerbated the situation. At the end of 2008, the then Master of the Rolls, Sir Anthony Clarke, gave Lord Justice Jackson the unenviable task of, first, undertaking a fundamental review of the costs of civil litigation, and, second, proposing solutions.[78] I would suggest that it is central to the eventual success of Lord Justice Jackson's proposed reforms that they can be shown to have properly taken into account: (1) why costs operate as they do in English civil litigation; (2) why the Woolf Reforms did not succeed in controlling these costs, let alone in reducing them (as intended); (3) why they have increased; and, therefore, (4) how to effectively bring them under control now. Successful reform of litigation costs will almost certainly involve systematic reform, rather than localized adjustments, to the way in which litigation is funded and costs are awarded.

Jackson's review was wide-ranging, both in terms of the subjects that he considered relevant, and also in terms of the sources from which he drew. His Preliminary Report, for example, dedicated over 100 of its 650 pages to a comparative analysis of costs regimes in other jurisdictions, including both common law and civil law systems.[79] For the same reasons that it was investigated during Lord Woolf's *Access to Justice* inquiry,[80] particular attention was again paid to the fixed costs system in Germany. It is of particular interest for our present purposes that Jackson appears tentatively to have viewed discovery as, potentially, an unnecessary expense, since countries such as France, Germany and The Netherlands seem to be able to conduct litigation effectively without it.[81]

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[76] Jackson, "Preliminary Report", *supra*, note 66, at 1-9. A Final Report was released in December 2009.

[77] A. Clarke, "The Woolf Reforms: A Singular Event or an Ongoing Process?" [hereinafter "Clarke"] in Dwyer, *Ten Years On*, *supra*, note 5, at 33.

[78] Jackson, "Preliminary Report", *supra*, note 66, at 3.

[79] *Id.*, at 545-647.

[80] See Woolf Report, *supra*, note 60, at ch. 7, para. 14.

[81] Jackson, *supra*, note 66, at 388, 397. In his Final Report, however, Jackson chose to recommend modifying the current discovery system ("disclosure" in CPR parlance), rather than abolishing it, so that in large commercial cases, and cases where the costs of standard disclosure may be disproportionate, the court may make a case management order from a menu of options: Jackson, "Final Report", *supra*, note 61, at 372-73.

For policy reasons, it would therefore be helpful to develop a system of categories that will elucidate points of similarity and points of difference in a fashion that is more nuanced than the existing and insufficient presentation of monolithic oppositions. It is likely that such a categorization would be functional (*i.e.*, it would examine *how* procedural systems work) or analytical (*i.e.*, it would examine *why* they work now as they do).

IV. THE DEVELOPMENT OF FUNCTIONAL AND ANALYTICAL CATEGORIES

This paper argues that the "age-old" categories of "common law" and "civil law" are no longer relevant, at least in terms of what is needed for the effective analysis of the operation and the reform of English civil procedure. The existing categories are unduly genealogical and geographical. What we need now are categories that are functional and analytical. The "age-old" categories are also monolithic — that is, they do not allow us to capture variations and options for change with a sufficient level of granularity. Our difficulty, of course, is that we do not currently have a fully operational set of functional or analytical categories. It is outside the scope of this paper to produce such a set of categories, but some initial work has already been done in this area. Of particular note are Mirjan Damaška's contributions, which should be considered a starting point for further work.

The most significant example of an analytical approach to comparative procedure can be found in *The Faces of Justice and State Authority*.[82] Here, Damaška makes his famous suggestion that we should classify procedural systems in terms of two dimensions: the structure of judicial authority and the purpose of adjudication. For each of these two dimensions, there are two values. Thus, judicial authority can be either hierarchical or coordinate, and the purpose of adjudication can be either policy implementing or conflict solving. In this way, Damaška provides a framework against which we can examine, describe and analyze procedural systems. The forced dichotomies of Damaška's method compel the analyst to decide what he or she considers to be the essential features of a procedural system, and to identify where there are hybrid features in

[82] M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986) [hereinafter "Damaška, *Faces of Justice*"].

play.[83] In turn, "comparison [of legal systems] is complicated by the almost universal hybridity of legal systems and orders".[84]

In *Evidence Law Adrift*,[85] Damaška presents another analytical model of similar power. Here, he suggests that the distinctive characteristics of Anglo-American evidence law ("Anglo-American" is his term) can be understood in terms of three supporting pillars: the bicameral trial court; temporally compressed and marginally prepared trials; and comprehensive party control over proceedings. As those three pillars begin to change or crumble, so we might expect Anglo-American evidence law to change dramatically. The analysis here is extensible. We could actually say that a significant proportion of civil procedure, not just with respect to evidence — and not just for Anglo-American procedure — can be understood in terms of the constitution of the court, the balance between pre-trial and trial activity, and the balance of control between the court and the parties. Terms like "court control" and "judicial activism" are potentially misleading because they cover a wide range of phenomena. In England, managing cases actively can mean as little as timetabling the main stages of an action, while, in Germany, it might mean asking the parties for further evidence on contested factual claims, and instructing experts.[86]

Although Damaška's analysis is extensible, it is not comprehensive, and this is partly because it was designed to deal only (*i.e.*, exclusively) with evidence law. It does not consider, in particular, expectations about the conduct of the parties, the role and the conduct of counsel and the role of the court. The third of these factors is similar to the "purpose of adjudication" dimension of the analytical model from *Faces of Justice*.[87] These three factors might be considered to be broadly "cultural" because they do not directly touch on the functional mechanics of the procedural system.[88] By the role and the conduct of the parties and their counsel, respectively, I refer to such factors as the extent to which the parties might be seen to be trying to achieve a settlement based on the merits of

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[83] For a valuable analysis of Damaška's method in *Faces of Justice*, *id.*, see I. Markovits, "Playing the Opposites Game: On Mirjan Damaška's *The Faces of Justice and State Authority*" (1989) 41 Stan. L. Rev. 1313.

[84] Twining, *General Jurisprudence*, *supra*, note 17, at 250.

[85] S*upra*, note 13.

[86] Compare A. Kessler, "Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial" (2005) 90 Cornell L. Rev. 1181. Kessler's use of "inquisitorial" here seems to be stretching the bounds of the normal legal definition, as equitable procedure was far from being court-led.

[87] *Supra*, note 82, at 77-80.

[88] See Clarke, *supra*, note 77, at 34; Dwyer, *Judicial Assessment*, *supra*, note 19, at 180-81.

the case (while recognizing that all parties wish to win), and the extent to which lawyers might be expected to act in the interests of justice rather than in those of their client, where these interests conflict. With respect to the role of the court, I am thinking of procedural models where the court is an umpire to a private dispute (a liberal or *laissez faire* model), where the court exists to heal the pathology of a civil dispute (a welfare model), or where the court exists to provide a dispute resolution service, subject to finite resources (a managerial model).[89]

We might say of English civil procedure, generally (except for family law proceedings): that a spirit of cooperation is expected between the parties; that lawyers are expected to exercise some discretion, such that they will hold back from furthering their client's case in the face of the broader interests of justice; and that there is currently a conflict between a managerial and a liberal model of court adjudication. It may be that there is a stronger managerial model in the Fast Track (county courts), while there is still a predominantly liberal model in the Multi Track. The tribunal is composed of a judge only, there is extensive pre-trial preparation (with trials in the Fast Track becoming very compressed), and, whatever the intentions of the CPR, proceedings are still controlled by the parties, both before and at trial (and more so in the Multi Track).

If we were to go on to repeat this six-point analysis for a number of procedural systems, starting with, for example, France, Germany and the United States federal courts, what this analysis is likely to show is that different systems are closer to one another in different areas. Rather than saying, for example, that we have the United States at one end of a spectrum, with strong party control and a heavy emphasis on the trial, and Germany at the other end, with strong judicial case management and no clear final trial — with England and France sitting somewhere in between — we may instead find that the American emphasis on case management conferences brings them closer (*i.e.*, than English procedure) in some respects to German procedure, while English Fast Track cases are increasingly close to German procedure in terms of cooperation between the parties and the managerialism of the trial process. There are also strong variations within procedural systems. The distinction between Fast Track and Multi Track English cases has been discussed here, but one might also consider possible marked differences between pre-trial and trial behaviour in U.S. courts.

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[89] Dwyer, *Judicial Assessment*, *id.*, at 198-211.

The complexity of civil procedural systems for at least the last two centuries has been poorly served by broad-brush, monolithic categorizations such as "common law" / "civil law" and "Anglo-American" / "Continental European". The paucity of analytical tools for categorization has hindered attempts at procedural reform because, in consequence, we have often failed to understand the issues that surround a particular area of procedure, and we have not been able to properly assess the benefits and the risks that are associated with borrowing concepts from other procedural systems. Effective procedural reforms require effective tools for root-cause analysis of the problems and the opportunities that are involved.

Part VII
Cultural Dimensions of Harmonization

Cultural Dimensions of Harmonization: An Introduction

Peter Gottwald[*]

Some decades ago, prominent comparatists believed that procedural law could not be a subject of comparative law because it was rooted too much in national traditions.[1]

Those times are gone, thank God! In the decades after the Second World War, not only substantive civil law, but also procedure was subject to broad practical and academic comparison. With the ongoing integration in Europe, and the globalization of business and, even, of everyday life, there has been a strong movement of transnational learning, in which we have learned from one other. In this way, there has been a coming together of the common law and the civil law. In Europe, this has been true at least since Great Britain became a member of the European Community in 1978, and subsequently reformed its civil procedure rules in 1999. Already, at that time, Lord Goff of Chieveley regarded this as a momentous event.[2]

In this part, "Cultural Dimensions of Harmonization",[3] we focus on the question of whether this learning from one another, this reception of foreign legal concepts and ideas with the effect of some harmonization of procedural institutions, has some cultural dimensions[4] and limitations.

One question that must first be asked, however, is: what is legal culture? Normally, we use this term without much reflection. It should probably correspond with the style of a legal system. Or, more precisely,

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[1] Otto Kahn-Freund, "On Uses and Misuses of Comparative law" (1974) 37 Mod. L. Rev. 1, at 20.

[2] See Robert Lord Goff of Chieveley, "Coming Together — The Future" in B. Markesinis, ed., *The Clifford Chance Millennium Lectures — The Coming Together of the Common Law and the Civil Law* (Oxford, Portland, OR: Hart Publishing, 2000) 239, at 248. "The most important coming together of the common law and the civil law which has yet occurred."

[3] See 597*ff*.

[4] See Rolf Stürner, "Procedural Law and Legal Cultures" in T. Gilles & T. Pfeiffer, eds., *Prozeßrecht und Rechtskulturen* (Baden-Baden: Nomos Verlagsgesellschaft, 2004) 9.

it refers to the common practices, values, symbols and beliefs of groups of people — that is, to "collective values", or "building blocks of culture".[5] In the field of procedure, legal culture is represented by: the court system; the way of selecting and appointing judges; the influence of the government and political parties in filling leading positions; the institution of a truly impartial or a corrupt judiciary; the participation of laypeople in delivering judgments (*e.g.*, in particular, the jury trial); the appearance of courts in public; the role of the courts as a state power or as a service enterprise; the methods and manners of dispute resolution; the active or passive conduct of proceedings by the judge (including the functional scope of judicial case management); the system of cost fixing and shifting; the financial risk of going to court; the presence, absence or functional reality of legal aid and legal insurance; the speed of proceedings; the effectiveness of the enforcement of awards and orders; and the self-image of the profession (*e.g.*, whether practitioners perceive themselves to be members of a "free" profession or just replaceable cogs in the business machine).[6]

In all of these topics, the common law and the civil law represent not only different legal systems or legal families, but also different legal cultures and traditions. There is no doubt that legal culture corresponds with traditions, and it is therefore a conservative element.[7] All reforms that touch the traditional legal system are received coolly or even with hostility. This is because they may lead to a change in the living conditions of the ordinary citizen, or at least in the conditions of the bar.

I am reminded of the outcry of judges and members of the bar when the German legislature, in 1999, presented a draft to abolish the free right to an appeal in the form of the "second first instance".[8] The effect was that only a very moderate restriction became law.

From a political or economic perspective, many reforms that bridge the gap between national systems are useful and convincing, and they may very well represent real progress. However, people tend to reject them instinctively, out of a fear that such reforms may destroy amiable

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[5] Oscar G. Chase, *Law, Culture and Ritual* (New York, London: New York University Press, 2005) 6; Oscar Chase, "Some Observations on the Cultural Dimension in Civil Procedure Reform" (1997) 45 Am. J. Comp. L. 861, at 863.

[6] Peter Mankowski, "Rechtskultur" (2009) 64 Juristenzeitung 321, at 326 *et seq*.

[7] *Id.*, at 322.

[8] See Forum des Deutschen Anwaltsverein, "Justizreform — Zivilprozess" (2000) 50 Anwaltsblatt 177.

traditions, and, step by step, destroy the culture of their parents and their grandparents. It is remarkable that a majority of lawyers are executing law reforms and, at the same time, claiming that these reforms destroy important or, at least, likeable characteristics of a nation's lifestyle.

Most of you know that the European communities within the European Union have contributed much to the overall economic power and prosperity of all of the Member States. Throughout the Member States, the living conditions of ordinary citizens have improved significantly in the last several decades. Nonetheless, there still is widespread dissatisfaction with European institutions and their way of changing life.

In the field of law, English lawyers claim that the influence of the English common law is diminishing in Europe, despite the fact that the English common law remains a great influence in the Commonwealth and on the conduct of international commerce.

In my opinion, it is not surprising that a class that is losing — or that fears to lose — its influence is lamenting this loss (or, perhaps, impending loss). What is more difficult to understand, and perhaps even somewhat "crazy", is that people who are profiting from the legal changes and reforms of our time are doing so while vigorously claiming that the time before was a better one.

Regardless, we still enjoy different legal cultures in the Western world. The differences between these cultures may depend on their self-images, as distinct societies, and their respective priorities. Someone who sees his or her ideal in a primacy of economic power, and is something of a self-made person, will prefer legal values that are quite different from those that would be preferred by an individual who believes in a sure and certain degree of welfare for all citizens.

Many of the inherent details of a country's court systems, and of the conduct of the court proceedings therein, are regarded as part of that country's national legal culture. Is it possible to change the existing legal cultures of the world through rational harmonization? Are they an obstacle to harmonization? Are concerns about the ease of reformation and the promotion of international business the motors that will overcome traditions? Is there some kind of interaction?

These questions will be addressed in the following papers. First, Professor Patrick Glenn[9] will analyze whether or not there is a "Western legal tradition" that represents an obstacle to further harmonization. Then, Professor Michele Taruffo[10] will comment on Professor Glenn's thesis from a European perspective.

[9] "A Western Legal Tradition?" in Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories* (Markham, ON: LexisNexis Canada, 2010) [hereinafter "Walker & Chase"] 601.

[10] "Some Remarks about Procedural Models" in Walker & Chase, *id*., 621.

A Western Legal Tradition?

H. Patrick Glenn*

I. INTRODUCTION

Since the publication in 1983 of Harold Berman's *Law and Revolution: The Formation of the Western Legal Tradition*,[1] there has been widespread use of the concept of a western legal tradition. This has obvious consequences for thinking about civil and common law traditions, and could contribute to their demise. The distinction between them, and their procedural laws, would have been exaggerated, and, given deep and underlying commonality, there would be no real obstacle to further harmonization. Only minor national variations might remain.

In what follows, I would first like to try to outline the general debate surrounding the idea of a western legal tradition, since it remains a controversial one. Since the debate has taken place at a high level of generality, it appears useful (with regard to the work of the International Association of Procedural Law) to consider the force of the argument in the context of procedural law and judicial institutions, and I will therefore endeavour to do this in the third part of the paper. Finally, reservations to the thesis of a western legal tradition appear appropriate at both the general and particular levels.

II. A WESTERN LEGAL TRADITION: THE GENERAL DEBATE

Support for the idea of a western legal tradition is presently found in many different quarters. There is also major resistance to it, also from a number of different quarters. The debate in general raises questions about the nature of the distinctions we draw between legal traditions or lawyers of different beliefs.

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1 H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Massachusetts: Harvard University Press, 1983).

1. Perceptions of a Western Legal Tradition

Harold Berman, in *Law and Revolution*, was primarily concerned with demonstrating the significance of religious thought on the legal realm. *Law and Revolution I* dealt with the significance of the Gregorian church-state reforms of the 11th and 12th centuries to what we have subsequently come to consider secular law. *Law and Revolution II* is devoted entirely to demonstrating the influence of the Protestant Reformation on the law of western Eurasian jurisdictions and those derived from them.[2] Christianity was certainly common to the civil and common laws, and unquestionably influenced them in a profound manner. Christianity also left much room for the development of both.

Is it the case, however, that their Christian elements are sufficient to completely overshadow whatever other differences remain? This has not been the judgment of lawyers for the last 1,000 years. The existence of a common religious element would therefore not in itself entail the demise of ongoing, even largely autonomous, traditions of civil and common law. Within Christianity, there are established, recognized and ongoing sub-traditions — notably, those of Roman Catholicism, Greek and Russian Orthodoxy, and Protestantism — which do not appear to be (re)-coalescing into a new unity.

Are the civil and common laws thus correctly seen only as sub-traditions of a greater western legal one, and will they even disappear within it? Christianity is, with respect, more established in the world than the overarching idea of a western legal tradition. Yet, we do not speak of a Christian legal tradition among the legal traditions of the world, and we do not even speak of a single legal tradition within and across the Christian churches. There is notably the canon law of the Roman Catholic Church and the ecclesiastical law of Protestant churches. There are therefore reasons for the absence of an overarching western legal tradition founded on religious grounds.

The arguments in favour of a western legal tradition are not limited, however, to those drawn from a religious perspective. Those from other disciplines have been explicitly favourable to the idea. Political theorists, notably those arguing for cosmopolitan recognition of universal duties, have written of a western legal tradition and may see this as a necessary stage in the development of a still-wider normative structure. Seyla Benhabib, for

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[2] H. Berman, *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition* (Cambridge, Massachusetts: Harvard University Press, 2006).

example, has taken the position that even "before Kant the western legal tradition recognized a sphere of international law".[3] The historian Kenneth Pennington, returning to Berman's formative period, has written of "sovereignty and rights in the Western legal tradition" in the period from 1200 to 1600, and this wider historical perspective brings considerations other than and beyond the religious lens into the justification for a broad view of western law.[4] Epistemologists, looking over a number of legal traditions in the world — including the Chinese, Arabic and English — have seen sufficient commonality in western means of understanding to justify a western legal tradition.[5]

It is not the case, however, that the argument for a western legal tradition is limited to the external viewpoints of non-lawyers. Berman himself was a distinguished lawyer, teaching over a lifetime in fields as diverse as international trade and the distinctly non-religious Soviet law (as it then was). Lawyers working beyond a western legal tradition have also perceived its existence. Authors writing on Islamic law have set it off against "the Western legal tradition" (and religion obviously plays a large role in this),[6] while P. G. Monateri, in "Black Gaius", has sought to discover the non-western roots — notably Middle-Eastern ones — of what would have become a "Western legal tradition" (taking care, however, to place the idea in quotation marks).[7] Closer to the bone, and from what would clearly be a position internal to a large view of western law, the Romanist Tony Honoré has spoken of the "Western legal tradition" in which Roman law would be, at least implicitly, a foundational element.[8] James Gordley, on the other hand, has written of the outdated or "überholte" distinction between civil and common law.[9] In the casebook that he co-edited with Arthur von Mehren, however, Professor Gordley has removed the procedural materials that previously occupied a large

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[3] S. Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006), at 25.

[4] K. Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993).

[5] S. Gu, *The Boundaries of Meaning and the Formation of Law* (Montreal: McGill-Queens University Press, 2006), at xviii.

[6] E. Griffel, "Introduction" in A. Amanal & E. Griffel, eds., *Shari'a* (Stanford: Stanford University Press, 2007) 1, at 16.

[7] P.G. Monateri, "Black Gaius: A Quest for the Multicultural Origins of the 'Western Legal Tradition'" (2000) 51 Hastings L.J. 479 [hereinafter "Monateri"].

[8] T. Honoré, *Ulpian*, 2d ed. (Oxford: Oxford University Press, 2002), at vii. For reliance on Roman law, see D. Goldman, *Globalisation and the Western Legal Tradition* (Cambridge: Cambridge University Press, 2007), at 4.

[9] J. Gordley, "Common law und civil law: eine überholte Unterscheidung" (1993) Z. Eu. P. 498.

place,[10] and his *Foundations of Private Law* is devoted exclusively to what can now be recognized as the substantive law of common law jurisdictions, with no consideration of institutions and procedure.[11]

In all of this, Professor Gordley occupies what appears to be the most radical position. The other authors who have been mentioned speak affirmatively of a western legal tradition, but do not, *sauf erreur*, draw negative conclusions about civil and common law traditions. They could live on happily, but would have to be seen essentially as sub-traditions of the larger, western one. This western legal tradition would be relatively benign with respect to internal diversity. Professor Gordley, however, appears to view the effect of such a tradition, explicit or implicit in his work, as incompatible with the ongoing existence of recognizable civil and common laws. It would at least be the case that insistence on such multiple traditions would be bereft of any theoretical or practical significance.

There is therefore considerable legal opinion supporting the idea of a western legal tradition, even to the detriment of notions of civil and common law. It is perhaps surprising, however, that there appear to be few, if any, attempts to define this western legal tradition or state its characteristics. Perhaps they are all too obvious, or implicit, to those who know and work within the tradition. It seems appropriate to state, however, that if the civil and common laws are capable of disappearing into a wider conceptualization, the same may be possible of that which we know as western. The Europe/Asia distinction is now fast declining and has even been formally rejected by the U.S. Department of State in favour of the idea of Eurasia,[12] while academics are working hard at diluting any exclusivist notion of that which would be western.[13]

It may be an easier task to support such long-recognized notions as civil and common law traditions. In eliminating all distinctions, we may be eliminating thought itself. It might rather be a question of how rigid

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[10] A. von Mehren & J. Gordley, *Introduction to the Comparative Study of Private Law* (Cambridge: Cambridge University Press, 2006).

[11] J. Gordley, *Foundations of Private Law* (Oxford: Oxford University Press, 2006).

[12] P. Perdu, *China Marches West: The Qing Conquest of Central Eurasia* (Cambridge, Massachusetts: Harvard University Press, 2005), at xiv.

[13] J. Goody, *The East in the West* (Cambridge: Cambridge University Press, 1996); D. Lach, *Asia: The Making of Europe* (Chicago: University of Chicago Press, 1965); W. Halbfass, *India and Europe: An Essay in Understanding* (Albany: State University of New York Press, 1988), at 4-5 (on "oriental" sources of Greek philosophy). With respect to law in particular, see Monateri, *supra*, note 7. Most would designate Christianity as a western religion, but there is a recognizable Judeo-Christian tradition, flowing from Christian retention of the old or Jewish bible, and an argument has recently been made for an Islamo-Christian tradition. See R.W. Bulliet, *The Case for Islamo-Christian Civilization* (New York: Columbia University Press, 2004).

and indelible are the distinctions we make. There is therefore significant opposition to the disappearance of the civil and common law traditions.

2. Opposition

Opposition to a single western legal tradition, and support for ongoing civil law and common law traditions, may be the result of inertia, sloth, ignorance, vested interests or normative commitment. Some further acknowledgment of this will be made in the third part of this paper. There are, however, other forms of opposition, insisting on both empirical and theoretical significance of the civil / common law distinction.

The most visible and controversial support for the distinction is found in the "legal origins" thesis, largely accepted by the World Bank,[14] which would have civil or common law origins as the root cause of national economic development, or its absence. From this economic perspective, there would be no point in speaking of a western legal tradition, since all that is economically important flows from civil and common law origins, while insistence on a single, western tradition would mask all that is significant.

The leading statement to this effect may be the 1999 article "The Quality of Government", by Rafael La Porta and his co-authors;[15] this work stands for the proposition that French civil law countries "exhibit heavier regulation, less secure property rights, more corrupt and less efficient governments, and even less political freedom than do the common law countries".[16] National legal systems, and their origins, would therefore have much to answer for.

The legal origins argument has been sharpened, moreover, by subsequent concentration on court structures and performance. To this effect, Glaeser & Shleifer have argued that "the historical evolution of legal systems in France and England starting in the twelfth and thirteenth centuries has shaped how these systems operate".[17] Thus, from their narrow focus on court structures and administration — as exemplifying both civil and common law traditions, and designated as such — Glaeser & Shleifer draw economic conclusions that are similar to those of La Porta *et al.*

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[14] World Bank, *Doing Business in 2004/05/06/07*, online: <http://worldbank.org>.
[15] R. La Porta *et al*., "The Quality of Government" (1999) 15 J.L. Econ. & Org. 222.
[16] E. Glaeser & A. Shleifer, "Legal Origins" (2002) Q. J. Econ. 1193, at 1194.
[17] *Id.*, at 1194.

Further, it would not only be entire national economic performances that flow from 12th century court structures, but also the contemporary performance of the court structures themselves. In addition, contemporary civil law court structures beyond those of the French have also been taxed with "higher expected duration … less consistency, less honesty, less fairness in judicial decisions and more corruption".[18] The civil and common law traditions would continue to have their effect, moreover, within a federation such as the United States, depending on whether the state in question had been settled by people from civil or common law countries.[19]

The civil and common law traditions therefore would explain much beyond the law, and it would be impossible to draw conclusions about about their dissolution or insignificance until much of the human disparity in the world disappears. An argument of such breadth will naturally attract criticism, and much of the criticism appears telling. The history of the legal origins thesis, relying on greater centralization of the administration of justice in France than in England, would clearly be wrong (the royal courts being very much instruments of centralization in spite of their incorporation of local juries).[20] A causal relation between 12th-century court structures and 21st-century performance of nation-state economies would be simply untenable,[21] and national economies would be more dependent on contemporary political choices than ancient legal structures.[22] The world, moreover, would provide too many counter-examples (*i.e.*, India, China), and the categorization of the countries of the world into civil and common law jurisdictions would overlook subtle and important distinctions in the national legal traditions.[23] The law

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[18] S. Djankov *et al.*, "Courts" (2003) 19 Q. J. Econ. 453, at 453 (based on data relating to eviction of a non-paying tenant and collection of a bounced cheque; drawn from Lex Mundi law firms in 109 countries).

[19] D. Barkowitz & K. Clay, "The Effect of Judicial Independence on Courts: Evidence from the American States" (2006) 35 J. Legal Stud. 399.

[20] D. Klerman & P. Mahoney, "Legal Origin?" (2007) 35 J. Comp. Econ. 278.

[21] Association Henri Capitant, *Les droits de tradition civiliste en question* (Paris: Société de législation comparée, 2006) [hereinafter "Association Henri Capitant"]; K. Davis & M. Kruse, "Taking the Measure of Law: The Case of the *Doing Business* Project" (2007) 32 Law & Soc. Inq. 1095.

[22] Mark Roe, "Legal Origins and Modern Stock Markets" (2006) 120 Harv. L. Rev. 460.

[23] J. Armour & P. Lele, "Law, Finance and Politics: The Case of India", online: <http://ssrn.com/abstract=1116608> (there is little support for the idea that India's common law heritage has quickened its financial development); D. Clarke, "Economic Development and the Rights Hypothesis: The China Problem" (2003) 51 Am. J. Comp. L. 89 (the rights of either civil or common law are unable to explain the development in China); K. Dam, "Legal Institutions, Legal Origins, and Governance", online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=932694> (oversimplified coding of the legal origins of particular countries); M. Siems, "Legal Origins:

stated and relied upon by the legal origins group would also be, unfortunately, wrong.[24] The case for indelible civil and common law traditions, over time and with large and empirically demonstrable consequences, is clearly challengeable. In the light of recent economic developments, *The Economist* magazine has recently concluded, reluctantly, that "the continental model has some strengths".[25]

The distinction would have significance beyond the empirical, however, and Pierre Legrand has found in such long-standing legal beliefs and practices the source of irreconcilable *mentalités*. European laws are therefore not converging, and can never converge, because the minds of continental and common lawyers follow incommensurable patterns of thought.[26] The civilian lawyer can never understand the common law lawyer's understanding of law, and *vice versa*.

Yet are we really consigned to such profound ruts of mutual incomprehension? The notion of incommensurability has become widespread since Isaiah Berlin borrowed it from mathematics and gave it currency in the social sciences and humanities.[27] I do not personally believe there is any such thing as incommensurability, outside some rare instances in mathematics (such as the square root of 2 being inexpressible in integers) that do not really touch most of us deeply. There are certainly incompatibilities in the world, and difficult choices, but to raise this to the level of incomprehension appears exaggerated. We can only appreciate the existence of incompatibility, or radical difference, if some initial process of comparison has taken place. The exaggerated nature of the incommensurability claim, applied to civil and common law traditions, is denied moreover by those in the field, and a Parisian *avocat* recently concluded that "[t]he differences of common law and civil law no longer

Reconciling Law & Finance and Comparative Law?" (2007) 52 McGill L.J. 55 (the dichotomy of the civil and common laws fails to reflect their many combinations in national laws, and the variable influence of legal traditions).

[24] Association Henri Capitant, *supra*, note 21. For the general debate on *Doing Business*, see the papers in J.-F. Gaudreault-DesBiens *et al.*, *Convergence, concurrence et harmonization des systèmes juridiques* (Montreal: Editions Thémis, 2009); most notably, see H. Muir Watt, "Les reactions françaises à « Doing Business »", 67. See also F. Rouvillois, *Le modèle juridique français : un obstacle au développement économique?* (Paris: Dalloz, 2005).

[25] *The Economist* (May 9, 2009), at 13.

[26] P. Legrand, *Fragments on Law-as-Culture* (Deventer: Willink, 1999), at 74 ("not only does Europe harbour two legal traditions, it also furnishes us with two legal *mentalités*").

[27] I. Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), at 102-104, 171-72.

create communication problems which are detrimental to the effectiveness of our representation of clients."[28]

Those who insist on the autonomous and mutually exclusive character of civil and common law traditions have therefore not been able to mount "killer arguments",[29] and the same appears to be the case for those who think in terms of an overriding western legal tradition. What can we make of this in terms of the distinctions and categories we use?

3. On Distinctions and Categories

The inconclusive character of the general debate on a western legal tradition, or ongoing civil and common law traditions, suggests that neither argument is capable of speaking to the complexity of the question. The western legal tradition argument is incapable of encompassing ongoing particularities; the civil and common law traditions argument is incapable of addressing obvious, and apparently growing, commonalities. It would be increasingly difficult, if not unjustifiable, as Professor Zekoll has written,[30] to categorize national procedural systems into civil and common law families. The taxonomic process would have lost whatever interest or justification it might have presented in the 19th and 20th centuries.

It is one thing to jettison a taxonomic process that has always been a dubious one in the field of law, whatever justification might exist for it in the physical sciences. It is another thing, however, to reject categories and distinctions as a means of thought, since without them we would appear condemned to a form of permanent intellectual stall. Thinking does involve making distinctions, and the idea of separation into categories as a means of advancing knowledge is at least as old as Plato and his notion of *divisio*.[31] It appears rather to be a question of the importance that we assign to the distinctions and the categories that we create. Are they simple

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[28] A. de Foucaud, "Civil and Common Law in Paris as in New York" (1997) 25(1) Int'l Bus. Law. 15. Compare the still more radical statement of an English solicitor that "[t]here is no difference between civil and common law which matters." F. Neate, "Mystification of the Law" (1997) 25(1) Int'l Bus. Law. 5.

[29] The phrase is that of Joseph Singer in, "Normative Methods for Lawyers" (2009) 56 U.C.L.A. L. Rev. 899, at 947.

[30] J. Zekoll, "Comparative Civil Procedure" [hereinafter "Zekoll"] in M. Reimann & R. Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) [hereinafter "*Oxford Handbook*"] 1327, at 1329 ("the historical perspective no longer supports the idea that procedural systems can be neatly divided into the traditional legal families of Romanic, Germanic, and Anglo-American procedure").

[31] Plato, *Politics*, at 258e-267c.

intellectual aids, or reflections of underlying and definitive truths? The taxonomic project would take them as reflecting underlying truths or reality, as might be the case in the hard sciences.

They can equally be seen as mere intellectual aids, however, if we are willing to admit some tension or ambiguity in our underlying categories: here, those of the civil and common law, or of western law in general. Mirjan Damaška has thus written of "ideals" of hierarchical and horizontal organization of authority, and these in their "historical context".[32] In his *Topics*, Theodor Viehweg concluded that all of our initial objects of division or separation are essentially arbitrary, and that all forms of taxonomy or categorization must be taken lightly.[33] Viehweg's view appears to be supported by the inconclusive nature of the general argument about a western legal tradition versus separate civil and common law traditions.

The debate on the desirability, or not, of categories appears to overlook, moreover, an important characteristic of the traditions that we are discussing. Traditions consist, only, of normative information.[34] As such, they are non-reifiable and non-objectifiable. A legal system — seen as a bounded entity, within which its elements are in interaction — is an eminently reifiable concept. Samuel Huntington's "civilizations" were defined by Huntington himself as "entities", the better to have them "clash".[35]

Normative information, however, should always be seen as normative information, with which one can engage and not clash. A legal tradition may therefore influence, without displacing, an alternative legal tradition, and both may co-exist in some measure in a process of ongoing engagement. Adherents to the traditions, moreover, may prefer ongoing engagement as opposed to a definitive process of total victory or defeat. This accommodating view of the arguments about western versus civil and common law traditions may, or may not, be supported by a more specific examination of institutional and procedural traditions.

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[32] M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), at 16, 29. See especially "fictitious creatures" that may be "under certain conditions useful for analyzing" (at 5).

[33] T. Viehweg, *Topics and Law* (New York: P. Laing, 1993).

[34] See H.P. Glenn, "Comparative Legal Families and Comparative Legal Traditions" in *Oxford Handbook*, *supra*, note 30, 421. See especially the "monothetic" nature of the taxonomic process, or "limited feature classification" (at 438).

[35] S. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996), at 28, 41, 43. See also "[a] civilization is a 'totality'" (at 42).

III. INSTITUTIONAL AND PROCEDURAL TRADITION(S)

The argument for a western legal tradition has been made from many perspectives, both legal and extra-legal. It does not, however, appear to have been made by procedural lawyers, as opposed to lawyers dealing with substantive law. Procedural lawyers have criticized the civil law/common law distinction without, however, justifying the criticism in terms of an overarching tradition. The criticism, moreover, appears to come from within the traditions, which are assumed to still be controlling in some measure.[36] This may tell us something about the relative strength of the civil law / common law distinction as it relates to institutions and procedure.

What can be said of institutional and procedural traditions, in particular, though still within the cadre of the larger debate? In the absence of an overarching argument for a western legal tradition in matters of institutions and procedure, it appears appropriate to examine more closely the particular traditions themselves, as a means of assessing their ongoing distinctiveness and resistance to harmonization.

1. The Origins of Institutional and Procedural Traditions in the Civil and Common Laws

Civil and common law institutional and procedural traditions are at least a millennium old. One can see in civilian procedure, moreover, a continuation of the Roman (hence Romano-canonical) procedure, facilitated in its development since the 11th century by the 1,000 years during which Roman law worked its way through earlier, *legis actio* and formulary procedures. In the case of both civil and common law, the way was relatively open in the 11th and 12th centuries to adoption of the institutions and procedures which we have known ever since. Continental procedure had been open since the third century, and the resurgence of customary forms of law thereafter was not incompatible with either open courts or a judicial function conceived in terms of the application of law that pre-existed the case. Contemporary civil law procedure could be launched, although it is perhaps more accurate to speak of it as being relaunched. In England, there could be no strong opposition to the institutional and procedural innovations of the Normans, although they proceeded lightly enough to avoid serious provocation. Common law

[36] Zekoll, *supra*, note 30.

procedure could thus be launched discreetly and begin the process of becoming a law common to the kingdom.

There was no Roman base to the procedures introduced by the Normans into England, and the Norman institutions and procedures were carefully, even brilliantly, structured to comply with the situation on the ground. Hence, choices were made in favour of the Chancellor's control of the litigation process, the jury, the itinerant judge, the orality of proceedings, the compressed procedure known as a trial, and the use of lawyers to plead to issue and eventually to present evidence. It was a very different set of institutions and procedures from those that had prevailed on the Continent, but, apparently, it was right for the circumstances. It has now prevailed for the better part of a millennium and has inevitably attracted great loyalty. The same accretion of loyalty has occurred in the civilian world, again to that which was procedurally most appropriate in the circumstances, so we are thus faced with institutional and procedural traditions, and loyalties, which are just as long as the civil and common law traditions themselves.

We have had problems identifying these procedures, known by those hostile to them as inquisitorial or accusatorial; I propose to speak, in a less pejorative manner, of investigative and adversarial forms of procedure.[37]

How do these investigative or adversarial forms of procedure fit within the civil and common law traditions? We today think of procedure as the servant or means of implementing substantive law. Article 2 of the Quebec *Code of Civil Procedure*,[38] informing us that "[t]he rules of procedure in this Code are intended to render effective the substantive law," finds its counterpart in rule 2.01 of the Ontario *Rules of Civil Procedure*[39] to the effect that the court may grant any necessary relief "to secure the just determination of the real matters in dispute".

This view of the respective roles of substantive and procedural rules was not, however, that of the common law at its inception. Substantive law was, in the unforgettable language of Maine, "secreted in the interstices of procedure",[40] and even known only to the juries of each region who were charged with its application in their deliberations.

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[37] This is quite possible in English. In French there are more difficulties. Nonetheless, a "procédure d'enquête" has been historically recognized, and there is a French word, "adversative" — although it is not historically applied to procedure. The English "adversarial" is, of course, derived from Old French and Latin, so some linguistic parallel should be possible.

[38] R.S.Q., c. C-25.

[39] R.R.O. 1990, Reg. 194.

[40] H.S. Maine, *Dissertations on Early Law and Custom* (London: John Murray, 1883), at 389.

The substantive law of the civil and common law traditions, to the extent that the latter was in some way identifiable, could well have been identical or uniform. The concept of *seisin* appears to have been known in all forms of landholding that were influenced by feudalism.[41] Put slightly differently, there was no known opposition between the substantive laws of England and the Continent, since the former were largely lost in the process of jury deliberations.[42]

In the result, the differences between civil and common law traditions are, in their essence and historically, differences in institutions and procedure, and not differences in substantive law. There may have been differences in substantive law, but they were either undiscoverable or inconsequential. English legislation could thus change the common law, but it was historically interpreted in a restrictive manner; in any event, it was not part of the common law. It was, in continental language, a *ius proprium*, and not part of the *ius commune* of England.[43]

To the extent that Professor Gordley sees a civil and common law distinction as not being justified in the substantive law that he is examining, he may be historically accurate. The distinction is properly located elsewhere, in institutions and procedures, and the real case for the ongoing, normative force of distinct traditions is to be found in such institutions and procedure. The question thus becomes one of the continuing validity of such traditions, or, as institutional economists would say, the extent of path dependency in their operation.

2. Investigative and Adversarial Procedure and Path Dependency

The 19th century saw major reforms of the common law tradition. The writ system was abolished, the proliferation of competing court structures simplified and a court of appeal created. These were changes to institutions and procedure, and brought the common law closer to the civil law. Their most profound effect, however, was to give rise to a notion of substantive law in the common law, and, hence, to a need for sources for the articulation of this law. The new substantive law was

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[41] F. Joüon des Longrais, *La conception anglaise de la saisine du XIIe au XIVe siècle* (Paris: Jouve, 1924).

[42] Equity presented clearer substantive rules than did the common law, but equitable principles were drawn from the Chancery, itself informed by Roman-canonical tradition. Even the trust can be seen as the nesting in the common law world of canonical principles. See H.P. Glenn, "The Historical Origins of the Trust" in A. Rabello, ed., *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (Jerusalem: Sacher Institute, 1997), at 749.

[43] H.P. Glenn, *On Common Laws* (Oxford: Oxford University Press, 2005), at 25*ff*.

largely influenced by the civil law, with Pothier becoming the second most-cited source before the English courts, after English case law itself.[44] Thus, the underlying, potential commonality of the substantive laws of the civil and common law became much more visible. Much of what was essential to the common law tradition remained, however, unchanged. Superior courts retained their superiority (notably over administrative agencies and lower courts, and as sources of law), judges continued on circuit, juries were not abolished, and lawyers continued to plead to issue and present evidence, while the fusion with Equity accentuated the adversarial character of the procedure by providing a new form of fact-finding in the process of discovery. Institutional and procedural distinctions could also be seen as contributing to differences in substantive law, and the extent of civil liability in the common law world remains more restrictive than in the civil law world, arguably because of necessary restraint in the growth of common law institutions.

Douglass North, speaking of the new institutional economics ("NIEs"), has stated that identification of the precise sources of path dependence is a "major frontier of scholarly research".[45] We need to understand more fully the "constraints on the choice set in the present that are derived from historical experiences of the past".[46] In terms of civil and common law traditions, it is the institutions and the procedures that have given identity to these traditions, and they have functioned, with some considerable success, for at least a millennium. Procedural lawyers, therefore, have reason to support them. They are institutions and procedures that have functioned, and not failed, in their respective social and historical environments, and, in so succeeding, they have given rise to ethically important concepts of role and function on the parts of both the judges and the lawyers.

The primary reason for path dependency of institutional and procedural traditions is that lawyers adhere to them for what they perceive to be good, and even paramount, reasons. The function of the judge is not defined, in either tradition, by positive law. Positive law can add nothing to the accumulated, self-enforced teaching about how a truly independent judge must act. The same can be said for lawyers and for their

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[44] *Cox v. Troy* (1822) 5 B. & All. 474, 106 E.R. 1264, *per* Best J. See also H.P. Glenn, "The Civilization of the Common Law" in A. Rabello, *Essays on European Law and Israel* (Jerusalem: Sacher Institute, 1996) 65.

[45] D.N. North, *Understanding the Process of Economic Change* (Princeton: Princeton University Press, 2005), at 76.

[46] *Id.*, at 52.

conception of their own role. We see this in a number of ways, all of which speak to the ongoing importance of a distinction, even if taken lightly, between civil and common law traditions — and investigative and adversarial forms of procedure.

A first, contemporary indicator of an ongoing distinction is the engaged debate on the advantages and disadvantages of investigative or adversarial forms of procedure. John Langbein's article on "The German Advantage in Civil Procedure"[47] has happily crystallized this debate, provoking at once support[48] and vigorous dissent.[49] This debate appears significant for the existence of ongoing and distinct traditions because its result could affect all litigants and change the fundamental activities of all of the legal actors in the process. It goes to professional role. This is not the case, at least not directly, for the debate in substantive law concerning the merits of cause and consideration, or on the different forms of trust or *fiducie*.

A second contemporary indicator of an ongoing distinction is the debate in common law jurisdictions about case management. Professor Jolowicz has seen in the English reforms a fundamental shift towards investigative forms of procedure, and in this he may eventually be proven correct.[50] Yet we are now seeing a barrage of arguments and reactions from across common law jurisdictions that demonstrate that institutional and procedural traditions of independent actors are not easily susceptible to modification by the enactment of formal rules.[51]

In Ontario, there has been a turning away from case management because there would not be enough judges to handle the increased burden.[52]

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[47] J. Langbein, "The German Advantage in Civil Procedure" (1985) 52 U. Chicago L. Rev. 823.

[48] For court structures, see C.H. Koch, Jr., "The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems" (2004) 11 Ind. J. Global Legal Stud. 139.

[49] J.S. Parker, "Comparative Civil Procedure and Transnational 'Harmonization': A Law- and Economics Perspective", online: <http://papers.ssrn.com/sol13/papers.cfm?abstract_id-1325013>, at 29 [hereinafter "Parker"] (on the higher "quality" of the U.S. development of facts); J. Reitz, "Why We Probably Cannot Adopt the German Advantage in Civil Procedure" (1990) 75 Iowa L. Rev. 987, at 988 (on how the change in process of witness examination would fundamentally alter the roles of the attorney and the judge), 990 (for references to literature on Langbein's proposal).

[50] J.A. Jolowicz, "The Woolf Reforms" in J.A. Jolowicz, *On Civil Procedure* (Cambridge: Cambridge University Press, 2000) 386, at 389 ("the first casualty of the reforms is likely to be the adversary system").

[51] On the failure of uniform rules to produce uniform procedural results, see Jordan M. Singer, "Civil Case Processing in the Federal District Courts: A Twenty-First Century Analysis", online: <http://ssrn.com/abstract=1331024>, at 84 ("Summary Observations") [hereinafter "Singer"].

[52] W.K. Winkler, "Civil Justice Reform — The Toronto Experience" (2007-08) 39 Ottawa L. Rev. 99, at 101. In the result, case management occurs only on a case-by-case basis, and only for those cases seen as justifying it.

Attempts to simplify procedure and eliminate discovery in cases of (relatively) small amounts would have brought lawyer discovery efforts into the trial itself, complicating the simplified procedure.[53] In Quebec, there has been a wave of motions to extend strict time limits, and the judiciary accedes to most of the extension requests.[54] In the United States, it has been said that "nearly every federal district court could set schedules earlier, grant fewer extensions, encourage earlier filing (and earlier resolution) of motions, and keep critical dates firm",[55] and similar criticisms of judicial activity can be heard in England and Wales.[56] In British Columbia, current proposals of case management reform have been referred to as "demeaning to counsel" and "beyond the judicial mandate",[57] and these expressions give explicit voice to ongoing concepts of role elsewhere in the common law world. I am unaware of such a debate, in this particular regard, in what is recognizably the civil law world. There appear to be enough judges to manage cases in the civil law world. A small judiciary has been essential, however, to the common law tradition.

A third indicator of an ongoing civil law / common law distinction would be found in the embedding of these traditions in national law. The traditions did not originate in national or state law, since they pre-date our concept of the nation-state. There have, however, been centuries of national commitment to various versions of the traditions, and the national traditions voluntarily see themselves as part of a longer and still more noble tradition. The notion of a western legal tradition overlooks not only civil and common law traditions, but also — and, perhaps, even more significantly — these national legal traditions, as well as the variety

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[53] *Id.*, at 106.

[54] Ministère de la justice, *Rapport d'évaluation de la Loi portant réforme du Code de procédure civile* (Québec: Gouvernement du Québec, 2006), online: <www.justice.gouv.qc.ca>, at 16-90. (Extension of delays were requested in 90 per cent of cases going to trial. These requests were rarely contested, and almost always granted.) Petitions for extension may now be made by telephone.

[55] Singer, *supra*, note 51, at 84.

[56] A. Zuckerman, "Court Control and Party Compliance — The Quest for Effective Litigation Management" in N. Trocker & V. Varano, *The Reforms of Civil Procedure in Comparative Perspective* (Turin: G. Giappichelli, 2005) 143, at 155, 159 [hereinafter "Trocker & Varano"]. For the view of a group of practitioners that "the [Woolf] reforms appear to have failed … Lawyers and courts seem to have continued business as usual and discovery appears to be very similar today to what it was ten years ago," see J. Sepulchre, "United States versus the rest of the world: who is winning the war on litigation?" in IBA Legal Practice Division, *Litigation Committee Newsletter* (April 2009) 18, at 21.

[57] "Entre Nous" (2008) 66 The Advocate 489, at 489, 490.

among them, and even the particular traditions of states, provinces and judicial districts.[58]

The jury is embedded in the U.S. Constitution, and Oscar Chase has written about how it has become embedded in U.S. popular understanding in a way that is profoundly resistant to elimination through any movement towards "western" judicial institutions or procedure.[59] The blogs would flame. The same embedding in national tradition may be said of the trial, and it has been said in the United States that: "[t]he American trial is one of our greatest cultural achievements. Not only does it stand in a rich tradition, but it has caused the admiration of most of the people … in the best position to know."[60] The notion of a final hearing in some contemporary civil law jurisdictions does not have the same historical and popular resonance. Films about final hearings are unlikely, at least for a few centuries.

3. Harmonization?

Is harmonization leading to a western legal tradition in matters of institutional and procedural traditions? Or is it likely to? I think that it is unlikely, in spite of my real admiration for recent efforts of harmonization (such as the Storme Report and the ALI/UNIDROIT *Principles of Transnational Civil Procedure*[61]). Here, the forces of inertia, sloth, ignorance and vested interests join up with those of normative commitment — and it is a fearsome combination. The adversarial system was not reformed in the 19th century because it was the most difficult thing to reform, and it remains so today. Even the ALI/UNIDROIT Principles

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[58] See M.-L. Niboyet, "La réception du droit communautaire en droit judiciaire interne et international" in J.-S. Bergé & M.-L. Niboyet, *La reception du droit communautaire en droit privé des Etats membres* (Brussels: Bruylant, 2003) 153, at 153-54 (on the utopian character of global uniformization, given attachments to "particularismes nationaux", institutions "solidly anchored" in national traditions, and rules "heavily charged with history"). For the "crazy quilt" of procedural variation within the United States, see Damaška, *supra*, note 32, at 1.

[59] O. Chase, *Law, Culture, and Ritual* (New York: New York University Press, 2005), at 142-44.

[60] R. Burns, "The Death of the American Trial", online: <http://papers.ssm.com/sol3/papers.cfm?abstract_id-1334946>, at 1. See also *id.*, at 142.

[61] M. Storme, *Approximation of Judiciary Law in the European Union* (Gent: Kluwer, 1994); ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge: Cambridge University Press, 2006) [hereinafter "ALI/UNIDROIT Principles"]. For admiration, see H.P. Glenn, "The ALI/UNIDROIT Principles of Transnational Civil Procedure as Global Standards for Adjudication?" (2004) 9 Unif. L. Rev. 829-45. For magisterial treatment of recent efforts of harmonization, see K. Kerameus, *Studia Iuridica V* (Athens: Sakkoulas, 2008), Part VI, at 539*ff*. ("Comparative Law and Legal Harmonization").

retain "customary" means of eliciting testimony in each forum.[62] The most powerful forces of reform appear to be motivated by the abuses that surface in each of the procedural traditions, and the work of harmonization is a stimulus and a guide within the reform process rather than itself a justification for it.

Perhaps the most optimistic thing that can be said is that, when things get bad enough, there will be reform — and harmonization efforts can play a role in this reform. This is optimistic because things can become very bad without consequent reform, and it has recently been written that: "[t]he corruption of judges is rampant, from Central Europe to Central Asia, to Africa, and to Latin America."[63] Major players, however, have ways of avoiding the pitfalls of existing procedures and can buy their way out of many others. Arbitration has been one of the means of avoiding national court systems and their procedures, and reform has consisted in the recognition of arbitration by both legislatures and courts, thereby overturning 19th century antagonism. As a result, international commerce and cross-border transactions have been facilitated in some measure, but few would now maintain that arbitration is always an inexpensive and expeditious means of dispute resolution. Moreover, the civil and common law ways of doing things resurface in international arbitrations, so both normative commitment and vested interests (in fee structures) reappear in the alternative and reforming structure. Further, there are those who oppose harmonization in the name of competing and mutually challenging models;[64] in spite of its idealistic character, this view adds itself to existing obstacles.

Of the civil and common law institutional and procedural traditions, it appears to be that of the common law that is presently most vulnerable. In the United States, the inherent superiority of first instance courts appears to have been largely abandoned, and it is also being challenged elsewhere. Rights of appeal have become widespread in the common law world, if still not as extensive in civilian jurisdictions. The judge on

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[62] ALI/UNIDROIT Principles, *id.*, principle 16.4 ("[e]liciting testimony of parties, witnesses, and experts should proceed as customary in the forum"). In the process of interrogation, we may find that the most profoundly rooted concepts of professional role, which have prevailed for many centuries in both civil and common law, pre-date any 19th- or 20th-century reforms towards case management or *mise en état*.

[63] W. Osiatynski, "Paradoxes of constitutional borrowing" (2003) 1 Int. J. Const. L. 244, at 263. See also Transparency International, *Global Report on Corruption in Judicial Systems* (2007), online: <http://www.transparency.org>.

[64] Parker, *supra*, note 49, notably at 18 ("[a]s contracts and disputes become more diverse, so also becomes the optimal *ex post* procedure for each given dispute").

circuit has become a rarity. It is said in the United States that the trial is vanishing, and behind the vanishing trial is a massive decline in formal litigation across many common law jurisdictions.[65] To correct problems of access to justice that are caused by lawyers' fees, we have created procedural devices (the contingent fee, the class action) that allow lawyers to charge still more — and they do. There is now ferocious criticism within the tradition itself,[66] and the common law world has seen remarkable recent legislation that is designed to bring about fundamental reform of the legal profession and to remove much of its independence.[67]

IV. CONCLUSION

Although there have been exceptions, reforms of institutions and procedures are more likely to be precise and focused than broad and aggressive. Many reforms are dependent, moreover, on prior reforms. Case management in the common law could not be contemplated until the adoption of resident judges, and there has been resistance, sequentially, to both. The civil and common law institutional and procedural

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[65] M. Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1 J. Emp. St. 459. For the decline in civil trials in federal courts from circa 8,000 in 2000 to circa 5,600 in 2007, see National Law Journal (June 30, 2008), at 10 (on trial lawyers who are searching for the means to practise their skills). For more frequent turning away from common law courts than civil law courts as further refutation of the legal origins argument, see S. Voigt, "Does Arbitration Blossom when State Courts are Bad?", online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1325479>. There is also a "tide of pro se litigants". See National Law Journal (March 9, 2009), at 6 (on how there are now some 150 centres in the United States for assisting *pro se* litigants). *Cf.*, on how filings of first-instance cases in France are continuing to outnumber dispositions, see F. Ferrand, "The Respective Role of the Judge and the Parties in the Preparation of the Case in France" in Trocker & Varano, *supra*, note 56, 7 at 13.

[66] See notably P.R. Wood, "Predictions for the Future of Financial Law and Lawyers" (2008) 9 Business L. Int'l 234, at 245 ("I predict the demise of the adverse practices in some U.S. litigation; these practices are contrary to the American dream of the rule of law. They are contrary to the marvelous achievement of the American legal system. Even the wicked priests of the medieval era in their pursuit of sin and usury did not take as big a cut as these practitioners"). See also A. von Mehren & Peter L. Murray, *Law in the United States*, 2d ed. (Cambridge: Cambridge University Press, 2007), at 295 ("American civil litigation will come reluctantly in line with the rest of the world. The American system of civil dispute resolution lies well outside the world mainstream in terms of complexity and expense"). Yet for linking of procedural delays with fee practices also within the historically investigative procedure of Italy, see M. Taruffo, "Recent and Current Reforms of Civil Procedure in Italy" in Trocker & Varano, *supra*, note 56, 217, at 229 ("more briefs and more hearings are profitable to both lawyers … it is amazing to observe that the reform drafters simply ignore it").

[67] For the United Kingdom, see the *Legal Services Act* (U.K.), 2007, c. 29 (creating the Legal Services Board). For New South Wales, see the *Legal Profession Act 2004 No. 112*, Part 7.3 (creating the Legal Services Commissioner). A review of fees and costs has also recently been undertaken in the United Kingdom.

traditions, and their various manifestations, are therefore likely to be with us for a long time to come. We can speak of a western legal tradition, since in many respects it appears appropriate to do so, but not to the detriment of ongoing civil and common law traditions, which are more profoundly rooted than all forms of substantive law. Abroad, the western traditions are seen as hegemonic, and it is good not to mask their internal variety. These traditions should not be seen as reified categories within which national structures must be taxonomically classified, but as ongoing normative statements, more or less effective in particular circumstances, and always in need of surveillance against the forces of inertia, sloth, ignorance and vested interests.

Some Remarks about Procedural Models

Michele Taruffo[*]

I.

I really appreciate Professor Glenn's report.[1] In particular, his presentation of the problem that concerns the existence of a "Western legal tradition" is interesting, and it includes a very useful explanation of the various aspects of the topic. I would just add that, in the perspective of discussing procedural categories at a very general level, we should also take into account other possible legal traditions (such as the Islamic and the Asian-confucian traditions) that are characterized by the presence of different procedural models.

Professor Bell's historical reconstruction is clear and interesting, although necessarily sketchy. I would only underline that, in the historical tradition of the continental *Ordo iudiciarius*, a truly inquisitorial system of civil procedure never existed. There were the criminal and the ecclesiastical inquisitions, but no civil inquisition. Since their origins in the 11th and 12th centuries, civil proceedings have always been adversarial, and the parties have had the monopoly of the procedural initiatives, the determination of the subject matter of the dispute and the prosecution of the case.

II.

When speaking about procedural models, the first thing that I would say is that we should finally get rid of the opposition between adversarial and inquisitorial models of civil procedure. Although such an opposition has been overemphasized for a long time — mainly by Anglo-American scholars — it is clearly misleading, or, at least, useless, as Mirjan Damaška

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[1] H. Patrick Glenn, "A Western Legal Tradition?" in Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories* (Markham, ON: LexisNexis Canada, 2010) 601.

clearly demonstrated more than 20 years ago.[2] To Damaška's argument, I would add only the historical remark that I have just made: that no real inquisitorial system has ever existed in the history of continental civil procedure.

Things are not very different if we — following Professor Bell's suggestion — speak of "investigative" rather than "inquisitorial" procedural models. Actually, the term "investigative" still suggests the idea of a judge who actively "investigates", on his or her own initiative, the facts in issue — who looks for evidence, and searches for the truth of the facts (and who, perhaps, also establishes, on his or her own motions, which facts are relevant for his or her decision). Such an idea, however, finds no support in either the history or the current reality of continental procedural systems. Even when the judge has some powers to order, on his or her own motion, the presentation of some items of relevant evidence, these powers are clearly supplementary. Even when they are used, they do not result in a truly "investigative" judicial attitude or role.

III.

Another common opposition that may come under discussion is the very well-known distinction between common law and civil law systems of civil procedure. Very often, this distinction is taken into consideration with the aim of showing that the two main systems are converging to some extent, although a more interesting and puzzling topic would, perhaps, address the ways in which — and the reasons why — they are still diverging. This, however, is not my point here. My point is that, even if we assume that such a distinction made some sense in the past (which is not a certainty), I wonder whether it keeps making sense in the current state of things and in the predictable future. The distinction relies upon the premise of the existence of two main and relatively homogeneous models of civil procedure that could be compared and possibly brought closer to each other. However, it is just this premise that deserves to be questioned.

First of all, one could doubt whether a common law model of civil procedure still exists (even if the assumption is made that it existed in the past). The most probable solution of this doubt is negative.

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[2] See Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986), at 3.

On the one hand, it seems clear that, after the reform of civil procedure that was enacted in 1999[3] — but even more so, after the reforms of the judiciary that were enacted in the last few years[4] — England has cut all of its connections with the traditional Anglo-American system of procedure. Speaking of the procedural reform, although Lord Woolf has referred to it as a "mid-Channel reform", it is clear that, while the reform reduced the distance from the English system to the continental systems (although the English system never became a civil law system), it greatly increased the distance of England from the United States. Suffice it to say that the Woolf reform put the English adversarial system to an end, while such a system still is — and seems oriented to be, even in the future — the core of American civil procedure.

On the other hand, the procedural "American exceptionalism" that many authors underline is becoming more and more "exceptional", and probably even unique in the landscape of what once used to be the common law model of civil procedure. In other terms, the American model seems to be on the way to becoming a "national", rather than a "general", model. The importance of such a model should never be underestimated, due to the political and economic strength of the United States, and, also, due to the imperialistic tendency of the Americans to export their own legal and non-legal peculiarities elsewhere. It seems clear, however, that such a model now characterizes a national system of justice that might hardly be considered to be a "general" model that is applicable, as such, in other contexts. In a sense, therefore, the "exceptionalism" of the American system is a barrier to any convergence of this system, not only with civil law systems, but also with other systems that traditionally belonged to the common law tradition.

Such a remark is confirmed, and certainly not contradicted, by Geoffrey Hazard's observation that the American system of procedure is not uniform and homogeneous in itself. Notwithstanding the presence and the unifying influence of the *Federal Rules of Civil Procedure*, Hazard emphasizes the number and the importance of the internal differences that exist within the American federal and state civil procedures. We are thus faced with a procedural system that is becoming more and more unique in the international perspective, but that is also internally

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[3] *Civil Procedure Rules 1998* (U.K.), S.I. 1998/3132, L.17, online: <http://www.justice.gov.uk/civil/procrules_fin/stat_instr.htm>.

[4] See *Constitutional Reform Act 2005* and Lord Mance, "Constitutional Reforms, the Supreme Court and the Law Lords" (2006) 25 C.J.Q. 155.

fragmented and diversified: both demonstrate the opposite of a general model of procedure.

At present, one may also wonder whether it is appropriate to think of *one* civil law procedural model as anything unique and homogeneous. Probably, the correct answer to such a question is negative. In the past, and until the end of the 1980s, a common way of referring to the non-common law systems was to distinguish between Western and socialist countries. However, the Western procedural model was not unitary, due to the differences among at least three different sub-models: the French model (which existed also in Belgium and Italy), the Austro-German model (which existed, with some variations, also in other European and non-European countries) and the Spanish model.

After the fall of the Berlin Wall and the end of the former socialist regimes, that landscape changed, of course, but it did not become simpler, let alone uniform. On one hand, the differences between the French and the Austro-German models persisted, and interesting developments of the German model were initiated in the Scandinavian countries. On the other hand, the former socialist systems did not simply merge into one of the pre-existing European models, notwithstanding the clear influence of the German model (before and after the fall of the socialist regimes). Rather, it seems appropriate to speak of a new model — or of a bunch of new models — that are emerging, as typical, in most of the former socialist countries.

Moreover, one may wonder whether Spain still belongs, after the *Ley de Enjuiciamiento Civil* was enacted in 2000, to the civil law procedural tradition, or whether the Spanish system is now a mixed system or a completely new model of procedure. The same remark may probably be made for most of Latin American procedural systems: traditionally, they belonged to the civil law tradition (with direct connections mainly to the Spanish or the Portuguese basic models), but, at present, things are different, and such systems should probably be placed "somewhere in-between" civil law and common law models (and in different locations in this rather vague space).

Last, but not least, there are various important procedural systems that cannot be properly classified as civil law systems, although they do not properly correspond to a common law model, either. Consider, for instance, the examples of China, Japan, Israel, South Africa and the other former African colonies. What should we say of such systems? That they are "mixed", "atypical", "in transition", or what else? At any rate, one thing is sure: they do not fit — at least not anymore — with any traditional version of the civil law model, nor with any traditional version of the common law model.

It should therefore be clear that any approach that is based upon the rough distinction between the common law and the civil law procedural models, respectively, is exceedingly vague and misleading. Actually, it suggests only rough and general ideas about the two models, which, at present, do not find any correspondence in the reality of the various procedural systems. Such an approach is theoretically inaccurate and it blurs a plurality of very relevant differences that characterize such systems. Real differences are much more interesting than fictitious similarities because it is by considering differences that we may detect the impacts of various cultural, political and legal factors, together with the importance of historical traditions.

IV.

A relevant topic that is often discussed while speaking about different procedural systems is whether it makes sense to figure out a possible harmonization of such systems and — if the answer is affirmative — what we should mean by "harmonization". As often happens, the solutions to these questions depend … That is, they depend on the meaning that we ascribe to the term "harmonization".

First of all, and in order to make a long story short, a clear distinction should be made between "harmonization" and "unification". Unifying different procedural systems would mean the introduction of *one* procedural regulation (*e.g.*, one code of civil procedure, with all of the necessary and detailed rules) in the place of a plurality of pre-existing regulations. Generally speaking, such a project is doomed to failure: it is well known that the "Storme project"[5] was not successful, although it was aimed at unifying only some aspects of civil proceedings and only within the European area. The recent example of Switzerland, where the 27 pre-existing procedural codes have been merged into one code, is not a counter-argument if one considers the size of the country and its substantial cultural and legal homogeneity. More generally, the idea of a worldwide enactment of one common and unique code of civil procedure is basically unrealistic, as is the idea of one common code for all of the old, new and future members of the European Union. Even more, it would be culturally and politically absurd, since it would mean the nullification of a variety of cultural, ethical and historical traditions.

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[5] See Marcel Storme, ed., *Rapprochement du droit judiciaire de l'Union européenne* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1994).

Of course, this does not mean that *any* kind of unification should be rejected. Actually, some common devices that are aimed at permitting the circulation of some legal effects, at least in some specific areas of the world, may be possible and useful. Relevant examples may be found in the European provisions concerning jurisdiction, injunctions, small claims and enforceability, through which uniform rules have been introduced into all of the countries of the European Union. However, the importance of such devices should not be overemphasized. In fact, these uniform rules are enforced in different ways in the many different countries that apply them. Unification, then, is much less effective in practice than it appears to be in theory.

On the other hand, a solution that may work within the broad, but limited, context of the European Union may not be generalized. The failure of the Hague Conference (about a possible, worldwide convention on jurisdiction and the recognition of foreign judgments) taught a clear, negative lesson about the possibility of generalizing solutions. Although generalized solutions may be accepted in some places of the world, they are not generally accepted. Additionally, the difficulty in devising common procedural rules in the area of Mercosul is clear evidence of the practical impossibility of unifying different procedural systems.

However, excluding unification does not mean that the introduction of a fair level of "harmonization" among procedural regulations is impossible. Here, the problem is to identify the level at which a significant degree of harmonization may be achieved. Of course, as I have explained above, such an appropriate level is not the same as those in which the very specific and detailed provisions that represent a large part of each national procedural code exist. On the other hand, the level should not be that of the very general constitutional and fundamental guarantees of the administration of justice (such as access to justice, due process of law, independence of the judiciary, and so forth). This is not to say that such guarantees do not deserve to be enforced. Just the contrary: we should take for granted that the fundamental guarantees are acknowledged and applied in any procedural system that we are taking into account. When they are not implemented, any discussion of harmonization of procedural systems would be nonsense.

The "fair level" of harmonization may be found in an intermediate space that exists between the top of the general guarantees and the bottom of the specific provisions that describe procedural details. Looking at this space, at present, we may find some examples of "model laws" that might be used as points of reference for a possible harmonization of national

procedural systems. One of these examples is the *Código Modelo*[6] for the Ibero-American countries. It was published some years ago, but, so far, it has been applied only in Uruguay. Nonetheless, it is a common reference for the reforms that are enacted or are in preparation in several Latin American countries. The other example, which is more recent and more general in purpose, is provided by the ALI/UNIDROIT *Principles of Transnational Civil Procedure.*[7] These Principles, published in 2006, were specifically aimed at providing common points of reference for any national regulations for transnational disputes. Now, however, they are generally considered to also provide a useful "model" for the harmonization of national procedural regulations for domestic disputes.

V.

If, on the basis of such remarks, one were to attempt to glance at the future, one could be skeptical about the possibility and the advantages of thinking in terms of "categories", as if the problem consisted of how to put some new and updated concepts into the place of the old and outdated ones. In most areas of culture, and also of legal thinking, the traditional dogmas, and the use of concepts that are too abstract and too vague, have been set aside in favour of more concrete approaches that are based upon the historical, social and ideological dimensions of legal phenomena. On the other hand, the diversification and the fragmentation of procedural models in the present world is probably going to increase in the future, rather than lead to the definition of new, unifying concepts. This is not to say that concepts are becoming useless; it is just to stress that the invention of new "Grand Categories" may not be the purpose of the study of procedural law.

This may also be said about a category that is sometimes proposed as a new conceptual device for such a study — *i.e.*, the category of *cooperation*. It is a rather vague concept, and it could be defined in a variety of different ways. One may be rather skeptical about interpreting, in terms of cooperation, a context such as that of judicial proceedings — in which the main dynamics are those of an adversarial contest between parties that struggle for victory in front of a more or less active judge,

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[6] See *El código procesal civil modelo para Iberoamérica* (Montevideo, Uruguay: 1988).

[7] ALI/UNIDROIT, *Principles of Transnational Civil Procedure*, online: <http://www.unidroit.org/english/principles/civilprocedure/main.htm>. See also ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge: Cambridge University Press, 2006).

who, in turn, must search for a just solution to the dispute — rather than that of a converging set of friendly activities that involve the parties and the judge, and that are all aimed at achieving a satisfactory final outcome. From this point of view, cooperation within the procedural context seems to be the subject matter of wishful thinking (or the expression of an optimistic ideology of civil justice), rather than an effective analytical device.

At any rate, a possible suggestion for the future could be to think not (only) in terms of categories, but (at least mainly) in terms of the *values* that should be implemented in the administration of civil justice. Among such values, we may refer to an effective equal access to justice for everyone (which is not yet ensured in many systems), to an effective protection of rights for all (which also does not exist everywhere), to just decisions that are true to the facts and that are based upon correct interpretations of the governing legal rules, to an efficient management of cases by judges, and so forth. Interpreting the various procedural systems in the light of values like these would lead not only to a better understanding of their actual reality, but also to the detection of their limits and their inefficiencies — and, therefore, to the discovery of ways through which to introduce the reforms that are needed for a fair administration of civil justice in a civilized world.

Part VIII

Looking Ahead: The Future of Categories – Categories of the Future

Looking Ahead: The Future of Categories – Categories of the Future

Janet Walker[*]

Having traversed the lengths, the depths and the heights of the matter; having canvassed the range of perspectives; having explored the myriad nuances and complexities of the issues raised, we arrive at the final part of our examination of the current state of the common law / civil law "divide". In this part, two eminent scholars in the field of comparative law, from either side of the divide, Professor Loïc Cadiet,[1] Council Member of the IAPL, and Professor Geoffrey Hazard, the principal architect of the ALI/Unidroit *Principles and Rules of Transnational Civil Procedure*,[2] offer their thoughts on the theme of the conference. They direct their analysis, both retrospectively, to the papers presented at the conference, and prospectively, to their own perceptions of the future.

It would hardly be appropriate at this point — following the more than 40 contributions that have preceded this part, and preceding the remarks of two such leading figures — to embellish the discussion with further comments on the questions addressed. It is, however, entirely appropriate to recall the remarks of the outgoing President of the Association, Federico Carpi,[3] who, at the opening of the Conference, did not speak of a "divide", but instead, said "[o]n another occasion, I spoke of 'two icebergs, side by side: the drift of common law and civil law.' The idea of encounter and collision between the great contemporary juridical systems is certainly not new, and it is treated at length in the writings of the great comparative scholars of the last century, such as René David."

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[2] ALI/UNIDROIT, *Principles and Rules of Transnational Civil Procedure* (Cambridge: Cambridge University Press, 2006).

[3] President, International Association of Procedural Law ("IAPL"); professor of Civil Procedural Law at Bologna, Italy.

At the closing of the Conference, President Carpi reprised his "iceberg" motif and elaborated as follows:

> Étant parvenus à la fin de nos journées de travail, bien chargées, nous pouvons affirmer que notre navigation au milieu des icebergs c'est à dire au milieu des concepts fondamentaux du common law et du civil law, a été bien tranquille, sure et sans risque de couler à pic. En des termes empruntés à la voile on peut dire qu'on a navigué bon plein et au travers!
>
> Selon la tradition, on fait remonter le début de la comparaison juridique, dans le sens moderne du terme, aux premières années du XXème siècle. Même si, dans la ville de Bologne du XIIIème siècle, les glossateurs faisaient déjà de la comparaison, en sens général.
>
> Il y a eu plusieurs transformations de nos catégories et notamment à savoir:
>
> > a) le droit privé était le domaine d'élection de la comparaison, tandis que maintenant l'évolution progressive de la globalisation a obligé l'élargissement de nos intérêts à d'autres disciplines.
>
> L'apport des spécialistes de la procédure civile a été particulièrement considérable.
>
> > b) Au début du XXème siècle le modèle de civil law était caractérisé par la présence de la discipline codifiée, tandis que le modèle de common law reposait, d' une façon prédominante, sur le droit jurisprudentiel.
>
> Actuellement le contraste des catégories selon le rôle et la place de leurs origines n'a plus de sens.
>
> L'orgie législative a saisit et continue à saisir aussi bien les pays de civil law que ceux de common law.
>
> Même dans les pays du civil law on ne peut pas négliger le droit jurisprudentiel ou « droit vivant ».
>
> Les toujours plus fréquentes communicabilité et circulation des idées générales et abstraites et des instituts aussi bien au point de vue de la théorie qu'au point de vue de la pratique, du commerce et des affaires, ont amené à la convergence graduelle dont Basil Markesinis a écrit.

En Europe l'activité des Cours suprêmes, a agit, pour nos icebergs, comme Le Gulf Stream.

La tutelle juridictionnelle a poussé la Cour européenne des droits de l'homme a dessiner quelque chose de fondamental comme « due process of law », valable pour toutes les familles juridiques.

Le pouvoir interprétatif uniforme des traités et des principaux règlements a offert l'occasion à la Cour de justice des communautés européennes d'exercer un rôle trainant dans l'harmonisation même des procès nationaux, encore plus influant que les projets de lois modèles.

> c) Une fois effacé le limite entre nos catégories sur la base du système des sources et sur la structure des codifications, on s'est rendu compte que les méthodes de l'enseignement du droit, la formation des juges et des avocats, leurs états d'esprit, leur culture, et spécialement, les problèmes du langage technique possèdent la capacité de produire des poussées différentielles.

La Justice doit être envisagée comme élément d'évolution et non certainement pas comme élément de stagnation ou encore en voie de régression.

Pour cela le juge, l'arbitre, le mediateur, par des méthodes s'accordant à leurs aptitudes, peuvent concourir au développement économique et culturel, grâce à l'emploi des meilleurs moyens possibles pour la résolution des conflits.

With these observations, we turn to the last two papers in the volume.

Avenir des catégories, catégories de l'avenir : perspectives

Loïc Cadiet[*]

I. INTRODUCTION

Il me faut, d'emblée, adresser mes remerciements les plus vifs et les plus chaleureux aux organisateurs de ce colloque à la fois pour la très grande qualité de cette manifestation et pour l'honneur qu'ils m'ont fait en me demandant de vous faire part, aux côtés du professeur Hazard, de mes réflexions sur les questions dont nous avons débattu. C'est l'occasion pour moi de saluer le professeur Hazard, auquel je ne manquerai pas d'associer le professeur Taruffo, pour leur initiative des *Principes et Règles de procédure civile transnationale*, et pour le *fair-play* remarquable dont ils ont fait preuve lors du débat international, souvent vigoureux, auquel leurs projets successifs ont donné lieu; ils se souviendront bien sûr de la discussion très animée, je dirai même musclée, qui s'est déroulée à Paris le 20 octobre 2000 sous la direction du regretté Philippe Fouchard, laquelle portait sur l'avant-projet préliminaire n° 2 des *Règles transnationales de procédure civile*, élaboré sous l'égide de l'American Law Institute[1].

Cette discussion témoignait de la très grande difficulté de compréhension existant entre juristes américains et juristes français et, plus généralement, entre juristes de *common law* et juristes de *civil law*, pour utiliser la distinction sur laquelle repose notre colloque. Cette difficulté ne concerne pas seulement les solutions de leur droit respectif; en amont, elle tient aux notions mêmes qui structurent la pensée juridique. Un exemple en a été donné par Emmanuel Jeuland lorsqu'il a dû traiter des changements survenus dans le rôle des témoins et des

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[1] Voir : P. Fouchard (dir.), *Vers un procès civil universel? Les règles transnationales de procédure civile de l'American Law Institute*, Éd. Panthéon-Assas, 2001.

experts,[2] ce qui ne fait pas immédiatement sens pour un juriste français qui, du reste, ne traduit pas en français les expressions *common law* et *civil law*, mais les emploie telles quelles, ces expressions littéralement traduites par « droit commun » et « droit civil » renvoyant pour lui à quelque chose de très différent[3]. L'expérience des *Principes de procédure civile transnationale* me conduit cependant à deux observations supplémentaires. La *première observation* est que, pour être très difficile, la compréhension n'est pas impossible: trois ans après la réunion de Paris, les professeurs Hazard et Taruffo sont revenus en France, mais à Lyon cette fois-ci, à l'invitation de Frédérique Ferrand, pour présenter et soumettre à la discussion la version d'avril 2003 du projet,[4] qui était devenu, entre-temps, le projet conjoint d'UNIDROIT et de l'American Law Institute et qui ne portait plus sur un corps substantiel de *Règles* techniques mais sur un *corpus* ramassé de *Principes* directeurs de procédure civile transnationale[5]. C'est peu dire que la rencontre s'est beaucoup mieux passée. Cet apaisement n'était pas dû à la très forte chaleur, venue d'Afrique, de cette belle journée de juin, ni aux effets roboratifs de la gastronomie lyonnaise, mais au consensus, à la fois méthodologique et intellectuel, auquel étaient parvenus, après des mois de travail commun, nos collègues constituant le groupe d'experts d'UNIDROIT. La *deuxième observation* est que ce consensus n'était pas le résultat d'ajustements spontanés se produisant comme par enchantement, mais de rapprochements pragmatiques – le mot a été employé à de multiples reprises – opérés à partir de principes fondamentaux pouvant être considérés comme communs à l'ensemble des systèmes judiciaires, du moins dans la lettre de leurs normes juridiques, sinon toujours dans la réalité de leurs pratiques procédurales[6]. Mais ces rapprochements eux-mêmes n'ont été

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[2] Voir : E. Jeuland, « Le changement de rôle des témoins et des conseils dans quelques pays de droit civil et, en particulier, en France » dans Janet Walker & Oscar G. Chase, *Common Law, Civil Law and the Future of Categories*, Markham, ON, LexisNexis Canada, 2010, p. 193-204.

[3] Il est amusant d'observer que la Fondation pour le droit continental, créée à partir de la France pour promouvoir les systèmes juridiques de tradition romano-germanique, est l'expression retenue en définitive pour traduire *Civil Law Initiative*: <http://www.fondation-droitcontinental.org>.

[4] Voir : F. Ferrand (dir.), *La procédure civile mondiale modélisée – Le projet de l'American Law Institute et d'UNIDROIT de principes et de règles de procédure civile transnationale*, EJT, 2004.

[5] ALI/UNIDROIT, *Principles and Rules of Transnational Civil Procedure*, Cambridge University Press, 2006.

[6] Voir : F. Ferrand, « Les principes ALI/UNIDROIT de procédure civile transnationale, entre concurrence et compromis », dans J. du Bois de Gaudusson et F. Ferrand (dir.), *La concurrence des systèmes juridiques*, Presses universitaires d'Aix-Marseille, 2008, p. 63-78. Voir aussi : N. Andrews, « The Modern Procedural Synthesis: The American Law Institute and

possibles qu'en raison des évolutions accomplies depuis quelques décennies que ce soit sur la scène internationale ou dans les droits nationaux. Dans l'ordre international, je pense notamment à l'émergence d'un espace judiciaire européen *lato sensu* structuré dont l'article 6 § 1 de la *Convention européenne des droits de l'homme*, proclamant le droit au procès équitable, constitue le commun dénominateur le plus visible. Avec le droit au procès équitable, c'est un processus d'universalisation progressive du droit processuel qui s'opère dans l'ordre des valeurs fondamentales de la société, transcendant les frontières nationales aussi bien que les frontières matérielles du procès, comme celles qui, par exemple, séparent traditionnellement la procédure civile de la procédure pénale ou de la procédure administrative. Dans les droits nationaux, je pense surtout à la réforme des règles de procédure civile anglaise réalisée à la fin du siècle dernier à la suite du Rapport de Lord Woolf selon lequel, en s'avançant jusqu'au milieu du *Channel*, le procès civil anglais s'est continentalisé. Ce rapprochement du droit anglais des droits qu'on dit romano-germaniques de l'Europe continentale a été déterminant dans la définition des *Principes de procédure civile transnationale* ainsi que l'avait rappelé le professeur Stürner dans le discours inaugural qu'il avait prononcé à Mexico en 2003 lors du XII[e] congrès mondial de notre association[7].

Cette excursion ne nous éloigne bien sûr pas de notre sujet; elle en est au cœur et elle nous dit assurément un certain nombre de choses sur la distinction entre *common law* et *civil law*, du moins si l'on accepte de considérer *common law* et *civil law* comme des catégories et, qui plus est, comme des catégories qui iraient de soi. Si l'on admet ce point de départ épistémologique, on peut alors répondre à l'invitation de s'interroger sur le futur des catégories et sur les catégories du futur. Les collègues qui sont intervenus au cours de ces deux journées ont répondu à cette invitation, chacun à leur manière et dans leur domaine. Il m'incombe, à mon tour, de vous livrer quelques réflexions personnelles qui n'ont bien sûr aucune prétention à la synthèse ni à l'exhaustivité. Je ne pourrai pas citer l'ensemble des intervenants; je les remercie de bien vouloir m'en excuser. Mes observations seront partielles et partiales, voire iconoclastes.

UNIDROIT's "Principles and Rules of Transnational Civil Procedure" » (2008) 164 Revista de processo 109.

[7] Voir : R. Stürner, « Procédure civile et culture juridique », *RIDC* 2004.797.

II. LE FUTUR DES CATÉGORIES, ESSAI DE RÉTROSPECTIVE PROCÉDURALE

S'interroger d'abord sur le futur des catégories conduit à se demander ce qu'est devenue, du point de vue du droit du procès, la distinction entre *common law* et *civil law*. C'est un exercice de *rétrospective* procédurale, qui consiste à retracer l'évolution de la division des systèmes de procédure entre famille de *common law* et famille de *civil law*, et il n'est pas complètement inédit. Il avait déjà donné lieu, au congrès de notre association, organisé à Taormina en 1995, à deux rapports très approfondis des professeurs Azmy Ateia et Takeshi Kojima[8]. Les réponses à la question des rapports entre *common law* et *civil law* sont donc assez attendues, sinon convenues. Mais, précisément, avons-nous eu raison et avons-nous raison de raisonner ainsi? Le futur des catégories, ce n'est pas seulement le futur de leur contenu respectif et celui de leur articulation (A), ce qui est en question, c'est aussi l'avenir de leur existence même (B).

1. L'évolution de la distinction

L'évolution de la distinction entre *common law* et *civil law* a été au cœur de nos débats, comme nous y invitaient les organisateurs du colloque, et elle est certaine. Dans une vue superficielle et, peut-être, optimiste des choses, c'est celle du dépassement continu de la distinction entre *common law* et *civil law* par rapprochement mutuel des deux catégories. La procédure de *common law* se civiliserait tandis que la procédure de *civil law* s'anglo-américaniserait dans un processus œcuménique, sinon idyllique, de fertilisation croisée[9].

Les multiples *facteurs* de cette évolution ont été identifiés: c'est d'abord la réforme à l'œuvre dans chaque pays pour répondre aux besoins du temps présent afin d'améliorer les réponses de la justice civile à la demande sociale; la revendication générale, et permanente, d'une justice plus simple, plus rapide, moins onéreuse conduisant partout à des solutions qui se ressemblent, les mêmes causes produisant à peu de choses près les mêmes effets. C'est également l'organisation plus ou moins

[8] Voir : A.A. Ateia, « Le regroupement des familles juridiques en droit judiciaire », p. 629-684, et T. Kojima, « Legal Families in Procedural Law Revisited », p. 569-625, dans I. Andolina (a cura di), *Transnational Aspects of Procedural Law,* Milano, Giuffrè, 1998.

[9] Voir aussi : G. Canivet, « Influence croisée de la *common law* et du droit civil » (2004) 63 La. L. Rev. 946.

élaborée, plus ou moins rapide, mais indiscutable et inévitable, de la société internationale afin de répondre à des nécessités mondiales, qu'il s'agisse des besoins du commerce international, avec l'arbitrage commercial international ou les procédures civiles transnationales que j'évoquais il y a un instant, ou de la répression de la criminalité internationale, avec la justice pénale internationale telle qu'elle s'incarne dans les juridictions *ad hoc* ou à la Cour pénale internationale.

Quant aux *manifestations de cette évolution*, elles ont également retenu notre attention. L'accent a été mis surtout sur le changement affectant le rôle des acteurs du procès, la distribution des prérogatives et des charges procédurales entre le juge et les parties, le statut de l'expertise et du témoignage, ces éléments étant en effet traditionnellement présentés comme des marqueurs de la distinction entre procédure de *common law* et procédure de *civil law*. Mais notre regard a également embrassé d'autres aspects de l'activité procédurale comme les actions collectives, la forme orale ou écrite des actes processuels, les questions probatoires, l'exécution des jugements ou les modes alternatifs de règlement des conflits. Sur tous ces points, des convergences sont observées que je ne récapitulerai bien sûr pas ici, même si, en vérité, la situation est beaucoup plus nuancée que cela, dès lors qu'on ne se contente pas d'une vue générale et superficielle des choses.

Cela étant, je ne suis pas sûr que le plus important consiste à peser le pour et le contre comme le ferait un épicier sur sa balance, à mesurer l'étendue du rapprochement et la part des spécificités qui demeurent; il me semble encore moins intéressant de répondre à la question de savoir, dans une conception concurrentielle, voire agonistique, des systèmes juridiques,[10] si cette évolution marque la victoire d'une famille juridique sur une autre. Laissons ces petits calculs d'un autre âge, comme d'ailleurs le trébuchet de l'apothicaire, à la Banque mondiale qui ne devrait pas oublier qu'elle est mondiale, à défaut d'être altermondiale, et qui ferait bien de s'en tenir à la mission qui devrait être la sienne, à savoir lutter efficacement contre la pauvreté en apportant des aides, des financements et des conseils appropriés aux pays en difficulté[11].

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[10] Voir : J. du Bois de Gaudusson et F. Ferrand (dir.), *La concurrence des systèmes juridiques*, précité, spécialement O. Pfersmann, « Propos introductifs: existe-t-il véritablement une concurrence des systèmes juridiques? », p. 23-33, ainsi que M.-C. Ponthoreau, « Existe-t-il véritablement une concurrence entre *common law* et tradition civiliste? Le point de vue du comparatiste de droit public », p. 35-47.

[11] Sur la critique des rapports *Doing Business* de la Banque mondiale, voir notamment : M. Haravon, « Le mirage des classements pour mesurer l'efficacité de la justice civile », JCP E 2006. 2369; B. du Marais (dir.), *Des indicateurs pour mesurer le droit? Les limites méthodologiques des*

Le projet des organisateurs de ce colloque allait plus loin que la seule étude descriptive de cette évolution assez bien connue. En posant la question des relations entre *common law* et *civil law* en termes de *catégories*, ils ont fait le choix d'un questionnement de type épistémologique installant l'analyse comparative au cœur de la théorie générale du droit[12]. Mais alors les choses deviennent plus complexes et moins évidents les enseignements de notre colloque car nous sommes conduits à nous demander ce que vaut, dans son principe même, la distinction entre *common law* et *civil law*, si *common law* et *civil law* peuvent même être pensées en termes de catégories.

2. C'est *l'existence des catégories* qui est alors en cause

Nous avons en fin de compte assez peu parlé des catégories et de la classification des systèmes de procédure dans les deux catégories de *common law* et de *civil law*, comme si leur existence allait de soi. Mais est-ce le cas? Soraya Amrani-Mekki a certes plaidé en faveur de l'existence de ces catégories en se référant à la méthode wébérienne de l'idéaltype,[13] tandis que Patrick Glenn s'est au contraire interrogé sur l'opportunité des catégories[14] dans une analyse qui met davantage l'accent sur les traditions plutôt que sur les systèmes juridiques nationaux, historiquement datés.[15] La question est complexe et peut se décliner à des niveaux différents de généralité selon que l'on s'intéresse au principe même de la division ou, plus largement encore, à l'analyse des familles procédurales en termes de catégories.

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rapports Doing business, La documentation française, 2006; Association Henri Capitant, *Les droits de tradition civiliste en question,* vol. 1 et 2, Société de législation comparée, Paris, 2006, spécialement vol. 1, p. 32 :

> Ce qui rend les conclusions du groupe LLVS et donc les Rapports *Doing business* peu convaincants, ce n'est pas l'emploi de méthodes quantitatives en tant que telles. C'est plutôt qu'en l'espèce elles sont employées de façon sommaire et semblent sous-tendues par la volonté d'obtenir, plus que de démontrer, le résultat escompté, à savoir la faible efficience économique du droit civil.

[12] Voir : J. Commaille et A.-J. Arnaud, *Dictionnaire encyclopédique de théorie et de sociologie du droit*, sous « Catégorie », Paris, LGDJ, 2e éd., 1993.

[13] Voir : S. Amrani-Mekki, « The Future of the Categories, the Categories of the *Futur* » dans Walker & Chase, précité, p. 247-266.

[14] Voir : H.P. Glenn, « A Western Legal Tradition? » dans Walker & Chase, précité, p. 601-620.

[15] Voir : H.P. Glenn, « La tradition juridique nationale », *RIDC* 2003.2.263.

a) Contenu du principe

Le principe de la distinction entre *common law* et *civil law* paraît acquis pour le plus grand nombre. L'évolution du contenu de la distinction ne remettrait pas en cause son principe même qu'il s'agirait seulement de repenser et, à cet égard, le professeur Damaška, d'entrée de jeu, a clairement exposé les termes du débat en nous faisant part de ses vues pénétrantes: la distinction est certes trompeuse, nous dit-il, mais elle contient une part de vérité en raison des structures d'autorité et des organisations judiciaires différentes qui demeurent à l'œuvre ici et là[16]. Fermant le ban, le professeur Glenn, avec la science merveilleuse qu'on lui connaît des deux univers juridiques, lui a fait écho en nous expliquant que les traditions distinctes de *common law* et de *civil law* allaient encore nous accompagner pendant un certain temps[17]. L'existence de systèmes juridictionnels mixtes ne remettrait pas davantage en cause le principe de la distinction dont ils ne seraient qu'une forme hybride, comme le seraient aussi à certains égards les juridictions internationales qui combinent de manière variable éléments de *common law* et éléments de *civil law*. La chute du mur de Berlin aurait même renforcé le principe de la distinction en rayant de la carte judiciaire planétaire une troisième famille, celle des droits socialistes, dont certains pays de tradition civiliste auraient regagné le giron originaire alors que les autres auraient rejoint la catégorie fourre-tout des systèmes mixtes.

L'interprétation est simple, mais est-elle aussi convaincante que cela?

J'observe d'abord que ce récit n'est pas partagé par Alan Uzelac qui nous a montré que, derrière les apparences, la tradition dite socialiste est encore d'une grande vitalité en ce qui concerne son pays et peut-être, plus largement encore, un certain nombre de pays de l'ancienne sphère d'influence soviétique[18]. Et que dire de la Chine dans la singularité irréductible de ses diverses traditions, dont certaines sont millénaires?

Surtout, je ne vous cache pas ma perplexité quand j'entends le professeur Andrés de la Oliva Santos[19] nous expliquer que les caractères traditionnels de la procédure de *civil law* ne se retrouvent pas dans la

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[16] Voir : M. Damaška, « The Common Law / Civil Law Divide: Residual Truth of a Misleading Distinction » dans Walker & Chase, précité, p. 3-22. Voir aussi: D. Fairgrieve et H. Muir Watt, *Common law et tradition civiliste*, Paris, PUF, 2006.

[17] H.P. Glenn, « A Western Legal Tradition? », précité.

[18] Voir : A. Uzelac, « Survival of the Third Legal Tradition? » dans Walker & Chase, précité, p. 377-396.

[19] Voir : A. de la Oliva Santos, « Spanish Civil Procedure Act 2000: Flying Over Common and Civil Law Traditions » dans Walker & Chase, précité, p. 63-74.

nouvelle procédure civile espagnole qui est aujourd'hui beaucoup plus proche de la procédure civile des États-Unis sans que cela veuille toutefois dire que l'Espagne aurait quitté la famille civiliste pour devenir un système de *common law*. J'entends bien les raisons qu'il nous expose de manière très claire pour justifier ce *distinguo*, qui tiennent à l'existence, en Espagne, d'un droit d'origine légale plutôt que judiciaire, à l'existence d'un corps organisé et hiérarchisé de magistrats professionnels et à l'absence de jury, qui seraient des traits distinctifs des droits de *civil law*. Mais cela suffit-il vraiment à justifier qu'une distinction de principe, catégorique, soit encore faite entre *common law* et *civil law*? D'autant que les différences qui subsistent, du point de vue espagnol, ne font plus nécessairement sens au regard d'autres pays que l'on dit de *civil law*: un quart du contentieux en première instance est traditionnellement réglé en France par des tribunaux (tribunaux de commerce, conseils de prud'hommes, *etc*.) qui ne sont pas composés de juges professionnels, mais de juges laïques, élus par leurs pairs, et, dans la plupart des pays de tradition civiliste, la jurisprudence, au sens de droit produit par les juges, est devenue une source de droit et pas seulement en matière administrative, comme c'est le cas en France depuis toujours. À l'inverse, le jury n'existe plus en matière civile en Angleterre, sous réserve de quelques hypothèses particulières, et les pays de *common law* ont tous développé un droit d'origine légale. Pour sa part, le professeur Baumgartner nous a montré que la Suisse a développé depuis très longtemps des solutions judiciaires et procédurales qui démentent clairement la pertinence de la distinction entre *common law* et *civil law*[20].

b) Discussion du principe

C'est le principe même de la distinction entre *common law* et *civil law* qui est donc discutable. Il est tributaire d'une classification des systèmes juridiques qui date d'une époque, la fin du XIX^e^ siècle et la première moitié du XX^e^ siècle, caractérisée par les États-Nations et un état du monde, divisé en quelques sphères limitées d'influence, marqué par le colonialisme européen[21]. Ce n'est pas une donnée naturelle, ce

[20] Voir : S.P. Baumgartner, « Civil Procedure Reform in Switzerland and the Role of Legal Transplants » dans Walker & Chase, précité, p. 75-96.

[21] Sur l'idée que le droit comparé classique est dépassé dans la mesure où il prend le droit étatique comme modèle d'étude et de construction, alors que « ce modèle ne s'impose plus », voir H.P. Glenn, « Droit mondial, droit mondialisé ou droit du monde? » dans *Mélanges X. Blanc Jouvan*, précité, p. 259-69.

n'est qu'une construction doctrinale, une création intellectuelle, qui a été faite par des professeurs à des fins essentiellement pédagogiques pour essayer de mettre un peu d'ordre dans le désordre apparent du monde juridique. Cette classification à géométrie variable a du reste évolué au gré des auteurs et au fil du temps, depuis Pierre Arminjon puis René David jusqu'au Juriglobe de l'Université d'Ottawa et Ugo Mattéi en passant par Konrad Zweigert et Hein Kötz[22]. Les typologies traditionnelles, auxquelles appartient la distinction entre *common law* et *civil law*, sont assez largement remises en cause par les comparatistes. Pour m'en tenir à la seule littérature publiée en France, le professeur Arnoldo Wald se demandait il y a quelques mois, dans les *Mélanges offerts à Xavier Blanc-Jouvan*, s'il ne fallait pas repenser les familles juridiques en prenant appui, notamment, sur un critère tiré du niveau de développement économique[23] alors que, de son côté, dans la *Revue internationale de droit comparé*, Jaako Husa se demandait, à propos de la classification des familles juridiques, si le temps n'était pas venu « for a memorial hymn »[24]. Et je ne dis rien des critiques postmodernes adressées par des auteurs comme Pierre Legrand aux fonctions et aux méthodes traditionnelles du droit comparé sur le thème de l'incommensurabilité des systèmes[25]. Les processualistes ne peuvent pas rester à l'écart des débats qui animent les comparatistes et soulèvent la question du rôle contemporain du droit comparé par rapport au droit international privé et du droit communautaire, au sens européen de l'expression et, d'un certain point de vue, ibéroaméricain[26].

La diversité est devenue telle à l'intérieur de chaque famille, le lien s'est tellement distendu entre la réalité concrète des systèmes procéduraux et les catégories conceptuelles censées l'exprimer que la distinction entre *common law* et *civil law* ne fait plus sens aujourd'hui, me semble-t-il, pour rendre compte du paysage procédural mondial. Michele Taruffo en avait fait un procès tout à fait convaincant dans une conférence prononcée à Tokyo en 1999 sur le thème de la dimension transculturelle de la justice

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[22] Sur ces évolutions, voir, par exemple : G. Cuniberti, *Grands systèmes de droit contemporains*, Paris, LGDJ, 2007, spéc. n[os] 1-11.

[23] A. Wald, « Doit-on repenser les « familles juridiques »?, dans *De tous horizons – Mélanges Xavier Blanc-Jouvan*, Paris, Société de législation comparée, 2005, p. 187-197.

[24] J. Husa, « Classification of Legal Families Today – Is It Time for a Memorial Hymn? », *RIDC* 2004.1.11.

[25] Voir, en dernier lieu : P. Legrand (dir.), *Comparer les droits, résolument*, Paris, PUF, 2009, spéc. P. Legrand, « Au lieu de soi », p. 11-37, et « La comparaison des droits expliquée à mes étudiants », p. 209-244.

[26] Pour une synthèse critique éclairante, voir : C. Delyanni-Dimitrakou, « Les mutations des prémisses philosophiques du droit comparé », dans *De tous horizons – Mélanges Xavier Blanc-Jouvan*, précité, p. 25-53.

civile[27]. Quant à recourir à la notion de système mixte, cela ne sert à rien. La catégorie des systèmes mixtes est une paresse inacceptable de l'esprit, sinon un échec de la pensée, et, en tout cas, le vestige d'une conception trop européocentrique du monde. Il faut alors s'interroger sur les catégories du futur, ce qui est une question de *prospective* processuelle.

III. LES CATÉGORIES DU FUTUR, QUESTION DE PROSPECTIVE PROCESSUELLE

Si le passé informe le présent, le présent informe le futur. Les catégories du futur se dessinent donc dans la trame du présent, sinon dans leur contenu du moins dans leurs contours. Mais s'agit-il bien de catégories à proprement parler, au sens kantien plus qu'aristotélicien du terme? En vérité, cette structure de l'entendement mental me paraît peu appropriée, en raison de la rigidité, de l'homogénéité et de la fixité qu'elle postule, pour rendre compte de la flexibilité, de la complexité et de l'évolutivité des réalités procédurales contemporaines[28]. La distinction *common law / civil law* n'est pas du tout du même ordre que les grandes dichotomies de la pensée juridique identifiées par Norberto Bobbio : droit statutaire et droit coutumier; droit naturel et droit positif; droit objectif et droit subjectif[29]. Je préfère pour ma part raisonner en termes de modèles et les modèles du futur, qui se dessinent sous nos yeux, doivent être déclinés tant sur le terrain de la macrocomparaison des systèmes de justice que sur celui de la microcomparaison des modes de règlement des différends.

1. Sur le terrain macrocomparatif des systèmes de justice

Sur le terrain macrocomparatif des systèmes de justice, il n'est pas simple de définir avec assurance les modèles susceptibles de se substituer aux classifications traditionnelles des familles juridiques et, notamment, à la distinction entre *common law* et *civil law*.

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[27] M. Taruffo, « Dimensioni transculturali delle giustizia civile » (2000) 4 Rivista trimestrale du diritto e procedura civile 1047.

[28] Sur la notion de catégorie, conçue comme un « instrument abstractif » et, plus précisément, un « complexe de droit », au même titre que les institutions et les ordres juridiques, mais distinguée des « modèles systématiques », voir : H. Roland et L. Boyer, *Introduction au droit*, Paris, Litec, 2002, n^{os} 318-319.

[29] N. Bobbio, *Dalla structura alla funzione*, Milano, Ed. della Comunità, 1977.

a) Des modèles de substitution

Des modèles de substitution ont été évoqués au cours de cette conférence, à travers la référence à la tradition juridique occidentale[30] ou aux systèmes de type méditerranéen[31]. Il n'est pas niable que ces propositions apportent quelque chose à la peinture du paysage judiciaire planétaire en mettant notamment l'accent sur des données qui, comme la tradition et la culture, enrichissent considérablement la réflexion comparatiste par rapport à l'analyse traditionnelle en termes de systèmes: elles y font entrer l'histoire, les pratiques et les mentalités qui expliquent beaucoup plus un système juridique que n'en rendent compte ses seuls dispositifs normatifs[32]. C'est à la tradition occidentale que se référait Henry Lévy-Bruhl, au début des années 1960, dans son histoire sociologique de la preuve judiciaire, pour associer « les droits européens et américains modernes »[33]. C'est à cette même analyse englobante que se livrait Michel Foucault lorsqu'il étudiait, à travers « l'histoire de l'Occident », le rôle des pratiques judiciaires dans la production de la vérité et des formes de savoir[34] et c'est à la même association que procède Ewoud Hondius quand il s'interroge, avec perplexité, sur la suprématie du droit occidental, dans un article publié dans les *Mélanges Johannes Spruit*[35]. S'inscrivent aussi dans cette veine les conférences, associations, instituts réunissant des juristes appartenant à une même communauté linguistique, hispanophone, anglophone, lusophone, francophone, *etc*.[36]. Mais ces modèles sont d'un rendement limité car ce qui leur sert de ciment est trop large, donc insuffisamment intégratif, pour en faire des modèles opératoires et, au surplus, ils ne rendent compte que d'une petite partie de la réalité au regard de tout ce qui reste en dehors de leur sphère.

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30 Voir : H.P. Glenn, « A Western Legal Tradition? », précité.

31 Voir : A. Uzelac, « Survival of the Third Legal Tradition? », précité.

32 Voir : H.P. Glenn, « La tradition juridique nationale », précité.

33 H. Lévy-Bruhl, *La preuve judiciaire – Étude de sociologie juridique*, Paris, Librairie Marcel Rivière et Cie, 1964, spéc. p. 9-10.

34 M. Foucault, « La vérité et les formes juridiques », dans *Dits et écrits I, 1954-1975*, Paris, Gallimard, 1994, spéc. p. 1411.

35 E. Hondius, « The Supremacy of Western Law », dans *Viva vos iuris romani – Essays in Honour of Johannes Emil Spruit,* Amsterdam, J. C. Gieben, Publisher, 2002, p. 337-342.

36 Voir, par exemple, dans la sphère francophone, au sens large, le rôle important joué par l'Association Henri Capitant des amis de la culture juridique française*:* <http://www.henricapitant.org>, et par l'Association des hautes juridictions de cassation des pays ayant en partage l'usage du français : <http://www.ahjucaf.org>.

b) Du généalogique au géographique

Il est permis de se demander si les classifications de ce type, que j'appellerai *généalogiques*, ont encore un sens. J'entends bien que les feuilles d'un arbre ne tombent jamais bien loin de ses racines, mais je sais aussi que nous sommes des personnes différentes de nos parents, fruit d'une combinaison génétique différente de la leur et d'une histoire affective et sociale également distincte. Dans la Bible, il est écrit que « mon voisin près de moi vaut mieux que mon frère au loin »[37]. La proximité géographique l'emporte sur la généalogie commune. N'est-ce pas ce que nous laissent voir les évolutions géopolitiques du monde avec la structuration d'ensembles régionaux de développement commun, économique et culturel, voire politique et social?[38] La construction européenne est, de ce point de vue, assez bien avancée sur le terrain de l'intégration et les choses vont encore progresser avec l'adhésion de l'Union européenne à la *Convention européenne des droits de l'homme*[39]. Les autres tentatives de ce type ne sont pas nombreuses, que ce soit sur le continent sud-américain ou sur le continent africain, et ne présentent pas le même degré de développement. Il faut cependant saluer ici l'extraordinaire travail accompli par l'Institut ibéroaméricain de droit processuel. J'ai la conviction que ces regroupements régionaux sont la voie de l'avenir, même si, bien sûr, et nous l'avons entendu au cours de ces deux journées, notamment par la bouche d'Eva Storskrubb, les difficultés sont nombreuses[40]. Ces organisations régionales, et c'est particulièrement vrai en Europe, fabriquent des systèmes originaux de justice, transcendant les systèmes nationaux de justice auxquels ils

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[37] Ou « Mieux vaut un voisin proche qu'un frère éloigné », *Proverbes* de Salomon, 27, 10.

[38] Sur cette nouvelle dimension régionale du rapprochement des systèmes et des droits judiciaires, voir aussi : F. Ferrand, « La procédure civile internationale et la procédure civile transnationale: l'incidence de l'intégration économique régionale », (2003-1/2, NS) VIII Uniform Law Review/Revue de droit uniforme 397; J. Basedow, « Vie universelle, droit mondial? À propos de la mondialisation du droit », dans *Mélanges Xavier Blanc-Jouvan*, précité, p. 223-238, qui observe judicieusement que « l'augmentation du nombre d'institutions à caractère régional semble annoncer un déplacement de la législation mondiale du plan international vers le plan interrégional » (p. 237).

[39] Traité UE, art. 6, version consolidée (*JOUE*, n° C 115, 9 mai 2008). Le Traité de Lisbonne du 13 décembre 2007 (*JOUE*, n° C 306, 17 décembre 2007) comprend un Protocole à annexer au Traité UE qui précise les conditions de l'adhésion de l'Union européenne à la *Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales*, notamment pour garantir que les recours formés par des États non membres et les recours individuels soient dirigés correctement contre les États membres et/ou l'Union, selon le cas.

[40] Voir : E. Storskrubb, « What Changes Will European Harmonization Bring? » dans Walker & Chase, précité, p. 403-420.

s'ajoutent, ces systèmes nationaux seraient-ils issus de familles différentes, et elles le font à partir de principes communs, comme, par exemple, ceux du procès équitable. Ce nouvel ensemble est autre chose que la somme de ses parties juxtaposées. Ce nouveau droit commun, au sens de *jus commune* et non pas de *common law*,[41] rejaillit à son tour sur les systèmes de justice et de procédure des États membres que la force des choses et celle des arrêts des cours européennes invitent à l'harmonisation. Les juridictions nationales sont conduites à dialoguer entre elles, ce qui peut aller jusqu'à la mise en œuvre d'actes de procédure inconnus dans leur propre système, notamment en matière d'obtention des preuves[42], et avec les juridictions européennes. Harmonisation, hybridation, coordination sont les maîtres mots de cette nouvelle manière de penser la justice, non plus en termes de *famille* mais en termes d'*espace*, ce à quoi Mireille Delmas-Marty fait référence à travers la notion de pluralisme ordonné, qui exprime l'unité dans la diversité[43], cette unité dont Albert Camus disait qu'elle est non pas écrasement des différences mais harmonie des contrastes. L'espace judiciaire européen est ainsi un nouveau cadre de pensée, de même que l'espace ibéroaméricain, tout comme pourraient le devenir un espace judiciaire africain, un espace judiciaire est-asiatique et, pourquoi pas, un espace judiciaire proche-oriental. Il n'est pas interdit de rêver.

Ces nouveaux espaces judiciaires sont à considérer en eux-mêmes, pour ce qu'ils sont, dans la réalité de leurs dispositifs normatifs et de leurs pratiques juridictionnelles et non pas par référence aux généalogies des systèmes juridiques et judiciaires des États qui les composent. D'où, du reste, la mise en place complémentaire, au sein de ces ensembles régionaux, afin de favoriser leur acculturation mutuelle, de réseaux reliant les praticiens de la justice des différents pays dont l'objet est d'assurer

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[41] Voir : M.-F. Renoux-Zagamé, dans L. Cadiet (dir.), *Dictionnaire de la justice*, Paris, PUF, 2004, sous « Jus commune ».

[42] Voir, par exemple, le *Règlement (CE) n° 1206/2001 du Conseil du 28 mai 2001 relatif à la coopération entre les juridictions des États membres dans le domaine de l'obtention des preuves en matière civile et commerciale* (*JOUE*, n° L. 174, 27 juin 2001, p. 1), spéc. l'art. 10, à propos de l'exécution d'une mesure d'instruction :

> […] 2. La juridiction requise exécute la demande conformément au droit de l'État membre dont cette juridiction relève. 3. La juridiction requérante peut demander que la demande soit exécutée selon une forme spéciale prévue par le droit de l'État membre dont elle relève, au moyen du formulaire type A figurant en annexe. La juridiction requise défère à cette demande, à moins que la forme demandée ne soit pas compatible avec le droit de l'État membre dont elle relève ou en raison de difficultés pratiques majeures.

[43] M. Delmas-Marty, *Pour un droit commun*, Paris, Éditions du Seuil, 1994; *Les forces imaginantes du droit*, Éditions du Seuil, vol. II, *Le pluralisme ordonné*, 2006.

les échanges d'information mais aussi les communautés de formation, comme en Europe avec le Réseau judiciaire européen (European Judicial Network) et le Réseau européen de formation judiciaire (European Judicial Training Network), et Eduardo Oteiza a eu parfaitement raison d'insister, dans son rapport, sur l'importance primordiale que présente une formation spécifiquement ibéroaméricaine des juristes ibéroaméricains[44]. Aujourd'hui plus qu'hier et demain plus qu'aujourd'hui, l'avocat, le juge et le professeur de droit doivent être avocat, juge et professeur de droit avant d'être avocat, juge et professeur de droit de telle nationalité ou de telle autre. Ainsi que l'a écrit Guy Canivet, ancien premier président de la Cour française de cassation, aujourd'hui membre du Conseil constitutionnel, « le pouvoir judiciaire est par nature non territorial, dans la mesure où il est moins lié à un territoire qu'à des principes »[45]. Dans les nouvelles luttes sociétales en faveur de la protection de l'environnement, des consommateurs, des travailleurs et des petits investisseurs, il y a sans doute beaucoup plus à attendre de l'action internationale des juges que de longues et difficiles négociations interétatiques[46]. De ce point de vue, est particulièrement éclairant l'exemple cité par Linda Mullenix de la *class action* soumise à une juridiction fédérale américaine par les actionnaires de la société française Vivendi Universal[47]. Je ne suis pas certain que cette *class action* soit plus compatible avec le droit français qu'avec le droit allemand. En revanche, il me semble important de souligner que « cette nouvelle forme de gestion du contentieux transnational est parfaitement conforme à la fonction de régulation économique qui incombe désormais aux juridictions étatiques dans l'ordre global, dans l'intérêt de la communauté des États et parfois même en application de normes communes »[48]. Du point de vue processuel, ce développement des actions collectives internationales marque un renforcement de la fonction sociale du procès, apparue à la fin de XIX^{e} siècle dans les législations procédurales continentales, mais jusque-là cantonnée dans

[44] Voir : E. Oteiza, « Civil Procedure Reforms in Latin America: The Role of the Judge and the Parties in Seeking a Fair Solution » dans Walker & Chase, précité, p. 225-246.

[45] G. Canivet, « La convergence des systèmes juridiques par l'action du juge », dans *Mélanges Xavier Blanc-Jouvan*, précité, p. 11-23, spéc. n^{o} 27.

[46] Voir : L. Cadiet, « Justice, économie et droits de l'homme », dans L. Boy, J.-B. Racine et F. Siiriainen (dir.), *Économie et droits de l'homme*, Bruxelles, Larcier, 2009, p. 537-567.

[47] Voir : L.S. Mullenix, « American Exceptionalism and Convergence Theory: Are We There Yet? » dans Walker & Chase, précité, p. 41-62.

[48] H. Muir Watt, « Régulation de l'économie globale et émergence de compétences déléguées: sur le droit international privé des actions de groupe » (2008) Rev. crit. DIP 581, spéc. n^{o} 14.

le champ des justices nationales et dans le domaine traditionnel des contentieux individuels.

Il faut encore, au-delà de ces considérations générales, passer du plan macrojudiciaire au plan microjudiciaire et tenter de qualifier les nouveaux modèles qui émergent ainsi sur le terrain des procédures de règlement des différends.

2. Sur le terrain microcomparatif des types de procédure

Sur le terrain microcomparatif des types de procédure dans le règlement des litiges, la distinction entre la procédure de type inquisitoire, ou investigative, et la procédure de type accusatoire, ou adversative si Patrick Glenn m'autorise cet adjectif[49], ne rend pas davantage compte des réalités procédurales contemporaines que celle entre *common law* et *civil law* ne le fait des systèmes juridiques d'aujourd'hui.

a) L'abandon de la distinction traditionnelle

Les *raisons* qui conduisent à l'abandon progressif de cette distinction sont à la fois d'ordre technique, économique et juridique. Les raisons techniques ont déjà été évoquées au cours de nos précédents colloques et congrès; elles le seront encore lors de nos prochaines réunions. Cette répétition est le signe visible de leur importance, qu'il s'agisse du développement des procédés scientifiques de preuve et, notamment, de la preuve génétique, qui était le thème d'une des sessions de notre congrès mondial à Mexico en 2004[50], ou du développement de la dématérialisation du procès, déjà abordé à Vienne en 1999[51], à Bahia en 2007[52], à

[49] Voir : H.P. Glenn, « A Western Legal Tradition? », précité, spéc. note 35.

[50] Voir : L. Cadiet et O.G. Chase, « Culture et administration judiciaire de la preuve », Rapport général au XII[e] congrès de l'Association internationale de droit judiciaire, Mexico, 22-25 septembre 2003, dans C. Gomez Lara et M. Storme, *XII Congreso Mundial de Derecho Procesal*, t. I, 2005.

[51] Voir : H. Rüssmann, « The Challenge of Information Society: Application of Advanced Technologies in Civil Litigation and Other Procedures », dans W. Recheberger (dir.), *Procedural Law on the Threshold of a New Millennium*, *XI World Congress on Procedural Law*, Wien, Manzsche Verlags-und Universitätsbuchhandlung, 2002, p. 205-249.

[52] Voir : J. Walker *et al.*, « Information Technology on Litigation », dans A. Pellegrini Grinover et P. Calmon (dir.), *Direito Processual Comparado, XIII[e] World Congress on Procedural Law*, Rio de janeiro, Ed. Forense, 2007, p. 119-197.

Gandia/Valencia en 2008[53] et qui le sera encore à Pécs en 2010 où nos travaux seront entièrement consacrés à la justice électronique.[54] Nous n'avons peut-être pas encore pris conscience à quel point le progrès scientifique et technique, qui ne connaît pas les frontières, va modéliser les procédures juridictionnelles dans un processus à vocation internationale, qui laissera moins d'espace aux singularités nationales. Quel que soit le jugement de valeur qu'on lui réserve, qu'on y voie une bonne ou une mauvaise chose, c'est une révolution de type paradigmatique qui est en train de s'opérer, entraînant une déritualisation, voire une délocalisation, de la justice là où les rites exprimaient traditionnellement la prégnance des cultures judiciaires locales. Le *desk judge*, évoqué par Judith Resnik[55], n'a pas besoin de *courthouse*, ce qui, d'ailleurs, peut remettre en cause les principes fondamentaux de la justice démocratique, à commencer par la publicité de la justice. La norme technique va modeler la règle juridique. Giuseppe Tarzia n'avait pas manqué d'observer, il y a 10 ans déjà, que

> 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[56].

L'informatisation remet en cause la distinction traditionnelle de l'oral et de l'écrit auxquelles ne peuvent se réduire les nouvelles technologies; elle favorise la coopération du juge et des auxiliaires de justice, spécialement les avocats, dans la mesure où elle suppose la définition et la mise en œuvre de protocoles communs d'échange des données; surtout, en contribuant à la rationalisation du fonctionnement des juridictions et des procédures, l'informatisation apparaît comme un outil important du management judiciaire, qui traduit lui-même l'émergence d'une nouvelle culture économique du procès. En quelque sorte, le marché rejoint la science dont il partage assurément la culture quantitative. Ce processus de

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[53] Voir spécialement : S. Amrani-Mekki, « El impacto de las nuevas tecnologías sobre la forma del processo civil », dans F. Carpi et M. Ortells Ramos (dir.), *Oralidad y escritura en un proceso civil eficiente*, Universitat de València, 2008, vol. I, p. 93-133.

[54] M. Kyengel (dir.), *Electronic Justice, Present and Future*, University of Pécs, 23-25 septembre 2010: <http://www.iapl2010.hu>.

[55] Voir : J. Resnik, « Managerial Judges, Jeremy Bentham and the Privatization of Adjudication » dans Walker & Chase, précité, p. 205-224.

[56] G. Tarzia, « Harmonisation ou unification transnationale de la procédure civile » (2001) 4 Rivista di diritto internazionale privato e processuale 869.

normalisation s'observe déjà à l'intérieur des systèmes nationaux à travers l'interconnexion des réseaux intranet du Barreau et des juridictions, aussi bien que dans l'espace judiciaire européen à travers, notamment, les procédures communautaires d'injonction de payer et de règlement des petits litiges. La justice et la procédure sont saisies par la technique et l'économie qui risquent de les soumettre à leurs propres catégories. La recherche de l'efficacité procédurale est devenue un enjeu majeur des réformes législatives et un principe directeur des procès civils, ou, pour le dire à la manière anglaise, un « overriding objective » (*Civil Rules Procedure*, Part 1). Dès le début des années 1970, le droit français imposait au juge de limiter le choix des mesures d'instruction « à ce qui est suffisant pour la solution du litige, en s'attachant à retenir ce qui est le plus simple et le moins onéreux » (art. 147 du Code de procédure civile) et, l'offre d'un nouveau code de procédure civile que le professeur Andrea Proto Pisani vient de faire en Italie comporte également, dans le titre préliminaire des « Principî fondamentali dei processi giuridizionali », un article 0.8, intitulé « Efficienza del processo civile »[57]. Mais ni la science ni le marché ne sont des fins en eux-mêmes. Le procès a pour seul but la solution juste du litige et, avant de s'observer dans la sentence elle-même, la justice doit caractériser d'abord la procédure qui y conduit. Si une procédure juste ne protège pas nécessairement des sentences injustes, il y a peu de chances, en revanche, qu'une procédure injuste conduise à de justes sentences. L'efficience procédurale ne peut donc pas se faire au prix de l'équité processuelle. Une justice de qualité en est une qui parvient à combiner ces deux logiques[58]. Cette recherche est au cœur de la mission d'évaluation des systèmes judiciaires confiée, en Europe, à la Commission européenne pour l'efficacité de la justice.

b) La promotion d'un nouveau modèle

Encore faut-il préciser ce qui se substitue alors à la distinction traditionnelle du procès accusatoire, ou adversatif, et du procès inquisitoire, ou investigatif. Il me semble, en réponse à cette question, que ce que donne à voir l'évolution contemporaine, c'est l'émergence d'un *modèle du procès coopératif dans un système de justice plurielle*.

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[57] A. Proto Pisani, *Per un nuovo codice di procedura civile* (2009) V Il Foro Italiano 1 (extrait).

[58] Voir : L. Cadiet, « Efficience *versus* équité? », dans *Mélanges Jacques van Compernolle*, Bruxelles, Bruylant, 2004, p. 25-46.

Le *modèle de procès coopératif* exprime l'idée que le procès n'est ni la chose des parties ni la chose du juge, mais qu'il est à la fois la chose des parties et la chose du juge, car parties et juge sont nécessairement conduits à coopérer afin d'aboutir dans un délai raisonnable à la solution équitable et efficiente de l'affaire. Le management judiciaire rend compte de cette idée en ce qu'il traduit un accroissement des pouvoirs du juge dans le respect des droits des parties qui doivent donc être associées à la solution de leur litige, ce qui est, au demeurant, un facteur d'acceptation du jugement. Il s'agit sans doute, dans la plupart des cas, de se prononcer sur des questions d'intérêt privé, dont seules les parties doivent avoir la maîtrise, mais rendre la justice est une question d'intérêt général qui met en cause le respect des lois et la paix sociale. En outre, la saisine du juge met en œuvre une institution publique dont le fonctionnement, financé par l'impôt national, ne peut pas être laissé à la seule initiative privée. Le budget de la justice n'est pas indéfiniment extensible et la justice ne doit pas seulement être rendue dans l'absolu du cas particulier dont le juge est saisi; elle doit l'être dans la totalité des affaires qui lui sont soumises et entre lesquelles les moyens de la justice publique doivent être équitablement répartis. Cette notion de procès coopératif est à la base des principes directeurs du procès consacrés par le Code de procédure civile de 1975[59]; c'est sur elle que repose aussi la réforme de la procédure civile anglaise opérée à la suite du rapport de Lord Woolf[60]; et c'est elle que consacrent à la fois la Cour européenne des droits de l'homme, récemment encore dans un arrêt du 3 février 2009[61], ainsi que les principes UNIDROIT de procédure civile transnationale quand ils disposent, à l'article 11.2, que « les parties partagent avec le tribunal la charge de favoriser une solution du litige équitable, efficace et raisonnablement rapide »[62]. Tout est dit dans cette remarquable disposition. Il faut seulement ajouter que ce modèle coopératif a vocation à se déployer au moyen d'accords processuels convenus entre le juge et les parties, soit dans le cadre de chaque litige particulier sous la forme, notamment, de contrats individuels de procédure, soit dans le cadre de protocoles d'accord, sortes de conventions collectives de procédure, plus largement conclus

[59] Voir : L. Cadiet et E. Jeuland, *Droit judiciaire privé*, Paris, Litec, 6e éd., 2009, nos 516-543.

[60] Voir *supra* : N. Andrews, « English Civil Justice and the Managerial Judge: Reflections for a Comparative Audience »; voir aussi : J. Bell, « L'Angleterre: à l'aube d'une réforme radicale de la procédure civile », *RGDP* 1999.307.

[61] CEDH, 2e section, 3 février 2009, *Poelmans c/ Belgique*, no 44807/06, *Procédures* 2009, no 81, obs. Fricéro.

[62] ALI/UNIDROIT, *Principles and Rules of Transnational Civil Procedure,* précité.

entre les juridictions et leurs partenaires habituels, spécialement les ordres d'avocats. De multiples exemples de cette contractualisation croissante du procès et, plus largement de la justice, pourraient être donnés, ici et là, en France, où elle se développe de manière très significative depuis de nombreuses années, comme en Angleterre, d'un certain point de vue, à travers les *pre-action protocols*. Nos amis italiens s'y intéressent également, comme en témoigne le colloque, publié à la *Trimestrale*, que le professeur Carpi avait organisé, à Bologne, en 2007, sur le thème « Accordi di parte e processo »[63]. Du coup, avec la notion de contrat processuel, nous retrouvons là une vraie catégorie juridique, susceptible d'une véritable analyse technique, étant précisé que la contractualisation n'est pas réductible à l'utilisation des contrats du droit dogmatique, mais qu'elle repose aussi sur des usages dégradés ou métaphoriques de la notion de contrat. Elle consiste surtout, en effet, dans l'emploi d'une certaine procédure d'élaboration des décisions de type contractuel en ce qu'elle fait appel à des phénomènes de participation des parties concernées, tantôt simple adhésion, tantôt véritable négociation: *contrahere* plutôt que *contractus*, d'où vient que, dans l'ordre de la production des normes juridiques, contractualisation et procéduralisation ont partie liée, se combinent plus qu'elles ne s'opposent[64]. Lorsqu'on ne peut pas ou plus se mettre d'accord sur une conception commune des valeurs inscrites dans les normes juridiques, il faut du moins pouvoir le faire sur une façon commune de dire le droit et de rendre la justice.

Cette dimension contractuelle du procès contemporain s'inscrit en second lieu dans un *système de justice plurielle*. J'entends par là que le droit du règlement des différends ne se limite pas à la solution des conflits par une juridiction instituée à cet effet. Le juge ne doit pas être conçu comme un premier, mais comme un dernier recours, qui doit être saisi seulement lorsqu'il n'a pas été possible de régler autrement le conflit. Il faut que les parties aient épuisé les voies du dialogue entre elles avant d'aller chercher la tierce parole du juge. C'est un devoir civique et une responsabilité sociale. Les modes alternatifs de règlement des conflits doivent donc être largement développés, y compris devant le juge lui-même, y compris au cours de la procédure juridictionnelle et non pas seulement au début de l'instance. Parler d'un système de justice plurielle, c'est exprimer l'idée que chaque litige doit se voir offrir le mode de

[63] « Accordi di parte e processo », dans *Quaderni della Rivista trimestrale di diritto e procedura civile*, Milan, Giuffrè, 2008.

[64] Voir : L. Cadiet, « Faire lien, propos introductifs », dans S. Chassagnard-Pinet et D. Hiez (dir.), *La contractualisation de la production normative*, Paris, Dalloz, 2008, p. 169-184.

règlement qui lui convient, la loi devant faciliter le passage d'un mode à l'autre dès lors que chacun d'eux présente des garanties équivalentes de bonne justice dont le professeur Peter Murray a tout à fait justement souligné la nécessité pour éviter que cette justice alternative ne se fasse au détriment des parties les plus faibles[65]. Le droit à une conciliation équitable doit répondre au droit à un procès équitable[66]. Il faut bien sûr insérer, dans ce panorama, les autorités publiques indépendantes, spécialement les autorités de régulation de marché, qui exercent des missions de juridiction aussi bien que de conciliation, sans oublier comme l'a rappelé le professeur Hazard[67], le rôle joué par les fonds collectifs de garantie en matière de responsabilité civile, spécialement dans les accidents de la circulation et les accidents médicaux, dont l'intervention, qui relève de la justice distributive plus que corrective, se situe dans les interstices du droit substantiel et du droit processuel. Dans tous ces registres de la justice plurielle, l'évolution contemporaine invite à penser la procédure non plus sur le mode du « prêt-à-porter » mais sur celui du « sur mesure ». Le système de justice doit offrir à chaque sorte de litige le type de procédure qui lui convient, sommaire ou non, rapide ou non, et, au sein même de l'institution judiciaire, il doit être possible de passer souplement d'une procédure à une autre au moyen de « passerelles » permettant de réorienter la procédure en cours d'instance sans avoir à tout reprendre depuis le début, en fonction de l'évolution du litige qui peut se simplifier ou, au contraire, se compliquer. La diversité, la flexibilité et la réactivité sont une bonne réponse à la complexité des sociétés contemporaines, ce qui conduit à quitter une conception *statique* et *standard* du procès, reposant sur une division rigide du travail entre le juge et les parties, déterminée par la *loi*, au profit d'une conception *dynamique* et *diversifiée*, supposant au contraire une coopération permanente du juge et des parties, susceptible de reposer, en cas de besoin, sur le recours au *contrat*, déjà évoqué, comme outil de gestion de la procédure[68].

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[65] Voir : P.L. Murray, « Mediation and Civil Justice: A Public-Private Partnership? » dans Walker & Chase, précité, p. 539-556.

[66] Voir : L. Cadiet, « Procès équitable et modes alternatifs de règlement des conflits », dans M. Delmas-Marty, H. Muir-Watt et H. Ruiz-Fabri (dir.), *Variations autour d'un droit commun – Premières rencontres de l'UMR de droit comparé de Paris*, Société de législation comparée, 2002, p. 89-109.

[67] Voir : G.C. Hazard, Jr., « Civil Procedure in Comparative Perspective » dans Walker & Chase, précité, p. 657-666.

[68] Voir : L. Cadiet, « Complessità e riforme del processo civile francese » (2008) Rivista trimestrale di diritto e procedura civile 1303.

J'ai bien sûr conscience des limites du modèle suggéré, alors que les plus élémentaires droits de la défense, à commencer par le droit d'accès au juge, ne sont même pas assurés dans un nombre assez considérable de pays, que ce soit pour des raisons d'ordre idéologique ou d'ordre économique. Nos préoccupations sont celles de gens privilégiés, sans aucun doute. Mais les organisateurs de ce colloque nous invitaient à regarder en avant, *looking ahead*, avec la part d'imperfection, d'incomplétude et d'insatisfaction qui accompagne nécessairement ce type d'exercice. D'où aussi l'intérêt de raisonner en termes de modèles plutôt que de catégories, d'un idéal à atteindre plutôt que de représentation de la réalité.

Civil Procedure in Comparative Perspective

Geoffrey C. Hazard, Jr.[*]

Comparisons of civil procedural systems can appropriately be made at many degrees of depth, as demonstrated in the papers that were presented at the 2009 International Association of Procedural Law (IAPL) Conference in Toronto.[1]

I. SYSTEMS OF RIGHTS AND REMEDIES

One degree of depth is the relationship between the system of rights and remedies administered through judicial procedure and the system of rights and remedies administered through "social safety nets".

Most European countries have wide social safety nets — including, in particular, comprehensive medical care and disability insurance systems that are available to all injured persons. These provide substantial recourse for persons injured in such dangerous activities as driving automobiles, working in factories and living in the accident-prone environment of the home. In some regimes, these social benefit systems are formally available, but systemically inadequate. This pattern is evident in regimes with underdeveloped economies that try to emulate the European social systems. Many of them lack the financial resources to actually provide social insurance, but their civil justice systems are administered as though such insurance systems were adequate.

In the United States, in contrast, there is no comprehensive social network. The U.S. has a patchwork that provides little or no insurance for many injuries, and a civil justice system that provides a limited basis of reparation for injury, based essentially on fault. The civil justice system is administered with, more or less, a consciousness of this reality. There

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[1] International Association of Procedural Law (IAPL), Common Law – Civil Law: *The Future of Categories / Categories of the Future* (2009 IAPL Annual Conference, Toronto, Canada: June 3-5, 2009). See IAPL online: <http:www.iap/2009.org/>.

are deep differences of opinion within the American community as to whether this arrangement accords with a proper sense of justice. The system, however, has deep roots in American culture, and has long been institutionalized. It should be taken as a postulate in comparative legal analysis.

II. SYSTEMS OF PROCEDURE AND AUTHORITY

Another degree of depth, as observed by Professor Damaška, is the relationship between a procedural system and the structure of authority in the regime within which it is embedded. He contrasts the systems of strong hierarchical authority in some European regimes with the highly decentralized system in the United States. Regarding the system of authority, Professor Damaška and others particularly note the significance of the American use of juries.

The use of juries is at the same time a distinctive mode of procedure and a distinctive allocation of authority. Jury trial devolves the application of law in specific cases to an *ad hoc* group of citizens, rarely including any who are trained in law. Moreover, these groups are drawn from narrowly confined localities within a very large country. Jury selection is based on the population of a single county or, in the federal court system, a single group of counties. It is notorious, and a prime matter of litigation strategy in the United States, that juries in one county are likely to be very different from those in another county.

The jury system, too, has deep roots in American culture, and is institutionalized in the country's constitutions — not only in the federal Constitution, but in those of the states as well. Over 90 per cent of all American litigation is conducted in the state trial courts. In most states, these courts are organized along county lines, not only in terms of the juries, but also as the basis for the appointment of the trial judges (and, in some states, the appellate judges as well). Almost all American trial judges have entered their professional careers in the county in which they attained judicial office, and many of them were born there or nearby. Almost all appellate judges have similar, if somewhat broader, social backgrounds.

This localization of the judicial establishment, as it may be called, contrasts sharply with practice in other regimes. In many systems — for example, those of France, Germany and Italy — a professional in the law is ordinarily required to have diverse geographical experience

before becoming a full-fledged judge. In England, a somewhat similar pattern is reflected in a profession that is centred in London. Of the developed legal systems, perhaps only in Canada is the profession from which judges are chosen somewhat similarly localized as it is in the United States.

It is worth noting that this highly localized system in the United States is also reflected in other branches of its government, and particularly in the organization of its police departments and public school systems. These governmental institutions are intimately involved in the nurturing of local cultures. The U.S. structure of government authority thus remains largely as Alexis de Tocqueville found it almost two centuries ago. It is based not at the federal level, or even at the state level, but in counties and townships. This, too, should be recognized as a characteristic of "American exceptionalism".

III. "EXCEPTIONAL" AMERICAN PROCEDURES

The extreme localism of the American structure of governmental authority cannot coherently be factored out in comparative legal anthropology. However, it can be factored out in comparative legal analysis. When it is factored out, American civil procedure is "exceptional" — that is, it is different from most other systems — in perhaps three procedural arrangements apart from jury trial and localism in governmental structure. These are referred to in many of the IAPL Conference papers, and are as follows:

- pre-trial discovery, including deposition of witnesses (including parties) and disclosure of documents;
- expert evidence provided through party-selected and compensated experts; and
- the class suit, or, as it is sometimes appropriately referred to, "group litigation".

I shall make remarks about each of these procedures and their protean possibilities in the "harmonization" of civil procedure.

IV. Pre-trial Depositions and Documents Disclosure

1. Depositions

In my observation, pre-trial depositions — particularly the deposition of parties — have, in practice, limited utility in their official purpose, but substantial utility in a latent purpose.

The official purpose of depositions is disclosure of the statements that the deponent may make at trial. In the course of extensive experience as an expert witness in professional conduct of lawyers, I have read thousands of witness depositions in cases from all parts of the United States. Very rarely does one encounter a witness who gives unexpected testimony. The lawyer sponsoring the witness (including non-party witnesses) is permitted to coach him or her, and will have done so thoroughly — especially if the witness is an important one. Sometimes, indeed, the witness is first subjected to a practice round of examination in the office of the sponsoring lawyer, a pre-pre-trial deposition so to speak. On the opposite side, lawyers who take depositions typically come with an elaborate schedule of questions that are tailored to the case and to the witness. They obviously have a very good idea of what the witness will say. Both sides will have conducted an assembly of all available documents, such as medical reports and income statements. These documents will have been shown to the witness, first by the sponsoring lawyer in the preparation stage, and again by the opposing lawyer at the deposition. Hence, no one is likely to be surprised.

There is also much redundancy in these scripts; the questions posed to a specific witness are often the same questions put to multiple witnesses. Lawyers on the defence side are typically compensated on an hourly basis and, hence, have strong incentive to be very thorough. Lawyers on the plaintiff's side are required, as a practical matter, to attend and forebear.

There are exceptions, particularly in the deposition of witnesses whose vocations have made them verbally adroit. Sometimes, such a witness can be ensnared, trying to be too clever by half. But, if this proves to be the case, the snare might be strategically saved for trial.

What, then, is the real utility of depositions? It seems to me that it is in assessing how a witness will stand up in trial, and particularly how a witness will be perceived in a jury trial. If that is the actual function, then the question is whether it could be substantially performed by a somewhat different procedure. For example, the procedure would have the

witness's proposed testimony presented in writing, with the assistance of the advocate. The written statement could be presented or supplemented by a video presentation — a new technology whose possibilities are still underutilized. The witness would be subject only to cross-examination at deposition, and only upon permission of the court or by agreement of the parties on a reciprocal basis.

2. Documents Disclosure

The evolution of e-mail has created something of a crisis in American documents discovery. In cases where e-mail is important, there is often too much of it, and it can be especially difficult and expensive to locate (especially if there have been years intervening since its transmission).

The original concept in American documents discovery, pioneered in the *Federal Rules of Civil Procedure* (FRCP) in 1938, implicitly contemplated perhaps a few dozen documents rendered by a typewriter or in longhand. Now, we often confront thousands or even more documents that have been rendered electronically. The major premise, in FRCP Rule 26(b)(1), was that all documents should be disclosed if they are "reasonably calculated to lead to the discovery of admissible evidence". As to e-mail documents, that premise has now had to be qualified in Rule 26(b)(2)(B), which limits the discovery of documents that are "not reasonably accessible because of undue burden or cost". The e-mail difficulty thus challenges the premise of American discovery, expressed by the Supreme Court in *Hickman v. Taylor*,[2] that there must be the "fullest possible knowledge of the issues and facts before trial".[3]

The trial courts have evolved a "tranch" system to cope with e-mail. E-mails in some described category are first ordered produced. Then an assessment is made as to whether another tranch is justified. At this point, there is perhaps yet another probe and assessment. The process is essentially one of negotiation between counsel, through the court, rather than one of either right or preclusion of disclosure.

Concerning documents disclosure, I expect that the United States will need to adopt something like that in the Transnational Principles, as explained by Professor Stürner. The underlying premise of this approach should be appreciated, because it contradicts a long tradition of privacy in civil law procedure. The premise is that civil litigation today often

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[2] 329 U.S. 495 (1947).

[3] *Id.*, at 501.

involves ordinary citizens in confrontation with a bureaucracy, private or public, that is plausibly claimed to have done the claimant wrong. That is a universal problem of justice in the modern world, and hence a universal problem for civil procedure. Disclosure could include certain categories of presumably available documents — the disclosure of which would be obligatory — plus negotiation between the parties for some further disclosure. This procedure would be backed by "managerial" judging and rules of presumption about facts, which could be invoked if and when disclosure was not made.

V. EXPERT WITNESSES

Expert testimony is essential in a wide range of cases, and especially in litigation that involves environmental issues, complex financial transactions, and business and professional practice. It can also prove helpful in an even wider range of cases. The enormous variety of vocation and practice in the communities of the modern world is simply beyond the acquaintance of most jurists — including some who unfortunately believe otherwise. The essential problems with bringing to bear the necessary expertise in litigation are those of cost and bias: cost because the time and attention of genuine experts is expensive, and bias because an expert can be influenced to some degree by the source of compensation.

The tradition in the civil law systems has been that expert testimony should come from experts appointed by the court. The tradition in the common law systems is that expert testimony is to be provided by the parties. The basic difficulty with the civil law system is that the best experts are often not available to the court because they are too expensive or too remote, or both. Hence, even in conscientious civil law systems, the court is often relegated to asking the local university to send someone. The expert appointed by such a procedure would likely be neutral, but also possibly not very expert. The basic difficulty with the common law system is that experts are often selected on the basis of their theatrical ability as much as their technical competence, and, in any event, are often more readily available to the side with more money, which is typically that of the defendant. It is said that the result in common law cases is the "battle of the experts", or, worse, of the "hired guns".

The papers in the IAPL Conference address a variety of ways in which the common law system could be modified in the direction of the civil law system. These include, *inter alia*, appointment of experts jointly

by the parties, a court-appointed expert along with party experts, a court-appointed expert to confer with party experts and present a responsive report, and a conference among the experts in the presence of the judge and counsel, perhaps to yield a joint report.

These are alternatives that strike me as attractive. In evaluating them from a civil law perspective, it might be noted that experts in common law systems have very strong incentive to appear fair and independent, whether appearing before a judge or a jury. After all, the finder of fact must yield only to persuasion and is easily put off by evident partisanship. Of course, this means that an expert must appear to be fair and independent, whatever his or her real sentiment, and despite the source of expert compensation. But maintaining such an appearance can approximate real independence, and, hence, might be the practical equivalent of the ideal.

VI. CLASS OR GROUP LITIGATION

A number of the IAPL Conference papers address the concept of claims for civil remedies brought on behalf of a large group of people who are similarly affected or threatened by alleged harm. Professor Mullenix indeed suggests that this type of proceeding can make a distinct contribution to social justice in the modern environment. I agree, along with similar suggestions about how the American "class suit" would require modification in other regimes.

The basic social problem to which the class suit can respond is, broadly speaking, the failure of the political branch — *i.e.*, the legislature and administration — to recognize and respond to a substantial social evil. Such social evils consist of harms to the health, safety, or social or economic well-being of ordinary citizens. The harmful instruments are substances like asbestos, harmful emissions from factories, harmful discrimination in administration of public services, such as schools, and harmful sale of fraudulent investments. The social evils are quantitatively substantial because they are systematic, affecting hundreds or even millions of people, and not merely accidental and occasional.

Their broad adverse effect typically results from the fact that they are somehow not initially understood by those adversely affected, often going unnoticed or ignored or concealed by persons in positions of authority, whether public or private. Officials of private companies do not want to absorb the cost of their "externalities"; lower operatives (who

often recognize the harms) do not want to lose their jobs. Public officials may be screened from the facts, or think complainants are only trouble-makers. Officials may be subjected to, or afraid of, political repression.

In the language of modern political economy, these are generally "agency problems": the failure of agent-actors to take remedial action that is within the scope of their knowledge and authority.

To avoid invidious references by referring only to the American experience, we can identify as examples the asbestos cases, the vehicle rollover cases and the current sub-prime residential mortgage cases.

The American class suit allows victims, or perhaps more often lawyers who are acting for victims, to frame a lawsuit on behalf of a group that is described in categorical terms. The remedy sought may be an injunction or compensatory damages, or both. Redress is sought against those allegedly causing the harms, and, sometimes, against allegedly indulgent public officials. The justification is that legal harm is being caused, but is not being adequately addressed by other legal means (*i.e.*, remedial legislation or administrative intervention). Implicitly, the class or group action is a trenchant criticism of responsible "authority", and, hence, it is more or less politically controversial on that account. More generally, it is implicitly critical of the whole social apparatus, particularly with respect to the "political class".

However, the class suit device is also subject to abuse. Such abuse includes suits that target innocent or "less guilty" defendants; over-aggressive dissident-claimants; excessively aggressive claimant lawyers; defendants in denial or devious or fraudulent evasion; excessively aggressive defence lawyers, overburdened or uncomprehending judges; costly expenditures in addressing and possibly remedying the harms; and disturbance of popular confidence in the social system.

Nevertheless, something like the class suit has definite and justifiable social utility, both as it is practised in the American system and as it might be adapted to other systems. My colleagues, Professors Linda Mullenix and Antonio Gidi, among others, have written extensively on the subject in critical and comparative terms. The discussions in the IAPL conference have furthered the dialogue on the subject.

VII. ADDENDUM

A key issue in comparing civil law and common law adjudication is the allocation of function between the judge and the advocates.

The allocation in common law systems is open and apparent. The advocates are openly "proactive" in their presentation of evidence and legal arguments, and the judge is neutrally receptive of these submissions. This responsive role of the judge properly operates even in "managerial judging", which, in principle, deals with the sequence in which the issues are addressed at the pre-trial stage. When common law cases go to trial, the traditional allocation governs: the advocates are proactive in presenting evidence and arguments; the judge is responsive, making interim rulings during the trial, and conclusions and decisions at the end.

The basic allocation between the advocates and the judge holds in a jury trial. In a jury trial, the judge's functions are, first, to rule on the admissibility of evidence as the advocates proceed; second, to determine, once the submissions are complete, whether the evidence is sufficient to be submitted to the jury; and, third, if the case is to be so submitted, to formulate the rules of law in making instructions to the jury. This allocation is modified in a non-jury trial, where a common law judge intervenes and makes interim rulings that are approximately similar to a civil law judge.

Analysis of the civil law allocation of the functions of the judge and the advocates is more difficult. In the hearings in court, the judge is proactive in pursuing evidence, and, in principle, in expounding the governing law (the judge is presumed to know the law and usually proceeds on that basis). The role of the advocates is ostensibly and traditionally that of supplicant commentator, and is more or less passive. Hence, from public appearances, the difference between the two systems is radical.

However, in my observation, the advocates in civil law systems are just as adversarial as their equivalents in common law procedure. Indeed, they may be even more so, precisely because they have such a modest role in the open hearings.

Accordingly, the advocates must do their manoeuvring out of court in such tasks as: determining, as a plaintiff's advocate, the court in which to commence the case (if there is a choice); looking, as a defence advocate, for objections to the plaintiff's choice of forum; formulating the governing legal concepts to be suggested to the court; identifying relevant documents and witnesses; and "coaching" witnesses, directly (in some systems) or indirectly (for example, through discussion with their clients, who can, in turn, talk with friendly witnesses). The advocates prepare scripts of questions that they will ask the judges to present to witnesses. In some civil law

systems, the advocates on each side "package" sets of questions, which the judge then passively accepts and administers.

Among civil law systems, there are many variations in performance of the allocation. The variations range from ones in which the judge really is dominant to ones in which the hearing is essentially a diluted — and often inept — version of the common law relationship between advocates and judge.

The description and the analysis of the allocation in civil law systems has long been hampered by conventions concerning professional and scholarly discussion of the allocation. Within the profession, the advocates do not want to discuss it, for fear of giving offence to the judiciary. Also, the theoretical allocation protects the advocates from recrimination by their clients, for the advocates can say (rightly, in theory) that the judge was in charge. The judges do not wish to discuss the matter for obvious reasons.

The convention in civil law scholarship has also shielded the matter. Traditionally, civil law scholarship attends to the law in formal terms, not to mere "practice". Hence, notice is not taken when practice deviates from formality. Also, many civil law professors are also practitioners, and they are, hence, subject to the inhibitions mentioned above.

The foregoing analysis of the civil law allocation is of course conjectural — a set of inferences drawn by a common law practitioner from discussions with civil law counterparts. But it might be substantially correct.