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A CIVILIAN LAWYER LOOKS AT COMMON LAW PROCEDURE*

*Konstantinos D. Kerameus***

Introduction

In the years since World War II there has been an increasing tendency among lawyers to look beyond their own fences. In 1953, the late Professor F.H. Lawson delivered his Cooley lectures at Michigan under the title "A Common Lawyer Looks at the Civil Law."¹ Ten years later, Professor Abram Chayes gave his Vanderbilt lecture under the heading "A Common Lawyer Looks at International Law."² In this text, a civilian lawyer tries to look at common law procedure.

How is it that cool-thinking lawyers have been attracted by the temptations of visual adventures? While the growing interest in foreign legal systems may well be attributed to the dramatic increase of transnational transactions, this empirical parameter to the rise of comparative legal studies accounts only for part of the explanation. The other part, at least equally important, is related to the expectation of obtaining a deeper knowledge of one's own legal system through the comparison with different legal conceptions and principles.³ We look at foreign law also for the sake of our own law. This look over the border is both rewarding and refreshing. It enables us to look back at the working of our own rules, that is, at the same problems of man and society, with a better appreciation of the respective strengths and weaknesses of our system.

Understanding the study of foreign law as a means of gaining insight into our own law as well should easily integrate the following observations into the John H. Tucker, Jr. lectures in civil law. Comparison has been a major modern aspiration of the civilian tradition. From the perspective of European systems of civil procedure, no other

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1. University of Michigan Law School (1953).
2. 78 Harv. L. Rev. 1396 (1965).
3. See, e.g., R. Schlesinger, *Comparative Law, Cases-Text-Materials* 18-25 (4th ed. 1980) [hereinafter Schlesinger]; "The Foreign Solution As A Contrast Or A Means of Gaining Perspective"; H. Steiner and D. Vagts, *Transnational Legal Problems, Materials and Text* 218-19, 227 (3d ed. 1986) [hereinafter Steiner and Vagts].

comparison can be as fruitful and instructive as the comparison with the rich repository of experience represented by the common law.

An across-the-systems comparison of civil procedural patterns, though neglected in the initial steps of modern research, has begun in recent years to open encouraging paths. As lawyers, we should be grateful for the increased degree of attention paid to the working of judicial mechanisms. As pointed out recently, "[o]ur notion of a legal system, our very concept of law, most of our jurisprudential and political debates about the nature of law, are profoundly related to the work of the judiciary."⁴ Therefore, if comparison is to go beyond certain theoretical elaborations, and to aim at producing meaningful results which could appeal not only to scholars but to practicing lawyers as well, one must focus on the administration of justice.

This is even more the case in a comparison between the civil law and the common law. Among the many factors which contribute to the development of the common law, contemporary analysis emphasizes the role of the judge.⁵ The judge is considered to be not only the prime pronouncer of legal precepts, but also the most central actor in a common law jurisdiction—to be contrasted to the professor in the Germanic legal family, or the advocate in the Romanistic legal family.⁶ Common law judges loom before Continental eyes across the narrow but deeply significant Channel, or the wide zone of the North Atlantic, as powerful dignitaries of the law, cautiously and skillfully holding it together. From the opposite viewpoint, American legal writing, so far as it deals with European developments, tends to view Continental judges as mere civil servants.⁷ Such a generalizing contradistinction is, however, too abstract and too simplistic to be useful. Comparison must descend to a lower and more specific level and focus not so much on the personality of the judge, but rather on the actual ways and means of handling civil disputes. Within this framework, I will try then to approach from a civilian perspective some of the most distinctive features of common law procedure. I will limit my inquiry to procedural patterns in the United States in the context of civil litigation, leaving aside the vast and rapidly evolving area of criminal procedure. My aim is not to offer a full-fledged comparison between the two systems, but simply to highlight some salient features of American civil procedure piled up around the judge, his power and function, as they appear to lawyers nourished in the civilian tradition.

4. Steiner and Vagts, *supra* note 3, at 226.

5. Cf. Rheinstein, *Die Rechtshonoratioren und ihr Einfluss auf Charakter und Funktion der Rechtsordnungen*, 34 *Rebels Z* 1, 2-5 (1970).

6. Cf. I Zweigert and Kotz, *An Introduction to Comparative Law* 63 (1977).

7. Schlesinger, *supra* note 3, at 183-85.

Adjudicatory Jurisdiction

Jurisdictional issues surround the commencement of litigation in all legal systems. The importance of these issues is even more pronounced in the United States, where jurisdiction, especially jurisdiction to adjudicate, relies on extremely detailed considerations, and often makes up a large portion of the subject matter in hard-core courses, such as civil procedure,⁸ federal courts, and admiralty. This importance is certainly attributable in part to the federal structure of the country. Constitutional limitations on state court jurisdiction, particularly the elaborate jurisprudential ramifications of the due process clause of the fourteenth amendment, account for a good percentage of the cases and the other legal discussion involving jurisdictional issues. Nevertheless, similar questions, although more limited in importance and numbers, arise *within* the federal court system as well, at least with regard to restrictions on service of process.⁹ Under rule 4(f) of the Federal Rules of Civil Procedure, “[a]ll process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held” Thus, the whole discussion about the defendant’s physical presence within the district or the existence of minimum contacts with the forum may resurge to a certain extent within the federal court system as well.¹⁰

This preoccupation with territorial connections between the forum, the cause of action, and the defendant found a classic expression in Justice Holmes’s statement that “[t]he foundation of jurisdiction is physical power.”¹¹ Modern scholarship offers more nuanced rationalizations, identifying the general interest in securing compliance with the law and efficiency in its enforcement as the psychological and political bases for such a jurisdictional approach.¹² Yet, regardless of the motivation, it becomes apparent that in the United States, locating the proper court in a civil action does not always depend on pre-established abstract concepts, but often requires a painstaking inquiry

8. Cf., for instance, the 216 pages (59-275), or about 19.3% of the whole book, devoted to jurisdiction in J. Cound, J. Friedenthal and A. Miller, *Civil Procedure, Cases and Materials* (3d ed. 1980), as opposed to the respective 49 pages (154-203), or about 4.3% of the whole book in L. Rosenberg and K.H. Schwab, *Zivilprozessrecht* (13th ed. 1981).

9. See F. James and G. Hazard, *Civil Procedure* 69 (3d ed. 1985) [hereinafter James and Hazard].

10. See, e.g., *Insurance Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266 (9th Cir. 1981); *Samuels v. BMW of North America, Inc.*, 554 F. Supp. 1191 (E.D. Tex. 1983); *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. 312 (D. Md. 1983).

11. *McDonald v. Mabee*, 243 U.S. 90, 91, 37 S. Ct. 343, 344 (1917).

12. James and Hazard, *supra* note 9, at 111-12.

into whether, in the particular case, there exist minimum contacts between the forum, the cause of action, and the defendant. Since the prevailing test focuses on "sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations,"¹³ then jurisdiction over the defendant is not a self-evident link established on general lines, but rather a highly individualized structure of authority¹⁴ which requires in each case verification in accordance with the particular factual context.

This persistent reliance of American civil procedure upon the gravity and relevance of connections in the particular case is in stark contrast with European jurisdictional conceptions. On the Continent, adjudicatory jurisdiction is based either on the domicile of the defendant or, in special cases, on other connections between the cause of action and the territory of the court. Jurisdiction based on domicile is called "general jurisdiction" and encompasses even causes of action otherwise unrelated to the forum.¹⁵ The other types of jurisdiction are called "special jurisdictions,"¹⁶ as, for instance, in actions pertaining to performance, breach or rescission of contracts, which may be brought at the place where the contract is to be performed, or actions for wrongful conduct, which may be brought at the place where the conduct occurred. Thus, continental law considers the defendant's domicile as an appropriate place of litigation for all purposes, and the place of contractual performance as a proper forum for any suit pertaining to the contract, even if, in the particular circumstances, that place has no other connection with the dispute. For example, the Supreme Court of Switzerland held that a suit *must* be brought at the defendant's domicile, even if all meaningful connections point to another forum.¹⁷ The doctrine of *forum non conveniens* is not part of the civilian

13. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 320, 66 S. Ct. 154, 160 (1945).

14. See M. Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 *Yale L.J.* 480 (1975).

15. In a similar sense, the term "general jurisdiction" has been recently adopted by the United States Supreme Court: *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 n.9, 415, 418 n.12, 421 n.1, 423, 424, 104 S. Ct. 1868, 1872 n.9, 1873, 1874 n.12, 1876 n.1, 1876-77, (1984); *Burger King v. Rudzewicz*, 105 S. Ct. 2174, 2182 n.15 (1985).

16. Characteristically, the same distinction between general jurisdiction and special jurisdiction was also used in the Brussels Convention of September 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, arts. 2 ff., 5 ff.

17. Decision of September 28, 1966, BGE 92 I 201, at 203-04; subsequently confirmed by decision of March 22, 1967, BGE 93 I 29, at 37 under c. Cf. *Liver*, 104 *Zeitschrift des Bernischen Juristenvereins* 31-34 (1968).

tradition. The civil law system simply attempts to identify in advance an appropriate nexus for asserting jurisdiction in *most* cases, but with full awareness that such nexus may be less proper in some cases. This is a deliberate policy choice in favor of legal certainty and the speedy resolution of preliminary jurisdictional issues, at the expense perhaps of individual equity.

Compared to this clear, yet flat and non-distinguishing Continental attitude, the elaborate American search for sufficient contacts appears as an overwhelming concern for individualized justice, even at the expense of certainty and predictability. It is certainly true that, in the vast majority of cases, the jurisdictional situation is so clear that the court finds it unnecessary to deal specifically with jurisdictional issues. However, precisely because of the dramatic expansion of the scope of jurisdiction in the last three or four decades, the relevant and most common question today is not whether any further expansion is necessary, but rather whether the connecting factors relied upon by the plaintiff are truly sufficient to support the exercise of judicial power. Thus, although perhaps marginal in a statistical sense, the most celebrated cases indulge in a detailed examination, unknown in the civil law world, of numerous individual facts for purely jurisdictional purposes. It does not seem that the due process clause alone can explain this difference in approach. Similar constitutional provisions in Europe have not supported even a superficially similar treatment of jurisdictional issues. It is perhaps not accidental that, in the United States, the minimum contacts test was introduced under the label of a quest for "substantial justice."¹⁸ Thus, even procedural due process is enriched by substantive, or at least not-merely-procedural considerations. American notions of establishing adjudicatory jurisdiction invite a scrutiny of defendants and causes of action on a case-by-case basis and in a manner not disassociated from a contemplation of the merits.

Discovery

Pretrial discovery and deposition procedures have been hailed as an important feature of twentieth century American developments. With the re-formulation and expansion of the devices and sanctions of discovery through the adoption of the Federal Rules of Civil Procedure, the concept of a formal preparation for trial, as far as the ascertainment of the relevant facts is concerned, became an integral part of American civil procedure. Parties are now required not only to disclose facts pertaining to the case of the party seeking discovery, but also to disclose

18. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 320, 66 S. Ct. 154, 160 (1945).

evidence needed for their defense. Pretrial discovery prolongs the process of taking of evidence, and dilutes the notion of a single concentrated trial. Under the federal rules of discovery, the trial becomes simpler and more predictable through the prior scrutiny of much of the evidence. In fact, trial may often become superfluous, since the awareness of the available evidence and the elimination of fictitious issues may encourage out of court settlement.¹⁹

From a broader comparative perspective, one could make two general remarks about modern discovery. First, this gradual and mutual preparation of evidence is a significant and perhaps inevitable deviation from the notion of a single highly concentrated trial under traditional common law. It was once possible to accumulate all of the evidence in a single day in court, and to have an all-sided, synthetical, and balanced evaluation of it. However, the growing complexity of contemporary litigation has exceeded the boundaries of such accommodation. Presenting evidence in a complicated antitrust suit, or in a tort case involving an air crash, in a single day in court, without any previous glimpse at documents and witnesses and without any precise delineation of the evidentiary issues, may well amount to an exercise in futility, in that it may exceed the intellectual grasp of both court and counsel. Although an overall view of the evidentiary material is, of course, still desirable, practical necessity seems to have imposed this progressive unfolding of the evidence.

Developments in Europe have gone the opposite way. Since early modern times, civil proceedings on the Continent have unraveled in a series of consecutive stages.²⁰ There has never been a highly concentrated and dramatic trial in the common-law sense of the word. The general traditional perception has been that the disclosure of the truth is served better by a system of gradual procedural ripening of the evidentiary material, based on a continuous cooperation between the court and the parties, with the court considering the relevancy of party allegations and ordering the taking of appropriate evidence, and the parties offering step by step their methods of proof. Therefore, the question frequently asked by American lawyers as to how the Continental system may function efficiently without pretrial devices may be answered by recalling that such devices are simply unnecessary in countries where the trial itself consists of consecutive stages: what is

19. On purposes and consequences of discovery, see W. Glaser, *Pretrial Discovery and the Adversary System* (1968).

20. Cf. B. Kaplan, A.T. von Mehren and R. Schaefer, *Phases of German Civil Procedure*, 71 *Harv. L. Rev.* 1193, 1211-12 (1958); A.T. von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, 2 *Europaisches Rechtsdenken in Geschichte und Gegenwart: Festschrift fuer Helmut Coing* *Jum* 70 Geburtstag 361-71 (1982).

in the United States a *pretrial* device is part of the regular trial method on the Continent. In recent decades, however, there has been a movement towards concentration of the trial, evidenced by the requirement that, at least in one-member courts, the parties must present all evidence in a single hearing of the case.²¹

Thus, having started from polar opposites, American and European conceptions currently seem to be on a course of convergence. On this side of the Atlantic, the original concentration of the trial seems to be diluted, while on the Continent the advantages of presenting the evidence in a single hearing are being gradually recognized.

The second remark pertains to the function and power of the judge under modern discovery rules. Since the traditional common law approach of a concentrated trial was closely connected to the so-called "sporting theory" of justice,²² *deconcentration* by means of pretrial devices rolls back the absolutely passive role of the judge who used to be a mere arbiter of the parties' contest. Indeed, the mechanics of discovery, as well as the pretrial conference and pretrial orders, presuppose a more active participation by the judge.²³ The degree of participation depends on the exigencies and peculiarities of the particular case. Again, this enhancement of the power of the common-law judge through pretrial devices is more of an attempt to do justice in the case at bar, than to promote general policies in contemplation of the future.

Admissibility of Evidence

Besides discovery procedures, the other striking feature of common law rules of evidence pertains, of course, to the rules governing its admissibility. Traditional American doctrine distinguishes between two kinds of exclusionary rules: first, rules designed to "enhance truth-seeking by excluding weak evidence, prejudicial evidence, or other evidence that is somehow disruptive of an orderly inquiry into past events";²⁴ the hearsay rule constitutes the best example of this first group. The second group attempts to protect, under the name of privileges, certain extrinsic societal values which are considered so important as not only to tolerate, but also to require, restraints on the search for the truth. These values may flow directly from the Constitution, such as the privilege against self-incrimination, or may

21. Typical in this respect is article 270 (as amended, effective March 1, 1985) of the Greek Code of Civil Procedure.

22. James and Hazard, *supra* note 9, at 227.

23. See generally *id.* at 265-70.

24. R. Lempert and S. Saltzburg, *A Modern Approach to Evidence, Text, Problems, Transcripts and Cases* 645 (2d ed. 1982) [hereinafter Lempert and Saltzburg].

be designed to protect other values, such as free communication, the uninhibited development of favored relationships, or the effective functioning of governmental institutions.²⁵ Professional, relational, or public-authority privileges are to a greater or lesser extent known to most European systems of civil procedure. However, the first group of exclusionary rules, and especially the prohibition of introducing hearsay evidence, usually do not have counterparts in the civilian world.²⁶ According to Wigmore, the hearsay rule is the "most characteristic rule of the Anglo-American law of evidence—a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure."²⁷ It may well be that, historically as well as functionally, the hearsay rule is closely connected to the development of the jury system.²⁸ As uninformed laymen were charged with the task of ascertaining facts of which they had no immediate knowledge, it became necessary to develop safety devices which would protect jurors from the uncertainties of forensic impressions. Today, the connection between hearsay and jury trial is reflected in the presumption that the trial judge, sitting without a jury, disregards all inadmissible evidence in reaching his decision.²⁹

In spite of recent relaxation, American rules on the admissibility of evidence go far beyond Continental bars to information offered to the courts. In this respect, the difference of approach was initially purely historical. Europe had lived for centuries under a rigid system of a quantitative evaluation of witnesses and their evidence. As Wigmore puts it, there were rules "declaring (for example) one witness upon personal knowledge to be equal to two or three going upon hearsay."³⁰ One of the major objectives of the great procedural codifications on the Continent in the early nineteenth century was the elimination of these formal restraints upon judicial activity.³¹ Free

25. 5 Wigmore, *Evidence in Trials At Common Law* 28 (Chadbourne rev. 1974) [hereinafter Wigmore].

26. See, e.g., Schlesinger, *supra* note 3, at 397 n.26.

27. See, e.g., J. Weinstein, J. Mansfield, N. Abrams and M. Berger, *Cases and Materials on Evidence* 1325 (7th ed. 1983) [hereinafter Weinstein, Mansfield, Abrams and Berger].

28. See C. McCormick, *Handbook of the Law of Evidence* § 244, at 579 (2d ed. 1972).

29. See, e.g., Weinstein, Mansfield, Abrams and Berger, *supra* note 27, at 1209-10. See also *Builders Steel Co. v. Commissioner of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950), where the court stated: "In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not."

30. Wigmore, *supra* note 25, at 16 n.25.

31. See R.C. van Caenegem, *History of European Civil Procedure*, in 16 *International Encyclopedia of Comparative Law*, Ch. 2, at 87, 89 (1971).

evaluation of evidence was hailed as the all-sweeping principle, empowering the judge to ponder, in each particular case, contrasting means of proof. Among other things, this principle rendered obsolete the rules of admissibility, which, like all mechanical rules of proof, were primarily geared towards witnesses with indirect or suspect knowledge of the relevant facts. Rules on admissibility were in principle no longer compatible with the high degree of confidence placed in the judge appropriately to assess evidentiary matters.

Here again, as with discovery,³² the disparity between the systems on the two sides of the Atlantic has been gradually decreasing. In a movement centripetally convergent to the relaxation of exclusionary rules in the United States, some European courts have been insisting increasingly on distinguishing between admissibility and evaluation of evidence, by stressing that the latter depends on, rather than obviates, the former. Yet, there remain significant differences between the two systems which should not be minimized. In the United States, the exclusionary rules are designed to *improve*, rather than to prevent, fact-finding.³³ Indeed, they appear to do so in the vast majority of cases. They are also value-oriented in the sense that they are attached to the quest for truth, which is a central value in any procedural system. However, by over-emphasizing the ordinary course of human behavior and engaging in a pre-categorization of evidence into typical situations, the exclusionary rules inevitably neglect the peculiarities of specific cases. I submit that by restricting the admissibility of evidence, American law perceives the judicial function as a general method of resolving disputes, rather than as an individualized process of satisfying particular needs.

Trial By Jury

Connected to the hearsay rule, but much broader in its reach, trial by jury appears to the outsider as the single most important feature of common law procedure. This is more true of America than of England. For, although England provided the historical roots of the institution, the United States added to it both a constitutional guarantee and a political dimension. The seventh amendment, supplemented also by nearly all state constitutions, preserves the right of trial by jury and prevents the courts from reexamining the jury's determination of the facts. By virtue of its elevation to constitutional rank, but also by its own merits, the right to a jury trial has always been regarded

32. See text accompanying *supra* notes 19-23.

33. See, e.g., Lempert and Saltzburg, *supra* note 24; Weinstein, Mansfield, Abrams and Berger, *supra* note 27.

in America as "a symbol of popular participation in the administration of justice."³⁴

It may be worth recalling, however, that the constitutional sanctioning of the jury system hinges on what would seem to be a historical technicality. The Constitution of the United States, as well as the state constitutions, did not introduce an all-encompassing right of the people to administer justice. They merely *preserved* the right to a jury trial as it existed in English law in 1791 when the seventh amendment was adopted, or at the date of the respective adoption of the state constitutions. Since in England only actions at law, as distinguished from suits in equity, were tried before a jury, the historical test required by the Constitution depends on whether the remedy or the right at hand is analogous to a common law action, or rather to an equitable remedy. This distinction became even more technical when common law and equity were merged. Since then, actions derived from common law and actions derived from equity have been tried in all other significant respects alike, except for the participation of a jury in the former, but not in the latter.

Finally, one should not forget that the broad political perception of the jury trial as a deliberate method of immediate popular participation in the administration of justice is probably weakened by the uniform construction that the right to a jury may be waived by the parties.³⁵ Nonetheless, in spite of historical fortuities or the other limitations mentioned, the jury system came of age in the common law world, and has been preserved in the United States as a reasonable way of tying the administration of justice to the conceptions and expectations of the community at large.

For all its rich cultural heritage, Europe has not enjoyed in this respect the benefit of a continuous and smooth evolution. The complex structures of Roman law, received by most of Europe in the early Modern ages, required extensive legal training and made necessary the entrustment of the whole judicial system to professional judges. Against this traditional background, even the French Revolution and nineteenth-century liberalism could not attain lay participation, except with respect to certain felonies. Private law rules have always been considered as—and perhaps made—too technical and refined to be properly understood by laymen. Even the participation of lay assesseurs in district courts for commercial matters is now in retreat. A lay element does appear in the Federal Republic of Germany, where lay judges sit with professional judges in the labor courts as well as in the commercial district courts; however, these judges are full members of the court, voting

34. James and Hazard, *supra* note 9, at 421.

35. For a modern expression of this idea, see, e.g., Fed. R. Civ. P. 38(b), (d).

on both legal and factual issues.³⁶ The most recent lay involvement in the administration of justice took the form of the so-called "alternative" methods of dispute resolution. In an attempt to reduce court delays and to bring judicial mechanisms nearer to the people's understanding; small claims, consumer protection, or neighborhood disputes are relegated to a rather amorphous adjudication conducted by laymen. Progress is, however, limited and slow, if only because of the century-long estrangement of nonlawyers from the administration of justice.

To most European observers, lay involvement in adjudication tends to promote decision-making in accordance with the peculiarities and the needs of the particular case, yet often at the cost of insensibility to general legal precepts and to predictability of result. For example, if persuaded on the merits of the claim, lay judges would probably be more prone to overrule an exception of liberative prescription, thus undermining the role of prescription in fostering legal certainty. The impact of such emotion-driven judgments on subsequent cases cannot be underestimated. The pursuit of justice adapted to individual configurations requires a delineation of jury trial removed as far as possible from the purely historical test. In *Ross v. Bernhard*,³⁷ the Supreme Court of the United States indicated a similar approach by pointing out "the practical abilities and limitations of juries."³⁸

Joinder of Parties and Class Actions

The problem of the appropriate and/or necessary parties to an action opens an inviting field for comparing American and European conceptions, especially with respect to the scope and number of parties present before the court, or the parties to be bound by its decision.³⁹ As compared to European systems, American civil procedure expands the circle of parties joined in the trial, or subject to the effects of the judgment. The principle that some parties *must* be included in an action either as plaintiffs or defendants—the so-called "necessary parties" rule—although not unknown on the Continent, is more prevalent in the United States, both in scope and actual operation. In Europe, parties are qualified as necessary mainly when their non-involvement would prevent any adjudication at all, as for example in an action

36. See, e.g., E. Kern and M. Wolff, *Gerichtsverfassungsrecht* § 23, at 150-58 (5th ed. 1975). See generally M. Cappelletti, *Laienrichter -heute?*, *Festschrift fuer Fritz Baur* 313-27 (1981).

37. 396 U.S. 531, 90 S. Ct. 733 (1970).

38. *Id.* at 538 n.10, 90 S. Ct. at 738 n.10.

39. For a comparative treatment, see E.J. Cohn, *Parties*, in 16 *International Encyclopedia of Comparative Law*, Ch. 5 (1976).

for partition which does not name all co-owners as parties. A desire to avoid inconsistent judgments may justify additional instances of classifying parties as necessary; yet, failure to join these parties does not result in a bar to the action. Moreover, the concept of inconsistent judgments as a basis for the necessary parties rule is construed narrowly, covering situations in which a separate procedural treatment of various parties is excluded by rigid legal rules rather than by considerations of expediency. Thus, the necessary-parties rule is regarded in Europe as a means of obviating legal obstacles rather than of affirmatively promoting justice, of averting evil rather than producing good. The converse seems to be true in the United States, where the rule seems to be based on the traditional equitable principle of attaining "complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit . . . ; for a court of equity in all cases delights to do complete justice, and not by halves."⁴⁰

This active approach to the delineation of necessary parties is supplemented by a case-by-case assessment of the relevant factors. For instance, in deciding whether absentees should be joined in the proceedings, the protection of absentees, of present parties, or of society's interest, and plaintiff's access to a forum are carefully weighted on an ad hoc basis rather than by resort to pre-established and rigid rules.⁴¹ Thus, completeness of adjudication depends upon the discretion of the judge, and may encompass highly varying circles of interested persons.

A civilian lawyer tends to place class actions within this broader understanding of necessary parties. Indeed, he views the whole institution of class action as a crossroad of several typical American law avenues, rather than as an isolated phenomenon of random reaction. The first of these avenues is purely historical: the long established wide scope of necessary parties had prepared the soil well for an organic blossom of the class action; as the relentlessly growing numbers of necessary parties began to make the traditional rule unworkable, the intellectual climate was ready to accept a modern joinder scheme. The second avenue runs through the peculiar American tendency to deal with legal problems in inseparable conjunction with social realities. This pragmatic approach may explain why residency in the same neighborhood, or the suffering of a common wrong are regarded as sufficient links for constituting a class for litigation purposes. Adequacy of representation within the class is determined by equally pragmatic considerations. Finally, the optimistic American belief in law and the

40. F. Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* 3, 2 (1837).

41. See, e.g., James and Hazard, *supra* note 9, at 532-44.

court system as a fitting and almost omnipotent vehicle for remedying social needs and expanding justice⁴² has also supported the unique development of class suits. Class actions were the response of the legal system to the civil rights movement of the 1950's and 1960's, the consumer movement of the 1960's and 1970's,⁴³ and the environmental protection movement of the 1970's and 1980's. Only a high degree of confidence in the efficiency of the judicial process is likely to allow large-scale procedural answers to high-stakes factual problems.

Appellate Review

A superficial comparison of appellate review on both sides of the Atlantic⁴⁴ would immediately identify one structural similarity: in both systems, appellate courts are set on two levels, the first consisting of the intermediate appellate courts, such as the circuit courts in the federal judiciary, and the second consisting of supreme courts, or courts of final resort. Nevertheless, behind this formal resemblance at least two substantial disparities can be identified. First, in a common law jurisdiction appeals are usually on the record, which, in the formula of Federal Rule of Civil Procedure 52(a), means that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." On the other hand, civilian intermediate appeals are both on the law and the facts, thus opening a much wider scope of review: not only may findings of fact in the court of original jurisdiction be re-evaluated on appeal and modified or overturned on the same evidentiary record, but also new evidence, to a large extent new factual allegations, and to a restricted extent even new claims may be introduced on appeal. In short, a civilian court of intermediate appeal has potentially the same power over the subject matter as the trial court. Many civilian countries adhere to the so-called rule of "double jurisdiction," in the sense that, in principle, any case deserves a double chance of judicial examination, on both legal and factual issues. The second substantial difference between the two systems concerns the question of whether the final resort to the respective supreme court is a matter of right or of judicial discretion in each particular case. Civilian procedure adopts the former, common law procedure the latter point of view.

42. See, lately, L. Cohen-Tanugi, *Le droit sans l'etat—Sur la democratie en France et en Amerique*, especially at 59-166 (1985).

43. Cf. James and Hazard, *supra* note 9, at 563. See also M. Cappelletti, *La protection d'int aerets collectifs et de groupe dans le procés civil (Maetamorphoses de la procaedure civile)*, *Revue internationale de droit compare* 571-97 (1975).

44. See P. Herzog and D. Karlen, *Attacks on Judicial Decisions*, in 16 *International Encyclopedia of Comparative Law*, Ch. 8 (1982).

Like in other areas of law, dissimilarities in appellate review are perhaps not as accentuated today as they once were. With regard to the scope of review, there may be some retreat from the classical rule in the United States and an extension of appellate review to some questions of fact; nevertheless, this is borne out more in scholarly writing than in actual cases.⁴⁵ As far as final appeals are concerned, German law has recently made resort to the supreme court dependent upon the discretion, either of the intermediate appellate court, or of the supreme court itself, if the appellant is aggrieved for more than 40,000 DM (approx. U.S. \$20,000).⁴⁶ Yet, the main features of discrepancy loom large. In a civilian jurisdiction, the law-fact distinction runs along the line between the supreme court on the one hand, and the courts of first instance and intermediate appellate courts on the other; in a common law jurisdiction, the line runs between all appellate courts on the one hand and the trial courts on the other. This common treatment of all appellate courts, as distinguished from the trial courts, is not only a matter of terminology or convenience, but also produces important practical consequences in terms of precedential value, style and reporting of opinions, as well as in the staffing of the courts with, for example, law clerks. Yet, a civilian lawyer is much more accustomed to expect a wide degree of conformity in individual cases between the decisions of trial and intermediate appellate courts; he is therefore likely to regard as inappropriate the common law upgrading, and at the same time confinement, of intermediate appellate courts to the upper end of the judiciary.

The dissimilarities described above point to a different allocation of functions to appellate review in both systems. In Europe, intermediate appellate review is but a second, most often *de novo*, examination of the case by more experienced judges, a sort of instinctive response to the awareness of human fallibility. Because they have potentially the same power of inquiry into the dispute as the trial courts, the intermediate appellate courts in Europe have less of an impact on the community than their common law counterparts. Only the appellate courts of last resort, which are restricted to questions of law, may claim to shape the life of the law in the whole country. Despite the lack of a *stare decisis* doctrine, such expectations are in most cases fulfilled. The moral influence of supreme court decisions falls only slightly short of the formally binding force attached to

45. Cf., e.g., Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 Wash. U.L.Q. 409 (1981), as opposed to *Pullmann-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781 (1982).

46. §§ 546, 554b German Code of Civil Procedure. See Baumbach/Lauterbach/Albers/Hartmann, *Zivilprozessordnung* 1179, 1200 (43d ed. 1985).

judicial precedents in the common law world. Yet, from a pragmatic viewpoint, the impact of these decisions tends to be reduced by another factor. By unqualifiedly regarding final appeals as a matter of right, and by not utilizing any screening devices, the civilian system aspires for too much and attains too little: supreme court dockets are overloaded, and selective elaboration on crucial or sensitive areas does not seem feasible. Methods of appeal are viewed more as means for parties to vindicate their rights, than as vehicles for the courts to mold general policies.

To a Continental observer, the most distinctive feature of the common law appellate review is its progressive limitation of the scope of review. This limitation is achieved on the intermediate appellate level through the law-fact distinction, and on the supreme court level by entrusting the court with a high degree of discretion. Through the first elimination, intermediate appellate courts are relieved from most factual preoccupations, and become almost pure, though not final, arbiters of the law. In exchange, or perhaps because of this limitation, they reach a much broader audience. Similarly, by permitting the supreme court to choose the cases it will hear based on their overall significance, the common law invites a programmed delineation of the areas in which the supreme court finds some judicial pronouncement desirable, appropriate, or even necessary, and thus transforms the supreme court from a passive reactor to party applications, to an active designer of judicial policy. In sum, by assigning to each level in the court system a distinct scope of examination or review, common law procedure encourages the individuality of each court and facilitates its contribution in the shaping of the law and in the bringing about of social change.

Epilogue

A comprehensive comparison between the procedural law of two of the great legal families in the world should, of course, encompass other issues as well. Elaboration and style in drafting judicial decisions and dissenting opinions, issue preclusion, and the actual operation of *stare decisis* are among the issues deserving such separate treatment which, however, could not be undertaken here. Nevertheless, even the cursory examination of the few issues which have been considered here tends to suggest that, although procedural problems can be answered in many different ways, from the multiplicity of the answers often emerge convergent trends. Some of these trends can and should, in the years to come, be strengthened through extensive study and mutual understanding. By way of contrast, other dissimilarities seem too inherent in the respective systems to be eliminated in the near future. They are part of the price we have to pay for the diversity of the contemporary world.

The themes which have been treated here cover the whole spectrum from irreducible differences to gradually diminishing deviations. The most striking example of the former category is trial by jury, as dictated in the United States in its current form by both historical tradition and constitutional provisions. Similarly, the dissimilarities described in connection with jurisdiction over the person and class actions seem to reflect an essentially different understanding of judicial authority and of the very function of civil procedure. On the other hand, some rules deriving from, or related to, trial by jury, like those pertaining to the admissibility of evidence or the scope of appellate review, exhibit a greater degree of flexibility and reveal some signs of convergence parallel to European developments. Finally, a fourth group of procedural devices give, under completely different forms on the two sides of the Atlantic, expression to the same basic policies: discovery devices in the United States and the consecutive stages of proceedings in civilian countries serve the same objective of a prepared and gradual approach to the ultimate fact-finding.

Beyond the specifics of comparison, this look at American civil procedure from a civilian viewpoint leads me to two more general remarks. First, civil procedure has gradually risen to a distinguished position within the legal system at large. What only fifty years ago was essentially confined to "code pleading" and, later on, to dealing with the "decisional forms," has now spread over to the constitutional limitations of jurisdiction and admissibility of evidence, to moral issues in discovery devices, and to the massive social implications of class actions. These and similar questions, while still being characterized as procedural, have embraced the totality of human and social behavior, and increasingly supply paramount substantive considerations to the workings of the judicial machinery. Thus, American civil procedure tips the scales against the frequent allegation that in modern western societies we are witnesses to the final victory of form over substance. Of course, one has to question whether the goals sought can be fully obtained through the judicial process alone; whether legal methods by themselves are capable of bringing about major social changes. But this question goes well beyond our present inquiry. An examination of modern American civil procedure is at the same time a study in the inherent limits of any regulation of societal affairs by means of law.

The second general remark pertains to the intrinsic values of the procedural rules themselves. It does not suffice to maintain that the function of procedure consists in enforcing the law through truth-finding devices. For there remains the perennial dilemma: should a system aim at a correct resolution of each individual dispute even at the cost of evading some general principles, or should it rather aspire to a reasonably general level of legal certainty and predictability even

at the cost of sporadic individual injustice? American civil procedure has reached the crossroads of this modern dilemma. As we have seen, the approach to jurisdiction, discovery, and trial by jury seems to follow individualistic preferences, while the law on the admissibility of evidence, class actions, and appellate review is more receptive to concerns for stability and general policies. The dilemma is endemic and probably will never fade away. In the words of the Supreme Court of the United States, "few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.'"⁴⁷

47. *Kulko v. California Superior Court*, 436 U.S. 84, 92, 98 S. Ct. 1690, 1697 (1978), quoting *Estin v. Estin*, 334 U.S. 541, 545, 68 S. Ct. 1213, 1216 (1948).

