GEOFFREY C. HAZARD JR., *Transnational Rules of Civil Procedure: a Challenge to Judges and Lawyers.*

ABSTRACT

Le tre conferenze svolte presso la Facoltà di Giurisprudenza di Urbino dal professor Geoffrey C. Hazard, emerito della *Yale Law School*, già presidente dell'*American Law Institute*, e attualmente presso la *Pennsylvania Law School* di Philadelphia, hanno avuto per oggetto alcuni nodi centrali del modello di giustizia civile statunitense. In particolare, nel corso di tre incontri a carattere seminariale, si sono considerati temi come la fase introduttiva del processo civile federale, l'evoluzione delle questioni concernenti la disciplina della fase di *discovery* nelle *Federal Rules of civil Procedure*, e infine alcuni dei problemi connessi alla disciplina più diffusa di etica professionale contenuta nelle *Model Rules of Professional Conduct*. Il collegamento fra i tre temi trattati ha rappresentato la linea di svolgimento delle tre lezioni – conferenza, nella prospettiva della riforma del modello di giustizia federale.

GEOFFREY C. HAZARD JR

TRANSNATIONAL RULES OF CIVIL PROCEDURE: A CHALLENGE TO JUDGES AND LAWYERS

Introduction

Professor Michele Taruffo of the University of Pavia and I have undertaken a project to propose a "code" of procedural rules to govern litigation arising from legal disputes in transnational business transactions[1]. In developing the code we have proceeded through three drafts[2]. The third draft is now being published, entitled American Law Institute, Transnational Rules of Civil Procedure[3]. This draft will be the subject to various international conferences and seminars in the next two or three years. We are pleased to say that the project will be jointly sponsored by UNIDROIT (International Institute for the Unification of Private Law), an international organization of long standing that is headquartered in Rome and which is dedicated to harmonization of law of the various nations. It is expected that UNIDROIT will organize a complementary set of advisory conferences for discussion of the proposla. UNIDROIT's sponsorship will affirm the truly international character of the project and thus, we trust, improve the possibilities of acceptance of the concept in the years ahed.

This presentation describes the general concept of the project. In

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[1] For prior discussion of the problem of transnational procedure and the concept of a universal code, see M. TARUFFO, *Drafting Rules for Transnational Litigation*, ZZP Int'1 L.J. 449 (1997); Geoffrey HAZARD, *Transnational Rules of Civil Procedure: Preliminary Draft No. 1, 33* Texas Int'1 L.J. 499 (1988).

[2] The first draft is published in 30 Cornell International Law Journal 89 (1995). The second draft is published in 33 Texas Int'1 L.J.499 (1998). Professor Taruffo and I are Co-Reporters for the project. We ARE PLEASED TO SAY THAT, EFFECTIVE January 1999, Dr Antonio Gidi has been designated as Assistent Reporter. Dr Gidi received his degree in Law in Brazil and has received advanced degrees in law at the Universities of Milan and Pavia, with Professors Tarzia and Taruffo, and at the University of Pennsylvania, with me. He is now a Adjunct Professor of Law at the University of Pennsylvania, where we teach the discipline Comparative Civil Procedure.

[3] *Discussion Draft No. 1*, March 15, 1999.

companion lectures I shall consider two central problems that we have been required to address n the project. These are, first, the difference in concept of the roles of the Judge and the advocates in civil law as compared with common law system; and, second, the ralated problem of "pretrial discovery" as it is called in common law systems, a procedure that is unknown in most civil law systems.

The social Need for Transnatioanl Rules

It is familiar that the modern world is becoming inreasingly intimate in economic, political and social relationships.Business and finacial enterprises are now worldwide in scope, political relationships among nations are intense and complex, and the lives of ordianry citizens interlinked across borders[4]. The largely free flow of goods, services and people from one European country to another, now familiar in the European Union, is becoming approximated in transnational relationships in other parts of the world, for example in Latin America and North America[5]. It inevitably follows that there will be legal disputes in transnational transactions, because no human relations proceed without dispute and peaceful and rational resolution of such disputes requires reference to law.

Reference to law reveals, of course, that the elgal system of the world are quite different in their specifications, and sometimes in theier basic concepts. These differences create uncertainty and the possibility of discrimination. Hence, for at least a century the modern nations have sought to harmonize their legal systems in forms that include treaties and international conventions and the harmonization of the laws internal in various states. Traditionally and for the most part, these efforts have centered on substantive law, particulary commercial law and regulations concealing legal status of individuals. Relatively little attention has been directed to harmonization of procedural law[6].

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[4] I take special note here of the terrible tragedy caused by the U.S. military plane that collided with European vacationers on the Italian ski lift. In my opinion the crew was clearly blame worthy because their itinerary departed from the approved flight plan. The event is one of the consequences of the internatioanl intimacy I have referred to

[5] See MERCOSUR and NAFTA.

[6] However, there have been some notable endeavors to address procedure. See M. STORME; Marcel Storme (ed.) *Approximation of Judiciary law in the European Un-*

Procedural law is most difficult to harmonize because a nation's procedural law is most deeply embedded in its culture, in its political structure and in tha professional training of its judges and lawyers[7].

Nevertheless, the need for harmonization of procedural law is evident. All practicing lawyers know that resolution of legal disputes often depends on the identity of the forum that assumes jurisdiction of the dispute. All judges and lawyers recognize that the procedure for adjunction of disputes employed by a forum can be influential in determination of the merits – that is, the actual outcome of the litigation. From the viewpoint of clients, assuming that generla principles of fairness have been observed, the outcomes are of salient importance. The fundamental objective of harmonization therefore is reduction of the risk of different outcome in adjudication that results from difference in forum and difference in procedure. Complete elimination of such differences is an impossibility, even within national systems, but their reduction is an eternal goal in administration of justice. Establishing the same rules of procedure, regardless of forum, is a means to that end.

The scope of Application of Transnational Rules

From an idealistic or theoretical viewpoint, we might contemplate a single set of procedural rules to govern adjudication of all civil disputes in all countries[8]. Long experience demonstrates that such an arrangement is profoundly impractical. Every national legal system in fact has several different procedural systems for various kinds of disputes depending on the substantive law invoked. A notable example concerns the procedure in administrative law, which in every modern system is more or less distinctive from the procedure that applies in the courts of general jurisdicton. So also the procedure in the labor dispute courts established in many countries. Moreover, within the

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ion, Kluwer, 1994, See also Anteproyecto del Codigo Procesal Civil Modelo para Iberoamerica, REVISTA DE PROCESSO, Vols. 52 and 53, 1988 and 1989.

[7] See G. HAZARD, *Susstance, Procedure and Practice*, in Toward Comparative law in the 21st Century, thefairness have been observed, the Institute of Comparative Law in Japan, 1091.

[8] Even this definition of the ideal is only partial. It assumes that different procedural rules should govern civil disputes and criminal prosecutions.

courts of general jurisdiction there tipically are distinctive procedures for some types of disputes, for example, domestic relations litigation (divorce and separation proceedings) and bankruptcy. In many systems there is further proliferation, for example, special procedures for matters affecting decedents' estates.

However, every legal system has a basic procedural law that applies in its courts of general jurisdiction. In the civil law countries this system is called the code of civil procedure or similar title[9]. In common law jurisdictions these provisions are referred to as the rules of civil procedure or similar title[10]. These rules appy to most civl disputes, including disputes between local citizens and foreign nationals and those among foreign nationals. A basic issue in "harmonization" is whether a court system should adopt an internationalized procedure for all disputes or retain its national system for disputes among its own nationals and an internationalized procedure only for transnational disputes – that is, legal disputes involving an international element. A closely related issue is this: Assuming an internationalized procedure applies only to transnational disputes, how should that category of disputes, how should that category of disputes be defined? No definite answer to these questions can be proposed, but it is nevertheless appropriate to begin thinking about harmonization of procedure.

Two Procedural Systems Administered by the same Courts

Professor Taruffo and I have concluded that an internationalized procedure should apply only to disputes involving an international elemente and, within that category, only to disputes arising from business transactions. The specific formulation of the scope of application in the Discussion Draft is as follows:

Rule 1(a). Subject to domestic constitutional provisions and statutory provisions not supersede by these Rules, the courts of a state that

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[9] See, e.g., the German Zivilprozessordnung, the italian Codice di Procedura Civile, the spanish Ley de Enjuiciamento Civil and the french Code de Procédure civile.

[10] In the United States one code applies in the federal courts, the federal Rules of civil Procedure, while each State has its own counterpart code. Many of the state codes are patterned on the federal Rules. See F. James, G. Hazard and L. Leubsdorf, civil procedure (4th ed. 1992).

has recognized these rules shall apply them in disputes arising from a sale, lease, loan, investment, or any other business transaction:

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

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

We recognize that such a definition presents two unavoidable problems. One is that the scope provision is inevitably somewhat ambiguous. That is, the term "business transaction" is not self – defining and indeed has somewhat different connotation in various legal systems. Thus, ambiguity cannot be completely defined other than through interpretation in practice[11]. The second problem is that, if a code of transnational rules is applied only in a certain category of cases, then judges and lawyers of a country must become accustomed to using two differnt procedural systems, one in ordinary legal disputes and the other in transnational disputes.

The task of applying two different procedural systems may be regarded as legally anomalous, indeed perhaps profoundly anti-legal. How can it be that true "justice" can be done in one class of cases according to a long established code of procedure, and yet done also in another class of cases according to a newly adopted international code of procedure? We have already encountered this kind of objection, particularly from legal theorists. However, practicing lawyers in the modern world very well know that administered justice takes many procedural forms.

The answer to this objection is perhaps threefod. First, if that argument were ully accepted, it implies that non procedural reform within a natioanl system should be adopted in the future, and that none should have been adopted in the past[12]. All reforms of procedure by definition to some extent repudiate the system as it existed prior to the reform. Second, as observed above, all modern legal systems in fact have several different procedural regimes – the system in

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[11] Problems of scope of application of procedural rules are a chronic problem in American litigation, chiefly because in our federal system state substantive law can be administered in federal courts and federal law can be administered in state courts. We assume similar if less severe problems arise in other legal systems.

[12] There are lawyers and judges who seem to hold sch a viewpoint unconsciously, although they are usually reluctant to express it in such unequivocal terms

the ordinary courts, that in the administrative courts, the labour courts, criminal courts, small claims courts and also special proceedings for specific areas of substantivr law, such as family matters, bankruptcy etc. It is true that individual iudicial officers and most lawyers are specialized in practice within a legal system and hence individually practice according to only one procedural law. However, each legal system considered as a whole has a pluralistic attitude toward procedural justice and not a monolithic one[13]. Third, lawyers in modern prtactice, in contrast to judges, increasingly are having to learn to deal with different procedural systems. The judge in Bologna, for example, may need to function only according to the italian Code of Civil Procedure, but the lawyers in Bologna often must deal with legal disputes that actually or potentially may be adjudicated in a foreign court.

Finally, and perhaps most important, judges in the modern era are increasingly required to deal with more than one corpus of law. This is true within federal systems, where an integration is required at least between different bodies of substantive law, as in Canada, or more extensively as in the United States, where judges frequently must accomplish an integration of federal and state law both "procedural" and "substantive". Lawyers in today's world must of necessity make such integrations even more often, that is, in connection with international litigation and legal counseling for clients in anticipation of such litigation. For example, in a recent legal controversy being litigated in courts in London and Los Angeles, I was called upon to provide evidence to an English court about the procedural law of the American fedral courts and the rules of professional ethics in the States of California and Connecticut.

Specialized Courts for Transnatioanal legal Disputes

The problems of multiple procedural law are thus difficult, although not insuperabe. However, they are very real problems and they should not be ignored.

We expect that a source of resistance to international harmonization of procedural law will be reluctance of ordinary judges and law-

[13] The anomaly that the true "justice" can in principle result from different procedural systems must be addressed, even indirectly, in any concept of private international law.

yers to learning a new regime and how to perfrm their finctions within it., We should be sympathetic toward these attitudes. Accordingly, it may well be more practical to apply transnational rules only in a limited number of courts, staffed by judges who can become acquainted with theses special rules. A familiar institucional arrangement is a court of special jurisdiction to adjudicate international legal disputes.The former socialist countries had such tribunals to adjudicate disputes arising from transactions with capitalist enterprises. For indipendent reasons specialized commercial courts have been established in some American States[14].

Counttries with more than one major commercial center might have several branches of such a court. It can be safely predicted that when specialized courts are created with their own corps of judges, similar specialization will evolve in the legal profession.

Conclusion

In light of the foregoing analysis, the justification for a code of procedure for litigation in transactional legal disputes seems adequate, at least to Professor Taruffo and to me and to the organization [s] sponsoring our project. It is also evident that there will be technical and practical difficulties in formulating a code of transnational rules that is acceptable in various legal systems. It is also evident that administering such a code will present professional difficulties for lawyers, and perhaps more serious ones for judges. Hoever, it also seems evident that some such adjustment of procedural law will be necessary in the 21st Century. It is not to early to adress these problems now.

The Development Stage of Litigation: Discovery and Amendment of Pleadings in Civil and Common Law Procedures

The procedure of adjudication in the civil law systems is called "inquisitorial" and its counterpart in common law systems is called

[14] The Court of Chancery in Delaware has long been recognized as functionally a court specialized in corporation law.

"adversarial". These terms are often interpreted as pejorative[15]. However, they are better understood ad descriptive of the difference in basic strictures of a civil law adjudication and an adjudication conducted according to the common law tradition. This difference occurs in what we may call the development stage of litigation. Specifically, the difference is manifested after the initial pleadings have been presented by the parties but prior to final decision. The analysis herein focuses on that development stage, where the consideration of the dispute advances from the declamations by the opposing parties to the resolution by the court.

In both civil law and common law systems the formulation of the plaintiff's claims and the defendant's defenses, i. e., the complaint and the answer, are the responsability of advocates for the parties[16]. In both systems the decision of the case and its official expression are of course the responsability of the court. The court in all systems is the neutral arbiter appointed by the state to decide the controversy[17].

In civil law systems, after the filingof the pleadings, the initiative in development of the inquiry is in the hands of the judge, with the advocates providing a monitoring and supplemental role. In the common law systems that development stage is in the hands of the advocates, with the judge performing a monitoring and supplemental role.

This difference in assignment of primary responsability reflects differences in presuppositions about the logic of a judicial investigation and in allocation of what might be called the riskof ignorance. Those differences may reflect underlyng differences in politcal tradition and culture between typical civil law regimes and those of the common law.

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[15] The term "inquisitorial" can be interpreted as signifying an uncontrolled examination of a witness's inner – most thoughts, while the term "adversarial" can be interpreted as an uncontrolled berating of a witness's personality and character.

[16] Common law terminology for the pleadings varies somewhat. The plaintiff's statement of grievance is usually called the Complaint but also may be called the Petition or Writ; the defendant's response is usually called the Answer but may be called the Response. In civil law terminology the usual terms are Complaint and Answer [check].

[17] This analysis ignores the possibility of appeal and the controls that appellate process imposes on the first instance tribunal. All modern legal systems have procedures for appeal and all appellate systems have a general similarity to each other.

Pleadings: The Advocates' Procedural Function

Party pleadings are the first public manifestation of a legal dispute. The complaint and answer are formal documents prepared by advocates and submitted to the court. The pleadings thereby become, at least provisionally, the definition of the dispute in legal terms. However, the pleadings are themselves legal artifacts and the product of legal process. That legal process is the analytical and advisory activity of advocates on each side. The advocates interview their respective clients, often several times, examine files – often voluminous files – to identify relevant documents, identify thierd partt witnesses whose testimony may be supportive, and consider the kinds of expert testimony that may be necessary or helpful. these tasks, of the advocates, whether in the civil law system or that of the common law, are confidential on each side and hence "invisible" from a public viewpoint.

Certainly they are invisible from the court's viewpoint. Nevertheless, they are important legal processes. The advocates transform laymen's descriptios of the dispute into legally relevant narratives. They also bring forth legally relevant documents from legally trivial papers, consider whether bystander osbservations can become third party testimony, and estimate the possibility that experts can through their testimony bring light that might not otherwise dawn the judicial mind.

There are some important difeerences between civil law and common law in the rules governing the functions of the advocates. Noteworthly among them are the following: In most civil law systems advocate is prohibited from direct communication with third party wiwitnesses, whereas in common law this is permitted[18]; in most civil law systems a party can make only a "statement" to the court rather than giving full-fledged testimony; in civil law systems the parties have no legal power to require disclosure of documents in the hands of a third party, that authority being exclusively vest in the court, whereas in common law regimes the parties have power to compel such production of relevant documents; in civil law systems the court determines whether expert testimony is necessary and selects the experts; in

[18] In England and other common law jurisdictions that maintain a division in the legal profession between barristers and solicitors, the barristers (the lawyers who will appear in court) are prohibited from direct communication wirth third party witnesses but solicitors are not. The conventional arrangement in these systems is that the solicitors organize the evidence for presentation in court by the barristers.

common law regimes the parties can select and present experts of their own selection.

These are important differences, as will be more fully explained presently.

However, it is important to note the basic similarity in the formative role of the advocates in defining legal dispute. The importance of the advocate's role is apparent if we recall that many legal disputes are in effect settled in the advocate's offices[19]. In the first place, many legal disputes are avoided because an advocate consulted by a grievant determines that the grievant's case is not wighty enough to prosecute[20]. A grievance that an advocate declines to prosecute is in effect a legal dispute resolved. In the next stage of the advocate's function, is often correspondence with the advocate for the opposing party. Many disputes are formulated and resolved through confidential correspondence between advocates.

In this process the parties legal and factual positions are articulated and middle grounds often discerned. Some disputes are resolved at a next step, in which plaintiff transmits a proposed complaint prior to actually commencing litigation, thus giving a more specific statement of the claim and signaling seriousness of purpose. Other disputes are resolved after the pleadings ar e filed but before the court has become actively engaged. These stages are under the control of the advocates and all occur before the court is called upon to decide anything.

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[19] In the United States the settlement rate prior to trial, i. e., cases filed but in which no verdict is reached, is over 90%. There are no accurate figures for the rate of settlement at the pleading stage but I would guess that it is about 50% perhaps 60%. Compare RAND [study for Judicial Center on percentage of cases in which no discovery is undertaken.]

[20] Quantitative data on "cases not filed" are obviously impossible to collect, because they are lodged in lawyers'n confidential files widely dispersed among the bar. My own estimate based on experience and conversation with American lawyers is that only about one in twenty grievances that reaches a lawyer's office proceeds beyond the initial consultation. [See Harvard study – Paul Weiler – of unfiled medical malpractice claims].

From First Pleading to Amendment

The pleadings in all legal systems largely determine the legal and factual framework in which the court will proceed. If the pleadings are not amended, they will constitute not only the initial framework in which the court proceeds but also the final one. The legal and factual framework of a judicial inquiry, established through the advocates' pleadings, determines what evidence is relevant and what legal principles are to be applied. If no unexpected testimony or documentary proof is encountered, nor any additional legal principles introcuced, a lawsuit in the proceeding will be the court's assessment of credibility of witnesses or its interpretatio of relevant documents.

However, there can be evidence or documentary proof on side that has not been anticipated by the opposing party. There can be unexpected legal principles invoked by the opposing party. There can be unexpected legal principles invoked by the opposing party or by the court, or a legal principle that occurs to one of the participants as an afterthought. The problem at this point is the nature of the responses that can be made and the power of initiative in making them. In terms of procedural machanics, this problem can be described as the permissible scope and initiative in amendment of pleadings. In terms of procedural jurisprudence, however, consideration of this problem must address more fundamental issues in the administration of justice.

The impetus for amending pleadings, i. e., to change the framework of the court's inquiry, is encounter with evidence that was unespected by one or both parties or encounter with previously unspecified legal principles. These unexpected events are variance from the original "script". For example, a witness may be brought forward who had not previously been identified, or documents produced that came as a surprise, or legal arguments made that had not been anticipated.

In classic common law terminology, this was called the problem of "variance" or "departure" – meaning that the claim as presented at trial varied or departed from the claim stated in the pleadings[21]. The attitude in classic common law procedure, was that no variance or de-

[21] See F. JAMES, G. HAZARD and J. LEUBSDORF, *Civil Procedure Sec.* 4.18; see, e.g., Rigby v. Beech Aircraft Co., 548 F.2d 288 (10th Cir. 1977).

parture should be permitted. A party who had failed to anticipate the development of the case – tipically a plaintiff although sometimes a defendant who odmitted a valid defense – would simply fail in the lawsuit[22]. In modern common law procedure amendment is permitted much more liberally, particularly in American procedure. Hwever, all common law systems contemplate that amendment will be permitted if discovery produces unanticipated evidence and that the evidence, by virtue of the amendment, will become admissible at trial. In any event the initiative for amending the pleadings, and thus chamging the framework of the inquiry, is vested in the parties acting through their advocates, although the court may direct amendment on its own initiative[23]. The policy toward amendment in most civil law systems is quite different. Amendment is permitted only in exceptional circumstances[24]. More impotrant as a practical matter, after the pleadings are closed the initiative in development of the case is vested in the court. The parties have no right to obtain amendment and the court has no obligation to go outside the framework established in the pleadings. Indeed, according to concepts prevailing in some civil law systems the court has no *authority* to go outside that framework[25] The premise is that the parties have had opportunity to state their claims and that the court's responsability is to respond in those terms. Accordingly, litigation ordinarily will be limited to that framed in the original pleadings, even if unexpected evidence be presented as the case develops or if additional legal principles come to mind. Moreover, in the tradition of professional ethics in civil law systems, advocates are not permitted to have direct communication with prospective winesses other than their clients. Thus, the proof ordinarily is limited to evidence that can be anticipated by the advocates through discussions with their clients before the case is commenced.

These differences in policy toward amendment are somewhat paradoxical when considered along with differences in the structure of the civil law and common law rpoceedings. A common law adjudication

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[22] There was a separate procedure in the courts of equity which was some what more forgiving.

[23] See federal Rules of civil Procedure, Rule 15(a) ("leave [to amend] shall be freely given when justice so requires") Compare English...

[24] Citation. Check with Gidi

[25] Citation from Gidi.

proceeds through a series of preliminary stages, including discovery and potentially peremptory motions[26].

Unanticipated evidence is revealed in common law adjudication through pretrial discovery procedures, including deposition of witnesses (both paery witnesses and third party witnesses) and disclosure of documents. There is a corresponding responsability imposed on the advocates to amend their pleadings if they wish to use such evidence at the plenary trial. This responsibility is strictly enforced because ordinarily there is only one plenary hearing in common law systems and the other side should have fair warning that the "script" has been edited, so to speak. A civl law adjudication is conducted in a series of hearings on different days, often with substantial intervals between hearings. Any surpriseto the opposing party could be remedied simply by scheduling as further hearing, since the matter of scheduling in the civil law is flexible rather than being predetermined.

Conclusion

It seems paradoxical that the civil law system does not have flexibility concerning amendment corresponding to the flexibility of its scheduling system.

One would think that an open scheduling system would facilitate a liberal amendment system. The case would consist of an exploration state in the early hearings, like common law discovery, and a decision state once all the possibilities have been revealed. However, from a realistic viewpoint this possibility may suggest why it has not come to be so.

The problem with a combination of "free amendment"and "free scheduling" is that it could resdult in infinite protraction of the litigation.

From a realistic viewpoint, one party to ligation – sometimes both parties – has incentive to prolong the litigation and thereby to avoid a conclusion. Given that the civil law system has a flexible schedule of

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[26] I use the term peremptory motions to refer to initiatives of the parties either to terminate the litigation on grounds other than the merits, such as improper venue or statute of limitations, or on the ground that there is no adequate factual basis for the claim. See F. JAMES, G. HAZARD and J. LEUBSDORF, *Civil Procedure Chapter 4* (4th ed. 1992).

hearings, it must maintain a rigid policy toward amendments, otherwise the proceeding could go on foreever. By the same token. Greater flexibility toward amendment would be practicable if plenary adjudication is conducted in a single consecutive hearing[27]. Indeed, if the civil law adopts the principle of a single consecutive plenary hearing, a preliminary stage of development of the evidence could evolve, essentially similar to common law discovery. Civil procedure in that structure may become more appropriate as civil litigation comes to address more complicated controversies, where neither the court nor the advocates can anticipate all the developments in the evidence.

A "Behavioral" Approach to the Roles of Judge and Advocate in Civil Law and Common Law Systems

Introduction

The distinction between the civil law system of procedure and those of the common law is traditionally drawn in terms of the role of the judge and the correlative role of the advocates. Stated simply, and hence necessarily with some inaccurancy, proceudre in the civil law systems is described as "inquisitorial" and that in common law as "adversarial". The term inquisitorial has a sisnster implication from its association with inquiries into religious heresy centuries ago. Technically, however, it means that the procedure goes forward through the initiative of the judge, who is responsible for questioning of witnesses and ascertaing the existence and meaning of relevant documents. At the same time, "adversarial" has a sinister implication in suggesting that a common law triasl is an exercise in forensic brutality in which innocent parties are victims, and so also the truth. Technically, however, the term "adversarial" simply means that the procedure goes forward through the initiative of the advocates for the parties, who in that system are responsible for the questioning of witnesses and the presentation of relvant documents.

As my colleague Professor Michele Taruffo ahs contended, modern comparative law analysis must reach beyond these stereotypes[28].

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[27] Cite to new Italian Code?

[28] See M. Taruffo ...cite

In doing so we explore fundamental attitudes about the pursuit of administered justice. In comparative law the term "administered justice" is, in my opinion, preferable to term "justice". The term "justice" suggests a purity of means and a verisimilitude of conclusion that is associated with the intervention of God. Indeed, kings, and judges in ages past claimed that they were instruments of God and their procedures and judgments partook of God's perfect justice and infinite wisdom.

The term "administered justice" seems to me a better term in serious legal discussion because it reminds us that it is a human activity and hence always attended by human failings, such as conflict of purpose, misunderstanding, sloth, indifference and a certain amount of dissimulatin or outright falsification. As a common lawyer I can attest that these failings are encountered in the systems I have observed, among both judges and lawyers. I infer from discussion with continental colleagues that the same human failings occur in civil law systems. We should therefore beware of comparing an imaginary ideal system, whether of the type in civil law or that in common law, with either type of system in the real world.

Traditional comparative law analysis begins with exposition of the rules of the systems being compared. That ia a useful approach and the most feasible kind of inquiry, because it involves the study of written texts. However, another approach is to study behaviour patterns of principal actors. Thus, comparative corporation law can be analyzed in terms of the bahavior of bankers, etc. This approach seems to me especially promising in the analysis of procedure in the administration of justice. After all, procedure in the administration of justice consists of the bahavior of judges and advocates and their interactions with and effects on the parties.

All modern legal systems function chiefly through professional judges, people trained in law who have made a life's work of being a judge[29]. All modern legal systems permit the parties to civil legal disputes to have assistance of an advocate, at least if they can afford to pay the necessary fees. Modern litigation must address all kinds of le-

[29] In most civil law systems the office of judge ordinarily is a lifetime career commenced upon completion of legal educetion. In all common law systems of which I am aware those holding the office of judge assumed that position after some years in practice as a lawyer. In my opinion this results in important differences in typical viewpoint of judges in the two kinds of system. However, that is an inquiry for another occasion.

gal dispute, from major business litigation to routine domestic relations controversies. Modern litigation involves various kinds of parties, from individuals to large corporations. It proceeds through a variety of procedures. However, one constant is that civil litigation in all modern systems is in the hands of professional judges and lawyers. Analysis of the roles of judges and lawyer is therefore a useful key to differences in systems.

Comparisons of Models

Having in mind that comparative law should avoid comparison between an idealized version of one legal system with the realities of another system, it must be recognized that accurate description of the realities of any legal system is very difficult[30]. The phenomenon of adminisstered justice is complex and even within one legal system is somewhat heterogeneus. Hence, it is easy to fall into the trap of using stereotypes, such as the reckless American jury or the indifferent civil law judge. I therefore propose a different line of analysis: To describe the model or paradigm fulfillments of the professional roles of judge and advocate in the civil law and common law systems. I do not mean thereby to imagine judges and advocates in either system as angels or supermen. I mean only to iamgine judges and advocates of high standing in each system.

In these terms we could describe the model civil law judge as follows. Such a judge:

– Carefully reads and accurately grasps the parties' statements of claim and defense set forth in the pleadings.

– Clearly and promptly identifies the important issues in controversy and deduces what evidence should be received concerning the claims and defenses.

– Accurately differentiates between preliminary and perhaps peremptory issues, decision of which might resolve the dispute without

[30] See M. Taruffo... A differnece of opinion I have with an esteemed colleague, Professor john Langbein of Yale University, is that I believe his analysis to some extent is a comparison of an idealized (German) civil law system with a disparaged common law system. See J. LANGBEIN, *The German Advantage in Civil Procedure*, 52 U. Chicago L. Rev. 823 (1986).

further inquiry, and those issues that logically or practicallyshould be considered in later sequence.

– Schedules necessary hearings promptly and conducts them efficiently.

– Conducts a careful review of relevant documents and an orderly interrogation of witnesses, recognizes the probative relationships between documents and testimony, and discerns whether there may be further inquiry concerning other documents or other witnesses.

– Makes accurate summary notes as the case proceeds and has a firm mental grasp on the caseas a whole.

– Renders judgment promptly, clearly and with well-reasoned explanation.

Correlatively, we could describe the ideal civil law advocate as follows:

– Makes careful preliminary inquiry into relevant legal principles and potential sources of documentary proof and witness testimony.

– Formulates carefully drafted statements of claim (for plaintiff) and carefully guarded statements of defense (for defendant), incorporating all plausible legal premises and anticipating all foreseeable evidence.

– Prepares material for presentation in accurate anticipation of the judge's scheduling orders.

– During hearings, listens attentively to the judge's interrogation and is ready with suggestions for amplification and the right to proof as to matters which the judge seems to ignore.

– Prepares well-crafted written briefs and arguments for the concluding stage of the proceeding.

– Carefully scrutinez the judge's decision to ascertain potential bases for appeal[31].

The roles of judge and advocate in common law systems are similar to those in the civil law system but are juxtapposed in the stages after the pleadings are filed.

In both systems the pleadings are the responsibility of the advocates. A lawsuit does not begin unless the plaintiff files a complaint

[31] For a comparison based on observation made several decades ago by a leading American legal scholar, see Benjamin KAPLAN, *Civil Procedure – Reflections on the Comparison of Systems*, 9 Buffalo Law Review 409 (1960).

and formulation of the complaint is the responsability of the advocate for the plaintiff. A lawsuit proceeds to disputed issues only so far as defendant disputes the plaintff's contentions, and determining what issues should be disputed is the responsability of the advocate for the defendant.

A model common law advocate could be described as follows:

– like the civl advocate, makes careful preliminary inquiry into relevant legal principles and potential sources of documentary proof and witness testimony.

– Like the civil law advocate, formulates carefully drafted statements of claim (for plaintiff) and carefully guarded statements of defense (for defendant).

– Conducts as searching pretrial discovery as is permitted by permitted by the rules of discovery and as is feasible within the available finacial resources[32].

– Accurately differentiates between preliminary and perhaps peremptory issues and those that logically should be considered at plenary hearing[33].

– Presents amended pleadings in advance of trial, to assert claims for which new evidence has been found through discovery and to eliminate claims for which the evidence is weak.

– Perceives the logical order in which evidence should be presented at trial and prepares the presentation of documents and witnesses on that basis.

– Is prepared on the day of trial which all evidence for his client and evidence to counter the opposing party.

– Makes a logical and coherent exposition of the issues and evi-

[32] Sometimes in American civil litigation, where discovery may be elaborate and expensive, a defendant may simply allow plaintiff's counsel to examine all of its documents. This is rare, however, because a defendant who lacks means to defend a complex case typically will also lack financial means to pay a judgment. Accordingly such a person will not have been sued in the first place!

[33] The procedural mechanism for addressing these issues are pretrial motions, primarily a defendant's motion to dismiss for insufficiency of the plaintiff's claim on legal grounds and a motion by either plaintiff or defendant for summary determination on the basis that no genuine issue of fact is presented. The procedural rules defining these motions under U.S. procedure are Rule 12(b) (6) (motion to dismiss for insufficiency) and Rule 56 (summary judgment). Compare [cite English counterpart rules].

dence at the beginning of trial and a logical and forceful summary after all the evidence on both sides has been presented[34].

– Prepares well-crafted written briefs and arguments for the concluding stage of the proceeding.

– Carefully scrutinizes the judge's decision (or the jury verdict) to ascetain potential bases for appeal.

A description of the role of the common law judge, parallel to the description of the civil law judge, could be as follows:

– Carefully considers and promptly decides preliminary and peremptory issues that are presented by motions from the parties, such as a motion to dismiss or motion for summary judgment

– Carefully considers and promptly resolves disputes arising in discovery, particularly issued of privilege and relevance

– Schedules the trial at an early convenient date.

– At trial, presides over jury selection[35] and gives jurors an orientation to the issues in the case, monitors presentations by advocates, sustains or overrules objections by advocates to questions or statements by the opposing advocate.

– At completion of evidence, decides whether the evidence is sufficient for jury consideration, solicits suggested jury instructions from opposing parties and gives instructions to jury as to legal principles to be applied.

– Presides at reception of verdict and orders judgment accordingly.

In a case tried without a jury, the judge himself listens to the evidence and determines issues, essentially as would a civil law judge. In any event the common law judge occasionally interjects claryfing questions addressed to witnesses.

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[34] The normal sequence at trial is that plaintiff's advocate and then defendant's makes an opening statement, plaintiff then presents its evidence, defendant next presents its evidence, and in the summations plaintiff's advocate speaks first, then defendant's advocate, then plaintiff may close. The judge then may comment and, in a jury trial gives instructions to the jury about applicable legal principles. See F. JAMES, G. HAZARD and J. LEUBSDORF, *Civil Procedure*, chapter 7 (4th ed. 1992).

[35] Jurors are selected at random from a roster of eligible persons. The procedure is complex but generally managed with efficiency. See MUNSTERMAN AND MUNSTERMAN, *The search for Jury Representativeness*, 11 Justice System Journal 59 (1986).

The Behavioral Approach

The foregoing descriptions are a "behavioral" approach to comparison of procedural systems. The focus is not on the rules that govern the functions of the principal actors, nor on the theory of justice on which the systems are based, or on an idealization of either system. Rather this approach recognizes that the actual functions in the model constitute an expression of the rules. Put differently, the rules are merely the framework in which the behavior of the professionals proceeds; it is their behavior that constitutes the administration of justice.

Analysis of the behavior of the professional participants is a foundation for evaluating the strengths and limitations in each system and a pathway to accomodating them. This is the approach that Professor Taruffo and I have employed in our work on the transnational Rules of Procedure.. That is, we have begun with such questions as the following: What do the advocates do when they first are engaged by parties to a legal dispute? When does the judge first encounter the case? Who determines the legal concepts and evidence that will be the basis of decision? Of course, in both civil law and common systems it is the court that will decide the dispute. But the essential features of each system are the interactions in the transformation of a legal dispute from the advocates'offices to the point of a judicial decision.