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CIVIL PROCEDURE

Prof. Dr. C.H. van Rhee, Professor of Law, Maastricht University
& Mr. R. Verkerk, researcher, Maastricht University

Abstract
After addressing some problems specific to comparative legal research in civil procedure, this article focuses on ‘families’ of civil procedure, fundamental and other civil procedural principles, contemporary trends and developments in civil litigation at the national and international level and harmonisation of civil procedural law.

Keywords: civil procedure, civil litigation, private law

0. Introduction

When approached from a national point of view, the notion of ‘civil procedure’ does not pose major difficulties. In principle, civil procedure governs the adjudication of civil cases before a court of law. Apart from the occasional difficulty, for example the fact that in some countries such as France and the Netherlands there is limited room for deciding ‘civil’ claims for compensation in a criminal procedure, legal scholars and practitioners are perfectly able to give a definition of civil procedure in a national context. This is different in comparative legal research. Of course, also in this context one may claim that civil procedure governs the adjudication of civil cases before a court of law. However, if one observes this definition closely, one may conclude that it is problematic.

The first difficulty - and this will not come as a surprise for those who are familiar with the case-law of the European Court of Human Rights as regards the definition of ‘civil rights and obligations’ in Article 6 of the European Convention of Human Rights (Jacobs & White, 2002, 139-170) - is posed by the definition of a ‘civil case’. In England, for example, the adjective ‘civil’ is used in the dichotomy civil–criminal. In principle, cases that are not criminal in nature are classified as civil. As such they are subject to the rules of civil procedure. In other countries the definition of a civil case is different. This is due to the fact that in most Civil Law countries the main dichotomy is that between private law and public law. The rules of procedure that are applicable to cases within the ambit of public law are either criminal or administrative in nature. Administrative procedural rules are applicable as regards actions in which one of the parties is the State or another public authority. This results in a major difference as regards jurisdictions like England, where such actions are adjudicated on the basis of the ordinary civil procedure rules (Jolowicz, 2000, 11-22).

The second difficulty as regards the definition of civil procedure is related to the classification of rules as ‘procedural’ or ‘substantive’. This classification is of primary importance in an international context due to the applicability of the *lex fori* as regards procedural law (for examples, see Kerameus, 1997). Although a court may apply foreign substantive private law, it will under no circumstances adjudicate cases according to foreign civil procedure rules. At first sight the distinction between substantive law and procedural law seems clear. Substantive law *inter alia* defines, regulates and creates rights and duties, whereas procedural law regulates the

legal proceedings in case of a dispute concerning these rights and duties. However, in practice the distinction is not always that clear. How should, for example, remedies in English law be classified? Do they belong to the domain of procedural or substantive law? (Andrews, 2003, No. 1.44) And to what area of the law do the rules on proof belong? In some jurisdictions, such as France, rules on proof can be found both in the Civil Code and in the Code of Civil Procedure. In the Netherlands, which originally knew a system that was similar to that of France, the situation has changed. In that country the rules on proof have been transferred to the Code of Civil Procedure.

On the basis of the above one may conclude that defining 'civil procedure' in a comparative legal context is a difficult task. If one attempts to provide for a working definition nevertheless, it seems justified to closely follow the working definition for 'civil litigation' supplied by J.A. Jolowicz (Jolowicz, 2000, 20-22). The learned author states: (1) Civil litigation involves proceedings before a court of law; (2) The initiation of civil proceedings is a voluntary act; (3) The plaintiff acts in his own interest; (4) Civil litigation does not occur without the will of the defendant. It is this type of litigation that is governed by 'civil procedure'. Of course, this definition, although much more useful in comparative legal studies than the definition mentioned in the initial paragraph, is not ideal either, for parts of the law that in some countries are brought under the heading 'civil procedure' cannot be brought under it. Problematic areas are, for example, the rules on judicial organisation, enforcement, and the rules on cases which do not involve the adjudication of contested matter but the performance of acts of an 'administrative' nature by a court of law (for example, the appointment of a guardian).

Apart from problems of definition, other difficulties specific to comparative legal research in the area of civil procedure can be mentioned. In a well-known article, J.H. Langbein, for example, criticises comparative legal research in American and German civil procedure by Johnson & Drew. Johnson & Drew came to the conclusion that American courts are 'undermanned' when compared to the much greater number of judges *per capita* in Germany. Langbein, however, points out that there is a fundamental difference between American and German civil procedure which makes this conclusion doubtful. He states that many of the tasks that are performed by the court in Germany are performed by the parties and their counsel in the American adversarial system. Therefore, a smaller number of judges is required (Langbein, 1979).

In the next paragraphs we will focus on a selection of topics that are of interest from a comparative legal point of view. First, some remarks will be made on 'families of civil procedure'. Next, fundamental and other principles of civil procedure will be discussed. Thirdly, contemporary trends and developments in civil procedure in the various national systems of civil procedure will be addressed. Finally, some remarks will be made on harmonisation of civil procedural law (on these and related topics also, for example, Kaplan, 1960; Cappelletti, 1989; Jolowicz, 1990; Markesinis, 1990; Habscheid, 1991; Grunsky, 1992; Lemmens & Taelman, 1994-…; Civil Procedure in Europe, 1997-…; Jacob, 1998; Carpi & Lupoi, 2001; Stürner, 2001; Kötz, 2003; Storme, 2003).

1. Families of civil procedure

At least two large families of civil procedure may be distinguished in today's world: those that find their origin in the Common Law and those that have developed on the basis of the Romano-canonical procedure (Van Caenegem, 1973; Van Rhee, 2000).

The Common Law family is, of course, the result of the expansion of the British Empire, which brought the English system of civil litigation to places all over the world, for example the United States of America, Canada, Australia, India and South Africa.

Originally, the distinction between Common Law and Equity, which today is mainly relevant in the area of substantive law, also played a role in the field of procedure. In England, the three superior courts of Common Law (King's Bench, Common Pleas and Exchequer) knew the writ system with its forms of action. Litigation could only be commenced if a suitable remedy was available and, because the available writs in the register of writs became fixed, this was not necessarily the case. The English Courts of Equity (basically the Court of Chancery and the Equity side of the Exchequer) knew a procedure that was more akin to the Romano-canonical procedure of the European Continent. In equitable cases, the Chancery was not bound by a fixed list of writs.

In the nineteenth century, this system changed considerably. The first step was taken in the United States of America. There, the 1848 Code of Procedure of the State of New York, drafted by David Dudley Field (1805-1894), was to some extent influenced by the Romano-canonical model and abolished the distinction between Common Law and Equity in the field of procedure. It introduced a uniform procedure for Common Law and Equity which knew only one 'form of action', that is the 'civil action' (Clark, 1993; Van Rhee, 2003).

Other Common Law countries followed suit. In India, for example, this happened with the introduction of the 1859 Code of Civil Procedure, whereas in England itself the Judicature Acts 1873-1875 brought about a system that resembled, to a certain extent, the system of the 1848 New York Code (Van Rhee, 2005). South Africa is a special case. After the Cape had been taken over by England from the Dutch in 1795, the Roman-Dutch law continued to reign supreme in the field of substantive law. However, a procedural system was introduced that was based on English law. An important difference between England and South Africa was that in the latter country the distinction between Common Law and Equity was not introduced in the field of procedure because it was absent in substantive law; substantive law remained Roman-Dutch (De Vos, 2002).

On the Continent of Europe, the medieval Romano-canonical procedure formed the basis of further developments. It was not only based on Roman law, but also on canons from the second part of Gratian's *Decretum*, the law of northern Italian cities and papal decretals. Originally applied within the ecclesiastical sphere, the learned Romano-canonical procedure soon became the model for the modernisation of procedural law within the secular courts. In Europe, most superior courts like the *Reichskammergericht* for the German States, the French *Parlement de Paris*, as well as the *Grand Conseil de Malines* in the Low Countries knew a procedure that was inspired by the learned Romano-canonical model. During the so-called 'codification period' (roughly the late 18th century until – in some countries - the end of the nineteenth century), the learned procedure exerted considerable influence, both in a positive and in a negative way. In a positive way because many of its basic features were adopted by the codes of civil procedure that were introduced all over Europe (often through the intermediary of the 1806 French *Code de procédure civile*), and in a negative way, because various features that were felt to be unsuitable to nineteenth century conditions were substituted by their opposite (an oral instead of a written procedure, the hearing of witnesses in public instead of behind closed doors) (Van Caenegem, 1973; Van Rhee, 2000).

An aspect of the Romano-canonical procedure that was left untouched by many of the Codes was the relatively passive position of the judge which resulted in undue delay and high costs. An

early but in the end unsuccessful attempt to introduce an active judge was the First Book of the *Corpus Iuris Fridericianum* of Frederic the Great of Prussia, dating from 1781. More successful was the procedural model advocated in Austria by Franz Klein (1854-1926) at the end of the nineteenth century. This model became the focus of attention in Continental Europe and beyond (Jelinek, 1991). In his programmatic work *Pro Futuro* Klein stated, amongst other things, that an active judge would be a solution to undue delay and high costs (Klein, 1891). The judge should establish the 'substantive truth' instead of basing his judgment on the truth as fabricated by the parties (the 'formal truth'). Klein's 1895 Code of Civil Procedure became very influential outside Austria and paved the way to an approach of civil procedural law which at the end of the twentieth century even became popular in England with its traditionally adversarial model of civil litigation. The 1998 English Civil Procedure Rules are the result of this development. Currently, the keyword in many countries is 'co-operation' between the parties and between the judge and the parties (see also Stadler, 2003, 57, 69).

2. Fundamental principles and 'other' principles of civil procedure

A distinction must be made between fundamental principles and 'other' principles of civil procedure. Fundamental principles of civil procedure may be seen as standards to fulfil the requirements of justice (Andrews, 2003, No. 3.02). When these principles are ignored, one cannot speak of a fair trial. Other principles of civil procedure are not fundamental, but are nevertheless observed in many jurisdictions. If they are ignored, however, the fairness of the trial is not immediately endangered.

Although the precise content of a list of fundamental principles of civil procedure is subject to debate - one may think of the right to trial by jury of the 7th Amendment to the Constitution of the United States, a right which even in England is absent in most civil cases (Andrews, 2003, ch. 34) - many fundamental principles are widely shared throughout the world. Exemplary for the codification of (fundamental) principles of civil procedure in a national code are the *principes directeurs du procès* of the French Code of Civil Procedure. These Guiding Procedural Principles take the form of a chapter at the start of the Code. This Chapter is divided into ten sections devoted, respectively, to the judicial proceedings (Section 1, Articles 1-3), the subject-matter of the dispute (Section 2, Articles 4-5), facts (Section 3, Articles 6-8), evidence (Section 4, Articles 10-11), law (Section 5, Articles 12-13), adversarial procedure (Section 6, Articles 14-17), defence (Section 7, Articles 18-20), conciliation (Section 8, Article 21), oral arguments (Section 9, Articles 22-23) and the duty of restraint (Section 10, Article 24) (Cadiet, 2005).

Fundamental principles of civil procedure have shaped and continue to shape civil procedure in many countries. A good example are the principles that may be found in Article 6 of the European Convention of Human Rights (on a world wide scale, Article 14(1) of the International Convenant on Civil and Political Rights of the United Nations contains similar guarantees). Only the first paragraph of Article 6 ECHR is applicable to civil litigation. It lays down that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' After a somewhat dormant existence in the years following the coming into force of the European Convention on 3 September 1953, Article 6 now figures prominently in the case-law of the European Court of Human Rights. On the basis of it, the European Court has worked out a detailed scheme of fundamental principles that must be observed by the Courts of the Members States of the Council of Europe (Jacobs & White, 2002, 139-170; Andrews, 2003, ch. 7). Article 6 ECHR has had a harmonising effect on the systems of civil procedure in Europe.

Apart from fundamental principles, ‘other’ principles of civil procedure may be distinguished. A combination of fundamental and ‘other’ principles may be found in the Principles (and Rules) of Transnational Civil Procedure that are currently being prepared within the framework of the American Law Institute and UNIDROIT (Hazard, Taruffo, Stürner & Gidi, 2001; UNIDROIT 2004, Study LXXVI-Doc. 11; American Law Institute & UNIDROIT, 2006). The project was instigated by the American Law Institute and aimed originally solely at creating transnational rules for international commercial disputes. Later, when the project was incorporated within the framework of UNIDROIT in 2000, work on transnational principles started. Principles, which are less specific and broader than rules of procedure, may be better fit for the harmonisation of civil procedure. The fundamental principles that have been identified concern, amongst other things, the independence and impartiality of the court, the right to engage a lawyer and the right to be heard. An example of a principle that in our opinion cannot be classified as fundamental is the principle that the proceedings shall ordinarily be conducted in the language of the court.

The drafters of the principles claim in their introductory paragraph that their principles may be implemented by a national system in different manners: either by statute or a set of rules or by way of an international treaty. Case-law of national courts could in their opinion also play a role.

3. Trends and Developments in the national systems of civil procedure

Civil procedure changes quickly. Throughout the world several general trends and developments can be perceived.

First of all, there is the age-old problem of high costs and undue delay (Van Rhee, 2004). High costs and undue delay are according to some currently even more problematic than in the past due to the increase in litigation rates during the last few decades (Zuckerman, 1999, 42). Various strategies have been employed to fight this problem. The cheapest, and therefore a popular strategy is the introduction of new rules of civil procedure. Reorganising the courts and additional funding is another approach. A change in procedural culture is a third option. This option is currently advocated in countries like England and The Netherlands. In practice combinations of these approaches may be chosen.

Undue delay and high costs may give rise to a review of the triangular relationship between the judge and the parties or aspects of it. A distinction is often made between two theoretical extremes: the inquisitorial model and the adversarial model (Jolowicz, 2003). In a purely adversarial system the judge acts as an umpire. He does nothing but listen to what the parties put before him and declares a ‘winner’ in his judgement. In a pure inquisitorial procedure the judge has an active, dominant role. He is, for example, involved in the framing of the issues and the gathering of the evidence. Neither extremes exist in practice. Nevertheless, the United States of America and, before the introduction of the 1998 Civil Procedure Rules, England are often seen as examples of systems tending towards the adversarial model. The Civil Law systems are categorised as less adversarial (the adjective ‘inquisitorial’ instead of ‘less adversarial’ is often used by English and American authors). This is due to the fact that in these systems the judge is more active than his Anglo-American counterpart. The differences, however, can easily be exaggerated. Throughout most systems of civil procedure the parties enjoy a certain degree of autonomy. The decision whether or not to initiate legal proceedings is left to their decision, they decide about the subject-matter that is put before the court, and it is also usually the parties who decide whether or not to make use of available procedural techniques and instruments.

The role of the judge is changing or has changed in many jurisdictions. As stated above, this happened in Austria at an early moment as a result of the 1895 Code if Civil Procedure

(Oberhammer & Domej, 2005). French law gradually changed from 1935 onwards, giving the *juge chargé de suivre la procedure* (the expression *juge-rapporteur* became more common) and later the *juge de la mise en état* certain case management powers (Wijffels, 2005). Recent changes in English law also reveal a clear shift in control over the procedure from the parties to the judge. Lord Woolf, the 'father' of the 1998 English Civil Procedure Rules, identified the adversarial culture as one of the main reasons why English procedure before the reforms was slow and expensive.

In the United States, case management has also been on the agenda since experiments in this field were started in the pre-trial stage at the Circuit Court of Wayne County, Michigan, sitting in Detroit in the 1920s (Epp, 1991, 715-717). However, during trial the adversarial model is largely left untouched and hence the procedural system of the USA is very different from European procedural models. The role of the American judge in civil proceedings has been the subject of discussion during the last few decades. This discussion was started by a celebrated article of J.H. Langbein, entitled 'The German Advantage in Civil Procedure' (Langbein, 1985). In complex litigation in the United States Langbein saw 'growing manifestations of judicial control of fact-gathering'. He stated: 'Having now made the great leap from adversary control to judicial control of fact-gathering, we would need to take one further step to achieve real convergence with the German tradition: from judicial control to judicial conduct of the fact-gathering process. In the success of managerial judging, I see telling evidence [….] that judicial fact-gathering could work well in a system that preserved much of the rest of what we now have in civil procedure'. Langbein has triggered a discussion that continues until this very day (Allen, Köck, Riecherberg & Rosen, 1988; Bryan, 2004).

Apart from giving the judge a more active role, another strategy to decrease costs and undue delay is tailoring the procedure to the complexity of the case. This has resulted in the introduction of summary procedures for small claims litigation in many countries. In Austria, for example, summary proceedings for debt collection (*Mahnverfahren*) are obligatory for money claims not exceeding 30.000 Euro. In Poland there is a simplified fast-track procedure for small claims since the Reform of Civil Procedure in 2000. In England a small claims procedure was introduced in 1974, at first limited to claims under £100. Later this was changed to £1000. With the introduction of the 1998 Civil Procedural Rules the amount was raised further to £5000 for the majority of cases (Andrews, 2003, No. 22.01). Also as regards more complicated cases there is differentiation in England; the two other procedural tracks that are available are the fast-track and the multi-track.

At the European level a Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation has been issued in 2002 (COM (2002) 746 final, 20.12.2002). In this respect, one may also refer to the European Directive combating late payment in commercial transactions (2000/35/EC, 29.06.2000, Official Journal 2000 L200, 35-38).

A third way to reduce litigation costs and undue delay is avoiding litigation altogether or to stop it at an early stage. There is an increasing interest in Alternative Dispute Resolution (ADR) such as, for example, mediation, mini-trial and arbitration. Many countries have passed legislation to encourage ADR. In Austria, for example, legislation on mediation (*Mediationgesetz*) has been accepted by the *Nationalrat* recently. In Belgium new legislation in this field has been adopted by Parliament (new Sections 1724-1737 of the Belgian Judicial Code). Also on the supra-national level an interest has been shown in ADR. Within the framework of the Council of Europe, the Committee of Experts on the Efficiency of Justice (CJ-EJ) examines questions connected with

mediation as an alternative to court proceedings in civil cases. The European Union has published a Green Paper on the issue of ADR, regarding alternative methods as an important means to enhance access to justice (COM (2002) 196 final, 19.04.2002). In addition the European Commission issued a preliminary draft proposal for a directive on certain aspects of mediation in civil and commercial matters in 2004 (COD/2004/0251).

Apart from the three methods to combat undue delay and costs mentioned above, a multitude of other approaches to curb undue delay and costs exist in different national legal systems. An interesting example is the Austrian *Fristsetzungsantrag* or 'application to set a time-limit'. By way of this application the parties may file a request with a higher court to order the lower court to perform a requested procedural act within a certain time-limit. The application is, however, rarely used, most likely because it may give rise to further delay (Oberhammer, 2004, 230). Another example is the use of IT technologies. In some countries (for example, Austria and Germany) electronic communication is used at a large scale, whereas other countries (for example, The Netherlands) are behind in this respect.

Some authors are extremely sceptical as regards the effectiveness of reform in civil procedure in order to address problems in civil litigation (Leubsdorf, 1999). Indeed, history shows us that the effects of reform projects were often short-lived (Van Rhee, 2004). It is therefore still an open question whether, for example, the new English Civil Procedure Rules 1998 will have a lasting impact. First signs are, however, positive.

4. Harmonisation of civil procedural law

In many fields of law efforts are made to reduce the differences between the existing national legal systems (on fundamental similarities in and differences among procedural systems, see Hazard, Taruffo, Stürner & Gidi, 2001, 772ff). This is also true in the area of procedural law even though harmonisation of procedural law may pose specific difficulties due to the fact that it is closely related to court organisation: a change in procedural rules may necessitate changes in court organisation and this often turns out to be an insurmountable problem, if only for political reasons. This is very clear where the harmonisation of the rules on recourse against judgements is at stake (on 'harmonisation' and the related concept of 'approximation', see Hazard, Taruffo, Stürner & Gidi, 2001, 769-772).

Some authors claim that harmonisation of procedural law may have negative consequences, for example if it means that a country with an efficient system will have to change its rules in order to comply with a common standard that is less efficient (Lindblom, 1997). Others are of the opinion that harmonisation of procedural law should be pursued due to its benefits. It could, for example, simplify transnational proceedings and cut transaction costs. Harmonisation may also safeguard preceding substantive law harmonisation (Kerameus, 1998; Schwartze, 2000).

The authors who are in favour of harmonisation also claim that the harmonisation of civil procedure is highly feasible. In their view one reason for this is that the unification of procedural law may have a fragmentary character: '[…] specific procedures can be unified or only a partial degree of unification can be carried out. This is more difficult in substantive law, where there is a greater tendency towards overall standardisation: the law of contracts and the law of bankruptcy, for instance, form a coherent whole, so that it is difficult to put forward partial reforms' (Storme, 1994, 54).

In the context of the European Union Article 65 of the Treaty Establishing the European Community (cf. Articles III-158 and III-170 of the European Convention), provides a legal basis

for the harmonisation of civil procedural law, at least as regards civil matters having cross-border implications and in so far as necessary for the proper functioning of the internal market (Drappatz, 2002). Although the field of operation of Article 65 ECT is still unclear (Hess, 2002, 13-14), it is not unlikely, that in the future Article 65 ECT or its successors will also be of significance for cases which are currently qualified as purely national (especially Article 65 sub c may be relevant in this context, which allows measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States).

An important question is how procedural harmonisation can be achieved (Kerameus 1990; Stürner, 1992). One of approach is the drafting of a model code. An example is the *Codigo Procesal Civil Modelo para Iberoamerica* (1988). Although this code has no binding force, it is a model for reforms in procedural law in Latin America. An early example of its influence is the 1989 *Codigo General del Proceso* in Uruguay (Storme, 1994, 42).

A project aiming at partial harmonisation is that of a working group chaired by Professor Marcel Storme from Ghent. In their report, published in 1994, the working group presented a series of Articles with explanations aiming at the harmonisation of civil procedural law in the European Union (Storme, 1994). The topics that were addressed are: Conciliation, The Commencement of the Proceedings, Subject Matter of Litigation, Discovery, Evidence, Technology and Proof, Discontinuance, Default, Costs, Provisional Remedies, Order for Payment, Enforcement of Judgements or Order for the Payment of Money, *Astreinte*, Computation of Time, Nullities, and Rules relating to Judges and Judgements. The proposal is aimed at a European directive (see also Schwartze, 2000, 143).

An earlier attempt by the Council of Europe (*Principes de procédure civile propres à améliorer le fonctionnement de la justice*) was more restriced. The Council's recommendation of 1984 addressed the formal course of proceedings (Council of Europe, R (84) 5, 28.02.1984). Part of its aims was to speed up the litigation process (Schwartze, 2000, 143).

The Storme Report has triggered some discussion. It was criticised by P.H. Lindblom (Lindblom, 1997). The main thrust of his criticism was that partial harmonisation will lead to great complexity because of the need to deal with the interaction between harmonised and non-harmonised rules. The author states that an analysis of the Storme Commission proposal demonstrates that they leave considerable uncertainty as to the remaining role of national laws, and that they would not gain universal acceptance because they would conflict with the approach adopted in some jurisdictions.

The Storme Report was followed by another project in the field of the harmonisation of civil procedural law: The Principles and Rules of Transnational Civil Procedure, drafted within the framework of the American Law Institute and UNIDROIT (Hazard, Taruffo, Stürner & Gidi, 2001; UNIDROIT 2004, Study LXXVI-Doc. 11; American Law Institute & UNIDROIT, 2006). These Principles and Rules aim at providing a framework that a country might adopt for the adjudication of disputes arising from international transactions that find their way into the ordinary courts of justice. The project is inspired in part by the model of the Federal Rules of Civil Procedure in the United States. The Transnational Civil Procedure Project conjectures that a procedure for litigation in transactions across national boundaries is also worth the attempt.

Apart from the above projects, it seems that systems of civil procedure have a tendency to converge 'naturally' due to the increasing contacts between the systems. There is, for example,

reason to believe that the divide between Common Law and Civil Law countries is narrowing (Van Rhee, 2003). The forms of action, that set civil procedure in civil and Common Law countries apart, have been abandoned in most, if not all, Common Law jurisdictions during the nineteenth and twentieth centuries (Van Rhee, 2003). Apart from the United States of America, the Anglo-American civil jury has nearly disappeared from the legal landscape. Written elements gain in importance in civil litigation in Common Law countries (for example, witness statements in England which may serve as an alternative for examination in chief) (Zuckerman, 1999, 47). Currently, the adversarial system is under attack. England has witnessed a major reform in this respect. As stated above, the role of the judge has been strengthened in this country, giving him extensive case-management powers. Consequently, the English judge has become much more like his Continental European counterpart (Stadler, 2003, 56).

At the same time the law of civil procedure of many Civil Law countries changes, bringing this procedure nearer to Common Law examples. Orality, for examples, which traditionally did not play a significant role in the systems that found their origin in the Romano-canonical procedure, has been on the rise ever since the nineteenth century (Van Rhee, 2005). At the same time, Continental procedural lawyers show an interest in various elements of English civil procedure, such as, for example, discovery and pre-action protocols.

Apart from harmonisation projects and the ‘natural’ movement of systems of civil procedure in each others direction, some influential international regulations and conventions play a harmonising role (Werlauf, 1999). Some of these have already been mentioned, for example, Article 6 of the European Convention of Human Rights. Within Europe the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in civil and commercial matters has been important. The Convention originally only applied to the then six Member States of the European Community, but became more influential when the Community/Union expanded. The Brussels Convention has recently been converted into a European Regulation (EC No. 44/2001, 22.12.2000, Official Journal L012 1-23). This Regulation is applicable to all Member States except from Denmark.

In 1988 the parallel Lugano Convention was put into place. This Convention aims at international cases involving the Member States of the European Union and the Members of the European Free Trade Association (Schwartze, 2000, 141-142).

On a world-wide scale harmonisation is due to various Conventions on civil procedural topics drafted by the Hague Conference on Private International Law. An example is the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (1970).

Conclusion

The authors of the present article hope to have demonstrated that in the area of civil procedure some of the major differences that for a long time have set the various systems of civil procedure in the world apart from each other are disappearing. This occurs especially in those parts of the world, where the systems of civil procedure are in close contact with each other, for example in the European Union. There, the divide between the Common Law jurisdictions and the Civil Law jurisdictions has become less pronounced than in the past.

Whether or not harmonisation of civil procedure is a goal that should be pursued is open to discussion, as is the question how it should be pursued. Evidently the drafters of documents aiming at harmonisation are convinced of its benefits. Examples of such documents have been discussed in the present article, for example the model code of civil procedure in Latin

American, or the Rules and Principles of Transnational Civil Procedure on a world-wide scale. However, even if one is not convinced of the blessings of harmonisation, it is clear that these documents and especially the comparative legal research on which they were based and to which they have given rise may contribute to a better understanding of the differences and similarities in the existing systems of civil procedure in today's world. They may also give the procedural lawyer an insight into the shortcomings of the various procedural systems and into the question how these may be addressed. An example is the age-old problem of undue delay and high costs, the solution of which will certainly benefit from comparative research in civil procedure. That comparative scholarship in civil procedure is indeed a fruitful enterprise is demonstrated by the ongoing discussion on the 'German Advantage in Civil Procedure' triggered by J.H. Langbein in 1985. This discussion is still with us today and those scholars who have followed it will most likely underwrite our opinion that it has thoroughly deepened our insight in a multitude of procedural questions.

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