Chapter 1
Goals of Civil Justice and Civil Procedure in the Contemporary World

Global Developments – Towards Harmonisation (and Back)

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Abstract Some of the most thrilling topics of civil procedure are those that revisit its very roots. What are the goals of civil justice? This question seems to be simple only on the surface, viewed from the closed perspective of national law and jurisprudence. However, the moment when we embark on a comparative journey, the adventure starts. How do the goals of civil justice differ from country to country? Are they compatible? Is it possible at all to speak of the universal tasks of civil justice in the contemporary world? And, if not, are we making a mistake when we consider that 'judges' and 'courts' have the same meaning and same importance in all cultures? In this chapter, the author presents a synthetic study on these issues, based on the reports that present a particular approach to the goals of civil justice and civil procedure from the angle of a representative set of different contemporary legal traditions and systems.

1.1 Introduction

What is the goal of courts and judges in civil matters in the contemporary world? It would be easy to state the obvious and repeat that in all justice systems of the world the role of civil justice is to apply the applicable substantive law to the established facts in an impartial manner, and pronounce fair and accurate judgments. The devil is, as always, in the details. What is the perception of an American judge about his or her social role and function, and does it correspond to the perception of the judge in the People's Republic of China? What are the prevailing opinions on the goals of civil justice in doctrine and case law of Russia and Brazil? Do courts in

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Hong Kong and in Hungary understand in the same way the need to balance accuracy and speed of court procedures, or to take into account public interests when adjudicating civil disputes?

The research presented in this book addresses the same set of these and other fundamental questions from the angle of various legal traditions in the contemporary world. It presents insights of reputed and knowledgeable authors who were able to bring profound insights from almost all corners of the globe. Indeed, in a small book it is difficult to claim that all globally relevant national systems of civil justice are covered. Instead, we tried to collect some typical and representative insights from major legal traditions, respecting at the same time geographical, cultural, political and historic diversity. In addition to contributions from Europe, Asia and North and South America, this book contains views from both the common law countries and the civil law countries. The contributions also cover the span of ideologically very different viewpoints (e.g. from the USA and mainland China), but also contain material regarding the countries that may be generally categorised as countries in a (post-) transition (Hungary, Russia, Slovenia, Croatia). The jurisdictions covered also display various levels of trust in their civil justice, which often correspond to the rather diverse levels of the overall effectiveness of their civil justice; it suffices to note the contrast between generally well-functioning systems, as in Norway or the Netherlands, and those burdened with systemic deficiencies, as in Italy or Croatia.

Through the prism of the main question about the goals of civil justice, the papers collected in this book touch upon some of the most topical issues of contemporary legal and judicial reforms. What matters are regarded as being typical, important matters that deserve judicial attention, and what is the collateral task that may and should be outsourced to other state agencies or private professionals? Should civil courts deal with registers, enforcement and collection of uncontested debt, or should they stick to dispute resolution in contested matters? Do all civil disputes deserve equal attention and thorough deliberation of all factual and legal aspects, or should they be awarded only that level of attention that is proportionate to their social importance? When dealing with cases, should the principal task of civil judges be to resolve 'hard cases' that raise difficult new issues of law and facts, or should they instead focus on steady and fast mass processing of routine cases? All these and other issues have a profound impact on the social image and perception of the judiciary, and define expectations that citizens have from the courts in their country. On the other hand, the state authorities also give rather different assignments to their judicial bodies. Dispensing justice may be only one of them – contemporary trends demonstrate that civil courts face increasing pressure to focus on costs, and even provide their services on a quasi-commercial basis. On the other side of the spectrum are the expectations to implement high social goals and public policies while making decisions in private disputes, such as the need to achieve social harmony or objective truth. Civil justice today has many faces. This book should help the interested reader from any given legal tradition to recognise and understand them.

The purpose of this introductory chapter is to summarise the main ideas presented in the 11 chapters that follow. They were motivated by the questionnaire

which was distributed to the authors (see Annex A below). In spite of the fact that the approach to the flagged issues and questions was rather diverse, this chapter basically follows the structure of the questionnaire. It will start with the section on the general attitude and doctrinal opinions on the goals of civil justice. However, as ideology often differs from reality, in the following sections some particular topics which can help explain these goals will be discussed:

- The matters regarded as being within the scope of civil justice (in particular, whether the goal of civil justice is confined to litigation, or also includes other, non-contested matters);
- The balance between the protection of individual rights and the public interest;
- The balance between the desire to reach accurate results ('material truth') and the need to ensure trial within a reasonable time;
- The level to which the civil justice system sees its goal in the handling of 'hard cases', as opposed to the routine mass processing of a large number of cases;
- (Non-) recognition of the principle of proportionality;
- The level to which civil justice sees its task as the resolution of complex, multi-party matters;
- The balance between strict formalism and the wish to reach equitable and fair results;
- The precedence of approaches to civil justice: problem solving v. case processing;
- The level to which civil justice is understood as a freely available public service – as opposed to a quasi-commercial source of revenue for the public budget; and
- Self-understanding of the goals of civil justice – user-orientation (satisfying the wishes of the public), or self-centred goals (satisfying the criteria set by 'insiders' – judges, higher courts, lawyers, etc.).

1.2 The Two Main Goals of Civil Justice

For some, the topic of the goals of civil justice may seem to be an old, exhausted subject. The standard textbooks of civil procedure pay lip-service to this issue. It is usually part of an obligatory introduction, repeating outworn formulas, a more or less attempt to exercise the private style or originality of the author. Defining the general goals of civil justice at least in some of the national legal systems does not stir much interest among the legal community, and the focus is rather on pragmatic and practical solutions, on the micro-management of affairs (Silvestri: 4.1).[1]

Yet, as the following chapters will demonstrate, the topic of the goals of civil justice is at present tending to be revived. A thorough discussion or even a full reconceptualisation of the goals of civil justice may be a precondition for successful procedural reforms – especially if it is desired that such reforms be deep, far-reaching

[1] The papers collected in this book will be cited by the name of the author and the number of the section.

and effective. The most successful procedural reforms of the past, from Franz Klein's reforms in the 1890s to the Lord Woolf reforms in the 1990s, were rooted in the profound perception of the procedural goals – social function (Klein), or overriding objective (Woolf) – of civil justice. Today, the goals of civil justice are being discussed and used as arguments and counter-arguments in the context of many jurisdictions. Among those, the conceptual discussion contrasting the various perceptions of the goals of civil justice is on-going, for example in the Netherlands (Van Rhee: 3.1), and it was also behind the 2009 reform of the CJR in Hong Kong (Chan and Chan: 7.2). Even in the common law countries, such as the United States, where civil justice evolved organically and its founding principles were traditionally not a subject of scholarly work, the goals of the process became an interesting topic, as demonstrated by the works of Damaška, Scott and others (Marcus: 6.3). The oscillating balance between the opposed goals is behind many important changes in procedural law and practice, which can best be illustrated in the examples of the countries that are undergoing dynamic social changes, such as mainland China, and transitioning countries in Europe, such as Russia. As pointedly put forward by Professor Silvestri, some justice systems require radical reforms, 'and no radical reforms can be devised unless they are prepared by a thorough process aimed at identifying which goals must or can be reached' (Silvestri: 3.1).

Several authors in this book mention that there is no general consensus about the goals (functions, purposes, aims) of civil procedure. Indeed, there may be many forms of expressing the ideas upon which civil justice is founded. But, it is striking that, in the end, all collected papers speak of the goals of civil justice in surprisingly similar terms. The words may be different, but all authors present the goals as a contrast between two main approaches, whereby any given system of civil justice may be defined by the balance (or imbalance) reached between them.

The two main goals of civil justice may be in the broadest sense defined as:

- resolution of individual disputes by the system of state courts; and
- implementation of social goals, functions and policies.

In various doctrinal works, these goals have different names. For the first, the conflict-resolution (dispute-resolution, conflict-solving) goal is often spoken of. The second, the policy-implementation goal, is more difficult to denote uniformly, as the social policies and functions that civil justice should have may be rather diverse and serve different political or social ideologies or paradigms.[2]

The two goals of civil justice are almost never fully separated. But, the balance between them may be very different, and may shift over time. The relative weight and importance attributed to the interests of the individuals in the dispute, and the level and scope to which others (including the state and its officials) may or should intervene in order to protect trans-individual (collective, social, political, national, state, etc.) interests may be quite different. The tasks of civil justice or matters regarded as being within its scope may also be influenced by the one or the other

[2] On the general level, the conflict-resolution and policy-implementation goals are elaborated in the still topical book by Mirjan Damaška (1986).

goal – e.g. while the conflict-resolution goal would use civil justice only for the settlement of contested matters, the policy-implementation goal may have an impact on the transfer of jurisdiction to civil justice for a number of other purposes (from the holding of public registers to decision making in non-contested matters; see more at Sect. 1.3 below). Moreover, the implementation of social goals may also play a role at the level of system design, as the state may encourage or discourage the use of civil justice (or its use in a particular way) for reaching the other, external goals (i.e. private enforcement of public law rights, as is the case in the USA; correcting inappropriate government activity, as is the case in Brazil; or achieving social harmony, as is the case in China).[3] In order to explain the opposition of the two goals, it may be useful to briefly present the extremes, which may serve as the ideal type models or reference points for the presentation of the current situation.

The exclusive focus of civil justice on the conflict-resolution goal was historically associated with the liberal states of the nineteenth century. In its purest form, this goal concentrates only on the enforcement of the challenged rights of individuals, and sees the function of civil justice in providing a neutral forum which is put at the disposal of the litigants in order to evade resorting to self-help. As an instrument of the reactive liberal state, civil justice had to provide its services in the way that would ensure a minimum of intervention. Just as the *laissez-faire* economy refrains from intervening in the business transactions between private parties, the liberal system of civil justice refrains from intervening in the legal transactions of private law, by giving the maximum powers to the litigants. In the same way as the owners in a classic liberal state possess an absolute freedom to dispose of their property, the litigants in a civil litigation have an absolute freedom to dispose with their claims and with the process as a whole – they are *domini litis,* the masters of civil litigation. Under the principle of minimum intervention, the role of the state and its officials – judges – is limited to the role of a referee, who passively observes the interplay of the parties, maintains the observance of the rules of the game, and only in the end (if ultimately necessary) intervenes and makes a decision. The end result, in the interest of putting an end to the conflict, must therefore be final – *res iudicata* – but it affects only the parties (*facit ius inter partes*), and is none of anybody else's business. From the state's perspective, the only systemic interest is to keep its conflict-resolution services running at the minimum cost, while at the same time still fulfilling the main task – diverting the private parties from resorting to forcible self-help (Marcus: 6.2, citing Posner).

The other extreme as regards the balance between the individual and collective interests may be found in the Marxist critique of the (private) law. In fact, the most radical approach argues that the conflict-resolution machinery of the state is, by its focus on the interests of private individuals (private property, private entrepreneurs), in its essence bourgeois and anti-social, and that it should be abandoned or at least radically restructured. As Lenin argued, the comfortable illusion about the neutrality and the objectivity of the liberal justice system was wrong. He stated that 'all bourgeois law is private law', and as such reflects a capitalistic, imperialistic,

[3] See Chaps. 6, 12 and 8 written by Marcus; Wambier; Fu.

exploitative system of government (Lenin 1918; Merryman and Pérez-Perdomo 2007: 95). In reversing this submission, all law, on the contrary, should become public law, meaning that civil justice (to the extent that it temporarily remained indispensable) should also become an instrument of the economic and social policy of the socialist state (Vyshinsky 1950: §1). To that extent, the conflict-resolution function in civil procedure would in principle have no particular value in itself – it should be viewed only within the broader context of the implementation of desired social and political goals. The individualistic element should be controlled and put in the function of social(ist) aims and targets. Even more so because it was also, as an expression of *a priori* negative remnants of private rights and private property, ideologically suspect. Therefore, in a system of civil justice founded exclusively on policy-implementation goals, we may encounter an interesting mix of two features – the general marginalisation of civil justice, and the paternalistic state control of individual litigants (Uzelac 2010: 382–387). The weak powers of the parties in the process could be in theory contrasted with the strong powers of the judge. But in fact, the state intervention needed to control private actions of the parties, and steer them towards the benefit of the society, could happen on multiple levels (from local to national, from the lowest to the highest courts and judges), by a multitude of officials (most prominently, by state prosecutors) and at any point in time (irrespective whether the decision has become formally final or not). To that extent, the passive parties in such an activist state did not stand in contrast to active judges. The judges were rather passive – bound to follow political instructions (either directly or through the concept of 'socialist legality') and controlled and scrutinised at many levels (including the political control at the time of their appointment and periodical re-election). To that extent, the concept of civil justice rooted in an extreme policy-implementation goal leads more to the general passivisation and marginalisation of civil procedure, rather than to (as sometimes incorrectly interpreted) civil procedure characterised by an omnipotent judge and passive parties.[4]

All papers collected in this book depict civil justice systems that see their role and social task somewhere between these two extremes. None of them is pure, in the sense that none of them denies completely either the conflict-resolution or the policy-implementation goal of civil justice. Several authors speak of the multitude of goals (e.g. Chan and Chan, in Chap. 7), but in my opinion all of them could fall either under the first or the second main goal.

The systemic position and relative importance of the first or the second goal are, of course, different. The first apparent contrast may be between the jurisdictions that generally shy away from resolving disputes by court judgments, like mainland China, and those that, on the contrary, tend to use the courts and court judgments in private matters in a large number of areas, also in cases that would in other places be handled by other means, like the USA. However, this contrast may be softened upon closer examination. While Professor Fu clearly states that the 'the courts [in China] are often viewed as a tool to promote policies and serve political needs'

[4]A very good portrait of such practice of civil procedure is given by Aleš Galič in respect to civil justice of socialist Yugoslavia (below: 11.6). See also Dika and Uzelac (1990).

(Fu: 8.1), the analysis by Professor Marcus may also imply, although in a somewhat different sense, that civil justice in America has the clear political purpose[5] of serving as a substitute for administrative modes of enforcement of legal rules. The widespread use of class actions and the use of punitive damages as methods of influencing or altering behaviour at the larger scale may also serve as examples that American civil justice has advanced far beyond the pure conflict-resolution model of the liberal state.[6]

In the civil law countries, the 'dualist conception' of the goals of civil procedure (Kengyel and Czoboly: 10.1) – the one that recognises both conflict resolution and the implementation of trans-individual policies – is expressed in other terms. While the conflict-resolution goal is often phrased similarly (as enforcement of substantive rights and obligations, authoritative determination of rights by provision of enforceable judgments, or resolution of disputes between individuals and businesses in accordance with the law), the expression of the policy-implementation goals is less uniform. In some countries depicted in this book, the trans-individual function of civil justice is expressed in terms of legal order: 'civil justice protects legal order as a whole' (Hungary), 'the goal is to maintain social order' (China), 'legal order proves itself through civil proceedings' (Austria) or 'the aim of civil procedure is to strengthen legality and law and order' (Russia). Some other formulas reveal more precisely the content of this goal and the way in which it transcends the individual interests of the litigants. Professor van Rhee speaks below (3.1) of two such particular goals – demonstrating the effectiveness of private law, and development and uniform application of private law. These two aspects include the elements of general prevention (based on the assumption that the citizens will be more likely to act in accordance with the law if they see that it works in practice) and the elements of general recognition and acceptance of civil justice (based on the assumption that the citizens will be more likely to respect their obligations if they have a clear horizon of expectations, and see that the law is uniformly and reasonably interpreted by the courts, in the light of the social changes and the new requirements of the society).[7] It is safe to argue that these two aspects are among the most generally accepted and the least controversial aspects of the policies that are viewed as the goal of civil procedure.[8] In a narrow sense, both goals may even be compatible with the liberal, conflict-resolution concept of the goals of civil justice (if they are viewed exclusively from the perspective of effectiveness and costs).

[5] A good illustration of the opposition to the conflict-resolution approach is the quote from Fiss, who argued that the social function of the lawsuit should not be trivialised to only resolving private disputes (Marcus: 6.3).

[6] At least due to the relative infancy of collective litigation schemes, the civil justice systems of continental Europe and Latin America may be categorised closer to the classical liberal concept than to the USA.

[7] The preventive function is also noted with respect to Russia as one of the 'auxiliary aims' of civil procedure. For Germany, *Rechtsfortbildung* (development of law) is recognised as one of the important functions of civil procedure.

[8] However, new debates in some countries may show its relevance in a new light; see Sect. 1.10 below.

As a supplement to the preventive function of civil justice, some authors in this book speak of the educational goal and purpose of civil procedure. This purpose is, for example, noted in Article 2 of the Code of Civil Procedure of the Russian Federation (Nokhrin: 9.1). It is also noted with respect to China, though with the note that it is generally not achieved due to the easy and frequent challenges to final judgments (Fu: 8.12). The educational function was also frequently cited in the former socialist states, where it was put in the context of demonstration of political ideology. For that reason, this function is today rarely cited in the other states, especially the (post-) transition states.

Another indication of the policy-implementation goal of civil justice may be found in the concept of the socialisation of civil justice, understood in the sense that civil justice should promote social justice, and bring justice closer to the needs of the society at large. Although this concept was only conveyed in one chapter of this book, with a note that it was influential in the 1970s and early 1980s, and that it has today a 'retro flavour' (Silvestri: 4.2), the ideas of the access to justice movement should not be completely disregarded. It seems that, at least in continental Europe, it is often considered that civil courts should promote the equal opportunities of both parties to protect their rights and represent their interests in the process, which may require some forms of proactive behaviour on the part of the judges in order to secure the equal chances of the weaker party in the proceedings.

In the same direction, but a little bit further, goes the demand that civil procedure be in the service of achieving the overarching social goal of social harmony. This concept is, after the brief period of the strengthening of the conflict-resolution goal, since the 2000s again gaining momentum in China (Fu: 8.1, 8.4). In the Chinese context, the emphasis on the harmonious development of society is combined with the channelling of the civil cases towards judicial mediation. The 'broader aim of social harmonisation' is also noted among the goals of civil justice in Russia (Nokhrin: 9.1). In Russia, but also in the former socialist states of Central Europe such as Hungary, Slovenia or Croatia, another value that is or was listed among the goals of civil procedure is the pursuit, assertion and revelation of material/objective/substantive truth.[9] This goal, so Kengyel and Czoboly (below: 10.1), was at the centre of the concept of a civil action according to socialist procedural law. From the national reports, it seems that this goal plays, to the extent that it is still recognised in some countries, a much less prominent role today. However, establishing the truth in the proceedings is ranked among the goals of civil procedure also in Austria, as consistently recognised by decisions of its highest court.[10] In German procedural theory, the finding of substantive truth in civil procedure is also noted, but has an instrumental value, serving as a means to achieve the parties' acceptance of the decision, as well as the aim of legal certainty.[11] Whether the goal of civil proceedings is

[9] See Kengyel and Czoboly (below: 10.1); Nokhrin (below: 9.1, 9.4 – mentioning also as a general aim the search for 'social truth'); Galič (below: 11.6).

[10] Koller (2.1). However, the same court (OGH) balances this goal with the other goals, such as finality of judgments, or suppressing the use of illegally obtained evidence.

[11] Koller, ibid. (citing Brehm).

to establish substantive truth or not may be relevant for the concept of an active or passive judicial role in the proceedings, but can also have an effect on their overall effectiveness (or the lack thereof).

The discussion about the role of substantive truth (and substantive justice) is also connected to the general evaluation of the role of procedural formalism in the achievement of the goals of civil justice. Under a liberal conflict-resolution model, the procedural forms have a purpose in themselves. They are nothing but the rules of the game that have to be meticulously observed to guarantee the fairness of the outcome. But, it seems that the times when procedural formalism was a goal in itself are long gone. Even in Germany, which is often regarded as the fortress of formalism, there is a well-established line of case law originating from the *Reichsgericht* decision which held that procedure must not impede the enforcement of rights, and argued that even *res iudicata* must give way to the 'paramount goal of civil justice, which is, to reach justice in the individual case'.[12] The instrumental function of civil justice (or, as Bentham called it, the 'adjective function' of procedural law)[13] rejects the inherent values of the procedure, or at least trades them off against the external goals that have to be reached through the administration of justice. But, although 'excessive formalism' is today rejected even at the constitutional level (through the case law of the European Court of Human Rights),[14] it can hardly be argued that all procedural forms are *a priori* harmful, and that they should be gradually eliminated (as was the ideology in Soviet times). The formalism contributes to legal certainty and predictability, and to that extent can be compatible with moderate policy-implementation concepts.

The bare effectiveness – the ability to produce, in as many cases as possible, any sort of decision on civil rights and obligations within a reasonable time – also appears in the context of the discussion about the goals of civil justice. Although a functional and capable system of civil justice should be among the preconditions, and not the goals of civil justice, the grave problems in dealing with caseload and securing appropriate and predictable time for handling the matters entrusted to civil justice led to focusing on only one goal – to keep the system from falling apart, hoping to reduce caseload and shorten the length of the proceedings (Silvestri: 4.1). The Italian case may be one of the most dramatic ones, but many other civil justice systems, in particular in south-eastern Europe, suffer from systemic deficiencies that sublimate all procedural goals and their employment in only one direction – fighting against the tide of new cases and handling the overcrowded dockets of long-overdue matters. Whether this may be categorised as a goal in itself, or just a symptom and the reason for the absence of any (other) goals, may be a topic for discussion.

Partly for reasons described in the preceding paragraph, but also for several different reasons, a rather prominent and influential trend in the reconceptualisation of

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[12] Decision of the highest German court, BGH, from 1951, cited in Koller, ibid.

[13] See Marcus (below: 6.2); similarly the German *Reichtsgericht* spoke of the instrumental function (*dienende Funktion)* of procedural law; see Koller (below: 2.1.2).

[14] See more at Sect. 1.10 below.

procedural goals has emerged. It is the trend which seeks to improve the cost effectiveness of civil litigation, to reduce the expenses for civil justice paid from the taxpayers' purse, or even to require the civil justice system to produce revenues for the state budget. One of the forms of this trend is advancing the goal of proportionality, or, as reported by Peter and David Chan for Hong Kong, towards the concept of justice under which 'efficiency and expedition are as important as the correctness of the outcome' (quoting Zuckerman).[15] Such efficiency requires that the limited public resources for the justice system be distributed fairly and appropriately, *inter alia* by saving costs and time by active judicial case management and a continuing effort to streamline procedures (Chan and Chan: 7.2). According to Zuckerman's 'three-dimensional concept of justice', a contemporary civil justice should not focus on accurate and lawful decisions only, but should also take into the same equation the time and costs needed to deal with the case (Zuckerman 2009: 49, 69–71).

But, while the 'three-dimensional concept' in theory needs careful balancing of several factors (the social and individual importance of the court case, the expectations and needs of the society and the litigants, and the available resources), the cost awareness may be in some countries driven less by conscious attempts to improve the effectiveness, fairness and quality of the proceedings, and more by external factors, e.g. by the general policy of cutting public funds and expenses for public services. Such a situation, according to Professor van Rhee, may be found in the Netherlands, where the governmental policy to reduce expenses for civil justice has produced controversial plans to increase court fees and to mandate mediation. This is all happening under the same policy – the policy of discouraging litigation, which has to be only the *ultimum remedium,* the last resort if all other attempts by private parties to resolve the dispute fail. These plans led to a 'clash between the government on one side and lawyers and legal scholars on the other as regards the goals of civil justice', whereby the government advocated, more or less, a conflict-resolution model, while the other side opposed the reforms with references to the beneficial public effect (so-called positive externalities) of litigation on public order (Van Rhee: 3.1).

The transposition of general concepts of the goals of civil justice in concrete procedural designs may be better illustrated by analysing how the perception of procedural goals affects various topical issues of contemporary procedural law.

1.3 What Should Be the Object of Civil Justice? Various Matters Within the Jurisdiction of Civil Courts

The goals of civil justice may be closely connected with the scope of its work. As described above, the conflict-resolution goal is in many legal systems seen as the very core of the goals of civil justice. However, it is interesting to note that dealing

[15] Chan and Chan (below: 7.1.1); also see Zuckerman (2009: 49 and 71).

with dispute resolution, i.e. with disputed matters, for many national systems of civil justice constitutes only a minor part of their overall caseload.[16] Obviously, in most uncontested (or extra-contentious) cases[17] the policy goals and reasons are in the forefront. It is also noted that, in essence, the tasks of the courts in such proceedings are 'more or less administrative in nature'.[18] In fact, while the public and cultural image of judicial work is associated with adjudication, in cases such as issuing excerpts from land registers, appointment of guardians or stamping of payment orders while collecting uncontested debt, there is very little adjudication indeed. The use of courts for essentially non-judicial, administrative purposes is also the reason for the significant divergence among national justice systems: all civil courts deal with adjudication, but it depends on the political choice of each state as to how many other tasks will be transferred to the judiciary. Evaluated by the universal standards of due process, as expressed in Article 10 of the UN Universal Declaration of Human Rights or Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the residual right to have a contested case dealt with by the *courts* cannot be outsourced; but, all other matters and tasks are subject to the discretionary and changeable choice of state authorities. As modern societies become more complex, one can rarely encounter pure and logical distribution or functions, i.e. courts that only deal with dispute resolution, and the state or local administration that deals with the rest. Entrusting the judiciary with other duties, based on different motives and different reasons, seems to be popular in many parts of the world. In many countries, more and more 'externalities' are being transferred to the courts, from the regulation of family relations to the control of local elections.[19]

The national reports confirm this description. None of the reported jurisdictions confine their civil justice systems to dealing with 'proper court cases', i.e. with contested matters only. But, the relative share of the uncontested matters in the overall work of the civil courts differs from country to country. Professor van Rhee points to the fact that, though Dutch civil courts deal with diverse types of uncontested matters, the more administrative (i.e. uncontested) matters 'do not play such

[16] For example, the contested matters in Croatia constitute in all courts only about 25 % of the annual caseload, while the rest is composed of enforcement, public register cases and other non-contentious matters. At the level of the first instance courts of general jurisdiction, this percentage is even lower. In 2012, among all civil matters received by municipal courts, there were 154,466 litigations, 476,543 land register cases, 176,713 enforcement cases, 11,039 inheritance cases and 112,112 other extra-contentious cases (i.e. litigations constituted only 16.6 % of their annual caseload). See *Statistički pregled za 2012.* (Statistical survey for 2012) of the Croatian Ministry of Justice, http://www.mprh.hr/lgs.axd?t=16&id=3851 (last visited in September 2013).

[17] Their names are different, what reflects the lack of uniformity: *ex parte* or voluntary jurisdiction; *jurisdiction gracieuse* (French); *Freiwillige Gerichtsbarkeit, Ausserstreitverfahren* (German), etc.

[18] See Van Rhee (below: 3.2); Silvestri (below: 4.3); Koller (below: 2.2 – speaking of 'administrative activity' in the area of civil justice – *Verwaltungstätigkeit im Bereich der Privatrechtsordnung*).

[19] For Austria, it is noted that 'the legislator decided to submit more and more matters to non-contentious jurisdiction which do not share the same characteristics as those matters forming traditionally the core of non-contentious jurisdiction'. Koller (below: 2.2).

a preponderant role [in the Netherlands] as in some other jurisdictions' (Van Rhee: 3.2). Compared to the Netherlands, the share of non-contentious matters is apparently larger in Austria and Germany. Christian Koller notes 'numerous non-contentious matters' and lists several categories of cases: matters which 'traditionally encompass areas of civil law which require an active intervention by the judge in the interest of parties not in a position to adequately protect their interests'; administration of land and commercial registers, guardianship, estates, cartel matters, bankruptcy, forcible execution of judgments and other titles, etc. (below: 2.2). Even more non-contentious matters may be within the scope of the Italian judiciary which has a 'vast array of proceedings dealing with non-contested cases' regulated in an entire book of the Italian Code of Civil Procedure and in a number of special statutes (Silvestri: 4.3).

Whether the judiciary is the best forum to resolve non-contentious matters is another topical question. Professor Wambier notes the concerns regarding the quality that the judicial branch of government may provide in non-contentious matters ('voluntary judicial proceedings') where the 'judge plays a chiefly administrative role'. Based on such considerations, some procedures in Brazil are being reformed so that they will no longer require the intervention of a judge. These reforms include the transfer of jurisdiction in matters such as amicable divorce or the execution of wills to other legal professionals, such as public notaries or registrars (Wambier: 12.3).

Does the involvement of the courts in a smaller or larger number of non-contested matters change the overall assessment of the goals of civil justice? Or, does it only complicate and multiply the goals? Professor Silvestri states that the intensive involvement of the courts in non-contested matters is open to dispute, and that it creates a 'multifaceted puzzle' of *giurisdizione volontaria* (Silvestri: 4.3). User-friendliness, clarity and efficiency may be only some of the values jeopardised by a too colourful mix of diverse tasks 'pushed' by the legislator onto the courts.[20]

But, there may be even worse consequences than confusion for those who use the services of the state's justice system. The judges, as those who are bound to enforce the procedural rules, may confuse their roles and the goals of particular types of proceedings. It is considered that the proceedings in non-contested matters should be simpler, faster and less formal than the 'regular' proceedings in disputed matters. Is this really the case? And whether or not there is an overspill of unnecessary formality and complexity from the default model of proceedings in contested matters is a topic that deserves attention. The overspill in the opposite direction may be even more disastrous: if the large number of cases encountered by judges in the practice of their judicial work is pure administration, the same attitude may reflect on their method of acting in 'proper' court cases which require a prudent, reasonable and professional adjudication.

While the scope of the matters may influence the perception of the goals of civil procedure, the overarching goal of the procedure may influence the matters within

[20] The engagement of judges in the supervision of parliamentary and local elections exists, e.g., in Belgium and Croatia (see Van Rhee – quoting B. Allemeersch (below: 3.2)).

the scope of the proceedings and the method of dealing with them. The most apparent example is China, where the goal of social harmony imposes obligations on all courts to see to it that, irrespective whether the case is contested or uncontested, it is primarily settled in an amicable way, and only very exceptionally by a decision that would not be voluntarily subscribed to by all of the participants in the proceedings. In such a manner, the specific goal of civil justice in China leads to an interesting contrast with the European judiciaries. Whereas in Europe the chief product of civil justice is still adjudication (the production of enforceable titles), the chief products of civil justice in China are conciliation and mediated settlements (Fu: 8.3).[21] Some convergence, however, may be observed in more recent developments both in Europe and in China. While mediation has become more desirable and prominent at the European level, civil procedure reforms in China since the 1990s have introduced more space for classic adjudication, although the 'transplanted' Western procedures are still perceived as legal irritants.[22]

1.4 Individual Rights v. Public Interest in Civil Procedure: From Pure Liberalism to Full State Paternalism

The general aspects of the underlying tension between the two approaches to civil justice – that is, civil justice focused on the protection of individual rights as opposed to civil justice which is a part of the mechanisms for the implementation of policies aimed at the promotion of the public interest – were already discussed in Sect. 1.2 above. The issues that will be elaborated here deal with the fine-tuning between the two opposing targets, as well as with the particular forms in which their pursuit takes place.

The first issue may be observed as a link between the scope of matters entrusted to civil justice, and the objectives of the process. The pronounced inclination of American civil justice is a good example of a justice system which has extended the target of protection of individual rights to a more overarching target of public interest goals. As reported by Professor Marcus, the aims of American civil justice frequently go beyond the context of bipartisan dispute resolution. American civil justice does not merely take on some essentially administrative tasks – it replaces state administration: 'The very heart of the common law system contemplates that

[21] As Professor Fu notes, the goal of social harmony is even emphasised in the enforcement proceedings, where reaching a settlement through court mediation (usually by forcing the creditor to waive partially his right) has become almost a norm.

[22] A good example is the introduction of the system of collection of uncontested debt by payment (dunning) orders, for which the goal of protection of the creditor's rights is failing in practice due to ample opportunities to file frivolous objections. The inclination to mediated solutions also leads to ample opportunities to evade the payment, which results in the fact that payment orders are issued in an ineffective procedure that currently 'accounts for no more than 1 % of the first instance civil cases in China' – Fu Yulin (ibid.). For the notions of 'legal transplants' and 'legal irritants' see Watson 1974, Kahn-Freund 1974, Ewald 1995, and Teubner 1998.

the courts themselves will develop and enforce – via private litigation – the sorts of legal protections that are ordinarily adopted by legislative or administrative actions in other legal systems' (Marcus: 6.4). The resemblance to the European fashion of entrusting the courts with many essentially administrative tasks and obligations exists, but is superficial. Namely, while in Europe it is legitimate to view this process as the bureaucratisation of the state judiciary, in the USA one may speak of the judicialisation of the matters otherwise dealt with by the state bureaucracies. Not only that private litigation is a good substitute for governmental law enforcement, the essentially judicial, adjudicative manner in which the American courts deal with mass claims, collective actions and class litigation provides conclusive proof of this submission (see more in Sect. 1.7 below).

The (North) American situation may be in some respects exceptional, but in its general attitude it is not entirely alone. Professor Wambier notes the 'judicialisation of politics' in Brazil, and explains how the Brazilian judiciary is being given more powers to interfere with the activities of the government, and exert control over public administration (below: 12.4).

In cases where legislation entrusts the courts with the implementation of statutory provisions that express certain public policies, the courts would, in theory, have to follow faithfully such public policies and protect the public interests at stake. The element of public interest is particularly expressed in some fields, e.g. in family law. Still, as some issues in those fields are a matter of public controversy, the judicial implementation of the public policies may take its own course. As Professor Silvestri notes, in Italy it sometimes happened that the 'courts … opposed the very policy they were expected to implement' (Silvestri: 4.4).

Something like that would hardly be imaginable in China, where, 'in the context of a "socialist" society based on public ownership, the ideas of protection of public interest permeate civil justice' (Fu: 8.4). Accordingly, Chinese judges have wide discretion to intervene for reasons of public interest in the parties' disposition of their private rights. The courts have the duty to control whether the parties' actions in civil cases violate the 'interests of the state, social/public interests, or third party interests'. At least in theory, the courts have vast powers: if, in their view, the public interest is disregarded, they may deny the claimant the right to withdraw the claim; control the court judgments irrespective of the parties appeals; refuse to enforce the arbitral awards; etc.[23] The extra-judicial influences motivated by local interests or the views of the ruling elites occur more often through unofficial rather than official channels, examples being the telephone calls of government officials to the court, 'the masses filing administrative petitions against the court or staging sieges on the internet', etc. The courts have special closed committees which discuss the cases, and whose records cannot be accessed by the parties or the public, but only by those who have the power to supervise the courts (ibid.).

The Russian approach to the role of public interest in civil proceedings is, at least in its own self-understanding, closer to the balance of private and public rights and interests (Nokhrin: 9.3). Still, some recent cases demonstrate dynamic development,

[23] Ibid. Fu Yulin notes, however, that in practice those measures are rarely applied.

as well as some tensions between the two goals – the protection of individual rights and the public interest. In some cases, the public interest played a role in the form of protection of the proprietary interests of the state; in others, it was referred to when various Russian courts prohibited (for 'reasons of public morals') Gay Pride marches. As noted by D. Nokhrin, this was due to the Russian doctrinal position according to which 'homosexuals in Russia aren't exposed to any real discrimination, because Russian legislation does not recognize sexual orientation as a circumstance in any way significant'.[24]

European and American systems of civil justice generally deny that in core matters processed by the courts such extra-judicial influences or political considerations play an important role.[25] In Western systems of civil justice, to the extent that it exists, the involvement of public interest in the operations of civil justice is proportional to the share of matters of a non-judicial (administrative) nature entrusted to them (see Sect. 1.3 above). The non-contentious matters are often motivated by public interest. For instance, the court administration of public registers has as its motivation the safeguarding of legal certainty regarding real estate and land transfers (Koller: 2.3). On the contrary, in conventional, bi-party civil law disputes, the doctrine of judicial independence dictates the detachment of court decisions and actions from policy-related considerations. The courts 'must apply the relevant norms to the facts established in the proceedings … [and] not [be] bound by any overriding policy or national interest that would necessarily affect their decision'.[26] The public interest plays a role in conventional disputes only in the matters that transcend the interests of the individual litigants, e.g. in cases where the interests of children or people with mental disabilities are concerned. In the same category are also labour and housing cases, cases regarding environmental or consumer protection, antitrust cases, etc. In the latter two cases, the trans-individual and supra-individual interests are often combined with special types of proceedings, such as collective or representative actions (see more in Sect. 1.7 below).

In spite of the Western ideological rejection of the idea that the civil courts should in their dealing with private law matters directly serve societal, national or governmental goals, there is a trend in many European and non-European countries that the courts exert a more active role in the process and engage in a number of matters on their own initiative, even against the dispositions of the parties. For instance, in France, Austria, Germany, the Netherlands and in many other jurisdictions on the European continent, the courts have to apply the applicable

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[24] Below, 9.2.3. The decisions in those cases led to the finding of the violation of the human right of peaceful assembly, together with violations of the right to an effective remedy and of the prohibition against discrimination (Arts. 11, 13 and 14 of the ECHR). See *Alekseyev v. Russia*, ECtHR app. nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010.

[25] However, some features of the US system, such as the possibility to award punitive damages, show a higher level of inclination to use the individual case for the general goal of changing behaviour in a larger segment of the society.

[26] Koller, ibid. See also Van Rhee (below: 3.3).

procedural and substantive law *ex officio* when administering justice.[27] A number of countries give courts also right (and obligation) to explore facts *ex officio* – see more in Sect. 1.5 below.

One goal related to the protection of public interests plays, however, an important role in almost all contemporary systems of civil justice. It is a goal that, though policy-based, may be defined as the *intrinsic* goal of civil justice – the goal of the efficient and fair administration of justice. In England and in Hong Kong, this goal is expressed in terms of the overriding/underlying objective which lies at the centre of recent civil justice reforms (Chan and Chan: 7.1.2, 7.2, 7.4.3, 7.5.1, etc.). Civil justice as another important public service should be 'effective, efficient and fair' (Zuckerman 2009: 54). Active case management and, where necessary, *ex officio* actions by the court should function in the service of swift, streamlined and inexpensive proceedings, the predictable timing of the procedure, and the prevention of abusive and delaying behaviour of the parties. An interesting new development in this direction can be observed in the recent reforms and the subsequent case law in Hong Kong, where the courts now may (and will) strike out the claimant's case for inordinate delay (provided that the decision to strike out must be founded on the abuse of the process of the court, namely that the delay causes a substantial risk that a fair trial is not possible).[28] In stark contrast, the civil justice systems of the European socialist and post-socialist countries, while formally adhering to an active role of the judge and the high level of importance of the (external) public interest, in the areas of intrinsic procedural values usually show their rather weak, passive face. Poor case management and time management and the resulting inefficiency are often confirmed by the findings of systemic deficiencies and the violations of the right to a trial within a reasonable time before the European Court of Human Rights.[29]

In the cases in which public interest elements are recognised, one may inquire whose role it is to enforce them. Is it the task of judges (only), or of some other participants or the internal/external stakeholders? In about half of the reported legal systems, an important side-body that may participate or intervene in the civil proceedings is the state prosecutor (public prosecutor, public minister, procurator). The names of the office may be different, but the main function of intervention is always the same – it is the intervention on the side of trans-individual interests. Though, the scope and reach of the prosecutorial intervention varies. In China, it is a continuing power to supervise the courts and challenge their judgments – even those that have already become effective.[30] In Russia, the intervention takes a twofold form: the prosecutor can either initiate public interest litigation as a claimant; or, he can

[27] See, *inter alia* Van Rhee (also supported with comments by Frédérique Ferrand regarding France).

[28] See in particular the leading case of *Nanjing Iron* cited in Chan and Chan, 7.2 below.

[29] See for examples from Croatia Grgić (2007); Uzelac (2004, 2006). On common socialist roots for inordinate delay and inefficiency in post-Yugoslav countries see Galič (below: 11.6).

[30] Fu (below: 8.4). The powers of the Chinese prosecutors to intervene in civil proceedings were recently reinforced and augmented.

appear as a quasi-neutral evaluator of legality that provides 'impartial' opinions to the court.[31] A similar regime also exists in France and in the Netherlands, where the members of the office of the Public Ministry may initiate various proceedings (e.g. for annulment of marriage) and issue advisory opinions (*conclusions*). At the highest court level, the advisory opinions are issued by the Procurator General and the Advocates General (*avocats généraux*) at the Supreme Court (Cour de cassation/Hoge Raad).[32] The procurator at the highest court may also challenge final and binding judgments in the interest of the law, but – in the French and Dutch cases – the decision has only an exemplary effect and does not affect the rights and duties of the applicant.[33] The German and Austrian systems, on the other hand, do not have comparable bodies with broad powers, although some modest forms of prosecutorial intervention exist there as well. For example, the public prosecutor in Austria has the right to commence proceedings for annulment of marriage; the chief financial state attorney, *Finanzprokurator,* may intervene in order to protect the public interest.[34] In Germany, all powers of the public prosecutors to intervene in civil proceedings were abandoned, and the direction of development in several post-socialist countries is the same (e.g. in Hungary, in successor countries of the former Yugoslavia).[35]

1.5 Establishing the Facts of the Case Correctly v. the Need to Provide Effective Protection of Rights Within an Appropriate Time

Contemporary systems of civil justice vary considerably in their attitude towards substantive truth as the goal of civil procedure. Naturally, accurate fact-finding is always recognised as an important target in the proceedings. At the end of the nineteenth century Franz Klein wanted to shape a model of civil procedure in which establishing substantive truth, and engaging in efficient case management, would be two mutually non-exclusive goals. Yet, in the course of history it was proved that, in

[31] The two colliding functions of the prosecutor in Russia caused issues with the fairness of the proceedings – see Nokhrin (below: 9.2.5); similar considerations in some transition countries led to reform and/or abandonment of the prosecutorial intervention in civil cases.

[32] See Van Rhee (below: 3.3).

[33] On the contrary, in the socialist countries that knew the prosecutorial challenge to final judgments, the effect of the successful challenge was the reversal of the decision, with full effects on the parties to the proceedings.

[34] Koller (below: 2.3). The apparently broader powers of the State Financial Procurator were in practice limited through the case law of the OGH.

[35] See Kengyel and Czoboly (below: 10.3). For instance, in Croatia the powers of the public prosecutor to challenge final judgments (the so-called *request for the protection of legality*) were dismantled in 2003, just as the third-party intervention by the public prosecutor. The only remaining role of the public prosecutor is to initiate certain public interest litigation. This happens in practice infrequently and has only marginal importance.

extreme cases, the ideological demand for objective (or even absolute) truth could overshadow all other goals of procedure. Soviet doctrine thought that the principle of material truth was embedded in the principle of (socialist) legality. The need to establish 'material truth' was the ideological justification for paternalistic supervision through the reports by the highest courts and the Office of the Public Prosecutor.[36] With the same background, in Hungary during the socialist period truth-finding was also placed at the pinnacle of all procedural values. The pursuit of truth was the duty of the judge, who had to actively control the parties and their dispositions. The spirit of paternalistic inquisitorialism was motivated by distrust in individual freedom and the suspicious attitude towards private initiative (Uzelac 1992).

In the 1990s, as a counter-reaction, a new approach to the role of truth in civil proceedings occurred in many former socialist countries. In Hungary, for instance, the pursuit of truth was deleted from the procedural principles contained in the code. This was supported by the Constitutional Court's decision that 'there was no constitutional guarantee relating to the revelation of the material truth'.[37] Consequently, in the new Hungarian Code of Civil Procedure, the fairness of the proceedings (impartial decision making based on the principle of party representation and the right to be heard) replaced the revelation of truth as the principal procedural goal. In more recent times, though, the exclusive focus on the acceleration of proceedings raised criticisms that speed was placed above the accuracy of the results. These critiques may lead to the (moderate) rehabilitation of the value of truth-seeking in adjudication (Kengyel and Czoboly: 10.3). The 'change of paradigm' also happened in Russia, where many scholars today advocate the concept of 'formal truth' (Nokhrin: 9.4).

While the debates over the place of objective/absolute truth in civil procedure often had a highly ideological context and background, the more important set of issues today is linked to the rights and obligations of trial judges to investigate factual issues on their own motion. One issue is whether judges may order the taking of evidence *ex officio*. Another issue is whether judges have the duty to actively stimulate the parties to state the facts and produce evidence. If there is an obligation of the judge to give instructions to the parties, advise them and encourage them to put forward all their procedural material in a truthful and comprehensive manner, we may ask about the consequences of eventual failures to do so. The description of the systems in Austria and Germany may indicate that speedy and accurate civil procedure is not incompatible with active judicial involvement in the evidence-taking process.[38] On the other side, in some post-socialist jurisdictions, such as in Slovenia and Croatia,[39] the pronounced expectations that the court (and not the parties)

[36] Nokhrin (below: 9.4). Under Art. 14 of the Russian Code of Civil Procedure of 1964, the judge had to 'take all measures … for full and objective investigation of the real circumstances of the case' irrespective of the parties' disposition.

[37] See Kengyel and Czoboly (below: 10.3).

[38] See Koller (below: 2.4) on the situation in Austria and Germany.

[39] For Slovenia and Croatia see Galič (below: 11.6), Uzelac (2004, 2006).

actively investigate facts and supply evidence led to several systemic anomalies: to passive and abusive behaviour of the parties, to a protracted and de-concentrated style of the proceedings ('the piecemeal trial') and to the practice of successive remittals of the judgments based on the argument that the court has to 'try harder' and continue to investigate what really happened (even if the parties have not actively contributed to the clarification of disputed facts).[40]

The problem of such imposed judicial 'pursuit' for truth disappears in common law systems that are concerned, so Chan and Chan (below: 7.5.1), 'with legal truth and not material truth'. The clarification of all disputed facts is in common law systems regularly seen as the more or less exclusive obligation of the parties. Since the Woolf reforms, the trend is not only to burden the parties with the gathering of facts, but also to compel the parties to collect, present and verify their procedural material at the earliest possible stage of the proceedings ('the front-loading of facts-gathering exercise before the action is commenced').

1.6 One Size Does Not Fit All: Proportionality Between Case and Procedure

The axiology of civil procedure gets its flavour from cases that may be considered typical for the national civil justice system. But, the spectrum of cases is rarely uniform: most national judiciaries handle 'small' and 'big' cases; complex and routine cases; unique cases and repetitive/cloned cases. Two issues arise in this context: first, whether some types of cases are for one or the other system more 'typical'; and, second, whether or not the goals and modalities of their implementation are in each given system adjusted to the different nature of the case at hand. The authors of this book were invited to comment on the extent to which the goals of civil justice are viewed from the perspective of resolving the 'hard cases' (difficult legal matters that raise new issues of law and fact) and on the extent to which they are viewed from the perspective of the mass processing of routine, repetitive matters. They were also asked to comment on the proportionality between the methods of treatment of cases, and their social importance. The issues that occur here are also related to the application of filtering mechanisms and various summary proceedings adjusted to the processing of small claims. The specific procedures regarding the courts' processing of collective, diffuse and group interests are dealt with separately in Sect. 1.7 below.

A very clear reply on the question of 'hard cases' and their treatment in China was given by Fu Yulin: 'Hard cases are not welcomed by courts and frequently get

[40] One foreign observer of the practice of Croatian courts argued that the usual approach of the appeals courts in civil trials was 'no stone should be left unturned'. The practice of successive remittals was repeatedly found to be among the 'systemic deficiencies' of civil procedure in Croatia, Slovenia, Poland, Hungary, Bulgaria, Ukraine, Romania and Russia. See Grgić (2007: 158).

refused at the beginning of the proceedings' (below: 8.6). This is, seemingly, not only a feature of Chinese exceptionalism. A straightforward answer to the question about the goals of adjudication is also given by Elisabetta Silvestri: 'At present, Italian civil justice is more about processing a huge number of ordinary cases than handling "hard cases"' (below: 4.8). She also points to the relative nature of the 'hard case' notion, namely, in a dysfunctional legal system, poorly drafted legislation and systemic inability to deal with the everyday caseload may cause cases that would otherwise be regular and simple to look like irresolvable puzzles. But, also for most other civil law systems it can be stated that they have an inclination to focus on the resolution of a large number of average and small cases, rather than on dealing with socially significant individual cases.

Not only for Italy can one say that the goal of the system is first to survive the influx of matters, and only second to produce high-quality justice. In such a situation, it is not surprising that separate mechanisms, developed outside of the state's justice system, are gaining momentum. Today, arbitration, for instance, is becoming pre-eminent in dispute resolution in complex and valuable international commercial cases. The new trend in some countries is to discourage litigation and to keep the cases that do not belong in the courts away from the courts. Efforts by the new Dutch government to suppress litigation, fostering early settlements and out-of-court mediation, may serve as an example of this trend.[41]

Bureaucratic excellence in dealing with a large number of repetitive cases is a feature that has become a hallmark of Austrian and German civil justice. The Austrian example of automated, IT-supported order for payment proceedings (*Mahnverfahren*) may serve as a model example of a system that corresponds to the goal of fast and cost-effective, mass processing of cases and fast filtering of uncontested claims (Koller: 2.6).

The processing of small claims poses bigger challenges for many legal systems. While common law countries generally have a policy of keeping the small cases off judicial dockets by various means (including the high costs of litigation), the civil law world is more sympathetic to small claims. The principle that judges should not waste their time on irrelevant, small matters (*de minimis non curat praetor*) is generally rejected by the European systems of civil justice. In extreme cases, e.g. in Italy or in Croatia, 'it is inconceivable that courts refuse to take into consideration cases which are deemed trivial or inappropriate'. After a long and exhausting process, 'frivolous and groundless claims will end up being rejected, but not to entertain them would amount to a denial of the fundamental right of access to justice' (Silvestri: 4.9). In Hungary, up until 2009, there was no special procedure in small cases, and the same procedural rules applied for all cases, irrespective of their value (Kengyel and Czoboly: 10.6).

[41] See Van Rhee (below: 3.1, 3.6). On the other hand, the intention of the Dutch reforms may be mixed, and attributed more to a policy of the saving of public funds than to a well-considered plan to secure optimal, proportionate court procedures (below: 3.10).

In most countries, however, some proportionality is achieved by channelling small claims to special courts or special summary proceedings.[42] It is also achieved by the availability of early provisional relief, e.g. by conditional judgments (*Vorbehaltsurteil*) in Germany. In spite of the introduction of the European Small Claims Procedure in the EU (which has only added to the maze), the papers presented below show that the approaches to small claims are dissimilar and varied even if we focus only on European territory. While Italy has justices of the peace (*giudice di pace*), the Netherlands and France use *référé* proceedings (*Kort Geding*) and Austria and Germany channel small claims to the jurisdiction of special courts (*Bezirksgerichte, Amtsgerichte*). The procedure before such courts is also a special one: 'formalities are kept to a minimum, emphasis is put on the oral part of the proceedings, and admissibility of appeals is restricted'. Koller goes on to note that 'it would be incorrect to conclude that [small] cases are considered less important based on their amount in dispute' and pointed to the constitutional limitations to simplification and streamlining (Koller: 2.6).

The procedure in small cases may be less formal, but it is still regulated. An exception is German law, which leaves the procedure in cases where the amount in dispute does not exceed €600 entirely to the discretion of the court (but only if it is in conformity with constitutional guarantees). The relationship between proportionality and specialisation reveals interesting problems and paradoxes. Legislative division into cases and courts that have to deal with matters in special proceedings with a differing level of formality may be more formal and less flexible than a regime which would give courts full discretion to deal with cases in the way they deserve. Bureaucratic inertia may, however, prevent the courts from using such discretion in the way that would be appropriate. But, excessive specialisation accompanied by the multiplication of courts of different types and procedures with special features may be confusing, ineffective and contrary to the wish to secure predictable and appropriate standards for all cases. It can also contribute to the blurring and fuzziness of the goals of civil justice.

1.7 Multi-party Litigation and Collective Actions

All replies given by the authors of this book regarding the role of class litigation end up in a simple division – 'only in America' on one side, and all other jurisdictions on the other side. A case such as *Daar v. Yellow Cab Co*,[43] in which the court ordered the taxi company to charge unduly low fares to future customers because unidentifiable customers were overcharged in the past, cannot happen in

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[42] See texts in this book that deal with the situation in Austria, Brazil, Hong Kong, Italy and Hungary.

[43] *Daar v. Yellow Cab Co,* 433 P.2d 732 (Cal. 1967). See Marcus (below: 6.3). He argues that this case is an example of the 'behavior modification view' which 'favor[s] creative use of the class action'.

any other place, not even today when many systems are flirting with some forms of collective proceedings (and the cited Californian case has a history of over four decades in the USA).

The replies from all other jurisdictions are diverse, but reflect the same basic attitude: in all other countries civil justice is still predominantly focused on 'one-on-one' resolution of individual disputes. As to the multi-party and aggregate proceedings, it is stated that 'multi-party litigation is still in its infancy' (the Netherlands); that the reception of it is 'far from stellar' (Italy); that 'the handling of complex multi-party matters cannot … be considered as a major goal of civil justice' (Austria); that 'judges are reluctant to process multi-party cases' (China); etc. A notable exception only is Brazil, for which it is stated that it has 'a very well-developed class action system' within which 'complex matters are frequently handled' (Wambier: 12.2).

In spite of low use and poor reception in practice, legislators of many countries show a continuing interest for regulation in this field, from Hong Kong[44] to Germany.[45] But, the scepticism and critical attitudes are also strong.[46]

The ambition to include the resolution of complex multi-party matters in the goals of civil procedure is certainly present in many systems of civil justice. Many legal scholars share the view that in complex contemporary societies the courts should be equipped to address complex social matters. Some types of proceedings which provide the right to conduct representative litigation to certain associations or independent public bodies (e.g. *Verbandsklage*) exist in several jurisdictions, but have all gained more theoretical interest than practical relevance. In reality, very few civil justice systems are ripe for the adequate processing of multi-party claims even by means of conventional methods of case and court administration (merger of cases, strategic litigation, etc.). This will, obviously, remain the challenge to be addressed in the future.

1.8 Equitable Results v. Strict Formalism

Is the goal of civil procedure substantive justice, or should it be the correct application of legal provisions, irrespective of the outcome? There are many ways to attack this question as a false dilemma. Indeed, in an ideal case the two should converge. However, it is undeniable that the inclination towards substantive justice vs. formal legality varies considerably.

The preference for substantive justice may be diagnosed in systems as different as China and the United States. As explained by Fu Yulin, 'in the Chinese legal

[44] New initiative pending since 2009; see Chan and Chan (below: 7.7).

[45] Koller presents the 'experimental law' on pilot cases of investors in the capital markets (*Kapitalanleger-Musterverfahrensgesetz*), which combines the elements of a collective action and a test-case procedure (below: 2.7).

[46] According to Koller, such criticisms had the result that the Civil Justice Reform Act of 2007 could not be passed in Austria.

culture and judicial customs, achieving an equitable result and substantive justice has always been the priority, and less emphasis is placed on strict formal compliance of formalism or entrenchment of the principle of legality'. In the 1990s, more emphasis was placed on the principle of legality, but in the 2000s a contrary trend under the concept of 'active justice' emerged (Fu*:* 8.9). On the other side, the active use of civil justice for policy implementation in the United States[47] and the American reliance on civil litigation for the purpose of public law enforcement can hardly be manageable on the basis of strict legal formalism.

Stronger loyalty to strict legalism may be diagnosed in the civil law environment. Civil law judges are in most cases predominantly 'concerned with finding the correct legal solution to resolve a dispute'.[48] The principle of legality is, as expressed by Christian Koller, 'enshrined' in the Austrian and German constitutions, while the principles of equity and observance of the basic principles of justice, though present incidentally in statutory law, are far lower in the hierarchy of values (infra: 2.8). Moving to Eastern Europe, it seems that the adherence to formalistic behaviour is even more pronounced there. At least, that may be the inference from the jurisprudence of the European Court of Human Rights which often found violations of fair trial rights on the basis of excessive formalism in several countries of eastern and southern Europe.[49]

In some countries, a movement away from 'unnecessary formalism' may be diagnosed. Remco van Rhee states that since the 1970s 'the keyword in Dutch civil procedure has been "deformalisation"' (below: 3.8). The motivation for loosening strict formal requirements is at least in part to bring nearer the attainment of the goal of substantive and equitable results, as the intention of the reforms is to prevent the parties from using the rules of civil procedure to twist the result in their favour on formal grounds. The traditional sympathy for solutions based on equitable results and substantive justice is also attributed to Norway (Backer: 5.9).

1.9 Problem Solving v. Case Processing

The contrast between the goal of substantive justice and the goal of strict legalism is mirrored in another opposition of values. The authors of this book were invited to comment on how their national civil justice systems and their main actors predominantly view their purpose and aim – whether they regard the administration of justice as an activity that should focus on finding adequate solutions to the problems underlying the disputes or whether, on the contrary, the main systemic goal is to efficiently process the cases within their jurisdiction, engaging the least amount of effort and expense.

In the comments given, it was sometimes suggested that the balance between those two objectives would be the best solution. However, evaluated on the content

[47] See Marcus, ss. 6.4 and 6.5.

[48] Alvim Wambier (below: 12.6).

[49] E.g. Croatia, Russia, Greece, Ukraine, Czech Republic, etc. See Fernhout (2008).

of their replies, it may be concluded that the balance has decisively shifted towards case processing. As noted by Kengyel and Czoboly, in times of economic crisis, the pressure on courts increases and everything is directed 'at solutions requiring the least effort and expense' (below: 10.9). Where the justice system is not working, the 'idea of courts as problem solvers is met with a good measure of scepticism' (Silvestri: 4.11). Sometimes the idea of problem solving is rejected on doctrinal grounds. Van Rhee states that 'problem solving is not, according to the majority of Dutch authors, a primary goal of the civil justice system', although it may be its by-product (below: 3.9). The recent trend in Norway also places stronger emphasis on the efficient management of cases (Backer: 5.10). For Austria, in spite of Franz Klein's legacy that requires civil justice to resolve social conflicts and fulfil welfare tasks, 'the need to solve the parties' problem does not prevail over the goal of civil procedure to swiftly decide the case' (Koller: 2.9). Finally, even for China, which cherishes court settlements the most, the short time limitations of 3–6 months within which the courts have to dispose of civil matters 'strongly compel the courts and judges to focus on case processing' (Fu: 8.10). Mediation is, of course, supported in many jurisdictions, but it seems, unfortunately, that this support rests today more on the ideas of case processing (how to dispose of the case quickly; how to keep cases away from the courts) than on the ideas of finding adequate solutions for the problems of the individuals and the society.

1.10 Freely Available Public Service v. Quasi-commercial Source of Revenue for the Public Budget

Should civil justice be a free and accessible service open to everyone, or should it be run as a business always aware of costs and hence concerned with cost efficiency? Should civil justice be funded by taxpayers, or should its operations be funded by the concrete users of its services via court fees? Should civil justice be an expense, or a source of revenue for the state budget? All these issues may also be viewed as 'goals', or at least as targets closely connected with the more general understanding of the goals of civil justice.

In the light of comments from different sides of the globe, it seems that we cannot avoid the conclusion that civil justice is increasingly being commercialised. Only in a very few countries do the parties to civil litigation still not pay any court fees due to the adherence to the principle of free access to the courts.[50] But, even in the countries which are traditionally model examples of the social state, such as

[50] In the 2012 report of the European Commission for the Efficiency of Justice (CEPEJ) it is noted that 'only 2 member states provided for a free access to all courts: France and Luxembourg'. As the report deals with the data for 2010, it could only note that, since October 2011, also in France a contribution to legal aid of €35 is paid. See European Judicial Systems (2012: 74). Two years before, the CEPEJ reported that five members of the Council of Europe did not have receipts from court fees as they apply the principle of free access to court (EJS 2010: 63).

Norway, trends are changing. While 'civil justice was originally largely perceived as a freely available public service … nowadays, court fees as well as lawyers' salaries have risen to such an extent as to make civil litigation an expensive exercise for the ordinary citizen' (Backer: 5.11). It may get even worse: in the Netherlands, the government proposed legislation that intended to dramatically increase court fees, seeking to raise the level of self-financing of the civil justice system.[51] In Austria, civil justice is already covering its costs by 110.9 %, effectively subsidising other branches of the justice system.[52] Interestingly, ever since the courts started to operate as dispute-resolution providers in China in the 1980s and early 1990s, they have 'operated like commercial institutions' and are expected to 'cover budgetary deficiencies'. As even at present local governments still plan their expenditures for the courts in relation to the courts' contribution to the local treasury, Fu Yulin concludes that 'given such background, … Chinese civil justice remains a quasi-commercial source of revenue for the public budget' (below: 8.11).

In the jurisdictions that are raising court fees, the intention of introducing higher court tariffs is not always focused exclusively on increasing contributions to the budgets of the state or local administration. Another reason, as testified by Silvestri, is to reduce the caseload of the courts (below: 4.12). This reason may have a pragmatic background; it can also have a systemic justification, in the context of the proportionality principle. However, for all countries that consider it, the increase in the court fees raises the issue of access to justice, in particular if – as stated for Italy – the citizens cannot count on a modern and adequately funded system of legal aid (Silvestri: ibid.).

1.11 User Orientation?

The ultimate goal of civil justice may be captured in the question regarding the ultimate purpose and aim of the civil justice system. One of the possible phrasings of this question is – Does civil justice have to serve the interests of its ultimate users, or do citizens and other members of the society have to serve the interests of civil justice? This may be seen as a mean and apparently unscientific question. However, many of the reports confirm directly or indirectly that a lot can be done to establish and improve a user-friendly attitude on the part of national civil justice systems. The ecosphere of civil justice is all too often polluted by an eco-centric – or even *ego*-centric – attitude, and the 'insider's' values often prevail over the values that serve the interests of users as 'one-shotters' and 'outsiders'.[53]

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[51] Van Rhee (below: 3.10). The target was to cover approximately 64 % of the costs through court fees. Due to the change in government, this project is currently on hold, but similar projects are underway in Germany (Koller: 2.10).

[52] The high revenue of the civil justice system in Austria can, though, be connected with its engagement in some non-contested matters, such as land and company registers, as well as with the fees collected from automated payment order processing (*Mahnverfahren*).

[53] See more in Uzelac (2008: 413–427).

A direct example comes again from the admirably sincere article written by Fu Yulin. The politicians, she says, in principle plan legislation keeping in mind the interests of the users. But, as the 'participants of the legislative process are mainly senior judges and top-notched professors, procuratorate, and only a small number of lawyers', the initial intentions often become diluted (Fu: 8.12). Backer also suggests that 'it is probably not unfair to say that the goals of civil justice used to be somewhat self-centred'. The concept of judicial independence also feeds the view that this is rightly so, and only in recent years are the needs and wishes of the court users being explored independently of judges and lawyers (Backer: 5.12).

Currently, a fashionable method of proving (rightly or wrongly) the level to which civil justice systems cater to the needs of the users is to conduct user satisfaction surveys. In the Netherlands, such surveys have been conducted on a regular basis since the start of the new millennium. The results of the surveys are relatively favourable – e.g. 84 % of the users are generally satisfied, but the users are less happy with the length of proceedings, the empathy displayed by the judge and with some other special issues (Van Rhee: 3.11). The results of similar user satisfaction surveys are more ambiguous in Austria, where seemingly different polls organised by different organisations have resulted in significant differences in results. For example, contrary to the usual view of the Austrian judiciary as fast and efficient, a poll organised by the Bar Association of Lower Austria showed that 86 % of participants thought that judicial proceedings lasted too long or 'much too long' (Koller: 2.11). Most surveys in Austria and in Germany still display at least an average level of satisfaction (in Germany 60 % of the population has fair or considerable trust in German courts). In general, the civil justice systems of the nations of northern and western Europe still seem to do a fairly good job in relation to their users. But improvements are possible even there, and the self-centred goals (e.g. judicial independence, good financial status and job security) are still better protected than the wishes and the needs of the users.

The situation in some other countries is much worse. In the dysfunctional systems of civil justice even the weak and unreliable results of user satisfaction surveys are missing. There is, however, a strong feeling of dissatisfaction: some systems do not work, and all users are unhappy – even the professional ones (Silvestri: 4.13). Crisis is usually a good motivator for change, but change may require a long time, and meanwhile the society may suffer from the *status quo*.

1.12 Conclusion

The goals of civil justice are a topic that needs rethinking. Civil justice should serve the interests of the society of the twenty-first century, and the new social context imposes the need for significant changes. These changes require clear starting points. Without clearly stated goals, it is hard to make solid and consistent plans, produce indicators of their success and maintain the momentum of the reforms. The study of diverging goals in different justice systems helps us to compare and understand the

differences in procedures and legal institutions. Maybe, if we realise that some of our goals are the same, it will also help us to reduce comparative differences, and improve our judiciaries even where everybody believes that any reform is doomed to fail.

Annex A: The Questionnaire

IAPL – INTERNATIONAL ASSOCIATION OF PROCEDURAL LAW
MOSCOW CONFERENCE
September 2012

TOPIC: **GOALS OF CIVIL JUSTICE**
Questionnaire for National Reporters

General framework: The main questions indicated are:

- How do the goals of civil justice differ from country to country?
- What is the role of civil justice in the contemporary world?

The National Reporters are invited to present their views and the current state of affairs in their jurisdictions (and, if so agreed, in other similar jurisdictions), and comment (however briefly) on all or any of these issues:

1. *Prevailing opinions on goals of civil justice.* Please state doctrinal sources and relevant case law.
2. *Matters regarded to be within the scope of the goals of civil justice:* Are the goals of civil justice limited to litigation (decision making in contested matters), or do they also encompass non-contested matters? What is the portion of the work of civil justice in matters such as enforcement, holding of registers (land, company registers), collection of non-contested debt, regulation of future relationships between the parties, etc.? To what extent are the goals of civil justice viewed from the perspective of such tasks of the civil courts?
3. *Protection of individual rights v. protection of the public interest* (conflict resolution v. policy implementation). Please comment:

   – to what extent is it considered that the system of civil justice should pay attention to matters of public interest (public policy, morals, infringement of the rights of third parties);
   – to what extent should civil procedures reach results that are in line with certain policies (national interest, views of ruling elites or classes, governmental programmes, suppression of illegal activities, reasons of national security, confidentiality obligations, professional privileges, etc.);
   – what are the issues that the court should (in the context of the goals of civil procedure) determine *ex officio*;
   – which other actors or bodies (except the court and the parties) have an obligation to ensure that the goals of civil justice are being reached; which actors or bodies have the right to intervene in the judicial process on that account?

4. *'Material truth' v. fair trial within a reasonable time.* Please comment on the attitude in your jurisdiction with regard to the desirable balance between the wish to establish the facts correctly and the need to provide effective protection of rights in an appropriate time. What has precedence: the accuracy of adjudication, or the need to afford parties legal security and effective remedy in due time?
5. *'Hard cases' v. mass processing of routine matters.* Please comment to what extent the goals of civil justice are viewed from the perspective of resolving difficult legal matters which raise new issues of law and fact, and to what extent they are connected with the need to ensure the steady and routine handling of the courts' workload, coping with backlogs and the administrative requirements of efficiency.
6. *Principle of proportionality (de minimis non curat praetor) or same standards and processes to everyone, irrespective of the importance of the case.* To what extent is it considered that the goal of civil justice is to afford as much attention to the cases as they deserve, discarding all the matters that do not belong there? What filtering mechanisms are available? Or, is it considered that refusal to deal with a case in the same manner would be denial of justice? What are the real differences in the way and style of handling 'small claims' and 'proper court cases'?
7. *Bi-party proceedings v. resolution of complex, multi-party matters.* To what extent are the goals of civil justice limited to handling simple matters in which only rarely the cases involve more than two parties? Or, is the handling of complex, multi-party matters, where the courts have to exercise complex functions of social regulation, also considered to be the core goal of the civil justice system?
8. *Equitable results and substantive justice v. strict formalism and the principle of legality.* Is the goal of civil justice to reach an equitable result, or to find a correct legal solution by the strict application of the law?
9. *Problem solving or case processing.* Is it the dominant view that the civil justice system needs to approach the cases by trying to find an adequate solution to the underlying problems? Or, that cases have to be efficiently resolved by means requiring the least effort and expense by the competent authorities?
10. *Civil justice as freely available public service, or as a quasi-commercial source of revenue for the public budget.* Is the goal of the civil justice system (in particular: courts) to be available at no expense to everyone who needs legal protection, or is it just another social service that has to be paid by those who use it? What is the level of the court fees and is their rationale to cover the costs of the functioning of civil justice?
11. *Orientation towards the users, or self-centred goals?* Are the goals of civil justice defined to cater to the needs and wishes of the users? How is the perception of users regarding the fulfilment of the goals of civil justice established; who represents it? Or, are the goals defined mainly from the perspective of the civil justice system itself – by its professional actors (courts, judges, lawyers) and not by those whose rights are at stake?

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