The fundamental principles of the law of civil procedure*

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Introduction

To broaden our comparative horizon and compensate as much as possible for the absence of a Swiss national report, I will take the liberty of

*Translators’ Note:

Professor Habscheid based his report upon the submissions from seventeen national reports representing the following countries: Australia (A Ligertwood); Austria (R Sprung); Brazil (JC Barbosa Moreira); Federal Republic of Germany (P Arens); France (G Wiederkehr); German Democratic Republic (H Kellner); Great Britain (A Kiralfy); Greece (G Rammos & NK Klamaris); Hungary (L Nevai); Italy (N Trocker); Japan (H Nakamura); the Netherlands (P Zonderland); Poland (A Zielinsky); Portugal (C Ferreira da Silva); South Africa (D Zeffert); Spain (MAF Lopez); and Sweden (PO Bolding). In addition, the author relied on his own extensive knowledge of Swiss law in order to broaden the comparative horizon of the paper.

The translation (which appears with the permission of Professor Habscheid) is presented by the translators as an example of comparative synthesis of the foundations of the law of civil procedure which will, we are sure, prove useful to teachers of the subject in the English-speaking world. It is possible that for many whose training is in the common law mould the Continental method of the author may be unfamiliar; and for such readers we recommend three other translations of a related nature: the classics by Piero Calamandrei Procedure and Democracy (trans by JC Adams & H Adams NY Univ Press 1956) and Eduardo J Couture “The Nature of Judicial Process” (trans by PJ Eder) (1950) 25 Tulane L Rev 1; as well as the more recent discussion by PH Lindblom “On the Distinction between Procedural and Substantive Law” (1974) 18 Scandinavian Studies in Law 109.

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making a few references to Swiss law. The national reports constitute a veritable gold mine for a comparative study of the basic problems of the law of civil procedure. They reveal that the burning questions relating to our subject do not present themselves in the same way and with the same importance in every country. Moreover, the perspective of each national legal system is different and, naturally, the scientific interests of each reporter are not identical. For these reasons and to ensure a manageable volume we have been forced in this general report to make a choice; we have chosen two major groups of problems which are common to the national laws studied:

I Substantive law, civil procedure and the constitutional system
II The principle of procedural justice: a fair trial ("Verfahrensgerechtigkeit") as guarantee of a just and equitable judgment.

We consider that these two major subjects are in keeping with the great theme of our congress: the humanisation of the law of civil procedure – which has been the aim, in the context of their times, of all the legal systems in our history worthy of the name from the Code of Hammurabi onwards, and which is therefore no modern innovation; this must be noted and emphasised at the outset so as to avoid any unjustified pretension.

SUBSTANTIVE LAW, CIVIL PROCEDURE AND THE CONSTITUTIONAL SYSTEM

Civil procedure as an institution of the state

To emphasise the basis of the law of civil procedure, we must begin with the fact that today the civil process is an institution of the state. Since the state embodies the social system, procedural law reflects the ethical, ideological and political ideas which characterise a society. In consequence, the law of civil procedure must not be considered in isolation, but rather as an integral part of the ideas and conceptions which are expressed in the constitutional order. To approach procedural law without considering these fundamentals would be tantamount to closing one’s eyes to the fact that it is one of the areas of law in which the basis of the system is most clearly reflected.

In this regard, it seems necessary in particular to emphasise and to distinguish between two systems of civil procedure, as the national reports demonstrate:

- on the one hand, the systems of Romano-Germanic and Anglo-Saxon origin, which I refer to as the western systems (systèmes libéraux);
- on the other hand, the socialist systems.

(It is true that there is a third group developing: the countries of the Third World, but it has been impossible for me, to my regret, to receive national reports from the latter.)

In socialist states, it is not the individual as such (as in western states) who is the subject of the civil process, but the individual as a member of society, of a class (and here the working class figures foremost). For this
reason, the duties of the courts are construed completely differently from those in western countries. In the former, it is no longer a matter of applying individual rights (droit subjectif), but rather of upholding the objective legal order (l'ordre de droit objectif), namely, striving to realise the socialist ideals governing the political and economic systems and, in this context, protecting socialist property (which has a different quality from private property). Moreover, socialist justice must conform to another prerequisite: that of educating the individual. Indeed according to Marxist-Leninist doctrine, politics and law are capable of modifying man's conscience and educating him toward socialist thought and action. This principle is clearly defined in art 3 of the Fundamentals of Civil Procedure in the USSR (likewise, art 2(1) (last clause) of the GDR Code of Civil Procedure).

One thus sees, at first glance, to what extent these fundamental objectives substantially affect the development of the civil process in socialist countries: it is the inquisitorial régime (règle inquisitoire) which reigns; the Ministère Public has many opportunities to intervene in the litigation, he can even act as plaintiff if the interests of the state or society demand it. Likewise, one finds participation in the procedure by representatives of socialist organisations and the labour collective which exposes to the tribunal their opinion on the matter to be decided.

Already these various examples demonstrate that not only the generally settled objectives, but also the structure of civil procedure in socialist states differs from that of civil procedure in western countries.

Admittedly, the latter legal systems also possess a basic ideology, but this ideology is a pluralism of ethical, political and social ideas. There is no governing concept, and for this reason the educative function of procedural law – if one admits that the judiciary has such a duty – is much more limited, in that it is also the educated and adult man, bearing various fundamental individual rights that are inherent in him (and not conferred on him by the state or society), who is the original subject of the lawsuit. It stems from this that the civil process is governed by the adversary principle (principe de contradiction), that the rights of the Ministère Public, if

1See Kellner Nat Rep GDR 1ff, GDR CC Proc art 2 para 1; USSR Principles of Civil Procedure art 2a.
3See Kellner Nat Ré GDR 6ff; and for Soviet law, Habscheid Introduction à la procédure judiciaire (1968) 4ff, and Habscheid Droit judiciaire privé suisse (1975) 62.
4GDR CC Proc art 7; USSR Principles of Civil Procedure arts 29 para 1, 44 para 2.
5GDR CC Proc art 4; RSFSR (Russian Republic) CC Proc art 147 para 1; Kellner Nat Rep GDR 715.
6See eg Trocker Nat Rep Italy 34ff.
7See id 36ff; Barbosa Moreira Nat Rep Brazil 15; Arens Nat Rep FRG 11; Rammos/Klamaris Nat Rep Greece 3; and see also Kiralfy Nat Rep England 9ff.
they exist, are—according to law and practice—very much more limited,¹⁸ that there is no participation of representatives of social groupings, etc.

Furthermore, if the legal terminology is often the same the connotations of identical terms are different.⁹ This is why the terminology alone can hardly serve as a criterion of comparison.

Nevertheless, one conclusion seems certain to me: the political systems reflected in the constitutional framework have a direct effect on the foundation of the law of civil procedure. And it is in this context that our second problem arises.

**Relationship between substantive rules and civil procedure**

(a) Some preliminary remarks

The clarification of the relationship between substantive law and the law of civil procedure has long been the debated subject par excellence in doctrinal theory. In effect, procedure loses its raison d'être in the absence of substantive law, from which one may conclude that a large part of the law of procedure by its very function reflects the substantive law. But there is another aspect which must be emphasised. In the case of litigation, the substantive law is realised and concretised by the judgment, which is the outcome of a civil action. On this view, Professor Gustav Walker, collaborator of the “father” of the Austrian Code of Civil Procedure, Franz Klein, was no doubt correct in saying:

*“Substantive law and procedure stand in the same relationship to one another as the idea to its practical application; and as the best idea can be thwarted by unskilful execution thus even the best Civil Code is of little value if it is not supported by a good procedure.”*¹⁰

Indeed, civil procedure is the institution which in the event of litigation makes the most of substantive law; its object will then be no more and no less than the realisation of that which the legal system guarantees by substantive law. One needs a good procedural law for giving effect to the substantive law.

One can say that all the national reports start from this basic notion, recognising an interdependence between substantive law and procedural

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¹⁸See the general report of Cappelletti and the national reports of the Ninth International Congress of Comparative Law Teheran 1974, on the Role of the Ministère Public in Civil Procedure. (Published in Cappelletti & Jolowicz Public Interest Parties and the Active Role of the Judge in Civil Litigation (1975) Section One.)

¹⁹See eg Habscheid Droit judiciaire privé suisse 44ff; and Zielinski Nat Rep Poland 10ff, who draws our attention to the fact that the separation of powers, the basis of liberal ideology, is not a principle in socialist countries.

²⁰1903 Juristische Blätter (JBI) 65; see also Nowak Die Stellung des Zivilprozessrechts in unserer Gesamtrechtsordnung JBI 1961 64ff; cf also Sprung Nat Rep Austria 2ff; and Nevai Nat Rep Hungary 4ff who quotes Karl Marx: “...das materielle Recht hat seine notwendige eingeborene Prozessform... Es muss ein Geist sein, der den Prozess und die Gesetze beseelt, denn der Prozess ist nur die Lebensart des Gesetzes, also die Erscheinung seines inneren Lebens” (“...substantive law of necessity has its own innate form of procedure... It must be a spirit which breathes life into the procedure and the laws, because procedure is merely the life form of the law, ie the outward appearance of its inner life”) (Marx-Engels Werke I (1958) 145).
law and emphasising that the law of procedure is *at the service of substantive law to realise it if the case arises*, but *without being absorbed into it*.\(^1\)

Now, through civil procedure, one must attain, in the final resort, that which the legal system pursues in the substantive law – substantive law which constitutes an ideal order in relationships between legal subjects. But it is evident that so metaphysical a consideration has only limited bearing. However, it emphasises that the aim or aims of civil procedure are to be found in the inter-relationships between the rules of substance and the law of civil procedure.

Determining the aim or aims of civil procedure presents at first a consideration of practical importance: it can contribute to a better understanding of procedural law itself. But it can also furnish indications which allow one to show how certain fundamental questions of procedure can be resolved, as for instance the juridical nature of the authority of *res judicata*, the breadth of freedom of action, or the question of choice between, on the one hand, the adversary principle, and the inquisitorial principle, on the other.\(^1\) But beyond this, to me it seems dangerous to try to draw conclusions about the legal nature of civil procedure, or worse still about the aim and value of procedural norms. In such an hypothesis, one would fear that the object of civil procedure would be evaluated as a vague rule of interpretation giving rise to different and frequently opposing conclusions. One observes such a development in German jurisprudence which has evolved, by means of a defined aim of procedure, a criterion of interpretation appropriate to every case. It thus dismisses the procedural norms which it considers too formal by declaring that since the realisation of the substantive law and subjective rights is the aim of procedure, one must eradicate the relatively formalistic obstacles. And it also refers to the higher aim of the law of civil procedure (*"das höhere Verfahrensziel"*), that is, the maintenance of public order and the legal security to allow for other rules of formal law.\(^1\)

Certainly, the results obtained by this conflicting argument have up to this point been largely accepted. But this argument, based on the aim or aims of procedure adapted to each need, can be neither approved nor defended. Or, to quote Professor Gaul, *"es erweist sich die vermeintliche Teleologie als eine recht wetterwendige Ideologie"*\(^1\) (the so-called teleology would prove to be a very versatile ideology). The great theorist of German civil procedure, Professor Fritz v Hippel, also warned us against the development of the aim of civil procedure in the sense of *"eine zivilprozes­suale Rechtstheorie im Westentaschenformat, eine Einheitslösung zwecks einfacher Repräsentation"*.

\(^{12}\)Likewise Wiederkehr *Nat Rep France* 4 For the Netherlands, cf Zonderland *Privatrechtspleging in grondtrekken* (1977) 6ff.


\(^{12}\)Cf Gaul *op cit* 37ff.

\(^{12}\)Gaul *op cit* 39.
und sicherer Orientierung im zivilprozessualen Urwald\textsuperscript{16} (a theory of civil procedure in a nutshell, a standard solution which aims to be a simple and reliable compass through the jungle of civil procedure).

(b) Do we characterise the aim of procedure as substantive or procedural?

The national reports of western and socialist countries reveal that three trends\textsuperscript{17} can be distinguished –

- The first aims at a radical separation of civil procedure from substantive law, and defines the aim of civil procedure as being purely procedural.
- The second emphasises the obvious predominance of substantive law. The task of procedural law is to realise the substantive law.
- The third is oriented towards a dual correlation between civil procedure and substantive law; the aim of procedure lies, according to this theory, in the realisation of individual rights and/or in the verification of the legal order; this objective must particularly allow for the maintenance of law and order and legal stability.

One can say that the third theory predominates today. One acknowledges the scientific merits of other doctrines, above all that of public lawyers, but one recognises that only the “mixed” objective postulated by the third theory answers practical needs.

Although several national reports mentioned this problem, only Professor Arens’s report (FGR) deals with it exhaustively, and this is because in Germany this question has remained highly controversial since the famous work of James Goldschmidt Der Prozess als Rechtslage.\textsuperscript{18} I will therefore outline the present state of the debate.

James Goldschmidt has defined the civil action as “a process designed to attribute authority to the judgment [ie to res judicata]”\textsuperscript{19}. To reduce the function of the civil process to this has the advantage of allowing one to determine in a uniform manner the aim of every process, and not only the civil process. But, as Professor Arens points out, this definition is lacking in substance inasmuch as it explains neither the forms, nor the developments, of procedure.\textsuperscript{20} Further, the authority of res judicata cannot be considered the final aim of the civil process. The authority of res judicata is only the natural consequence of a process not its final objective.


\textsuperscript{17}For the first, see eg Arens Nat Rep FRG 3ff; for the second see Nakamura Nat Rep Japan 5ff; see also Arens op cit 5ff; for the third, see Sprung Nat Rep Austria 2ff; Rammos/Klamaras Nat Rep Greece 3; Trocker Nat Rep Italy 5ff; Wiederkehr Nat Rep France 1; Barbosa Moreira Nat Rep Brazil 7; Arens Nat Rep FRG 7ff; Zielinski Nat Rep Poland 6; Ligertwood Nat Rep Australia 2.

\textsuperscript{18}Published in 1925 (new imp 1962).

\textsuperscript{19}Op cit (n 18 above) 150ff.

\textsuperscript{20}Arens Nat Rep FRG 4.
The authority of *res judicata*, as revealed by some national reports, only enforces the validity of an order in any subsequent litigation between the parties or concerning other persons subject to this authority. It then only represents the technical legal means, by which the law (or rather the claim, be it established or denied) will be respected in any future litigation. Thus no relationship of cause and effect obtains between the authority of *res judicata* and the procedure. This is why civil procedure cannot finally confer this (procedural) authority upon the order, but is only concerned with the decision on the subjective rights which forms the issue of the litigation. The authority of *res judicata* is therefore only the technical means of ensuring that this decision is respected in subsequent litigation. Goldschmidt's conception appears to a certain extent parallel to Luhman's sociological conception. According to the latter, the function and aim of civil procedure is to guarantee the effectiveness of a decision on all the problems posed, but not the accuracy of this decision.

If I understand Luhmann correctly - his "sociological" language is not easy to understand - he considers the task of judges as being an "accumulating of facts", the results of which are gathered like the information in an imaginary computer, programmed in advance by the law, which finally renders the decision - already abstractly determined - for each concrete case. However, such an understanding of the task of judges and of jurisprudence in general certainly does not apply to present day jurisprudence. It can only result - in my opinion - from a misunderstanding of legal practice. Today's judge, if he has ever been a deductive and analytical automaton, is at all events an "authentic" judge who not only declares the precepts of the law, but who also collaborates in their development; this is a fact stressed by several national reporters: judicial activity is no longer restricted to a sole application of law, that is a simple submission of stated facts to a legal rule, but presumes the preliminary discovery of this rule. Before being able to proceed to the "submission", ie to the legal qualification of facts, the judge must essentially "find" and even construct the legal norm which is indispensible for his syllogism.

To reduce the function of the civil process to the "production" of decisions, in conformity with Goldschmidt's opinion, does certainly not offer the advantage of protecting the law of civil procedure against the incursion of ideological elements, and, hence against political abuses.

We have already emphasised that the law of civil procedure must not be considered in isolation, but rather in the context of the ideas and
conceptions which are expressed in the constitutional framework. The political abuses of the civil process and the law of civil procedure could, from this point of view, certainly not be avoided by a formalistic determination of the goal of civil procedure. The German experience offers, in this regard, numerous examples from the era of national socialism. Here I content myself with a reference to "Gesetz über die Mitwirkung des Staatsanwalts in bürgerlichen Rechtssachen" (law on the participation of the Attorney-General in civil litigation) of 15.7.1941.27

It hardly matters whether one defines the aim of a civil action (which one would wish free of any ideology) in a formal or empirical manner; thus understood, the aim offers no protection against the political abuses of the law of civil procedure. The supporters of a formal definition of the function of the civil process have therefore, justifiably, remained in the minority; this is further clearly evident from the national reports. With the separation of the function of civil procedure from the substantive law, one abandons not only the idea that civil procedure is the institution which in the event of litigation optimises the substantive law,28 but it is further no longer possible to explain how certain fundamental questions of procedure can be resolved.

(c) Substantive characterisation of the aim of procedure

We have already emphasised that there exists a bilateral correlation between substantive law and the law of civil procedure. Indeed a procedure loses its raison d'être in the absence of substantive rules. Furthermore, substantive law is realised and concretised in the event of litigation, by the judgment which is the result of a civil suit. The endeavours to determine the aim of civil procedure in a substantive sense have adopted one or other aspect of this correlation. In this regard, the opinions of Pawlowski (FRG)29 and of Kaneko (Japan)30 are typical, for they start from the hypothesis according to which the substantive law to be elucidated is not established in a definite form before the action. The substantive rules are continually modified, and this is why they are indefinable.31 According to this conception, there is no substantive law "fixed in advance". The civil process creates the substantive law for each concrete case, and thus fixes it for a certain period.32

This conception is not easy to refute. One could justly reject certain points of detail, but there remains nevertheless an essential idea which, in my opinion must be taken into consideration. In fact, in the case of litigation, substantive law can only be realised and concretised by the judgment, which is the result of civil proceedings. The modern constitutional state prohibits the private pursuit of justice, and has, for this reason, the duty of guaranteeing legal protection to its citizens.33 Without the

27RGB1 (Official Journal of the Reich) 383.
29"Aufgabe des Zivilprozesses" (1967) 80 ZZP 363; see also Arens Nat Rep FRG 5ff.
30See Nakamura Nat Rep Japan 6.
31Pawlowski op cit (n 29) 365.
33Cf Habscheid Droit Judicire Privé Suisse 4ff.
tribunals which must furnish this legal protection, the regulations of substantive law would remain formulae devoid of meaning. The general legal norm, applicable to numerous cases, could not determine the "law" in each concrete case. Beyond this state of fact - if one takes into consideration that in civil procedure, it is not a simple matter of identifying real, pre-existing and obvious legal facts but, in the application of the substantive law incumbent on the courts, one also find elements of the formation and development of the law\[^{34}\] - it then becomes clear that the civil process is not only a vindicatory procedure, but more a pure process of concretisation of law. In other words, the judge must often find or formulate the law. The civil process is consequently a procedure in which the pre-existing substantive law is concretised in each decided case, or possibly settled. One should not go so far as to say that the civil process "creates" the substantive law in the first place. That neither could nor should be its function; since the competence to legislate is entrusted in each constitutional state to the legislator, even if certain states reject the separation of powers, as do the socialist states.\[^{35}\]

Likewise, with regard to English law, Professor Kiralfy emphasises in the following manner the development of common law by the judges:

"In English law the tradition of an unwritten law means that the judges are more creative and establish case law which is followed by other judges."\[^{36}\]

This concretisation of substantive law, such as we have described here, must not thus be considered the final aim of civil procedure as it is not so much civil procedure as the action itself which is revealed as a concretising procedure of law, so much so that in terms of this criterion, the civil action is not different from other types of action. It is for this reason that it is necessary to try to find another criterion, which could define more concretely and with more certainty the ultimate goal of civil procedure.

Most national reports consider that the civil process aims, either at the realisation of individual rights (droits privés subjectifs), or at the verification of the legal order.\[^{37}\] According to the most current definition, the civil process permits the realisation or, further, the exercise of rights.\[^{38}\] This definition seems to be concise and accurate. In civil procedure, it is a matter – in the majority of cases – of realising individual rights, but only in the majority of cases.

Indeed, the notion of individual rights is insufficient, or unacceptable, in cases where the civil process envisages, not the protection of private interests, but, primarily, the protection of legal institutions\[^{39}\] as well as the public interest. An action for setting aside a bigamous marriage or for

\[^{34}\]Cf in detail Habscheid (above n 25) 9ff.
\[^{35}\]See eg Zeilinski Nat Rep Poland 10.
\[^{37}\]Cf above n 17.
\[^{38}\]Likewise, Arens Nat Rep FRG 7ff; Ligertwood Nat Rep Australia 2; Barbosa Moreira Nat Rep Brazil 8.
\[^{39}\]For this notion, see Raiser "Rechtsschutz und Institutionenschutz im Privatrecht" in (1963) Summum ius summa iniuria 145ff.
establishing paternity not only protects the individual interests of the parties, but far more so the institutions themselves, be it the institution of marriage or that of filiation. The protection of these institutions thus accommodates the public interest and is of prime importance, even when it is a subjective right that the plaintiff asserts.\textsuperscript{40} There are even cases where the civil process envisages only the protection of the public interest.\textsuperscript{41}

These are the hypotheses which have induced the theorists and most of the national reporters to define civil procedure as tending, beyond the mere protection of individual rights, to the verification of the objective legal order (or the protection of legal institutions).\textsuperscript{42} Even according to this conception, there remains to determine if the civil process pursues these two objectives in the sense of "not only ... but also" (ie complementary) or in the sense of "either ... or" (exclusively).\textsuperscript{43} Be that as it may, the following concrete conclusions have been drawn, according to each of the aims of the civil process, with a view to the development of procedure: when the civil process tends towards the protection of individual rights, one must assert the adversary principle (principe de contradiction). If, on the other hand, public interests are at issue, the state must take the initiative from the beginning of the process, or during the latter, by instituting the inquisitorial principle.\textsuperscript{44} I believe, however, that this relationship is not universally valid.

First of all, neither of these principles necessarily corresponds to one or other of the aims of procedure; rather, they correspond to the action itself. If its object is not, according to substantive law, withheld from the freedom of action of the parties, one will apply, in accordance with the procedure, the adversary principle and the parties will keep their freedom of action. If, on the other hand, according to substantive law, it is more or less excluded from the freedom of action of the parties, the inquisitorial principle will then be applied and the freedom of action of the parties will be reduced if not excluded. This observation holds for western countries.\textsuperscript{45} To simply relate such and such a principle to such and such an aim would indicate a preference for an indirect rather than direct solution. For indeed, the aim of civil process is determined according to the object of each action, and one can even say that it stems from this object; so that one wonders why one does not draw concrete conclusions for the formulation of the procedure, not from the object of the action, but directly from the aim of the procedure. Futher, the aim of civil procedure is always determined in an abstract manner, and I end by doubting whether a useful

\textsuperscript{40}Cf Jauernig 1971 JUS 331, who does not see any subjective rights here, other than the 'right of action' (Klagebefugnis).
\textsuperscript{41}See eg the interdictory procedure of the German law, in particular FRG CC Proc art 641 1.
\textsuperscript{42}Gaul 168 AtP 46ff; Jauernig 1971 Jus S 331ff; Arens Nat Rep FRG 7ff; Wiederkehr Nat Rep France 1; Sprung Nat Rep Austria 2ff; Rammos/Klamaris Nat Rep Greece 3; Trocker Nat Rep Italy 5ff; Barbosa Moreira Nat Rep Brazil 7; Zielinski Nat Rep Poland 6; Ligertwood Nat Rep Australia 2.
\textsuperscript{43}See on the one hand Gaul 168 AtP 46ff; and on the other hand Jauernig 1971 Jus S 331.
\textsuperscript{44}In this sense Jauernig 1971 Jus S 331ff.
\textsuperscript{45}See eg Trocker Nat Rep Italy 22ff; Rammos/Klamaris Nat Rep Greece 14; Barbosa/Moreira Nat Rep Brazil 14ff.
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criterion for drawing concrete conclusions as regards the formulation of the action exists.

However, if one wishes to establish the relationship cited above (protection of individual rights = adversary principle; protection of public interests = inquisitorial principle), one also runs the risk of reaching conclusions which no longer correspond to the substance of the law. The institution of an action by professional groups or inter-professionals with regard to stopping practices seen as unfair competition, aims in a broad sense at the protection of fair competition, and therefore the protection of the public interest. The same applies to litigation by consumer associations.

That being so, one cannot explain why the issues raised by these group actions are subject to the adversary principle and not the rule of inquisition. Indeed, when the protection of the public interest is placed foremost; and according to the principle cited above, one should – at least – apply the inquisitorial method.

In short, one can say that this dual notion of “protection of individual rights and/or public interests” does not adequately determine the function of the civil process and that applies not only to “western” countries, but also, above all, to countries under a socialist system according to which the parties can – insofar as substantive law is concerned – remain free outside of court, but not in judicial proceedings. This distinction in the aim of the civil process, according to the format of the procedure, disregards the fact that we are trying to determine the function of civil procedure in toto, ie as an institution in all legal systems. Besides it supposes the existence of these two principles (adversary and inquisitorial) and this following the correlation on the one hand between the adversary rule (règle des débats) for ordinary procedure and, on the other hand, the inquisitorial rule (règle inquisitoire) for special procedures, especially those concerning the legal status. But if one considers that there are codes of civil procedure which provide for the adversary principle (and not the inquisitorial principle) for these special procedures, one is then ready to conclude that the concept under discussion cannot be valid for all systems.

(d) Attempted synthesis

Our outline has demonstrated that there are three possible definitions

44As, for eg, FRG s 13 UWG (law on unfair competition) and s 13 n 1, 2 & 3 AGBG (law on the general conditions); for the French law, see Solus/Petrot Droit judiciaire privé I (1961) 239ff.
45See esp Cappelletti “La protection d’intérêts collectifs et de groupe dans le procès civil” (1975) Rev int dr comparé 571ff; Hamburg & Kötz Klagen Privater im öffentlichen Interesse (1975); and of course Arens Nat Rep FRG 8. Cf also Raiser op cit (above n 39) 156.
46Personally, I am of the opinion that litigation by professional syndicates protects the interests of private individuals in the first place, and only secondly the public interest: see Habscheid “Zur Problematik der Verbandsklage im deutschen Recht”, forthcoming in Mélanges en l’honneur de Prof Rammos (Athens).
48See eg Greece CC Proc art 630 and 635 para 4 (former version), which provided for the inquisitorial maxim (now repealed by law 958 of 1971).
of the function of civil procedure. One is adopted by socialist countries and stems from the hypothesis that the relationships of individual rights enjoy legal protection insofar as they are "part and parcel of a whole". The second is accepted by some national reporters of western countries, such as Messrs Arens (FRG), Barbosa Moreira (Brazil), Nakamura (Japan), and leads to determining the function of the civil process – solely or at least partially – as confirming, or giving effect to, the legal system. The third is adopted by Messrs Trocker (Italy) and Ligertwood (Australia) and sees the realisation of individual rights as the aim of civil procedure. The contradiction between the first and the two other conceptions is – in my view – hardly surmountable since the emphasis is placed on the contribution of justice to the realisation of a socialist system, namely, to the formation of socialism and the education of the socialist individual.

The two other conceptions remain, however, within the limits of the open, pluralistic society with no dominant ideology.

This leads us to the questions of a possible synthesis of these western conceptions. Such a synthesis is not immediately excluded, since the fundamentals are more or less homogenous. And I repeat: pluralism is also an ethic, an ideology. If one starts from the hypothesis according to which the primary function of the civil process is the realisation of individual rights, one can understand the term "individual rights" in as broad a sense as possible, that is in such a way that it encompasses not only subjective rights in the strict sense, but also every legal power that private law authorises individuals to exercise, or a group of individuals having identical (individual) interests. This determination of the aim of civil procedure has, firstly, the advantage of balancing the dual correlation which subsists between the substantive law and the law of civil procedure. This definition of the aim of procedure restores the order of importance of the aims of the civil process by confirming the priority owed to the protection of an individual interest and thus to the precept of material, substantive and individual justice. The protection of a public interest and the realisation of objective private law are consequently the indirect aims of the civil process, achieved by a reflex action of the procedure.

51See GDR CC Proc art 2:1, IV; and Kelner Nat Rep GDR 6; Zielinski Nat Rep Poland 1ff and at the text accompanying nn 1–5. Mr Kellner writes: "Die Gerichte haben die Aufgabe, die sozialistische Staats- und Gesellschaftsordnung zu wahren, gesetzlich garantierte Rechte und Interessen zu wahren und durchzusetzen sowie durch eine hohe Wirksamkeit des gerichtlichen Verfahrens dazu beizutragen sozialistische Beziehungen im gesellschaftlichen Zusammenleben der Bürger zu fördern (art 2 para 1 CC Proc)" (The courts have the duty to uphold the socialist state and social system, to safeguard and enforce legally guaranteed rights and interests, as well as to contribute, through a highly efficient judicial procedure, to the advancement of socialist relationships in the communal social life of citizens).

52Arens Nat Rep FRG 8.
53Barbosa Moreira Nat Rep Brazil 7.
54Nakamura Nat Rep Japan 7.
55Trocker Nat Rep Italy 2.
56Ligertwood Nat Rep Australia 2.
57Likewise, Barbosa Moreira Nat Rep Brazil 7.
With the concrete realisation of law, the civil process also protects the objective private law in its entirety. The confirmation of the objective legal order must not be regarded as the specific function of the civil process, because the law, as such, is not an aim in itself which allows one to consider its realisation as the primary function of an institution of the state such as civil procedure. The objective law is the appropriate technique by which a power is accorded to the individual to enable him to protect his interests. One's conception of the categories of this "power", be it a right, a capacity or anything else, is unimportant. And the proposed definition of the aim of civil procedure finally has the advantage of covering, by using the broad sense of the term "individual right", every institution of substantive law, such as, eg, the "Verbandsklage" of German law, the actions of professional syndicates in French law or the "class action" of American law; all of which could not be theoretically accounted for by the narrower definition of individual rights. 58

The autonomy of the law of civil procedure

We have already emphasised that a dual correlation exists between the law of civil procedure and the substantive right. Indeed, an action in the absence of a substantive right loses its raison d'être, and on the other hand the substantive right is realised and concretised in the event of litigation by the judgment to be rendered, the latter resulting from a civil action.

Leaving aside this dual, functional correlation between procedural and substantive law, one must recognise unequivocally the existence of an autonomous law in all respects. 59 The independence of the law of civil procedure as distinct from substantive law already arises from the fact that the former has for a long time had a general theory (théorie générale) which is completely independent of the conceptions of the substance of law, and where the development of common principles would have been possible, the influence of substantive doctrines on the law of civil procedure (and vice versa) remains minimal. The notion of procedure, the origins of which are to be found in the considerable development of the theory of the law of civil procedure at the turn of the century and especially in Continental Europe, has led not only to different terminology for procedural law and substantive law, but even to a profound discord between these two branches of law. This separate development is not only justified, but it is also necessary – without however denying the necessity of a reciprocal influence of the two branches. It is justified by the fact that the firm and even indissoluble union of private law and civil procedure, which was entirely accepted in Continental Europe (at least up to the beginning of this century) and which finds its basis in Roman legal theory, has prevented the doctrine of civil procedure from developing a general theory. But this general theory is necessary, for the law of civil procedure encom-

58 See in detail Habscheid op cit (above n 48) and nn 46 and 47 above.
59 See the majority of the national reporters: Arens Nat Rep FRG 8ff; Barbosa Moreira Nat Rep Brazil 6ff; Bolding Nat Rep Sweden 8ff; Kiralfy Nat Rep England 1ff; Ligertwood Nat Rep Australia 1ff; Nakamura Nat Rep Japan 2ff; Nevai Nat Rep Hungary 2ff; Rammos/Klamaris Nat Rep Greece 2ff; Trocker Nat Rep Italy 1ff; Wiedeterkhr Nat Rep France 1ff; and Zielinski Nat Rep Poland 17.
passes – even for the most resolute private lawyer – branches belonging to public law, even if one is unwilling to concede that it falls solely within this branch of law.

Further, the substantive conception of procedural institutions, as for instance the object of litigation or the authority of *res judicata*, had led to results that were difficult to reconcile with the aim of the civil process, on the one hand, and the public (or partially public) character of procedural law on the other. Thus, the thesis which sees in the authority of *res judicata* the basis for the acquisition or the loss of a right of action ("*materielle Rechtskraftlehre*") is not reconcilable with the thesis according to which the function of the civil process as an institution is to help the parties defend their (existing) rights.

The English national reporter, Professor Kiralfy, stresses the close relationship between the law of procedure and substantive law, based on historical factors such as the system of "writs" in which each is subject to a particular procedure, and to the formalism ("forms of action") of the 19th century.61

The independence of the general theory of the law of civil procedure in relation to the conception of substantive law is nevertheless necessary for the countries of continental Europe which have abandoned the Roman system of actions. In these countries, the particular nature of civil procedure cannot be conceived according to substantive notions. Thus, for example, the authority of an erroneous judgment, i.e., a judgment not conforming to the substantive legal situation, can only be explained by the task attributed to the principle of *res judicata* which is to ensure legal stability.62 If one also wishes to explain this (or only this) in substantive terms, one will be forced – as does, incidently, the substantive doctrine of *res judicata* – to conclude that the erroneous judgment gives rise to a substantive right which did not exist until then, or else leads to the abolition of an already existing right. One can thus, at this stage, assess the significance of an erroneous judgment; but such a conception of the authority of *res judicata* no longer accords with the aim of civil procedure; indeed, it is not always a matter of forming substantive relationships between parties. In the civil process the judge must take into account the facts raised and then investigate whether the legal consequences claimed by a party must be upheld or not. If the facts alleged do not correspond to the historical reality, or if the judge has not been convinced by the argument as to what the law prescribes, this does not mean that the judge has decided "erroneously"; the judge has decided in a just manner in this case, but the facts which form the basis of the judgment do not conform to the true situation. Considered in this light, the phrase employed by the substantive theory of the authority of *res judicata*: "the erroneous judgment creates a non-existent right or consigns an already existing right to extinction" thus signifies that

60 Cf Wiederkehr *Nat Rep France* 2ff; Fernandez Lopez *Nat Rep Spain* 6.
61 Kiralfy *Nat Rep England* 1ff.
by the authority of res judicata, a legal consequence occurs even if the constituent elements of the respective rule of law are not given or else that a legal consequence does not occur, even if the constituent elements of the rule of law are actually present. It is obvious that such a consequence cannot be accepted. From this example, one can therefore conclude that, in order to grasp and elucidate the particular nature of the civil action, an autonomous general theory of the law of civil procedure is necessary in the aforementioned countries.

But even in these countries, the theory of the law of civil procedure must avoid reaching legal constructions too remote from the conceptions of substantive law, because in consequence the aims envisaged by the legal norms would not be attained. One must not ignore the fact that the institutions of the law of civil procedure, at least as a general rule, are the procedural complements of the substantive law or, at least, are supposed to be. Indeed, it is only in this manner that the balance between the substantive law and the law of civil procedure can be maintained. It is necessary, therefore, that these two theories mutually influence each other. Certainly, the substantive theory is the older, the more venerable. Nevertheless, it can benefit considerably from the “new” procedural theory. The influence of the German procedural theory relating to the object of litigation on the substantive conception of the “Anspruchskonkurrenz”, namely the competition of several individual rights, is a good example.

THE PRINCIPLE OF PROCEDURAL JUSTICE (“VERFAHRENSGERECHTIGKEIT”) AS GUARANTEE OF A JUST AND EQUITABLE JUDGMENT

The world in which we live is imperfect and will remain so. For this reason we will never attain a system of justice that produces decisions which always reflect the actual truth. However, what we can do is guarantee to each citizen dignified and fair treatment before the courts, and equality of treatment for all parties. The parties must be afforded the same opportunities, the same chances, the principle of “Waffengleichheit”, the equality of weapons must prevail. A procedure with this aim will ensure, as far as possible, not only a just and equitable judgment, but also a process “with a human face”.

In this context, several secondary problems, which have been dealt with by the national reports, arise. I mention above all: the questions (old and new) of the independence of the courts, contempt of court, access to justice, the right to be heard, the authority of the judge, the freedom of the parties and the principles of procedure. We will permit ourselves, in the following pages, to outline the new developments concerning these fundamental questions.

63Thus see Michelakis “Rechtsnorm und Rechtskraft” in Hommage en l’honneur de Schima (1969) 309ff.
64See in detail Calabros Urteilsiwirkungen zu Lasten Dritter (1977) s 5 II 3d and s 7.
The functional independence of judges

Most European constitutions expressly mention judicial independence; e.g., the constitution of the Federal Republic of Germany, art 97; the Danish constitution, art 64 phr 1; the French constitution, art 64; the Greek constitution, art 87 s 2; the Italian constitution, art 101 al 2; the Irish constitution, art 35 al 2; and – as an example for socialist countries – the constitution of the USSR, art 112, to mention only a few. This feature is mentioned in the national reports of Messrs Kellner, Zielinski, Trocker, Ligertwood, Rammos/Klamaris, Wiederkehr and Fernandez Lopez.

"Judicial independence" is indeed an insufficiently defined term. Functional as opposed to personal, independence is freedom from interference with jurisdiction and independence with regard to the instructions of the executive. Constitutional texts provide, often clearly, that the judge is subject only to the law. Judicial independence does therefore not offer protection against "interference" by the legislature.

Indeed, in principle the legislator remains free to replace or amend the applicable law so that the judge will have to dismiss the action as unfounded. The state might be tempted to resort to such an amendment if it is itself the defendant. This was so in the case of Burmah Oil Co Ltd v Lord Advocate, where the British parliament removed, by means of retrospective legislation, the basis of the plaintiff’s case, and this after the House of Lords had rendered an interlocutory judgment in favour of the plaintiff. According to Continental European constitutional law, this attitude of the British parliament could not be considered as a breach of the functional independence of a judge who is not protected against legislation, but who must simply apply it. It would be otherwise if such a legislative interference had not complied with other constitutional principles, for instance, the principle of good faith.

The personal independence of judges

Personal independence, that is, the judge’s assurance that, in principle, he need not fear the loss of his office – the principle of tenure – is usually recognised as a concomitant necessity of functional indepen-
Certainly, one can only speak of a principle, which, even in France, does not have such absolute vigour that one might deduce from the unequivocal formula of article 64 al4 of the French Constitution, according to which the judges cannot be removed from office.

A stripping of jurisdiction is always possible, for substantive reasons, after a formal procedure, and exceptionally, even without one.78 One can cite as a typical example the "good behaviour" clause of Anglo-Saxon law, which was inscribed for the first time in the Act of Settlement of 1700, which guaranteed judicial tenure "quandium se bene gesserint" (during good behaviour).79

Although the Act of Settlement has itself been superceded by subsequent legislation,80 the clause has been maintained in Canadian law81 and in the constitution of the USA.82

The deprivation of office in Western countries is in principle tied to a specifically formal procedure: England and Canada require the resolution of the two legislative chambers in respect of judges in superior courts;83 while for judges in county courts and English "Recorders" (part-time judges), the Lord Chancellor’s decision suffices.84 The USA guarantees the independence of its federal judges in article II, s 4 of the American constitution by requiring interference only by way of impeachment proceedings, which are motivated by the accusations of a majority of the members of the House of Representatives, and confirmed by a two-thirds majority in the Senate.

The procedure (art II, s 4 USA Const) concerning the President, the Vice President and all "civil officers" (which includes federal judges) can be set in motion on grounds of "treason, bribery, or other high crimes and misdemeanours". The significance of this last general ground - "other high crimes and misdemeanours" - is much debated in legal theory and in constitutional practice.85

Most controversial is whether a criminal offence must have been committed, or if any outrageous behaviour suffices ("any offence against

77Eg art 64 al 4, French constitution; art 87 al 1 & 2 West German constitution; art 64, Danish constitution.
78See s 24 DRiG (Federal German Law on the status of the Judiciary) which provides for the automatic loss of office in the case of a serious criminal offence. For comparative law, see Habscheid (above n 9) 44ff; for Swiss law, see ibid 38ff.
79Jolowicz (above n 75) 125.
80Supreme Court of Judicature (Consolidation) Act 1925; Appellate Jurisdiction Act 1876. See Jolowicz (above n 75) 126 n 74; see also Courts Act 1971, Part III, 17(4), and 21(6). [See now The Supreme Court Act 1981, 11(3) and 11(8).]
81British North America Act 1867, s 99(1); Watson "Fundamental Guarantees of Litigants in Civil Proceedings in Canada" in Cappelletti & Tallon (above n 75) 195.
82USA Constitution art III, Smit "Constitutional Guarantees in Civil Litigation in USA" in Cappelletti & Tallon (above n 75) 446.
83Cf above n 80; British North America Act 1867, s 99 (Watson (above n 81) 195) concerning the superior courts of the provinces.
84On grounds of incapacity or "misbehaviour" (Courts Act 1971, Part III, s 17(4) and 21(6)).
Continental constitutions generally require a judicial decision or one emanating from a specific judicial body.

**Contempt of court**

If interference by the state represents the most traditionally dangerous form of unlawful influence upon the reasoning and decisions of the judge, it is however not the only one. The parties themselves can attempt to influence the judge unlawfully. Thus, in all legal systems, attempts at bribery are punished by penal measures.

Sometimes however, judicial independence is subjected to pressure greater than crude attempts at corruption. I refer to the power of the "mass media", whose task of informing does not stop at the door of the court. "Trial by press" has become the catch-phrase. To obviate this, the Anglo-Saxon judge has at his disposal a powerful and unique weapon which, despite certain modifications of detail in 1960, has lost none of its efficacy in England. Contempt of court is not only a means of defence against polemical newspaper articles, but also an instrument of defense against any form of resistance to the authority of the judge when this appears unlawful and fulfills certain conditions.

Certain aspects of contempt of court are illustrated, for example, by the power of the judge to impose summary punishment in order to maintain the dignity of the court and, by means of the provisions of the criminal law, to protect it against action impinging upon constitutionally established authority. But the power of punishment of the judge in matters of contempt of court goes much further.

It seems in this regard that one must stress a requirement: that the independence of the judge must not give way to fundamental rights, such as freedom of the press, expression and speech; it must even retain priority in a case of conflict. Lord Justice Salmon observes with reason: "Take away that right, and the freedom of speech and all other freedoms will whither and die."

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86 A very restricted interpretation was once adopted, for obvious reasons, by President Nixon's legal defense team: see Abraham op cit 44-45.
87 Art 97 I GG; art 88 II BVG (Austria).
88 West Germany: art 97 al 2; France: Conseil supérieur de la magistrature; Italy: art 1071 Italian Const, Consiglio Superiore de la Magistratura; Netherlands: art 180 al 4 Const Holland, Hoge Raad. For Switzerland, see Habscheid (above n 9) 55: the law varies according to the canton in question. For the federal judges, it is the Federal Assembly which exercises disciplinary supervision (art 85 al 11, Federal Constitution).
89 See now also the Contempt of Court Act 1981.
91 Ss 105, 106 of the West German code of civil procedure limit the protection to constitutional courts.
92 In Morris and Others v The Crown Office [1970] 2 QB 114; see Schweitzer (above n 90) 2.
The "natural" judge

The written guarantee of the "natural" judge is first encountered in article 4 of the French Constitution of 1791. The constitutions of independent Latin American states, which closely resemble the French Constitution, have adopted this principle, and it is now recognised in nearly all Western legal systems.94

English law – and this seems interesting to me – contains, neither implicitly nor in writing, a principle according to which the competent court must be determined in advance (whether this be either a particular division or chamber, or even a particular judge). One may ignore provisions for the division of business – assuming these exist – and consider it to be legitimate that the executive should nominate a particular judge. One assumes that intentional submission to a particular judge – for instance a very severe one – is no less just than a system of blind chance. And this would not be otherwise, in the long run, were matters to be allocated according to the initials of the people concerned. One assumes that recusal on grounds of reasonable apprehension of bias suffices as protection against a biased judge.

This limited concern is the result of the particular respect and confidence that the English show toward their judges.95 As for socialist countries, one must emphasise that there exists a specific rule – the principle of evocation – which gives the superior court the power to remove the matter from the court of first instance and adjudicate in its place.96 Through our eyes, such a right is hardly compatible with the principle of the natural judge.

The impartiality of the judge

It might surprise one that, in countries having a written constitution, it is not in the constitutional texts but in the respective codes of procedure97 that we find the really dominant postulate of procedural justice (Verfahrensgerechtigkeit),98 99 known as the principle nemo iudex in re sua.

Although the principle is generally recognised, the device of recusal has remarkable features:

According to one of the systems there is a rigid distinction between the iudex inhabilis, the judge excluded by legislation, and the iudex suspec-
sus, suspected by the parties, and covered by a general rule. His exclusion depends on their initiative. The dogmatic rigour of this distinction may be tempered by the possibility of the parties' also recusing the *iudex inhabilis*.

French and Italian law, on the other hand, require that the judge in certain cases (which are generally serious) recuse himself, and moreover afford the parties the possibility of demanding his recusal. These systems reject the notion of the *iudex susctus*, but allow the judge to anticipate recusal in appropriate cases.

The Greek Code of Civil Procedure presents in article 52 (formerly article 53) a simple but nevertheless just solution; it abandons the notion of the *iudex inhabilis*, as well as the obligation of abstention, but it accords the judge and the parties a right of recusal when one of the grounds for rejection previously mentioned is present. Under clause (f) of this law is inscribed a general clause relating to *iudex susctus*. The decision relating to this demand is always taken at the conclusion of a particular proceeding.

The parties to an English civil action are spared a complex procedure of recusal, but the judge who risks seeing his judgment annulled is inclined rather toward voluntary recusal; this all the more so since English civil procedure does not provide for the forfeiture of the right to demand recusal (as, for example, does art 342 al 2 CPC, France; such provision makes the judgment pronounced by the judge, "suspect" but not recused, almost unimpeachable). The parties do not lose their right of recusal, even if they were aware of the grounds of suspicion, unless they have expressly manifested their consent.

The English judge will voluntarily recuse himself on the same grounds as those recognised on the Continent and, following the celebrated maxim "Justice should not only be done, but should be seen to be done", he will withdraw in circumstances where a "reasonable man" could believe that legitimate suspicion of bias exists. In English law, this flexible solution avoids the harsh consequences of the rigid provisions of the German ZPO where a judge must participate, whether he wishes to or not, in the reopening of the case when a quashing action (*action en nullité*) or action for restitution (*Wiederaufnahmeverfahren*) is instituted, even if he had participated in the judgment under attack. This is certainly a strict consequence of the principle of the natural judge.

Several laws provide for solutions designed to prevent the demand for

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100Cf's 20 *Jurisdiktionenorm* Austria, and § 42 ZPO, West Germany.
101Art 339 CPC France; and art 515 CPC, Italy.
102Art 341 CPC France; and art 52 CPC, Italy.
103Art 339 al 2 CPC France; art 51 al 2 CPC Italy.
104For the Spanish law see Fernandez Lopez Nat Rep Spain 8 (hardly *iudex inhabilis*!).
105Golowicz (above n 75) 137.
106No recusal, that is no consideration of alleged suspicion, may be had once proceedings have ended; likewise, eg Arts 43 and 44 al 4 of the West German ZPO.
107Golowicz (above n 75) 137.
recusal from becoming a means of obstruction in the hands of the parties or their advocates. The Italian CPC imposes on the applicant\textsuperscript{108} the costs of an unsuccessful request for recusal and necessarily anticipates a pecuniary sanction; the French Code of Civil Procedure\textsuperscript{109} makes this optional, but provides theoretically for a fine of as much as F10 000.

An English advocate will only make cautious use of the request for recusal as a means of delay. A Canadian court will impose, in respect of such an unfounded request, a fine of $2 000 for contempt of court.\textsuperscript{110}

**Access to justice**

If we now examine the procedural guarantees which bear on the situation and the protection of the parties during proceedings, the guarantee of free access to courts is placed, as it were, “at the very beginning” of the procedural rights of the citizen.\textsuperscript{111} The civil process will not take place unless this access is provided for. The prohibition against taking the law into one’s own hands, as prescribed by a state, carries with it the obligation of guaranteeing to the individual that he be able to obtain justice through the institutions of the state: a social and legal system which prevents its citizens from vindicating their rights must offer them an alternative means as a substitute.\textsuperscript{112,113}

(a) The notion and substance of the guarantee

This guarantee consists, in detail, of: acceptance of the summons by the court; securing a hearing by the judge; conducting a trial; examination of the allegations and legal arguments contained in the claim; and, finally, promulgation of a decision. Expressed concretely, it is the power of setting the judicial machinery in motion.\textsuperscript{115} For some years the debate that we believed to be closed has been revived in Germany and Switzerland, namely, whether there exists a “Rechtsschutzanspruch”,\textsuperscript{116} that is, the right of obtaining a favourable decision from the court when preliminary conditions are fulfilled. The dominant theory\textsuperscript{117} denies this right. More specifically, this means – according to the dominant theory – the right to justice

\textsuperscript{108}Art 54 CPC Italy.

\textsuperscript{109}Art 535 CPC France.

\textsuperscript{110}Schweitzer (above n 90) 23.

\textsuperscript{111}Cappelletti & Vigoriti “Fundamental Guarantees of the Litigants in Civil Proceedings: Italy” in Cappelletti & Tallon (above n 75) 534 (considered “le plus important”).

\textsuperscript{112}Cf Mees Der Rechtsschutzanspruch (1970) 40.

\textsuperscript{113}The national reporters nearly all discuss access to justice: cf Arens Nat Rep FGR 12; Zielinski Nat Rep Poland 7ff; Barbosa Moreira Nat Rep Brazil 20; Trocker Nat Rep Italy 9 and 12ff; Rammos/Klamaris Nat Rep Greece 9; Wiederkehr Nat Rep France 20; Fernandes Lopez Nat Rep Spain 8.

\textsuperscript{114}Rosenberg/Schwab Zivilprozessrecht 11ed (1974) 11, s 3f; and Nakano Das Prozessrechtshältnis 79 ZFP 108.

\textsuperscript{115}Oppenheim “Les Garanties fondamentales des parties dans le procès civil en droit français” in Cappelletti & Tallon (above n 75) 487.

\textsuperscript{116}Regarding this notion, see Mess op cit (n 112); and Stein, Jonas & Pohle ZPO – Kommentar 19ed, Introduction, 1f.

\textsuperscript{117}See Habsccheid Droit judiciaire privé suisse 2ff; (1964) Fam RZ (Zeitschrift für das gesamte Familienrecht) 489ff; (1967) Fam RZ 61ff.
covers only the right to a decision of the court, but not to a specific or advantageous judgment. 118

Indeed, to interpret the plaintiff's access to court as a right one can exercise against the state is not an expression of extreme dogmatism, but rather a conception which condemns every denial of justice, whether formal or real, open or covert, as a betrayal by the state. And it appears that certain dilatory procedural practices, as well as extremely lengthy proceedings, which may result in a denial of justice, 119 constitute a violation of this fundamental right.

(b) The legal basis and limits of the guarantee

The constitutional right of access to justice is expressly accorded in the Italian constitution (art 24), the Japanese constitution (art 32) and the Greek constitution of 1975 (art 20 al 1). In West Germany there is a controversy regarding the basis of this right.

The more popular theory accords constitutional status to the right of access to justice, 120 upon the basis of art 101 al 1 (natural judge), 103 (right to be heard) and finally the principle of the Rule of Law ("Rechtsstaat"), of the just state (art 20 al 1 West German Constitution). 121 The Bundesverfassungsgericht (West German Federal Constitutional Court) has not yet had occasion to decide this question, but, in a 1954 decision 122 the court declared that a denial of formal justice is incompatible with art 101 al 1 of the constitution.

In the other countries under review constitutional courts have repeatedly confirmed the right of free access to justice and have not tolerated exceptions. 123 These countries have shared the common experience of a period of injustice and dictatorship, and the draftsmen of their constitutions were induced to reinforce the competence of the third power of the state and to provide for free access to it.

On the other hand, in the common law world, in Scandinavia, and in socialist countries, there is in principle no longer any constitutional obstacle to the refusal of party access to the courts. 124 125 These countries have made use of such possibilities, especially in the field of social insurance and in administrative matters, but also in labour law: the power of conciliation but also that of deciding contentious matters has been transferred to

118 Habscheid op cit (n 117).
119 See B Verf GE 3, 359 (364). Trocker Nat Rep Italy 15ff, and especially 19ff, provides us with an excellent survey of the problem and the debate in his country.
120 For another opinion cf Düring, in Maunz, Dürig & Herzog GG - Kommentar art 103. Ann 88: guaranteed by s 13 GVG (Law on judicial organisation).
121 Baur "Les garanties fondamentales des parties dans le procès civil en RFA" in Cappelletti & Tallon (above n 75) 13; and Calavros Urteilswirkungen zu Lasten Dritter s 2 II lb.
122 B Verf GE 3 359 (264).
123 See Cappelletti "Fundamental Guarantees of the Parties in Civil Proceedings" in Cappelletti & Tallon (above n 75) 711.
124 With the exception of the 7th Amendment of the US Constitution.
125 Cappelletti (above n 123). See the discussion on this subject by Zielinski (Nat Rep Poland 7ff), who also deals with the question of arbitration.
commissions comprising members who are not protected by the guaran­
tees of independence bestowed upon judges.

Nevertheless, litigation costs money and time, consumes energy and
patience and therefore produces dissatisfaction.\textsuperscript{126} Besides, the control over
decisions by a superior tribunal also takes time. Administrative proceed­
ings can work more expeditiously. These reasons and, certainly, the lesser
interest taken by the state in the regulation of private litigation, explains a
certain restriction upon the right of access to justice.

Despite the different points of departure of constitutions, one can
detect a welcome convergence (rapprochement):

Thus, there exists in Italy, in the domain of motor and social insur­
ance,\textsuperscript{127} a preliminary non-judicial procedure. One speaks of the “giurisdi­
zione condizionata” (conditional access to state courts). But the preliminary
judgment is subject to complete judicial revision in respect of both facts
and law.\textsuperscript{128} The Japanese reporter, Mr Nakamura, points out that a similar
institution exists in his country, the Chotei-tetsuzuki, a conciliation pro­
cedure with the participation of a professional judge.\textsuperscript{129}

On the other hand, the “quasi-judicial” tribunals in Anglo-Saxon
countries or the institutions of public arbitration in socialist countries,
who adopt a habitus of justice,\textsuperscript{130} \textsuperscript{131} strive toward certain procedural stan­
dards.\textsuperscript{132} Will this lead to the development of administrative courts after
the French, German, or Italian models? The question remains open. But
the “giurisdizione condizionata” of Italian law or the existence of specialised
tribunals\textsuperscript{133} must not create the impression that the constitutional basis is
or could be affected. To this extent there can of course hardly be question
of convergence.

(c) The reality of access to the courts

“Justice is open to all, like the Ritz Hotel”.\textsuperscript{134} This is the sarcastic
aphorism attributed to English justice. This must be close to an internat­
ional truth.\textsuperscript{135} It has been estimated that in Italy, for an action worth a
million lire, the costs of the proceedings at first instance are barely lower
than this figure,\textsuperscript{136} and in West Germany, a “normal” action of up to DM 2
000 will cost approximately DM 2 400 after two instances. The obligation
of the plaintiff to furnish security for the expenses of the court and his legal

\textsuperscript{126}Cf Sprung Nat Rep Austria 3ff.
\textsuperscript{127}Law 990 of 24 December 1969: see Trocker Nat Rep Italy 14ff.
\textsuperscript{128}Tracker ibid.
\textsuperscript{129}Nakamura Nat Rep Japan 11ff.
\textsuperscript{130}They enjoy, eg, certain guarantees of independence: see Cappelletti (above n 123) 717.
\textsuperscript{131}Zielinski Nat Rep Poland 7ff.
\textsuperscript{132}For example, the right to be heard: Cappelletti (above n 123).
\textsuperscript{133}In West Germany there are five jurisdictions, each with an institution of review (art 95,
Constitution).
\textsuperscript{134}The source of this observation is unknown.
\textsuperscript{135}Fechner “Kostennisko und Rechtswegsperre – Steht der Rechtsweg offen?” 1969 JZ 349;
Tracker Nat Rep Italy 15ff; Barbosa Moreira Nat Rep Brazil 20.
\textsuperscript{136}Tracker Nat Rep Italy 17.
representative does not encourage him to attempt to seek judicial endorsement of his rights.

Legal assistance and aid are two solutions instituted in order to avoid legal protection being the privilege of the rich.\(^{137}\) The Italian constitution expressly provides in art 24 III: “Indigents will be assured means of prosecution and defence before all courts, by the appropriate institutions”. It has already been said that these “institutions” are “more worthy of a Kafka novel than a legal aid program”.\(^{138}\) In West Germany the existence of a right to legal aid may be deduced from art 3 al 1 of the constitution (principle of equality), on the one hand, and art 103 of the Constitution (right to be heard), on the other.\(^{139}\) It seems equally sound to found the right to legal aid upon art 3 (principle of equality before the law), in order to stress the “equality of weapons” (“Waffengleichheit”) of the parties in the process.\(^{140}\) In detail the implementation of legal aid presents considerable differences and particularities, and I wish to consider only the most obvious here.\(^{141}\)

The guarantee of reciprocity, set as a condition for foreigners to obtain legal aid,\(^{142}\) has lost much of its importance since the Hague Convention on civil procedure of 1954 (art 20). The provisions for commercial societies and bodies corporate\(^{143}\) are very different; the facilitative rules of the West German and Austrian codes of civil procedure\(^{144}\) concerning stateless persons who are in particular need of protection (for example, in the case of expulsion) are hardly satisfactory.

In all countries it is necessary to examine at the outset whether the litigation has any prospect of success. In this regard German law is hardly praiseworthy: the decision relating to the application for legal aid is pronounced at the end of a “quasi-adversarial” procedure during the course of which, according to s 118a al 1 ZPO, the “adversary” must be heard.\(^{145}\) In the procedure relating to the application for legal aid, the West German ZPO, even goes as far as treating the applicant as the adversary of the other. Other notable differences are reflected, for example, in the level of the means test of income\(^{146}\) and wealth,\(^{147}\) also with regard to the (highly criticised) professional obligations of advocates – concerning unpaid rep-

\(^{137}\) Rosenberg & Schwab Zivilprozessrecht s 90 I 1 442.
\(^{139}\) B Verf GE 2 339; Düng (above n 120) art 103 ann 77.
\(^{140}\) See also Ligertwood Nat Rep Australia 20. For Switzerland, see Aubert Traité de droit constitutionnel suisse Nos 1813–1821; Habscheid (above n 9) 276–277.
\(^{141}\) In detail, see Gottwald “Armenrecht in Westeuropa und die Reform des deutschen Rechts” (1976) 89 ZBP 136.
\(^{142}\) Eg s 114 al 2 West German ZPO.
\(^{143}\) See Gottwald (1976) 89 ZBP 145.
\(^{144}\) S 114 II 2 ZPO, West Germany; art 195 II (previously 197 II) CCP Greece.
\(^{146}\) Absolute or relative systems.
\(^{147}\) In Denmark the cut-off level is 200 000 dkr; Gottwald (1976) 89 ZBP 155.
representation, and the right of tax exemption, the portion of income to be deducted from the net revenue for estimating the determinant income (family expenses, etc.), the role of the unassisted party, and the competent authority.

One must further consider the unsatisfactory situation of the person who is not poor from the technical point of view of the law nor even in the general sense of the word, but for whom the costs of a lost action are considerable, and who suffers devastating effects which are frightening and which threaten his living.

These are the most common problems. This menacing effect indicates to what extent confidence in the Rule of Law (Rechtsstaat) is eroding. Access to the courts often becomes a “paper guarantee”, its forced denial is, especially with regard to the prohibition against taking justice into one’s own hands, unjust and absurd. Indeed, the implementation of the just social state (sozialer Rechtsstaat) has not yet made much progress in the matter of the costs of litigation.

The right to be heard

The right to be heard is a procedural principle of eternal value: in this regard, one must allude to some more recent aspects of this maxim, which embodies, perhaps as no other, two thousand years of legal history and which is not confined to any particular legal system, as is shown by the national reports of Professors Ahrens (FGR), Kelner (GDR), Zonderland (Netherlands) and Fernandez Lopez (Spain).

The principles of English law seem most convincing in that the right to be heard is divided into a right to notice and a right to be heard, these two elements being equally necessary for a fair trial — and which are flexibly construed when one speaks of the right of each party to proper notice of the case against him and the right to put his own case.

(a) The right to notice

If one hopes to defend one’s rights effectively, one must know how and why they are being challenged. If one is sued in civil proceedings, one must be notified at the very commencement of proceedings.

Although the various rules on the initiation of a summons are different, there remains an essential common feature: this is the requirement of
proper service of a writ containing the particulars of claim. The rules for
the writ must, on the one hand, ensure that the litigation will be brought
to the notice of the defendant; and, on the other hand, ensure that the
defendant does not obstruct an ordinary writ and thus prevent the matter
from coming before the judge. That is why one requires a form of substi-
tuted service which creates fictitious knowledge of the summons. By this
"substituted service" – the term may cover various forms of "notice" – one
includes here only published notice. Indeed the defendant to an English
action is treated with much consideration and regard, whereas certain
civilian codes of procedure underestimate the close relationship between
the rules relating to summons and the right to be heard. 155 The English
dodge permits "public" notice but generally only when this method ren-
ders it likely that it will come to the notice of the addressee, that is when
one knows, at least, that he is within the territorial jurisdiction of the high
court. 156

In terms of a decision of the Bundesverfassungsgericht (West German
Constitutional Court), 157 the right to be heard has been defined as follows:
the court may only base its decision on facts and evidence on which the
parties have been able to comment beforehand, that is, in our context, on
which they have had previous knowledge. This has given rise to a debate
most surprising to an Anglo-Saxon jurist – whether there exists a right to
know the legal deliberations of the court, and if the judge must have a
"legal exchange" with the parties. 158 Until now, the almost unanimous
doctrinal view has been that protection against arbitrary decisions entails
the right to be informed of the juridical deliberations of the court. The
judge can therefore easily base his decision on a legal opinion of which the
parties do not have previous knowledge, and the decision could thus catch
them unawares. 159

(b) Right to be heard

Whilst the "right to notice" supposes no action on the part of the
party involved, the latter must exercise an active rôle in order to assert his
"right to be heard". So far as the court is concerned, it has – in principle –
observed its obligations when it has given the parties an opportunity to
express themselves. 160

The right to be heard, as opposed to the right to notice, applies not
only to the facts and the inferences to be drawn from the evidence, but also
to legal pleadings. The English Court of Appeal has considered that the
conduct of a trial court 161 which only considered the inference of the
evidence, and had then believed it could ignore the advocate's arguments
constituted an infraction of the rules of natural justice. The court might

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155 See eg ss 203ff ZPO, West Germany.
156 Jolowicz (above n 75) 158; Bunge Das englische Zivilprozeßrecht (1974) 82.
157 B Verf GE 5, 24.
158 Arndt "Das rechtliche Gehör 1959 NJW 6ff.
159 Dürig in Maunz, Dürig & Herzog (above n 120) art 103 ann 38.
160 Dürig in Maunz, Dürig & Herzog (above n 120) art 103 ann 48 & 49.
161 Jolowicz (above n 75) 162.
have considered likewise the action of a hasty criminal judge in Germany, who began composing the text of his judgment during the address of the defence counsel.\textsuperscript{162}

The right to be heard requires more than a mere leave to speak. The court must rather listen and be disposed to take the submissions into account in its decision.

Other current questions concerning the content of this right merit study on several important points: does the principle permit exceptions, for example, in the case of provisional proceedings or compulsory execution; in what form should the right be granted (in writing or orally); can one remedy a breach on appeal; does it entail the right to an interpreter and legal aid?\textsuperscript{163}

\textit{(c) The holder of the right}

The problem of knowing who is possessed of the right has not yet been sufficiently discussed. The majority view in Germany extends this right beyond the parties and others interested to all those whose legal position is such that they are directly affected by the action.\textsuperscript{164} According to another view, any person who has a material interest must be heard, including those whose interests are only indirectly affected by the action.\textsuperscript{165}

\textbf{The authority of the judge and freedom of the parties}

We now turn to the principles of procedure in the strict sense of the word, those principles concerned with the development of the action, the procedere. One obviously hesitates to speak of a principle of justice in this context. No one would hesitate to describe a case led before a biased judge — whom one could not have recused — as irregular. Could one say as much of a violation, for example, of the adversary principle? Is it not here a pure policy decision by the legislator, rather than a requirement of justice?

Even if one does not perceive a definite answer to this question, one has at least to recognise that we are dealing with unsettled principles, which, more than the others, depend on the mood of the times and the extent and ideology of the state. And, further, as Rosenberg has rightly written: "Jede Reform hat noch stets nach kürzerer oder längerer Zeit eine Hinneigung oder gar Rückkehr zu den eben verlassenen Grundsätzen zur Folge gehabt"\textsuperscript{166} (each reform has always had, as a consequence, sooner or later, a tendency towards, or even a return towards, the principles which were previously abandoned).

The continental theory of civil procedure has always strictly distinguished between two principles of procedure: the principle of free deter-
mination and the principle of proceedings. The first signifies that it is for the parties alone to determine the ambit of their litigation; it is upon them that the opening, object and close of the litigation depend. The second concerns the allegation and proof of the facts and is indeed the duty of the parties (and thus differs from the inquisitorial principle). Although the distinction between these two principles is not abandoned, one must all the same bear in mind how closely they are linked. One can almost conceive of them as two sides of a coin, as two instances of the application of the power of the parties, and one must appreciate that here we are dealing with fundamental issues and not mere technicalities.

(a) Principle of free determination

At the beginning of this report we referred to the dependence of procedural law upon its relationship with socio-political phenomena, in short, its relationship to the political system. This is obvious if one considers the field of application of the principle: "Ne procedat iudex sine actore". The regulation of the proceedings in Western countries, which compliments the autonomy of substantive law, leaves the individual free to vindicate or not to vindicate his rights by means of judicial remedies.

It is different in socialist legal systems. Starting from the notion that the civil process is destined in the first place to serve the realisation of the socialist legal system, the Public Prosecutor (Ministère public) has a proper right of action at law if the interests of the state or society demand this. The code of civil procedure of the German Democratic Republic, brought into force on 1 January 1976, has led to some relaxation. Other than in the draft Code of 1970 no general right of action of the prosecutor is provided, except in matters relating to the right to work. In a "normal" civil action, the prosecutor has a certain power of participation, for example, a general right to lodge an appeal.

But in Western systems too, the monolithic dogma of the principle of free determination appears to be waning: s 308a al 1 of the West German code of civil procedure authorises the court, to stipulate mero motu, new conditions of tenancy in cases involving lease rentals, when the lessor fails in his application for eviction. In short the judge acts without motion of the parties (the object of the litigation being ejectment). This power has until now seemed to be a privilege of the socialist judge. According to the Greek code of civil procedure, in provisional proceedings the court determines the extent of the appropriate provisional order in its own discretion, without being bound by the order applied for.

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167 Habscheid (above n 9) 315ff.
168 Habscheid Introduction à la procédure civile (1968) 41; Wengerek "Aktuelle Fragen der polnischen Zivilprozessrechtswissenschaft" (1972) 85 ZZP 191.
170 art 737 CCP Greece (formerly art 736).
171 Zielinski Nat Rep Poland 13
172 Principles of Civil Procedure in the USSR 37 II.
173 Art 737 CCP Greece (formerly art 736).
In Greece and West Germany there is another exception to the principle concerning the opening of proceedings: according to West Germany’s s 24 Ehe G (matrimonial law) and art 1378 No 1 of the Greek code of civil procedure, the action for setting aside a marriage may be launched by the public prosecutor. In Swiss law the “public authority” can bring certain actions concerning civil matters of the state. The dilution of the principle of free determination is obvious in that the legal consent and the judgment of recognition (paternity) in family matters are excluded from the realm of legal compromise (s 617 of the West German code of civil procedure).

(b) The adversary principle

The adversary principle appears to be following the same pattern. Whereas the common law systems remain strictly attached to it, socialist countries – as we are informed by Zielinkski, Kellner and Neval – reject it as a matter of principle. In other systems, one can perceive a certain tendency toward relaxation and flexibility, as explained by Barbosa Moreira and Trocker in respect of Brazil and Italy. According to arts 6 and 9 of the new French code of civil procedure, it is for the parties to produce the facts and evidence necessary for supporting their claims. But art 7 al 2 and art 10 give the judge wide powers of admitting and seeking further evidence and thus limit the adversary principle. For German law, s 139 of the West German code of civil procedure, which imposes upon the judge the duty of seeking clarification through questioning of the parties, (“richterliche Frage – und Hinweispflicht”), must be cited. In this context it must be emphasised that arts 7 al 2 and 10 of the French CPC are permissive, whereas s 139 of the West German ZPO is obligatory, upon the judge. The “outer limit” is determined only by the judge’s duty of impartiality. Despite these tendencies, it would be going too far to characterise continental European procedure as “inquisitorial”.

(c) Formal control of the proceedings

One might reasonably say that whilst considering the formal aspect of the control of the action one rediscovers the present trend reflected in the determination of the objective truth underlying the action. Whilst the Anglo-Saxon judge relies on the initiative and interests of the parties with regard, for example, to the calling of witnesses, the “continental” judge becomes more active than was formerly the case. The responsibility for developing the proceedings falls increasingly on him, without his

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175 See Habscheid (above n 9) 63.
176 Ligertwood Nat Rep Australia 4ff.
177 Nat Rep Poland 13.
178 Nat Rep GDR 12ff.
179 Nat Rep Hungary 18ff.
180 Nat Rep Brazil 14ff; for Spain see Fernandez Lopez Nat Rep Spain 14ff.
181 Nat Rep Italy 36ff.
182 See Cappelletti & Perrillo Civil Procedure in Italy (1967) 182ff.
183 Ligertwood Nat Rep Australia 5ff 15ff.
necessarily becoming a “social engineer” (“Sozialingenieur”). Finally, socialist doctrine expressly rejects the idea of a passive judge who would simply “wait and see”, and be nothing more than an arbiter “listening in”. The principle is adopted – and here I refer to Nevaï and Kellner – of judicial initiative in the development of the proceedings (“initiativreiche Prozessgestaltung”).

**Oral procedure and publicity**

Even though the necessary public and oral character of civil procedure is proclaimed in a great many constitutions, codes and conventions (national and international), this principle is not carried to extremes, that is, it is not obligatory for each stage and every form of procedure. Formerly, oral procedure ranked most often on a par with publicity, just as written procedures went with secrecy; however, publicity does not necessarily derive from the oral nature of the proceedings. Can one not imagine that written proceedings could be public? The object of publicity in the law of procedure is the control of justice by the public and it is considered to be the great liberal conquest of the French Revolution. So far as the oral procedure is concerned, it is considered as the means of attaining a better understanding between the judiciary and the public.

The occasional proceedings held *in camera* usually deal with the protection of the privacy of the parties, secret affairs of the state or business matters. On the other hand, the exceptions to the principle of oral proceedings do not stem from the subject of but from the phase in the proceedings. The question is not whether the whole action develops only by writing, or orally, but rather which stage of the proceedings is oral and which is not. The argument in favour of oral proceedings is naturally its accelerating effect, but – as Ligertwood emphasises – it also constitutes a means of achieving equality of weapons in the proceedings (“adversary in nature”) and, linked to cross examination, it becomes an excellent method of probing credibility.

As regards the concentration and expediting effect of oral proceedings, we must not forget that oral representation is strictly respected in

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184 Trocker *Nat Rep Italy* 7 34ff; Barbosa Moreira *Nat Rep Brazil* 14; Ramos/Klammaris *Nat Rep Greece* 10; Wiederkehr *Nat Rep France* 5 23ff; Sprung *Nat Rep Austria* 4; Arens *Nat Rep FGR* 17.
185 *Nat Rep Hungary* 19.
186 *Nat Rep GDR* 6ff.
187 Habscheid “Richtermacht oder Parteifreiheit” (1968) 81 ZZPP 175.
188 Art 10 of the United Nations Universal Declaration of Human Rights; art 6 of the European Convention on Human Rights. See art 93 al 2 of the 1975 Greek constitution, and s 128 I of West Germany’s code of civil procedure (ZPO) and s 169 p 1 of her law on judicial organisation (GVG).
189 Jauermig *Zivilprozessrecht* 18ed (1977) 84.
190 Law of 7 Fructidor an III (1795). But see also the abolition of the Star Chamber in Great Britain.
191 Ligertwood *Nat Rep Australia* 18.
192 Wiederkehr *Nat Rep France* 17.
193 Sprung *Nat Rep Austria* 5.
194 *Nat Rep Australia* 8ff.
Danish, Swedish or English procedure but necessitates thorough (written) preparation ("pleadings") for the trial. It is yet to be seen whether the recent amendment to the West German code of civil procedure (Ver­einfachungs­novelle) which introduces a preliminary written procedure and the concentration of the trial (which will be conducted orally) will achieve the object of expediting proceedings. In any event, the German legislator has recognised that a concentration of proceedings can only be achieved through an enforced reversion to oral procedure.

Conclusion

Our general report, far from being complete, seems to have shown that in all countries -- Western or socialist -- we live in a time of doctrinal debate and legislative reform the aim of which is to adapt civil procedure to the needs of our time. We have observed everywhere the same or similar basic problems which need to be solved; we have also noticed that solutions sometimes result in the convergence of different legal systems. Comparative procedural law can thus reinforce those trends which have as their aim the task of rendering the civil process yet more just, more equitable and more humane, all of this being in the great tradition of legal science which is expressed in the truly humane definition Ulpian gives of the concept of the law (Dig 1.1.1): "ius est ars aequi et boni"!