

## A Single Civil Procedure for Europe : A Cathedral Builders' Dream

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It is in the context of the internationalisation of procedural law on the one hand, and that of the quest for straightforward, effective, rapid and low-cost court proceedings on the other hand, that the report submitted by the working party which I had the honour to chair must be located.

With very limited resources and lacking any logistical assistance whatsoever, but making grateful use of the help volunteered by the highly-qualified members of this working party, we were able to present to the European Commission a report containing 16 proposed directives seeking to achieve harmonisation among the systems of procedural law which apply in the in those days 12 EU member states.

Thanks to a comparative survey of the various systems of procedural law, we succeeded in identifying similarities and areas of agreement which have allowed us to propose a certain set of measures, having obtained world-wide and anonymous consent for this project from the members of this working party.

In my introductory general report, to which I refer in this acticle, I emphasised the urgent need for the approximation of European procedural law and outlined the methods by which this objective could be achieved<sup>1)</sup>. I would, however, also refer to the Report on civil procedures in EC countries which was drawn up at the request of the Tokyo Marine and Fire Insurance Co:<sup>2)</sup>

“The fact that there are very marked differences in civil court procedures will continue to undermine the purpose of European Community directives both as to the speed at which they are implemented by member states and as to their enforcement”.

Having located procedural law in general, and European judicial law in particular, in its proper context, it is appropriate to take stock of the current position and to identify those factors which could shape future developments.

At this point, I would make two observations which could usefully serve as a starting

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1) Storme, M., *Rapprochement du droit judiciaire de l'union européenne, Approximation of Judiciary law in the European Union* (1994) Dordrecht, p. 3-36.

2) (1991) London, p. 19.

point.

1. When the working party which I chaired commenced operations in 1987, any notion of unification, or even harmonisation, was out of the question, or at least deemed to be inconceivable
2. At the European level, the only available instruments were the 1950 European Convention on Human Rights and the 1968 Brussels Convention.

The Storme Commission's report was submitted in early 1993, which seemed to mark the end of a daring adventure. The report was commented upon, examined and criticised at a number of conferences and symposia. From the Commission, however, no reaction was forthcoming.

Then, without warning, the Green Paper of 20/12/2002 emphatically stated that

“the Storme proposal provides an extremely valuable frame of reference and a source of inspiration” (Com (2002) 746 final, p. 15).

It now appears that even in EU circles it is accepted that the harmonisation of procedural law is desirable, necessary and achievable.

However, this does not tell the whole story. It was the Maastricht (1992), Amsterdam (1997) and Tampere (1999) agreements which provided the building blocks for an embryonic system of European procedural law, thanks to the various regulations which have been adopted over the past three years, as well as the proposals which are currently on the drawing board.<sup>3)</sup>

We should first of all recall that it was at Maastricht that the High Contracting Parties reaffirmed

“their objective to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by including provisions *on justice* and home affairs in this Treaty”

It is this that gave rise to the construction of three pillars, the third of which related to co-operation in the fields of justice and domestic affairs.

However, the Treaty of Amsterdam had the effect of transferring judicial co-operation from the third pillar to the first. The new Article 65 constitutes a fundamental provision in this regard, stating as it does that measures in the field of judicial co-operation in civil matters having cross-border implications include:

- “(a) improving and simplifying
- the system for cross-border service of judicial and extra-judicial documents,
  - co-operation in the taking of evidence,

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3) The proposal dated 18/4/2002 for the creation of a European enforcement order is extremely important in this connection, since it seeks to abolish the need for an *exequatur*.

- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extra-judicial cases
- (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and jurisdiction;
- (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States”.

Since the adoption of this text, several initiatives have been taken in the field of civil proceedings. In common with Guinchard, Douchy, Bandrac and Lagarde,<sup>4)</sup> professor Hakim Boularbah<sup>5)</sup> proposes a highly appropriate distinction between the procedural law relating to instruments of co-operation, European judicial law and common procedural law.

In the first instance, there are those instruments which, in essence, seek to establish a rigid and organised framework aimed at facilitating and reinforcing judicial co-operation and information amongst the courts and authorities of the member states. This has essentially served to regulate the principle of co-operation and information, as well as practical details such as the use of languages, court costs, forms and databases, without actually giving rise to any rules of procedural law. The object of the exercise is not to harmonise the internal procedural laws of the member states, but to organise the relations between the courts and the appropriate authorities of each of the member states. The national systems of procedural law largely continue to apply to all matters relating to the practical implementation of the various measures on co-operation.

However, we are also witnessing the gradual emergence of a European body of procedural law. This may be specifically applicable to cross-border court disputes, regulating such matters as serving court documents abroad, collecting evidence in other countries, or discovering the international scope or the effects of foreign court decisions. This body of law may also govern all domestic procedures, regardless of any transnational character which they may have.

Finally, thanks to a number of Community instruments and initiatives, but above all on the basis of the fundamental principles of the European Union — more particularly the right to a fair trial — it has been possible to achieve a system of procedural law which is common to the member states.

Without going into too much detail, I would recall the main instruments to have been adopted in these fields.

The first category, i.e. judicial cooperation, contains the regulations dealing with

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4) Guinchard, S., Douchy, M., Bandrac, M., and Lagarde, X, *Droit processuel* (1<sup>st</sup> edition) (2001) Paris p. 166, no. 133.

5) «Le cadre général des règles communautaires en matière de procédure civile: coopération judiciaire, droit judiciaire européen et droit processuel commun», in *Le droit processuel et judiciaire européen* (2003) Bruges, p. 167 et seq.

servicing court documents collecting evidence: Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters and Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

It can be said that these regulations facilitate certain procedures, but can in no way be considered to have laid down rules of European procedural law which could replace domestic rules on court proceedings. It should also be recalled that these regulations present considerable gaps — for example in relation to the “double date” phenomenon.<sup>6)</sup>

There is also Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

Personally, I do not believe that this directive adds a great deal to the Convention of The Hague of 25/10/1980.

Council Regulation (EC) No 743/2002 of 25 April 2002 establishing a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters, for its part, constitutes the instrument for planning the action — essentially in the areas of scientific research, publications and seminars — covered by Article 65.

The second category contains certain instruments which create a number of rules of European judicial law in relation to cross-border disputes — such as Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which replaces the 1968 Brussels Convention, Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, and Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.<sup>7)</sup>

As has already been mentioned, a Green Paper has recently been published by the European Commission (20/12/2002). This makes provision for a European payment order procedure, as well as measures seeking to simplify and accelerate the settlement of disputes which concern modest amounts of money (small claims).

In order to guarantee access to a system of effective administration of justice in each of the member states, the Commission intends in the first instance to create a uniform — or

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6) Cf. on this subject Boularbah, H., *op. cit.*

7) It is intended soon to replace this Regulation by a Draft Council Regulation of 3/5/2002 relating to jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, which will repeal Regulation (EC) No. 1347/2000 and amend Regulation No 44/2001 in matters of maintenance (Document COM (2002) final). This proposal had been the subject-matter of a political agreement by the Council on 28/11/2002.

at least harmonised — European payment order procedure. The Commission has in mind the creation of a procedure which would apply in parallel with ordinary national procedures, and which would only govern the first, unilateral, stage of the proceedings rather than the subsequent stages in the event where the debtor challenges the debt owed.

Moreover, if we start from the assumption that it is often in connection with disputes relating to modest sums of money that the incompatible or complex nature of the member states' legal and judicial systems discourage or prevent citizens and businesses from enforcing their rights, the Commission also proposes to seek the harmonisation of national judicial law by laying down procedural rules relating to claims for small amounts.

As is acknowledged by the Commission, the harmonisation of procedures or the creation of a European procedure for the collection of uncontested debts or the settlement of disputes relating to modest amounts of money will, in reality, be “the first initiatives in the field of civil judicial co-operation directly concerning the rules that govern the procedure to obtain an enforceable decision”.<sup>8)</sup> If they are adopted, these measures will, for the first time, create common judicial rules capable of leading to a verdict in all disputes, including cases of a purely domestic nature.<sup>9)</sup>

Finally, a system of common European procedural law could emerge from the fundamental principles of the European Union, such as those contained in the Charter of Fundamental Rights of the European Union (Charter No. 2000/C634/01 of 18/12/2000).

This Charter seeks to guarantee an effective remedy before a court of law whilst at the same time restating the guarantees contained in Article 6 of the European Convention on Human Rights.

Article 47(1) and (2) of the said Charter is worded as follows:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.”

This constitutes a common procedural right which contains three guarantees: the guarantee of access to a court; procedural guarantees (reasonable time, fair trial, independent and impartial proceedings and impartial judge), and the guarantee that the court's decision will be enforced. The last-named guarantee is the outcome of recent court decisions by the Strasbourg court (see in particular *Hornsby v. Greece* dated 19/3/1997, *Perez de Rada Camilles v. Spain* dated 28/10/1998 and *Estima Jorg v. Portugal* dated 21/4/1998).

Personally, I remain convinced that the non-discrimination principle (Article 12 EC

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8) Commission Green paper (Document COM (2002) 746 final) p. 7.

9) Cf. also on this subject Boularbah, H., *op. cit.*

Treaty) should become the guiding principle behind the harmonisation of procedural law within the European Union. However, the European Court of Justice (ECJ) mistakenly restricts the discrimination principle to discrimination in domestic law as between nationals and the citizens of another member state.

It is clear that any business which establishes itself in a member state will encounter discrimination in the field of court proceedings where it compares the latter to proceedings as they apply in other member states.

It follows from the foregoing that the unification of civil proceedings within the European Union may no longer be a dream, but remains far from a satisfactory reality.

Nevertheless, the wording of certain provisions already anticipate the successful emergence of a common system of judicial law within the European Union.

The European Council conference at Tampere referred to

“a genuine area of justice must ensure that individuals and businesses can approach courts and authorities in any Member State as easily as in their own and not be prevented or discouraged from exercising their rights by the complexity of the legal and administrative systems in the Member States” (COM (2002) 261 final, p. 30).

The criticisms which could be levelled at the manner in which approximation is being achieved in the area of civil procedure can be summarised as follows.

1. The Commission lacks a coherent vision of the fundamental importance of procedural law for the European Union.

This was already my considered view when my working party submitted its report in 1993. It is only 10 years later that this report was expressly cited (Green Paper of 20/12/2002).

I do not intend to lay the blame for this at the Commission's door, since for over 40 years procedural law was regarded as an area which fell outside the ambit of Community decision-making.

It is this factor which explains the minimalist attitude adopted by the Commission and the Council, which were of the opinion that

“if the establishment of minimum guarantees appears to be insufficient, discussions should be directed towards a certain degree of harmonisation of the procedures”.<sup>10)</sup>

2. The absence of a coherent attitude is reflected in the vertical approach adopted towards the harmonisation of procedural law,<sup>11)</sup> i.e. subject-by-subject harmonisation, instead of a horizontal approach which would

“ensure that individuals and businesses can approach courts and authorities in any

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10) OJ C 12 of 12/1/2001, p. 6.

11) This expression is used by the Council, in doc. 13017/01 JUSTCIV 129.

Member State as easily as in their own and not be prevented or discouraged from exercising their rights by the complexity of the legal and administrative systems in the Member States”<sup>12)</sup>

Such a horizontal approach towards approximation would also enable the EU to avoid “any weakening, even if only potential, of the uniform application and interpretation of Community law throughout the Union would be liable to give rise to distortions of competition and discrimination between economic operators, thus jeopardizing equality of opportunity as between those operators and consequently the proper functioning of the internal market”.<sup>13)</sup>

It is necessary to guarantee the principles of equivalence and effectiveness, as developed by the European Court of Justice,<sup>14)</sup> in relation to court procedure. Prof. A.M Van den Bossche summarises the position in the following terms:

“Since the European Communities are communities founded on the rule of law, and since the Union, being based on them, shares this characteristic, it would be inappropriate to remove from the outset the fundamental, and more general, question as to whether the divergent nature of the rules on court procedure between the member states, which govern the procedures of the ordinary courts, is conducive towards guaranteeing access to justice, as well as equivalent and effective legal protection in all member states, or whether it is instead such as to prevent and dissuade citizens from claiming and enforcing their rights. If it is intended to reach a coherent and convincing solution, it will be necessary to adopt a horizontal approach, seeking to put into place a European "common core" in the field of procedural law.”<sup>15)</sup>

3. It is obvious that harmonisation should not be restricted to cross-border disputes, for why should such cases take precedence over national disputes ?

Naturally, it is possible to conceive of alternative European procedures running parallel with national procedures, but this would need to be a transitional system.

### **Why harmonise ?**

It is certainly the case that the European Union requires unification/harmonisation, not only in relation to international or transnational disputes,<sup>16)</sup> but also, and especially,

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12) COM (2002) 261 final, p. 30.

13) Report of the Court of Justice on certain aspects of the application of the Treaty on European Union, may 1995, item 11.

14) Case 33/76, *Rewe* [1976] ECR 1989.

15) Van den Bossche, A.M., *L'espace européen de justice et le rapprochement du droit judiciaire* (2003) Bruges.

16) For an explanation of this distinction, cf. Kerameus, K., *Some reflections on reasons and scope of procedural harmonization* (2002) Rome, Unidroit.

because the "lawyers' law" has also become the most appropriate instrument for those lawyers who give advice or act in court in cases which transcend national borders.

On the other hand, I also take the view that harmonisation at the European level could also inspire attempts at harmonising civil proceedings at the worldwide level.<sup>17)</sup>

### **Harmonising — yes, but how ?**

Whilst preparing our final report for 1993, I started to reflect on the various methods of unifying the law in the European Union. In this connection, twelve years ago I set about analysing the legal thinking and practice which prevailed in the 18<sup>th</sup> century.<sup>18)</sup>

The 18<sup>th</sup> century featured and combined every conceivable approach towards legal sources, so that the debate surrounding the question as to which of these sources should enjoy supremacy, which already took place in those times, can even today continue to inspire reflection on legal unification in Europe.

This proposition can be illustrated by referring to three jurists, born in the 18<sup>th</sup> century, who have left their indelible stamp on the manner in which the law has developed since those times, and who are representative of the three major legal traditions which have dominated, and continue to dominate, European legal thinking, to wit the German, French and Anglo-Saxon traditions, each having assessed and defined from their different perspectives (these differences sometimes owing more to appearance than to reality) the manner in which the law was created. These three figures are Lord Mansfield, Portalis and Von Savigny. They made reference to the case law, legislation and the leading writers.

To these categories should be added — as does Rodolfo Sacco — the unwritten law of civil procedure, i.e. the custom and practice of our law courts.

Lord Mansfield is the very incarnation of the judge who considers that the best way in which to adapt the law to changing times is for the courts to reshape age-old principles and rules in order to adapt them to new circumstances.

Portalis, on the other hand, in his renowned "*discours préliminaire*", emphasised how desirable it was, in his view, that everything should be regulated by statute. He was equally firm in his conviction that legislation cannot regulate everything, and that there was therefore plenty of scope for interpretation and application of the law by the courts. In exceptional cases, the latter should even be allowed on certain occasions to fill certain gaps in the law.

Finally, Von Savigny undoubtedly continues to be the ultimate representative of the contribution made by legal writing to the development of the law. He envisaged a substantial contribution by the leading writers in order to clarify and perfect the law as

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17) However, cf. Ferrand, F., *La procédure internationale et la procédure civile transnationale: l'incidence de l'intégration économique régionale* (2002) Rome.

18) "Lord Mansfield, Portalis of Von Savigny? Overwegingen over de eenmaking van het recht in Europa, i.h.b. van de vergelijkende rechtpraak" (1991) *TPR* 849 et seq.

contained in legislation, using theoretical and scientific methods. However, Von Savigny was in reality an opponent, not of codification itself, but of bad codification, because the latter meant that the law would be dominated by other fundamental principles existing outside the code.<sup>19)</sup>

The preference which I expressed in the said paper for a comparison between the case law has in the meantime been realised in part thanks to the *ius commune* project (Maastricht) and thanks also to the creation of a journal of comparative case law which was launched in Ghent in 1992 under the leadership of Ewoud Hondius and myself, in the shape of the *European Review of Private Law* (*Revue Européenne de Droit Privé, Europäisches Zeitschrift für Privatrecht*).

I have to confess that I am currently becoming increasingly aware of the richness inherent in the comparative study available literature on the subject of judicial law. It enables us to discover not only the diversity of the various academic and practical approaches adopted in the field of procedural law, but also to discuss the need to replace this diversity by as much unity as possible: *e diversitate unitas*.<sup>20)</sup>

This is why I have for some time now decided to make the case for a more explicit comparative analysis of the available literature in the various areas of procedural law (see more particularly the *Civil Procedure in Europe* series under the leadership of Messrs. Meyknecht, Van Rhee and Storme. The following works have already been published in this series: *Seizure and Overindebtedness in the European Union; Recourse against Judgments in the European Union; Recognition and enforcement of foreign judgments outside the scope of the Brussels and Lugano Conventions*, under press *Evidence*.

It would be extremely useful to take the initiative of assembling the procedural specialists belonging to the various schools of judicial law in Continental Europe in order to reflect on the possibility of a common approach by the literature towards procedural law, i.e. a common doctrine for Europe, common principles of procedural law in Europe.

I would draw your attention particularly to the fact that I have expressly focused on the Continental approach towards procedural law. The reason why I proposed this restriction is not that English is not spoken on the Continent, except in Gibraltar, but that I believe it to be more appropriate to stake out the field for a common Continental approach and, once such an approach had been conceived, we could meet our common law colleagues in order to discover those points which the Continental procedural law and the common law of procedure have in common.

The leading writers will be required to formulate the general principles of civil procedure, i.e. the fundamental principles which constitute the basis of equitable court

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19) On the subject of the continued value of Von Savigny's ideas, and on the interpretation of legislation by means of the "*wirkliche Fortbildung des Rechts*", see von Huber, U., "Savigny's Lehre von der Auslegung der Gesetze" (2003) *JZ* 1 et seq.

20) Cf. Koch, H., *Einführung in das europäische Zivilprozeßrecht, Juristische Schulung* (2003) I et seq.

proceedings within the meaning of the “fair trial” principle of Article 6 of the European Convention, i.e. a trial which seeks to achieve the relevant objective, which is a rapid, equitable, truthful and enforceable judgment.

I do not believe that the general principles of law can by themselves make a useful contribution towards harmonisation in Europe. It should, however, be added that there are general principles of European law which could play a unifying role, such as for example the non-discrimination principle. However, as has already been emphasised earlier, this principle has wrongly been restricted to domestic rules of civil procedure.<sup>21)</sup> Nevertheless, the European citizen is entitled to a uniform system of judicial protection within the European Union. This is why an attempt at reaching consensus on certain principles should be made. When comparing the current situation with that which was written 400 years ago by the Bruges lawyer Joost de Damhouder in his work *Praktycke in civile zaken* (court practice in civil matters), we will see that the complaints made in those days (1560) can be compared with those made famous by our late colleague Sir Jack Jacob, who explained that our civil procedure was dominated by a “three-headed hydra: delays, cost and vexation”. This is why it is necessary to ask the question whether we have not advocated general principles which are inadequate for the purpose of successfully conducting civil proceedings. This is also why it is necessary to replace certain principles by opposite principles, and, on the other hand, to redefine certain principles or to add others.

### 1. Opposite principles

a. Judicial activism should replace the principle of judicial neutrality, which has often been wrongly interpreted as judicial passivity. In the report which I submitted to the Conference of our International Association at Coimbra in 1991, not only did I advocate such judicial activism, but I also proved that we are inexorably moving in that direction. The most striking current example of this trend is definitely the fundamental idea expressed by Lord Woolf whilst preparing the reforms which he sought to introduce in England and Wales:

“Without effective control, however, the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply”

Such activism should lead to a very clear division of labour between the parties and the judge: the dispute belongs to the parties, whereas the trial belongs to the judge. This means that the parties are required to present facts and arguments, whereas the judge must direct the trial — it is he who will decide the various time limits, organise the probation

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21) Case C 343/96, *Dilexport*.

procedure, call for the intervention of third parties and determine the legal foundations of the dispute.

b. For many centuries, we have been living under a system which placed the heaviest procedural burden on the claimant's shoulders. It was for the latter to commence the action, advance court costs, arrange for the defendant to be advised, summons the latter before the court of his place of residence, bear the burden of proof, advance the costs of any expert examination, etc. It is high time for this burden to be reversed.

In Germany, the *Mahnverfahren* ensures that the creditor may, on unilateral application, obtain the title which can subsequently be rebutted by the debtor against whom the order was made. In France, there is talk of reversing the burden of litigation, whereas in the Netherlands there are those who advocate also reversing the burden of litigation. From the available statistical data, it can be seen that court actions stand a better chance of succeeding than of failing. This inevitably prompts the conclusion that the burden of the proceedings should be placed on the shoulders of the party who failed to meet his contractual obligations, or who infringed the legal order. The claimant will be issued with a title on the basis of a *prima facie* case, against which the defendant may object in order to subject the case to the full court procedure.

A specific application of this principle whereby the burden of litigation is reversed has already been defended in connection with the dictum *where there is no interest, there can be no action*. I have proposed that this dictum should be reversed to read *where there is an action, there is an interest*. Those persons or associations which go to the trouble and expense to bring an action related to, for example, *diffuse rights* (defence of the cultural heritage, protection of the environment, etc.) should be presumed to be protecting an interest and must accordingly be given access to the courts.

c. Although the Belgian Supreme Court (*Cour de Cassation*) and the international case law of the Strasbourg Court have confirmed that the appealable nature of court decisions does not constitute a general principle of law, I would add that appeals are indefensible *per se*. Is it possible to make acceptable a decision made on appeal which differs from the first decision, in spite of the case involving the same parties, the same facts and the same applicable law ?

The dispute should be settled in its entirety at first and last instance, and the parties should be required to conduct the entire dispute within the context of this sole instance. Arbitration, which takes place over a single instance, can be invoked in support of this thesis, as well as the statistical evidence that the majority of court actions are awarded to the claimant. One can of course provide for a system of leave for appeal.

## **2. Certain principles must be redefined**

a. Public access to justice is a method of invigilation exercised by the community of citizens, in the sense that "justice must be seen to be done". In today's world however, it

is legitimate to ask the question whether such public accessibility should not be restricted now that the media are indulging in the increasingly unacceptable practice of “multiplying” court trials. Public access to the courts was decreed as a principle a long time before the media came into existence. It was seen as a method of supervising on the part of the neighbours, of the rural community, of the surrounding community, as a result of which the courts had to operate under the watchful eye of the small community which prevailed in those days. Today, however, we have evolved towards a system of justice dispensed by the media, concerning which the words of Mauro Cappelletti continue to be perfectly applicable where he made his famous pronouncement that “the worst of all kinds of trial is trial by newspapermen”.

This redefinition of public access to the courts could find a new application if the countries of the European continent were to recognise the *sub judice* principle.

b. The principle of a fair trial must be regarded as one of the fundamental principles of law, but nevertheless remains an extremely vague rule which results in too many trials being conducted without the parties having sought the intervention of a public service, i.e. the courts, in a manner which is correct and serious.

The latter observations should undoubtedly give a new dimension to the fundamental principle of the need for a fair trial, and should prompt calls for a more adequate system of penalising abuse of process. The courts should be allowed to apply this penalty without the parties being required to make a specific request to this effect. The power to do so as of right would be in order because Niklas Luhmann’s *Gesetz des Wiedersehens* prevents the lawyers from claiming abuse of process against each other.

c. Although it has not yet been possible to provide an exact definition of the term “reasonable time limit”, it is definitely the case that the principle laid down in Article 6 of the European Convention should become a compulsory guideline. It is therefore of the utmost urgency to manage and dominate the time element of court proceedings. Justice is the only industry whose production is not subject to the demands of timing.

d. The independence and impartiality of the courts are without the slightest doubt the most essential fundamental principles of procedural law. Although it is not necessary to redefine this principle, it is useful to recall that justice is becoming increasingly expensive, for the entire community as well as for the contending parties. In this connection, I would cite the example of Costa Rican constitution, which lays down that 5 per cent of the budget should be allocated to the administration of justice. This could put an end to the corrupt practices which currently occur all too frequently in some nations of this world.

However, justice is also becoming too expensive for the contending parties, as a result of court costs. It is the big law firms which have caused fees and costs to rise sky-high. The lawyer is no longer paid by the page, as was the case in medieval times, but by the six-minute period !

### 3. Certain legal principles should be added to the current supply

Among proposals currently being mooted, there are some on which I entertain certain doubts.

a. It is fashionable to believe that alternative dispute resolution (ADR) is capable of resolving most, if not all, of the problems currently afflicting the administration of justice. I have my doubts on this subject because, on the one hand, I share Lord Devlin's opinion where he stated that injustice resided in the fact that certain disputes do not even succeed in reaching the courts, and because, on the other hand, it is a fact that submitting all disputes to the courts will inevitably result in obstructing the paths of justice.

b. It is definitely the case that barristers are less involved in alternative dispute resolution than they are in the proceedings before the state courts. As a result, there is a risk that the fundamental principle of *Waffengleichheit* (equality of arms) will become dead letter.

c. It is obvious that the rights of the defence constitute an absolutely essential principle of procedural law, which could also be reinforced by the right to be noticed and the right to be heard. However, in this connection it should be emphasised that, since the end of World War II, the rights of the defence have been strengthened to such an extent that they have become a high-quality luxury item, in respect of which the words of Mauro Cappelletti remain highly appropriate where he wrote at the end of his introductory chapter to *Access to Justice*, citing Hooper, that

“our judicial system, admirable though it may be, is at once slow and costly. It is a finished product of great beauty, but entails an immense sacrifice of time, money and talent”.

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By way of conclusion, I would emphasise that if it is possible to achieve a consensus on the most important general principles of procedural law, it must also be possible to apply these principles in a uniform manner within the European Union.

In order to achieve these objectives, it would appear that these general principles, modified, redefined or supplemented, should contain a certain promise of improving the regulation of court proceedings, i.e. a system of rules promoting court proceedings which are more rapid, less expensive and less burdensome. Only if this is realised will European harmonisation stand a chance of succeeding.

We can draw some consolation from the fact that, at the level of a market which functions well, one rule only submerges, i.e. the rule which is undoubtedly regarded by the consumer as being the best. It is by applying this “best practice” standard that unification will be achieved in Europe.

By way of conclusion, I would once again draw attention to the title of this paper: “A

cathedral architect's dream — a single civil procedure for Europe”.

Towards the end of January, on the occasion of the meeting of the Board of our Association, I had the opportunity to visit the magnificent cathedral of Regensburg, the city of residence of our colleague and friend Peter Gottwald. It is a magnificent example of gothic architecture, but it was a work which it took three centuries to build. Walking around this imperial city of Kyoto, I had the opportunity to visit also magnificent temples the building of which took also a long time.

My conclusion is perfectly straightforward: the soul of a cathedral or temple architect is needed to achieve the long-term unification of procedural law in Europe and elsewhere in the world.

Ghent, 2/2/2004