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Fundamental Aspects of Fact-finding and Evidence-taking in a Comparative Context

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Intersentia Ltd
Trinity House | Cambridge Business Park | Cowley Road
Cambridge | CB4 0WZ | United Kingdom
Tel.: +44 1223 393 753 | Email: mail@intersentia.co.uk

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TABLE OF CONTENTS

C.H. van Rhee
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THE PURSUIT OF TRUTH IN CONTEMPORARY CIVIL PROCEDURE. REVIVAL OF ACCURACY OR A NEW BALANCE IN FAVOUR OF EFFECTIVENESS?

In the pursuit of justice, truth always plays a prominent role. Few if any legal systems are willing to waive the right to claim that the results of their legal processes are fair, just and above all based on the truth. In most legal systems, elaborate rules on the taking of evidence try to guarantee that an accurate, factual basis is used for the application of the law. Such rules are the core of most methods of adjudication.

There are, however, different approaches and even different procedural philosophies regarding the ways in which evidence should be selected, presented and evaluated in a court of law. These differences exist both between different legal traditions – e.g. between common law and civil law systems of civil justice – but also on local, regional and national levels. A question that needs to be addressed in this context is the place of truth-finding in the hierarchy of the values observed and respected by civil courts. Placing truth at the pinnacle of all procedural values (as is purportedly done by some systems of civil procedure) may have various detrimental consequences when balancing the core values of civil litigation and may not be justified.

Even if there is agreement on the systemic place of truth in a civil justice system, there are manifest and sometimes dramatic differences in the methods that are regarded as producing truthful results. At the level of procedural ideology, considerable differences may be noticed between traditions that rely on a strong judge, vested with inquisitorial powers and broad authorities, and traditions that prefer party presentation of evidence before a passive fact-finder.

John Henry Wigmore's statement in his 1904 *Treatise on the Anglo-American System of Evidence in Trials at Common Law* reflects the latter approach where he argues that 'cross-examination is beyond doubt the greatest legal engine ever invented for the discovery of truth'.[1] Starting from this background, the right to

[1] This quote is often repeated in case law and contemporary legal publications. See e.g. *Lilly v. Virginia*, 527 U.S. 116 (1999). See also Damaška 1975, p. 1103-1104.

party presentation of evidence, including the right to cross-examination, is regarded as so essential that it is considered to be of constitutional significance.[2]

The former approach may be noticed in modern Continental European civil procedure, especially in the twentieth and twenty-first centuries. One of the most influential modern procedural codifications in Europe, the Austrian Civil Procedural Code of 1895,[3] is based on the idea that the 'principle of party presentation should be superseded and the judge vested with the power to conduct the proceedings' since party presentation is considered to basically impede accurate fact finding and establishing the 'objective truth'.[4] The fundamental ideas of the author of that Code, Franz Klein, were directed against the concept of civil procedure as a 'war without the Red Cross',[5] in which the judge acts as a passive observer of the two fighting parties, each of which distorts reality for the benefit of its own cause.

The differences between the American and European approaches to the concept of truth and the corresponding method of presenting evidence in civil proceedings are still very prominent. In the era of globalisation it is only natural that the two approaches have been subject to comparative discussion, and some practitioners and individual dissident authors have occasionally argued for the adoption of an approach to evidence different from their own national approach. An example is Professor John Langbein, who has argued for assigning judges rather than lawyers the task to investigate the facts in the American legal system. In doing so, the author was at the time inspired by the legal system of West Germany which, in his opinion, would help reduce the problematic features of the adversarial process dominated by lawyers, who tend to distort evidence and add unnecessary complexity and expense to civil trials.[6] On the European Continent, we can meet voices inspired by American experiences that, on the contrary, ask for a more adversarial approach. In doing so, these voices promote gradually embracing evidentiary notions that were previously considered to be incompatible with fundamental principles of the national legal process.[7]

Yet, it is still too early to speak of 'harmonisation' as fact-finding practices are among the elements of procedural systems that are most difficult to amend by mere legislative action or any other method of reform. This may be explained not only by persisting contrasts in deeply rooted cultural perceptions about the truth and accuracy in civil litigation, or by a struggle between 'modernists' and 'traditionalists',[8] but also by the constant redefinition of these concepts in light of

2 In addition to the confrontation clause of the Sixth Amendment to the U.S. Constitution, 'innumerable cases insist that for a fair trial, civil litigants must have the right to cross-examine'. See Posner & Dodd 1993, p. 1.

3 See references in Verkerk 2010, p. 34.

4 More in Frodl 2012, p. 49.

5 See Klein 1891, p. 39.

6 Langbein 1985, p. 823-824.

7 Some popular Anglo-American procedural tools that are discussed in Europe are discovery, cross-examination and party-appointed expert witnesses.

8 Such national debates exist in almost any legal system. They can also be observed at an international level. The opposition between 'modernists' and 'traditionalists' may be nicely →

modern trends towards mediation and other means of dispute resolution as an alternative to litigation in a court of law.[9]

At a more pragmatic level, it should be noted that fact-finding practices greatly depend on the different procedural structures in particular jurisdictions, such as the participation of professional and/or lay fact-finders, the level to which rules of evidence are formalised, and the forms and organisation of trials (e.g. written or oral proceedings, concentration or 'deconcentration', case-management and time management). As long as procedural forms and structures remain different, approaches to evidence will also remain different.[10]

Nevertheless, at the European and global level some harmonisation of civil procedural forms and structures is taking place, and this also has an important impact on approaches to evidence.[11] The changes may be observed both in old and well-established legal systems such as, e.g., the English legal system, and in transition and post-transition countries. In particular, the latter countries have gone through a long and difficult period of transformation which is still not over. They share the common heritage of Socialist law, which puts great weight on the concept of the 'material truth', considered to be the key value in the hierarchy of procedural values. The 'material truth' was contrasted with the 'formal truth' as being the result of a formalistic and adversarial application of law that only pretended to ensure equality before the law, while at the same time essentially serving the interests of the ruling class or the bourgeoisie.[12] Instead of masking the class nature of judicial proceedings, Socialist law pretended to promote a truthful, correct ideology which had to be mirrored in litigation, displaying a 'Socialist legal consciousness', 'class instincts' and a 'Socialist legality'. The 'material truth' was considered to be a truth that resulted from a process in which judges, as agents of the ideology of the ruling Socialist elites, apply the law to facts established by these very judges on the basis of a free evaluation of evidence.

With the fall of Socialist regimes in Eastern Europe and the former Soviet Union, the transformation of the civil justice system of the former Socialist countries was put on the agenda. However, the process of transformation was neither fast nor straightforward. Some elements of the Socialist legal tradition managed to successfully survive the reform movement.[13] In particular, the central position of the

illustrated by the example of some forward-looking Dutch reforms (see the contribution of Verkerk in this volume) and the 'antiquarian approach' of Italian law (see the contribution of Silvestri in this volume).

9 More on truth in the context of mediation and litigation can be found in the contribution of Jagtenberg & De Roo in this volume. For an Asian perspective, see the contribution of Chan in this volume.

10 An exceptional jurisdiction in respect of the search for the truth in civil litigation is the United States of America. For more on American exceptionalism, see the contribution of Marcus in this volume. In contrast, the contribution of Langbein, also in this volume, highlights some areas where a modest convergence between American and European civil procedure is present.

11 Among recent works on the issue of harmonisation, see Kramer & Van Rhee 2012.

12 See Vyshinsky 1948, p. 73-76.

13 *Cf.* Uzelac 2010.

'material truth' and the strong, inquisitorial, paternalistic position of judges *vis-à-vis* the parties continued to be the hallmark of many post-Socialist states for a long period after the political changes. Some of the countries that decided to delete the 'material truth' from the list of key values in civil procedure soon after the fall of Communism (e.g. Hungary) later even had to face a certain revival of the old ideas. In addition, in various post-Socialist states ample opportunities to challenge final and binding judgments and to re-open the proceedings upon petition of the state prosecutor or even by courts *ex officio* were preserved precisely with reference to the supremacy of the truth and the imperative to preserve substantive legality and accuracy. It is not clear how long this situation will continue to exist since many legislative reforms are in course or are about to be undertaken in a number of the post-Socialist states.[14] Some convergence may be observed between post-Socialist states and the rest of Europe where in various transition or post-transition countries the paternalistic inquisitorial tradition is traded for more responsibility for the parties and an enhanced collaboration between judge and parties.[15] On the other side, some of the old, established democracies are trading their tradition of more passive and reserved judges for an increase in the case-management powers of the judge and extended powers to order the taking of evidence *ex officio*.[16]

However, convergence does not mean that the debate about the fundamental principles underpinning the law of evidence and the practices of proof taking is over. More than ever before, we are witnessing intensive changes in approaches to evidence in civil litigation. The frequency of legislative changes at the national and international level, the internationalisation of the law of evidence through the jurisprudence of transnational tribunals[17] and also the variety of doctrinal views are unprecedented. Therefore, an effort to collect comparative information about the ways in which civil justice systems treat truth and fact finding is justified.

Consequently, in this volume we have tried to collect fresh, contemporary views on the various dimensions of truth and evidence taking in civil proceedings. A specific point of interest was the interplay between truth and evidence taking, on the one hand, and efficiency in civil proceedings, on the other. Efficiency is, in our opinion, a key issue to be discussed in a book on the pursuit of truth in civil litigation. Apart from the fact that a link between the pursuit of truth and efficiency has been emphasised since the time of ancient Rome,[18] all legal systems must find the right balance between the amount of time and money invested in the civil trial and the thoroughness of the proof-taking stage in litigation. Obviously, a system of proof that can produce trustworthy results is in need of considerable investment of

14 In the present volume, reforms in the following post-Socialist countries are discussed: Romania, Slovenia and the Russian Federation.

15 For instance, the Croatian Code of Civil Procedure was amended in 2003, limiting the powers of judges to order the taking of evidence *ex officio*.

16 The Netherlands is a good example of a jurisdiction displaying such a trend in Western Europe. On recent developments in this country, see the contribution of Verkerk in this volume.

17 See e.g. the situation at the Court of Justice of the European Union discussed by Sladič in this volume.

18 See the contributions of Milotić and Karlović in this volume.

time and resources, but the available amount of time and resources is not without limits. If a proper balance between truth and the necessary time and resources cannot be found, the whole process of litigation may be endangered.

Under the influence of the case law of the European Court of Human Rights, acceptable time-limits are a specific point of attention. From this case law it appears that many national legal systems have issues with securing legal protection within a reasonable time. The traditional, one-dimensional approach to civil procedure, according to which the use of any amount of time and money is justified if it results in accurate, legally correct judgments, is currently being superseded by a new, 'three-dimensional' concept under which keeping time and costs under strict control is equally important as producing a correct final decision.[19] In more and more jurisdictions, the truth in civil litigation is not an absolute goal anymore. As with most things in life, truth has its price, and this price should, according to many, be proportionate to the social importance of the case. Still, some procedural 'fundamentalists' argue the opposite, advocating a one-dimensional concept – i.e. truth at all costs – and unfortunately these fundamentalists are every now and then rather influential.

As stated above, in this volume we have made an effort to collect comparative information about the ways in which civil justice systems treat truth and fact finding. This information is presented in six parts.

In the first part, six authors address challenges in the area of truth and efficiency in Western Europe, more specifically in the Netherlands and in Italy. This part provides interesting contrasts, since obviously the two jurisdictions are each other's opposites: the Netherlands offering a no-nonsense approach to civil procedure and to truth and efficiency in which a clear balance between the two concepts seems to have been found,[20] and Italy providing a very learned approach with attention to every procedural detail without in practice being able to produce results acceptable to modern litigation standards (one of the contributors even speaks of the Antique Shop of Italian civil procedure).[21] In this part of the present volume not only litigation before a court of law, but also the role of truth in the area of alternative dispute resolution (mediation) is addressed.[22] Additionally, the following specific means of evidence are studied: oath and confession, expert testimony and court inspection.[23] Part 1 concludes with a contribution that studies the role of the truth in Italian summary proceedings.[24]

In Part 2, the common law perspective to the central issues of this volume is provided by studying developments in the United States and South Africa (in the procedural field, South Africa can rightly be classified as a common law jurisdiction even though in the area of substantive private law it is a so-called 'mixed jurisdiction'). The first contribution in Part 2 discusses the demise of the civil trial in

19 Zuckerman 2009, p. 49.
20 See the contribution of Verkerk.
21 See the contribution of Silvestri.
22 See the contribution of Jagtenberg & De Roo.
23 See the contributions of Silvestri, Ferraris and Bina.
24 See the contribution of Ferrari.

American civil litigation.[25] This is obviously of major importance for truth finding as it is a known fact that trial is (was) considered to be of primary importance for establishing the truth in common law systems. The author of this contribution also addresses the issue of (modest) convergence between American and European systems of civil procedure in the area of fact finding. Subsequently, American 'extremism' in the pursuit of the truth is discussed.[26] This 'extremism' may not always produce the right balance between truth and efficiency as discussed in the present volume, and the contribution may therefore serve as an example of an approach that from a European perspective raises some questions. Finally, the situation in South Africa is addressed.[27] The author of this contribution submits that South African civil procedure is still very much trial-centred and holds that this situation should change in the direction of what he calls 'a more nuanced continental European system'.

Part 3 of this volume discusses Socialist and post-Socialist perspectives on truth and efficiency. The contribution opening Part 3 forms a bridge between common law and civil law traditions, more specifically between the Socialist and post-Socialist variants of the latter, as it discusses developments in Mainland China and in Hong Kong.[28] Obviously, as a result of the existence of two systems of civil procedure within the People's Republic of China, interesting contrasts can be offered. Subsequently, Romania, Slovenia and the Russian Federation are the focus of attention.[29] These jurisdictions can be classified as post-Socialist members of the Civil Law family; the attentive reader may spot various interesting parallels between their (formerly Socialist) systems of civil procedure and that of mainland China. It should be noted that the contribution on truth and efficiency in the Russian Federation is preceded by a contribution discussing the jurisdiction of the various courts in Russia.[30] This contribution may be helpful for a better understanding of the subsequent contribution.

Part 4 of the present volume discusses taking and administering evidence before the Court of Justice of the European Union. Obviously, due to the nature of this court various issues in the field of truth and efficiency must be put in a different perspective than when these topics are studied within a purely national procedural context. The highly sophisticated means available at the CJEU to ensure truth and efficiency in judicial proceedings are discussed in depth in this part of the volume.

An historical Part 5 then follows in which Roman dispute resolution is the core issue. Truth and efficiency in Roman arbitration proceedings are discussed[31] next to the role of presumptions in the context of one of the major contracts of Roman law, the *stipulatio*.[32]

25 See the contribution of Langbein.
26 See the contribution of Marcus.
27 See the contribution of Paleker.
28 See the contribution of Chan.
29 See the contributions of Spinei, Rijavic and Abolonin & Abolonin.
30 See the contribution of Valeev, Fathkullina & Valeeva.
31 See the contribution of Milotić.
32 See the contribution of Karlović.

The final part of this volume (Part 6) discusses an experiment in the Netherlands aimed at rendering a judgment in civil proceedings immediately after the hearing before the cantonal section of the Dutch First Instance Court.[33] The authors show that the efficient approach in hearing civil cases discussed by them is very beneficial for quality. This may be considered a promising sign, since those who oppose reform often think that quality and efficiency are antagonists. Obviously, the contribution to the final part of the present volume is proof of the opposite which may, indeed, be reassuring for all those interested in the interplay between truth and evidence taking, on the one hand, and efficiency in civil proceedings, on the other.

C.H. van Rhee & A. Uzelac
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[33] See the contribution of Bloemink, Van Dooren, Entjes, Van Gompel & Fernhout.

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