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

Global Developments – Towards Harmonisation (and Back)

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

1.1 Introduction

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

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

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

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

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

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

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

1.2 The Two Main Goals of Civil Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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