ВЕСТНИК
ГРАЖДАНСКОГО
ПРОЦЕССА
ЮРИДИЧЕСКИЙ ЖУРНАЛ ДЛЯ ПРОФЕССИОНАЛОВ

Legal Journal
«Civil Procedure Herald»

INTERNATIONAL ASSOCIATION OF PROCEDURAL LAW
CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION
SUPREME COURT OF THE RUSSIAN FEDERATION
SUPREME ARBITRAZH COURT OF THE RUSSIAN FEDERATION
ASSOCIATION OF LAWYERS OF RUSSIA
MOSCOW STATE LOMONOSOV UNIVERSITY

CIVIL PROCEDURE IN CROSS-CULTURAL DIALOGUE: EURASIA CONTEXT

IAPL World Conference on Civil Procedure
18–21 September, 2012,
Moscow, Russia

CONFERENCE BOOK

Edited by Dmitry Maleshin

СТАТУТ
МОСКВА 2012

Platitude always a good thing (is there a time when too many choices may be a bad idea?) and how are we to know? When we have so many choices, and so many different possible measures of what constitutes a fair, just or good process, it may be virtually impossible to come up with a uniform and universally satisfying dress code. So, in the United States, for the near future, it may be «come as you are» – formal, informal or «semi-formal». Perhaps in a country this diverse the choice of dispute process should be similarly diverse, but it makes one wonder, along with Lon Fuller, whether each process choice must or should have its own integrity. I wouldn't wear a ball gown to a barbecue and I wouldn't wear a bathing suit to the courthouse.

[1] Chris Guthrie, *Panacea or Pandora's Box? The Costs of Options in Negotiation*, 88 *Iowa Law Review* 601 (2003) – is a rosé a good choice when some of the dinner guests want red wine and the others want white?

SESSION 2. GOALS OF CIVIL JUSTICE

General Reporter –
Prof. **Alan Uzelac**, IAPL Council member, University of Zagreb Faculty of Law, Croatia

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

National Reporters:
- Austrian National Report (with additional information on Germany): Dr. **Christian Koller**, University of Vienna, Austria
- Brazilian National Report: Prof. **Teresa Arruda Alvim Wambier**, Catholic University of São Paolo, Brazil
- Chinese National Report: Prof. **Fu Yulin**, Peking University, China
- Hong Kong National Report: Prof. **David Chan**, Prof. **Peter Chan**, City University of Hong Kong, Hong Kong
- Hungarian National Report: Prof. **Miklós Kengyel**, Andrassy University, Budapest, Hungary
- Italian National Report: Prof. **Elisabetta Silvestri**, University of Pavia, Italy;
- Dutch National Report: (with additional information on Belgium and France), Prof. **C.H. (Remco) van Rhee**, Maastricht University, Netherlands
- Norwegian National Report: Dr. **Inge Lorange Backer**, University of Oslo, Norway
- Russian National Report: Dr: **Dmitry Nokhrin**, Constitutional Court of the Russian Federation, Russia
- American National Report: Prof. **Richard Marcus**, University of California, Hastings College, USA.

Alan Uzelac[1]

GENERAL REPORT

I. Introduction

1. This general report is a product of a process initiated when it was decided that the IAPL Moscow Conference 2012 should revisit one of the fundamental topics of civil procedure, the goals of civil justice. The organizers of the conference gave as a direction only two very general questions:
– How do the goals differ from country to country? and
– What is the role of civil justice in the contemporary world?

[1] Professor of University of Zagreb Faculty of Law (Croatia).

2. I accepted to serve as the general reporter during the Pecs Colloquium in September 2010. One of my first duties was to elaborate the two questions given as a direction, and to find the national reporters who would be willing and able to provide in-depth information about their national systems. It was quite a challenging task, as the mission to report on the «role of civil justice in the contemporary world» needed a global approach. At the same time, it was suggested, for organisational reasons, not to engage more than six national reporters. After an exchange of views with the organizers, I got permission to slightly increase the number of reports, so finally there were ten national reports, provided by twelve national reporters. Capturing the global differences from country to country still seemed as an impossible mission. Yet, I had a great luck and a privilege of working with knowledgeable reporters who were able to bring profound insights from almost all corners of the globe. Of course, one cannot make a claim that all globally relevant national systems of civil justice are covered, but at least this report can draw on the insights collected from Europe (Austria, Belgium, Croatia, France, Germany, Hungary, Italy, the Netherlands, Norway, Russia), Asia (China: both PRC and Hong Kong), North America (the USA) and South America (Brazil). Insofar, it can be claimed that both the common law countries (USA, Hong Kong) and the civil law countries (the rest) are included in the survey, and that the main branches of civil law jurisdictions (Romanic and Germanic, Scandinavian, Latin American) are represented. In the context of the topic of this report (and the venue of the conference), it is important to note that the reports cover the span of ideologically very different countries (e.g. the USA and mainland China), but also contains materials regarding the countries that may be generally categorized as countries in a (pre&post)transition (Hungary, Russia, Croatia[1]). The jurisdictions covered also display various level of trust in their civil justice, which often corresponds to rather diverse level of its overall effectiveness; it suffices to note the contrast between the generally well-functioning systems such as Norway or the Netherlands, and those burdened with systemic deficiencies, such as Italy or Croatia.

3. The national reports collected for this paper were the following[2]:

– Report Austria (with additional information on Germany), by Dr. Christian Koller (University of Vienna);

– Report Brazil, by Prof. Teresa Arruda Alvim Wambier (Catholic University of São Paolo);

– Report China-PRC, by Prof. Fu Yulin (Peking University);

– Report China-Hong Kong, by David Chan & Peter C.H. Chan (City University of Hong Kong);

– Report Hungary, by Prof. Miklós Kengyel (Andrassy University, Budapest);

– Report Italy, by Prof. Elisabetta Silvestri (University of Pavia);

– Report Netherlands (with additional information on Belgium and France), by Prof. C.H. van Rhee (Maastricht University);

– Report Norway, by Dr. Inge Lorange Backer (University of Oslo);

– Report Russia, by Dr. Dmitry Nokhrin (Constitutional Court, Saint-Petersburg); and

– Report USA, by Prof. Richard Marcus (University of California, Hastings College).

[1] There was no formal national report from Croatia, but I included some references to my home jurisdiction in order to extend the scope of comparisons.

[2] The reports are ordered in alphabetical list of main countries covered; in the rest of the text, they will be quoted by the reference to the country and the number of paragraph in the text of the report.

Some national reporters circulated their reports to further experts from different jurisdictions, whose names and functions are noted in the published text of the national reports. To all national reporters, as well as to all other colleagues who helped in any way in the progress of the work on national reports (and the general report) I owe my sincere gratitude.

4. The national reporters were invited to produce their report on the basis of the questionnaire that was circulated among them in March 2011[1]. Further on, several national reporters held a meeting with the general reporter during the Heidelberg Congress in July 2011, where the format of the reports and the calendar for their submission were agreed. Most of the reports were submitted in draft or final version until the end of 2011. The general report is finalized in the April 2012.

5. The structure of this general report will follow the structure of the questionnaire. It will start with the chapter on general attitude and doctrinal opinions on goals of civil justice. However, as ideology often differs from reality, in the following chapters some particular topics which can help explain the goals will be discussed:

– The matters regarded to be within the scope of civil justice (in particular, whether the goal of civil justice is confined to litigation, or also to 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 reasonable time;

– The level to which 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 resolution of complex, multi-party matters;

– The balance between the 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 the quasi-commercial source of revenue for the public budget

– 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.).

II. Goals of Civil Justice

6. For some, the topic of 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 a part of an obligatory introduction, repeating the outworn formulas, with more or less attempt to exercise 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 legal community, and the focus is rather on pragmatic and practical solutions, on micro-management of affairs[2].

[1] The Questionnaire for national reporters is attached as Annex of this General Report.

[2] See Report Italy, at 1.

7. Yet, the vast majority of the submitted national reports demonstrate that the topic of goals of civil justice is tending to be revived, and that a thorough discussion or even a full reconceptualization of it may be a precondition for successful procedural reforms – especially if it is desired that such reforms be deep, far-reaching and effective. The most successful procedural reforms of the past, from Franz Klein's reform in the 1890s to the Lord Woolf reforms in 1990s, were rooted on the profound perception of the procedural goals – social function (Klein), or overriding objective (Woolf) – of the 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 which supplied reports, the conceptual discussion contrasting various perception of the goals of civil justice is going on e.g. in the Netherlands[1], and it was also behind the 2009 reform of the CJR in Hong Kong[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 the others[3]. The oscillating balance between the opposed goals is behind many important changes in procedural law and practice, which can be best illustrated on the examples of the countries that undergo dynamic social changes, such as mainland China, transition countries in Europe, Russia etc. 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»[4].

8. In several national reports it was mentioned 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 national reports speak about the goals of civil justice in surprisingly similar terms. The words may be different, but in all of the collected reports the goals are being presented as a contrast of two main approaches, whereby any given system of civil justice may be defined by the balance (or disbalance) reached between them.

9. 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 had different names. For the first, it was often spoken about the conflict resolution (dispute resolution, conflict-solving,) goal. The second, 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[5].

10. 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

[1] See Report Netherlands, at 3.

[2] See Report Hong Kong, at 2–5.

[3] See Report USA, Ch. III.

[4] Report Italy, at 1.

[5] On the general level, the conflict resolving and the policy implementing goals are elaborated in the still topical book of Mirjan Damaška, *The Faces of Justice and State Authority,* New Haven, 1986.

quite different. The tasks of civil justice or matters regarded to be within its scope may also be influenced by the one or the other goal – e.g. while the conflict solving goal would use civil justice only for settlement of contested matters, the policy goal may have an impact on transfer of jurisdiction to civil justice for a number of other purposes (from holding of public registers to decision-making in non-contested matters) – see more *infra,* Ch. III. 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 the public law rights, as is the case in the USA; correcting the inappropriate government activity, as is the case in Brazil; or reaching of social harmony, as is the case in China)[1]. 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.

11. The exclusive focus of civil justice on conflict resolution goal was historically associated with the liberal states of the 19th century. In its purest form, this goal concentrates only on the enforcement of challenged rights of the 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, the civil justice had to provide its services in the way that would ensure a minimum of intervention. Just as the *laisse- faire* economy refrains from intervening in the business transactions between private parties, the liberal system of civil justice refrains from intervening into 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 with 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 the business for anybody else. From the state perspective, the only systemic interest is to keep its conflict resolution services running at the minimum cost[2], while at the same time still fulfilling the main task – diverting the private parties from resorting to forcible self-help.

12. 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 resolving 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 is 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, imperialist, exploitative system of government. 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 economic and

[1] See Report USA; Report Brazil; Report China.

[2] See Posner, cited in Report USA, at 7.

social policy of the socialist state. Insofar, the conflict resolving function in civil procedure would in principle have no particular value in itself – it should be viewed only in a broader context of implementation of desired social and political goals. Individualist 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 implementing goals, we may encounter an interesting mix of two features – general marginalization of civil justice, and the paternalistic state control of individual litigants. The weak powers of the parties in the process could be in theory contrasted to 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 the 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). Insofar, the passive parties in such an activist state were not contrasted by active judges. The judges were rather passive – bound to follow the political instructions (either directly or through the concept of «socialist legality»), and controlled and scrutinized at many levels (including the political control at the time of their appointment and periodical re-election). Insofar, the concept of civil justice rooted on an extreme policy implementing goal leads more to general passivization and marginalization of the civil procedure, rather than the (as sometimes incorrectly interpreted) civil procedure characterized by an omnipotent judge and passive parties.

13. All national reports summarized in this general report 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 resolving, or the policy implementing goal of civil justice. Several reports speak about the multitude of goals, 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 is, 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 matters, also in cases that would in other places be handled by other means, like the USA. However, this contrast may be softened by closer examination. While Professor Fu clearly states that the «courts [in China] are viewed as a tool to promote political policies», and that «the judiciary is inclined to adjust its goals to serve political needs»[1], the analysis of Professor Marcus may also imply, although in a somewhat different sense, that the civil justice in America has a clear political purpose[2] of serving as a substitute for administrative modes of enforcement of legal rules. The ample use of class actions and the use of punitive damages as a method of influencing or altering behaviour at the larger scale may also serve as examples that American civil justice has far advanced from the pure conflict resolving model of liberal state[3].

[1] Report China, at 1.

[2] A good illustration for opposition to conflict resolving approach is the quote from Fiss, who argued that «social function of the lawsuit should be not trivialized to only resolving private disputes». Report USA, at 10.

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

14. In the civil law countries, the «dualist conception»[1] of the goals of civil procedure – the one that recognizes both conflict resolution and the implementation of trans-individual policies – is expressed in other terms. While the conflict resolving goal is often phrased similarly (as enforcement of substantive rights and obligation, authoritative determination of rights by provision of enforceable judgments, or resolving of disputes between individuals and businesses in accordance with the law), the expression of the policy implementing goals is less uniform. Several reports express the trans-individual function of the civil justice 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 individual interests of the litigants. Professor van Rhee speaks of two such particular goals – **demonstrating the effectiveness of private law**, and **development and uniform application of private law**[2]. 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 the practice), and the element 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)[3]. 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 (however, new debates in the Netherlands may show its relevance in a new light, see *infra* at 21 and Ch. XI). In a narrow sense, the both goals may even be compatible with the liberal, conflict resolving concept of the goals of civil justice (if they are viewed exclusively from the perspective of effectiveness and costs).

15. As a supplement to the preventive function of civil justice, some reports speak about the **educational goal and purpose** of civil procedure. This purpose is e.g. noted in Art. 2 of the CPC of the Russian Federation[4]. It is also noted in respect to China, though with the note that it is generally not achieved due to the easy and frequent challenges of final judgments[5]. 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.

16. Another indication of the policy implementing goal of civil justice may be found in the concept of **socialization of civil justice**, understood in the sense that civil justice should promote social justice, and bring the justice closer to the needs of the society at large. Although this concept was only reported in one report, with a note that it was influential in 1970s and early 1980s, and that it has today a «retro flavour»[6], the ideas of the access to justice movement should not be completely disregarded. It seems that, at least in continental

[1] Report Hungary, at 1.

[2] Report Netherlands, at 2.

[3] The preventive function is also noted in respect to Russia as one of the «auxiliary aims» of civil procedure. For Germany, *Rechtsfortbildung* (development of law) is recognized as one of the important functions of civil procedure.

[4] See Report Russia, at 4.

[5] Report China, at 31.

[6] Report Italy, at 4.

Europe, it is often considered that civil courts should promote equal opportunities of both parties to protect their rights and represent their interests in the process, which may require some forms of proactive behaviour of the judges in order to secure the equal chances of the weaker party in the proceedings.

17. In the same direction, but a little bit further, goes the demand that civil procedure be in the service of achieving the overreaching social goal of **social harmony.** This concept is, after the brief period of the strengthening of conflict resolving goal, since the 2000s again gaining momentum in China[1]. In the Chinese context, the emphasis on harmonious development of society is combined with the channelling of the civil cases towards judicial mediation. The «broader aim of social harmonization» is also noted among the goals of civil justice in Russia[2]. In Russia, but also in former socialist states of Central Europe such as Hungary 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**[3]. This goal, so Professor Kengyel, was in the centre of civil action of socialist procedural law[4]. From the national reports, it seems that this goal plays, to the extent that it is still recognized 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 recognized by its highest court[5]. In the German procedural theory, finding of substantive truth in civil procedure is also noted, but has an instrumental value, serving as a means to achieve parties' acceptance of the decision, as well as to the aim of legal certainty[6]. Whether or not the goal of civil proceedings is to establish substantive truth, may be relevant for the concept of active or passive judicial role in the proceedings, but can also have an effect on their overall effectiveness (or the lack thereof).

18. The discussion about the role of substantive truth (and substantive justice) is also connected to general evaluation of the role of **procedural formalism** in the achievement of the goals of civil justice. Under a liberal conflict resolving model, the procedural forms have a purpose in themselves. They are nothing but the rules of the game that have to be meticulously observed to guarantee the fairness of the outcome. But, it seems that the times when the procedural formalism was a goal in itself are long gone. Even in Germany, which is often regarded as the fortress of formalism, there is a well-established line of case law originating from the *Reichsgericht* decision that held that procedure must not impede the enforcement of rights, and argued that even *res iudicata* must give way to the «paramount goal of civil justice, which is, to reach justice in the individual case»[7]. The instrumental function of civil justice (or, as Bentham called it, the «adjective function» of procedural law)[8] rejects the inherent values of the procedure, or at least trades them against the external goals that have to be reached through the administration of justice. But, although «excessive

[1] Report China, at 3.
[2] Report Russia, at. 14.
[3] See Report Hungary, at 1; Report Russia, at 14. The Russian report also mentions as a general aim the search for «social truth».
[4] Report Hungary, ibid.
[5] Report Austria, at 10. However, the same court (OGH) balances this goal with the other goals, and notes that the pursuit for truth does not as such render the taking of illegally obtained evidence admissible (ibid. – see).
[6] Report Austria, at 5, citing Brehm.
[7] Report Austria, at 9.
[8] See Report USA, at 7; similarly the German *Reichtsgericht* spoke about the instrumental function (*dienende Funktion)* of procural law, see Report Austria, ibid.

formalism» is today rejected even at the constitutional level (through the case law of the European Court of Human Rights)[1], it can hardly be argued that all procedural forms are a priori harmful, and that they should be gradually eliminated (as was the ideology in the Soviet times). The formalism contributes to legal certainty and predictability, and insofar can be compatible with moderate policy implementing concepts.

19. The **bare effectiveness** – ability to produce, in as many cases as possible, any sort of decision on civil rights and obligations within a reasonable time – also appears in the context of discussion about the goals of civil justice. Although a functional and capable system of civil justice should be among the preconditions, and not the goals of civil justice, the grave problems in dealing with the caseload and securing appropriate and foreseeable time of handling the matters entrusted to civil justice led to the focusing on only one goal – to keep the system from falling apart, hoping to reduce the caseload and shorten the length of the proceedings[2]. Italian case may be one of the most dramatic ones, but many other civil justice systems, in particular in South Eastern Europe, suffer from systemic deficiencies that sublimate all procedural goals and their employment in only one direction – fighting with the tide of new cases and handling the overcrowded dockets of long-overdue matters. Whether this may be categorized as a goal in itself, or just a symptom and the reason for absence of any (other) goals, may be a topic for discussion.

20. Partly for reasons described in the preceding paragraph, but also for several different reasons, a rather prominent and influential trend of reconceptualization of procedural goals has emerged. It is the trend which seeks to improve the cost-effectiveness of civil litigation, to reduce the expenses for civil justice paid from the taxpayers' purse, or even to require the civil justice system to produce revenues for the state budget. One of the forms of these trends is advancing the goal of **proportionality**, or – as reported by Chan & Chan for Hong Kong – to the concept of justice «under which procedural efficiency is just as important as the correctness of the judgment»[3]. Such efficiency requires that the limited public resources for justice system be distributed fairly and appropriately, inter alia by saving cost and time by active judicial case management and a continued effort to streamline procedures[4]. According to Zuckerman's «**three-dimensional concept of justice**», a contemporary civil justice should not focus on **accurate and lawful decisions** only, but should also take into the same equation the **time** and **costs** needed to deal with the case.

21. But, while the «three-dimensional concept» in theory needs careful balancing of several factors (social and individual importance of the court case, the expectations and needs of the society and the litigants, and the available resources), the cost-awareness may be in some countries driven less by conscious attempts to improve the effectiveness, fairness and quality of the proceedings, and more by the external factors, e.g. by the general policy of cutting public funds and expenses for public services. Such a situation, according to Professor van Rhee, may be traced in the Netherlands, where the governmental policy to reduce expenses for civil justice has produced controversial plans of increasing court fees and mandating mediation. This is all happening under the same policy – the policy of discouraging litigation which has to be only the *ultimum remedium,* the last resort if all other

[1] See more infra at 55.
[2] Report Italy
[3] Report Hong Kong, at 3.
[4] Ibid., at 5.

attempts of private parties to resolve the dispute fail. These plans led to a «clash between the government on one side and lawyers and legal scholars on the other as regards the goals of civil justice», whereby the government advocated more-or-less a conflict resolving model, while the other side opposed the reforms with references on beneficial public effect (so-called positive externalities) of litigation on public order[1].

22. The transposition of general concepts of the goals of civil justice in concrete procedural designs may better be illustrated by analysing how the perception of procedural goals affects various topical issues of contemporary procedural law. Many topics were already announced in the preceding paragraphs. Therefore, the following overview of such issues will deal only with the issues that have not already been covered *supra*.

III. Matters within the scope of civil justice

23. The goals of civil justice may be closely connected with the scope of its work. As described above, the conflict resolving goal is in many legal systems seen as the very core of the goals of civil justice. However, it is interesting to note that dealing with dispute resolution, i.e. with **disputed matters**, for many national systems of civil justice constitutes only a minor part of their overall caseload[2]. Obviously, in most uncontested (or **extra-contentious**) cases[3] the policy goals and reasons are in the forefront. It is also noted that, in essence, the tasks of the courts in such proceedings are «more or less administrative in nature»[4]. In fact, while the public and cultural picture of judicial work is associated with adjudication, in the cases like issuing excerpts from land registers, appointment of guardians, or stamping of payment orders while collecting uncontested debt, there is very little adjudication indeed. The use of courts for essentially non-judicial, administrative purposes is also the reason for the significant divergences among national justice systems: all civil courts deal with adjudication, but it depends on the political choice of each state how many other tasks will be transferred to the judiciary. Evaluated by the universal standards of due process, as expressed in the Art. 10 of the UN Human Rights Declaration or Art. 6 of the European Human Rights Convention, the residual right to have a contested case dealt by the *courts* cannot be outsourced; but, all other matters and tasks are subject to a discretionary and changeable choice of the state authorities. As modern societies become more complex, one can rarely encounter pure and logical distribution or functions, i.e. courts that only deal with dispute resolution and the state or local administration that deals with the rest. Entrusting the judiciary with other duties, based on different motives and different reasons, seems to be popular in many parts of the world. In many countries, more and more «externalities» are being transferred to the courts, from the regulation of family relations to the control of local elections[5].

[1] See Report Netherlands, at 6.

[2] E.g. in Croatia, the contested matters constitute only about 25% of the annual caseload of all courts, while the rest is composed of enforcement, public register cases and other non-contentious matters.

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

[4] See Report Netherlands, at 9; Report Austria, at 13 (*Verwaltungstätigkeit im Bereich der Privatrechtsordnung*); Report Italy, at 7.

[5] For Austria, it is noted that „the legislator decided to submit more and more matters to non-contentious jurisdiction which do not share the same characteristics as those matters forming traditionally the core of non-contentious jurisdiction». Report Austria, at 11.

24. The national reports confirm this description. None of the reported jurisdictions confines their civil justice systems to dealing with «proper court cases» i.e. with contested matters only. But, the relative share of the uncontested matters in the overall work of the civil courts is different from country to country. Professor van Rhee points to the fact that, though Dutch civil courts deal with diverse types of uncontested matters, the more administrative (i.e. uncontested) matters «do not play such a preponderant role [in the Netherlands] as in some other jurisdictions»[1]. Compared to the Netherlands, the share of non-contentious matters is apparently bigger in Austria and Germany. The Austrian report notes «numerous non-contentious matters» and lists several categories of cases: matters which «traditionally encompass areas of civil law which require an active intervention by the judge in the interest of parties not in a position to adequately protect their interests»; administration of land and commercial registers, guardianship, estates, cartel matters, bankruptcy, forcible execution of judgments and other titles etc. Even more non-contentious matters may be within the scope of the Italian judiciary: Italian report speaks of a «vast array of proceedings dealing with non-contested cases» regulated in an entire book of the Italian Code of Civil Procedure and in a number of special statutes[2].

25. Whether judiciary is the best forum to resolve non-contentious matters is another topical question. Reporting on Brazil, Professor Wambier notes the concerns regarding the quality that judicial branch of government may provide in non-contentious matters («voluntary judicial proceedings») where the «judge plays a chiefly administrative role». Based on such considerations, some procedures are being reformed so that they do not require intervention of a judge any more. These reforms include transfer of jurisdiction in matters such as amicable divorce or execution of testaments to other legal professionals (such as public notaries or registrars)[3].

26. Does involvement of courts in a smaller or bigger number of non-contested matters change the overall assessment of the goals of civil justice? Or, does it only complicate and multiply the goals? Professor Silvestri in her report states that intensive involvement of courts in non-contested matters is questionable, and that it creates a «multifaceted puzzle» of *giurisdizione volontaria*[4]. User-friendliness, clarity and efficiency may be only some values that may be jeopardized by a too colourful mix of diverse tasks «pushed» by the legislator to state courts[5]. But, there may be even worse consequences than confusion for those who use the services of state justice system. The judges, as those who are bound to enforce the procedural rules, may confuse their roles and the goals of particular types of proceedings. It is considered that the proceedings in non-contested matters should be simpler, faster and less formal than the «regular» proceedings in disputed matters. Is this really the case, and whether there is an overspill of unnecessary formality and complexity from the default model of proceedings in contested matters is a topic that deserves attention. The overspill in the opposite direction may be even more disastrous: if the large number of cases encountered in practice of judicial work is pure administration, the same attitude

[1] Report Netherlands at 10.

[2] Report Italy, at 6.

[3] Report Brazil, at 5–6.

[4] Report Italy, ibid.

[5] The engagement of judges in the supervision of the parliamentary and local elections exist e.g. in Belgium and Croatia (see Report Netherlands – quoting B. Allemeersch – at 10).

may reflect on their method of acting in «proper» court cases which require a prudent, reasonable and professional adjudication.

27. While the scope of matters may influence the perception of the goals of civil procedure, the overarching goal of the procedure may influence the matters within the scope of the proceedings and the method of dealing with them. The most apparent example is China, where the goal of social harmony imposes obligation on all courts to see to it that, irrespective whether the case is a contested or uncontested, it is primarily settled in an amicable way, and only very exceptionally by a decision that would not be voluntarily subscribed by all of the participants in the proceedings. In such a manner, the specific goal of civil justice in China leads to an interesting contrast with the European judiciaries. Whereas in Europe the chief product of civil justice is still adjudication (production of enforceable titles), the chief products of civil justice in China are conciliation and mediated settlements[1]. Some convergence, however, may be observed in the more recent developments both in Europe and in China. While mediation becomes more desirable and prominent at the European level, civil procedure reforms in China since 1990s have introduced more space for classical adjudication, although the «transplanted» Western procedures are still treated as an oddity[2].

IV. Protection of individual rights v. protection of the public interest

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

29. The first issue may be observed as a link between the scope of matters entrusted to civil justice, and the objectives of the process. The pronounced inclination of the American civil justice is a good example of a justice system which has extended the target of protection of individual rights to a more overarching target of public interest goals. As reported by Professor Marcus, the aims of American civil justice are frequently going beyond the context of bi-partisan dispute resolution. American civil justice does not only take on some essentially administrative tasks – it replaces state administration: «The very heart of the common law system contemplates that the courts themselves will develop and enforce – via private litigation – the sorts of legal protections that are ordinarily adopted by legislative or administrative actions in other legal systems»[3]. The resemblance to the European fashion of entrusting courts with many essentially administrative tasks and obligations exists, but is superficial. Namely, while in Europe it is legitimate to view this process as bureaucratization

[1] See Report China, at 4–5. As professor Fu notes, the goal of social harmony is even emphasized in the enforcement proceedings, where «reaching a settlement has become almost a norm (usually achieved by court mediation)».

[2] A good example from the Chinese report is the introduction of the system of collection of uncontested debt by payment (dunning) orders, for which „the goal of rights protection is still to be fully entranched». The inclination to mediated solutions leads to ample opportunities to evade the payment, which results in an ineffective procedure that currently „accounts for no more than 1% of the first instance civil cases in China». Report China, at 6.

[3] Report USA, at 18–19.

of the state judiciary, in the USA one may speak about the judicialization of the matters otherwise dealt by the state bureaucracies. Not only that private litigation is a good substitute for governmental law enforcement, the essentially judicial, adjudicative manner in which the American courts deal with the mass claims, collective actions and class litigation provides conclusive proof of this submission (more on multi-party litigation see *infra* at VIII.).

30. The (North) American situation may be in some aspects exceptional, but its general attitude is not entirely alone. The Brazilian report also emphasizes the «judicialization of politics» in Brazil. The judicial branch of government in Brazil is being given more powers to interfere with the activities of the government, and exert control over public administration[1].

31. In cases where legislation entrusts the courts with implementation of statutory provisions that express certain public policies, the courts would, in theory, have to follow faithfully such public policies and protect the public interests at stake. The element of public interest is particularly expressed in some fields, e.g. in family law. Still, as some issues in those fields are a matter of public controversy, the judicial implementation of the public policies may take its own course. As Professor Silvestri notes, in Italy sometimes happened that «courts ... opposed the very policy they were expected to implement»[2].

32. Something like that would hardly be imaginable in China, where, «in the context of a «socialist» society based on public ownership, the consciousness of protection of public interest permeates civil justice»[3]. Accordingly, the Chinese judges have a very large discretion to intervene for reasons of public interest into the parties' disposition of their private rights. The courts have the duty to control whether the parties' actions in civil cases violate the «interests of the state, social and public interests, or «third party» ... interests»[4]. At least in theory, the courts have vast powers: if, in their view, the public interest is disregarded, they may deny the claimant the right to withdraw the claim; control the court judgments irrespective of the parties appeals; refuse to enforce the arbitral awards etc.[5] The extra-judicial influences motivated by local interests or the views of the ruling elites occur more often through non-official than official channels, examples being the phone calls of the government officials to the court, «the masses filing administrative petitions against the court or staging sieges on the internet» etc.[6] The courts have special closed committees which discuss the cases, and whose records cannot be accessed by the parties or the public, but only by those who have the power to supervise the courts.

33. The Russian approach to the role of public interests in the civil proceedings is closer to the «balance of private and public rights and interests»[7]. Still, some recent cases demonstrate dynamic development, as well as some tensions between the two goals – protection of individual rights and the public interest. In some cases, the public interest played a role in the form of protection of proprietary interests of the State[8]; in the other, it was referred

[1] Report Brazil, at 11–12.

[2] Report Italy, at 9 – citing the case of Eluana Englaro, a girl that had gone into the permanent vegetative state in 1992, and the court action of her father who asked for permission to disconnect life-supporting medical equipment.

[3] Report China, at 7.

[4] Ibid., at 8.

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

[6] Ibid., at 10.

[7] Report Russia, at 24.

[8] Ibid., at 25–26.

to when various Russian courts prohibited (for «reasons of public morals») the Gay Pride marches[1]. As noted by D. Nohrin, it was due to Russian doctrinal position according to which «homosexuals in Russia aren't exposed to any real discrimination, because Russian legislation does not recognize sexual orientation as a circumstance in any way significant»[2].

34. European and American systems of civil justice generally deny that in core matters processed by the courts such extra-judicial influences or political considerations play an important role[3]. In Western systems of civil justice, to the extent that it exists, the involvement of public interest in the operations of civil justice is reversely proportionate with the share of matters of non-judicial (administrative) nature entrusted to them[4]. The non-contentious matters are often motivated by public interest. For instance, the court administration of public registers has as its motivation safeguarding of legal security regarding real estates and land transfers[5]. On the contrary, in conventional, bi-party civil law litigations, the doctrine of judicial independence dictates the detachment of court decisions and actions from the policy-related considerations. The courts «must apply the relevant norms to the facts established in the proceedings... not bound by any overriding policy or national interest that would necessarily affect their decision»[6]. The public interest plays a role in conventional litigations only in the matters that are transcending the interests of the individual litigants, e.g. in cases where the interests of children or people with mental disabilities are concerned. In the same category are also labour and housing cases; cases regarding environmental or consumer protection; antitrust cases etc. In the latter two cases, the trans-individual and supra-individual interests are often combined with the special types of proceedings, such as collective or representative actions – see more *infra* in Ch. VIII.

35. In spite of the Western ideological rejection of the idea that the civil courts should in their dealing with private law matters directly serve societal, national or governmental goals, there is a trend in many European and non—European countries that the courts exert more active role in the process and engage in a number of matters on their own initiative, even against the dispositions of the parties. For instance, in France, Austria, Germany, the Netherlands and many other jurisdictions of the European Continent, the courts have to apply the applicable procedural and substantive law *ex officio* when administering justice[7]. A number of countries also give right (and obligation) to explore facts *ex officio* – see *infra,* Ch. V.

36. One goal related to the protection of public interests plays however an important role in almost all contemporary systems of civil justice. It is a goal that, though policy-based, may be defined as the *intrinsic* goal of civil justice – the goal of efficient and fair administration of justice. In England and Hong Kong, this goal is expressed in terms of

[1] Report Russia, at 27–28.

[2] Ibid., at 29. The decisions in those cases led to the finding of the violation of the human right of peaceful assembly, together with the violations of the right of an effective remedy and the prohibition of discrimination (Arts. 11, 13 and 14 of the ECHR). See *Alekseyev v. Russia*, ECtHR ap. nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010.

[3] Some features of the US system, such as the possibility to award punitive damages, show a higher level of inclination to use the individual case for general goals of changing behavior in a larger segment of society.

[4] On such matters see supra Ch. III.

[5] Report Austria, at 16.

[6] Report Austria, at 19. See also Report Netherlands, at 11.

[7] Report Netherlands (also supported with comments by F. Ferrand regarding France).

the overriding/underlying objective which lies at the centre of recent civil justice reforms[1]. Civil justice as another important public service should be «effective, efficient and fair»[2]. The active case management, and, where necessary, *ex officio* actions by the court, should be in the function of swift, streamlined and inexpensive proceedings, foreseeable timing of the procedure, and prevention of abusive and delaying behaviour of the parties. Interesting new development in this direction can be observed in the recent reforms and the subsequent case-law in Hong Kong, where the courts now may (and will) strike out the claimant's case for inordinate delay[3]. In a striking contrast, the civil justice systems of the European socialist and post-socialist countries, while formally adhering to an active role of the judge and the high level of importance of (external) public interest, in the areas of intrinsic procedural values usually show their rather weak, passive face. Poor case-management and time-management and the resulting inefficiency are often confirmed by the findings of systemic deficiencies and the violations of the right to a trial within a reasonable time before the European Court of Human Rights.

37. In the cases in which public interest elements are recognized, one may inquire whose role is it to enforce them. Is it the task of judges (only), or of some other participants or the internal/external stakeholders? In about the half of the reported legal systems, an important side-body that may participate or intervene in the civil proceedings is the state prosecutor (public prosecutor, public minister, and procurator). The names of the office may be different, but the function of intervention on the side of trans-individual interests is always the same. The scope and reach of the prosecutorial intervention varies. In China, it is a continuing power to supervise the courts and challenge their judgments (even those that were already became effective)[4]. In Russia, the intervention takes a twofold form: the prosecutor can either initiate public-interest litigation as a claimant; or, he can appear as a quasi-neutral evaluator of legality that provides «impartial» opinions to the court[5]. Similar regime exists also in France and the Netherlands, where the members of the Public Ministry may initiate various proceedings (e.g. for annulment of marriages), and issue the advisory opinions (*conclusions*). At the highest court level, the advisory opinions are issued by the Procurator General and the Advocates General (*avocats généraux*) at the Supreme Court (*Cour de cassation)*[6]. The procurator at the highest court may also challenge final and binding judgments in the interest of law, but – in the French and Dutch case – the decision has only an exemplary effect and does not affect the rights and duties of the applicant[7]. The German

[1] Report Hong Kong, at 5, 11, 15.

[2] A. Zuckerman, *The Challenge of Civil Justice Reform: Effective Court Management of Litigation*, *City University of Hong Kong Law Review,* 2009, vol. 1(1), p. 49–71, at 54.

[3] See *Nanjing Iron & Steel Group International Trade Co Ltd and others v. STX Pan Ocean Co Ltd and others,* HCAJ 177/2006. The case was dismissed because the claimant has not taken any action in the case for two years, with the explanation that «in the absence of some compelling reason, it is contrary to the ... objective ... to ensure that a case is dealt with as expeditiously as is reasonably practicable ... for a party to allow an action to languish for 2 years once the same has been commenced ...simply is no excuse for such a long delay» – ibid., p. 13.

[4] The powers of the procurators were in China recently reinforced and augmented. See Report China, at 13–14.

[5] The two coliding functions of the prosecutor in Russia caused issues with the fairness of the proceedings – see Report Russia, at 35; similar considerations in the transition countries led to reform and/or abandonment of the prosecutorial intervention in civil cases.

[6] Report Netherlands, at 12.

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

and Austrian systems, on the other hand, do not have comparable bodies with broad powers, although some modest forms of prosecutorial intervention exist there as well. For example, the public prosecutor in Austria has the right to commence proceedings for annulment of the marriage; the chief financial state attorney, *Finanzprokurator,* may intervene in order to protect public interest)[1]. In Germany, all powers of the public prosecutors to intervene in the civil proceedings were abandoned, and the direction of development in several post-socialist countries is the same (e.g. in successor countries of former Yugoslavia)[2].

38. The protection of public interest plays a special role in the multi-party proceedings and other forms of collective litigation – see *infra,* Ch. VIII.

V. Establishing the facts of the case correctly v. The need to provide effective protection of rights within an appropriate amount of time

39. Contemporary systems of civil justice vary considerably in their attitude towards substantive truth as the goal of civil procedure. Naturally, the accurate fact-finding is always recognized as an important target in the proceedings. At the end of 19th century, Franz Klein wanted to shape a model of civil procedure in which establishing substantive truth, and engaging in efficient case management, would be two mutually non-exclusive goals. Yet, in the course of history it was proved that, in the extreme cases, the ideological demand for objective (or even absolute) truth could overshadow all other goals of the procedure. The Soviet doctrine thought that the principle of material truth is embedded in the principle of (Socialist) legality[3]. The need to establish «material truth» was the ideological justification for the paternalistic supervision through the reports by the highest courts and the Prosecutor Office[4]. With the same background, in the socialist period the truth-finding was also placed at the pinnacle of all procedural values in Hungary. The pursuit of truth was the duty of the judge, who had to actively control the parties and their dispositions. The spirit of paternalistic inquisitorialism was motivated by the distrust in individual freedom and the suspicious attitude towards private initiative[5].

40. In 1990s, as a counter-reaction, new approach to the role of truth in the civil proceedings occurred in many former Socialist countries. In Hungary, for instance, the pursuit of truth was deleted from the procedural principles contained in the procedural code. This was supported by the Constitutional Court decision that «there was no constitutional guarantee relating to the revelation of the material truth»[6]. Consequently, in the new Hungarian CCP, the fairness of the proceedings (impartial decision-making based on the principle

[1] Report Austria, at 22. The apparently broader powers of the State Financial Procurator were int eh practice limited through the case law of the OGH.

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

[3] Report Russia, at 36. Under Art. 14 of the Russian CCP of 1964, the judge had to «take all measures ... for full and objective investigation of the real circumstances of the case» irrespective of the parties disposition.

[4] Ibidem.

[5] See Uzelac, *Istina u sudskom postupku* [The Concept of Truth in Judicial Proceedings], Zagreb, 1992.

[6] See Report Hungary, at 9 (quoting CC decision of 9 December 1992, I.30.).

of party representation and the right to be heard) replaced the revelation of truth as the principal procedural goal[1]. In more recent times, though, the exclusive focus on acceleration of proceedings raised criticisms that speed was put above the accuracy of the results. These critiques may lead to the (moderate) rehabilitation of the value of truth-seeking in the process[2]. The «change of paradigm» also happened in Russia, where many scholars today advocate the concept of «formal truth»[3].

41. While the debates about the place of objective/absolute truth in civil procedure often had a highly ideological context and background, the more important set of issues today is linked to the rights and obligations of trial judges to investigate factual issues on their own motion. One issue is whether judges may order taking of evidence *ex officio.* Another issue is whether judges have the duty to actively stimulate parties to state the facts and produce evidence. If there is an obligation of the judge to give instructions to the parties, advise them and encourage them to put forward all their procedural material in a truthful and comprehensive manner[4], we may ask about the consequences of eventual failures to do so. The description of the systems in Austria and Germany may indicate that speedy and accurate civil procedure is not incompatible with the active judicial involvement in the evidence-taking process. On the other side, in some post-socialist jurisdictions, such as Croatia, the pronounced expectations that the court (and not the parties) actively investigate facts and supply evidence led to several systemic anomalies: to passive and abusive behaviour of the parties, to protracted and de-concentrated style of the proceedings («the piecemeal trial»), and to the practice of successive remittals of the judgments based on the argument that the court has to «try harder» and continue to investigate what really happened (even if the parties have not actively contributed to the clarification of disputed facts)[5].

42. The problem as such disappears in common law systems that are concerned «with legal truth and not material truth»[6]. The clarification of all disputed facts is in common law systems regularly seen as the more-or-less exclusive obligation of the parties. Since the Woolf reforms, the trend is not only to burden the parties with gathering of facts, but also to compel the parties to collect, present and verify their procedural material at the earliest possible stage of the proceedings («front-loading of facts»)[7].

VII. Proportionality between case and procedure

43. The axiology of civil procedure gets its flavour from cases that may be considered typical for the national civil justice system. But, the spectrum of cases is rarely uniform: most national judiciaries handle «small» and «big» cases; complex and routine cases; unique

[1] Report Hungary, at 10.

[2] Ibid., at 12–14.

[3] Report Russia, at 37.

[4] See Report Austria, at 23, on situation in Austria and Germany.

[5] One foreign observer of the practice of Croatia courts argued that the usual approach of the appeals courts in civil trials was «no stone should be left unturned». The practice of successive remittals was repeatedly found to be among the «systemic deficiencies» of civil procedure in Croatia, Slovenia, Poland, Hungary, Bulgaria, Ukraine, Romania and Russia. See A. Grgic, *The Length Of Civil Proceedings In Croatia – Main Causes Of Delay,* in: Uzelac/van Rhee (eds.), *Public and Private Justice: Dispute Resolution in Modern Societies,* Antwerpen etc., 2007, p. 153–173, at 158.

[6] Report Hong Kong, at 19.

[7] Ibid., at 20.

cases and repetitive/cloned cases. Two issues arise in this context: first, whether some types of cases are for one or the other system more «typical»; and, second, whether or not the goals and modalities of their implementation are in each given system adjusted to the different nature of the case at hand. The national reporters were invited to comment whether goals of civil justice are more or less viewed from the perspective of resolving the «hard cases» (difficult legal matters that raise new issues of law and fact), or the perspective of mass-processing of routine, repetitive matters. It was also asked about the proportionality between the methods of treatment of cases, and their social importance. The issues that occur here are also related to the application of filtering mechanisms and various summary proceedings adjusted to processing of small claims. The specific procedures regarding court processing of collective, diffuse and group interests are dealt with separately, in Ch. VIII.

44. A very clear reply on «hard cases» question and their treatment in China is given by Professor Fu: «Hard cases are not welcomed in courts and are frequently refused [at the initial stage of the proceedings]»[1]. This is, seemingly, not only a feature of Chinese exceptionalism. A straightforward answer to the question about the goals of process is also given by Elisabetta Silvestri: «at present, Italian civil justice is more about processing a huge amount of ordinary cases than handling «hard cases». She also point to the relativity of the «hard case» notion; namely, in a dysfunctional legal system, poorly drafted legislation and systemic inability to deal with the everyday caseload may cause that cases that would otherwise be regular and simple look like an irresolvable puzzle[2]. But, also for most other civil law systems it can be stated that they have an inclination to focus on the resolution of a large number of average and small cases, rather than on exemplary dealing with the socially significant individual cases. Not only for Italy one can say that the goal of the system is first to survive the influx of matters, and only secondary to produce high-quality justice. In such a situation, it is not surprising that separate mechanisms, developed outside of state justice system, are getting a momentum: today, arbitration is, for instance, taking over the primacy in dispute resolution in complex and valuable international commercial cases. The new trend in some countries is to discourage litigation and keep the cases that do not belong in courts away. Efforts of the new Dutch government to suppress litigation, fostering early settlements and out-of-court mediation may serve as an example for this trend[3].

45. The bureaucratic excellence in dealing with a large number of repetitive cases is a feature that has become a hallmark of Austrian and German civil justice. The Austrian example of automated, IT-supported order for payment proceedings (*Mahnverfahren*) may serve as a model example of a system that corresponds to the goal of fast and cost-effective mass processing of cases and fast filtering of uncontested claims[4].

46. The processing of small claims poses bigger challenges for many legal systems. While common law countries have generally a policy of putting the small cases off judicial dockets by various means (including the high costs of litigation), the civil law world is more sympathetic to small claims. The principle that judges should not waste their time on irrelevant, small matters (*de minimis non curat praetor*) is generally rejected by the European systems

[1] Report China, at 18.
[2] Compare Report Italy, at 15.
[3] See Report Netherlands, at 17. On the other hand, the intention of the Dutch reforms may be mixed, and attributed more to a policy of saving of public funds than to a well-considered plan to secure optimal, proportionate court procedures – see ibid., at 24.
[4] See Report Austria, at 30.

of civil justice. In extreme cases, e.g. in Italy or Croatia, «it is inconceivable that courts refuse to take into consideration cases which are deemed trivial or inappropriate». After a long and exhausting process, «frivolous and groundless claims will end up being rejected, but not to entertain them would amount to a denial of the fundamental right of access to justice»[1]. In Hungary, up until 2009, there was no special procedure in small cases, and the same procedural rules applied for all cases, irrespective of their value[2].

47. In most countries, however, some proportionality is aimed by channelling small claims to special courts or special summary proceedings[3]. It is also aimed by availability of early provisional relief, e.g. by the conditional judgments (*Vorbehaltsurteil*) in Germany[4]. In spite of introduction of the European Small Claims Procedure in the EU (which has only added to the maze), the national reports display that the approaches to small claims are dissimilar and varied even if we focus only on European territory. While Italy has justices of the peace (*giudice di pace*), the Netherlands and France use *référé* proceedings (*Kort Geding*)[5], and Austria and Germany channel small claims to the jurisdiction of special courts (*Bezirksgerichte, Amtsgerichte*)[6]. The procedure before such courts is also a special one: «formalities are kept to a minimum, emphasis is put on the oral part of the proceedings, and admissibility of appeals is restricted»[7]. The Austrian reporters had to note that «it would be incorrect to conclude that [small] cases are considered less important based on their amount in dispute» and pointed to the constitutional limitations to simplification and streamlining.

48. The procedure in small cases may be less formal, but it is still regulated. An exception is German law, which leaves the procedure in cases where the amount in dispute does not exceed 600 EUR entirely to the court discretion (but, only if it is in conformity with the constitutional guarantees)[8]. The relationship between the proportionality and specialization reveals interesting problems and paradoxes. Legislative division into cases and courts that have to deal with matters in special proceedings with a differing level of formality may be more formal and less flexible than a regime which would give courts full discretion to deal with cases in the way they deserve. Bureaucratic inertia may, however, prevent the courts to use such discretion in the way that would be appropriate. But, excessive specialization, accompanied by the multiplication of courts of different type and procedures with special features may be confusing, ineffective and contrary to the wish to secure foreseeable and appropriate standards for all cases. It can also contribute to blurring and fuzziness of the goals of civil justice.

VIII. Multi-party litigation and collective actions

49. A short summary of all replies on the role of class litigation would end up in a simple division – «only in America» on one side, and all other jurisdictions on the other side.

[1] Report Italy, at 20.
[2] Report Hungary, at 15.
[3] See reports for Austria, Brazil, Hong Kong, Italy, Hungary.
[4] See Report Austria, at 31.
[5] Report Netherlands, at 16.
[6] Report Austria, at 28.
[7] Ibid.
[8] Ibid., at 29.

A case like *Daar v. Yellow Cab Co.*[1] in which the court ordered the taxi company to charge unduly low prices to future customers because unidentifiable customers were overcharged in the past, cannot happen in any other place, not even today when many systems are flirting with some forms of collective proceedings (and the cited Californian case has a history of over four decades in the USA).

50. The replies from all other jurisdictions are diverse, but reflect the same basic attitude: in all other countries civil justice is still predominantly focused on «one-on-one» resolution of individual disputes. As to the multi-party and aggregate proceedings, it is stated that «multi-party litigation is still in its infancy» (the Netherlands); that the reception of it is «far from stellar» (Italy); that «the handling of complex multi-party matters cannot ... be considered as a major goal of civil justice» (Austria); that «judges are reluctant to process multi-party cases» (China) etc. A notable exception is only Brazil, for which it is stated that it has «a very well developed class action system» within which «complex matters are frequently handled»[2].

51. In spite of low use and poor reception in the practice, legislators of many countries show a continuing interest for regulation in this field, from Hong Kong[3] to Germany[4]. But, the scepticism and critical attitudes are also strong[5].

52. The ambition to include resolution of complex multi-party matters in the goals of civil procedure is certainly present in many systems of civil justice. Several reporters[6], just like other legal scholars, share the view that in complex contemporary societies the courts should be equipped to address complex social matters. Some types of proceedings which provide right to conduct representative litigation to certain associations or independent public bodies (e.g. *Verbandsklage*) exist in several jurisdictions, but have all gained more theoretical interest than practical relevance. In reality, very few civil justice systems are ripe for adequate processing of multi-party claims even by means of conventional methods of case and court administration (merger of cases, strategic litigation etc.). This will, obviously, remain the challenge to be addressed in the future.

IX. Equitable results v. Strict formalism

53. Is the goal of civil procedure **substantive justice**, or should it be the **correct application of legal provisions**? There are many way to attack this question as a false dilemma. Indeed, in an ideal case the both should converge. However, it is undeniable that the inclination towards substantive justice vs. formal legality varies considerably. This was also noticeable in the national reports.

54. The preference for substantive justice may be diagnosed in the systems as different as China and the United States. As explained by Professor Fu, «in the Chinese legal culture and judicial custom, achieving an equitable result and substantive justice has always been the

[1] *Daar v. Yellow Cab Col*, 433 P.2d 732 (Cal. 1967). See Report USA, at 14. Richard Marcus argues that this case is an example of «behavior modification view» which «favor creative use of the class action».

[2] Report Brazil, at 36.

[3] New initiative pending since 2009, see Report Hong Kong, at 27.

[4] Koller and Oberhammer present the «experimental law» on pilot cases of investors in the capital markets (*Kapitalanleger-Musterverfahrensgesetz*, which combine the elements of a collective action and a test-case procedure. Report Austria, at 23.

[5] Such criticisms caused that the Civil Justice ReformA ct of 2007 could not be passed in Austria – ibid., at 34.

[6] E.g. Koller and Oberhammer (at 19), Silvestri (at 22).

priority, and less emphasis is placed on strict compliance of formalism or entrenchment of the principle of legality»[1]. In the 1990s, more emphasis was put on the principle of legality, but in the 2000s a contrary trend under the concept of «active justice» has emerged[2]. On the other side, the active use of civil justice for policy implementation in the United States[3] and the American reliance on civil litigation for the purpose of public law enforcement can hardly be manageable on the basis of strict legal formalism.

55. Stronger loyalty to strict legalism may be diagnosed in the civil law environment. The civil law judges are in most cases predominantly «concerned with finding the correct legal solution to solve a dispute»[4]. The principle of legality is, as expressed by Koller/Oberhammer «enshrined» in Austrian and German constitutions, while the principles of equity and observance of basic principles of justice, though present incidentally in statutory law, are far lower in the hierarchy of values[5]. Moving to the Eastern Europe, it seems that the adherence to formalistic behaviour is even more pronounced there. At least, it may be an inference from the jurisprudence of the ECtHR that often found violations of the fair trial rights on the basis of excessive formalism in several countries of European East and South[6].

56. In some countries, a movement away from «unnecessary formalism» may be diagnosed. Professor van Rhee states that since 1970s «the keyword in Dutch civil procedure has been «deformalisation»[7]. The loosening of strict formal requirements are at least in part motivated by the approaching to the goal of substantive and equitable results, as the intention of the reforms is to prevent the parties to use the rules of civil procedure to twist the result in their favour on formal grounds. The traditional sympathy for solutions based on equitable results and substantive justice is also attributed to Norway[8].

X. Problem solving v. case processing

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

58. In the comments given by the national reporters, it was sometimes suggested that balance between those two objectives would be a best solution. However, evaluated on the content of their replies, it may be concluded that the balance has decisively shifted towards

[1] Report China, at 25.

[2] Ibidem.

[3] See Report USA, ch. III and IV.

[4] Report Brazil, at 37.

[5] See Report Austria, at 37–40.

[6] E.g. Croatia, Russia, Greece, Ukraine, Czech Republic, Russia etc. See F. Fernhout, *Formal Rules in Civil Procedure and Access to Justice: Striking a Balance Between Excessive Formalism and 'Anything Goes*, in van Rhee/Uzelac (eds.), *Civil Justice Between Efficiency and Quality: From Ius Commune to the CEPEJ*, Antwerpen etc., 2008, p. 207–216.

[7] Report Netherlands, at 21.

[8] Report Norway, at 28.

the case processing. As noted by Professor Kengyel, in the times of economic crisis, the pressure on courts increases and everything is directed «at solutions requiring the least efforts and expenses»[1]. Where the justice system is not working, the «idea of courts as problem-solvers is met with a good measure of scepticism»[2]. Sometimes the idea of problem-solving is rejected on doctrinal grounds. Professor van Rhee states that «problem solving is not, according to the majority of Dutch authors, a primary goal of the civil justice system», although it may be its by-product[3]. Prof. Inge Lorange Backer also notes the recent trend in Norway that puts a stronger emphasis in the efficient management of cases[4]. For Austria, in spite of Franz Klein's heritage that requires civil justice to resolve social conflicts and fulfil welfare tasks, «the need to solve the parties' problem does not prevail over the goal of civil procedure to swiftly decide the case»[5]. Finally, even for China, which cherishes court settlements the most, the short time limitations of 3 to 6 months within which the courts have to dispose of civil matters «strongly compel the courts and judges to focus on case-processing»[6]. Mediation is, of course, supported in many jurisdictions, but it seems that this support rests today more on the ideas of case-processing (how to dispose of the case quickly; how to keep cases away from courts) than on the ideas of finding adequate solutions for the problems of the individuals and the society.

XI. Freely available public service v. quasi-commercial source of revenue for the public budget

59. Should civil justice be a free and accessible service opened to everyone, or should it be run as a business corporation which is cost-aware and cost-efficient? Should civil justice be funded by the tax payers, or should its operations be funded by the concrete users of its services via court fees? Should civil justice be an expense, or a source of revenue for the state budget? All these issues may also be viewed as «goals», or at least targets closely connected with the more general understanding of the goals of civil justice.

60. In the light of comments from different sides of the globe, it seems that we can speak of **commercialization of civil justice**. Only in France, Iceland, Luxembourg, Monaco and Spain the parties to civil litigation still do not pay any court fees due to the adherence to the principle of free access to courts[7]. But, even in the countries which used to be model examples of social state such as Norway, trends are changing. While «civil justice was originally largely perceived as a freely available public service ... nowadays, court fees as well as lawyer's salaries have risen to such an extent as to make civil litigation an expensive exercise for the ordinary citizen»[8]. It may get even worse: in the Netherlands, the government is proposing legislation that would dramatically increase the court fees, seeking to raise the level of self-financing of the civil justice system[9]. In Austria, civil justice is already covering

[1] Report Hungary, at 18.
[2] Report Italy, at 24.
[3] Report Netherlands, at 23.
[4] Report Norway, at 29.
[5] Report Austria, at 41.
[6] Report China, at 26.
[7] European Judicial Systems. Facts and Figures, 2010 (CEPEJ Report, http://www.coe.int/cepej), p. 63.
[8] Report Norway, at 30.
[9] Report Netherlands, at 24. The target is to cover approximately 64 percent of the costs by court fees.Similar projects are underway in Germany, see Report Austria, at 45.

its costs by 110,9 percent, effectively subsidizing other branches of justice system[1]. Interestingly, ever since the courts started to operate as dispute-resolution providers in China in 1980s and early 1990s, they were «operated like commercial institutions» and were expected to «cover budgetary deficiencies». As even at present the local governments still plan their expenditures for courts in relation to the courts' contribution towards the local treasury, Professor Fu concluded that «given such background, the Chinese civil justice remains a quasi-commercial source of revenue for the public budget»[2].

61. In the jurisdictions that are raising court fees, the intention of introducing higher court tariffs is not always focused exclusively on an increase of contributions to the budgets of state or local administration. Another reason is, as testified by Professor Silvestri, in reducing the caseload of the courts[3]. This reason may have a pragmatic background; it can also have a systemic justification, in the context of the proportionality principle. However, for all countries that consider it, the increase in the court fees raises the issue of access to justice, in particular if – as stated for Italy – the citizens cannot count on a modern and adequately funded system of legal aid[4].

XII. User orientation?

62. The ultimate goal of civil justice may be captured in the question regarding the ultimate purpose and aim of the civil justice system. Here is one of the possible phrasing of this question – does civil justice have to serve the interests of its ultimate users, or do citizens and other members of the society have to serve the interests of civil justice? It may be seen as a mean and apparently unscientific question. However, many of the reports confirm directly or indirectly that a lot can be done to establish and improve user-friendly attitude of national civil justice systems. The ecosphere of civil justice is all too often polluted by eco-centric – or even ego-centric – attitude, and the «insider's» values often prevail over the values that serve the interests of users as one-shoters and «outsiders»[5].

63. A direct example comes again from the admirably sincere report of Professor Fu. The politics, she says, in principle plans legislation keeping in mind the interests of users. But, as the «participants of the legislative process are mainly senior judges and top-notched professors, procuratorate, and only a small number of lawyers» the initial intentions often become diluted[6]. Professor I. L. Backer also suggests that «it is probably not unfair to say that the goals of civil justice used to be somewhat self-centred»[7]. The concept of judicial independent also feeds the views that it is rightly so, and only in recent years the needs and wishes of the court users are being explored independently of judges and lawyers[8].

[1] Report Austria, at 44. The high revenue of the civil justice in Austria can, though, be connected with its engagement in some non-contested matters, such as land and company registers, as well as with the fees collected from the automated payment order processing (*Mahnverfahren*).
[2] Report China, at 28.
[3] Report Italy, at 25.
[4] Ibid., at 26.
[5] See more in A. Uzelac, *Turning Civil Procedure Upside Down: From Judges' Law to Users' Law* in *Tweehonderd jaar/Bicentenaire Code de Procédure civile*, Kluwer uitgevers, 2008, p. 297–309.
[6] See Report China, at 30.
[7] Report Norway, at 32.
[8] Ibid., at 33.

64. Currently, a fashionable method of proving (rightly or wrongly) the level to which civil justice systems cater for the needs of the users is conducting user satisfaction surveys. In the Netherlands, such surveys are being conducted on a regular basis since the start of the new millennium. The Dutch results of the surveys are relatively favourable – e.g. 84 per cent of the users are generally satisfied, but the users are less happy with the length of proceedings, the empathy displayed by the judge and some other special issues[1]. The results of similar user satisfaction surveys are more ambiguous in Austria, where seemingly different polls organised by different organisations have resulted in significant differences in results. For example, contrary to the usual view about the Austrian judiciary as fast and efficient, a poll organized by the Bar Association of Lower Austria showed that 86 percent of participants thought that judicial proceedings last too long or «much too long»[2]. Most surveys in Austria in Germany still display at least an average satisfaction (in Germany, 60 percent of population have a fair or considerable trust in German courts)[3]. In general, the civil justice systems of the nations of European North and West still seem to do a fairly good job in relations to their users. But, improvements are possible even there, and the self-centred goals (e.g. judicial independence, good financial status and job security) are still better protected than the wishes and the needs of the users.

65. The situation in some other countries is much worse. In the dysfunctional systems of civil justice even the weak and unreliable results of user satisfaction surveys are missing. There is, however, a strong feeling of dissatisfaction: some systems do not work, and all users are unhappy – even the professional ones[4]. The crisis is usually a good motive for change, but change may need a long time, and the society may suffer from the *status quo.*

XIII. Conclusion

66. The goals of civil justice are a topic that needs rethinking. Civil justice should serve the interests of the society of the XXI century, and the new social context imposes the need of significant changes. These changes need clear starting points. Without clearly stated goals, it is hard to make solid and consistent plans, produce indicators of their success and maintain the momentum of the reforms. The study of diverging goals in different justice systems helps us to compare and understand the differences in procedures and legal institutions. Maybe, if we realize that some of our goals are the same, it will also help us to reduce comparative differences, and improve our judiciaries even there where everybody believes that any reform is doomed to fail.

Annex

Questionnaire for National Reporters

General framework: The purpose of reports on this topic is announced by the IAPL in two questions:

– How do the goals of civil justice differ from country to country?

– What is the role of civil justice in the contemporary world?

[1] Report Netherlands, at 25–26.

[2] Report Austria, at 46.

[3] Ibid., at 48.

[4] Report Italy, at 27. The general attitude in Croatia is not very far from the one described by Professor Silvestri.

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

1. *Prevailing opinions on goals of civil justice.* Please state doctrinal sources and relevant case law.

2. *Matters regarded to be within the scope of goals of civil justice:* Are goals of civil justice limited to litigation (decision-making in contested matters), or they also encompass non-contested matters? What is the portion of the work of civil justice in matters such as enforcement, holding of registers (land, company registers), collection of non-contested debt, regulation of future relationships between the parties etc.? To which extent are goals of civil justice viewed from the perspective of such tasks of the civil courts?

3. *Protection of individual rights v. protection of public interest* (conflict resolution v. policy implementation). Please comment:

a. to which extent is considered that the system of civil justice should pay attention to matters of public interest (public policy, morals, infringement of the rights of the third persons);

b. to which extent should civil procedures reach results that are in line with certain policies (national interest, views of ruling elites or classes, governmental programmes, suppression of illegal activities, reasons of national security, confidentiality obligations, professional privileges etc.);

c. what are the issues that the court should (in the context of goals of civil procedure) determine *ex officio;*

d. Which other actors or bodies (except the court and the parties) have an obligation to secure that the goals of civil justice are being reached; which actors or bodies have right to intervene in the judicial process on that account.

4. *«Material truth» v. fair trial within a reasonable time.* Please comment the attitude in your jurisdiction on the desirable balance between the wish to establish the facts correctly and the need to provide effective protection of rights in an appropriate time. What has precedence: the accuracy of adjudication, or the need to afford parties legal security and effective remedy in due time?

5. *«Hard cases» v. mass-processing of routine matters.* Please comment to which extent are the goals of civil justice viewed from the perspective of resolving difficulty legal matters which raise new issues of law and fact, and to which extent are they connected with the need to secure steady and routine handling of courts' workload, coping with backlogs and administrative requirements of efficiency.

6. *Principle of proportionality (de minimis non curat praetor) or same standards and processes to everyone, irrespective of the importance of the case.* To which extent is it considered that the goal of civil justice is to afford as much attention to the cases as they deserve it, discarding all the matters that do not belong there? What filtering mechanisms are available? Or, is it considered that refusal to deal with a case in the same manner would be denial of justice? What are the real differences in the way and style of handling «small claims» and «proper court cases»?

7. *Bi-party proceedings v. resolution of complex, multi-party matters.* To which extent are the goals of civil justice limited to handling simple matters in which only rarely the cases involve more than two parties? Or, is handling of complex, multi-party matters, where the courts have to exercise complex functions of social regulation, also considered to be the core goal of civil justice system?

8. *Equitable results and substantive justice v. strict formalism and principle of legality.* Is the goal of civil justice to reach an equitable result, or to find correct legal solution by strict application of law?

9. *Problem-solving or case-processing.* Is the dominant view that the civil justice system needs to approach the cases trying to find adequate resolution of the underlying problems? Or, those cases have to be efficiently solved by means requiring the least efforts and expenses by the competent authorities?

10. *Civil justice as freely available public service, or as a quasi-commercial source of revenue for the public budget.* Is the goal of civil justice system (in particular: courts) to be available at no expenses to everyone who needs legal protection, or is it just another social service that has to be paid by those who use it? What is the level of the court-fees and is their rationale to cover the costs of functioning of the civil justice?

11. *Orientation towards the users, or self-centred goals?* Are the goals of civil justice defined to cater the needs and wishes of the users? How is the perception of users regarding the fulfilment of goals of civil justice established who represents it? Or, are the goals defined mainly from the perspective of the civil justice system itself – by its professional actors (courts, judges, lawyers), and not by those whose rights are at stake?

Christian Koller[1]

AUSTRIAN NATIONAL REPORT
(including additional information on Germany)

I. Introduction

1. The present report is based on the questionnaire prepared by Professor Alan Uzelac for his general report on Goals of Civil Justice to the International Association of Procedural Law in Moscow (September 2012). It will focus on the goals of civil justice from an Austrian perspective and include references to German law.

II. Prevailing opinions on goals of civil justice

A. *Legal doctrine*

2. Theories on the goals of civil justices are numerous and have triggered numerous scholarly writings[2]. Most commentaries or textbooks on civil procedure start by discussing and/or listing the «goals», «function» or «purpose» of the procedure[1]. However, no general consensus has emerged.

3. It is often stated that civil justice provides a means for the citizens to enforce and determine their substantive rights and obligations[2]. Consequently, enforcement of individual rights forms one of the main goals of civil justice. At the same time, the existence of an effective enforcement mechanism affects the level of compliance with legal norms in society at large. It might, therefore, also be argued that the legal order proves itself through civil proceedings (*Bewährung der Rechtsordnung*) and is thereby implemented[3]. It is, however, doubtful whether the implementation of the legal order amounts to a goal of civil justice of its own. Protection (and enforcement) of individual rights and implementation of the legal order (in general) rather form two sides of the same coin[4].

4. In Austria the procedural ideology of *Franz Klein* (who prepared, in 1893, the draft on which the Austrian Code of Civil Procedure[5] was based) has strongly influenced theories on goals of civil justice. According to *Klein's* procedural thinking each legal dispute qualifies as an «evil in society» (or a «social conflict») negatively affecting the functioning of modern economy[6]. Following this ideology, civil procedure serves as a remedy to cure such deficiencies in an expedient and efficient way[7]. In other words, it was *Klein's* understanding that civil procedure realises a «social function» (*Sozialfunktion*). Settling specific disputes is, therefore, not the sole purpose of civil procedure, it rather also serves (and fosters) welfare (*Wohlfahrtsfunktion*). *Klein's* procedural thinking is reflected in the opinion prevailing in Austria according to which civil justice not merely serves the enforcement of individual rights but also has the goal to provide an instrument for the resolution of «social conflicts». Consequently, it fulfils public welfare tasks[8].

---

[1] Professor of University of Vienna (Austria).

[2] This is particularly true for Germany, see, e.g, Gaul, *Zur Frage nach dem Zweck des Zivilprozesses*, *AcP* 168 (1968), p. 27 et seq.; Henckel, *Prozessrecht und materielles Recht* (1970), p. 41 et seq.; F. von Hippel, *Wahrheitspflicht und Aufklärungspflicht* (1939), p. 170 et seq.; Idem., *Zur modernen konstruktiven Epoche der «deutschen Prozessrechtswissenschaft»*, *ZZP* 65 (1952), p. 431 et seq.; Meyer, *Wandel des Prozessrechtsverständnisses – vom «liberalen» zum «sozialen» Zivilprozess?*, *JR* 2004, p. 1; Pawlowski, *Aufgabe des Zivilprozesses*, *ZZP* 80 (1967), p. 345; Stürner, *Prozesszweck und Verfassung*, *FS Baumgärtel* (1990), p. 545; the issue has been less controversial in Austria, for an overview see Fasching in Fasching/Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, 2nd ed., 2000, Einl para. 11 et seq.; for a more detailed analysis see Böhm, *Bewegliches System und Prozesszwecke*, in Bydlinski/Krejchi/Schilcher/Steiniger (eds.), *Das bewegliche System im geltenden und künftigen Recht* (1986), p. 211; Klein, *Reden, Aufsätze, Briefe I* (1927), p. 117 et seq.; Klein/Engel, *Der Zivilprozess Oesterreichs* (1927), p. 190; Novak, *Die Stellung des Zivilprozeßrechts in unserer Gesamtrechtsordnung*, *JBl* 1961, p. 64; Kuderna, *Soziale Funktion und soziale Elemente des Zivilprozesses*, *RdA* 1986, p. 182; Schoibl, *Die Verbandsklage zur Wahrung öffentlicher oder «überindividueller» Interessen im österreichischen Zivilverfahrensrecht*, *ZfRV* 1990, p. 3; Sprung, *Die Grundlagen des österreichischen Zivilprozeßrechts*, *ZZP* 90 (1977), p. 393.

[1] As already aptly noted by Gaul, *Zur Frage nach dem Zweck des Zivilprozesses*, p. 27.

[2] See Fasching in Fasching/Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, para. 11; Brehm in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, 22nd ed., 2003, vor § 1 para 5; Murray/Stürner, *German Civil Justice* (2004), p. 4; Rauscher in Rauscher/Wax/Wenzel (eds.), *Münchner Kommentar zur Zivilprozessordnung*, 3rd ed., 2008, Einl para. 8.

[3] Brehm in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, para. 6; Fasching in Fasching/Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, para. 11.

[4] Brehm in Stein/Jonas, *Kommentar zur Zivilprozessordnung*, para. 12; Rosenberg/Schwab/Gottwald, *Zivilprozessrecht*, 17th ed., 2010, § 1 para. 9.

[5] Hereinafter referred to as «ZPO»; RGBl. Nr. 113/1895 as last amended by BGBl. I Nr. 21/2011.

[6] See Klein/Engel, *Der Zivilprozess Oesterreichs*, p. 190 and 280; cf. Oberhammer/Domej, *Delay in Austrian Civil Procedure*, in van Rhee (ed.), *Within a Reasonable Time: The History of Due and Undue Delay in Civil Litigation* (2010), p. 257 with further references.

[7] Oberhammer/Domej, *Germany, Switzerland and Austria (CA. 1800–2005)*, in van Rhee (ed.), *European Traditions in Civil Procedure* (2005), p. 121; Ballon, *Der Einfluß der Verfassung auf das Zivilprozeßrecht*, *ZZP* 96 (1983), p. 427.

[8] See, e.g., Fasching in Fasching/Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, para. 12; Ballon, *Einführung in das österreichische Zivilprozessrecht*, 12th ed., 2009, para. 7; Holzhammer, *Zivilprozessrecht*, 2nd ed., 1976, p. 2.

ВЕСТНИК
ГРАЖДАНСКОГО
ПРОЦЕССА
ЮРИДИЧЕСКИЙ ЖУРНАЛ ДЛЯ ПРОФЕССИОНАЛОВ

Legal Journal
«Civil Procedure Herald»

INTERNATIONAL ASSOCIATION OF PROCEDURAL LAW
CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION
SUPREME COURT OF THE RUSSIAN FEDERATION
SUPREME ARBITRAZH COURT OF THE RUSSIAN FEDERATION
ASSOCIATION OF LAWYERS OF RUSSIA
MOSCOW STATE LOMONOSOV UNIVERSITY

CIVIL PROCEDURE IN CROSS-CULTURAL DIALOGUE: EURASIA CONTEXT

IAPL World Conference on Civil Procedure
18–21 September, 2012,
Moscow, Russia

CONFERENCE BOOK

Edited by Dmitry Maleshin

СТАТУТ
МОСКВА 2012

УДК 347.9
ББК 67.410
С 58

С 58 **Civil Procedure in Cross-cultural Dialogue: Eurasia Context: IAPL World Conference on Civil Procedure, September 18–21, 2012, Moscow, Russia**: Conference Book / Ed. by Dmitry Maleshin; International Association of Procedural Law. – Moscow: Statut, 2012. – 608 p. – На английском языке.

ISBN 978-5-8354-0874-0 (hardcov.)

The idea is to discuss the evolution of civil procedure in different societies, not only in the well-known civil or common law systems, but also in different countries of Eurasia, Asia, etc. Civil procedure in Europe and North America is a subject of enormous scientific and practical importance. We know a lot about these systems. But we do not know enough about civil procedure in the rest of the world. How does it work and what are the main principles? Culture is one of the main factors that makes civil procedure of these countries different. Therefore it is necessary to discuss the main links between different systems of civil procedure.

The discussion was held on the basis of national report from 24 countries, at the all there were participated from more than 40 countries.

УДК 347.9
ББК 67.410

ISBN 978-5-8354-0874-0

Printed in the Russian Federation

ORGANISING TEAM OF THE CONFERENCE

Dmitry Maleshin, coordinator (Moscow State Lomonosov University);

Nataliya Bocharova, website, general support (Moscow State Lomonosov University);

Tatiana Moiseeva, executive secretary (Moscow State Lomonosov University);

Lubov Skulskaya, visa assistance (Moscow State Lomonosov University);

Daria Simakova, registration (Monomax Congresses)

ACKNOWLEDGEMENTS

We would like to express our gratitude to Marcel Storme, Oscar Chase, Loic Cadiet and other IAPL Presidium members for accepting our invitation to organize an IAPL conference in Moscow.

We extend our special thanks to the representatives of our local co-organisers and supporters for sharing our idea of brining IAPL in Russia:

- Valery Zorkin, Chairman of the Constitutional Court of the Russian Federation
- Vyacheslav Lebedev, Chairman of the Supreme Court of the Russian Federation
- Anton Ivanov, Chairman of the Supreme Arbitrazh Court of the Russian Federation
- Pavel Krasheninnikov, Chairman of the Association of Lawyers of Russia
- Alexander Golichenkov, Dean of the Moscow State Lomonosov University Law Faculty

For their able and dedicated support, we extend our sincere appreciation to:

Elena Kravchenko (Constitutional Court); Tatiana Andreyeva, Vladislav Starzhenetskiy (Supreme Arbitrazh Court); Irina Reshetnikova (Arbitrazh Court of Ural region); Sergei Chucha, Konstantin Rebets (Moscow Arbitrazh Court); Elena Borisenko (Ministry of Justice); Igor Manilov, Igor Redkin, Zhunus Djakupov, Denis Panshin, Kirill Yakimenko, Polina Tsybko (Association of lawyers of Russia); Maria Sazonova, Vladimir Yarkov (Federal Notary Public Chamber); Konstantin Korsik (Moscow Notary Public Chamber); Olga Duzheva, Alexander Kosovets, Yanis Vafin, Alexander Shevchenko (Moscow State Lomonosov University); Viktor Blazheev, Dmitry Kutafin, Olga Maslova, Sergei Rossinsky, Alexey Svistunov (Moscow State Law Academy); Sergei Nikitin, Yuly Tay (Russian Academy of Justice); Sergei Gerasimov, Vladimir Gureev (Russian Law Academy); Damir Valeev (Kazan (Volga-Region) Federal University); Galina Uletova (Academic Law Institute); Viacheslav Komarov (National Law Academy of Ukraine); Hasan Mirzoev (Russian Academy of advocacy and public notary); Svetlana Kocherga, Pavel Fedorov (Moscow State University of economics, statistics and informatics), Eugeny Sherbak (Moscow State Public University); Dmitry Sumskoy (Russian State Social University); Alexei Zabelin, Lilya Poddubnaya (Moscow Finance and Law University); Vladimir Zernov, Alexei Tartishniy (Russian New University); Nikolai Manyak (Krasnodar region court); Yan Piskunov (Gazprom Media); Dmitry Magonya (Art de Lex Law firm); Ivan Marisin (Quinn Emmanuel Trial Lawyers), Kirill Samoilov (Statut Publishing), Anton Treushnikov (Gorodets Publishing), Ivan Sleptsov (Pravo.ru), Elena Povorova (Journal «Judge»).

We would never have been able to publish the Russian Volume of this Conference book without assistance in translation reports of our speakers from English into Russian of the following students and post-graduated students: I. Dibirov, A. Ivlieva, M. Lomko, I. Maslov, M. Panferov, S. Pischikova, G. Sotnikov (Moscow State Lomonosov University); P. Astafiev, L. Fatkhullina, A. Halimova, L. Mirasov, G. Muradynova, D. Muflihanov, V. Polyakov, M. Rakhimov, G. Yagudina (Kazan (Volga-Region) Federal University); L. Badykov, K. Ryahovsky (Russian Law Academy) and from Russian into English – N. Baradanchenkova, A. Mamayev, A. Neznamov, N. Roshupkin, E. Salikova, A. Shirshova, K. Sergeeva (Ural State Law Academy).

CONTENTS