Ius Gentium: Comparative Perspectives on Law and Justice 70

Alan Uzelac
Cornelis Hendrik (Remco) van Rhee
Editors

Transformation of Civil Justice

Unity and Diversity

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Preface

The civil justice systems of modern states are facing unprecedented challenges today, and they are—in most cases, unsuccessfully—struggling to find appropriate responses to them. At the same time, public confidence in the civil courts and their ability to protect and enforce civil rights and obligations is fading. The need to address this state of affairs through a broad international academic discussion is clear.

This book is the result of academic research on the transformations of contemporary civil justice systems. The contributions collected in this volume come from different regions of the globe, from (North and South) Europe to Africa and (North and South) America. They share, nonetheless, the same wish to explore whether the changes in the national justice systems appropriately address the needs of the present time. Both historical and contemporary contributions indicate that a profound change is now a *conditio sine qua non* for the survival of the civil courts as the principal protectors of the legal rights of those under the jurisdiction of modern nation states.

The core of this book is the research produced in the research project 6988 (TcJust-UD-IP-11-2013) that was funded by the Croatian Science Foundation (HRZZ). The international project team represented in this book by seven of its key researchers was reinforced by experienced, leading scholars of comparative civil procedure, but also by young and promising contributors interested in the topic. Most of them shared the experience of joint work and discussion at the postgraduate course and conference which took place at the Inter-University Centre Dubrovnik as part of the Public and Private Justice (PPJ) series. The editors would like to thank the Inter-University Centre, led by Secretary-General Ms. Nada Bruer, for their continuing kind assistance in providing an inspiring forum for high-quality, professional and academic debates.

The editors would also like to thank all of those who helped in the production and editing of the present volume. They are particularly grateful to Mr. Randolph W. Davidson (Pavia) for revising the contributions of the non-native English speakers. Valuable editing assistance was provided by Marko Bratković,

who also contributed to this volume. Some pertinent language issues were resolved by the courtesy of John Sorabji (London).

Last but not least, we would like to express our gratitude to the Springer team, whose collaboration and understanding greatly helped us to bring this book project to a successful finish.

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Part I
Introduction

The Metamorphoses of Civil Justice and Civil Procedure: The Challenges of New Paradigms—Unity and Diversity

Alan Uzelac and Cornelis Hendrik (Remco) van Rhee

In nova fert animus mutatas dicere formas corpora.
—Ovid, Metamorphoses

Abstract In 1975, Mauro Cappelletti predicted a profound transformation in the area of civil justice. In his view, the complexity of contemporary societies required new and enhanced methods of dispute resolution since the traditional means were increasingly insufficient to address societal (and even civilizational) challenges. It is questionable, however, whether this transformation has indeed occurred. In order to evaluate Cappelletti's prediction, the present contribution addresses a selection of changes in the area of civil justice that have occurred since Cappelletti's prediction and tries to identify the driving forces of change. Subsequently it identifies seven main transformation areas in civil procedure, evaluating both their present impact on civil justice and their possible future effects. The relevant areas are (1) Transformation by borrowing from national and transnational sources; (2) Transformation by technological modernization; (3) Transformation by the reorganization of courts and a redefinition of court functions; (4) Transformation by the establishment of a multi-dimensional procedure for civil cases; (5) Transformation by the pursuit of alternatives to litigation; (6) Transformation by the collectivization of decision-making processes; and (7) Transformation by 'dejudicialization' (privatization, outsourcing) of judicial tasks. The contribution serves as an introduction to the papers collected in the present volume, written by authors from a wide variety of jurisdictions in Europe and around the globe.

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1 Introduction

In 1975, Mauro Cappelletti, the father of comparative civil procedure, published a text on the metamorphoses of civil procedure. This text, devoted to the protection of group and collective interests, starts with a promising first section: *Une révolution en cours dans le droit judiciaire civil* (Cappelletti 1975, 571). The essence of Cappelletti's submission on a 'profound transformation' or a '*véritable révolution*' in the area of civil justice was the thesis that the complexity of contemporary societies requires new and enhanced methods of dispute resolution since the traditional means of individual redress are increasingly insufficient to address societal (and even civilizational) challenges.

Almost half a century later, Cappelletti's words still sound fresh—but only as a programmatic statement. As a description of the reality of national civil justice systems in Europe and the world, it can hardly be stated that they accurately depict the state of affairs in the first quarter of the 21st century. The main theme of Cappelletti's paper (and many of his other works), the establishment of adequate mechanisms of collective dispute resolution, is even today in an early stage. Doctrinal works produced on class actions, collective redress and the protection of group interests have rarely resulted in a broad and effective network of innovative judicial remedies. A revolution? A metamorphosis? Until well into the 21st century the new face of civil justice invoked by Cappelletti will be a wishful construct; new forms of judicial protection adjusted to process mass claims are—at least in Europe—not the reality but more like 'squeaking mice' (Harsági and Van Rhee 2014). The 'mighty cleavage' between private and public law (Merryman 1985, 91) is in most countries still present.

It should not, therefore, come as a surprise that, apart from a limited number of those interested in comparative law, scholars of civil procedure generally share the view that although civil justice does undergo changes, generally it does not radically alter its features—*plus ça change, plus c'est la même chose*. The inherited forms of civil justice, and the traditional doctrine of civil procedure, are taken for granted. Referring to the well-established human right to a fair trial for any dispute concerning civil rights and obligations, many think that the residual court monopoly on dispute resolution should not be put in jeopardy. Indeed, public criticism of civil justice is every now and then lively voiced, but is that not something that also shows the cyclic nature of history, as since Shakespeare's time there have been those who have complained about civil justice due to the 'law's delay' (Van Rhee 2004).

Current developments may, however, prove that Cappelletti's statements on the need for a profound transformation of civil justice are not inaccurate, only premature. There is no single factor which leads to this conclusion—it is rather a conjunction of several processes both outside and inside state judiciaries. An important process is the change in the social context and the methods of human interaction that is bringing Cappelletti's need for a 'profound transformation' to a whole new level.

Cappelletti most likely wrote his text with pen and paper—or maybe a typewriter. Back in 1975, personal computers were rare, and there were no mobile phones and no internet. Messages were sent by regular post office mail, as even the telefax did not acquire broad use until the 1980s and 1990s. With the fall of the Iron Curtain, economic globalization expanded, and integration processes, both in Europe and elsewhere, entered a new dimension despite all temporary difficulties. In the past 50 years, the world population has more than doubled. A 'profound transformation' can be noticed, but it is primarily a transformation of life outside national courtrooms. How much did this transformation affect civil justice, which in Cappelletti's time was already in need of a profound change?

One thing is certain: the present situation is more troublesome and uncertain than the picture painted by Cappelletti. The challenges have multiplied and intensified, and public dissatisfaction with the operation of contemporary judiciaries has accumulated. A *révolution véritable*, a rapid and adequate adjustment of civil justice systems to the requirements of the new social realities in most countries happened on a rather modest scale or did not happen at all. Where changes occurred, they often came with considerable delay, lagging far behind the overwhelming change in the social environment. It is well known that the national systems of civil procedure have a strong link to particular or even parochial characteristics specific to national legal systems and cultures (Deguchi and Storme 2008, 11) and consequently many reforms have been largely local and national in spite of economic and political integration processes.

The reactions of judicial systems to change are not only slow and indecisive, they are also going in rather different directions. For researchers of European procedural law, the current perception of European legal systems is one of 'unity and diversity' (Wijffels 2013, 14). In this introductory chapter, we will analyse the driving forces that motivate the transformation of civil justice systems. We will also try to synthesize several trends and reform processes in different jurisdictions, seeking to find some unity in the diversity of transformations. Additionally, we will show that the same unity and diversity is apparent in the contributions from different regions of the globe to the present volume.

2 The Driving Forces of Change in Contemporary Civil Justice Systems

The diversity of contemporary judicial systems is largely due to the nation state that promoted regulation, codification and an institutional framework exclusively linked to the sovereign power at the national level. The civil courts have for the longest period been immune to change, as they have their roots in the practices of local legal communities and largely deal with private interests which are not the first priority of national political elites [for a slightly different view, see Van Rhee (2012)]. However, with the European (and global) economic and political

integration processes, the push towards harmonization and unification has become more pronounced. This started in specific areas of substantive law, but gradually also spilled over into procedural law, in the beginning limited to establishing mutual trust and cooperation among European judicial systems while preserving their specific features (Schwartze 2000; Gottwald and Klicka 2002). The basis for cooperation and mutual understanding in the field of civil procedure is, at least in continental Europe, also to be found in the common origins of the law of procedure in Romano-canonical models, which formed a 'procedural *ius commune*' for many European territories before the codification period (Van Rhee 2011; Petrak 2008).

The early projects aimed at harmonization ('approximation') of procedural laws in Europe date back to the 1980s and 1990s (Council of Europe 1984; Storme 1994), but the trend towards producing 'genuine' European instruments of procedure that not only deal with mutual recognition of judicial decisions but also create new unified European procedures in civil matters (payment orders, small claims) only started in the 2000s (Freudenthal 2010; Kramer 2010). Attempts to achieve harmonization even removing the borders between the common law-civil law divide also happened on a global scale, e.g. by way of defining common principles and rules of transnational civil procedure (Hazard et al. 2001; ALI/UNIDROIT 2006).

One of the driving forces of harmonization of civil procedure was the globalization of the economy and the move towards increasing economic and social welfare through international trade. In this context, a relatively high degree of harmonization was achieved in the area of international commercial arbitration through the work of UNCITRAL on model legislation and international rules, such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Conciliation Rules (Sanders 2004). Another trend that has received global attention is the use of alternative dispute resolution, which is a field where both the UN and the European Union undertook important activities that were intensified in the 2000s. In the EU, this development received particular attention after the enactment of the Directive on Mediation (AIA 2008), and in great part also due to the growing applicability of alternative dispute resolution in the context of consumer protection (Hodges et al. 2012).

There are several reasons for the approximation of laws and practices in the area of civil justice that are particularly important for Southern and Eastern Europe. One of the reasons relates to problems with respect to delay and inefficiency of judicial proceedings (Van Rhee 2004; Galič 2013). Others are connected with the common heritage of socialism (Uzelac 2010). Some, especially in the Mediterranean countries, are the result of a history of dysfunctional court practices (Uzelac 2008).

In Western Europe, the excessive costs of litigation are the common driving force behind a number of reforms that have become the focus of attention especially in the past decade (Hodges et al. 2010). In any case, since the beginning of the 21st century there has been a perception in many national civil justice systems of crisis accompanied by common attempts to introduce a new approach to civil procedure (Zuckerman 1999; Trocker et al. 2005). The establishment of a balanced system of legal aid and assistance in which access to justice is guaranteed also for the

disadvantaged and legally illiterate members of the society is an issue in many jurisdictions, also in reform attempts in Southern and Eastern Europe (Uzelac and Preložnjak 2012).

Equally in the East and in the West, the sources of inspiration for legal reforms are often drawn from the activities of transnational bodies. Among others, a frame of reference was created by various documents of international organizations such as the UN and the Council of Europe. An even more precise and compelling source of motivation for reforms was the case law of transnational tribunals. For Europe, the major source is the case law of the European Court of Human Rights in Strasbourg, in particular concerning Article 6 of the European Convention on Human Rights (Van Dijk et al. 2018; Uzelac 2013). Successful or promising reform projects in other countries also play a major role: the global reputation of the reforms of the English Civil Procedure Rules by Lord Woolf is a good example (Andrews 2003; Van Rhee 2005; Gottwald 2010).

For some countries, a special source of reform involving harmonization was the EU accession process. The establishment of rules which make domestic legal systems of new Member States more compatible with the legal systems of existing EU Member States is not so problematic. The biggest stumbling block is the proper functioning of the justice system and ensuring effective and timely legal protection [for an example from Eastern Europe, see Uzelac et al. (2013), Uzelac (2009)].

3 The Forms of Transformation: Unity and Diversity in Seven Polycentric Steps

The metamorphoses discussed here are often not easy to spot and define. Why some forms change in a certain way depends on multiple factors. The judicial transformations, as described in the preceding paragraphs, also occur due to different factors and different local circumstances. Changes are sometimes subtle, sometimes abrupt, and very often interconnected. Still, it is possible to distinguish seven main transformation processes in civil procedure triggered by the contemporary challenges to the national justice systems. In the present introduction, these processes will be ordered based on their intensity and impact, from ‘soft’ and more conventional to more radical ones, including processes that may dramatically alter the very substance of our understanding of ‘civil justice’. In real life, often these processes occur simultaneously and combined. Nevertheless, they can be distinguished and are characteristic of many legal justice systems irrespective of their geographic or cultural location. There is in our opinion no relation of hierarchy between the various forms or processes of transformation. The seven processes are truly polycentric, as the policies of judicial reform can involve one, several or all of them at the same time.

The seven transformation processes distinguished here are the following:

1. Transformation by borrowing from national and transnational sources;
2. Transformation by technological modernization;
3. Transformation by the reorganization of courts and a redefinition of court functions;
4. Transformation by the establishment of a multi-dimensional procedure for civil cases;
5. Transformation by the pursuit of alternatives to litigation;
6. Transformation by the collectivization of decision-making processes;
7. Transformation by 'dejudicialization' (privatization, outsourcing) of judicial tasks.

These processes of transformation of civil justice systems are visible in various contemporary legal systems, and their particular features largely depend on perceptions of the goals of civil justice (Uzelac 2014). However, these transformation processes are undeniably present, and concrete examples can be found in the contributions to this volume.

3.1 Borrowing from National and Transnational Sources: Change as a Legislative Mimicry and Transplantation of Concepts

The 'softest' and most conventional form of legal adaptation to new social circumstances is the borrowing of ideas from other legal systems. Comparative legal historians have argued that 'massive successful borrowing is common place in law' (Watson 2000; also see Watson 1974).

While the notion of legal transplants can be controversial, it is certainly widespread and originates in the past. It consists mainly of some form of emulation of legal rules or principles, either by copying or by rephrasing and adjustment. One may now ask whether there is anything decisively innovative in the legal transplants pertaining to the functioning of civil justice in the 21st century. The method is old, but a novel element is its universal application to national civil procedure and civil justice systems (court structures and the legal profession). Some forms of procedural transplants have indeed been undertaken in the past, with varying success, such as the introduction of the German model of civil litigation in Japan in 1890, or the literal translation of the Austrian ZPO in the Kingdom of Yugoslavia in 1929. But such all-encompassing transplants were more the exception than the rule. With the start of the 21st century, the procedural reforms based on transplants from other legal systems became mainstream, in particular where it concerns borrowing from transnational sources. In Europe, for example, the reconfirmed European Union competence in the field of civil procedure introduced by the Treaty of Amsterdam and expanded by the Treaty of Lisbon caused the Member States to regularly check

their internal procedural design from the perspective of compatibility with EU law. Consequently, recent studies speak of a 'Europeanization' of civil procedure, announcing the introduction of common minimum standards (see Manko 2015; Tulibacka et al. 2016). The new case law of the European Court of Human Rights in the interpretation and application of the fair trial rights of Article 6 ECHR became indispensable in the reforms of civil procedure in a whole series of areas such as fairness, reasonable time, the means of recourse, effective remedies, the effective implementation of judgments and proportionality in the enforcement of civil judgments [*inter alia* see Van Dijk et al. (2018), Uzelac (2013, 2009)].

In a way, issues that used to be strictly national (for instance payment orders, or enforcement systems) are now increasingly 'trans-nationalized'. In economic and political integration such as in the European Union (where the notion of 'cross-border matters' became ubiquitous), the idea of mutual trust forces the legal reformers to resort to comparative law whenever a new reform of civil justice is planned.

Also, beyond membership in international organizations, procedural transplantation is becoming an indispensable technique. For example, the ambit of influence of EU law includes non-EU countries like Norway, among others, which follow the European *acquis* without wishing to become fully bound by EU membership (see *infra* the contribution of Fredriksen and Strandberg). In addition, the prospective members of closed clubs—such as the accession candidates to the EU—treat procedural models of the countries that have passed the test of compatibility in the accession process as best practices. The European Union as such may also have motives to regulate the judicial cooperation of its Members States with non-EU states (see the contribution of Weller to this volume).

Beyond transnational integration, the echo of successful reforms undertaken mainly for national reasons—like the Woolf reform in England and Wales—motivates national legislators, both in Europe (as in the Netherlands) and on the other side of the globe (as in Singapore, Hong Kong and China). There are mutual influences. Just as England may be a source of inspiration for Germany, the latter may be a source of inspiration for the former (cf. Gottwald 2010). The formation of bodies for the evaluation of the national justice systems such as the CEPEJ (European Commission for the Efficiency of Justice of the Council of Europe) motivates states to compare their laws and regulations with the laws and regulations of other states that are perceived to excel in efficiency and fairness. The easiest way to emulate (more) successful or efficient states are 'transplants' from foreign law even though these transplants sometimes 'go wild' (see the contribution of Galič to this volume), create 'legal irritants' (Teubner 1998) and generally raise further methodological issues (cf. Legrand 1997).

The principal agents of legislative borrowing that transform contemporary civil justice systems are currently official bodies involved in international processes. If scholars of civil procedure wish to retain their relevance, they need to study comparative law. While this is only partially true today, it is quite likely that the 'transplantational' nature of reforms in the national civil justice systems will transform not only civil justice, but also civil procedural scholarship, which will

need to absorb comparative methodology, so far rarely employed in the study of civil procedure. Comparative law becomes the engine of change for civil procedure (Picker 2016). This trend is already noticeable in international projects for the creation of model rules for national civil justice systems. The ALI-UNIDROIT Transnational Principles are a genuine comparative product, which will be raised to the next level in the ongoing ELI-UNIDROIT project that aims to produce European Rules of Civil Procedure (Hazard et al. 2001; ALI/UNIDROIT 2006; Uzelac 2017, 3–4).

3.2 Technological Modernization: From 'Justice' to 'E-Justice'

The challenge of keeping pace with technological developments is also fundamentally transforming civil justice. The nature of this transformation should not be underestimated.

Technology today is not a tool which merely assists the administrators and judges to do whatever they have been doing in the past but a tool which assists them to do so with higher efficiency and lower costs. As described *supra,* technological changes in the past few decades have led to a true 'revolution'. The attempts of national reformers to maintain traditional procedural forms, employing new 'inventions' such as computers and video recording only superficially, have little prospect of success in the long run, as such forms of legal process are (or will soon be) perceived as hopelessly antiquated, in spite of the use of new 'gadgets'. Modern technology urges a fundamental transformation of justice systems, legal markets and the law itself (Susskind 2003).

At present, civil justice systems still struggle with the adoption of fundamental changes mandated by the developments of modern life, as is demonstrated by contemporary studies on electronic technology (see Kengyel and Nemessányi 2012). Even the very idea of a fully 'electronic', paperless procedure is still controversial, though the public at large has every right to expect completely digitized proceedings, i.e. proceedings that are conducted by electronic means in all important procedural steps—initiation of the proceedings, service of documents, evidence-taking, hearings and decisions.

Moreover, the establishment of 'e-justice' (a fashionable and frequently used notion in many states) should not create a justice system in which the 'electronic' element is an end in itself. Electronic litigation should not be just a functional equivalent of the older, paper-based procedure. It has the capacity to fundamentally change the procedure, just as paper-based litigation did not simply emulate but fundamentally transformed oral procedures in the past.

Electronic litigation, if properly employed, can revolutionize all dimensions of communication among the main actors in the lawsuit. The flow of information will not only be speedier, but also more complete and productive. Immediate

communication is expedient, between the parties (or their representatives), between the parties and the court (including the court administration and other legal services and professions) and between different courts or their departments. Any decision made in a pending lawsuit can be announced and delivered instantly.

Such an immediate flow of communication is instrumental for the fulfilment of the goals of civil procedure. If all channels of communication are kept open, the various steps in the procedure can be openly discussed among all participants, and the ideal of an open justice system, in which the parties, their lawyers and the court collaborate in the execution of a common task—i.e. the conduct of a quick and inexpensive, but fair and accurate process—may be achieved. Electronic litigation is thus an optimal tool to neutralize the disadvantages of both adversarial and inquisitorial proceedings, contributing to a cooperative model that adjusts the procedure to its substance and optimizes the use of the necessary resources while reducing unnecessary litigation (Uzelac 2017; Van Rhee 2014).

Integral technological modernization as a form of thorough transformation of civil justice also has further positive features. It presupposes a system in which all necessary legal sources are freely accessible to and instantly searchable for the interested audience, from applicable laws and regulations to case law and commentaries. For the courts and lawyers it means that paper files are replaced by electronic files, transcripts by video recordings and public auctions in courts by digital bidding led by virtual auctioneers.

All of this has a number of side effects. The tremendous potential of new technologies does not only enable accelerated and cheaper proceedings, it also makes a number of conventional legal activities (and their agents) obsolete. Massive court archives, impressive court buildings and administrative staff (such as typists, drivers, administrators and bailiffs) may in the near future become unnecessary, replaced by only a handful of IT specialists. Moreover, the very essence of some legal professions that have built their portfolios on the classic written proceedings is put into jeopardy. For lawyers there is an urgent need to 'embrace new technologies and novel ways of sourcing legal work' in order to continue a prosperous, and avoid a disastrous, future (Susskind 2008, 269). Many aspects of the traditional operations of civil justice that are simple, routine and repetitive will be replaced by some form of automation. This, indeed, has the capacity to transform the profile of civil justice. In the future, civil justice will have to adopt a full spectrum of new technologies in order to become more flexible, more cost-efficient and leaner.

For many of the principal agents of the contemporary civil justice systems, who for ages have been pampered with high demand and high esteem for the services of their arcane profession—and abundant profits for low-tech legal work—this may not be good news. When paper-based industrial society changes into technology-based internet society (Susskind 2008), those professions which mainly survive on paper-based services—public notaries are a prominent example—may have tough times transforming, adapting, to new environments. However, adaptation is by no means impossible. From history we learn that the traditional understanding of

notaries as agents who are exclusively linked to documents is factually incorrect, as is demonstrated in the historical contribution by Milotić to the present volume.

In any case, the fear of a transformation of the traditional legal professions is certainly among the reasons why the transformation by technological modernization happens in a slow, poorly designed and inefficient way in many civil justice systems. A second historical contribution to this volume provides an example of new procedures which were intentionally disregarded by legal elites in order to protect their imminent interests, thereby creating parallel and largely conflicting modes of procedure in which, at least for the time being, the old modes were prevalent (see the contribution of Held). But, just as in the past, in contemporary societies social pressure is mounting, in particular in countries which have a history of slow and inefficient courts and a low level of social trust in the traditional forms of justice. Thus, paradoxically, new technologies are being introduced faster in these civil justice systems which experience more dysfunctionalities than in countries where judicial institutions are more trusted and their users more satisfied (see the contribution of Karolczyk to this volume).

3.3 Reorganizing Justice: A Redefinition of Court Structures and Their Functions

The changes discussed above do not only affect the technological functioning of civil justice. As has been stated, the organizational components of civil justice are also affected. Starting with court structures, the introduction of new technologies, enhanced means of communication and travel and a change in the profile and number of cases are putting a redefinition of the role and function of courts on the agenda, as well as the overall composition of court structures. This trend has sometimes been referred to as 'developing a public administration perspective' on judicial systems (Fabri and Langbroek 2000).

There are at least three dimensions to this reorganization process. The first dimension is related to the size and number of court structures. In many countries, the structure of the court network dates back to the 18th and 19th centuries. In the light of new realities (such as better roads, faster trains, airplanes and instant communication), it is legitimate to ask whether there is a need for a court in every community, and whether, in general, the structure of the court network is adequate for meeting the current justice demands.

The second dimension concerns specialization. While the transformation of court procedures often rationalizes the influx of cases, it should be noted that in the future the remaining court cases are likely to be more complex. One may ask whether this should lead to the creation of new, specialized courts, or to some other forms of specialization, depending on many factors. As several examples show (see the contribution of Baboolal-Frank to this volume) the process of modernization of court structures may result in a move in the opposite direction, i.e. to the creation of

a unified court system away from the decentralized and compartmentalized structures as they exist today in many jurisdictions. Such an amalgamated court system may bring advantages in terms of consistency, effectiveness and standardization of court functions while preserving specialist skills and knowledge.

The third dimension is a conceptual one and deals with rethinking the role and function of particular courts, especially those at the apex of the court pyramid. The new approach to justice systems as a public service offered to its users under favourable terms and for an affordable price motivates a reassessment of the role of the courts in the judicial hierarchy. Can a system of state courts afford multiple assessments of the same issue at three or more levels of adjudication? Should supreme courts be used for a private function, in order to correct errors in the factual and legal determination in a wide range of cases? The reforms of the supreme courts both in the East and in the West demonstrate a trend which focuses the role of these courts on specific, system-oriented issues. While this trend is not without difficulties, it is not likely that it will be stopped. As demonstrated by various contributions to this volume (see Bratković and Van Der Haegen), the past experience of slow procedures, backlogs and the poor quality of supreme adjudication transforms the very essence of the models upon which supreme courts are founded, shifting their attention from the mass processing of individual cases to a narrower range of systemically important issues, resulting in well-reasoned decisions of fundamental importance for the rule of law.

3.4 Multi-dimensional Procedures: From Speed and Costs to Proportionality, Access to Justice and Case Management

Technological modernization and court reorganization based on best international practices logically leads to another fundamental procedural transformation: the reshaping of the approach to cases processed by the civil justice system. The keywords of many reforms in different parts of the world since the beginning of the 21st century are *proportionality, access to justice* and *case management.* All of these notions are connected in the new, multi-dimensional perspective on the goals of civil justice.

While the conventional doctrine of civil procedure almost exclusively focused on substantive justice (i.e. on the accuracy of the decision-making process, the fairness of the judicial processes and the consistency of judicial decisions), the approach to reforms in the past two decades has raised to the same level of importance the element of appropriate time (i.e. the speed of decision-making), affordable costs (i.e. the reduction of unnecessary expenses) and the effectiveness of the enforcement of civil and commercial judgments (the timely and complete implementation of judicial decisions). There is a desire to distribute the means which are at the disposal of the national justice systems proportionally, based on the

importance and social value of the matters at stake. This is not an entirely new approach; its most authoritative and prominent example is Lord Woolf's 'new theory of justice' in England and Wales (Sorabji 2014, 161–199).

Part of the proportionate allocation of resources related to the enhancement of access to justice for the ultimate court users is the establishment of a system in which the users will have a real and practical possibility to use the system in a way that is appropriate to protecting their rights. In the context of austerity policies and social priorities, the establishment of a legal aid system which does not merely provide an attractive normative framework, but which is functional in practice can be a significant challenge (as is demonstrated in the contribution of Brozović to this volume).

Another way to promote access to justice is the creation of special proceedings which can provide quick and affordable relief to a large circle of court users. Among these special proceedings are summary proceedings for the certification of uncontested debts such as payment orders, and special proceedings for the protection of consumers. As explained in the contribution of Stephanie Law to this volume, one way to reduce costs and provide access to justice is to provide the courts with more extensive *ex officio* powers to establish the facts relevant for the protection of consumers. Indeed, for managerial judges with broad powers it is essential to maintain impartiality. In this volume, a team led by Professor Fernhout developed a method of assessing the predicted effectiveness of measures for safeguarding such impartiality.

3.5 *In Pursuit of the Best Alternatives: Consensual Dispute Resolution and ADR*

A transformation of the approach to the goals of civil justice leads also to a different attitude towards conventional civil litigation. Contentious civil litigation once upon a time viewed as the pinnacle of the legal process—as a constitutionally guaranteed default method of legal protection with which each dispute starts and ends—is progressively regarded (at least by some scholars) as a costly and lengthy method of dispute resolution which should be avoided wherever possible. If law is regarded as a service industry and civil justice as another public service offered to the society, then litigation should be used only where ultimately necessary.

If civil litigation is the ultimate remedy (*ultimum remedium*), what then is the first and preferable remedy? As there is no need for state intervention where private persons can resolve their problems autonomously and consensually, the first preference of contemporary civil justice is a negotiated solution, reached either as a result of direct contact between the disputants or with the assistance of a third, neutral party in some form of alternative dispute resolution (ADR).

As argued by Professor Marcus in his contribution to this volume, the ADR movement in the USA was a 'reaction to costly and lengthy proceedings the United

States was coping with'. From the USA, this movement was exported to other countries and has become one of the most common trends in practically all civil justice systems worldwide. Invariably, national jurisdictions are today promoting ADR, as exemplified by the contribution on Spain (see Gascón Inchausti), sometimes adopting rather innovative methods for special cases, such as family group conferences (described by de Roo and Jagtenberg in this volume).

Admittedly, the results of the ADR movement are ambiguous. Only a handful of jurisdictions have opted for mandatory ADR on a large scale, and this is controversial (Lupoi 2014). The announced transformation has so far happened mainly at a normative and doctrinal level, but the real effects on the reduction of contentious cases and the expenses of dispute resolution are so far rather limited (De Palo et al. 2014). Two contributions to this volume criticize the ADR movement from the perspective of the public goals of civil justice (see Marcus and Woo). Nevertheless, it is certain that the ADR movement continues to contribute to the transformation of civil justice, at least where it concerns a change in the culture of litigation and the psychology of the litigants (and their lawyers).

3.6 Collectivizing Decision-Making: Group Actions

A global trend, optimistically asserted by Mauro Cappelletti in his 1975 text, concerns the promotion of collective dispute resolution. Cappelletti's optimism may have been based on the fact that in the United States class actions had been gaining momentum since the second half of the 1960s. US class actions have a global reputation and present one of the major hallmarks of the American civil justice system which is still broadly used in spite of recent developments aimed at constraining some of its excesses (on 'patent trolls' see Marcus in this volume). Driven by private interest, US class actions generally manage to be decent instruments by which private law serves the enforcement of public interests. One of the remarkable examples of the positive use of class actions—the bright side of class actions—is presented in this volume in the contribution on human rights class actions (see Silvestri).

Outside the United States, collective redress in Brazil has developed into an important and widely used instrument. In Brazil, however, public bodies like the Public Prosecutor's Office play a key role in collective redress. The *actio popularis* based on Roman antecedents is still a common practice in this country. Even more popular is the Brazilian-style class action (*ação civil pública*), in conjunction with some other techniques, such as 'public civil inquests'. These secure a large volume of Brazilian mass litigation (see Cruz Arenhart in this volume).

In the rest of the world, the (re)discovery of collective litigation is a by-product of the transformative movements of the 2000s. Like the ADR movement in the past, the 'collectivization' movement in civil justice is more likely to be present in speeches, programmatic documents and academic writings than in everyday reality. There are, however, no signs that promoting collective actions and other forms of

collective decision-making will fade away. In the contemporary world of massification and automatization, it is somewhat logical to look for a functional equivalent of mass industrial processing in a document-based industrial society, although the mass processing of legal problems in a technology-based internet society can also be achieved by other means. A number of countries have enacted laws on collective redress. The Slovenian example shows that such legislation has a very high chance of being perceived as a legal irritant, due to unprepared transitional judiciaries (see Sladič in this volume).

In a limited number of areas such as consumer or financial services cases collective redress is gaining ground. A combination that has proved to operate well in the Netherlands is that of collective redress and ADR. Under Dutch law, some cases of mass damages may be decided by collective settlements concluded under court supervision. The experience with these settlements under the WCAM (Act on Collective Settlement of Mass Damage) are analysed by de Roo and Jagtenberg in the present volume.

3.7 Outsourcing, Privatization and Other Forms of Dejudicialization

A final trend of transformation is 'dejudicialization'. The notion of 'dejudicialization' is understood in this volume as encompassing all forms of a transfer of tasks from courts and judges to other, non-judicial persons and services.

In the words of Margaret Woo, the trigger for 'dejudicialization' is 'a renewed call for minimizing costs and maximizing efficiency' (*infra*). The starting point is the insufficiencies of modern judiciaries, primarily ineffectiveness due to an overburdening of the court system with non-essential tasks. Another reason for dejudicialization are the costs of the performance of judicial tasks, which can be considered excessive compared to the costs of some other, non-judicial arrangements. Dejudicialization is comparable to (and partly inspired by) the business strategy of outsourcing, by which companies subcontract their own internal activities to other, different companies.

In a broader sense, 'dejudicialization' can be either internal or external. Internal dejudicialization means the transfer of particular tasks from judges to other court staff or services. For instance, some time-consuming parts of the judicial process, like arranging the service of documents or the drafting of decisions, can be allocated to the court administration or to judicial assistants (for examples, see the contribution of Gascón Inchausti to this volume). Similarly, simple and routine judicial cases can be 'outsourced' to court clerks or land registrars. Such internal 'outsourcing' does not change the jurisdiction of the court, although it influences the internal competences and the internal division of labour within the court system. In a way, the promotion of (court-annexed) ADR as a replacement for civil litigation can be viewed as a form of internal outsourcing, as court cases are steered away

from the judicial decision-making process (adjudication) to an extra-judicial dispute settlement process (mediation), usually—but not always—conducted by professionals who are not judges.

A more radical form of dejudicialization is the transfer of tasks of the state courts to the private professions or private companies. As noted in one of the contributions to this volume (see Marcus), the ADR movement in the USA was a form of 'outsourcing' the tasks of the public courts to the private sphere. In areas that are by their very nature private, like family relations, dealing with relevant issues is more appropriately done by private means. In this sense, mediation was found to be most successful in the domain of family law according to studies by the European Commission (de Roo and Jagtenberg in this volume).

A whole range of non-contentious cases can easily be 'dejudicialized', as legislators generally have a certain latitude in distributing these cases to various bodies or branches of state power. These cases are also the easiest to privatize. Recent experiences with non-contested divorce and separation proceedings in France and Spain show a trend of transferring such cases from courts to notaries (on Spain, see Gascón Inchausti in this volume).

Dejudicialization is not only a blessing for overburdened judicial systems—it is also an important warning for them. A transformation of civil justice systems which transfers many of their functions to the private sphere can be a signal that these systems are incapable of adapting to new circumstances. And, as an apocryphal statement attributed to Darwin tells us, 'It is not the strongest of the species that survives, nor the most intelligent, but the one most responsive to change.' In a similar sense, if the justice systems do not adequately respond to the requirements and expectations of the new age, their transformation may well mean their gradual fading away. Such a prophecy might seem to be too radical, as billions of euros and dollars are still being invested in civil justice systems, but the dominance of 'public court-based dispute resolution' is undeniably shrinking. As noted by Gascón Inchausti in this volume for Spain, civil justice systems are able to resolve average civil and commercial disputes reasonably well, but obviously this begs the question as to the 'less than average' cases.

If 'average' means cases that are average in size and complexity, the remaining cases are either complex or high-value cases important for the national economies, or small and routine cases which may be legally less interesting, but due to the high volume of these cases still economically important. As regards both categories, the public courts are rapidly losing ground, as is demonstrated in several contributions to this volume. In high-value/low-volume cases, this is noticeable in the trends of introducing mandatory pre-action procedures, the growth of international commercial arbitration and the recent controversies about investor-state dispute resolution. In low-value/high-volume cases, the courts and judges are being bypassed through the introduction of (automated and digitized) payment order schemes, the mandatory mediation of disputes and various private options for the collection of small and uncontested claims.

Should one be worried, or should one welcome the trends of the shrinking dominance of public courts in dispute resolution worldwide? On the one hand,

modernization has always changed our lives, whether we like it or not. If other means of social regulation are better and more efficient than public courts, one should not feel too much sorrow when some matters are taken away from conventional civil dispute resolution. Many matters, in particular those related to the processing of non-contentious cases, were only by chance, i.e. through accidents of history, entrusted to courts. There are no good reasons for them to remain in court if other agents—or sophisticated machines—can decide them in a better and cheaper manner.

On the other hand, the extension of private and non-court mechanisms and the diminishing role of the state courts cause certain risks in contentious cases. While ADR may promote access to justice, it can also jeopardize access. In this context, Professor Marcus discusses in his contribution to this volume the risks of mandatory ADR, and the even greater risks of mandatory private arbitration. In the USA, where the privatization of justice has progressed further than elsewhere, consumers are bound by clauses that force them to waive their right to public litigation, and to arbitrate before consumer courts described as 'kangaroo courts'.

Consequently, one should be wary of the risks that accompany the erosion of access to public courts, and preserve and foster mechanisms that secure the equal protection of rights, especially between litigants of unequal power, wealth and experience. When dispute resolution schemes do not protect the rights of the weaker party in civil cases, these schemes cannot be a good replacement for a public and fair trial before an independent and impartial court of law. And, where civil justice cannot be qualified as 'civil' and does not provide justice, legal development is frustrated and at some point court users may resort to self-help.

4 Concluding Remarks

As has been demonstrated in this introduction, the global and European civil justice landscapes show considerable unity but also extreme diversity. It is obvious that the present changes in society and technology may have profound effects regarding the way disputes are resolved either in court (public justice) or out of court (private justice). In order to be able to compete with out-of-court solutions, the civil justice systems provided by the state courts are in need of reform. So far changes have not materialized on an all-compassing scale. Where changes have occurred it seems that the various implications of societal and technological developments have not been fully thought through (for example the implications of the availability of new technology). It is the conviction of the authors of the present introduction that the state courts serve important goals, not the least of which is in the area of the development and interpretation of the law. However, this goal will come under threat if the state court systems prove to be unable to meet the challenges posed by changes in society and technology. Private justice will fill the gap and obviously private justice will not be able to realize the public goals which state courts may serve. The future will show whether the necessary balance between public and

private justice can be found, giving rise to a civil justice system where both the private interests of the litigants and the public interests of society will be served in an optimal manner, in part by way of out-of-court solutions, and in part by way of the state judiciary.

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