Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe

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Is there any contribution that a European student of comparative law and procedure can make to the study of procedural reforms in the United States?

Clearly, the answer to this question cannot come from me. You will have to judge for yourself whether or not the continental problems of which I shall speak in this lecture are similar enough to the problems in your country to deserve your attention; whether or not the European solutions, as well as the trends, needs, and designs of reform, may offer any suggestions to Americans.

It is my intention first to analyze the reforms accomplished in Europe in the relatively recent past. I shall then turn to the principal current problems and trends of reform. Finally, I will reflect on the intellectual and socio-political background of such reforms, problems, and trends. This approach will also give us the opportunity to discuss what kind of scholarship in the field of civil procedure is demanded today, at least in Europe but probably elsewhere as well, in order to meet the changed needs of our time.

I. A LOOK AT THE PAST

The most varied systems of civil procedure have been in force at one time or another in continental Europe. I shall not go back to the ancient ones. I am concerned here only with those types that still exercise some influence—for better or for worse—on the Continent.

We must begin with the late Middle Ages and the *jus commune* procedure, the “common” procedure of Europe, adopted by the ecclesiastical and imperial courts; defined and refined by the learned *doctores* at the School of Bologna and all of the other Schools in Italy and elsewhere which followed the Bolognese model; influencing, and yet in turn influenced by, the statutory developments of the free city-states, the principalities, and other sovereignties; “received” as
the regular, general type of procedure by most of the Continent during the last centuries of the Middle Ages, and still the prevailing procedural norm on the eve of the French Revolution and beyond.\(^2\)

Subject to many variations—particularly noteworthy were those in France\(^3\)—the \textit{jus commune} procedure had certain unique characteristics. First, it attributed absolute predominance, indeed a real monopoly, to the written element. “Quod non est in actis non est in mundo”: procedural acts not reduced to writing were null and void; and a judgment based on elements other than written ones was itself null and void.\(^4\)

Second, it discouraged any personal, direct, open contact between the adjudicating body and the parties, the witnesses, the experts, or other sources of information such as places and things. The judge was required to base his decision exclusively upon the written record, not his personal impressions. Why not, then, entrust the preparation of the record to persons other than the judge? Thus, the \textit{actuarii}, the \textit{notarii}, and others—not the judge—examined the witnesses \textit{in camera} and translated into written language—often Latin—the witnesses’ spoken words. The court only met with the \textit{papers}—at the end of the proceeding.\(^5\) Hence, a wall existed between the judge, usually a \textit{doctor} and as such a representative of a small ruling segment of society, and the other persons involved in a civil litigation, particularly the parties and witnesses. With that wall came the insulation of the judge from the facts and, of course, from the people as well.

Third, the \textit{jus commune} civil procedure was characterized by the so-called “formal” or “legal” system of proof. The evaluation of evidence was mathematically established by law. One witness was no proof at all—\textit{testis unus testis nullus}\(^6\)—with but one exception.


\(^4\) The literature in this field is immense. See, e.g., M. Cappeletti, \textit{Procédure orale et procédure écrite} 42-43 (Milano: Giuffrè. 1971); Engelmann, \textit{The Romano-Canonical Procedure}, in Engelmann, \textit{supra} note 1, at 457-58.

\(^5\) See, e.g., \textit{i} G. Chiovenda, \textit{supra} note 3, at 127-28; Millar, \textit{supra} note 3, at 64.

the Pope. This exception is affirmed, for instance, by a famous author of the sixteenth century, J. Cujacius, in his comment to the Decretales Gregorii IX, lib. II, tit. XX De testibus et attestationibus, cap. XXVII. See J. Cujacius, Tomus Sextus Opera Postumorum 899 (Napoli: Muñio. 1729).

8. See, e.g., Engelmann, The Romano-Canonical Procedure, in Engelmann, supra note 1, at 489; Millar, supra note 3, at 44. With variations from place to place and from time to time, the proof of certain facts required testimony of a higher number of witnesses. For example, twelve or perhaps forty-four witnesses were required against a cardinal, 7 J. WIEMORE, supra note 6, at 242, and eight or sixteen-commoners (burgenses) were needed to prevail over a count or a baron. 2 G. SALVIOLI, Storia della procedura civile e criminale 429 (Milano: Hoepli. 1927).


11. See references in M. CAPPELLETTI & J. PERILLO, supra note 1, at 35 n.149; 2 G. SALVIOLI, supra note 8, at 427. Damasus in the thirteenth century summarized the requisites of a witness in the following couplet: "Conditio, sexus, aetas, discretio, fame, fortuna, fides; in testibus ista requiras." Die "SUMMA DE ORDINE JUDICIARIO" DES MAGISTERR DAMASUS 43 (L. Wahrmund ed. Aalen: Scientia. Reprint 1962). The hierarchy of testimonial values was even more strongly enunciated in a famous work written about 1200, probably by the Glossator Fillius of Medicina: Der Ordo "INVOCATIO CHRISTI NOMINE" 115 (L. Wahrmund ed. Aalen: Scientia. Reprint 1963) ("... ut potius sit credendum... si deorum... unius... honorato... nobili... Item... Item magis diviti diviti... stirpes...")

12. See, e.g., 7 J. WIEMORE, supra note 6, at 241.

13. See note 11 supra; note 149 infra and accompanying text.
A fourth feature of *jus commune* procedure was its segmental, piecemeal unfolding. Since the judge did not intervene and direct the proceedings, the parties or, rather, their attorneys, were the uncontrolled masters of the conduct of the case. Hence, abuses, dilatory tactics, and postponements were the usual plague. To cope with these abuses, the law tried to impose order by prescribing a series of compulsory and peremptory stages—a thirteenth century treatise enumerated eighteen of them in the ordinary case—thus aggravating the already rigid and abstract character of procedural segmentation. The dilution of civil proceedings was further aggravated by the fact that separate appeals had to be taken immediately from any kind of judicial decision at the risk of waiver—even from a partial or interlocutory decision, or one admitting or refusing evidence. Thus, the principal case was frequently suspended. Moreover, new evidence and facts were not infrequently admissible in the courts of second instance—one more encouragement for appeals. The usual course of a litigation, then, was a proliferation of derivative appellate proceedings, spreading outward like the numerous branches of a big tree.

The fifth and last characteristic of the procedure was the natural consequence of all the others: the enormously long duration of a civil case. Civil proceedings lasting for several decades were not unusual.

14. Under the older continental systems those principles which left the parties free to take or not to take a given step in the cause, to utilize or not to utilize any material relevant to the decision, to forward or to delay the progress of the cause, and rendered the court a purely passive instrumentality • • • prevailed in a much more rigorous fashion than they ever did in our own [United States] system.


16. See 1 G. Chiovenda, *supra* note 3, at 121-22; Engelmann et al., *Modern Continental Procedure*, in Engelmann, *supra* note 1, at 589 (in discussing the German and Austrian procedure in the period before the codification of the nineteenth century, the authors write that “too many modes of attack upon judgment were permitted. As a result even simple causes remained pending indefinitely”).


18. See, e.g., E. Kern, *Geschichte des Gerichtsverfassungsrechts* 31, 45-46 (München: Beck 1956); A. Troller, *Von den Grundlagen des Zivilverfahrens* 15-35 (Basel: Holbing & Lichtenhahn 1945) (“proceedings lived longer than the parties and were inherited from generation to generation”; Engelmann et al., *Modern Continental Procedure*, in Engelmann, *supra* note 1, at 598 (“all this dragged out the cause to interminable lengths”); Vollkommer, *Die lange Dauer der Zivilprozesse und ihre Ursachen*, 81 Zeitschrift für Zivilprozess 102, 121-23 (1968) (“proceedings lasting thirty years or more were not uncommon”). See also H.-G. Kip, *Das sogenannte Mündlichkeitsprinzip* 25 (Köln: Heymanns 1952).
II. THE ERA OF REFORM

This, then, was still the situation on the Continent on the eve of the French Revolution, somewhat improved here or there, yet further corrupted by other features of that era, such as: (1) the multiplicity of jurisdictions—royal, feudal, ecclesiastical, and so forth—based on the typical privileges and the nonegalitarian structure of the ancien régime society; and (2) the patrimonial, venal character of the administration of justice, which particularly in France was not a public service in the modern sense but rather a property right of the judges, who had either inherited or bought the judgeship and who had to be paid for their services by the parties.

The dismantling of such a system was commenced, but not achieved, by the French Revolution. After 1789, the sale and inheritance of judicial offices were forbidden. A loi of August 16-24, 1790, abolished the privileged jurisdictions as being in conflict with the revolutionary idea of égalité in the new bourgeois state. The same loi proclaimed the gratuitous character of the judicial function (gratuité de la justice), with the new judges compensated not by the parties but by the state.

The loi of 7 Fructidor of the Year III (1795) further abolished the secret character of the taking of testimonial evidence (principe du secret de l'enquête), establishing instead that the witnesses had to be heard at the public hearing in the

19. All over Europe, summary types of procedure were developed in order to attenuate the formalism of the ordinary jure commune procedure. See generally, e.g., H. Briegleb, supra note 17.

20. See, e.g., 1 G. Chiovenda, supra note 3, at 132, 134; 1 M. Rousselet, Histoire de la Magistrature française 4-19 and passim (Paris: Plon. 1957). In particular for Germany, see E. Döring, Geschichte der deutschen Rechtspflege seit 1500, 8-14, 19, 71 (Berlin: Duncker & Humblot. 1955); E. Kern, supra note 18, at 78, 105, 151. For Italy, see 2 G. Salvioli, supra note 8, at 74-137.


presence of the parties.\textsuperscript{24} Finally, the “formal system of proof” was radically attacked by the French reformers and the new concept of free judicial evaluation of evidence affirmed, although many archaic relics of the previous system outlived the revolutionary storm.\textsuperscript{26}

Most, but not all of these radical changes were adopted by the Napoleonic codes. Significantly, the code de procédure civile of 1806 returned in part to the secrecy of testimonial proof-taking. Under this code, testimonial evidence no longer was taken by the adjudicating court at a public hearing, but was to be taken by a juge-commissaire, in the presence of the parties but not of the general public.\textsuperscript{26} Thus, as lamented by French authors, since the judge-commissioner had to write down the witnesses’ depositions, and since he would not be the adjudicating judge, the latter would only have before him a piece of paper, without physiognomy.\textsuperscript{27}

But the reform movement, at last unchained, could not forever be so confined. It was in fact the natural outgrowth, as will be further seen, of the needs of a new liberal, bourgeois society, of the new intellectual and economic fabric of nineteenth and early twentieth century Europe. Thus, it would be improper to reduce the history of such a movement to recounting the individual accomplishments of “great” personalities. Yet, at least in the field of law and legal reform, individual greatness has meant, above all, a greater capacity to interpret the new general needs and new social demands, and to provide appropriate solutions to the new ideological and political problems. The “science” of procedure in the opening period of the reform movement is identified with men who showed that capacity. The long list includes Pagano in Italy, Bellot in Switzerland, Feuerbach and Mittermaier in Germany, and, above all, Jeremy Bentham, with his sharp, brutal, cutting critique of the past—an outsider, yet fully introduced into the Continent by a famous and early translation into French of his legal writings.\textsuperscript{28} P.F. Bellot openly recog-

\begin{enumerate}
\item See, e.g., \textsc{E. Bonnier}, supra note 6, § 248, at 225-26; \textsc{M. Cappelletti}, supra note 4, at 43-44 n.87; 2 \textsc{E. Glasson & A. Tissier}, supra note 10, at 781.
\item See, e.g., \textsc{Engelmann et al.}, Modern Continental Procedure, in \textsc{Engelmann}, supra note 1, at 758; \textsc{Millar}, supra note 3, at 45-46.
\item See, e.g., \textsc{Engelmann et al.}, Modern Continental Procedure, in \textsc{Engelmann}, supra note 1, at 760.
\item See, e.g., \textsc{E. Bonnier}, \textsc{Éléments de procédure civile} 230, 241, 243-44 (Paris: Plon 1893); 2 \textsc{E. Glasson & A. Tissier}, supra note 10, at 781; \textsc{R. Morel}, supra note 10, at 392.
\item \textsc{E. Dumont} translated Bentham’s works into French. He published the first three volumes of his translations in Paris in 1802. See \textsc{Dumont, Précéde to 2 Oeuvres de J. Bentham} (E. Dumont transl. Bruxelles: Hauman et Co. 1829). Much of Bentham’s legal writings were first published in French; their influence on the Continent was very significant. See \textsc{Millar}, supra note 14, at 197.
\end{enumerate}
nized Bentham's influence in the preface to his *code de procédure civile* of Geneva of 1819: "I owe to the friendship of Monsieur Dumont my acquaintance with the . . . manuscripts, as yet unpublished, of Bentham on procedure; I wish to recognize that they have often proved useful in the course of my work." 29

You may know more than I about the revolution in the field of civil procedure that, mostly under the pressure of Benthamite criticism, was soon to occur in England and in this country as well. Indeed, it was a very understandable revolution. Procedure in equity was very much akin to the *jus commune* procedure, some characteristics of which we have already examined: predominance of writing, 30 secret taking of evidence by examiners or commissioners, 31 numerical evaluation of testimonial evidence, 32 and incredible delay. 33 But procedure at law was not much better. There, too, the course of a civil litigation was stifled by formalism and technicalities, with the jury insulated from the facts by a long list of a priori, abstract disqualifications and exclusions. For instance, the parties, any third person interested in any way in the case, persons convicted of crimes, and others were not allowed to testify. 34

On the Continent, the great reform movement presented itself under an overarching and yet too often misleading symbolic name: "orality." What it meant, however, was much more than a mere reaction against the prevalence of writing in the *jus commune*


32. See R. Gresley, *A Treatise on the Law of Evidence* 4 (London: Saunders & Benning, 1836) ("... the courts of equity followed the maxim of the civil law, *responsio unius non omnino audiatur*, and required the evidence of two witnesses as the foundation for a decree"); 1 J. Wigmore, *supra* note 6, at 15-16; 7 J. Wigmore, *supra* note 6, at 290-94. Only some of the many *jus commune* rules of numerical evaluation of evidence were adopted by the courts of equity, most notably the rule that the testimony of only one witness was not sufficient. See, e.g., 7 J. Wigmore, *supra*, at 254; Millar, *supra* note 3, at 49.


and derivative proceedings. It meant a reaction against, and a radical break with, all those characteristics of the *jus commune* that we mentioned before. Thus, in addition to a revaluation of the oral element in procedure, the leading ideals of the reform movement were the following: first, "immediacy"—that is, a direct, personal, open relationship between the adjudicating organ and the parties, the witnesses, and the other sources of proof; second, "free" or, more precisely, "critical" evaluation of evidence, unfettered by a priori rules of exclusion or evaluation, and based on the direct observation of the evidentiary elements by the judge in open court; third, "concentration" of the case in a single hearing or in a few closely spaced oral sessions before the court, carefully prepared through a preliminary stage in which writings were not necessarily to be excluded; finally, and as a consequence of the first three ideals, a more rapid unfolding of the litigation.

These were the openly declared goals of the most progressive critiques, proposals, and legislative reforms throughout the nineteenth century in Europe; and these have continued to be the goals of reformers deep into our century. The two landmarks of the movement were the German Code of Civil Procedure of 1877 and the extremely influential, more radically innovative Austrian Code of 1895. The major innovation of the Austrian Code was its emphasis on a more active role for the judge both in expediting the proceeding and in promoting the social aim of effective equality of the parties. The crucial institution for this role was the personal, "oral" contact of the judge with the litigants, assisted but not substituted by their counsel.

35. For more details and references see M. CAPPELLETII, supra note 4, at 41-59, 89-92.  
36. In this context, the Code of Civil Procedure of Hanover of 1850 and the Austrian law on small claims procedure (*Bagatellverfahren*) of 1873 also deserve to be mentioned. On the Code of Hanover see, e.g., 1 A. WACH, *HANDBUCH DES DEUTSCHEN CIVILPROZESSRECHTS* 138-41 (Leipzig: Duncker & Humblot, 1885); Engelmann et al., *Modern Continental Procedure*, in Engelmann, supra note 1, at 598-99. On the Austrian *Bagatellverfahren* see, e.g., F. KLEIN & F. ENGEL, *DER ZIVILPROZESS OESTERREICHs* 40-41 (Mannheim: Bensheimer, 1927); Engelmann et al., supra, at 635.  
37. The German *Zivilprozessordnung* of January 30, 1877 has been in force since October 1, 1879, with a number of significant amendments. The Austrian *Zivilprozessordnung* of August 1, 1895 has been in force since January 1, 1898.  
38. Sections 182 and 183 of the Austrian Code contain the essential provisions concerning the social aspect of the judge's active role; they give the judge the power and duty to promote a decision based on a complete analysis of the merits of the case. To this end, he must advise the parties of any procedural error or incompleteness in their presentation of the facts. He may on his own motion call the parties to appear personally before him, order the production of documents, call witnesses, and order expert testimony. See notes 54 & 135 infra and accompanying text. Sections 182 and 183 were adopted almost literally in a series of amendments to the German Code in
These two landmarks were followed by a number of further statutory developments, all of which were more or less modeled on the first two. They included the Hungarian Code of 1911, the Norwegian Code of 1915, the Danish Code of 1916, the 1929 Code of Yugoslavia, the 1933 Code of Poland, the 1942 Code of Sweden, and the Swiss federal law of civil procedure of 1947.

III. The Impact of the Reform Movement on Delay

The natural question at this point is: what was the practical impact of such a large reform movement in Continental Europe? I have chosen for examination only one of the typical features of the


The judge’s powers to speed up the proceeding are provided for in other sections of the Austrian Code, such as §§ 87 and 179. These powers also served as a model for the German reforms. See German Zivilprozesordnung §§ 261b and 279a; Habscheid, Richtermacht oder Parteiﬁreiheit, 81 Zeitschrift für Zivilprozeß 175, 180 (1968).

On the extraordinary inﬂuence of the Austrian Code upon the legislation of various countries, see, e.g., Satter, Das Werk Franz Kleins und sein Einﬂuss auf die neueren Prozeßgesetze, 60 Zeitschrift für Deutsches Zivilprozeß 272 (1936-37); Schima, Der Einﬂuss der österreichischen Justizgesetze auf das europäische Ausland, in Almanach der Stadt Wien 1960, at 80-89.

39. The Hungarian Code of Civil Procedure of 1911 was the valuable work of A. Pléz. Like the Austrian Code of 1895, it was inspired by the ideals of orality, immediacy, concentration, and free evaluation of evidence. See, e.g., Fabinyi, Das ungarische Prozeßrecht, in Der Zivilprozeß in den europäischen Staaten und ihren Kolonien 265, 267, 279-82 (F. Leske & W. Loewenfeld eds. Berlin: Heymanns. 2d ed. 1933).

40. The Code of Civil Procedure of Norway, enacted in 1915 but in force only since 1927, was also modeled after the codes of Austria and Germany. See Alten, Das Zivilprozeßrecht in Norwegen, in Der Zivilprozeß in den europäischen Staaten und ihren Kolonien, supra note 39, at 483, 484.

41. The Danish Code of Civil Procedure of 1916, in force since 1919, also adopted the criteria of orality, immediacy, and free evaluation of evidence; it was strongly inﬂuenced by the Austrian model. See, e.g., H. Munch-Petersen, Der Zivilprozeß Dänemarks 50-88, 78-81 (Mannheim: Bensheimer. 1932).


43. The Polish Code of Civil Procedure of 1933 was also inspired by the same principles. See, e.g., R. Kann, Die polnische Zivilprozesordnung 98 (Berlin: Heymanns, 1933); Steimachowski, Das Zivilprozeßrecht in Polen, in Der Zivilprozeß in den europäischen Staaten und ihren Kolonien, supra note 39, at 695, 705-06.


pre-reform procedure, a feature that, however, was the natural consequence of all the others: delay—enormous, unbearable delay.

Judicial statistics in those countries where the reform movement has been consistently implemented are extremely eloquent. Toward the end of the nineteenth century a prominent German proceduralist, Adolf Wach, praised the success of the German Code of 1877 on the basis of the following figures: in the higher courts of first instance, the Landgerichte, twenty-seven per cent of all civil litigation was terminated within three months after the commencement of the case, another 28.7 per cent within three to six months, and still another 28.7 per cent within six months to one year; in the lower courts of first instance, the Amtsgerichte, 63.5 per cent of the contentious civil proceedings were decided in less than three months and another 22.8 per cent were decided within three to six months.46 The situation has not deteriorated in recent times. In a typical year, 1968, more than sixty per cent of the contentious civil proceedings in the Landgerichte and more than eighty per cent in the Amtsgerichte were terminated in less than six months.47

Notwithstanding this impressive record, our German brethren still often complain about the excessive duration of civil litigation in their country.48 Indeed, they have at least two main reasons to com-

46. A. WACH, DIE MÜNDLICHKEIT IN DEM ENTWURF DER ÖSTERREICHISCHEN CIVILPROZESSORDNUNG 21, 60 (Leipzig: Edelmann, 1895) (statistics for 1891 and 1893), See G. CHIOVENDA, Lo stato attuale del processo civile in Italia e il progetto Orlando di riforme processuali, in I SAGGI DI DIRITTO PROCESSIONALE CIVILE 395, 405 (Roma: Foro Italiano, 1980); A. WACH, Mündlichkeit und Schriftlichkeit, in VORTRÄGE ÜBER DIE REICHS-CIVILPROZESSORDNUNG 45 (Bonn: Marcus, 2d ed. 1895). Vollkommer gives the following information about the judicial statistics for the years 1888-1889: 56% of all contentious civil cases before the Landgerichte were terminated in less than six months, while 16% took more than one year (48% and 20% respectively for proceedings before the Oberlandesgerichte, i.e., the courts of appeal). Vollkommer, supra note 18, at 124.

47. Detailed statistical tables based on information from the statistisches Bundesamt in Wiesbaden and the Ministry of Justice in Bonn can be found in M. Capellletti, supra note 4, at 61-63. Note, however, that if one considers only contentious proceedings terminated with a judgment, the percentage of cases decided in less than six months becomes about 60% for both the Amtsgerichte and the Landgerichte. Moreover, if one considers only the ordinary contentious proceedings terminated with a judgment in the Landgerichte, thus excluding all special proceedings such as those involving matrimonial and legitimacy matters, the statistics for 1968 indicate that the percentage of cases lasting less than six months ranged from a minimum of 31.8% in Baden-Württemberg to a maximum of 48.4% in the Land Bremen, while the percentage of cases lasting more than one year ranged from a minimum of 21.1% in West Berlin to a maximum of 33.1% in Baden-Württemberg. See the statistics published in Anlage zur Stellungnahme des ZPO- und GVG-Ausschusses des DAV zum Regierungsentwurf der Beschleunigungs-Novelle, Zählkartensstatistik 1968, in 20 ANWALTSBLATT 161, 162 (1970).

48. See, e.g., J. BAUMANN & G. FEZER, BESCHLEUNIGUNG DES ZIVILPROZESS (Tübingen: Mohr, 1970); F. BAUR, WEGE ZU EINER KONZENTRATION DER MÜNDLICHEN VERHANDLUNG IM PROZESS (Berlin: de Gruyter, 1966); Henke, Judicia perpetua oder: Warum Prozesse so lange dauern . . ., 83 ZEITSCHRIFT FÜR ZIVILPROZESS 125 (1970); Schubert, Das Streben
plain. First, there still exists in Germany a remnant of that undue "glorification" of appellate courts and proceedings, which, as we have seen, was a typical feature of jus commune times. Thus, appeal to the courts of second instance still tends to involve a de novo examination of the case. As a consequence, appeals are quite frequent, and the over-all duration of litigation is greatly increased. In other countries, however, such as Austria, where the ideals of the reform movement admittedly have been implemented in a less dogmatic, yet more consistent and realistic way, this defect has been practically eliminated.

Second, compared to the results of the reform movement in other countries, the German figures are still far from being fully satisfactory. The judicial statistics for Austria indicate that, in recent years, the average duration of a civil case was only fifty to sixty days in the Bezirksgerichte—which decide the bulk of civil litigation—and about 145 days in the Gerichtshöfe Erster Instanz—the higher courts of first instance. The statistics also indicate that only an insignificant fraction of civil cases last longer than one year. It should be noted that this fact is not simply the impressive but inconclusive result of administering justice in a small, orderly country. Soon after the Austrian Code of 1895 went into effect, when


49. For comparative data, which indicate that appeals are strikingly more frequent in Germany than in England, see F. A. MANN, DIE DEUTSCHE JUSTIZREFORM IM LICHT ENGLISCHER ERFahrung 5-6 (Karlsruhe: Müller. 1959). A strong trend toward limitation of appeals in Germany is evident. See, e.g., F. BAUR, supra note 48, at 5, 23; Bundesjustizministerium, Bericht der Kommission zur Vorbereitung einer Reform der Zivilgerichtsbarkeit 117, 129-35 (Bonn: Deutscher Bundes-Verlag. 1961); Baur, supra note 38, at 451-53; Zweigert, Zum richterlichen Charisma in einer ethisierten Rechtsordnung, in Festschr FOR CARLO SCHMID 299, 307-8 (Tübingen: Mohr. 1962).


51. This is attributed, in part, to the fact that in Germany the powers of the judge to conduct and speed up the unfolding of the proceeding, modeled on the Austrian Code but mostly discretionary, are not used in a sufficiently rigorous and consistent way. See, e.g., F. BAUR, supra note 48, at 12-13; Baumgärtel, Welche Anregungen vermag das neue griechische Zivilprozessgesetzbluch für die in Deutschland geplante Prozessbeschleunigung zu geben?, 81 ZEITSCHRIFT FÜR ZIVILPROZESS 6, 9-10 (1968); Vollkommer, supra note 18, at 121.

52. See Bajons, Buchbesprechung, 10 ZEITSCHRIFT FÜR RECHTSGESELLSCHAFT 318, 320 (1969).

Austria was a large empire with world-wide intellectual and political ambitions, Franz Klein, the superb drafter of the Code, could proudly affirm that the reform's goals were already achieved; proceedings had become "simple, inexpensive, quick, and accessible to the poor." 54 Precise statistical data were given by him to prove this strong statement, showing the strikingly radical change ("die grosse Umwälzung") in the duration of pre- and post-reform cases. 55

Finally, I want to mention briefly still another country that has implemented the reform movement. In Sweden the official statistics for 1967 indicate that the average duration of civil litigation is two months from the date of filing to disposition of the case, with 33.5 per cent of all civil cases in courts of first instance terminated within one month, 51.4 per cent within one to six months, and only 15.1 per cent lasting for more than six months. 56

Such data speak, I think, with a clearer voice than multi-volume treatises. Although it is unquestionable that circumstances other than the form of procedure may also produce delay—such as insufficient staffing of the courts with judicial and clerical personnel, inadequate court organization, and flaws in the substantive law—the recent developments in Europe clearly demonstrate that the movement toward "orality" has greatly helped to speed up the proceedings.

This conclusion seems to be confirmed by the fact that delay still plagues civil proceedings in those other countries of Europe in which the reform movement has not, or has only partially, been implemented. In Italy, in Spain, and to some extent even in France, the unfolding of a civil case still resembles the efforts to start the broken mechanism of a clock which "must be hit and shaken in order to be put in motion even for a brief moment." 57 Shaking and beating is

55. Id. at 88. More data can be found in F. KLEIN, VORLEHRUNGEN ÜBER DIE PRAXIS DES CIVILPROZESSES 7-9 (Wien: Manz. 1900); F. KLEIN & F. ENGEL, supra note 36, at 330-38; Leonhard, Zur Geschichte der österreichischen Justizreform vom Jahre 1898, in Festschrift zur fünfzigjähr. der österreichischen Zivilprozeßordnung 1898-1948, at 126, 152-54 (Wien: Manz. 1948). For instance, in 1898 there was a dramatic increase in the percentage of cases showing a duration of less than six months from the time of filing in the court of first instance to their termination in the court of second instance. Such a percentage sprang from 1.8% in prereform cases to 48.2% in one district, from 8.4% to 68.7% in another, and from 7.3% to 70% in still another.
56. Professor P. O. Ekelof of Uppsala kindly furnished me with the information in the text.
57. This image is taken from the incisive description of prereform civil procedure by a prominent Austrian legal scholar, A. MENGER, DAS BÜRGERLICHE RECHT UND DIE BESETZEN VOLKSKLASSEN, ch. I § 11 (Tubingen: Laup. 1900).
done by party writings, and party writings in turn are prepared by
counsel, who do not necessarily suffer from court delay; there is
virtually no hearing in which the adjudicating court, not a mere
judge-commissioner, meets with the parties and the witnesses; the
decision is based on paper, not direct observation, and paper, of
course, may be gathered piecemeal; and finally, the previously noted
"glorification" of appeals still prevails.

Thus we have an average duration of eighteen and twenty-eight
months respectively for an ordinary proceeding of first instance in
Italy, before the lower and the higher courts of first instance;58 one
of ten months in the Tribunaux de grande instance in France;59 and
one of eight months in the Juzgados de primera instancia in Spain.60
Many Latin American countries do not count duration by days or
months, but by years;61 no wonder, since their procedure resembles
jus commune procedure even more closely than does that of Italy or
Spain.62

58. Detailed statistical data can be found in M. Cappeletti, supra note 4, at 65-66;
M. Cappeletti, J. Merryman & J. Perillo, The Italian Legal System 125-26 (Stan-

59. Civil procedure in the lower courts of first instance (Tribunaux d'instance) is
notably different from that in the higher courts (Tribunaux de grande instance). Only
in the lower courts is procedure primarily oral. See Lobin, Procédure écrite et procédure
orale, in ÉTUDES DE DROIT CONTEMPORAIN 161, 163, 166 (Paris: Les Editions de l'Épargne,
1970). Significantly, the average duration of civil proceedings of first instance changes
dramatically from the lower courts (seventy-three days in 1966) to the higher courts
(304 days in the same year). See ANNUAIRE STATISTIQUE DE LA FRANCE 1968, at 129 (Paris:
Institut National de la Statistique et des Études Économiques. 1969). See also P. Herzog,
supra note 21, at 139.

60. See ESTADÍSTICAS JUDICIALES DE ESPAÑA. AÑO 1966, at 123 (Madrid: Instituto
Nacional de Estadística. 1967). It should be noted that, particularly in the cases of
Spain and France, the official statistics used for our calculations seem less complete than
would be desirable. Private information suggests a greater delay in Spain than that
indicated by these statistics. In fact, the excessive duration of ordinary civil proceed-
ings in Spain is generally recognized. See, e.g., J. Prieto-Castro Ferrandiz, Derecho
Procursal Civil 358 (Madrid: Editorial Revista de Derecho Privado. 1964). The same
author sees this defect as a consequence of the written character of ordinary proceed-
ings, which are still closely tied to the principles of jus commune procedure. Id. at
354-60.

All of the figures concerning the average duration of litigation given in this

\[ \frac{P_1 + P_2}{I + C} = d \]

Article were derived from the formula used by statisticians, i.e.

P1 represents the number of proceedings pending at the beginning of the year, P2 the
number of proceedings pending at the end of the year, I the number of proceedings
initiated during the year, and C the number of cases concluded during the year; d gives
the average duration in years and fractions of years.

61. See M. Cappeletti, supra note 4, at 66 n.150 (based on Latin American reports
not yet published).

62. Id. at 22 n.39.
This, then, is a summary account of the development of civil procedure in continental Europe in the recent past—apart from that great schism of Eastern Europe which we will discuss later.

IV. CURRENT PROBLEMS AND TRENDS—CONSTITUTIONAL, INTERNATIONAL, AND SOCIAL

Naturally, the "orality" movement, with all its derivative ideas, is still very much alive as a basis for criticism and reform proposals in countries, such as Spain63 or Italy,64 where too many remnants of the old procedure prevail. In those countries, immediacy and concentration, efficiency and rapidity are still the problems.

In addition, however, a number of unprecedented problems have lately emerged throughout the Continent—at least the Western part of the Continent—that are typical reflections of a new reality and a new society. I will briefly examine only three of them: the "constitutional" problem; the "community" and "international" problem; and the "social" problem.

First, let us examine the constitutional problem. Emerging from a disastrous war and an oppressive experience of political organization and ideological credo, several European nations, including Germany, Italy, and Austria, have turned to constitutional guarantees as an anchor against similar storms.65 As a first step, they have adopted "rigid" constitutions—an innovation for Italy,66 although not for Germany and Austria—and they have granted constitutional status to some ideals of judicial administration such as judicial independence, the right to an impartial judge whose jurisdiction is predetermined by law, the right to counsel, and the right to be heard.67 As a second step, they have instituted special constitutional courts68—an innovation for Italy and in effect also for Ger-

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63. See, e.g., I L. PrieTo-Castro Ferrandiz, supra note 60, at 355; de Miguel, Los sistemas sobre la forma de la actividad procesal, Revista de Estudios procesales, No. 6, Sept. 1970 (at 1-11 of the reprint).
64. See, e.g., M. Cappelletti, supra note 9, vols. 1 and 2.
66. The Statuto Albertino of 1848, completely superseded only by the "rigid" Constitution of 1948, was an example of a nonrigid constitution. It could be changed by ordinary legislation without the necessity of any special amendment procedure.
67. Italian Constitution in force since 1948, arts. 24, 25, 101, 102, 104, 107, 108; German Constitution (Bonner Grundgesetz) in force since 1949, arts. 20, 92, 97, 101, 103; Austrian Constitution of 1920 (amended in 1929 and re-enacted in 1945), arts. 85, 87, 89, 90, 94 (not including provisions on right to counsel and right to be heard; however, the provisions of art. 6 of the European Convention of Human Rights have been constitutionalized in Austria. See notes 85, 90 infra and accompanying text).
68. See M. Cappelletti, Judicial Review in the Contemporary World (Indianap-
many,\textsuperscript{69} though not for Austria\textsuperscript{70}—entrusting them with the specific task of controlling the observance and implementation of the constitution by governmental organs, especially the legislature. To be sure, the American precedent of judicial review has played an influential role in this development. France, of course, has not followed the lead;\textsuperscript{71} yet, it is noteworthy that the \textit{Conseil Constitutionnel} of the 1958 French Constitution, although its role is to safeguard the supremacy of the executive rather than to protect individual rights, is less remote from a real constitutional court than was its unsuccessful predecessor under the 1946 Constitution, the \textit{Comité Constitutionnel}.\textsuperscript{72} On the other hand, other countries have followed the

\textsuperscript{69} Although there were some precedents for the present \textit{Bundesverfassungsgericht} in Germany, most notably the \textit{Staatsgerichtshof} under the Weimar Republic, none of them had a general power to review the constitutionality of legislation. \textit{See}, e.g., H. \textit{Spanner}, \textit{Die richterliche Prüfung von Gesetzen und Verordnungen} 6 (Wien: Springer, 1951); \textit{Friesenhahn, Die Verfassungsgerichtsbarkeit in der Bundesrepublik Deutschland}, in \textit{Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Verfassungsgerichtsbarkeit in der Gegenwart} 89, 92-99 (H. Mosler ed. Köln-Berlin: Heymanns, 1962).

\textsuperscript{70} The Austrian Constitution of 1920 had already established a special constitutional court called \textit{Verfassungsgerichtshof}, Arts. 89, 157-48.


\textsuperscript{72} \textit{See}, e.g., \textit{Bordeau, supra} note 71, at 105-13; \textit{Eisenmann \& Hamon, La juridiction Constitutionnelle en Droit Français}, in \textit{Max-Planck-Institut, supra} note 69, at 231, 237, 242-43, 255-57; \textit{Walline, The Constitutional Council of the French Republic}, 12 \textit{Am. J. Comp. L.} 483, 484-85, 488, 492-93 (1963). In the restrictive application given so far to articles 61 and 62 of the 1958 Constitution, the \textit{Conseil Constitutionnel}'s principal function has only been to guarantee that the legislature will not interfere with the large sphere of new "legislative power" of the executive. One of the central provisions of the Constitution, article 34, lists the areas that are reserved to the legislature; civil procedure, for example, is not included. Matters other than those listed in article 34 belong to the "regulatory power" of the executive (article 37), and the \textit{Conseil Constitutionnel} will bar the promulgation of enactments of the legislature that trespass on this territory.

The \textit{Conseil d'Etat} has proved to be much more important for the protection of civil liberties. Since the nineteenth century its principal role has been to protect the rights of individuals from invasions by the public administration. In performing this function, the \textit{Conseil d'Etat} has creatively melded a body of "general principles" as criteria binding on the public administration. Many of them have been derived from the Declaration of the Rights of Man of 1789 and the Preamble to the Constitution, and are considered to have constitutional force. \textit{See}, e.g., B. \textit{Jeanneau, Les principes généraux du droit dans la jurisprudence administrative} (Paris: Sirey, 1954); Syndicat Général des Ingenieurs-Conseils, \textit{Conseil d'Etat}, Decision of June 26, 1959, \textit{Dallos, Jurisprudence} 531 (1959). This development has become particularly important since 1958 when the executive's domain was dramatically increased. The \textit{Conseil d'Etat} has courageously affirmed the extension of its judicial review to the "regulatory power" of the executive, thus becoming the most important organ of control of the constitutionality of state action in France. \textit{See}, e.g., F. \textit{Bataillere, Le conseil d'Etat juge constitutionnel} 196-219 (Paris: Fichon et Durand-Amiaux, 1966).
constitutional trend, including Turkey,\textsuperscript{73} and since 1963 even Yugoslavia.\textsuperscript{74}

The new trend, no doubt, encompasses much more than civil procedure. Constitutional guarantees, as envisaged by the Italian, the German, or the Austrian constitutions, govern not only civil, but to an even greater degree, criminal proceedings. Yet, perhaps unexpectedly, the impact has been great even in the field of civil litigation. In the last few years, from one or another of the European constitutional courts we have learned, for instance, that it is a violation of the constitutionally guaranteed right to have an independent and statutorily predetermined judge when civil jurisdiction is entrusted to a court whose members are at the same time functionaries of the active administration.\textsuperscript{75} We have also learned that the plaintiff's constitu-


On the spread of judicial review to other countries see M. CAPELLETTI, supra note 68, at ch. 3, § 2.

\textsuperscript{75} German Constitutional Court, Decision of November 17, 1959, No. 15, 10 \textit{ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS} 200. As a result of this very important decision, more than 1,400 small courts (\textit{Friedensgerichte}) were abolished in the Land Baden-Württemberg. One of the principal reasons for the decision was the fact that the local mayors acted as judges in these courts. A second judgment has clarified and somewhat attenuated the prior decision, due more to a recognition of a deeply rooted, centuries-old tradition of the Land Baden-Württemberg than to any weakening of the constitutional principle of strict separation of powers. Decision of May 9, 1962, No. 11, 14 \textit{ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS} 75-76.

The principle stated in the text undoubtedly holds true for Italy, whether the courts involved are civil, criminal, or administrative. See, e.g., Italian Constitutional Court, Decision of June 9, 1966, No. 55, 11 GIURISPRUDENZA COSTITUZIONALE 479 (1966) (unconstitutionality of the Prefectural Councils because the members of these courts were at the same time members of the public administration; these courts had adjudicatory powers concerning the financial liability of local government employees); Decision of March 22, 1967, No. 30, 99 FORO ITALIANO I, 681 (1967) (unconstitutionality, for the same reasons, of the judicial functions of the \textit{Giunte Provinciali Amministrative} which heard claims against local administrative entities); Decision of Dec. 22, 1962, No. 108, 115 GIURISPRUDENZA ITALIANA I, 305 (1963) (unconstitutionality of the special agricultural divisions of the ordinary civil courts of general jurisdiction; the majority of the judges were lay “experts” who lacked full independence since they were, in effect, chosen by their professional associations which could also require their substitution at any time). For a statement of an even stronger doctrine, see Italian Constitutional Court, Decision of Dec. 22, 1961, No. 70, 6 GIURISPRUDENZA COSTITUZIONALE 1292 (1961). In this case, the Court declared a statute unconstitutional because in certain lease litigations it bound the ordinary civil courts to a technical determination of facts by an administrative body. The statute left to the judge review of violations of law, contradictions, and patent errors of opinion in the administrative determination, and entitled the judge to request clarification or to order an entirely new determination, but only by the same administrative body. However, in the words of the Constitutional Court, “the challenged provisions take away from the judge the power to freely evaluate the principal issue of the controversy; in this way, the decision of the case is in substance taken from the ordinary judge and placed in the hands of an administrative organ.” \textit{Id.} at 1299.
tional "right of action" is violated by requiring him, at the discretion of the judge, to post a security bond as a prerequisite to the commencement or prosecution of an action. We have learned that even in civil cases a right to counsel and a system of legal aid may be necessary elements of the constitutionally guaranteed right to a fair hearing, and that even in civil cases unconstitutionally obtained evidence may be excluded. Inadequate notice, as well as unreasonable limitations of the parties' right to present or to refute evidence, have also been held to constitute violations of constitutional guar-

76. See Italian Constitutional Court, Decision of Nov. 29, 1960, No. 67, 5 GIURISPRUDENZA COSTITUZIONALE 1195 (1960) (the Court found that the prerequisite could have the effect of denying access to court, i.e., right of action, to those who, although not eligible for legal aid, had insufficient means to post the bond).

In Germany, the Bundesverfassungsgericht considered a similar issue. Decision of Jan. 12, 1960, No. 22, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 264. The Court held the challenged statute constitutional, but stated that, if through these provisions "recourse to the courts is made unreasonably exacting or difficult," it would be no longer consistent with the Constitution. Id. at 268.

77. See German Constitutional Court, Decision of June 18, 1957, No. 6, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 53 (denial of legal aid in a proceeding concerning the legitimacy of a child found to violate the right to be heard guaranteed by art. 103 of the Constitution; the fact that in such proceedings the judge has extensive powers of initiative does not make a request for legal aid capricious). See Italian Constitution, art. 24, para. 2 (right to counsel) and para. 3 (legal aid: "Poor persons must, by appropriate institutions, be assured the means to plead and to defend themselves before any judicial body").


78. In Germany, the Supreme Federal Court for civil and criminal matters (Bundesgerichtshof) has excluded, both in civil and criminal cases, the use of evidence obtained in violation of the constitutionally guaranteed right to privacy. Moreover, this doctrine has been affirmed irrespective of whether the evidence was obtained privately or by public officials. Bundesgerichtshof, Civil Division, Decision of May 20, 1958, 11 NEUE JURISTISCHE WOCHENSCHRIFT 1344 (1958) (secret tape recording by a private person of a conversation excluded in a civil case); Bundesgerichtshof, Criminal Division, Decision of Feb. 21, 1964, 17 NEUE JURISTISCHE WOCHENSCHRIFT 1139 (1964) (use of private diaries by the public prosecutor without the consent of their author excluded in a criminal case, whether they came into the possession of the prosecutor through a state or a private act).

In Italy, the Constitutional Court has recently affirmed that judges cannot base their decisions on "evidence forbidden by law." Although occasioned by a criminal case, the statement is formulated as a general principle of law, applicable in any proceeding. Constitutional Court, Decision of Dec. 2, 1970, No. 175, 95 FORO ITALIANO I, 2985 (1970).

See also European Commission of Human Rights, Application No. 2645/65 (Scheichbauer v. Austria), Oct. 5, 1969, 50 COLLECTION OF DECISIONS OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS 1 (admission by an Austrian court of illegally obtained evidence found possibly to violate the "right to a fair hearing" guaranteed by art. 6, para. 1, of the Convention; although stated in the context of a criminal case, the language used by the Commission seems of general applicability since art. 6, para. 1 applies equally to civil cases).
More generally, civil as well as criminal courts have been constitutionally required not to base their decisions on facts, evidence, or procedural acts on which the parties have had no adequate opportunity to be heard.80

The analogies to, and divergencies from, developments in American constitutional jurisprudence are readily apparent. On the one hand, the European courts have been in the process of articulating minimum standards of due process similar, in part, to those developed by the United States Supreme Court. On the other hand, it seems important to observe that, particularly in the field of civil litigation, the constitutional decisions in Europe in some respects have gone even farther than those in the United States.81 For instance, the

79. "Notice is a necessary instrument of a fair hearing." Italian Constitutional Court, Decision of June 6, 1965, No. 57, 10 GIURISPRUDENZA COSTITUZIONALE 717, 723 (1965). Although this decision was occasioned by a criminal case, the language used by the Court is clearly general, and applies to any type of judicial proceeding. For Germany see, e.g., Constitutional Court, Decision of Feb. 1, 1967, No. 17, 21 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 132 (failure to notify the father about a legitimacy proceeding held to violate his right to be heard).

On the parties' right to present or refute evidence see Italian Constitutional Court, Decision of Dec. 22, 1951, No. 70, 6 GIURISPRUDENZA COSTITUZIONALE 1282 (1961). This decision, discussed in note 78 supra, was also based on the consideration that the binding fact determination by the administrative body deprived the parties of their constitutional right to present and to refute evidence. Also see Italian Constitutional Court, Decision of June 3, 1966, No. 53, 11 GIURISPRUDENZA COSTITUZIONALE 858 (1966). In this case, a statute giving the state railroad discretionary power to withhold from the court, whether civil or criminal, factual findings of investigations made after railroad accidents was held to violate the parties' right to be heard. "In fact, if the right of the parties to present to the judge favorable facts is denied or limited, if the right to exhibit evidence concerning those facts is denied or limited, it is then the judicial protection itself which is denied or limited." Id. at 876. For Germany, see Constitutional Court, Decision of Jan. 15, 1969, No. 14, 25 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 137 (total judicial disregard of a party's motion to introduce testimonial evidence in a case for recovery of a broker's commission violates his right to be heard).

At the European Convention level, see European Commission of Human Rights, Application No. 852/60 (X v. The Federal Republic of Germany), Sept. 19, 1961, in 1961 YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 346, 354 ("... in certain types of cases or in certain circumstances, the refusal by a court to allow the witness or witnesses called by the plaintiff to testify, could involve a violation of art. 6, para. 1, which recognizes the right of everyone to a fair hearing by an impartial tribunal that will determine his civil rights and obligations.") (dictum).

80. See, e.g., German Constitutional Court, Decision of July 24, 1963, No. 5, 17 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 66 (failure to give the party an opportunity to contest expert testimony held to violate his right to be heard). "We have consistently affirmed that art. 103, para. 1, of the Constitution does not allow a judicial decision to be based on facts or evidence on which the parties have not had an opportunity to be heard." Id. at 95. For Italy see Constitutional Court, Decision of Dec. 22, 1961, No. 70, 6 GIURISPRUDENZA COSTITUZIONALE 1282 (1961).

81. Consider, for instance, that in the United States the right to appointed counsel and legal aid is not yet regarded as a constitutional requirement in civil cases and the same is true for the exclusion of illegally obtained evidence. However, there has been some discernible movement toward extending these constitutional requirements to civil litigation. See, e.g., Note, The Right to Counsel in Civil Litigation, 63 COLUM. L. REV. 1322 (1963) (arguing that the right of an indigent civil litigant to appointed coun-
European developments would very probably make it impossible, at least in some continental nations, to employ methods such as those suggested by authoritative sources in this country to reduce the backlog of the courts "by blocking off some of the roads to the courthouse,"—particularly by excluding small claims and traffic injury cases from the courts. In the European view, these methods would violate the constitutional "right of action,"—the right of everyone to have all of his substantive rights and legitimate interests protected by "predetermined," "impartial," "judicial" bodies, that is, the courts. Hence, if it is true that the excessive judicial load can be

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sel is constitutionally required by both the equal protection and due process clauses); Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545 (1967); State v. Union Asphalt & Road oils, Inc., 281 F. Supp. 391, 406-10 (S.D. Iowa 1968) (illegally seized evidence excluded in antitrust suit for civil damages); Carlisle v. State ex rel. Trammell, 276 Ala. 456, 163 S.2d 596 (1964) (illegally obtained evidence excluded in civil action for abatement of gambling); Carson v. State ex rel. Price, 221 Ga. 299, 144 S.2d 384, 396 (1963) (gambling abatement: "That this mandate [of exclusion] was not for criminal cases only is clear from the Mapp decision and from the more recent pronouncement in One 1958 Plymouth Sedan...") Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958) (results of blood test taken while defendant was unconscious excluded in a civil case involving two private parties on the basis of state constitutional provision similar to fourth amendment); Dixon v. New York, 54 Misc. 2d 100, 281 N.Y.S.2d 912 (Ct. Cl. 1967) (evidence illegally obtained by state officials excluded in civil litigation); Williams v. Williams, 8 Ohio Misc. 156, 221 N.E.2d 622 (1966) (exclusion of evidence in divorce proceedings).

The United States Supreme Court has, itself, only gone so far as to exclude illegally obtained evidence in what may be termed "quasi-criminal" proceedings. See One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) (forfeiture proceeding). However, some strong dissenting opinions have suggested that several members of the Court are not happy with the distinction between civil and criminal cases in the application of the fourth amendment. See, particularly, the dissents of Justices Douglas (joined by Justice Black) and Brennan (joined by Justices Black and Douglas and Chief Justice Warren) in Abel v. United States, 362 U.S. 217, 241, 248 (1960) and Justice Douglas (joined by Justices Black and Brennan) in Frank v. Maryland, 359 U.S. 360, 374-76 (1959).

The language expressing this view is especially strong: "The Court now casts a shadow over that guarantee as respects searches and seizures in civil cases. Any such conclusion would require considerable editing and revision of the Fourth Amendment... The protection of the Fourth Amendment has heretofore been thought to protect privacy when civil litigation, as well as criminal prosecutions, was in the offing... The Court misreads history when it relates the Fourth Amendment primarily to searches for evidence to be used in criminal prosecutions." Frank was effectively overruled in Camara v. Municipal Court, 387 U.S. 523 (1967). The Court condemned warrantless searches by health officials as violative of the fourth amendment, thus making it appear likely that the exclusionary rule will be applied to such administrative searches in the future.

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83. See, e.g., Rosenberg, supra note 82, at 1034-35; Wright, Procedural Reform: Its Limitations and Its Future, 1 Georgia L. Rev. 503, 598-99 (1967).

Of course, changes in the substantive law and insurance plans that would make recourse to court less necessary and frequent would be unaffected by the developments mentioned in the text.

84. See Italian Constitution, arts. 24, para. 1 ("Everyone has a right of access to the courts for the protection of his rights and legitimate interests") and 25, para. 1 ("No
reduced only by transferring a portion of it to nonjudicial agencies or by dividing it among a larger number of judges, the current European solution would bluntly reject the first alternative, no matter how many hundreds or thousands of new judges would have to be provided.\(^{85}\)

one shall be denied the right to have his case decided by his natural, statutorily pre-determined judge"). In addition, art. 113 specifically extends the individual's right to have judicial protection to cases involving administrative action. All these provisions of the Constitution have been liberally applied by the Constitutional Court in a number of decisions which have declared several statutes unconstitutional because they limited or denied this "right of action." See, e.g., L. Comoglio, LA GARANZIA COSTITUZIONALE DELL'AZIONE ED IL PROCESSO CIVILE (Padova: Cedam. 1969). One momentous case was Constitutional Court, Decision of March 31, 1961, No. 21, 6 GIURISPRUDENZA COSTITUZIONALE 138 (1961). In that case the Court struck down a traditional institution of tax law, the "solve et repete," which obliged the taxpayer to pay the amount assessed by the taxing agencies before being allowed to challenge the assessment in court.

As for Germany, there is no explicit general provision in the Constitution concerning a "right of action", but art. 19, para. 4 guarantees recourse to the courts for all violations of individual rights and legitimate interests through any activity of public authorities. On the broad interpretation of art. 19, para. 4, given by both the German courts and the legal scholars, see, e.g., H. Peters, GESCHICHTE ENTWICKLUNG UND GRUNDFRAGEN DER VERFASSUNG 277-78 (Berlin: Springer. 1969). Moreover, a general "right of action" in civil and criminal matters is considered to be a consequence of the provisions of arts. 20 para. 2, 92, 97, 101 para. 1, and 103 para. 1, of the Constitution. See, e.g., A. Baumbach, W. Lauterbach & J. Albers, ZIVILPROZESSORDNUNG 1821 (München: Beck. 30th ed. 1970) ("In view of Art. 92 of the Constitution it is no longer permissible to transfer civil matters from the courts to administrative organs"); R. Zöller, ZIVILPROZESSORDNUNG 1047 (München: Stutt. 10th ed. 1968) (with reference to court decisions); Fechner, Kostenrisiko und Rechtswegsperrre—Steht der Rechtsweg offen? 1969 JURISTENZEITUNG 349; German Constitutional Court, Decision of June 6, 1967, No. 6, 22 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 49, 77-81. This does not mean that it would be unconstitutional to precondition recourse to the courts on a prior administrative proceeding, provided that such recourse includes a full re-examination, both of fact and law. See, e.g., German Constitutional Court, Decision of Nov. 10, 1964, No. 27, 15 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 203, 212 ("The right of access to court guaranteed by Art. 19, para. 4, of the Constitution, must provide for a complete re-examination by a court of the challenged action of the public authority, with respect both to fact and law"); Decision of Feb. 5, 1963, No. 24, 15 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 275, 282; A. Baumbach, W. Lauterbach & J. Albers, supra, at 1821; R. Zöller, supra, at 1047.

The reader should be made aware of the forceful historical background of such a jealous concern in the Italian and German Constitutions for safeguarding access to the courts. Under the fascist dictatorships, it was not unusual to exempt administrative action from judicial review and thereby arbitrarily to deprive individuals of their rights through the denial of a judicial remedy. A poignant example can be found in the field of the infamous racial legislation; judicial review was abolished for governmental action against the Jews. See 2 P. Calamandrei, ISTITUZIONI DI DIRITTO PROCESSUALE CIVILE 78-79 (Padova: Cedam. 1943) republished in 4 P. Calamandrei, OPERE GIURIDICHE 100-11 (M. Cappelletti ed. Napoli: Morano. 1970). For analogous developments in Nazi-Germany see, e.g., E. Kern, supra note 18, at 191, 199, 202; Fechner, supra at 349.

Even in France, in the absence of a similar historical background, the Conseil d'Etat has established that judicial review of administrative action involving excès de pouvoir is a general principle of constitutional force. See Ministre de l'Agriculture v. Dame Lamotte, Conseil d'Etat, Decision of Feb. 17, 1959, in M. Long, P. Weiz & G. Braibant, LES GRANDS ARITS DE LA JURISPRUDENCE ADMINISTRATIVE 225 (Paris: Sirey. 4th ed. 1959); Falco & Vidaillac, Conseil d'Etat, Decision of April 17, 1953, in id. at 388.

85. Indeed, there were 8,935 professional judges active in the ordinary courts in
Even more important, perhaps, is the impact of these new constitutional developments on the psychology of the continental judge and of European society at large. Although German and Italian judges are not entitled to set aside unconstitutional statutes—the power to annul such statutes being reserved to the respective constitutional courts—they do have the power and the duty to suspend a civil or criminal case and to submit the decision on the constitutional issue to the constitutional court. Thus, a new "constitutional conscience" is growing among a rather bureaucratic "career judiciary" which for centuries has been only too subservient, if not always to the executive, certainly to codes and other written legislation. This is a radical and, on the whole, quite welcome change, the far-reaching consequences of which I leave to your consideration.

Second, let us consider the "community" and, more generally, the "international" problem. A large part of Europe is slowly moving

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86. See M. CAPELLETTI, supra note 68, at ch. 4.
from a conception of absolute state sovereignties to a new dimension that is more community and internationally oriented. As in the constitutional field, so in this field the "American challenge" is strongly at work. Indeed, the "Europe of the nations," divided and disorganized both economically and politically, increasingly feels the challenge represented by modern federalism as exemplified by the United States and, for that matter, by the Soviet Union. These are mass psychological feelings, the future impact of which can hardly be foreseen. We are still quite far, of course, from some kind of European federation; yet the elements of a more integrated Europe are growing, even in the field of civil procedure. Evidence of such integration can be found in the recent convention for the recognition and enforcement of judgments in civil and commercial matters, concluded under the auspices of the European Economic Community by the six member states in Brussels in 1968, as well as the draft-convention governing bankruptcy, arrangements, and similar proceedings. Even more important is the close relationship established between the national courts and the Court of Justice of the European Communities. When faced with questions of interpretation or validity of Community Law, the national courts may, or if they are courts of last resort must, refer the issue to the Community Court for a binding decision. Also significant is article 6 of the


European Convention of Human Rights—and here we already move into the sphere of the Europe of the fifteen nations, not the six. That article establishes minimum standards of due process for domestic criminal and civil proceedings, including a fair and public hearing within a reasonable time by an independent and impartial court established by law. Admittedly, the Court at Strasbourg and the other organs of the Convention have been showing to date more restraint than boldness in the implementation of this and other parts of the Convention. Yet, this initial restraint is probably understandable, particularly in view of the remarkable innovation represented by the Convention which permits individuals to bring actions before supranational organs against their own state. Moreover, the forced withdrawal of the Greece of the colonels from the Council of Europe and the Convention suggests that the Convention already has something meaningful to require of its members in the field of civil liberties.

Let me conclude on this point by saying that, parallel to a slowly growing "constitutional conscience," there is also a "community," "European," and "international" conscience growing among the judges and people on the old "Continent of the nations." There are many signs of this development, even beyond bilateral or multi-

89. Apart from the international force, which of course is identical for all member states, the force attributed to the Convention by each state within its domestic legal order covers a broad spectrum. It ranges from states where the Convention is considered superior to the Constitution itself (e.g., Netherlands), to those where it has constitutional force (e.g., Austria), to those where it has the force of ordinary law (e.g., Germany, Italy), and finally to those where it does not acquire the status of domestic law (e.g., United Kingdom). See, e.g., Buergenthal, The Domestic Status of the European Convention on Human Rights: A Second Look, 7 JOURNAL OF THE INTERNATIONAL COMMISSION OF JURISTS 55 (1966).

90. For some cases of particular interest see notes 77-79 supra. Also see Buergenthal, Comparative Study of Certain Due Process Requirements of the European Human Rights Convention, 16 BUFFALO L. REV. 18 (1966); Grementieri, La convention européenne des droits de l'homme et le procès civil, 5 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 463 (1965); Rasenack, "Civil Rights and Obligations" or "Droits et Obligations de Caractère Civil": Two Crucial Legal Determinations in Art. 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 3 HUMAN RIGHTS J. 51 (1970).


A typical recent example is the "Delcourt" Case, Judgment of the European Court of Human Rights, D 34.773, Jan. 17, 1970 (participation of public prosecutor in the deliberation in chambers of the Belgian Court of Cassation without any opportunity for the accused to be represented at this discussion held unanimously not to violate art. 6 of the Convention).

92. It is unfortunate that Italy, as well as Cyprus, Malta, and Turkey, have not yet accepted the clause of the Convention giving standing to individuals.
lateral treaties and even in France, which still too often seems to feel the attraction of an outmoded vision of national grandeur. Indeed, it was in France, in 1964—when General de Gaulle was still at his apex of power—that a spontaneous judicial development occurred in the Munzer case in which the Cour de cassation practically wiped out the traditional power of the French judges to review the merits of a foreign judgment before giving it recognition.\footnote{Munzer v. Munzer-Jacoby, Cour de Cassation, 1st Civil Division, Jan. 7, 1964, in 1964 SEMAINE JURIDIQUE II 13590 (with comment by Ancel), 1964 (1st sem.) GAZETTE DU PALAIS-JURISPRUDENCE 372, 1964 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 344 (with comment by Batiffol).} My learned friend, Kurt Nadelmann, greeted this decision with an article subtitled: “One Down, and More To Go”\footnote{Nadelmann, French Courts Recognize Foreign Money-Judgments: One Down and More to Go, 13 AM. J. COMP. L. 72 (1964).}—and there is more to go, of course. Yet, even in this field, the trend is clear. Since it corresponds to one of the deepest needs and intellectual attitudes of our time—international openness—I believe that this trend, too, once finally unchained, will go very far indeed, possibly within a relatively short time.

I turn now to the third and last of the newly emerged problems: the “social” problem of equal access to justice. No social theory of justice could prevail, of course, on the eve of the French and European Revolution, under the dominance of physiocratic theories nurtured in the hothouse of Louis XV’s Court. A first major step was effected, as we saw,\footnote{See notes 22 & 23 supra and accompanying text.} by the Revolutionary abolition of the privileged jurisdictions and the proclamation of the idea of free administration of justice. Thus, the Revolution eradicated a centuries old custom of having the judges paid by the parties; it did not eliminate, however, all the other expenses of justice, such as lawyers' fees and court costs.\footnote{See, e.g., P. Catala & F. Terré, supra note 22, at 19.} Once more, the bourgeois égalité proved to be a very important, but only partial step. All citizens

\footnote{We should mention another important development which again evidences a growing respect for foreign legal values by the domestic courts of Europe. A line of decisions of the Italian Court of Cassation, initiated in 1959, struck down the traditional conception of foreign law as a mere fact, and affirmed the equal treatment in civil proceedings of national law and of foreign law made applicable by conflict-of-law rules. See Finaly v. Bonnin, Corte di Cassazione, 2d Civil Division, Judgment of Feb. 16, 1966, No. 486, in 118 GIURISPRUDENZA ITALIANA L. 1, 1401 (1966) (with comment by Cappelletti), 91 FORO ITALIANO I, 1549 (1966). For an analysis of the policy implications of this development, which is one manifestation of a trend present in a growing number of countries, see Cappelletti, Mandatory Ex-Officio Application of Foreign Law: The Comparative Method as an Answer in Cases where the Foreign Law Cannot Be Ascertained, 3 COMPARATIVE AND INT'L. L. J. OF SOUTHERN AFRICA 49 (1970); note 158 infra.}
achieved formal equality before the law—yet it is clear today that to
treat the economically and socially disadvantaged on an equal foot-
ing is but another kind of injustice. 97

Very concrete and precise data are available to define the extent
of this problem, as may be illustrated by an examination of the way
the laissez-faire century dealt with the problem of civil justice for
the poor. For example, the French, the Italian, and the German
solutions go back to the apogee period of laissez-faire: 1851, 98
1865, 99 and 1877 100 respectively. They strongly resembled one an-
other and, despite some improvement in Germany, 101 they are, prac-
tically speaking, still the law. These solutions are essentially based
on the idea of the so-called “honorific duty” of the legal profession
to provide free legal aid to the indigent. Poor parties must, of
course, demonstrate poverty and good cause, but once they have
done so they are treated on an equal footing with the rich: free
counsel, free justice—justice for all.

Yet, it goes without saying that in a free market economy unpaid
services tend to be poor. Poor services for the poor! Indeed, it is
an accepted rule in France that the “honorific duty” only applies
to the stagiaires, the young and inexperienced lawyers; 102 the experi-
enced lawyers generously renounce the honor—and prefer to be paid.
Also, in order to be able to demonstrate poverty and, above all, good
cause, the poor, the disabled, and the illiterate need legal advice and

97. See, e.g., P. Calamandrei, Procedure and Democracy 89-104 (New York: N.Y.U.
Press 1956). As noted earlier, a first attempt to deal with the problem of effective
equality of the parties was made in the Austrian Code of 1895. See note 38 supra and
accompanying text.

98. See, e.g., P. Catala & F. Terré, supra note 22, at 20-21; P. Frothier De La

99. See, e.g., Cappelletti, Povertà e giustizia, 94 FORO ITALIANO V, 42, 46 (1969).

100. Zivilprozessordnung of 1877, §§ 114-27. See, e.g., A. Blomeyer, Zivilprozessrecht
740 (Berlin: Springer. 1963); R. Schott, Das Armenrecht der deutschen Civil-
prozessordnung 45, 153-66 (Fenra: Fischer. 1900).

101. Although the German solution was originally based, like the French and the
Italian, on the idea of “honorific duty” (nobile officium) of the lawyers, changes have
been introduced starting as far back as 1919. As a result, German lawyers who handle
legal aid cases are compensated by a state fund. This compensation, however, is based
on a special fee schedule which, particularly in disputes involving larger amounts and
in matrimonial cases, pays much less than the usual fees. It can in no case exceed a
maximum of 216 DM (less than $60), and is limited to 75 DM (about $20) in matri-
monial and some other status cases. See Bundesgebührenordnung für Rechtsanwälte
(BRAGebO) §123 (as amended on October 29, 1969); A. Blomeyer, supra note 100, at
743; L. Rosenberg & K. Schwab, Zivilprozessrecht 429 (München: Beck. 10th ed. 1969);
Heimerich, Das überlebte Armenrecht, 1960 DER BEREIS-BERATER 1071, 1072.

1970); 1 THE INTERNATIONAL LEGAL ASSOCIATION, DIRECTORY OF LEGAL AID AND
ADVICE FACILITIES AVAILABLE THROUGHOUT THE WORLD, under France B 9 (London-New
York 1966); R. Schlesinger, supra note 87, at 103.
help. Even today in Italy, an application for legal aid must be put in writing on special stamped paper and submitted to the legal aid commission attached to the “competent” court; and a meritorious claim or defense must be demonstrated by a “specific” and “clear” statement not only of the facts, but also of the means of proof available and of the legal grounds for relief. Thus, in order to be able to ask for free legal aid, one needs legal aid.

Once again, the dry statistical figures speak with a clear voice. In 1966, a typical year, 449,947 ordinary civil proceedings were initiated in Italy in the courts of first instance, of which only 2,587 were legal aid cases—about 0.57 per cent. What a happy country, where only 0.57 per cent of the people are poor! Everybody knows that, unfortunately, this is not the case. The naked truth is that the doors of the courts of justice are closed and sealed to the poor.

The deception, then, becomes clear. Justice is not equal for all. This fact may be further evidenced by other data, such as those demonstrating the ratio between the amount in litigation and the amount of counsel fees and court costs falling upon the parties. In 1958, Kaplan, von Mehren, and Schaefer indicated that in Germany the ratio ran from 4.1 per cent in larger cases, to fifty-four per cent in smaller ones. Recent research by a noted Spanish proceduralist

103. See M. CapeUetti, La giustizia dei poveri, in PROCESSO E IDEOLOGIE 547-56 (Bologna: II Mulino, 1969) (exploring the snares and delusions in the administration of legal aid in Italy).

104. See ANNUARIO DI STATISTICHE GIUDIZIARIE 1966, at 19, 27 (Roma: Istituto Centrale di Statistica, 1968). The latest issue of the ANNUIARIO contains the data for 1967; the proportion was 0.49%.

Note, however, that in this field the situation in Italy appears to be much worse than that in Germany and France. In France in 1966, out of a total of 441,290 civil cases commenced during that year, 28,105 applications for legal aid were granted, about 6.4%. See ANNUAIRE STATISTIQUE DE LA FRANCE 1968, supra note 59, at 129-30. As for Germany, a proportion of about 20% was indicated in 1958 by Kaplan, von Mehren & Schaefer, Phases of German Civil Procedure II, 71 HARV. L. REV. 1443, 1469 (1958). The same proportion was found for the Land Baden-Württemberg in 1958 by Heimerich, supra note 101, at 1072, and by Koebel, Zivilrichter und Armenrecht, 17 NEUE JURISTISCHE WOCHENSCHRIFT 320 (1964). Based on data from the German Federal Ministry of Justice, we have found the following proportions between the number of civil cases and the number of parties given legal aid before the Landgerichte for the year 1968: Land Hamburg, 23.6%; Land Bremen, 22.8%; Nordrhein-Westfalen, 16%; Hessen, 12.3%; Baden-Württemberg, 11.2%; Bayern, 13.2%; Berlin, 15.5%. The proportions are lower for cases before the Amtsgerichte: Hamburg, 6.6%; Bremen, 8.6%; Nordrhein-Westfalen, 6.9%; Hessen, 6.1%; Baden-Württemberg, 6.9%; Bayern, 11.4%. This is certainly due, at least in part, to the fact that it is not necessary to be represented by a lawyer before these lower courts, and in practice representation of both parties by a lawyer occurs in less than 30% of the cases. See Anlage zur Stellungnahme, supra note 47, at 161.

105. It seems as though little has changed since Ovid wrote: “Curia pauperibus clausa est.” Ovid, AMORES, Lib. III, VIII, 55.

106. Kaplan, von Mehren & Schaefer, supra note 104, at 1464. The proportion of 4.1% was calculated for cases of 1,000,000 DM (about $270,000); that of 54% for cases involving 100 DM (about $27).
gives the following figures for Spain:107 in a typical big case involving 24,000,000 pesetas, the incidence of the costs upon the parties is about six per cent; in small cases, typically poor people cases, it is from fifty to eighty per cent. The sad conclusion of our Spanish colleague is that, "[i]n the majority of cases, justice is a luxury which is not accessible to the proletariat."108 Team research recently conducted in Italy provides even more startling information.109 While in large cases the average incidence of costs upon the parties is as low as 8.4 per cent, the figures rise to between fifty-one and sixty per cent in cases of less than 1,600 dollars; they jump to 170 per cent in cases of less than 160 dollars—clearly an unbearable economic burden. Indeed, this very fact is borne out by the official statistics, which show a tremendous diminution of small claim litigation in the last seventy years. In the courts of the justices of the peace (conciliatori) there were nearly two million cases per year at the turn of the century; in recent years, the average has plummeted to below 50,000 per year;110 while the population has nearly doubled.111 To be sure, the turn of the century was not a period of great social concern in Italy. On the contrary, welfare and other social interventions by the state in the economy have greatly increased since then. Why, then, this shocking, dangerous, and regrettable diminution of accessibility of civil justice to the poor?

The final answer, I believe, may only be given by the economists and sociologists. It is my guess that in a society in which the economic and social changes during the last quarter of a century have by far surpassed changes that had occurred in the course of many generations, the machinery of civil and commercial justice, if it is not radically, revolutionarily modernized and changed, is doomed to explode. Defects not only remain; they grow geometrically more aggravating. And it is indeed little wonder that those who are systematically excluded from the official justice are turning to violent methods of self-help.

As you see, our survey of modern trends of reform has brought us to another urgent and immense need for change that is typical of our epoch—and certainly not in Europe alone. It is the need for greater

107. See de Miguel, Los costos y las costas en el proceso civil español, 1969 Revista de Derecho Procesal Iberoamericana 901, 928-33.
108. Id. at 933.
110. See C. Castellano, C. Pace & G. Palomba, supra note 109, at 82-83.
social justice. The need is felt—and the trend is apparent. Of course, conditions are very different from one area to another; they are worse in Spain and Italy than in Germany or France, as they are worse in Germany and France than in Sweden. Yet, they were also very bad in Sweden only two or three generations ago. The difference is one of timing, not of trend. In Italy, for instance, after a stagnation of more than one century, a bill for a far-reaching reform of the legal aid system is finally under discussion in Parliament,112 as a result, in part, of the pressure of constitutional requirements.113 The bill provides for a national public fund to compensate the private practitioners who assist indigent persons—a form of social “judi-care.” Elsewhere on the Continent, too, reformist zeal is growing in connection with this and other social aspects of civil justice.114 Since 1949, England, perhaps more than any other country, has become the model generally looked to by European reformers in the field of legal aid,115 although Europeans are well aware also of the tremendous strides in this field made in contemporary America.116

V. DEVELOPMENTS IN COMMUNIST EUROPE

Since extreme social injustice was one of the major factors leading to the Russian Revolution of 1917, it seems appropriate to discuss briefly those countries of Eastern Europe, which, after the “great
schism” alluded to before, now form the new “legal family” of Socialist law.

To a certain degree, pre-1917 Russia as well as pre-World War II Rumania, Bulgaria, Albania, and, to an even greater degree, all of the other nations that now form the Marxist-Socialist part of Europe were but a part of that major legal family called the Civil Law.117

Up to the October Revolution in Russia, and to the end of World War II in the People’s Democracies, our earlier story applies, then, to all of these nations. The 1864 Russian Code of Civil Procedure, as well as the 1865 Code of Rumania, were strongly influenced by the French Code;118 the Hungarian Code of 1911, as well as the later codes of Yugoslavia and Poland, were modeled on the German and particularly the Austrian codes of the end of the last century.119 In Eastern Europe too, then, the story is that of a reaction against the jus commune type of procedure, and recourse to “orality,” immediacy, concentration, free evaluation of evidence—in other words, a move toward more simplicity, spontaneity, rapidity, and efficiency in the administration of civil justice. The sparse data available seem to confirm, at least for the twentieth century codifications, a certain success in achieving these goals.120

Unfortunately, data concerning pre-revolutionary Russia have been out of my reach. In particular, I have no concrete statistical proof to confirm my general impression that civil procedure, based on the Russian Code of 1864, was far from successful. What we do know, however, is demonstrative enough. The centuries old tradition in Czarist Russia included two significant characteristics. On the one hand, there was a sharp differentiation between law, particularly the written law, which was accessible only to a minor elite, and custom, which was in force among the bulk of the popula-


119. See notes 39, 42, and 43 supra and accompanying text.

120. This success seems to be illustrated by the duration of civil proceedings in pre-World War II Czechoslovakia. For instance, in 1936, 74.4% and 44.9% of civil proceedings in the lower and the higher courts of first instance respectively were terminated within six months. (Statistics provided by the Czechoslovakian Ministry of Justice through the courtesy of Dr. V. Steiner). Note that the Austrian Code of 1895 and the Hungarian Code of 1911 remained in force after 1918 in the two parts of the new state of Czechoslovakia which had belonged previously to Austria and Hungary. See Weiss, Das tschechoslowakische Zivilprozeßrecht, in DER ZIVILPROZESS IN DEN EUROPÄISCHEN STAATEN UND IHREN KOLONIEN, supra note 39, at 251, 252.
tion. On the other hand, the official, centralized, feudalized machinery of state and justice was totally extraneous—indeed, even hostile—to the people, both in the countryside and the towns. Hence, the great explosion, with its profound repercussions even in our apparently so technical subject—civil procedure.

Understandably, the first field of procedural reform was that of the courts' personnel. Indeed, transforming the rules of procedure would have had little social and ideological significance without a change in the judge's social background. Thus, the reformers decided to have judges elected popularly and for limited terms, although under the "guidance" of the omnipotent Communist party; to provide for participation of lay judges in deciding both the facts and the law; first to abolish, and then to reorganize on a "collective" basis the bar (Advokatura); finally—and here again the authoritarian character unfortunately prevails over the social aim—to give full powers of intervening in, and even initiating, civil cases to the mighty bureaux of the Prokuratura (which might be translated as the Office of the State Attorney).

Next came reform in the field of procedure proper: abolishing the monopoly of the private parties and their counsel in conducting

121. See R. David and J. Brierley, supra note 117, at 185-37.
122. Fedor Dostoevsky incisively described this situation in his first novel, Poor Folk (New York: E. P. Dutton, 1927). After waiting many years in misery for the decision of his suit to collect a debt from a merchant, Gorskiov, one of the novel's characters, could not survive the excitement of the long delayed victory.
125. See, e.g., R. Conquest, supra note 123, at 32-39; Barry & Berman, supra note 123, at 8-17; Friedman & Zile, Soviet Legal Profession: Recent Developments in Law and Practice, 1964 Wis. L. Rev. 32, 33-39.
civil litigation; establishing firmly the power as well as the duty of the judge, in addition to the Prokuratura, to search for the “objective truth” behind and beyond the allegations of the parties; requiring the court to assume the role of “assisting” and “advising” the parties, particularly those not represented by counsel; finally, placing strong emphasis on the “mass education” character of civil proceedings, which are to be “celebrated” in public, possibly in the factory, the kolkhoz, or the dwelling where comrades and neighbors of the litigants may be induced to attend.

These, then, are the general characteristics of Soviet civil procedure as they are reflected in the 1923 and 1964 codes for the Russian Soviet Federative Socialist Republic, in the codes of the other


131. The RSFSR, centering around Moscow, is by far the most important and most populous of the Soviet Union’s Republics. The 1923 Code is translated into English in
Soviet Republics, as well as in the Union's Basic Principles of Civil Procedure of 1962. With noteworthy but not overly impressive variations, in the past twenty-five years these have also become the general characteristics of civil procedure in the other European countries of the Communist orbit—although I should immediately add that, in many respects, in most of these countries the changes in the field of civil procedure have not been quite so revolutionary as in Russia. In fact, the Austrian Code, imitated in most of those countries' pre-war legislation, had already provided that the judge be very active in controlling and speeding up litigation and be concerned with his role in "assisting" and "educating" the economically and intellectually weaker party. Franz Klein's definition of civil procedure as a Wohlfahrtsrichtung, an institution for the collective welfare, is well known.

About how all of this, old and new, actually works today in Eastern Europe, I know too little. Of course, the impression of an


132. As a prominent Soviet proceduralist informs us, the 1964 Code of Civil Procedure of the RSFSR was the first to be compiled and has served as the model for the codes of the other republics of the Soviet Union. As a result, differences among the various codes are minimal. See Gurvic, La nuova legislazione processuale civile nell'URSS, 22 Rivista Trimestrale di Diritto e Procedura Civile 710, 714 (1968). The same was true for the Code of 1923. See Gsovski, The Soviet Union, in 1 Government, Law and Courts in the Soviet Union and Eastern Europe 1, 15 (V. Gsovski & K. Gzibowski eds. London: Stevens & Sons, 1959).

133. The 1962 Principles, providing a binding guideline for all the Union Republics, is translated into English in 7 Law in Eastern Europe: Miscellanea 299-317 (Leyden: Sijthoff, 1963).

134. See, e.g., M. Cappeletti, Interrogatorio della parte e principii fondamentali del processo civile nell'Europa comunista, in Processo e Ideologie, supra note 103, at 35-36.


136. Regarding the problem of duration of civil cases, I owe to the courtesy of Professors V. Steiner of Prague, H. Kellner of East Berlin, E. Wengerek of Poznan, and J. Stalev of Sofia, the following official statistics:

In Czechoslovakia, in 1968 the average duration for civil proceedings in courts of first instance was: 48.8% terminated within a final judgment within three months; 25.4% between three and six months; 16.7% between six months and one year; 6.8% between one and two years; and 2.3% lasted more than two years.

In East Germany the figures for 1969 concerning ordinary civil proceedings of first instance, excluding summary ex parte proceedings and family law matters, were as follows: (1) before the Kreisgerichte, 76.9% of the cases were terminated within three months; 14.1% between three and six months; 9% took more than six months; (2)
inquisitorial, authoritarian, or, at best, paternalistic system of civil litigation, with all its dangers of abuse, is not easily avoided. No doubt, true social justice should be an instrument to enhance, not to tramper on, the individual's liberties. However, I do know enough of how the Western systems work in practice. The possibility of justice being unavailable under a strictly adversarial system of litigation has become apparent enough in the Western world to make easy the prophecy that, without prompt and deep social changes, more and more mass social explosions will occur.

VI. TOWARD A MORE ACTIVE ROLE FOR THE JUDGE

At least in its conception of a more active role for the judge, the radical Communist solution, excessive and illiberal as it has only too often proved to be, nevertheless appears to be in the mainstream of a great current of legal thought and a powerful trend of procedural reform, which both have their roots within as well as outside the Old Continent. We must have the courage to admit this fact—and to admit that this is perhaps one of the major converging trends between East and West, a trend evident even in the United States.

When in 1906 an "obscure young professor of law at Nebraska" delivered an address to the American Bar Association entitled The Causes of Popular Dissatisfaction with the Administration of Justice,

before the Bezirksgerichte, 44.4% were terminated within three months; 11.1% between three and six months; 44.5% took more than six months. The figures for the preceding five years were about the same.

In Poland, during the years 1963-1967, the average duration of proceedings of first instance before the District Courts (which, according to article 16 of the Polish Code of Civil Procedure, have broad general jurisdiction) was between 3.1 and 3.7 months.

In Bulgaria, in 1969, only 9.5% and 8.3% of the civil proceedings of first instance before the People's Courts and the Provincial Courts, respectively, required more than three months for completion. The figures for the preceding three years were similar.

137. This is so not only on the Old Continent. In the words of a noted American scholar: "It is doubtless true that the theory of our adversary system is attractive in statement . . . but it seldom fits the facts in modern litigation. If it were to operate perfectly, both parties would have the same opportunities and capacities for investigation, including the resources to finance them, equal facilities for producing all the discoverable materials, equal good or bad fortune with reference to availability of witnesses and preservation of evidence, and equal persuasive skill in the presentation of evidence and argument. The case is rare where there is even approximate equality in these respects. . . ." E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 34 (New York: Columbia University Press, 1956), Also see F. James, Civil Procedure 7 (Boston: Little, Brown, 1965) ("Anything that the law of procedure or the judge's role can do to equalize opportunity and to put a faulty presentation on the right track so that disputes are more likely to be settled on their merits, will in the long run bolster up rather than destroy the adversary system, and will increase the moral force of decisions").

138. See note 38 supra and accompanying text (Austria and Germany); note 59 supra (France). For a comparative survey see Habscheid, note 38 supra.
the reaction of his audience was "a huge storm of indignation. Indeed, the first result of Dean Pound's indictment was that most of the morning's business session the next day was given over to speeches by various leaders of the bar upholding the existing procedures as 'the most refined and scientific system ever devised by the wit of man' and vilifying Pound's address as an attempt to destroy that which the wisdom of the centuries had built up." 139 Pound had the audacity to attack mercilessly that sanctuary of Anglo-American law which he contemptuously called "the sporting theory of justice"—the acceptance "as a matter of course that a judge should be a mere umpire, ... and that the parties should fight out their own game in their own way without judicial interference"; 141 he challenged "the idea that procedure must of necessity be wholly contentious" and that the judge "is merely to decide the contest, as counsel present it, ... not to search independently for truth and justice." 142

What in 1906 could still appear as a scandalous and unjustified indictment, however, is today but a broadly accepted truth. As Judge Irving R. Kaufman said at a seminar of prominent American judges and lawyers in 1961, "our current emphasis on early judicial intervention is ... the culmination of the efforts of many of our greatest legal thinkers to induce the judges to ... take an active part in the control of litigation .... Contrary to what most of us have accepted as gospel, a purely adversarial system, uncontrolled by the judiciary, is not an automatic guarantee that justice will be done." 143 Of course, Americans still have a long way to go in this direction, especially if it is even partly true, as Judge Kaufman asserted nine years ago and the Chief Justice of the United States reiterated as recently as August 10, 1970, that in many respects "the similarities are still striking" between the situation in 1906 and the present day situation. 144 Yet, many European and other civil-law countries, particu-

140. Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 8 Baylor L. Rev. 1, 14, 24-25 (1956) (previously published in 40 Am. L. R. 729 (1906)).
141. Id. at 14.
142. Id. at 14-15.
143. Kaufman, supra note 139, at 208, 211.
144. Id. at 210; Burger, The State of the Judiciary—1970, 56 A.B.A.J. 929, 933 (1970). Chief Justice Burger states: "If you will read Pound's speech, you will see at once that we did not heed his warning, and today, in the final third of this century, we are still trying to operate the courts with fundamentally the same basic methods, the same procedures and the same machinery he said were not good enough in 1906." Id. at 929.
larly in the Latin areas of Europe and America where the Austrian model of a socially concerned judicial activism has not yet been implemented, have an even longer way to go in this universal quest for effective, accessible, and truly democratic justice.

To be sure, procedure and procedural techniques are not the only tools in this quest. Reforms outside the field of procedure are of primary importance. But as long as an adversarial system of litigation provides a privileged position for the economically stronger party, social reforms limited to substantive law are insufficient. For example, socially progressive labor law is well developed in Italy; yet labor proceedings, with their unbearable duration, put the economically weaker party at a disadvantage. As in the field of substantive law, so in that of procedure the better way to meet the challenge of our time is not by sticking to old *laissez-faire* schemes, but rather by trying to reconcile private initiative with an appropriate degree of official control.

The final comment on this problem can be that of Dean Charles W. Joiner: "'No one wants to be a radical.' Few lawyers wish to be so characterized, yet procedure reform and honest appraisal demand radicals." 146

VII. Procedure and Ideologies

"Prophecies," politics, ideologies: what has all this to do, one might ask, with civil procedure? This question leads us to my last point.

Indeed, civil procedure has traditionally been considered a very technical branch of the law—the technical branch *par excellence*; and as a mere technique it has usually been studied and taught. Only too rarely have its ideological foundations, its philosophical background, its socio-political impact been analyzed. 147

was the pretrial conference as a means of judicial activism in the conduct of proceedings. These hopes have been, in part, disappointed. See M. Rosenberg, *The Pretrial Conference and Effective Justice* 28-70 (New York: Columbia University Press, 1964). This failure of the pretrial conference is not surprising to a European observer; it was simply the wrong institution. In those European countries where the intervention of the judge in the conduct of proceedings has proved to be successful (Austria, Sweden, etc.), the fundamental institution for this intervention has been conference between the judge and the parties (assisted, but not substituted, by their lawyers). See, e.g., R. Ginsburg & A. Bruzelius, *Civil Procedure in Sweden* 244 & n.115 (The Hague: Nijhoff, 1965).


147. For an effort in this direction, see M. Cappelletti, *supra* note 105.
Such an analysis, however, is indispensable once the proceduralist becomes aware that no legal technique is an end in itself, none is ideologically neutral. Take, for instance, the “formal,” numerical system of proof. Not only was it a reflection and a crystallization in the field of procedure of a hierarchically structured, nonegalitarian society—the superiority of the nobleman, the clergyman, the rich, over the commoner, the layman, the poor—but it was also a direct reflection and a legal imposition of an a priori, scholastic method of thinking. This method based the discovery of facts not on concrete observation and empirical case-by-case evaluation of factual and evidential phenomena, but on abstract premises once and for all accepted as “absolutes,” from which the “truth” had to be derived in a mechanical way. This was the mentality—the Ptolemaic method of thinking—of the epoch; it was faithfully mirrored in the courts.

Everybody knows of the great intellectual revolution that, led by such pioneer spirits as Galilei, Bacon, and Newton, introduced what we now call the modern era in human thinking, characterized by the primacy of observation, of trial and error methodology—in sum, the scientific method as opposed to the dogmatic and scholastic one. This revolution, too, is reflected in the law of procedure and evidence. As the beliefs of the man of science are, in the words of Bertrand Russell, “tentative, not dogmatic; they are based on evidence, not on authority,” so are those of the modern judge. When Voltaire inveighed against some of the basic rules of the formal system of proof still prevailing in his time, exclaiming that “it is for the judges to weigh the value of the testimony” and the witnesses’ sincerity, the new common sense was speaking through him. And so was the new common sense guiding Napoleon when he attacked another of the old basic rules. He found it unacceptable that one honest man’s testimony could not be received as evidence,

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148. See note 11 supra and accompanying text.

149. For instance, one “absolute” affirmed by Thomas Aquinas himself was that “mulier est minoris virtutis et dignitatis quam vir” (women are of lesser virtue and dignity than men); hence, the exclusion of women from giving evidence, or their lesser weight as witnesses. See 2 G. SALVIOLI, supra note 8, at 430. Other basic rules of the numerical system of proof derived their purported absolute character from sacred texts. Thus, the rule that excluded the testimony of one single witness and the rule that considered two uncontradicted witnesses to be full proof binding on the court were based on passages in the Bible. See, e.g., 7 J. WIGMORE, supra note 6, at 242-43, esp. n.6.


while that of two rascals ("deux coquins") had to be accepted as full proof.\textsuperscript{152} Indeed, the formal system of proof was soon to collapse—in France first, and then elsewhere. Common sense cannot be kept out of the courts for too long.

And so it is with all of the other aspects of procedure. Take, as another example, the relationship between the individual and the authorities. Secrecy of civil and, even more so, criminal proceedings was clearly a manifestation of oppressive authoritarianism. It necessarily came under heavy attack during the liberal European revolution that swept through the Old Continent from the end of the eighteenth century to the middle of the nineteenth. Two significant results were the abolition in revolutionary France of the secret character of the taking of testimonial evidence and the proclamation of publicity and orality of proceedings as fundamental rights of man in the principal constitutional documents stemming from the uprisings of 1848-1849.\textsuperscript{153}

So it is also with the relationship of the individual to society. The last two or three decades of the nineteenth century witnessed the incipient decline, on the one hand, of \textit{laissez-faire} conceptions in the organization of society, and the emergence, on the other hand, of new labor organizations as political forces. This development marked the commencement of social and welfare legislation in the more progressive nations, evidenced, once more, by the Austrian Code of 1895 with its conception of civil procedure as an educational tool and an institution for social welfare,\textsuperscript{154} an idea which had a deep influence on the modern legislation of other countries. Moreover, whereas nineteenth century individualism was manifest in the conception of civil procedure as a private affair of the parties—\textit{Privatsache der Parteien}\textsuperscript{155}—the movement toward a more active in-

\textsuperscript{152} See F. Gorphe, \textit{L'appréciation des preuves en justice} 35 (Paris: Sirey, 1947); J. Wigmore, \textit{supra} note 6, at 256 n.3.

\textsuperscript{153} On the Revolutionary abolition of the \textit{principe du secret de l'enquête}, see note 24 \textit{supra} and accompanying text. On orality and publicity of proceedings, both criminal and civil, proclaimed in the Declaration of Fundamental Rights by the National Assembly at Frankfurt in December 1848 and in the \textit{Reichsverfassung} of March 1849, see, e.g., R. Schmidt, \textit{Lehrbuch des Deutschen Zivilprozessrechts} 104-05 (Leipzig: Duncker & Humblot. 2d ed. 1906).

In pre-Revolutionary France, the campaign against secrecy of procedure (particularly in criminal cases) as a manifestation of oppressive authoritarianism was led by Voltaire. See J. Dawson, \textit{supra} note 21, at 376-77.

\textsuperscript{154} See note 135 \textit{supra}, and accompanying text.

\textsuperscript{155} This conception, already affirmed in the French \textit{Code de procédure civile} of 1806, was also basic to the Italian Code of 1865 and to the German Code of 1877. See, e.g., M. Cappelletti \& J. Perillo, \textit{supra} note 1, at 41; H. de Boor, \textit{Einzelmacht und Kollektiv im italienischen und deutschen Zivilprozess} 13, 61 (Göttingen: Schwartz, 1955); R. Morel, \textit{supra} note 10, at 7-8, 344-46. For later changes in Germany and France, see notes 38 and 59, \textit{supra}. 

\begin{thebibliography}{9}
\item \textsuperscript{152} See F. Gorphe, \textit{L'appréciation des preuves en justice} 35 (Paris: Sirey, 1947); J. Wigmore, \textit{supra} note 6, at 256 n.3.
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\end{thebibliography}
volvement of the judge in controlling litigation reflects the growing pressure for public intervention in private life which is a feature of our epoch. Indeed, this renewed clash between the adversarial and the inquisitorial approaches to litigation is but one aspect of the major challenge of our time: to reconcile private freedom with social justice. Of course, it is with the Communist Revolution that these developments have been brought to striking proportions. The basic ideology of the Revolution proclaims the abolition of private economic rights. As Lenin affirmed in 1922: "We acknowledge nothing as 'private.' For us everything in the province of economics is in the domain of public law and not of private law."\[156\] Traditionally, however, the contents of civil litigation had been and, in the Western world, still are "in the province of economics" and, more generally, of "private law." The sweeping movement to make that province "public" in the Communist states, then, is clearly the ideological foundation of all those radical—and, in our eyes, probably excessive—changes in the field of Socialist civil procedure of which we spoke before. The movement also explains further phenomena which cannot be analyzed here, such as the sharp reduction of the sphere of civil procedure proper.\[157\]

And so it is finally with the relationship between the state and the international communities of nations. In this area we notice a growing international openness in the trend toward more liberal recognition of foreign values, both on the legislative and the judicial levels. This is reflected in civil procedure as a new spirit in the application of foreign law\[158\] and the recognition of foreign judg-

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157. This reduction is understandable given the transfer of a great portion of those private economic relationships that in the West are the most frequent subject matter of civil procedure to the sphere of the state economy, in which organs other than the ordinary courts have jurisdiction. One aspect of this development is the institution of state arbitration bodies to settle economic disputes between organizations holding cooperative or state property. See, e.g., R. David & J. Brierley, supra note 117, at 187-93; Stalev, L'arbitrage d'Etat en République populaire de Bulgarie, 9 REVUE DE DROIT CONTEMPORAIN 117 (1962-63).

158. This is true for both Europe and the United States. See Sass, Foreign Law in Civil Litigation: A Comparative Survey, 16 AM. J. COMP. L. 332, 365-71 (1968). "The current trend in American jurisprudence is to discard the doctrine that foreign law is fact, to have the court rather than the jury decide questions of foreign law, and to permit the court to take judicial notice of the content of the law of foreign nations. This trend continues notwithstanding the defense of the common law methods of pleading and proving foreign law by several highly authoritative commentators." H. Smit & A. Miller, THE INTERNATIONAL JUDICIAL ASSISTANCE IN CIVIL MATTERS WITH SPECIAL REFERENCE TO THE RELATIONS BETWEEN ITALY AND THE UNITED STATES 74 (Milan: Giuffre. 1961). See Fed. R. CIV. P. 44.1 (added Feb. 28, 1966). For Europe, see generally the Symposium on DIE ANWENDUNG AUSLÄNDISCHEN RECHTS IM INTERNATIONALEN PRIVATRECHT, esp. at 35 (Berlin-Tübingen: de Gruyter-Mohr. 1966);
ments,\textsuperscript{160} and as a changing mood in the international cooperation in litigation.\textsuperscript{160} Here, of course, reform is only beginning. The international organizations still are in the initial stage. Their growth, however, is in sight. It is bringing about a new international dimension even in the domestic courts of the member states.

VIII. THE PROCEDURALIST’S ROLE

I have given only a few examples of the close connection of civil procedure with the intellectual and political apparatus of society, and I could go on. But my time has run out, and I wish to conclude.

My conclusion is addressed to the subject that is the proceduralists’ vital concern: the “science”—or simply the study—of civil procedure.

Today, it is only too clear that the happy times are past when procedural scholars could be content with a purely technical study of local practices and rules. By now, we have discovered that, embodied in those practices and rules, are the great waves of history: the socio-economic as well as the intellectual changes, revolutions, and stagnations of history. We have also discovered the remarkable importance of comparative studies as an approach to reform. Finally, we have discovered—and I quote from Franz Klein—that “the squalid, arid,

\textsuperscript{160} See notes 87, 93, 94 supra and accompanying text; M. Cappecletti, El valor de las sentencias y de las normas extranjeras en el proceso civil, esp. pt. I (Buenos Aires: Ediciones Jurídicas Europa-América, 1968).


\textsuperscript{160} For a country-by-country survey of the various forms of assistance rendered by one state in connection with judicial proceedings in another, see INTERNATIONAL CO-OPERATION IN LITIGATION: EUROPE (H. Smit ed. The Hague: Nijhoff, 1965). The volume also covers recent legislative developments in the United States, including Fed. R. Civ. P. 4(f) and 28(b) (as amended Jan. 21, 1968). Id. at 409-64.

In this context, the 1964 Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, as well as the 1968 Draft Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, should also be noted. The two documents are reported in 13 Am. J. Comp. L. 620 (1964) and 16 Am. J. Comp. L. 594 (1968), respectively. See generally F. Pocar, L'assistenza giudiziaria internazionale in materia civile (Padova: Cedam, 1967).
neglected phenomenon of civil procedure is in fact strictly connected with the great intellectual movements of peoples; and that its varied manifestations are among the most important documents of mankind's culture.\textsuperscript{161}

Thus, the proceduralists' task has grown to enormous proportions. We once considered ourselves the priests of a neutral science or art. Now we have learned that history and political science, economics and sociology have become necessary ingredients of our work. We also once believed that law and procedure were the net product of local and national situations. Now we have learned that an insulated study of law and procedure, sealed within local and national boundaries, does not correspond to the growing international dimension of our epoch.

The difficulty of such a task fills us with a sense of fear. What, then, does our epoch demand of us?

The answer, however, is as simple as it is clear. We must definitely reject the traditional deceptions that are not worthy of us, of our students, of our readers. Procedure is not pure form. It is the meeting point of conflicts, of policies, of ideas. It is the "Cape Wrath" where Rapidity and Efficiency have to be combined with Justice; it is also the "Cape of Good Hope" where Individual Liberty has to be combined with Equality of Opportunities. Procedure is, in fact, the faithful mirror of all of the major exigencies, problems, and trials of our epoch—of the immense challenge of our time.

Here, my fellow proceduralists, is our challenge. Here is our work.

\textsuperscript{161} F. Klein, supra note 135, at 8. See also P. Calamandrei, supra note 97, at 76 ("... the judicial process reflects the ... structure of the state, just as a drop of water reflects the sky").