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Two Valuable Treatises on Civil Procedure

Geoffrey C. Hazard Jr.

University of Pennsylvania Carey Law School

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TWO VALUABLE TREATISES ON CIVIL PROCEDURE

REVIEW BY GEOFFREY C. HAZARD, JR.*

ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM. By Neil Andrews. Oxford, England: Oxford University Press, 2003. Pp. cvi, 1073. ISBN 0-19-924425-1.

GERMAN CIVIL JUSTICE. By Peter L. Murray and Rolf Stürner, with a Foreword by Arthur T. von Mehren. Durham, North Carolina: Carolina Academic Press, 2004. Pp. xxxix, 670. ISBN 1-59460-003-1.

These two works present technically accurate, clearly written, and very illuminating analyses of civil procedure in two leading legal systems, those of England and Germany. Both books no doubt will soon be found in all substantial law school libraries. Both should be found in libraries of law firms whose practice involves more than occasional disputes in European courts.

These two studies reflect the evolving convergence of civil procedural systems in modern constitutional regimes. In the older tradition, England and Germany were the prototypes of the common law and civil law systems, respectively, the former being the “lawyer centered adversary system,” the latter the “judge centered inquisitorial system.” However, as these works demonstrate, the modern modifications in each regime have moved them towards each other. In particular, the new English system places primary authority and responsibility on the judge to give direction to the proceedings in major civil disputes, while the German system enhances the role of the advocates. In comparison with these and other systems originally derived from Europe—for example, Canada, Japan and Latin America—the American version remains distinctive for its extensive discovery and reliance on the jury.

* Trustee Professor of Law, University of Pennsylvania Law School.

I. ENGLISH CIVIL PROCEDURE¹

English Civil Procedure is written primarily for barristers and solicitors engaged in litigation in England. In format, style, and level of technicality, it is similar to one-volume treatises on American procedure, such as Charles Wright's treatise on federal courts and the original version of *Moore's Federal Practice* before that work was expanded into its present multi-volume form. Andrew's work is based upon and explains the "New Civil Justice System" in England, which is the revised code of civil procedure, familiarly known as "Lord Woolf's Rules."² That new code ("new English rules") came into effect in England and Wales in 1999, after much discussion in 1995 and 1996.

English Civil Procedure is written from a perspective internal to litigation in the English courts. In aim and achievement, it is a statement of what the law of English civil procedure "is," a guide in practice, and a source for citation to courts. Accordingly, the volume quotes the new English rules, provides historical comparison to the counterpart rules under prior procedural law, and comments on their purpose, conflicting policy objectives, and ambiguities in the formulations. The scope is comprehensive, including not only conventional subjects such as jurisdiction, pleadings, pretrial procedures, and trial, but it also reviews the laws of evidence, appeal, and enforcement of judgments. Perhaps equally valuable is the matter-of-fact, professional style. In reading various passages, one gains a sense of being in an actual English civil proceeding.

The author of *English Civil Procedure* is Neil Andrews, Lecturer in Law at Clare College, Oxford, and a member of the English bar. Although not an active practitioner, he has substantial legal experience and has taught the subject for some years. Andrews has also been exposed to the law of civil procedure in other systems, both in the civil law of continental Europe and in other common law systems, including Canada and the United States. He was a valuable and constructive member of the Working Group of the International Organization for Unification of Private Law (UNIDROIT), which has recently

1. See also ADRIAN A. S. ZUCKERMAN, *CIVIL PROCEDURE* (2003), another new book on English civil procedure. . .

2. Civil Procedure Rules, 1998, S.I. 1998/3132 (U.K.).

compiled the American Law Institute/UNIDROIT Principles of Transnational Civil Procedure.³ Although Andrews's perspective when addressing English civil procedure is that of home ground, his comprehension is cosmopolitan. A legally trained reader from another country will not be baffled by unexplained usages peculiar to English law. As Lord Woolf writes in his Foreword, "This is a serious book. I hope it reaches a very wide audience."

II. GERMAN CIVIL JUSTICE

German Civil Justice is by Peter Murray, an American practicing lawyer and adjunct professor of law at Harvard, and Rolf Sturner, a German jurist who is both an appellate judge and professor of law at Freiburg. Murray has taught a course in American civil practice for many years and has occasionally taught in Germany, as he is fluent in German. Judge Sturner has taught comparative procedure at Harvard, Freiburg, and elsewhere, as well as basic civil procedure in Germany. He is also fluent in English. Judge Sturner was Co-Reporter in the ALI/UNIDROIT project on Principles of Transnational Civil Procedure, and his participation was fundamental to the project's success. He continues periodically to visit Harvard Law School as a scholar and lecturer. Murray and Sturner have been working together for several years to bring forth this excellent work. As Professor von Mehren writes in his Foreword, it is "an outstanding contribution to comparative scholarship in an especially difficult field of law."

The viewpoint in *German Civil Justice* is external, that is, an explanation to an English-speaking legal audience of the ethos, concepts, and mechanics of German civil procedure. There are abundant technical references to the *Zivilprozeßordnung*, or (Germany's civil procedure statute) and to interpretive decisions. The book's scope and framework include jurisdiction, pleading and initial stage proceedings, provisional remedies, decision procedure and judgment, and appeal. The primary purpose is not to be a source for German lawyers, but a vehicle for English-speakers wishing to understand how the German system works. That purpose is well fulfilled, not only for scholars in comparative law, but also for

3. AM. LAW INST., ALI/UNIDROIT PRINCIPLES AND RULE OF TRANSNATIONAL CIVIL PROCEDURE: PROPOSED FINAL DRAFT (2004).

common law practitioners—in the United States and in other countries—who want a basic grasp of that system. The authors' experience in practice adds depth and subtlety in an account that also qualifies as an academic exposition.

III. THE ENGLISH REFORM OF CIVIL PROCEDURE COMPARED WITH THE U.S. FEDERAL RULES OF CIVIL PROCEDURE

The reform movement that led to the new English rules, addressed by Andrews in *English Civil Procedure*, was much like that for the U.S. Federal Rules of Civil Procedure ("Federal Rules") between 1934 and 1938—from the Rules Enabling Act to the adoption of the Rules by the Supreme Court. That is, the whole English system was brought under scrutiny, changes were made from the ground up, and the objective was to overcome the evils in the previous system identified as "cost, delay and complexity."⁴ For one, the objectives for the new English rules are substantially identical to those announced in the Federal Rules: "[T]o secure the just, speedy, and inexpensive determination of every action."⁵ Also like the Federal Rules, the new English rules have been controversial among both the English legal profession and academia. Similar to the Federal Rules, amendments and additions to the new English rules have proved necessary, and there has been even further modification through decisional law. The multi-volume treatises required to interpret the Federal Rules are monuments to that experience. No law reform is ever final, and it will not be for the new English rules either.

A principal feature of the new English system is that primary control of the proceedings rests with the judge rather than with the advocates on behalf of the parties. Thus, what pejoratively has been called "managerial judging" in the United States⁶ is adopted as a basic reform in the English system. Furthermore, the new system differentiates between simple cases that the court should send along a "fast track" and

4. NEIL ANDREWS, *ENGLISH CIVIL PROCEDURE* § 2.06, at 31 (2003). The three problems were first identified by the Civil Justice Review ("CJR") of 1988. Lord Woolf, appointed by Lord Mackay, the Lord Chancellor, in 1994 to review the English civil procedure system, drew upon the CJR's findings in writing his interim and final reports. Lord Woolf's reports served as the catalyst for the new civil rules. *Id.*

5. FED. R. CIV. P. 1.

6. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982).

complex cases that go on a “multi-track” route.⁷ Several factors determine whether a case falls into one or the other of these categories; these include the amount in controversy, the number of parties, the complexity of the legal and factual issues, the duration of anticipated trial (complexity of evidence, amount of oral testimony), and the possibilities of settlement.⁸ American proceduralists will recognize similar considerations identified as material for pre-trial conferences, as laid out in the Federal Rules: “complex issues, multiple parties, difficult legal questions, or unusual proof problems,” as well as the possibilities of settlement.⁹

The modern common law approach to civil litigation is to bring together all claims and parties whose interests arise out of a single out-of-court transaction or series of related transactions.¹⁰ Most cases are simple; they have few claims and even fewer parties. But in modern mass society some cases are complex, as defined by the new English rules and the Federal Rules. That complexity is the practical imperative for managerial judging. One can imagine advocates satisfactorily administering a case with only two sides, particularly one in which the claims are severely confined as in the old common law forms of action. Organizational questions, problems, or disputes would be remedied through bilateral interaction. But that is impossible in multi-party litigation, by reason of the different dynamic created by having three or more participants. For example, it is notorious that with multiple plaintiffs, and especially with multiple defendants, someone usually has incentive to hold out their side for special dispensation. Managerial judging is necessary to keep these complex cases on track and to solve internal administrative disputes among the parties. The new English rules have embraced this type of procedure.

Although the new English rules place heightened responsibility on judges, the pretrial stage still requires that the parties fulfill important requirements. These include: 1) A requirement that the plaintiff’s statement of the case include “a concise statement of the facts on which the claimant relies,”

7. ANDREWS, *supra* note 4, § 2.36, at 40, §§ 13.26 et seq., at 340.

8. *Id.* § 2.36, at 40, § 2.47, at 43.

9. FED. R. CIV. P. 16(c)(12), 12(c)(9).

10. *See, e.g.*, FED. R. CIV. P. 18, 19; RIGHT HONOURABLE LORD JUSTICE BROOKE, CIVIL PROCEDURE § 19, at 365 (2002).

known as a "fact pleading";¹¹ 2) Disclosure by a party of documents on which that party will rely or that adversely affect that party's case, or which support or adversely affect another party's case;¹² 3) Submission of written statements of evidence of witnesses (these can be prepared by counsel);¹³ and 4) Submission of written reports of experts.¹⁴

These requirements differ significantly from American procedure; however, the differences can be considered ones of degree rather than kind. In practice, most pleadings under the Federal Rules are submitted in detail corresponding to the requirements of fact pleading, and the English—and even German—systems essentially had always required the same degree of detail. Under all three systems, parties must disclose documents on which a party affirmatively intends to rely or to offer in refutation. Use of expert testimony is common, although the German system relies much more heavily on court-appointed experts rather than party-retained experts.

Overall, as illustrated by Andrews's work, there are very important institutional differences between American procedure and the English variety, even though both are rooted in the common law. Interestingly, there exist the same institutional differences between American and German procedure, even though Germany is a civil law system. These differences are identified below.

IV. CIVIL PROCEDURE IN A MODERN CIVIL LAW SYSTEM

German Civil Justice is especially valuable in establishing a picture of a modern civil law system at work, for the authors bring to bear their knowledge as practitioners as well as their academic expertise in the law. Germany's civil procedure is an exemplar of the civil law type, notwithstanding that there are important differences between Germany's version and those of the civil law systems in Latin countries such as France, Italy, Spain and the nations of Ibero-America. The basic differences between Germany and other civil law countries are that (1) the German judges—and those of some other Northern systems—actively employ the powers of judicial direction conferred by

11. ANDREWS, *supra* note 4, § 10.58, at 254.

12. *Id.* § 26.19, at 601.

13. *Id.* § 31.47, at 731.

14. *Id.* § 32.59, at 753.

the ethos of the civil law system, and (2) these same judges actively appreciate the importance of direct encounters between parties and witnesses, on one hand, and the face of judicial authority, on the other.¹⁵ In contrast, in some of the other civil law states, the judges are as passive as the stereotypical common law judge—an image of an umpire at a tennis match. In some of these latter systems the judges even discount witness testimony as unreliable and unwelcome; witness evidence is almost entirely in written form.

The German system, on the other hand, is like its English counterparts; it confers substantial powers and obligations on the advocates.¹⁶ These include:

*“[A] definite statement of the factual subject matter of the proceeding” in both complaint and answer.*¹⁷ Again, this is similar to the English requirement,¹⁸ but is in contrast with “notice pleading” permitted under the Federal Rules.¹⁹

Party designation of sources of evidence. This process includes both what we would call discovery or disclosure, and a definition of the scope of evidentiary inquiry. Concerning disclosure, “[a] party has the responsibility to describe . . . the factual proof for each factual allegation of its claim or defense and to identify the sources of that proof.”²⁰ When defining the scope of the inquiry, “the principle of party control of facts and means of proof . . . lies at the core of German civil procedure . . . [and] is to be contrasted to the principle of investigation by the court . . . which generally prevails in German criminal procedure.”²¹

Advocate responsibility for conduct of the case. “[P]leadings and briefs are submitted and signed solely by counsel, service on an attorney counts as service on the represented party, and

15. See MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

16. See PETER L. MURRAY & ROLF STURNER, *GERMAN CIVIL JUSTICE* 161 (2004) (“In all of the ordinary civil courts other than local courts [essentially small claims] representation by counsel is mandatory Even in those local courts where representation by counsel is not required, many litigants hire lawyers to conduct their litigation.”).

17. *Id.* at 194.

18. ANDREWS, *supra* note 4, § 10.58, at 254.

19. FED. R. CIV. P. 8.

20. MURRAY & STURNER, *supra* note 16, at 158.

21. *Id.* at 158-59.

parties are generally held to the strategic and tactical decisions made on their behalf by their lawyers”²²

However, notwithstanding these requirements on part of the advocates, Germany still obligates judges to give active attention to the advocates’ submissions and contentions. They may not simply respond to objections from an opposing party. Thus, the judge examines the pleadings to assure proper substantive jurisdiction and venue, the record of service of process to assure proper personal jurisdiction, and the proffered sources of evidence to determine their relevance and effect. The dynamic in the German system is indicated by the process of *Hinweise* on the part of the judge. *Hin* literally means “hint” and *weise* means “knowledge.” We might (more pretentiously) call it substantive dialogue. The point is that in legal responsibility and practice, the German judge participates in running conversation with counsel in order to understand the issues and in order to convey questions and doubts about what is being presented. “The degree to which a German judge is expected to expose her thinking processes to the parties to protect them from surprise and prevent injustice . . . is an important feature of German civil justice.”²³

V. A COMPARATIVE PERSPECTIVE

In other general respects, German civil procedure appears to be similar to that in many American civil proceedings without a jury: the best examples are suits still considered to be in equity and adjudicatory administrative proceedings. American judges engage in *Hinweise* not only in the pretrial stages but also in trial itself (“seen” because a lot of the signaling is sufficiently conveyed by raised eyebrows and other body language). Some English judges conduct their proceedings in similar fashion. Thus, a contemporary German proceeding in major litigation, an English trial of a similar case, and an American case without a jury would look very similar after the pretrial phase.

However, many American judges tend to avoid activism. One of the reasons, no doubt, is a feeling that it is unfair to help one side (which is a logical objection to a German *hin* or

22. *Id.* at 162.

23. *Id.* at 166 *passim*.

hint). The issue of whether the risks to one party or another of misconception and miscommunication between advocates and judges should be resolved by silence, rather than by commentary on the part of the judges, surely deserves further reflection and thought. However, the risk of misunderstanding is inherent in *any* trial process, so absolute neutrality on the part of the court is imperfect and illusory. Yet the common law tradition of judicial passivity reflects that illusion.

Notwithstanding its managerial judging protocol, the tradition that judges should “butt out” even persists in some elements of the English profession. In the new English rules, judicial initiative is referred to in terms of discretion over procedure and management, not in terms of responsibility for a substantively correct result.²⁴ Some English critics of managerial judging have conjured an array of evils far beyond any identified in the bar association rhetoric in the United States: 1) “a discretionary regime would require guess-work”; 2) litigants “would become supplicants before a court which has grown ‘too big for its boots’”; 3) “judicial authority would be destroyed”; and 4) it is “incompatible with the rule of law within a mature democracy.”²⁵

These tales of woe are standard responses to legal change. If England were a republic, it would also have complained that the new procedure would be a danger to the republic, as is often complained about changes in the United States. The terms of procedural debates thus have a certain continuity.

Among the many benefits of comparative study, particularly through such excellent works as these, is a deeper understanding of one’s own system. After all, civil litigation in a constitutional regime must fulfill basic common elements: fair notice, competent judging, right to counsel, intelligible statements of claim, exchange of evidence, fair hearing, definite judgment, and finality. But there are many ways of complying with these democratic parameters. Traditionally, one thought that there were two basic ways of structuring a judiciary: the common law systems, originating in England, and the civil law systems, originating in Roman and canon law. There

24. ANDREWS, *supra* note 4, §§ 13.15-60, at 338-50 (discussing judicial discretion and the court’s managerial powers).

25. *Id.* § 13.03, at 334-35 (citing a critique in Peter Birks, *Rights, Wrongs, and Remedies*, 20 *Ox. J.L.S.* 1 (2000)).

remain important differences between the two, particularly in the role of judges and advocates—for example, the English barrister remains a distinctive figure—and in the weight attached to the trial court fact findings in common law systems, contrasted with the broader revisory powers of appellate courts in the civil law systems.

However, study of these two books and subsequent comparison with the United States suggest that there does exist a comprehensive European civil procedure system. Its participants include both civil and common-law judiciaries, such as England, Germany, Canada, and Japan, among others. The real outlier is the United States.

VI. THE DISTINCTIONS OF OUR DISTINCTIVE SYSTEM

The distinctive features of the U.S. system are jury trial, pretrial witness depositions, broad documents discovery, judges selected primarily on popular and political bases rather than professional standing, and the “American rule” concerning litigation costs and expenses.²⁶ Each of these features would warrant an extended discussion, but the following brief commentary will suffice.

Jury trial is available of right in almost all trials on the merits in federal court and in non-equity cases in state courts.²⁷ Moreover, the composition of juries has been changed substantially from what it was a half century ago.²⁸ Most civil cases are not tried by jury because they are either settled or tried by a judge. However, the professionals in our system, the judge and advocates, nevertheless take account of what they suppose a jury would do. It is an outlook required in our summary judgment procedure, in which a “genuine issue of fact” ordinarily means that an issue could go to a jury, and this framework informs settlement decisions. American

26. See generally David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule,”* 15 *IND. INT’L & COMP. L. REV.* 583, 585 (2005).

27. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

28. See *Thiel v. S. Pac. Co.*, 328 U.S. 217 (1946) (invalidating the system of personal selection used in some federal district courts). Cf. *People v. Harris*, 679 P.2d 433 (Cal. 1984) (finding voter list unconstitutionally discriminatory against minorities).

juries do not look at cases in a radically different way from most American judges.

Another distinctive feature of the American civil system is deposition of all important witnesses, including parties. A universal norm in almost all contemporary civil litigation, the typical deposition is also tediously long, except as mercifully constrained by the new rules imposing time limits.²⁹ In contrast, the European systems do not permit depositions except under unusual conditions and, at trial or at hearing, normally receive direct testimony of a witness through written statement, with cross examination or judicial follow-up proceeding from that point. It is likely that American lawyers use these depositions to probe the appeal of a witness to a jury as much as to discern the content of the testimony. To the extent that attorney's engage in such behavior, there is a link between jury trial and deposition practice.

Broad document discovery, another distinctive feature of American jurisprudence, may also be linked to jury trial, at least in certain types of cases. Experienced litigators aver that, in most cases, only a dozen or so documents are really important. This is largely true even in financial or other cases involving hundreds of evidentiary documents because it usually boils down to a summary prepared by an accounting or other expert. Few finders of fact can work effectively with piles of paper, and juries certainly cannot. But document discovery can sometimes turn up the proverbial "smoking gun," i.e., a document establishing conscious recognition of wrong or risk on the part of the defendant.³⁰ It is not that such documents are often found that impels broad discovery demands, but the possibility that they might be found. Finding a smoking gun document is the hope of plaintiff counsel and the dread of defense counsel; its quest is especially intense in a jury case. Any fact-finder, but juries in particular, is somewhat uncomfortable finding fault on the basis of circumstances alone and much more confident when there is corroboration.

29. See FED. R. CIV. P. 30(d)(1) (limiting depositions to seven hours). Some states have even shorter limits.

30. See *Grimshaw v. Ford Motor Co.*, 174 Cal. Rpt. 348, 384 (Cal. Ct. App. 1981). The classic case of a "smoking gun" was the incriminating cost-benefits analysis found during discovery in the Ford Pinto case. For an account of that case, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 206-34 (1988).

Furthermore, most American judges have arrived at judicial office through a more or less political process. This is not to say that upon assuming office they cannot be technically proficient and competent in other respects. Nor is it to say that this background of the typical American judge is inappropriate, involving as it typically does, direct or secondary involvement in partisan politics. It is to say, however, that American judges have very different backgrounds from their counterparts in other legal systems. In other common law countries, judges are selected from ranks of recognized trial advocates by an evaluation process giving primary weight to professional standing and reputation.³¹ In civil law judiciaries, judges are career officials who begin in junior positions in the minor courts and gain promotion on the basis of evaluation of their superiors and colleagues.³² In contrast to other countries—where both common and civil law judge selection differs from the United States—one could say that American judges harbor viewpoints that are more in line with those of the general lay public, which is the source of jury venires.

Finally, there is the cost rule in the United States: generally, the loser does not pay the winner's litigation costs or attorney fees, with the exception of modest filing fees.³³ This basic rule has been modified by many statutory provisions awarding attorney fees to winning plaintiffs.³⁴ However, in almost all other legal systems, the winner—whether claimant or defendant—is ordinarily awarded attorney fees and other litigation costs, or at least a substantial portion thereof. It is perhaps ironic that here in the United States, the land of privatization, litigation is subsidized, particularly for claimants, whereas in the lands of semi-socialism, such as England and Germany, a litigant must pay for the privilege of suing. The American cost rule certainly facilitates plaintiff's bringing personal injury claims because those with modest means do not have to worry about being hit with a cost bill if they lose. How-

31. For a discussion on the judicial appointment process in the United Kingdom, see DEP'T OF CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A NEW WAY OF APPOINTING JUDGES 12-13 (2003), at <http://www.dca.gov.uk/consult/jacommission/index.htm>.

32. See, e.g., MURRAY & STURNER, *supra* note 16, at 68-72.

33. See, e.g., John Leubsdorf, *Recovering Attorneys' Fees as Damages*, 38 RUTGERS L. REV. 439, 439 (1986).

34. See, e.g., HERBERT B. NEWBERG, ATTORNEY FEE AWARDS (1986).

ever, there are trade-offs: The United States does not have comprehensive healthcare coverage that obviate the necessity for many personal injury claims. Similarly, other countries engage in closer government regulation of housing, commercial, and consumer transactions that would normally preempt many interactions that otherwise could become legal disputes. The American personal injury claims system is an important recourse for those people without social benefits provided for in less litigious societies.

VII. CONCLUSION

This Article outlines many comparative observations about English, German, and American civil procedure. First, the English and German systems are rather similar despite the fact that the English version rests on common law traditions, and the German version is an epitome of civil law procedure. Second, the American system is unique from both of them in important respects, particularly in personal injury and consumer cases, such as shareholder litigation. It was in recognition of these categories of U.S. litigation that the American Law Institute/UNIDROIT project for Principles of Transnational Civil Procedure addressed commercial litigation.³⁵ Third, differences in the rules of civil procedure reflect diverging attitudes about the social and political functions of civil litigation. In both England and Germany, redress of injuries is regarded as a social responsibility to be managed through state regulatory systems, such as health care in the case of personal injury. In the United States, on the other hand, injuries primarily have been addressed in terms of private initiative and allocation of responsibility among private actors through adjudication. Most conspicuous is the much wider range accorded to class suits and other aggregate or group litigation in American jurisprudence.³⁶ Given these differences, direct comparison without regard to the substantive context in which each system operates can be misleading. However, the systems deal with essentially similar procedural problems in ways that are mutually intelligible, and these two excellent books demonstrate just that.

35. See AM. LAW INST., *supra* note 3.

36. Antonio Gidi, *Class Actions in Brazil: A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 315-17 (2003).

