
CIVIL PROCEDURE: A EUROPEAN IUS COMMUNE?

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Introduction
"Descended into hell" ("Nedergedaald ter helle"). In an essay bearing this title E.J.H. Schrage recently focused attention on the fact that procedural law originated in Paradise, at least if we are to believe medieval and early modern legal scholars. In his work on civil procedure, the Flemish lawyer Philips Wielant made the following comment on the subject: "God did not want to condemn Adam without first summoning him [...] and without having heard him [...]." In other words, God did not summarily condemn Adam to earn his bread by the sweat of his brow, but rather observed a number of procedural formalities before he imposed the onerous punishment which has continued to weigh down upon us until this day. Eve was also heard before she and her sisters came to share the pain of childbirth. Only the serpent was condemned without the benefit of any procedural formalities. The book of Genesis offers no explanation for this, but fortunately the Dutch Authorised Version comes to our aid in this regard. In an explanatory note the comment is made that there was no need to hear the serpent, as it had functioned as a tool of the devil and the devil had no excuse, an argument that would surely not have withstood the fair trial test of Article 6 of the European Convention on Human Rights, had it applied in that case.

The rule that parties to a legal proceeding must be summoned and heard is an example of a formal requirement, a formality. A coherent totality of such formalities that regulate legal proceedings from beginning to end is what I would like to define as procedural law in the more narrow sense. The rules pertaining to the organisation of the judiciary (including jurisdiction), which may be included as an aspect of procedural law in a broader context, fall outside this definition. I will not address the organisation of the judiciary because in this paper I wish to approach procedural law chiefly as a European discipline. Issues regarding the organisation of the judiciary are less suited to such an approach in view of the fact that they are characterised by a very close connection with the national legal system.

* The present article is based on my inaugural lecture, delivered at Maastricht University on May 20, 1999. Financial support for the translation of the original Dutch text has been given by the Ius Commune Research School.


4. Pothier did not consider the organisation of the judiciary to be an aspect of true procedural law either, as evidenced by his definition of procédure in his Traité de la procédure civile (I consulted this work in Dupin Ainé (ed.), Oeuvres de R.-J. Pothier contenant les traités du droit Français VI, H. Tarlier, Brussels, 1832, p. 1): "La procédure est la forme dans laquelle on doit intenter les demandes en justice, y défendre, intervenir, instruire, juger, se pourvoir contre les jugements et les exécuter." This definition was so influential that the actual procedural law and the rules regarding the organisation of the judiciary were included in two separate codes, both in France and elsewhere. For a more extensive treatment of this and other questions of definition, see P. Zonderland, Privaatrechtspleging (op.cit.), p. 1 et seq.

Procedural law must be properly distinguished from substantive law. The object of substantive law is primarily to provide for the rights and duties of legal subjects, while above all procedural law determines how these legal rights and duties must be established, effected or shaped in legal proceedings.\textsuperscript{6} Around 1900 an Austrian legal scholar (the Gerichtssekretär \textit{Privatdozent} Dr. Walker) accurately stated this distinction as follows: "Materielles Recht und Prozess verhalten sich zu einander wie der Gedanke zu seiner Ausführung."\textsuperscript{7} ("The relationship of substantive law to procedure," he said "is that of the thought to its implementation.") Karl Marx phrased it more beautifully: "[...] der Prozess ist [...] die Lebensart des Gesetzes, also die Erscheinung seines innern Lebens."\textsuperscript{8} ("[...] Procedure is [...] the manner in which the Law conducts itself, and thus the manifestation of its inner life.")

One would assume from the above that procedural law constitutes more than just a technical instrument in the hands of practising lawyers. If this is indeed the case, then it is nothing less than remarkable that for some time the level of scholarly study of this area of law has been rather low in many countries.\textsuperscript{9} In the Netherlands and Belgium a revival in the study of procedure has been discernable only in the last few decades. With respect to the history of the law of civil procedure reference may be made to the 1973 contribution of R.C. van Caenegem to the \textit{International Encyclopedia of Comparative Law}.\textsuperscript{10} Moreover, historical studies of the procedural law of individual courts during the \textit{ancien régime} have appeared in this part of the world. These have primarily addressed the law as it was applied in practice, i.e. the "styles" of the various courts. Although they still proceeded originally from the erroneous thought that this law as it was practiced could be known from normative sources, I believe that authors such as J. van Rompaey heralded the arrival of a more felicitous age when they embarked upon the study of procedural law using archival documents from the various courts of justice.\textsuperscript{11} The interest in the history of the (fundamental) principles of procedural law is even more recent. The inaugural lecture at Leiden University of J.M.J. Chorus on the passive role (\textit{lijdelijkheid}) of the civil judge, may be regarded as the starting point in this context.\textsuperscript{12} In his inaugural lecture in Nijmegen on the principle of the hearing of both sides, W.D.H. Asser also displayed an interest in history.\textsuperscript{13}

The modest degree of attention devoted to procedural law as a scholarly pursuit is linked to the notion that procedural law scarcely qualifies for scholarly study.\textsuperscript{14} In fact,


Germany and Italy are the only European countries with an academic tradition in procedural law.\textsuperscript{15} This tradition has not, however, always appeared to have had the desired effect on university education. For example, G. Baumgärtel, the professor who was charged with conducting a study in the 1970s into the reasons for the lengthy proceedings in Germany, made the following comment in 1971: "Es ist aber wohl kein Geheimnis, dass gerade das Zivilprozessrecht in der Ausbildung — jedenfalls an der Universität — viel zu kurz kommt."\textsuperscript{16} ("Indeed it is no secret that it is precisely education on the law of civil procedure that is neglected — at the universities in any case.") This was not a new development, because there have always been problems with the study of procedural law at the university level. In the past, students had been known to graduate without any knowledge of procedural law, as evidenced by, \textit{inter alia}, the \textit{Ordo Iudiciarius} by Aegidius de Fuscararis of 1260-1266. In the beginning of his \textit{Ordo} the author comments that he wrote this work not only for his students, but also "ad eruditionem novorum advocatorum militantium in iure canonico, qui licet periti in iure existant, ignorantes tamen practicam causas nesciunt ordinare [...]" (that is to say, to teach new attorneys that practice canonical law, who, though they emerge as knowledgeable in law, are nevertheless unable to prepare a case for trial due to their ignorance of practice [...]).\textsuperscript{17} Nowadays, however, for most of the European countries it can no longer be asserted that students leave university without any knowledge of procedural law. After all, training in this subject constitutes a standard element of the curriculum at nearly every European university. However, this has not led to an absence of controversy regarding this field as a university discipline. Indeed, it was not so long ago that Austrian students argued that the subject should be removed from the curriculum, expressing their opinion that it made no contribution to their academic education — and that it would be better to gain a knowledge of procedural law on the job.\textsuperscript{18} The Austrian complaints must be taken seriously. However, the fact that the content of the study of procedural law may not currently contribute to the academic education of the student, or that it may contribute to a lesser extent, does not, in my opinion, warrant the conclusion that training in procedural law should be abolished. The more likely conclusion would be that this complaint should lead to a partial reconsideration of the content of the subject, both in the area of university research and that of university education.

In the area of education the main focus is currently on national procedural law, whereby the emphasis is usually on an explanation of the Code of Civil Procedure or a similar system of regulations, supplemented by relevant case law and applicable supra-national regulations. The same approach is often found in the field of research. As I see it, this one-sided emphasis on the technical aspects of one's own national procedure seems less suited to a course of research and training which has the pretention of being academic in nature. I believe that academic research and education should also focus on other subjects. For example, aspects of comparative law and the history of law are what I have in mind here.\textsuperscript{19} Today I would like to focus on two central questions in the nature of comparative law and the history of law. They are:

\textsuperscript{17} Cited by L. Fowler-Magerl, \textit{Ordines iudiciarii and Libelli de ordine iudiciorum (from the middle of the twelfth to the end of the fifteenth century)}, Typologie des sources du Moyen Âge occidental, fasc. 63 AIII.1*, Brepols, Turnhout, 1994, p. 80 (n. 8).
\textsuperscript{19} One aspect of the history of law may qualify as comparative law though. To compare the past to the present is referred to as vertical comparative law; as opposed to horizontal comparative law, whereby one compares modern systems to each other.
To what extent can the law of civil procedure be viewed as an international, European discipline?

What role can the history of law and comparative law play in shaping future law on civil procedure?

However, before proceeding to address these questions, I would like to consider some of the other factors that have played a role in the creation of the image of procedural law as a non-scholarly pursuit, a subject which offers the opportunity to also discuss a number of significant moments in the history of procedural law.

Procedural Law: Is it a scholarly discipline?

In 1927 Charles Homer Haskins published a book entitled "The Renaissance of the Twelfth Century." The Renaissance to which Haskins referred precedes the historic period which is usually denoted by this term and is characterised by a significant interest in Roman antiquity, including Roman law. This body of law was the subject of intense study and was rendered useful for practical application. The Roman legal code of the Byzantine emperor Justinian provided the basis in this context. The Justinian Code had been compiled in the sixth century A.D. on the basis of earlier texts. In a later period, this body of law became known as the Corpus Iuris Civilis. The Corpus Iuris Civilis included many texts on procedural law. However, no separate, exhaustive procedural sections are found there. Accordingly, in the absence of scholarly work the Roman legal texts presented no opening for the medieval legal scholar with respect to subjects of procedural law. Or in any event, the relevant passages spread throughout the entire Corpus Iuris had to be accumulated. They then had to be interpreted and systematically recorded. This was particularly necessary primarily because the texts in the Corpus Iuris relate to various forms of procedure. Although most pertain to the extra ordinem procedure customary under Emperor Justinian, one also finds material that addresses older procedural forms, such as the formula procedure. Moreover, it is not always clear to what type of procedure any given text applies.

The efforts of the medieval legal scholars resulted in the creation of an entirely new procedure which, apart from Roman law, was based on canons from the second part of Gratian’s Decretum, the law of northern Italian cities and recent letters containing papal decretals. Given its sources, the new procedure was designated as the Romano-canonical procedure.

Scholarly Romano-canonical procedural law was originally applied in the ecclesiastic courts. This was particularly the case with a new type of ecclesiastic courts, the so-called officialities. These officialities were established throughout large parts of Europe and had very broad subject-matter jurisdiction, as a consequence of which large sections of the population were brought into contact with Romano-canonical procedural law. This was not without its results, also possibly due to the fact that the procedural law of the secular courts no longer satisfied the requirements of the age. This secular procedural law was rooted in the society of the early Middle Ages, which was also evident from its reliance upon irrational evidentiary procedures such as trial by ordeal. This society of the early Middle Ages made way for a society with a more complex structure that needed another sort of procedural law, a

21. Only a few places in the Corpus Iuris Civilis involve a separate discussion of aspects of the procedure. One may cite Codex 2.1-13, 3.1-13, 4.19-21, 7.19, 7.42-70, 8.1, 9.1-7, and Institutes 4.6, 4.8 and 4.13-18 (cf. L. Fowler-Magerl, Ordines iudiciarii (op. cit.), p. 28 (n. 39)).
22. L. Fowler-Magerl, Ordines iudiciarii (op.cit.), p. 29.
23. R.C. van Caenegem, History (op.cit.), p. 16.
24. On this point one may consult C.M. Cipolla, Before the Industrial Revolution. European Society and Economy,
need which could be addressed by Romano-canonical procedural law. After all, the new procedure offered a number of important benefits relative to the existing methods. Indeed, it enabled the judge to handle more complex cases and provided a better balance between the activities of the judge and the parties. Accordingly, it was not long before the influence of the new procedure could be seen in the secular courts.

As long as Romano-canonical procedural law was applied within the ecclesiastic environment there was a certain degree of uniformity at a European level, albeit with some local variation. In this context, Romano-canonical procedural law was a genuine Ius Commune in the sense that it constituted a relatively uniform system of rules for all of western Christianity. Treatises in which this field was regarded as a universal discipline were numerous. To a great extent these treatises derived their scholarly character from the necessity of understanding the procedure from the standpoint of its sources in Roman and ecclesiastic law, which often resulted in references to these sources and the literature based upon them. A good example of this is the encyclopedic Speculum Judiciale of Guilelmus Durantis (who died in 1296). This Speculum, which, according to M.A. von Bethmann Holweg, assimilated the material of the more important writings of procedural law just as the ocean assimilates floodwaters, was written during the period 1271-1276 and comprises a masterful synthesis of procedural law as it had developed in the thirteenth century. For many centuries this text would head the list of the most frequently quoted works on procedural law. For example, Alain Wijffels demonstrated that during the period of 1460-1580 Durantis' Speculum was the work most frequently cited at the Great Council of Malines.

When Romano-canonical procedural law was applied outside the ecclesiastic sphere the character of the literature on procedural law changed. The totality of the learned procedure was not adopted, but the secular procedure was influenced to a greater or lesser extent by the Roman canon model. This fact explains the existence of a variety of "styles" of procedural law, that is, special forms of procedure specific to a given area or judicial body, which also imparted a local character to the literature on secular procedure. This literature did not address the basic unique pattern of Roman canon law, but rather, procedural law within one specific jurisdiction. We have many local examples of this. I have already mentioned Philips Wielant in my introduction. In his Practijke Civile to which I previously referred, this author primarily describes the forms of procedure in the Council of Flanders (Raad van Vlaanderen), the court of the Flemish Countship. To take another example, the same approach was taken by Gerard

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31. Cf. R.C. van Caenegem, Kanttekeningen (op.cit.), p. 1077. Van Caenegem considers the work of Durantis as marking the close of the formative period of the learned procedural law.


33. L. Fowler-Magerl, Ordines iudiciarii (op.cit.), pp. 33-34.
van Wassenaer in his work on the Court of Utrecht (Hof van Utrecht). Yet this approach was not accompanied by a reduction in the academic content of the literature on procedural law. This is apparent, inter alia, from the fact that the "styles" of procedural law addressed by the various authors are related to the basic pattern of Roman canon law. This is evident in the work of Van Wassenaer, from the explicit references to the sources of Roman canon procedure and the literature based upon it. Wielant follows up on the concept of Roman canon law more implicitly by making numerous references to the "the (civil) law", without, however, mentioning a specific source. Likewise the element of comparative law makes a significant contribution to the learned character of works such as those of Wielant and Van Wassenaer. Wielant regularly compares the procedural law of the Council of Flanders to the forms of procedure before the Great Council of Malines, one of the highest courts in the Netherlands and, to a lesser extent, to the procedure of the Parlement of Paris, the highest royal court of the French Kingdom. Van Wassenaer's perspective also extends beyond Utrecht, for it is evident that he has a thorough knowledge of procedural law in the province of Holland.

The period of codification (from the second part of the 18th century) effected a change in procedural law. Elements which had defined the scholarly character of this field in the past disappeared. In the first place, this was a result of the fact that the role of the learned law had played itself out; it was explicitly set aside as a source of law. As a consequence, Roman-canonical procedural law could no longer be used in interpreting procedural rules of positive law. Moreover, the possibility of local and regional comparative law came to an end. After all, in many cases codification brought a uniform procedure for the entire country. The only possibility that remained was in the area of international comparative law. However, there was less need for this form of comparative law than there had been for comparative law on a regional and local basis in the preceding period. After all, the practical use of knowledge regarding the similarities and differences between the procedure of the Court of Holland (Hof van Holland) and that of the Court of Utrecht (Hof van Utrecht), for example, was evident to an attorney in the Dutch Republic; he could be confronted with cases before both courts. By contrast, the importance of knowledge regarding the differences and similarities between national and foreign procedural law was less evident to an attorney in the period after codification. It was only the fact that a national system of procedural law had, to some degree or another, been derived from a foreign system that could delay the disappearance of the element of comparative law from the literature. We see this in the Netherlands, for example, where the procedure was revamped on the basis of the French procedure. In that context,

34. G. van Wassenaer, Practijk judicieel ofte instructie op de forme en manier van procederen, Gijsbert van Zijll, Utrecht 1669.
35. By this I do not, however, wish to say that the literature on procedural law of this period was primarily written for scholarly purposes. What is more likely is that the writers sought to provide a manual for the lawyer in practice. This is evident, inter alia, from the fact that they usually formulated their writings in the vernacular rather than in Latin. This view, as regards the work of Wielant, is also stated in Jb. Zeylemaker Jzn., Geschiedenis van de wetenschap van het burgerlijk procesrecht (praktijkrecht) in Nederland van de aanvang tot 1813, Geschiedenis der Nederlandsche rechtswetenschap IV, part 1, N.V. Noord-Hollandsche Uitgeversmij, Amsterdam, 1952, pp. 53 and 57. This does not, however, alter the fact that these works may be considered felicitous combinations of a practical and a more scholarly approach.
36. See, for example Ph. Wielant, Practijke (op. cit.), p. 265 (paragraph VIII.XV.4) and 316 (paragraph IX.XXVIII.5).
38. See, for example, Ph. Wielant, Practijke (op.cit.), p. 40 (paragraph I.IX.3-4).
39. See, for example, Ph. Wielant, Practijke (op.cit.), p. 97 (paragraph III.V.3-4).
40. See, for example, G. van Wassenaer, Practijk judicieel (op.cit.), p. 45 (section 156).
French material on procedural law continued to be essential for a long time. However, as time marched on and the developments led away from the French example, the necessity of comparative law disappeared. From that moment on comparative law work in the field of procedural law was actually undertaken only when there were plans to proceed to a recodification. However, this could not prevent the emergence of an approach to procedural law that we still encounter today in many textbooks, including those on which university education is based. This literature often exhibits a total absence of any element of comparative law. The major part of the information included in this literature involves descriptions of national procedural law. Under these circumstances it is not entirely incomprehensible that students might fall prey to the thought that the study of procedural law makes a lesser contribution to their academic education. After their graduation, these former students may easily hold the opinion that procedural law is a field that scarcely warrants serious academic study. If they aspire to a career as an academic, they will not be likely to consider the area of procedural law. It is important that an immediate halt be called to this situation, as it is precisely in the area of procedural law that there are currently many interesting scholarly questions which require further study. I mentioned two of these in the introduction. I will now proceed to the first of these questions.

Procedural law: Is it an international, European discipline?
Opinions about the character of procedural law vary, as they do with regard to the character of substantive law. Some think that this field of law is inextricably linked to the identity of a people or nation. It is thought that the manner in which this area of law has been shaped would exhibit a close relationship with a number of characteristics of the group of people for which it is intended. Matters such as the nature of the people, their philosophy of life and political beliefs are considered among these characteristics. A similar view resounds in the words written by Jonas Daniël Meijer in 1818: "[on] chercherait [...] vainement dans l'histoire l'exemple d'un peuple, qui sans avoir perdu son indépendence et son existence nationale, ait adopté la procédure d'une autre nation." The same view is encountered in the Allgemeine Begründung for the German Zivilprozessordnung of 1877, where the adoption of French procedural law in Germany was considered inappropriate on the basis of the following consideration: "Eine Nation, deren in bedeutenden Geschichtsepochen stärker hervorragendes Rechtsbewusstsein nicht bloss das materielle Recht, sondern auch das Rechtsverfahren umfasst, würde sich in einem fremden Verfahren nicht wiedererkennen." Others are amazed at the variations from one country to another in the area of procedural law. On 7 February 1828, parliamentary representative Dotrenge

expressed it in the following way during consultations on the Dutch Code of Civil Procedure: "Entre deux ou plusieurs nations civilisées ce n'est point de la conformité, mais de la disparité de leurs lois de procédures, qu'il devrait y avoir lieu de s'étonner et de se plaindre."[46] ("It is not the similarities, but indeed the differences between the legal procedures in two civilised countries that give rise to amazement or criticism.") At this current juncture in time, authors like the American L.M. Friedman question the narrow connection that allegedly exists between a system of procedural law and its target group.[47]

These and similar views about the nature of procedural law have significant implications for the question of whether this area of law can be viewed as an international discipline. Within the context of the European Union this is an urgent question, for if procedural law does indeed exhibit very close ties with a given people or nation there can be no question of harmonising this area of law. For the present this view, that procedural law is closely linked to the people or the nation, appears to prevail. The rule that judges are only allowed to treat the matters before them in accordance with their national procedural rules may also be seen as an expression of this. This limitation does not apply in the area of substantive law, where it may very well occur that foreign law would be applied to a given legal relationship.

In light of the prevailing view, the prospects for harmonisation of procedural law in the European Union appear somber. If the prevailing opinion is correct, it may be asserted that the design of harmonised rules of procedural law that are acceptable to all Member States of the Union may be viewed as a near impossibility. This appears to be confirmed by the fact that up until now European harmonisation measures in the field of procedural law have been scarce. The 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (which has been amended several times) appears to be the most significant achievement in this area. Renewed efforts to create a European approach to procedural law have had little success. I am thinking primarily of the report of the Working Group on Civil Procedure in Europe entitled: "Approximation of Judiciary Law in the European Union."[48] This report, which was drafted in the early 90s under the leadership of the Ghent-based emeritus M. Storme, and subsequently offered to the European Commission, included proposals for the harmonisation of some elements of procedural law. For a long time the report appears to have lead an anonymous existence in a desk drawer in Brussels. It seems, however, that as a consequence of the Treaty of Amsterdam this situation is slowly changing.

The result of the absence of harmonised rules of civil procedure in a European context is that in this area there continue to be obstacles to the smooth operation of the European internal market with its free movement of persons, goods, services and capital.[49] In this context it is important to examine whether the prevailing opinion regarding the nature of procedural law is correct. Is procedure in fact so closely connected with the community for which it is intended as to render any efforts towards harmonisation nearly pointless?

The history of procedural law in Western Europe seems to indicate that the accuracy of this assertion may be doubtful. In more forceful terms, the interrelationships exhibited by various Western European systems of procedural law form a select basis on which a harmonised procedure acceptable to all Member States may be designed. The scholarly study of the historical connections between the Member States' distinct systems of procedural law

48. M. Storme (ed.), Rapprochement du droit (op.cit.).
49. The argument that the harmonisation of procedural law is not necessary for the smooth operation of the internal market fails even in light of the experience with procedural law in the United States of America, which varies from state to state. After all, procedural law has already been largely harmonised in the United States by the introduction of the Federal Rules of Civil Procedure, which have also extensively influenced procedural law at the level of the separate States.
has, however, only gotten off the ground to a very limited extent. Those who make proposals for the harmonisation of procedural law in Europe do not appear to be sufficiently aware of the role that the history of procedural law can play in this regard.

Why, then, am I of the opinion that procedural law does not exhibit such a close connection with the target group as has been asserted? In the first place one can cite the success of Romano-canonical procedural law that operated as a true *Ius Commune* within the network of ecclesiastic courts in Europe. Notwithstanding the major differences among the peoples over which these courts had jurisdiction, it appeared to be possible to settle their disputes in accordance with a system of procedure which was, in its broad outlines, uniform. As noted above, this system of procedure appeared to be so successful that it also influenced the secular courts’ forms of procedure to a significant degree.

As indicated, the influence of Romano-canonical procedural law on the secular forms of procedure did not lead to the development of a uniform system of procedural law in non-ecclesiastic jurisdictions. There were a great many styles of procedural law. The existence of these styles could be the reason for the assumption that secular rules of procedural law do indeed exhibit a close relationship with the characteristics of the community for which they are intended. Upon closer examination, however, I do not believe that this is the case. An initial indicator for this can be found in the significant differences in style even among judicial bodies that operated within the same community. The example of the Court of Holland (*Hof van Holland*) and the Supreme Court of Holland, Zeeland and West-Friesland (*Hoge Raad van Holland, Zeeland en West-Friesland*) during the *ancien régime* is fitting in this regard. Despite the (nearly) identical group of people subject to the jurisdiction of these courts, the procedural law of these bodies exhibited significant variation. The origin of these differences is found in the distinct traditions of procedural law in which the Court of Holland and the Supreme Court were rooted, for the procedural law of the Court of Holland was influenced to a significant extent by the style of the Council of Brabant (*Raad van Brabant*),\(^50\) while the Supreme Court derived its procedural law from the Great Council of Malines.\(^51\) The characteristics of the groups of people living within the territory of these courts appear to have played a less significant role.

Nor can the thought that procedure and community are inextricably bound to each other be reconciled with the cases in which given regions or nations accommodated foreign procedural law. Nevertheless, examples of this are not scarce. One suitable example is found in the Low Countries, where an increasing influence of French-Burgundian procedural law may be discerned in the fifteenth century. This system of procedural law was strongly rooted in the procedure of the French *Parlement* of Paris,\(^52\) and was influenced to a significant extent by Romano-canonical procedural law.\(^53\) The tribute to the French-Burgundian procedure is also evident in the area of terminology. Anyone who has taken up Wielant’s handbook on civil procedure (*Practijke Civile*) or any random procedural ordinance from the Netherlands will be able to concur with this.

In the sixteenth century, significant procedural law impulses continued to emanate from

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50. M. Oosterbosch, D. van den Auweele (eds), *De ordonnantie van 20 juni 1474 voor de Raad van Brabant*, Algemeen Rijksarchief en Rijksarchief in de Provinciën, Studia 49, Brussels, 1993, p. XXIII.


53. On the influence of Romano-canonical procedural law in France, see R.C. van Caenegem, *History* (op.cit.), p. 32 et seq.
France. Thus, the French ordinance of Villers-Cotterets was taken as a point of departure at that time in efforts to streamline the procedure in the Netherlands. The procedural law that was thus created in the Low Countries in the sixteenth and preceding centuries underwent no major modification under the Republic that followed.

In more recent history as well, successful cases involving the exportation of procedural law have shaped the legal landscape of Europe. In this context the Napoleonic period is of continuing significance. This is due not so much to the fact that the Napoleonic codifications could be introduced into various European countries by the rattling of sabers, but more likely due to the fact that in many countries these codifications met with a fertile future after the defeat of the French emperor. This applied a fortiori to the Code de procédure civile, that had replaced the domestic procedure of the subject nations in many areas. Now if procedural law were really so intrinsically linked to the community for which it is intended, one would anticipate that the rules of procedural law imposed by the foreign ruler would be abolished as quickly as possible after the return of independence. A country's own procedural law would have to take its place. However, history took a different path. It is striking that in many countries the Code de procédure civile was either retained or determined the character of the new domestic provisions. In this regard Belgium is a revealing example. In that country the Code de procédure civile was not replaced until the second half of the twentieth century by the 1967 Judicial Code (Gerechtelijk Wetboek). This may be considered noteworthy, especially so given the fact that, in the nineteenth century, the young state of Belgium made frantic efforts to develop its own national identity. History was an important instrument in this endeavour, to such an extent that one did not hesitate to revise history and employ anachronisms. Now, if procedural law and the people do indeed exhibit a close relationship, one would expect that in Belgium, the French Code would have been replaced as quickly as possible with a home-grown product. However, this did not occur. Hence, the distinct national character of procedural law was apparently not such a prevailing feature.

There was a continuing French influence in the Netherlands as well. Although a national codification of procedural law had already been introduced here in 1838 (this occurred somewhat later in the province of Limburg), this codification was, to a significant extent, a copy of the French Code de procédure civile. It is noteworthy that variations from the French example were not usually the result of aspects of domestic national procedural law having been included in the code. This only occurred in a modest number of cases, for example, with regard to counterclaims, the preliminary hearing of witnesses (voorlopig getuigenverhoor) and in the procedure for retrial (revisie) (it should, however, be remembered that these forms of procedural law are rooted in French-Burgundian procedural law from the fifteenth and sixteenth centuries). In most cases these variations were a result of the fact that the example used for that procedural feature had originated from another foreign source, namely the Geneva Code of Civil Procedure. In this manner, a system of procedure was designed which, with respect to its origin, cannot warrant designation as a "national" product.

Thus far I have concentrated on the procedural law of the countries on the European

55. M. Storme, Honderdvijftig jaar (op.cit.), p. 131 et seq.
continent. I hope that I have demonstrated that the connection between the system of procedure and the specific features of the people living within the borders of these countries is less evident than has, in fact, been propounded. It would appear as a result that, as regards the European continent, harmonisation measures in the area of procedural law are not doomed to failure from their inception. All that remains is to consider the British Isles. In this context, I will concentrate on the procedural law of England and Wales, which I shall refer to succinctly as English procedural law.

English procedural law varies to a significant degree from its counterpart on the mainland of Europe. English procedure makes a distinction between the pretrial and the trial phase of the proceedings. The pretrial phase is intended, *inter alia*, for the exchange of pleadings (statements of case). If the parties do not wish to end the proceeding prematurely, this phase allows for the case to be prepared in a manner that facilitates an efficient hearing before the court during trial. This bifurcation of the process may also be related to the fact that, in England, civil cases could also be tried before a jury even in this century. The trial phase was the time during which the jury took cognisance of the case, with the case having to be presented with sufficient clarity at that time, which was only possible after thorough preparation during the pretrial phase.

The English practice of trial by jury and the (related) organisation of its process may be viewed as the result of typical English thoughts about the organisation of society. Trial by jury expresses the thought that laymen should have an influence on the distribution of justice. However, although procedural law in England clearly has a national character, the relationship between the English people and its procedure has not been so significant as to block external influences. The importation of rules of procedural law did occur in England as well; it had already occurred in the Middle Ages.

It is well known that in England a distinction is made between two systems of legal rules and principles. On the one hand, there is the system of Common Law (Law) and, on the other, the system that was designated as Equity. Equity arose to rectify Common Law, which through the ages had come to be a rather inflexible totality of legal rules. Decisions in Equity were dispensed by the Chancellor of the English King in the Court of Chancery, which developed its own procedural law. This system of procedural law exhibits traces of Romano-canonical procedural law, which relates to the fact that the English Chancellor was originally chosen from among the ranks of the clergy. As a consequence, he had knowledge of Romano-canonical procedure.

The Equity procedure continued to exist alongside that of the Common Law into the nineteenth century. In 1873-1875 a new uniform procedural law was introduced as an element of the so-called Judicature Acts. This new procedural law included elements of both the former Common Law procedure and the Equity procedure. Moreover, important rules of procedural law were taken from the procedure of the Admiralty Court, following the same pattern as Roman canon law. Further research will have to determine the extent to which present-day English procedural law contains elements of Roman canon law originating from the equity procedure and that of the Admiralty Court. There is a significant chance that the range of thought found in Roman canon law can be shown in the English procedure, also because it must

60. R.C. van Caenegem, History (op.cit.), p. 45.
not be ruled out that American procedural law, particularly the Field Code of New York, influenced English procedural law. The Field Code had already introduced a uniform civil procedure in New York in 1848. The procedural law of the State of Louisiana had played a significant role in the design of the Field Code. Louisiana procedure must be situated in the tradition of procedural law of the continent of Western Europe. As a result, this procedure exhibits external features of Roman canon law. One cannot exclude the possibility that elements of Roman canon law found their way into the English procedure by way of the Field Code, which had been influenced by Louisiana law.

If it can be shown that foreign rules of procedural law have been exported to England and that this has been of some importance as well, this will lead to the conclusion that even the English procedure is a national phenomenon to a lesser extent than has been asserted. If this is the case, then the chance that European harmonisation measures will fail due to the typical English character of English procedural law does not seem overwhelming. The chance that harmonisation measures will succeed is, in fact, increased due to the fact that English procedural law and that of the continent have exhibited a tendency to converge over the last decades. The English Mareva Injunction (Freezing Injunction), which exhibits certain features similar to the saisie conservatoire ("prejudgment attachment") of continental European law, may be cited as an example. Additionally, influences of the opposite sort also occur. An example is the Anglo-American discovery (disclosure) procedure, which is now attracting a lot of attention on the European continent. Discovery enables one party to compel the other to furnish relevant information about the case.

In concluding this section, it would be appropriate to point out that I have primarily addressed the question of whether it is possible to design uniform rules of procedural law. Uniform rules do not, of course, guarantee uniform interpretation and application of these rules in practice. In practice, the assertion of R. Stürner applies: "Dass Mentalitätsunterschiede und Lebensgewohnheiten die Praxis der Rechtsdurchsetzung mitprägen und zu Unterschieden führen mögen, ist eine alltägliche Weisheit." ("It is common knowledge that differences in mentality and custom also shape how law is implemented in practice and may lead to differences.") In the foregoing I have not attempted to undermine this assertion in any way. Nevertheless, I believe it is important to study whether there is potential in the European context for attaining a uniform system of procedural rules, for such a system would heighten the chance that the various European countries would increasingly develop similar procedures. The possibility or duty to request preliminary rulings from the European Court of Justice could make a contribution to this process.

The History of Procedural law and procedural efficiency

We turn now to address the second question raised in the introduction, namely, what role the history of procedural law and comparative law can play in shaping future civil procedure.

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65. See, for example, W.A.J.P. van den Reek, Mededelingsplichten in het burgerlijk procesrecht, Ph.D. thesis, Katholieke Universiteit Brabant, 1997 (also published by W.E.I. Tjeenk Willink, Deventer, 1997), as well as M. Storme (ed.), Rapprochement du droit (op.cit.).

66. R. Stürner, Das europäische Zivilprozessrecht (op.cit.), p. 17.

67. For a different opinion, see P. Legrand, ‘Against a European Civil Code’, The Modern Law Review 1997, p. 60. Speaking on a European civil code, this author expressed his scepticism about the benefit of a uniform law.
In the introduction, I described procedural law (in a narrower sense) as a cohesive whole consisting of formalities which regulate legal procedures from beginning to end. In civil matters, this procedural law aspires first and foremost to establish, effect or shape private legal rights and duties, thereby ending situations in which injustice reigns.68 A number of requirements are imposed on the formalities observed in realising this aspiration. They must regulate the legal battle in such a manner as to minimise the chance of an unjust decision. The chance of an unjust decision will be significant if it is based on inaccurate information. Consequently, a considerable number of procedural formalities are directed at creating the optimum conditions for determining the truth. But it does not just stop there, given that the nature of the rights and duties central to civil procedure imposes further requirements upon the formalities of procedural law. After all, it is rights and duties under private law that are involved, and the issue of whether these rights and duties should be established, effected or shaped has traditionally been viewed as a private matter. This means that the parties must be accorded the freedom to decide whether they wish to file an action, as well as the manner in which they wish to conduct their case. Hence, the court must not thrust its decision upon the parties, but only operate on the basis of their petition. Finally, the formalities imposed must not give rise to a prolonged and expensive course of proceedings. Prolonged and expensive proceedings mean that situations in which injustice reigns may be continued, while it is the precise aim of procedural law to bring an end to such situations.69

The various requirements which procedural law must satisfy give rise to tension. On the one hand, the rules of procedural law must guarantee inexpensive and rapid procedure, but on the other hand, optimal conditions for the finding of truth must be created, and the parties must be enabled to influence the course of the process. The latter two requirements can seriously delay the process and form the basis for considerable costs. After all, in the first place a thorough investigation into the truth usually cannot be realised within a short period and with less expensive means. Thus, the optimal manner of finding the truth is promoted by a procedure that permits the parties to explain their standpoint as extensively as possible, as well as to comment on the standpoint of the opposing party as extensively as possible. Secondly, the fact that parties must be afforded the opportunity to influence the course of the process means that they can not only delay the process, but also that they can transform it into a costly matter.

The tension noted above makes it very difficult to design a satisfactory procedure. Accordingly, dissatisfaction with the existing law and efforts to reform it have characterised the history of procedural law. Complaints invariably relate to the sluggishness of the process, its great complexity and high cost.70 This issue has even been discussed in non-legal sources.


One may cite, for example, Pantagruel by François Rabelais, Hamlet by William Shakespeare, Gulliver's Travels by Jonathan Swift and last but not least, Bleak House by Charles Dickens.

The complaints formulated in the past about procedural law are still heard today. This is the case for England as well as the countries of mainland Europe. Recently, Lord Woolf branded the procedure in England and Wales as expensive. In the Netherlands as well, to this day the legislature continues its efforts to streamline procedural law; witness, inter alia, the recent legislative proposal 26 855 to revise the Code of Civil Procedure. Some assert that complaints about procedure can be attributed, in part, to the antiquity of the legal rules in this area. Thus J.M. van Veggel asserts: "In addition, it should not be forgotten that our Code of Civil Procedure has existed for more than one hundred and fifty years. Proceedings people thought had been handled with dispatch then are now deemed to be lengthy." However, the question is whether this assertion is generally correct. It is possible of course that in certain matters people currently impose greater requirements on the speed with which a dispute is resolved than had been the case in the past. However, in the greater number of the cases, the current requirements that parties set on the progress of the process seem identical to those set in the past. In the Great Council of the sixteenth century, an average case in the first instance lasted two to three years and it was nevertheless deemed necessary to reform the procedure. Currently there is a comparable situation in the Netherlands and today as well there is an impetus to expedite matters.

In light of the above, one would expect major interest in earlier efforts to streamline the procedure. Unfortunately, it must be acknowledged that this has not been the case, surely not among those charged with new attempts at reform. As a rule, the attention of reformers is limited to the here and now. For example, Lord Woolf mentions only the two most recent reports from among the approximately sixty reports published in England since the middle of the nineteenth century on aspects of procedural law and the organisation of the courts. Nor is much attention devoted to the past in Dutch legislative proposals concerning procedure. As regards proposal 24 651 (now repealed), for example, we find a passage in the explanatory memorandum (memorie van toelichting) in which it is pointed out that "[c]urrently [my emphasis] [...] civil matters [should] in the first place also proceed quickly if we wish to comply with the societal demands of the time and with the requirements of the proper administration of justice." It would have been better to refrain from using the word "currently" here. After all, the history of procedural law shows that since the dawn of human memory people have been of the opinion that civil proceedings should run smoothly. One proof

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71. See chapters 10-12.
72. The famous "To be, or not to be" is followed by: "For who would bear the whips and scorns of time, Th'oppressor's wrong, the proud man's contumely, The pangs of despised love, the law's delay [my emphasis, CHvR] [...] When he himself might his quietus make, With a bare bodkin?"
73. See mainly chapter V of part four: "A Voyage to the Country of the Houyhnhnms" ("[...] after which they consult precedents, adjourn the cause from time to time, and in ten, twenty, or thirty years come to an issue").
76. J.M. van Veggel, 'Versnelling en vereenvoudiging van procedures', in J.G.A. Linssen, J.B.M. Vranken (eds), Ontwerp (op.cit.), p. 75.
77. C.H. van Rhee, Litigation (op.cit.), p. 342.
78. C.H. van Rhee, Litigation (op.cit.), p. 313 et seq.
80. M. Zander, Lord Woolf's Proposed Reforms (op.cit.), p. 79.
of this may be found more recently in history in the 1881 *Handelingen van de Nederlandse Juristenvereniging* (Acts of the Dutch association of lawyers). J.J. van Geuns asserted there: "All of our time strives toward speed; the improved means of community, increased trade, discoveries in every area, more widespread knowledge and as a result, also effort which is demanded of the citizen, should dictate that the question of what is right in many relations in life, would usually be amenable to being resolved that much more rapidly; but the configuration of forms and formalities that must give an answer to that question continue, with few exceptions, to pursue unperturbed their sluggish course."^82

Today I cannot address all the points from the history of procedural law that demand further study in shaping an efficient contemporary system of civil procedure. I will therefore limit my comments to one of these points, namely, the efforts to design a quick and inexpensive procedure by choosing to reinforce the oral element.

Many consider an oral procedure (or at least a procedure that, in addition to documentation, affords ample opportunity for the spoken word) to be the solution for delay and high costs.^83 It has been asserted that an oral procedure offers the potential for disputed points to be rapidly delineated and to get the truth on the table quickly, without requiring that excessive concessions be made in the area of the parties' autonomy. By contrast, a procedure in which the emphasis is placed on documents is considered to be detrimental to an efficient course of proceedings.^84 Adherents to this view will completely agree with the approach taken by Pantagruel when he said: "[...] si voulez que je connaisse de ce procès, premièremenet faitez-moi brûler tous ces papiers; et secondement, faitez-moi venir les deux gentils hommes personnellement devant moi, et quand je les aurai ouï, je vous en dirai mon opinion sans fiction ni dissimulation quelconque."^85 ("If I had to adjudicate this matter, I would first want all these documents to be burned, then I would have these gentlemen appear before me in person, and after having heard them, I would render my opinion without fabrication or pretense.") However, the study of comparative law and the history of law proves that an oral procedure is not an automatic solution to the problem in question.

In the first place, one can point to English procedural law, pursuant to which cases are, to a significant extent, oral in nature.^86 Nevertheless, the English procedure (at least, the procedure as it existed before the recent reforms) does not constitute the ideal of efficiency.^87 H. Kötz characterised the procedure of Common Law as the "Rolls Royce of civil procedures."^88 This seems an apt characterisation, given that on the one hand this procedure affords a high level of quality (for example, the principle of parties having extensive opportunity to be heard and cross examine the opponent party is accommodated to a great extent, and the procedure provides for very thorough investigation of the facts), but on the other hand it turns out to be so prolonged and expensive that many would think twice before trying to enforce their rights through an English court. It is still an open question whether the recent reforms will change this situation.

The history of law also proves that an oral procedure does not provide a panacea for

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^84. D. Binger, ‘De denkbeelden van Mr. F.J.A. Fles over het oraal debat in burgerlijke zaken’, *Weekblad van het Regt* 3317 (1871), pp. 3-4; C. Hahn (ed.), *Die gesammten Materialien* (op.cit.), pp. 114 and 117.

^85. This passage is found in chapter 10 of *Pantagruel*.


speed and reduced expense. It is well known that the Roman canon procedure emphasised written submissions. The rule that applied to this system of procedural law was: "quod non est in actis, non est in mundo", or, the judge bases his decision only on what has been laid down in writing. By contrast, the indigenous procedure, many elements of which would eventually be suppressed in accommodation of the newly-acquired procedure, was oral in nature. Nevertheless, L. Fowler-Magerl determined that the reception of the Romano-canonical procedural law was favourably influenced by the fact that the newly-acquired (written) procedure led to a more rapid final decision than the indigenous (oral) litigation process.\(^\text{89}\)

In light of the above, further study of forms of procedure in which the emphasis is on oral aspects would be useful for reformers currently working on procedural law. The fact that such oral features were often introduced in the past with the goal of making the process more efficient, but did not subsequently persist for long is a fact that deserves their special attention.

In this context, so-called summary proceedings comprise an interesting object of study. The well-known Saepe decretal of Pope Clemens V provides the basic text for the summary proceedings.\(^\text{90}\) In 1306 this decretal effected the official introduction of a fast-track procedure into Romano-canonical procedural law for a limited number of actions. Under this system of summary proceedings, matters were settled simpliciter, de plano, sine strepitu et figura iudicii, which (loosely translated) means: simply, without ceremony and without the tumult and formalities of a [standard] proceeding. This meant that the procedure was, to a significant extent, oral in nature.\(^\text{91}\) Although the oral element was a preponderant component of the original summary proceedings, this element disappeared as soon as an attempt was made to introduce summary proceedings as the standard form of procedure for all cases. One example of this is provided by the 1654 rules of the Reichstag in Regensburg.\(^\text{92}\) These rules introduced a procedure into the German Reichskammergericht that was based on the summary proceedings customarily used in Sachsen.\(^\text{93}\) The character of the procedure as reformed was largely written. The Dutch Lex Hartogh of 1896 is another example that also introduced a standard procedure inspired by summary proceedings.\(^\text{94}\) Here again, the oral element was relegated to the background.

A second interesting object of study where the suppression of oral features in favour of a more document-based conduct of the proceedings may be observed is German procedural law as embodied in the 1877 Zivilprozessordnung. Originally, according to the Zivilprozessordnung the judicial decision was to be based only on information that had been presented orally.\(^\text{95}\) By as early as 1924, however, measures were instituted that made it possible to refrain from an oral hearing of the case in certain circumstances.\(^\text{96}\) Although in the 70s G. Baumgärtel was still eager to reinforce the oral element in the German procedure,\(^\text{97}\) a further expansion of the written aspects may be discerned thereafter.\(^\text{98}\)


\(^{90}\) c. 2 Clem. V, 11.

\(^{91}\) See also R.C. van Caenegem, *History* (op. cit.), p. 20.


\(^{93}\) R.C. van Caenegem, *History* (op. cit.), p. 57.

\(^{94}\) See A.F.K. Hartogh, C.A. Cosman, *De Wet van 7 juli 1896 (Stbl. no. 103) tot wijziging van het Wetboek van Burgerlijke Regentsvordering*, Gebroeders Belinfante, The Hague, 1897, p. XIV et seq.


\(^{98}\) Cf. the *Rechtsplege-Vereinfachungsgesetz* of 17 December 1990. On this subject, see H. Prütting,
Other countries also increasingly chose a course of procedure that emphasised the written aspects. Belgium did this with the introduction of the 1967 Judicial Code (Gerechtelijk Wetboek).\(^9^9\) Likewise, a movement can be seen in England in the direction of a written procedure, originally only for small claims.\(^1^0^0\) Given the continuing confidence in the oral process that can now be simultaneously observed in many European countries\(^1^0^1\) (consider, for example the accelerated regime in the Netherlands, as well as the report of the Leemhuis Commission), the reason for the failure of efforts made in the past to shape a process in which the emphasis was placed on oral procedure constitutes a subject worthy of study. This may provide an answer to the question of whether the confidence in the oral procedure is justified or whether solutions to a sluggish and expensive procedure could best be sought elsewhere.

**Conclusion**

I hope to have demonstrated that procedural law need not be exclusively the domain of "dull practitioners."\(^1^0^2\) Since the twelfth century, procedural law has always been considered a scholarly discipline. It has enjoyed the interest of great legal scholars throughout the ages. Today as well there are also a multiplicity of issues in the area of procedural law that require an erudite approach grounded in the history of law and comparative law. I have indicated some of these issues. I think these and similar issues of procedural law must be pivotal in both academic research and academic teaching. This will, in my opinion, further efforts to harmonise procedural law in a European context. Additionally, I hope to have shown that the problems we confront today in the area of procedural law are not merely matters of the here and now. These problems are as old as our procedural law itself. The same is true of efforts to ameliorate the relevant problems by reforming the procedure. Earlier efforts cannot be simply ignored by modern reformers. It is important to always bear in mind that the present and the future can only be understood with an adequate knowledge of the past.

\(^1^0^0\) A.A.S. Zuckerman, *Reform* (op. cit.), p. 72.
\(^1^0^1\) Beyond Europe there is also significant confidence in the oral procedure, witness, for example, efforts in Central American countries to introduce an oral system there (communication from M.A. Field, Langdell Professor of Law, Harvard Law School, who has been involved in these efforts).
\(^1^0^2\) Cf. M.A. von Bethmann Hollweg, *Der Civilprozess* (op. cit.), p. 270.