Maastricht University

Civil Procedure

Citation for published version (APA):

van Rhee, C. H. (2002). Civil Procedure. In M. P. D. Faure, J. P. M. Smits, & H. P. D. Schneider (Eds.), *Towards a European Ius Commune in Legal Education and Research* (pp. 271-273). Intersentia.

Document status and date:
Published: 01/01/2002

Document Version:
Accepted author manuscript (Peer reviewed / editorial board version)

Please check the document version of this publication:

• A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
• The final author version and the galley proof are versions of the publication after peer review.
• The final published version features the final layout of the paper including the volume, issue and page numbers.

Link to publication

General rights
Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

• Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
• You may not further distribute the material or use it for any profit-making activity or commercial gain
• You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the “Taverne” license above, please follow below link for the End User Agreement:

www.umlib.nl/taverne-license

Take down policy
If you believe that this document breaches copyright please contact us at:

repository@maastrichtuniversity.nl

providing details and we will investigate your claim.

Download date: 10 Aug. 2020

C.H. van Rhee, 'Civil Procedure', in: M. Faure, J. Smits, H. Schneider (eds.), *Towards a European Ius Commune in Legal Education and Research*, Antwerp/Groningen, 2002, p. 271-273.

CIVIL PROCEDURE

Introduction by C.H. van Rhee

Civil procedure is one of the most history laden branches of the law. In many countries on the European continent, this procedure still has a distinctively Romano-canonical flavour (in my opinion, this is even the case in Germany, although P.H. Lindblom in a recent article in the *European Review of Private Law* ('Harmony of the legal spheres. A Swedish view on the construction of a unified European procedural law', *ERPL* 1997, p. 11-46) does not seem to agree with my point of view). Consequently, the significance of many of the modern rules can only be evaluated fully by a study of their long history. Strangely enough, most legal historians (just as their colleagues in the area of positive law) have not shown much interest in the study of procedure. As a result, modern treatises on the history of procedure are scarce, especially if one compares their number to studies dedicated to the history of other areas of the law.

A study of procedure in the past may shed extra light on many issues, for example on why the majority of civil lawsuits are still slow and costly even though attempts have been made to change this situation for at least seven centuries. The first paper in this section by professor K.W. Nörr contains (amongst other things) valuable information for the framing of a programme of research, for example as regards delay in civil procedure; it offers an insight regarding approaches to the history of procedure in the past as well as in present times . From the perspective of the study of procedural delay, the *ordine isonomico* and *ordine asimmetrico* dichonomy as proposed by Giuliani and discussed by professor Nörr, may play an important role.

The two remaining papers discuss two different periods in the history of procedure and show the changing attitude of the legislature to procedural reform. The paper by professor A.A. Wijffels depicts a legislature who has taken the traditional approach to procedural reform by focussing on the rules of procedure. It evokes the conviction of the late 18th and early 19th century lawmaker that good rules result in an expedient and affordable procedure. The aim of the legislature, therefore, is the search for beneficial rules. It imposes short time-limits and restricts any means of procrastination and delays at the different stages of the proceedings. Additionally, it relies to a certain extent on the faithful application of the rules by the judge and the litigants (or their counsel).

The study of procedural reforms in the past shows, however, that rules which are good in themselves are not a guarantee for a quick and an inexpensive procedure. More than once rules which could have furthered expediency and reduced costs (i.e. 'good' rules) have been applied in such a manner that the benefits they might have brought were taken away. This was either the result of their (intentional or unintentional) misinterpretation by those who had to work with them, i.e. the bar and the judiciary, or of their outright abuse.

An example of the first situation can be found in the 19th century State of New York. In 1848 New York witnessed the introduction of a code of procedure (named the Field Code after its main drafter), which aimed at curbing the evils of common law and equity procedures. The Field Code introduced a single procedure for both jurisdictions. However, due to the conservative attitude of members of the bar and the judiciary many of the new rules were misinterpreted and, as a result, old practices dating from before 1848 were retained. Consequently, the new rules did not bring the reforms so much wished for by the legislature (at least not immediately).[1]

An example of the outright abuse of rules may be found in the area of 'exceptions' or preliminary defenses of continental civil procedure. The rules governing this area of the law aimed at guaranteeing that preliminary defenses were introduced in a particular order (in various countries this is still their aim) and decided on in separate rulings before the defense on the merits. They made sure that issues which should be addressed in the initial stages of the proceedings could be addressed in this stage. The rules prevented, for example, a defendant pleading that the court lacked jurisdiction after having introduced his defense on the merits. This was beneficial because a successful preliminary defense would make proceedings on the merits superfluous. Nevertheless, defendants interested in using delaying tactics could abuse these rules, for example, by putting forward a long list of preliminary defenses they knew would not meet with success in order to have the court refute these defenses in a series of separate rulings and, thereby, cause delays. This was, indeed, what happened in practice.[2]

The conviction that good rules do not necessarily result in an expedient and affordable procedure is reflected by the last paper printed in this section, i.e. the paper by professor W.D.H. Asser. Professor Asser claims that the introduction of new rules in order to reform the procedure will only be successful if these rules meet the needs and interests of all parties concerned. He further claims: 'Instead of regarding the proceedings in court as a battlefield both parties should see it as a joint responsibility to enable the court to render justice or, if possible, to settle the dispute in some other way.' It is a change of attitude reformers should concentrate on, something which was advocated in England by Lord Woolf. Lord Woolf's proposals for reform of English civil procedure have been enacted in 1999. According to these rules the parties and the court should cooperate in deciding an issue at law. It is Lord Woolf's conviction that although the rules should be changed, changing them alone is not enough. In his paper professor Asser subscribes to this point of view.

It is my conviction that the issues addressed by professors Asser, Nörr and Wijffels have considerable significance for those involved in bringing about the harmonization of civil procedure, either in a European context or on an even larger scale.[3] Taking note of past experiences may help avoiding some of the pitfalls of the past and,

---

[1] On the Field Code, see my article in D. Heirbaut a.o. (ed.), *Handelingen van het XVe Belgisch-Nederlands Rechtshistorisch congres*, Antwerp 1998.

[2] On exceptions, see my forthcoming article *'Exceptiones dilatoriae' and 'peremptoriae': from Roman Law to Modern Civil Procedure in the Netherlands* (to be published in Festschrift J. Spruit).

[3] For harmonization in Europe, see M. Storme (ed.), *Approximation of Judiciary Law in the European Union*, Antwerp 1994. For harmonization on a world wide scale, see the *Principles and Rules of Transnational Civil Procedure* drafted by the Working Group for the Preparation of Principles and Rules of Transnational Civil Procedure, set up jointly by UNIDROIT and the American Law Institute (http://www.unidroit.org/english/procedure/main.htm).

therefore, contribute to the framing of a truly satisfactory procedure. Let us hope that we do not need to wait another seven centuries before the introduction of such a procedure.