

The Law's delay: An introduction

Citation for published version (APA):

van Rhee, C. H. (2004). The Law's delay: An introduction. In C. H. V. Rhee (Ed.), *The Law's delay. Essays on Undue Delay in Civil Litigation* (pp. 1-21). Intersentia.

Document status and date:

Published: 01/01/2004

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.

C.H. van Rhee, 'The Law's delay: An Introduction', in: C.H. van Rhee (ed.), *The Law's delay. Essays on Undue Delay in Civil Litigation*, Antwerp/Oxford/New York 2004, p. 1-21.

For further information on this book, see:

<http://www.intersentia.be/zoekdetail.asp?titel=&auteur=&isbn=&vakgebied=&trefwoord=&datum=&auteurid=401&reeksid=&pageid=0&page=1&pid=1095>

THE LAW'S DELAY

Introduction

Civil procedure and delay were born together. This is, of course, due to the fact that no lawsuit can be decided fairly without at least some minimum period of time in between first presenting the case to a court and obtaining a final judgement. Manifestly this type of delay is not problematic. Delay becomes a problem, however, if it can be classified as 'undue delay', i.e., when it is felt that too much time has elapsed between the filing of an action and its ultimate decision by the court. Although it is difficult to establish what amount of time can be classified as 'too much time', and also because opinions as regards this issue may differ from country to country and from period to period, it is no secret that undue delay has been part of modern procedure from almost its conception. This becomes evident when one studies the history of the Romano-canonical procedure, the 'mother' of most procedures on the European Continent. Already at the beginning of the thirteenth century and thus at an early stage in the development of the Romano-canonical procedure, a summary procedure was framed in order to decide a designated group of cases more quickly than the ordinary procedure allowed (*Clementina Saepe*). In this summary procedure, parts of the ordinary procedure could be omitted and it is clear a balance was sought between a quick administration of justice on the one hand and an acceptable end-result (i.e., a judgement) on the other hand.¹ Apparently, the ordinary procedure was deemed to be too slow for certain categories of cases. However, this was not a definitive solution to the problem of undue delay, as is shown by later complaints about the slowness of the litigation process and attempts to increase its expediency.

Complaints as regards delay are not restricted to the Civilian systems of the European Continent, where the Romano-canonical system was most influential, but they are also part of the 'life of the law' in Common Law jurisdictions. This is apparent from literary sources, for example where Hamlet in his famous 'To be or not to be' complains about 'the law's delay',² and anyone familiar with the work of Charles Dickens will know that the problem has persisted ever since. (Of course, Dickens' novel *Bleak House* is very well known in this connection. However, in his other novels, too, e.g., in *The Pickwick Papers*, Dickens criticises the slowness of the adjudication process in England). Recently, proposals made by a commission chaired by Lord Woolf, then Master of the Rolls, have resulted in reforms aimed at increasing the expedition of English civil procedure.

¹ On *Saepe* see the paper of K.W. Nörr in this volume. When referring to papers included in this volume, only the author's name will be mentioned.

² Although Hamlet was a Danish prince, we must assume that Shakespeare had English practice in mind when writing his play.

Even though there have been many more reform attempts and measures have been taken during the last 800 years in both Civilian and Anglo-American jurisdictions to accelerate civil litigation, complaints are still being voiced today. The legislature and rule-making authorities as well as numerous reform commissions continue to be occupied in curbing the evil of undue delay, often without much success. This may be due to various reasons, one of them being the fact that often not much attention is paid to earlier reform attempts and the reasons for their failure (or their temporary success). The lack of attention for the past becomes evident (and this is just one of many examples) if one consults the reports ‘Access to Justice’ by Lord Woolf and his commission. Although numerous relevant reports are available in the *British Parliamentary Papers* on the deficiencies of the English civil justice system since the beginning of the nineteenth century, Lord Woolf and his commission only consulted a few of them. This fact can, however, not be held against Lord Woolf since the sheer volume of the available reports is forbidding. Nevertheless, putting these reports aside is in my opinion not a desirable solution. One would have expected, at least from a continental perspective, that academic studies would have made the findings of the various parliamentary commissions accessible to the public, but this is not the case. Although at present this situation may be changing due, for example, to the interesting study of Patrick Polden on the history of the County Court,³ a large amount of work still needs to be done.⁴

The absence of an in-depth knowledge of past experiences may result in inaccurate findings for the future and also in the idea that the current problems in the area of civil procedure are unique (which they certainly are not). In an Explanatory Memorandum on repealed Dutch legislative proposals on civil procedure from the 1990s,⁵ for example, one finds the following quote:

‘[c]urrently [my emphasis] [...] civil matters [should] in the first place 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 seems that it would have been better to omit the word ‘currently’, since the need to litigate expeditiously has been felt at all times. Consequently, undue delay was, and still is, regarded as a problem.

The absence of an interest in the history of delay in civil procedure is also shown by the fact that measures that have proven to be unsuccessful in the past are repeatedly reintroduced, even in the same country, in order to fight delay. It is my conviction that if the legislature and the rule-making authorities were to have taken past experiences

³ *A History of the County Court, 1846-1971*, Cambridge, Cambridge University Press, 1999. Another interesting study is R. Stevens, *Law and Politics. The House of Lords as a Judicial Body, 1800-1976*, London, Weidenfeld & Nicolson, 1979.

⁴ Unfortunately, a paper on nineteenth-century reforms in English civil procedure aiming at reducing delay could not be included in the present volume since an author willing to write such a paper could not be found. In a forthcoming volume on Common Traditions in Civil Procedural Law, that is currently being prepared by A.W. Jongbloed (Utrecht), P. Oberhammer (Zürich), A. Wijffels (Louvain-la-Neuve) and myself (with contributions of N. Andrews – Cambridge - , J. Blackie – Strathclyde - , L. Cadiet – Paris - and P. van Orshoven – Louvain), and that is to be published by Intersentia Publishers, a chapter on the English nineteenth-century reforms will be included.

⁵ Tweede Kamer 1995-1996, 24 651, number 3 (memorie van toelichting), p. 45.

into consideration, many of the mistakes made by earlier generations could have been avoided. They would certainly not have been repeated.

Apart from an historical (comparative) approach to undue delay in civil procedure, a modern comparative approach is also very much needed. Although as regards modern systems of civil procedure important studies are available,⁶ one can certainly not claim that a sufficient body of literature does exist. This may partly be due to the fact that in many countries civil procedure is not regarded as a serious academic subject of study (notably in England), but usually seen as something that belongs exclusively to the domain of practitioners. Although there are some exceptions, such as Germany and Italy, in other countries chairs of civil procedure are non-existent or only filled part-time. This is unfortunate, since, as German and Italian scholars have shown, the subject is worthy of academic inquiry.

In order to enlarge the body of comparative and historical literature on the subject of undue delay in civil procedure, a conference was organised at the Maastricht Law Faculty (within the framework of the Ius Commune Research School) on April 24-25, 2003. Its aim was to bring together legal scholars with a comparative and historical interest in civil procedure. The papers presented at this conference are published in the present volume. Although scholars from many jurisdictions were invited, in the end papers were only presented by colleagues from Europe, North America and South Africa.

A decision was taken not to issue a questionnaire to the scholars presenting a paper and to leave to them the choice of the specific topics to be treated in their paper (as long as delay in civil procedure was the main theme). Since the present volume is intended as a first attempt, hopefully resulting in further publications,⁷ it was felt that the authors should be given the largest amount of freedom in framing their papers in order to obtain a good survey of as many relevant themes as possible.

Causes of undue delay

The study of the causes of undue delay in civil litigation is not an easy topic. Empirical data are often not available. Consequently, the Hungarian approach of obliging judges to fill out monthly reports with detailed causes of case postponements⁸ may be beneficial, although the administrative burden caused by this approach cannot be disregarded; it might hinder the judges from devoting a sufficient amount of time to adjudicating cases. Given the lack of data, more than once the student of civil procedure needs to rely on the rather impressionistic views that can be found in documents related to new legislation and rules of court. Some authors

⁶ E.g., A.A.S. Zuckerman, *Civil Justice in Crisis. Comparative Perspectives of Civil Procedure*, Oxford, Oxford University Press, 1999. Also in the Netherlands, the Interim Report of a commission appointed to re-evaluate the Dutch law of civil procedure contains an extensive chapter on foreign systems: W.D.H. Asser, H.A. Groen, J.B.M. Vranken (with assistance of I.N. Tzankova), *Een nieuwe balans. Interimrapport fundamentele herbezinning Nederlands burgerlijk procesrecht*, The Hague, Boom Juridische Uitgevers, 2003.

⁷ In this respect a project financed by the German Gerda Henkel Foundation on the History of Undue Delay in Civil Procedure can be mentioned. I have the honour of being the general editor of the volume that will result from this project. The volume will be published as part of the series *Comparative Studies in Continental and Anglo-American Legal History* (Duncker & Humblot, Berlin).

⁸ F. Glatz.

suggest that it is questionable whether these documents identify the real reasons for undue delay. In the present volume, Paul Oberhammer suggests, and I think rightly so, that the aim of policy-making in the field of procedure is quite often not to speed up litigation, but merely to obtain savings for the national budget. The author states that in his view apparent shortcomings can be overcome by investing more money in the judicial infrastructure, but, since this is an expensive solution, the legislature frequently chooses the ineffective but relatively cheap, simple and politically visible instrument of legislation. Additionally, on the basis of nineteenth-century materials related to the French *Code de procédure civile*, Alain Wijffels is of the opinion that the real problem the legislature tries to fight is not so much undue delay. Instead, the related problem of high costs associated with civil litigation is identified as the main focus of attention. According to Wijffels, it seems that in nineteenth-century France there was not a pressing need for the speeding up of civil lawsuits as long as costs could be kept under control.

These and similar observations should, in my opinion, be kept in mind when evaluating documents in which the legislature and rule-making authorities express their views on undue delay and the solutions to this problem. This is not to say, however, that the reasons we find expressed in these documents are not worthy of serious consideration, but only that some degree of caution is needed.

What are the reasons that were and still are advanced for the slow pace of litigation? The papers in the present volume contain a large selection of factors that have been identified over the centuries as lying at the root of slowness. It is not possible to discuss these factors exhaustively in this introduction. What I would like to do here is to present a selection with the aim of identifying some common themes. I have intentionally limited myself as far as possible to the information that can be found in the present volume, although there were occasions when there was temptation to go beyond what can be found in the papers included in this book. For reasons of convenience, I shall discuss my selection of factors under three headings: (a) external factors, (b) factors related to the actors involved in civil litigation, court organisation and the court budget, and (c) procedural factors.

External factors

Delay in civil litigation may well be the result of factors unrelated to court organisation and procedure, i.e., to factors that I shall call ‘external factors’ in this introduction. Several of these factors are mentioned and/or discussed in the present volume. A good example of delay caused by external factors can be found in Paul Carrington’s paper on asbestos litigation in the United States. When discussing the avalanche of cases that have been brought in the United States by victims of diseases related to the use of asbestos during the larger part of the twentieth century and the resulting crippling caseload of the courts, the author points out that the absence of public health care and unemployment insurance systems in the United States that are comparable to those of many European Countries has been an incentive to victims to acquire compensation for their illness through the United States court system.⁹

⁹ An interesting essay dealing with the outlook of the American justice system and ‘external factors’ in general was published by P. Carrington under the title ‘Die Streit-Macht’ in *Der Tagesspiegel*, number 18 288, Sunday 2 November 2003, p. 7.

The importance of ‘external factors’ as regards undue delay in Europe appears in the papers on Hungary and Poland. Both Ferenc Glatz and Fryderyk Zoll indicate that after the changes in the political and economic systems of those countries, the caseload of the courts increased to a considerable extent causing delays in the hearing of cases.¹⁰ Most likely, the transition to a market economy was one of the main reasons behind this development.

The prevailing political and economic system also lay at the base of undue delay discussed in some of the papers focussing on the *Ancien Régime*. The absence of a separation of powers, for example, contributed to slowness. This is apparent where Mark Godfrey and Ditlev Tamm mention the ability of the Sovereign to interfere with the administration of justice in Scotland and Denmark respectively. By means of royal letters addressed to the higher royal courts, the Sovereign was able to influence the hearing of an action in these jurisdictions. My own paper¹¹ shows that a similar situation existed in the Low Countries, where the Sovereign, at least in certain cases, tended to interfere if he was of the opinion that the hearing of an action should be halted in order to attempt an amicable settlement of the case. Apparently, the delay caused by this interference was considered to be unjustified; in the Netherlands and in other jurisdictions we find rules ordering the courts to ignore the Sovereign’s letters. At first sight this may seem odd, because both the letters interfering with the administration of justice and the rules ordering the courts to ignore them were issued in the Sovereign’s name. However, the situation becomes understandable if one realises that the letters interfering with the administration of justice were issued by an ‘administrative’ body other than the body promulgating rules against them.

Apart from political and economic ‘external factors’, the physical geography of a country and the available means of communication may have an effect as regards the expediency with which cases are being handled by the courts. These factors are discussed in Serge Dauchy’s paper on colonial Québec. Dauchy takes the reader to the seventeenth century and shows that the nature of the landscape of Québec and the available means of communication were such, that the time-limits that had been fixed for civil litigation in France in the *Ordonnance civil* of Louis XIV, could not be observed. A more flexible approach to time-limits was needed and, consequently, the Ordinance was modified. Anyone familiar with the history of procedure will know that this must have been felt to be a dangerous approach by many law-making authorities throughout the centuries since for a long time the general opinion was that it was exactly flexibility that resulted in undue delay.

For a last ‘external factor’ influencing the speed with which cases can be handled by the courts I again refer to the paper of Ditlev Tamm. This author states that cases were expeditiously handled by the courts in medieval and early-modern Denmark and holds that the relative paucity of legislation may have been one of the reasons behind this situation. I think this is a very pertinent observation with respect to the situation today,

¹⁰ A heavy caseload is also mentioned as a cause of delay in other papers (e.g., W. de Vos, P. Yessiou-Faltsi).

¹¹ See also my *Litigation and Legislation. Civil Procedure at First Instance in the Great Council for the Netherlands in Malines (1522-1559)* (= Studia 66), Brussels, Archives Générales du Royaume et Archives de l’État dans les Provinces, 1997, p. 61-63 and 327.

where the amount of legislation that is being poured out over the citizen is growing more quickly than ever before. Reducing the number of rules and regulations may not only be beneficial to individuals and stimulate economic activity, but it may also make our court system more healthy.

Factors related to the actors involved in civil litigation, court organisation, and the court budget

Many of the factors that have been discussed under the heading 'external factors' cannot be influenced by law reformers aiming at increasing the expedition of civil actions. As regards the factors dealt with under the present heading the position is different, but, nonetheless, it seems that some of the topics discussed below have not enjoyed any significant degree of attention in any of the periods discussed in this volume. This may be due to the fact that influencing these factors involves an increase in the budget for the judiciary. Measures that cost money are, for obvious reasons, not very popular with those who have to furnish that money. Therefore, means are sought to fight the evil of delay in another manner. Something that is at the same time promising and relatively inexpensive is to try to influence the procedural attitude of the actors involved in civil litigation. I shall start with discussing this theme.

The actors involved in civil litigation

In his paper, Daan Asser stresses that currently litigation is too much perceived by lawyers as well as by courts as a (regulated) battle and not as a means to solve an existing problem between the parties by way of co-operation. Asser, just as Lord Woolf has done in England, emphasises that we need a change in culture. The participants in the litigation process should stop viewing litigation as a battle, and begin co-operating in order to solve their problem. Asser claims that one should look at civil litigation 'in terms of helping people to solve their difficulties instead of helping them to fight them out'. Co-operation between the parties and a joint responsibility is needed. The author, who is currently involved in the reform of civil procedure in the Netherlands, suggests that courts should not decide procedural difficulties in the same manner as the merits of the case. In his opinion, procedural matters should be regarded as matters of management. Nevertheless, co-operation still is a distant goal in many countries. As a result, different kinds of procedural tactics are used which do not guarantee an expeditious decision of the action. One may, for example, refer to the tendency of litigants to keep their cards close to their chest and only at a relatively late stage inform the court and their opponent of their actual position. This is not only problematic in Continental but also in Anglo-American jurisdictions. Wouter de Vos, for example, stresses that it is a problem in South Africa, a country that, as far as civil procedure is concerned, clearly belongs to the Anglo-American tradition (of course, in the area of substantive private law South Africa, with its Roman-Dutch Law, may be characterised as a so-called 'mixed legal system').

The attitude of the judges is mentioned as a cause of delay by Michael Macnair. This author focuses on the personal predisposition of the judges. Judges may, for a variety of reasons, be over-cautious in ensuring that due process is followed. Macnair illustrates his point of view with the example of Chancellor King who showed such an attitude as an equity judge in the eighteenth century, according to Macnair due to his Common-Law background. The author states: 'Rigorous defence of the rights of

parties [...] to bright-line rules and to due process and procedure, may naturally tend to produce delays additional to those inherent in various concrete systems of judicial procedure'. As regards eighteenth-century Danish judges, a similar observation is made by Ditlev Tamm, who notes that these judges gradually found it safer to grant adjournments in order not to be accused of denial of justice than to proceed expeditiously.

Not only the procedural attitude of the actors involved in civil litigation, but also other factors related to them play a role as regards the expedition with which cases are handled by the courts. One factor is the quality of court staff. Quality may of course be enhanced by training programmes,¹² but at the same time good selection mechanisms are indispensable. In this context, Hamilton Bryson discusses the fact that in seventeenth and eighteenth-century England many public offices, including those of the clerical officers of the courts of law, had become sinecures. The holders of these offices, Bryson states, 'were paid nominal salaries, if any at all, that had been fixed in the middle ages'. '[T]hey supported themselves by fees that were, by ancient tradition, attached to the various services they rendered'. Additionally, they did not necessarily, perform the duties attached to the office themselves, but appointed a deputy to do the actual work for a small salary. Of course, as a result of this system there were no guarantees that court officials were competent and, consequently, delays could be expected.

Although sinecures do not exist anymore, the selection of court staff should remain the focus of attention of those who are interested in avoiding unnecessary delays in court. Optimal circumstances for selecting the most able professionals should be created and maintained. A scenario, sketched by Ferenc Glatz, should be avoided. This author holds that by not offering an attractive career opportunity to talented young lawyers, counter-selection takes place, leading to the courts being staffed with low quality professionals. This problem may be aggravated by appointments of judges and other court staff for political or personal reasons, something that is mentioned as a problem by Hamilton Bryson and Alan Uzelac. At the same time, the papers in this volume also show that the involvement of highly skilled professionals in the administration of justice is not a guarantee of expeditious procedure. From Ditlev Tamm's paper it even appears that courts staffed with non-professional lawyers deal with cases with more dispatch than courts staffed with professionals. In addition, Serge Dauchy mentions that in colonial Québec the presence of learned legal counsel was felt to complicate matters and result in delay. Consequently, the colonial authorities forbade litigants to make use of the services of legal counsel. Of course, that this approach was based on Luther's stereotype of 'Juristen, böse Christen' is clear, even though there may have been some truth in the opinion of the colonial authorities in Québec. This is demonstrated by Ditlev Tamm, who claims that from the eighteenth century, when legal counsel became involved in litigation in Denmark, delay became a serious problem. A cautious observer might, I think, agree with the opinion mentioned in Alan Uzelac's paper, that the presence of lawyers does not always lead to effective and speedy litigation.

¹² A. Uzelac.

One final interesting issue related to the actors involved in the litigation process that I would like to mention here is the manner in which court staff is paid. The method of payment should not be an incentive for complicating and increasing court business. Here sinecures in seventeenth and eighteenth-century England are again relevant. Because the holders of these sinecures were paid by fees that were attached to the various services they rendered, there was an incentive to increase business, i.e., to require unneeded services and therefore delay.¹³ Although, as far as I am aware, a system in which court staff are directly paid by the litigants for the services they render does currently not exist in any of the countries discussed in this volume, the history of sinecures shows that any interest (financial or other) of court staff in particular cases should be avoided at all costs. A *conditio sine qua non* for a disinterested approach to cases from the financial point of view is of course paying judges and court staff a decent salary, and it is clear that this is still problematic, even in some parts of the Western, democratic world.

Court organisation

Court organisation determines, at least to a large extent, the actual amount of time that a court can devote to administering justice. Various papers in the present volume point out, that delay was and is caused by the fact that judges, for various reasons, may in fact devote too little time to actually hearing and deciding cases. In medieval and early-modern Denmark, for example, the royal court only met once a year.¹⁴ The time devoted to hearing cases was felt to be insufficient in medieval England, where the central courts seem to have been in session for only about twenty weeks each year.¹⁵ At the German *Reichshofrat* of the *Ancien Régime* extended court vacations were *en vogue*.¹⁶ In nineteenth-century Finland problems existed at the local court level.¹⁷ Even when courts are in session for a reasonable amount of time, however, the judges might be hindered from hearing cases due to other duties. This might have been the case in eighteenth-century England: Michael Macnair states that the non-judicial business of the equity courts (e.g., the administration of estates and guardianship) took a lot of time of the judges. Even today, problems continue to exist. As regards Hungary, for example, Ferenc Glatz suggests that it would be a good idea to introduce professional management in the courts in order to free judges for their core adjudicative work. Professional management can, for example, be introduced by creating a Council for the Judicature (e.g., the *Raad voor de Rechtspraak* in the Netherlands).¹⁸ Isabel Velayos claims that in Spain freeing judges for their core adjudicative work could be achieved by extending the tasks of the clerks of the registry, who, in that country, are fully capable of handling some of the matters that are currently being handled by professional judges.

The Court Budget

The quality of the judicial infrastructure and, consequently, the expediency with which cases can be handled in court, is to a large extent dependent on the amount of money that the state is willing to spend on the courts. Unfortunately, in many countries this

¹³ W.H. Bryson.

¹⁴ D. Tamm.

¹⁵ P. Brand.

¹⁶ W. Sellert.

¹⁷ J. Kekkonen.

¹⁸ A.W. Jongbloed.

amount is far below what is actually needed. The absence of adequate financial resources is a serious impediment to improving procedure. Jukka Kekkonen shows that in nineteenth and twentieth-century Finland reform attempts came to an early halt due to the lack of financial resources. Inadequate budgets may also give rise to salaries that are too low to attract competent court staff. Additionally, inadequate budgets may lie at the root of an insufficient number of judges at the courts. An insufficient number of judges is considered to be a delaying factor in Hungary.¹⁹ Similar observations are made by Isabel Velayos for Spain. The traditional solution of this problem (at least if we take the last two centuries into consideration) is the abolition of panels of judges and the introduction of the single judge and/or a reporter-judge.²⁰ In cases where panels are deemed to be necessary, the problem of an insufficient number of judges is often tackled by appointing university professors or even legal counsel as unpaid part-time judges (this happens, for example, in the Netherlands). Although this offers people with those backgrounds a good opportunity to gain experience on the Bench, especially the appointment of legal counsel has recently turned out to be problematic from the point of view of the impartiality of the court. Nevertheless, imaginative solutions are needed because it is a fact that in several countries the number of judges is insufficient.

Extra resources will also allow the courts to use modern means of communication and data processing more extensively. Various authors argue that modern technology may contribute to expediency.²¹ Money is also needed to achieve logistical improvements in order to use court-time more efficiently, e.g., by transferring some tasks from the judges to other court officials (clerks),²² by outsourcing tasks,²³ and by introducing professional management of the courts.

Procedural causes

Under the heading of procedural causes of delay I shall address some of the reasons for delay, advanced by the contributors to this volume, which find their origin in the rules on jurisdiction and the rules of procedure, as well as in the manner in which these rules are applied.

Jurisdiction

Complicated rules on jurisdiction and the availability of means to challenge jurisdiction may be a significant source of delay. This was one of the problems the Austrian law reformer Franz Klein tried to tackle at the end of the nineteenth century. Unfortunately, as regards jurisdiction, Klein's proposals for reform were unsuccessful, although at present conflicts concerning subject-matter jurisdiction are extremely limited in number in Austria due to later reforms in this area.²⁴ Similar problems exist or have existed in other countries. In the present volume we find overlapping and competing jurisdictions being mentioned as a source of delay in, e.g., early-modern Scotland,²⁵ eighteenth-century England,²⁶ nineteenth-century Finland,²⁷ and modern

¹⁹ F. Glatz.

²⁰ A.W. Jongbloed, A. Uzelac, P. Yessiou-Faltsi.

²¹ See for information on his subject the papers of W. Rechberger & T. Klicka, I. Velayos, A. Uzelac.

²² I. Velayos.

²³ A. Uzelac.

²⁴ W.H. Rechberger & T. Klicka.

²⁵ M. Godfrey.

Croatia.²⁸ In Finland, problems in the area of jurisdiction have, in the nineteenth century, been solved by abolishing certain types of first-instance (i.e., trial) courts.²⁹ In the Netherlands, some of the measures that have been taken to achieve a fusion of the courts of first instance as well as the so-called ‘switch provisions’³⁰ may also result in a more simple jurisdictional structure and fewer jurisdictional problems. However, in other countries simplifying jurisdictional rules is apparently not high on the agenda since there it is felt that the introduction of new, specialised tribunals is a means to fight delay.

Procedure

Throughout the centuries, a variety of procedural rules, as well as procedural guarantees, including due process,³¹ have been identified as lying at the root of delay in civil litigation. As stated above, empirical research in this respect is often lacking, and, especially in proposals concerning (draft) legislation rules on procedure may have been identified as the cause of delay in order to avoid the introduction of measures more costly than a change in the rules. In other words, these proposals may give the false impression that it is mainly the existing rules that cause the problem of delay. Nevertheless, the identification of particular rules as being dilatory in nature in various countries and at various periods in time has, in my opinion, some significance even though more in-depth research into this matter is obviously needed.

A preliminary remark that should be made here is that delay is often not the result of the rules themselves, but of their application in practice. Expeditious proceedings can only be achieved if the rules of procedure are applied in a flexible manner. At least, this is the obvious conclusion to which the observations of various authors in this volume must lead. In the papers of some of these authors (e.g., those of Paul Brand, Ton Jongbloed and Isabel Velayos) strict procedural formalism is identified as a source of delay. To give just one example: In medieval England minor faults in the original writ or in the plaintiff’s count could lead to a dismissal of the claim and, consequently, to delays.³² At the same time, flexibility in the application of the rules, e.g., rules on time-limits, may in itself be a source of delay, and thus in this respect a balance must be found.

A second preliminary remark is that if one decides to fight delay with additional rules, one should make sure that these rules are clear and effective. Peter Gottwald discusses the modern German rule that the judge may set deadlines for performing procedural acts. If judges have not set any deadlines, however, they may preclude the parties from performing acts only if the admission of their arguments would delay ending the proceedings and the party concerned has acted with gross negligence. Obviously, this approach leaves much room for interpretation. Consequently, Peter Gottwald states, there was considerable debate in Germany as to when new argument would delay the settlement of the case. The Constitutional Court (*Bundesverfassungsgericht*) held that

²⁶ M. Macnair.

²⁷ J. Kekkonen.

²⁸ A. Uzelac.

²⁹ J. Kekkonen.

³⁰ A.W. Jongbloed.

³¹ M. Macnair, I. Velayos.

³² P. Brand.

it would be improper to preclude new arguments if the court bears some co-responsibility for their belated pleading or if they are no longer contested. Due to this interpretation, the preclusion rules have lost much of their effectiveness. Nevertheless, rules on preclusion remains a popular means to reduce delay in the German-speaking world and beyond.³³

Turning now to the procedural rules and guarantees as well as fundamental principles that have been identified as lying at the root of delay: First, the adversary system or the passive role of the judge in civil litigation has been identified as causing delay, for example by Lord Woolf in England, and by Wouter de Vos (South Africa) and Isabel Velayos (Spain) in the present volume. Alan Uzelac and Kjell Modéer do not go that far, but it nevertheless appears from their papers that it is a mistake to think that adversarial proceedings are more expeditious than proceedings of a more inquisitorial nature. The problem of the slowness of adversarial proceedings may, according to some, be overcome by case management or, more generally, by increasing the powers of the judge.³⁴ According to others, criminal procedure may serve as a model in this respect.³⁵

In this volume we also find the opinion that adversarial proceedings actually increase expediency, e.g. in the papers of Jukka Kekkonen (Finland) and Ferenc Glatz (Hungary). In Hungary, it is felt that delays can be avoided by a less active judge. Ferenc Glatz states that it is, in his opinion, not the task of the judge to brief the parties about their rights or to draw their attention to additional opportunities to expand their claims. Indeed, the inquisitorial type of judge of the Socialist era is not an example to be followed; an increase in the judge's powers should not result in the judge becoming a party to the suit. To me, it seems, that finding the right mixture of elements from the adversarial and the inquisitorial model of litigation should be the aim of law reformers. In other words, various aspects of both types of litigation should be taken into consideration in order to create an optimal procedure and in order to avoid situations where the legislature cannot make up its mind and constantly oscillates between the two extremes, as was the case in Sweden in the twentieth century.³⁶

Delay is often associated with the observance of procedural guarantees. An example is the rule that both parties should be heard by the court (*audiatur et altera pars*). As a result of this rule, defendants may delay the course of the proceedings by not entering a timely appearance in court and thus obliging the plaintiff to have them re-summoned. Defaulting defendants are, therefore, a serious problem.³⁷ Since the principle of *audiatur et altera pars* is part and parcel of the Romano-canonical tradition,³⁸ maybe even more generally of the Roman-Christian tradition (the rule was also observed in Paradise where, according to the Book of Genesis, God himself summoned Adam with the words 'Adam, ubi es?'), delays caused by the observance

³³ P. Oberhammer, W.H. Rechberger & T. Klicka.

³⁴ On case management in Germany see P. Gottwald. See also W.H. Rechberger & T. Klicka (Austria) and A.W. Jongbloed (Netherlands).

³⁵ This opinion has, for example, been voiced in the German territories; see W. Sellert.

³⁶ K. Modéer.

³⁷ See, e.g., W.H. Rechberger & T. Klicka, I. Velayos.

³⁸ On this subject see: L. Coenraad, *Het beginsel van hoor en wederhoor in het Romeinse procesrecht*, Gouda, Quint, 2000.

of this principle are as old as procedure itself. In this respect I may refer to the observations of Paul Brand on medieval England and Mark Godfrey on early-modern Scotland. Interestingly enough, however, Godfrey states that judging by the absence of rules to curb these delays in Scotland, they were originally not felt to be a problem (i.e., they were not classified as ‘undue delay’).

Related to the idea that both parties should have the opportunity to state their case to the court are the so-called *essoins* which we find in medieval England as well as on the Continent. Defendants who had been duly summoned but who were prevented from making an appearance, could avoid being declared to be in default by sending a messenger communicating valid reasons why no appearance was entered. Of course, these *essoins* would cause further delays if accepted by the court.³⁹

The idea that all relevant parties should be able to state their case can be pursued to extremes. Michael Macnair mentions that in the period studied by him (seventeenth and eighteenth-century England), one of the major procedural obstacles was the need to have all possible parties properly served and to restart proceedings whenever any party died or any female party married.

Another topic that is directly related to delay is the adjournment of the hearing of a case. Obviously, adjournments are potentially harmful for expedition. To what extent expedition may be affected appears, for example, in adjournments to view land in medieval England, discussed by Paul Brand. Additionally, adjournments may become extra harmful if they are related to interlocutory proceedings resulting in a postponement of the hearing of the action on the merits. Limiting the number and length of the adjournments as well as reducing the dilatory effects of interlocutory proceedings is regularly advocated as a means to curb delay. Although some flexibility must be allowed in individual cases, it has been observed that the courts should not be left too much discretion in granting adjournments. Hungary is a good example of a country where strict rules have been introduced in order to avoid adjournments becoming a major source of delay.⁴⁰

Evidentiary proceedings are notorious for their dilatory nature. Various reasons may be advanced as to why this is the case. In some jurisdictions, for example South Africa, part of the blame can be put on the absence of rules limiting the number of witnesses a party may summon. According to Wouter de Vos this is a feature of the adversary system in his country that should be changed. In medieval England, part of the problem was caused by the unwillingness of jurors to make a quick appearance,⁴¹ whereas in courts that applied the Romano-canonical procedure, the rule that the depositions of witnesses were only made known to the parties at a relatively late stage caused delay. Stephen Waddams states that the English ecclesiastical courts, whose procedure was strongly influenced by the Romano-canonical procedure, suffered as a result of this, something that he demonstrates by studying the findings of the nineteenth-century Ecclesiastical Courts Commission.

³⁹ P. Brand. See also my *Litigation and Legislation*, *supra* note 10, p. 290-291.

⁴⁰ F. Glatz.

⁴¹ P. Brand.

Also related to procedures that find their inspiration in the Romano-canonical procedure and proof, is the absence of immediacy when hearing witnesses. According to Pelia Yessiou-Faltsi, this is felt to be an important delaying factor in Greece. Indeed, the presence of the judge in charge of the case when witnesses are being questioned may promote expeditious procedure. At the same time, however, one should realise that the hearing of witnesses by a commissioner of the court and consequent mediacy was at one time introduced precisely in order to save court time and to fight delay.

After a case has been litigated, further delay may be the result of the court not being able or willing to pronounce a timely judgement. This occurred at the German *Reichshofrat*, where, according to Wolfgang Sellert, it was a serious delaying factor. Related to this problem was the employment by the parties of so-called *solliciteurs* at the early-modern Great Council of the Low Countries. There, these *solliciteurs* had to petition the court over and over again to pronounce judgment, apparently because the court did not render a timely judgement *ex officio*.⁴² In today's world pronouncing judgements in time still seems to be problematic. To attack this problem, measures have been introduced in some countries, e.g., in Greece and the Netherlands, allowing courts to deliver summary rulings in certain types of cases. In Greece, summary rulings are allowed in interlocutory matters, whereas in the Netherlands, the Supreme Court (*Hoge Raad*) may decide to issue such a judgement on the merits if it is of the opinion that the judgement of the lower court, submitted to its scrutiny, may be upheld and does not give rise to fundamental legal questions.

On the basis of the above, one may conclude that the standard procedure has various features that are not satisfactory from the perspective of delay. Some are of the opinion that summary procedures at first instance (and on appeal)⁴³ are the solution to this problem. Such simplified procedures may be an adaptation of the standard procedure or have a completely different outlook.⁴⁴ An example of the former type of procedure is one that allowed the court to combine together steps that under the standard Romano-canonical procedure had to be taken consecutively. We find this type of summary procedure, for example, at the medieval and early-modern English ecclesiastical courts.⁴⁵ Additionally, summary procedures could allow some of the steps in the ordinary procedure to be omitted altogether, as is demonstrated by Knutt Wolfgang Nörr (*Clementina Saepe*).

Today, experiments with summary procedures continue to take place. An example is the so-called 'accelerated regimen' in the Netherlands, an experiment originally started at the Rotterdam court that has resulted in changes to the Code of Civil Procedure. Features of this regimen are strict time-limits, the harmonisation of time-limits and the rule that the summons itself should include a response to any anticipated defence.⁴⁶ Similar experiments have taken place earlier in the twentieth century in Germany (the Stuttgart model) and in Sweden. In Germany, the model was inspired by criminal procedure and the aim was to prepare a case in a preliminary

⁴² C.H. van Rhee.

⁴³ F. Glatz.

⁴⁴ E.g., S. Dauchy, A.W. Jongbloed.

⁴⁵ R. Helmholz.

⁴⁶ A.W. Jongbloed.

stage in such a manner that it could be decided in one *Haupttermin*.⁴⁷ In Sweden the initiative was taken by the Chief Justice in a first instance court of Gothenburg. He introduced an oral, concentrated procedure in his courtroom, in which the parties and their lawyers had to be present at the first court meeting.⁴⁸ Another approach was chosen in Hungary, where the National Judicial Council may select cases pending before the ordinary courts in order to be dealt with in extraordinary or expedited proceedings.⁴⁹

Currently, the introduction of different procedural tracks for different categories of cases is very popular (e.g. England, Austria). An early example of a specific track for a specific group of cases is the debt collection procedures that have been introduced in various countries. Debt collection procedures are popular in, e.g., Austria⁵⁰ and Germany. The introduction of a debt collection procedure is currently being discussed in the Netherlands,⁵¹ and it is now also on the European agenda.

It is something of a paradox that summary procedures may not only be a solution for delay, but also the cause of it. This issue is discussed by Fryderyk Zoll in his paper on Poland. The author notes that delays in summary procedures may be the result of, for example, the impossibility of effecting a joinder of claims or of parties. Additionally, one should be aware of the fact that the creation of too many exceptions to the standard procedure, i.e., too much variation in procedure, inevitably results in delay. The Spanish experience is instructive in this respect. Under the old 1881 Code of Civil Procedure the multiplicity of procedural tracks available caused delays, for example due to the fact that the time-limits that had to be applied in a particular case were not clear. Spain is not the only example of a country where procedural differentiation resulted in problems: it seems that the same was true for Greece.⁵²

The availability of appeal is by most authors considered to be a fundamental aspect of a society under the rule of law. Nevertheless, it is clear to any observer that appeal proceedings have a dilatory effect. Fryderyk Zoll claims that the fact that in Poland the right to appeal is considered to be a constitutional principle stands in the way of reducing delay. The knowledge that an appeal can be lodged against a decision of a first-instance court may result in a situation where parties and their counsel do not invest much time and effort in first-instance proceedings. As a result, a case will last longer since it will only become fully developed before the appellate court. If appeal proceedings were not available, or if they were available but only if special criteria were met, the situation might be different.⁵³ Taking this into consideration, especially interlocutory appeals may be looked upon critically. Additionally, the availability of more than one appeal against the decision on the merits could be criticised from the perspective of delay. The least that can be said is that the filing of unnecessary appeals as a delaying tactic should be prevented. The idea that a reduction of the availability of and the need for appellate proceedings reduces delay has also been voiced in other

⁴⁷ P. Gottwald.

⁴⁸ K. Mod er.

⁴⁹ F. Glatz.

⁵⁰ W.H. Rechberger & T. Klicka, P. Oberhammer.

⁵¹ On this topic see M. Freudenthal, *Incassoprocedures*, Deventer, Kluwer, 1996.

⁵² P. Yessiou-Faltsi.

⁵³ I. Velayos.

countries.⁵⁴ The intention of the latest German reforms in civil procedure (2001, effective from 2002), was to strengthen the position of the court of first instance and to turn proceedings of first appeal primarily into a means of correction of errors, thus reducing the number of appeals that need to be brought. However, the new rules seem not to have the desired effect,⁵⁵ and this may be a warning for other countries, where similar experiments are taking place.⁵⁶

Delay as a result of several courts consecutively taking cognisance of the same case, either as a result of appeal or as a result of other mechanisms, has a long history. Before the introduction of the separation of powers, we find an instrument known in Scotland as ‘advocation’ (*évocation* in French) causing serious delays. Advocation could be used by the Sovereign. It resulted in a particular case being transferred from the court where it was initiated to another, typically higher court. The transfer could be due to various reasons, one of them being the importance of the case. Advocation was common practice in sixteenth-century Scotland, as is shown by Mark Godfrey, and it also occurred in other jurisdictions, for example in the Low Countries.⁵⁷

Until now, I have assumed that procedural rules are faithfully applied by those involved in litigation. I have ignored outright abuse of the rules as a delaying factor. Nevertheless, various authors specifically address this matter. Richard Helmholz’s paper proves that the dilatory abuse of the rules was recognised as a problem at an early stage in the English ecclesiastical courts.

Related to the abuse of rules is the ignoring of rules completely. Good rules lose their meaning if they are not applied. An example is the Code of Procedure for the State of New York introduced in 1848 (the so-called Field Code). Many of the rules of this code were not applied in practice, at least in the initial period, due to the hostility of the judges and practitioners. Comparable situations, although not as extreme, may be found in other jurisdictions. An example is Germany, where in 1924 the *Emminger Novelle* tried to introduce judicial case management. This *Novelle* was not successful because the judges were reluctant to apply the new rules.⁵⁸

Rules become powerless not only if they are ignored, but also if effective sanctions are lacking⁵⁹ or if sanctions are not imposed. Richard Helmholz states that in the English ecclesiastical courts, lawyers took oaths not to delay justice. Although the judges in the spiritual forum could subject any lawyer who violated the oath to discipline ranging from a simple admonition to the suspension or even disqualification from practice, this did not happen often. Nevertheless, sanctions (especially monetary ones) remain a popular means to reduce delay.⁶⁰

How to reduce delay in court?

⁵⁴ A.W. Jongbloed (Dorhout Mees Commission, 1950s), D. Tamm (as regards medieval Denmark).

⁵⁵ P. Gottwald.

⁵⁶ A. Uzelac.

⁵⁷ See my *Litigation and Legislation*, *supra* note 10, p. 86.

⁵⁸ P. Gottwald.

⁵⁹ A. Uzelac.

⁶⁰ On sanctions in Italy, see W. Asser.

Many of the dilatory factors that have been identified in the preceding paragraphs immediately suggest a solution in order to improve procedural efficiency. I shall not discuss these solutions in the present section, since this would be a tedious and superfluous exercise. In this section I shall touch upon some issues that have not (or have only partly) been discussed until now.

Various measures have been suggested over the centuries to fight delay. Some of them aim at preventing litigation altogether. An early experiment to avoid litigation is conciliation. The idea of preliminary conciliation goes back to the French Revolution⁶¹ and ultimately – at least according to some authors - to the model of the ‘peacemakers’ of the town of Leiden in Holland. Sweden, Denmark, Norway, Spain, Austria, Croatia, the Netherlands and Greece may be mentioned as examples of countries where experiments with conciliation have taken place in the past or are still taking place.⁶² It should be a caveat for current law reformers that the results of conciliation in the past were minimal, leading to its abolition in many jurisdictions shortly after its introduction.⁶³

Apart from conciliation, arbitration was advocated as a solution in order to avoid delay. Serge Dauchy tells us that in colonial Québec, arbitration was favoured because litigation before the state courts was thought to be harmful to the colony; it kept the inhabitants away from their labour. However, experiments with arbitration seem not to have been successful, something that is very different from the experiences with arbitration in today’s world, for example in modern Sweden.⁶⁴

In addition to arbitration, other methods of Alternative Dispute Resolution are currently very popular. The present volume contains information on mediation, which is a very successful means to solve disputes in countries like the Netherlands.⁶⁵

Another way of keeping cases away from the state courts is the introduction of money barriers or the requirement of permission to appeal. Kjell Modéer states that in 1915 the Swedish legislature introduced a rule that every party had to pay 1500 SEK to be admitted to the High Court, and no lawsuit with a value less than 1500 SEK was admitted. An important question, however, is whether the introduction of money barriers and/or the requirement of permission to appeal do not contravene the principle of access to justice. The least that can be said is that it seems that the requirement of permission to appeal seems more acceptable than the introduction of barriers at first instance. England has for a long time known a system of ‘leave to appeal’ (now called ‘permission to appeal’) and at the German *Bundesgerichtshof*, a system of permission has also been in place for a considerable amount of time.

When litigation before the state courts cannot be avoided, measures to keep delay within acceptable boundaries are very much needed. Remedies against undue delay may prove to be valuable. An example of such a remedy is the condemnation *in expensis pro retardatione processus*, which, according to Richard Helmholz, existed

⁶¹ A. Wijffels.

⁶² K. Modéer, D. Tamm, I. Velayos, P. Oberhammer, A. Uzelac, P. Yessiou-Faltsi.

⁶³ P. Yessiou-Faltsi.

⁶⁴ K. Modéer.

⁶⁵ A.W. Jongbloed.

in the medieval ecclesiastical courts in England. There, delay caused by the parties was considered to be an actionable wrong. Additionally, appeal against dilatory behaviour of court officials was available.⁶⁶ Remedies and sanctions against undue delay continue to be popular. In the present volume, Alan Uzelac discusses sanctions that are available in Croatia. Present-day Austria also knows a special remedy against delay caused by the court: the so-called *Fristsetzungsantrag*. The procedure is as follows: The parties may file a request with the higher court to order the lower court to perform the requested procedural act within a certain time-limit. If the court performs the requested procedural act within four weeks, the proposal is deemed withdrawn unless the applicant affirms the application within two weeks after notification. Requests are, however, extremely rare, particularly because the remedy itself can lead to further delay.⁶⁷

Apart from special remedies and sanctions aiming at a reduction of delay, other methods are currently being used in order to increase expedition in civil litigation. Forcing the parties to prepare their case well is such a method. In England the pre-action protocols have been introduced for this reason. The interesting feature of these protocols is that they encourage litigants to co-operate before the court gets involved, an approach that also saves court time if an action is nevertheless started. This is not so much the case with the more traditional approaches, where the parties prepare their case after the court has become involved under the supervision of a reporter-judge.⁶⁸ In a draft bill for the Netherlands dating from the beginning of the twentieth century, which was never enacted, the Austrian model of Franz Klein was copied, dividing the proceedings into two stages, the first stage aiming at a preparation of the case for the plenary hearing.⁶⁹ The division of cases in two stages in Germany is similar. There, the judge may opt for a preliminary hearing or a preliminary written procedure before the *Haupttermin*.⁷⁰ The traditional pre-trial conferences in Anglo-American jurisdictions are another example of this approach. Such a pre-trial conference is ordered by Rule 37 / 37A at the Cape, but this rule has, according to Wouter de Vos, not been successful in practice.

Part of most preliminary proceedings is the filing of a statement of claim. In some countries, plaintiffs are forced to present as much information as possible in their statement because this is thought to expedite the hearing of the action. In Hungary, for example, the plaintiff at this stage has to state in his statement of claim what evidence he relies on. Subsequently, the defendant is obliged to file his response to the statement of claim at the first hearing, whereas the plaintiff, in his turn, has to reply to this response without delay.⁷¹ In the Netherlands, the plaintiff must even discuss an anticipated defence in his statement of claim, i.e., before the defendant has filed his defence.⁷² A reduction of the number of additional pleadings would seem to be the

⁶⁶ R. Helmholz.

⁶⁷ P. Oberhammer. On this remedy, see also W.H. Rechberger & T. Klicka.

⁶⁸ P. Yessiou-Faltsi.

⁶⁹ A.W. Jongbloed.

⁷⁰ P. Gottwald.

⁷¹ F. Glatz.

⁷² A.W. Jongbloed.

natural consequence of this approach.⁷³ Another, more traditional means to obtain a full picture of the case at an early stage, is the German *Wahrheitspflicht*.⁷⁴

A question related to the above issue is whether the proceedings should focus on the substantive or the formal truth. In Croatia the formal truth is being favoured.⁷⁵ However, in most Western European countries a movement away from the formal truth in the direction of the substantive truth can be observed. It may be that here a divide can be observed between former Socialist countries, where, until recently, the inquisitorial type of judge who tried to discover the substantive truth reigned supreme, and other countries, where such a judge has since long disappeared.

Many authors favour the introduction of oral proceedings as a means to reduce delay in civil proceedings. This approach is, for example, advocated in Spain, Germany and Finland. At the same time, one should realise that an oral procedure is not a panacea for the problem of delay, since a (partly) written procedure may also save court-time, for example by preventing extended hearings and by allowing the judges to prepare the hearing of the action well. The best approach seems not so much to opt exclusively for an oral or written procedure, but to find a good mixture of both procedures.⁷⁶

The question remains whether reforming the rules of procedure is a solution for the problems that exist. It is, I think, clear to many professional lawyers that a reduction of delay cannot be achieved, or cannot be achieved only by introducing new rules of procedure. More forcefully, it seems that rules may often not contribute to swiftness at all: Wolfgang Sellert reports that litigation at the *Reichshofrat* of the *Ancien Régime* was relatively fast precisely because of the absence of a prescribed procedure. Likewise, in the early history of the Scottish Court of Session, litigation was swift and aspects of the court's simplified ordinary procedure, being the summary procedure, were prescribed to other courts in order to fight delay.⁷⁷ Therefore, reform should at least aim at a simplification of the rules and flexibility.⁷⁸ Additionally, errors should only lead to sanctions if the interest protected by the infringed norm has actually been harmed.⁷⁹ It is clear, of course, that the latter approach should be used with caution, because it leaves a considerable amount of discretion to the judge, making the application of the rules dependent on his or her views. I agree with authors like Alan Uzelac and Kjell Modéer, the latter of whom remarks that delay in civil procedure is definitely not a problem solved only with normative rules. In his opinion, delay is more a contextual problem than a normative one. Provocatively, Paul Oberhammer asks how much regulation procedure really needs.

If one, nonetheless, decides to introduce new rules, the question is how these rules should be introduced. First of all, it is better to refrain from law reform if there is no political interest in the issue. Law reform in colonial Québec, for example, was

⁷³ A.W. Jongbloed.

⁷⁴ P. Gottwald.

⁷⁵ A. Uzelac.

⁷⁶ K. Modéer. On oral proceedings and expediency, see also P. Oberhammer and D. Tamm.

⁷⁷ M. Godfrey.

⁷⁸ A.W. Jongbloed, K. Modéer.

⁷⁹ A.W. Jongbloed.

successful because the colonial strategy so required. Secondly, lawyers should participate in order to ensure that the new rules will be applied in practice.⁸⁰ And thirdly, one should possibly not be too bold. Hamilton Bryson's paper shows two approaches to law reform in the United States. The system of procedure may be changed through a single swipe of the legislative guillotine, something that happened in New York in the nineteenth century. Or it may occur painlessly and imperceptibly over a two hundred year period, as in Virginia. In Virginia, two procedural systems were left to exist next to each other: motion pleading was made generally available as an alternative to the ancient forms of action pleading. As a result of the attractiveness of motion pleading, this type of pleading gradually superseded the forms of action. Consequently, when the forms of action were finally abolished in Virginia in 1950, no one noticed or was even aware that an 800-year old institution had been finally laid to rest. Such an approach may also be observed in Austria (and, I should add, in the Netherlands). There, the summary procedure gradually overtook the ordinary procedure, finally to replace the ordinary procedure altogether.⁸¹

Final remarks

On the basis of the above, one may conclude that many of the problems in the area of delay in civil procedure do not have a national character and are certainly not new. Having noted this, it is surprising that national law-making bodies and reform commissions are making an effort to solve the existing problems without taking developments in other countries into consideration and without looking at past experiences.

Apart from adopting a comparative approach, law reformers should ask themselves whether the problem of delay in their country is so urgent that it should be tackled at all. Michael Macnair suggests that a reduction in delay attracts more business to the courts and, consequently, causes delays. Paul Carrington tells the story of an inundation occurring in relation to asbestos litigation, 'when the American judiciary built a broad highway to accommodate a class of meritorious claims with economy and dispatch'. 'The result', however, 'was not just, nor speedy, nor inexpensive', the author states.

Maybe one should start by focussing on jurisdictions where a good balance⁸² seems to have been struck. An example is Germany, where the average duration of civil trials is still satisfactory.⁸³ Or, when looking in the past, the medieval and early-modern English ecclesiastical courts, where, according to Richard Helmholz, procedure was expeditious, medieval and early-modern Denmark, the early-modern Court of Session in Scotland and the early-modern German *Reichshofrat*. The latter jurisdictions show that an expeditious procedure can be framed with a minimal amount of rules.

⁸⁰ H. Bryson.

⁸¹ P. Oberhammer.

⁸² The importance of looking for a balance is also emphasised by A. Wijffels.

⁸³ P. Gottwald.