

## Introduction to French Civil Justice System and Civil Procedural Law<sup>#</sup>

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### Abbreviation List

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| Art.        | Article  |
| C. civ.     | Code civil ( <i>Civil code</i> )   |
| C. com.     | Code de commerce ( <i>Commercial code</i> )  |
| C. consomm. | Code de la consommation ( <i>Consumer code</i> )   |
| CEDH        | Cour européenne des droits de l'homme ( <i>European Court of Human Rights</i> )  |
| COJ         | Code de l'organisation judiciaire ( <i>Judiciary code</i> )  |
| CPC         | Code de procédure civil ( <i>Code of civil procedure</i> )   |
| C. trav.    | Code du travail ( <i>Labour code</i> )   |
| D.          | Décret ( <i>Decree, Government act</i> )   |
| JCP         | Jurisclasseur périodique (Semaine juridique)   |
| JORF        | Journal officiel de la République française ( <i>Official publication of State notices</i> )                                       |
| JOCE/JOUE   | Journal officiel des Communautés européennes, puis de l'Union européenne ( <i>Official publication of European Union notices</i> ) |
| L.          | Loi ( <i>Parliament act</i> )  |
| Spec.       | Especially   |
| Vol.        | Volume   |

As the means for obtaining judicial enforcement of the rights that persons may assert, civil procedure is fundamentally the law governing judicial resolution of disputes within civil society. More technically, it may be defined as the set of legal rules regulating the organization and functioning of the courts of law competent for settling disputes affecting private interests. This lecture presents the organization of civil justice and the main features of civil procedure, followed by an indication of the trends that are today driving the evolution of the French civil procedure.

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Is it preferable to speak of '*private judicial law*' or '*civil procedure*'? This is an appropriate question because both expressions are encountered in French law, which can itself be puzzling to a reader unfamiliar with the subject. The traditional title of the field is civil procedure. This tradition goes back to the reign of Louis XIV, and more precisely to the civil ordinance of April 1667 '*concerning the reform of justice*'. The first commentators on this text dealt, in regard to it, with '*civil procedure*'. The tradition lingered on and, under the Code of Civil Procedure of 1806, a Napoleonic code, the teaching of civil procedure was nothing more than the teaching of the Code. The title did not raise any difficulty until the end of the 19<sup>th</sup> Century, at which time there was added to the study of procedure in the official *curricula* of university education also the study of judicial organization, procedural rules and procedures of enforcement. The term civil procedure thus appeared too narrow, and thus inaccurate. Therefore, like certain foreign, especially Italian, scholars, some authors preferred to speak, at the beginning of the 1940s, of '*private judicial law*' (*droit judiciaire privé* in French language). Private judicial law thus denotes both the law of civil justice (judicial organization and competence of the courts) and the law of the civil trial (the lawsuit, the proceedings, appeals and procedures of execution).

This semantic observation is the background of my lecture which will successively deal with organization of French judiciary (chapter 1), historical perspective of French civil procedure (chapter 2), regulation of French civil procedure (chapter 3) and contemporary features of French civil justice (chapter 4) before an opening conclusion.

## **Chapter 1**

### **ORGANIZATION OF FRENCH JUDICIARY**

#### **Contents**

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As the law both of civil justice and of the civil trial, private judicial law is built upon a court system characterized by the very French principle of the 'dualism' of court hierarchies<sup>1)</sup>. The organization of courts in France resembles in effect a diptych with, on the one side, the so-called judicial courts, organized hierarchically under the authority of the

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1) See D. Truchet, *Verbo « Dualisme juridictionnel »* in L. Cadet (ed.), *Dictionnaire de la justice*, Paris, Presses Universitaires de France, 2004.

highest judicial court, or *Cour de Cassation*, and, on the other, the administrative courts, organized under the authority of the highest administrative Court, or *Conseil d'Etat*. At the beginning of the French Revolution, a law of 16-24 August 1790 had separated judicial and administrative functions by insulating the administration from supervision by the judicial courts and subjecting it instead to a specific control exercised by the Administration itself. In the event of a dispute with the Administration, a citizen could only file an appeal with the immediate supervisor of the decision maker (a so-called 'hierarchical appeal') and, eventually, with the competent Minister who was thus both judge and party. This system is said to be based on the theory of 'administrator-judge.' However, it was not until the establishment of the *Conseil d'Etat* and of the Councils of Prefectures (*Conseils de préfecture*) in 1800, and then the law of 24 May 1872, that the dualism of the French court system really took shape. This law recognized in effect the *Conseil d'Etat*'s autonomous judicial authority, and thus marked a transition from a 'retained' to a 'delegated' justice, in which the last word was no longer left to the executive branch. Remarkably, the same law created a *Tribunal des conflits*, in charge of settling disputes that could arise between the two hierarchies of courts but which is not a supreme court<sup>2)</sup>. The Conflicts Tribunal is composed of equal numbers of members of the *Cour de Cassation* and of the *Conseil d'Etat*. There thus exist in France two orders of usual courts - judicial courts and administrative courts - though the former, it should be noted, dispense both criminal and civil justice.

Does this mean that the dual court system is here to stay? Only time will tell, but the principle of dualism is in fact subject to recurring and even growing criticisms. It is a source of practical complexity for the general public, whether due to the uncertainty or incoherence in the jurisdictional demarcation between the two categories of courts or the contradictions in case law that can result. While specialized judges may always be needed within the administration, the administration does not need its 'own' judge, since the right of access to a judge should not necessarily differ according to the nature of the dispute at hand. Even so, the judicial and administrative courts are increasingly subject to common rules of both constitutional and international origin, especially the right to a fair trial. These rules are proving to be important factors of homogenization in the sources of private and administrative law.

## ***1. The Composition of Courts***

### ***1.1. A Single Judge or a Panel of Judges?***

For many, French law embodies the principle of collegiality<sup>3)</sup>. A decision can only be rendered if a certain number of judges, generally three, were present at the hearings and

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2) See P. Gonod et L. Cadet (eds), *Le Tribunal des conflits*, Paris, Dalloz, 2009.

3) See T. Le Bars, *Verbo « Juge unique / Collégialité »* in L. Cadet, *Dictionnaire de la justice*, Paris, Presses universitaires de France.

participated in the deliberation. The advantages of such a system are several. First of all, collegiality helps ensure impartiality and a high quality of justice. Deliberation by a panel normally permits digging deeper into difficulties, encourages reflection, and helps overcome prejudices and biases. Collegiality also supports judicial independence, since judicial responsibility is shared under conditions of the utmost secrecy. This is also why French law is so attached to the anonymity of the collegial judgment and to the prohibition on the kind of dissenting opinions that are allowed in other systems, notably the common law. Judges are thus indirectly protected against threats, grudges and reprisals. Yet, the opposite single-judge system is not without merit. The single judge surely cultivates in magistrates a sense of personal responsibility, while concentrating judicial activity reduces the operating costs of the judicial apparatus, which is decidedly in the public interest.

This quite pragmatic consideration helps explain the current growth in single-judge panels. It is true that court organization in France has always known both single judge as well as multi-judge panels. Some examples of single-judge courts go far back, including the judge for summary interlocutory proceedings (*juge des référés*), the bankruptcy judge (*juge-commissaire en matière commerciale*), the former justice of the peace (*juge de paix*), and the district court (*tribunal d'instance*). But use of the single-judge panel has undeniably expanded in recent years. The rise is observable in civil matters, as shown by the creation of the juvenile judge (*juge des enfants*) in 1945, the expropriation judge (*juge de l'expropriation*) in 1958, the guardianship judge (*juge des tutelles*) in 1964, the judge in charge of enforcement of judgments (*juge de l'exécution*) in the period from 1972 to 1991, the family judge (*juge aux affaires familiales*) in 1993, and the proximity court (*juridiction de proximité*) in 2003, not to mention the increased authority of chief judges, and in particular the president of the principal court of first instance (*tribunal de grande instance*). Notably, judges sitting as single judges are, with very rare exceptions, professional judges, what brings us to another aspect of judicial organization.

### **1.2. Serving as a Judge: a Profession or a Mandate?**

The French system relies pre-eminently on professional judges, but at the same time leaves room for part-time judges, who are lay judges, mostly for reasons grounded in history, but often reinforced by budgetary constraints. Several rules of judicial organization reflect this pre-eminence. First, while professional judges may be totally excluded from certain specialized courts (e.g., the commercial court, or *tribunal de commerce*), they necessarily reappear as appellate judges entertaining appeals from decisions of such courts, since courts of appeal are composed entirely of professional judges. That said, the exclusion is sometimes only partial. Thus, although the labour court (*conseil de prud'hommes*) does not in principle include a professional judge, when a vote among the members of that even-numbered court (which is composed, in principle, of two employers and two employees as judges) results in a tie, the court reconvenes under the presidency of a professional judge, called the ‘tie-breaking’

judge (*juge départiteur*), who is in fact a judge of the district court (*tribunal d'instance*). In certain cases, there is a system known as *échevinage*, in which the court is composed of lay part-time judges chaired in all cases by a professional judge. This is the case with social security courts (*tribunaux des affaires de sécurité sociale*) and mixed courts for rural leases (*tribunaux paritaires des baux ruraux*).

Recruitment procedures in a way likewise illustrate the distinction between professional magistrates and part-time lay judges. For the latter, access to judicial functions is generally the result of election by the interested constituency. This is the case for the commercial court, the labour court, and the mixed court for rural leases. Only exceptionally is access to judicial functions the result of a simple designation. This is the case for the social security court and the proximity court. In any event, the system of competitive examination (*concours*) is not applied to these non-professional judges. Nor is a system of lottery, as is used to select the jury in the criminal court for serious crimes (*Cour d'assises*). By contrast, recruitment of professional judges (*magistrats de carrière*), like that of all other civil servants, takes place in principle through competitive examination (or on the basis of both a combination of qualifications and tests in particular cases). Lateral recruitment on the basis of qualifications remains rare.

## 2. Specialization of Courts

### 2.1. Courts of First Instance

Within the regular judiciary there coexist both civil and criminal courts which are not examined here.

The organization of the civil courts is relatively simple. At the first instance, the main civil court (*tribunal de grande instance* to be compared with *High Court* or *Landgericht*) is the pivot, stemming from the fact that it is a court of ordinary and general jurisdiction, which has exclusive jurisdiction over a great many matters, including personal status, real estate disputes and enforcement of judgments. Its territorial scope of jurisdiction is the French department (*département*). But departments may have several *tribunaux de grande instance*, depending on the size of the population, the volume of judicial activity, and the communications network. There are 163 *tribunaux de grande instance* in all (for 100 *départements*). Alongside these courts may be found courts of special jurisdiction that hear only those matters specifically determined by statute.

Another first instance court is the district court (*tribunal d'instance*, to be compared with *County Courts* or *Amtsgericht*), which is the successor to the former justices of the peace and is competent to hear small civil claims (such as disputes with neighbours, landlease cases, and litigation over debts of less than 10 000 €). As a rule, the territorial jurisdiction of the district court extends over several *cantons*, or districts, which are the territorial subdivisions of the *départements*. Usually the district court takes the *arrondissement*, comprising several

districts, as its territorial reference (each *département* has several *arrondissements*). District courts number 305. Since the law of 9 September 2002, there have also existed judges for very small civil claims (*juridictions de proximité*) who are in charge of controversies in an amount of less than 4,000 €. These 305 courts also have jurisdiction over injunctions to pay (*injonction de payer*, to be compared with *mahnverfahren*) or to perform up (*injonction de faire*) to the same monetary amount. The proximity court is in theory a full-fledged court. But, if it finds itself faced with a ‘serious legal difficulty relating to the application of a rule of law or the construction of a contract binding the parties,’ it may refer the case to the district judge to act on its behalf, as if it itself were the proximity judge itself (CPC, art. 847-4).

The commercial courts (*tribunaux de commerce*) are the oldest courts in the French judicial organization, dating back to the end of the Middle Ages. Today they number 135. A specifically French institution, the commercial court is a collegial court composed exclusively of merchants elected by their peers. (There was, however, a proposal, since abandoned, to convert it into a ‘mixed’ court, composed both of merchants and professional judges). The commercial court has jurisdiction over commercial cases, broadly defined as disputes between merchants, but also disputes over commercial acts (such as bills of exchange), even if they are not the act of a merchant, and over controversies involving commercial corporations, as well as bankruptcy proceedings involving commercial and craft enterprises.

The labour court (*conseil de prud’hommes*), whose origin dates back to the beginning of the 19th Century, resolves individual disputes arising out of an employment or apprenticeship contract. It first attempts conciliation, but if conciliation cannot be achieved, the dispute will be resolved by a judgment. There are today 210 labour courts. Members of the labour court are elected, with an even number of judges. Half the members represent employers, and half represent employees.

Two other courts of specialized jurisdiction, both staffed entirely by ordinary citizens (and known as *juridictions échevinales*), were created in the middle of the 20<sup>th</sup> Century. These are (i) the social security courts (*tribunaux des affaires de sécurité sociale*), numbering 116, and having jurisdiction over disputes involving social security, such as participation in a social security plan and payments of contributions and benefits, and (ii) the mixed courts for rural leases (*tribunaux paritaires des baux ruraux*), numbering 305, and, as their name suggests, having jurisdiction over cases involving rural leases among landowners and farmers.

## 2.2. Courts of Appeal

The right of appeal had very early beginnings, but its rationale has varied over time. Under the *Ancien Régime*, before the French Revolution (1789), the appeal was essentially a response to preoccupations of a political nature. Due to the variety in levels of courts (royal, feudal, and ecclesiastical), a judicial decision could be subject to a multitude of successive appeals designed to gradually bring cases within the immediate sphere of the royal power.

The appeal thus served a political purpose, as an instrument for the consolidation of royal power against both the aristocracy and the Church. The belief in separation of powers, coupled with a desire to deny any political role to judges, led the revolutionary Parliament to disavow any such political rationale in favor of technical considerations. The appeal thus came to represent a guarantee of good justice, and for that it would be sufficient that the case be tried twice. The appeal permitted reformation or nullification of the judgment against which it was brought. And so it was usually brought before a court higher than the court of first instance, namely the Court of Appeal.

In civil matters, every litigant has the right to a second level of review of a case if he fails at the first level. It really is a second level, both because it is the last level and because one can access it only after the first proceeding has been exhausted. But even this principle is not absolute. Frequently, access to this second level is unavailable. A litigant may, under certain conditions, renounce the appeal. Statute may also bar access to this second level of review due to the small amount in controversy (4000 €) or due to the particular nature of the litigation (*e.g.*, election disputes). In principle, appeal is brought before one of the 35 Courts of Appeal, constituting the courts of ordinary and general jurisdiction at the second level of review. It is only in rare situations that the appeal is brought before another tribunal, such as the national disabilities court (*Cour nationale de l'incapacité*) for technical litigation in the field of social security.

### 2.3. *The Cour de Cassation*

The principle of the so-called ‘*double level of litigation*’ entitles the litigant to have the case tried, in law and in fact, a second time. However, a further mean of recourse to France’s highest court in civil, commercial and criminal matters (*Cour de Cassation*) guarantees the litigant the right in any event to have the decision that was rendered by the lower courts examined for conformity with the rules of French law and, in an appropriate case, annulled.

Recourse to the *Cour de Cassation* (*le pourvoi en cassation*) is in principle extraordinary, in the sense that it is available only in cases specified by statute. When so authorized, the *Cour de Cassation* censures non-compliance with law of judgments rendered by trial courts, whether at the first level or on appeal. The *Cour de Cassation*, established by the Senate-Consult in 28 Floreal Year XII (1804), is the only court at its level, much as is the *Conseil d'Etat* within the hierarchy of administrative courts. Located in Paris, it is composed of high-ranking professional magistrates at the peak of their careers<sup>4)</sup>.

Due to the distinction between fact and law, recourse to the *Cour de Cassation* does not represent a third level of judicial review. A judge of the law only, the *Cour de Cassation* may only verify the correctness of the lower court’s construction of the rule of law and of its application to the facts found by the lower court, facts that the *Cour de Cassation* has

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4) See J. Buffet, *Verbo « Cour de cassation »*, in L. Cadet (ed.), *Dictionnaire de la justice*, Paris, Presses Universitaires de France, 2004.

no authority to review as such. Its role is limited to ruling on the legality of the challenged judgment and not on the merits of the case. It is often said that it is not the dispute as such that is submitted to it, and that its role is therefore not to re-examine the case as would a court of appeal, but only the final decision rendered by the court below. As a result, if the recourse to the *Cour de Cassation* is justified, this court may not, in principle, substitute its decision for that of the trial judges. It may only set aside, or quash the challenged judgment and remand the case to a lower court, which will decide the case anew. The *Cour de cassation* is not a supreme court in the American sense.

In addition to performing this judicial function in cases submitted to it, the *Cour de Cassation* plays a broader role. Its rulings are meant to ‘be authoritative’ (or, in French language, *faire jurisprudence*), that is to say, serve as a point of reference for all courts. This is not to say that they are binding, in the manner of a precedent as in common law systems, or in the manner of the ‘law-making rulings’ (*arrêts de règlement*) known under the *Ancien Régime* in pre-Revolutionary France. If they are authoritative, it is ‘by authority of their reason’ and not ‘by reason of their authority’. Ensuring the uniform interpretation of the law is also one of the *Cour de Cassation*’s prime missions. This is a mission necessitated by the principle of the equality of citizens before the law.

## **Chapter 2**

### **HISTORICAL PERSPECTIVE OF FRENCH CIVIL PROCEDURE**

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Historians of law have recounted the evolution that occurred during the long period elapsing from the introduction of the 1806 Code of Civil Procedure until the establishment of the Vth Republic and beyond.<sup>5)</sup> From this evolution emerged the new Code of Civil Procedure (*nouveau Code de procédure civile*), in 1975. The new Code was introduced

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5) See A. Wijffels, French civil procedure (1806-1975), in C.H. van Rhee (ed.), *European traditions in civil procedure*, Intersentia, Antwerpen-Oxford, 2005, p. 25-47.

pursuant to Article 37 of the new French Constitution, which granted jurisdiction to the Government to legislate in matters of civil procedure. This constitutional provision had been introduced for a very deliberate purpose; it was made to allow the reform of a subject that had, until then, been prevented by a Parliament which – at that time – was dominated by lawyers.

Presented in the above way, the development of the French civil procedure seems simple. In reality, it was far more subtle. The new Code of Civil Procedure did not come into being as a result of one instance of reason; the new Code was, instead, carefully thought out. In particular, the thought behind the Code had sought to break free from the restraints imposed by the 1806 Code (1). This break, which can already be observed in the form that the Legislator gave to the new Code of Civil Procedure (2), is contained in the Code's substance; it is a Code which conveys a modern conception of civil proceedings (3).

### ***1. Genesis of the New Code of Civil Procedure***

The new Code of Civil Procedure was conceived as the culmination of a substantial reform of civil procedure which lasted from 1963 to 1981. At the commemoration of its twentieth anniversary, Dean Cornu, who was one of the principal authors of the Code along with Henri Motulsky,<sup>6)</sup> recounted the advent of the new Code of Civil Procedure.<sup>7)</sup>

The adventure began in 1963. The period from 1963 to 1968 marked the early beginnings of the new Code. Jean Foyer, professor of law who became Minister of Justice in Michel Debré's Government, called upon a number of people, including both academics and practitioners, to work on the reform of the existing civil procedure.<sup>8)</sup> Out of this first reformative impetus came, on an experimental basis, Decree No. 65-872 of 13 October 1965.<sup>9)</sup> This Decree established a procedure for the preparation of the case under the guidance of a judge ('*mise en état*') before the *Tribunal de grande instance* (general first instance court), which had replaced the *Tribunal de première instance* (court of first instance)

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6) See G. Bolard, *Verbo « Motulsky (Henri) »*, in L. Cadet (ed.), *Dictionnaire de la Justice*, Paris, Presses universitaires de France, 2004.

7) G. Cornu, 'L'avènement du nouveau Code de procédure civile – La codification,' in: Cour de cassation (ed.), *Le nouveau Code de procédure civile: vingt ans après*, Paris, La documentation française, 1998, p. 19-28.

8) Members of the reform commission were: Gérard Cornu, Dean of the Law Faculty of Poitiers ; Pierre Francon, 'directeur adjoint des affaires civiles au Ministère de la justice' ; Henri Motulsky, Professor at the University Paris X - Nanterre. Gérard Cornu was the author, together with Jean Foyer, of a handbook on civil procedure in which the presentation of the subject-matter had been renewed considerably: G. Cornu and J. Foyer, *Procédure civile*, Paris, Presses universitaires de France, 1958.

9) *Journal officiel de la République française*, 14 October 1967, 9076.

at the time of the 1958 reform of France's judicial system.<sup>10)</sup> The commentary on this Decree by Henri Motulsky, entitled 'La réforme du code de procédure civile par le décret du 13 octobre 1965 et les principes directeurs du procès' ('The Reform of the Code of Civil Procedure by the Decree of 13 October 1965 and Guiding Procedural Principles'),<sup>11)</sup> sought to canonize the phrase '*guiding procedural principles.*' (*principes directeurs du procès* in French language)<sup>12)</sup>

It was in 1968 that a political decision was taken to draft a new Code of Civil Procedure. The Reform Commission of the Code of Civil Procedure was established in 1969. Jean Foyer (who was not Minister of Justice at this time) was nominated as the commission's president. He acted as such until the commission's dissolution, at the end of 1980. The composition of the commission could be illustrated as three concentric circles. The largest circle was composed of the plenary commission, comprising some fifty members. Such members came from diverse professions, each of which was interested in reform. The intermediate circle comprised the sub-commission, composed of some fifteen members.<sup>13)</sup> They were in charge of examining and amending the texts prepared by the drafting team. This drafting team was situated at the centre of the system. It was composed of Gérard Cornu, Pierre Francon, Claude Parodi and, until his death in 1971, Henri Motulsky.<sup>14)</sup>

The approach adopted by the commission for the elaboration of the Code was not to draft a complete Code at once, from the first line to the last. Instead, the commission sought to proceed gradually, by means of successive decrees. This would, ultimately, lead to the establishment of a new Code of Civil Procedure through the implementation of a 'codification decree,' uniting all of the earlier initiatives. This procedure allowed the commission to take into account the first lessons which were learnt from the practical use of the early decrees, and enabled it to then proceed with the necessary adaptations at the time of complete

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10) See G. Cornu and J. Foyer, *Commentaire de la Réforme judiciaire* (22 décembre 1958), Paris, Presses universitaires de France, 1960, p. 12-13.

11) *Semaine Juridique*, 1966, I, p. 1996. See also H. Motulsky, *Ecrits*, Volume I: 'Études et notes de procédure civile,' Paris: Dalloz, 1973, p. 130 ff.

12) See G. Rouquette, 'L'influence en France de la science allemande du procès civil et du Code de procédure civile allemand,' in W.J. Habscheid, *Das deutsche Zivilprozeßrecht und seine Ausstrahlung auf andere Rechtsordnungen*, Bielefeld, Giesecking-Verlag, 1991, p. 159 ff.

13) Including, apart from the original members, Roger Perrot, Claude Parodi, Paul Haegel, Jean-Baptiste Sialelli, Paul Fontaine-Tranchand, Maurice Parmentier and André Bertherat.

14) Henri Motulsky died when writing the commentary of the first *décret* which, four years later, gave rise to the new Code of Civil Procedure, the *décret* No. 71-740 of 9 September 1971, 'instituant de nouvelles règles de procédure destinées à constituer partie d'un nouveau Code de procédure civile.' See H. Motulsky, *Prolégomènes pour un futur Code de procédure civile: la consécration des principes directeurs du procès civil par le décret du 9 septembre 1971*, Paris, Dalloz, 1972, Chronique, XVII, which may be found equally in H. Motulsky, *Ecrits*, Volume I: 'Études et notes de procédure civile,' *supra* footnote 11, p. 275-304.

codification. In the first phase, the work of the commission led to the promulgation of four decrees, aimed at ‘Establishing New Rules of Procedure Intended to Become a Part of a new Code of Civil Procedure’ or ‘Intended to be integrated into the new Code of Civil Procedure.’<sup>15)</sup> It was only in 1974 that a plan to facilitate the unification of these different pieces of legislation was established. It was therefore only in a second phase of legislative activity that this set of separate texts was actually codified, in the form of Decree No. 75-1123 of 5 December 1975. This decree established a new Code of Civil Procedure.<sup>16)</sup> It was meant to provide the commission with the opportunity to introduce some modifications to the texts stemming from the decrees of 1971, 1972 and 1973 (for which the new Code was meant to be a substitute).<sup>17)</sup> The new Code entered into force on 1 January 1976.<sup>18)</sup>

The new Code was not, however, complete when it entered into force: its 972 Articles consisted only of a first part (Livre 1), dedicated to ‘Provisions Common to All Courts,’ and a second part (Livre 2), assembling the ‘Specific Provisions Relating to Each Court.’ The codification exercise therefore continued during the following years.<sup>19)</sup> It was only in 1981 that the new Code took on the form that it still has today; Decree No. 81-500 of 12 May 1981 established the provisions of the third and fourth parts of the Code, respectively entitled ‘Specific Provisions in Relation to Certain Subject-Matters’ and ‘Arbitration.’ Following the introduction of these two last parts, the new Code was composed of 1507 Articles. Initially, the framework plan of the new Code of Civil Procedure included a fifth part (Livre 5) on enforcement measures. This project was, however, abandoned; it was decided that enforcement measures would be dealt with in an independent Code. The codification of the new civil procedure can, therefore, be considered as completed from the introduction of the final two parts (Livres 3 et 4). But a sixth part was then added, dealing with Overseas territories (Articles 1508-1519). The 1975 Code of Civil Procedure however could still be referred to as ‘new,’ to distinguish it from the ‘old’ 1806 Code of Civil Procedure. Certain provisions of the old Code nevertheless continued to apply until 2007.<sup>20)</sup> A law for simplification on 20 December 2007 repealed the 1806 Civil Procedure Code such that the New Civil Procedure

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15) The *décrets* No. 71-740 of 9 September 1971, No. 72-684 of 20 July 1972, No. 72-788 of 28 August 1972 and No. 73-1122 of 17 December 1973.

16) *Journal officiel de la République française*, 1975, 188 p.

17) Article 2, *décret* 5 December 1975.

18) And on 1 January 1977 in the three departments of Alsace (Bas-Rhin and Haut-Rhin) and Moselle: Article 3, *décret* 5 December 1975.

19) With the *décrets* No. 76-714 of 29 July 1976, No. 76-1236 of 28 December 1976, No. 79-941 of 7 November 1979 (reform of civil procedure at the *Cour de cassation*), No. 79-1022 of 23 November 1979.

20) Especially the rules on enforcement against real estate and the rules concerning various different types of proceedings (e.g., challenges to the sale of real estate on the basis that the property was misvalued, or an application to accept a deceased person’s estate).

Code is henceforth the only civil procedure code<sup>21)</sup>.

Much has been written on the new Code of Civil Procedure as a work either achieved or yet to be so.<sup>22)</sup> Contributors to such works include those who were, themselves, assigned the historical mission of actually drafting the Code.<sup>23)</sup> The new Code arouses interest not only with regard to issues of civil procedure but also with regard to codification as a particular mechanism for enacting laws. The new Code of Civil Procedure in particular symbolizes the French ‘passion’ for codes, which continues to subsist in the Vth Republic.<sup>24)</sup> The recent celebration of the Civil Code’s bicentennial demonstrates, still, that Code’s dazzling and unrivalled nature.<sup>25)</sup>

## **2. Form of the new Code of Civil Procedural Code**

Words may vary from one author to another. The same reality is, however, obvious to those who comment on the Code of Civil Procedure; the new Code is, first, ‘a plan’, or a structure. It is, second, ‘a style.’

**2.1. The structure** of the old Code of Civil Procedure did not shine for its rationality. It consisted of two parts. The first part, entitled ‘Procedure before the Courts,’ was divided into five books (*Livres*). They dealt, respectively, with cantonal courts (*Justices de Paix*), lower courts, appeal courts, extraordinary means to challenge judgments and the enforcement of the latter. The second part, entitled ‘Various Procedures,’ comprised three books (*Livres*). The first book, without a title, was composed of twelve different titles (*titres*). Book 2 dealt with ‘Procedures related to applications to accept a deceased person’s estate.’ Book 3 contained a single title (*titre*), ‘Arbitration.’ It is an understatement to say that this table of contents made no sense; it was a plan inherited from History rather than a representation of the will of the 1806 Legislator.

21) L. No 2007-1787 of 20 December 2007 on simplification of law (*JO* 21 Dec., p. 20639. See H. Croze : *Procédures* 2008, Repères 2) and, in all the statutory provisions in force, the words « new Code of civil procedure » are replaced by the words « Code of civil procedure » (Art. 22, D. No 2008-484, 22 May 2008).

22) G. Bolard, ‘Le Nouveau Code de procédure civile,’ in *Mélanges J. Skapski*, Kraków, 1994, p. 9 ff. L. Cadet, ‘Le Code,’ in: Cour de cassation (ed.), (ed.), *Le nouveau Code de procédure civile: vingt ans après* supra footnote 7, p. 45-73. J. Héron, ‘Le nouveau Code de procédure civile,’ in B. Beignier (ed.), *La codification*, Paris Dalloz, 1997, p. 81-89.

23) G. Cornu, ‘La codification de la procédure civile en France,’ *Revue juridique et politique*, 1986, p. 689 ff; G. Cornu, ‘L’élaboration du Code de procédure civile,’ *Revue d’histoire des facultés de droit et de la science juridique*, 1995, p. 241 ff. C. Parodi, ‘L’esprit général et les innovations du Nouveau Code de procédure civile,’ *Defrénois*, 1976, p. 673 ff.

24) See J. Carbonnier, *Droit et passion du droit sous la Ve République*, Paris, Flammarion, 1996.

25) See especially *Le Code civil 1804-2004 – Livre du bicentenaire*, Paris, Dalloz et Litec, 2004.

Unlike before, the codification challenge facing the reformers of the twentieth-century civil procedure rules quickly led them to consider the issue of the Code's plan.<sup>26)</sup> The plan of the new Code of Civil Procedure is a work of reason, which resumed the legislative philosophy of the Napoleonic codification. That philosophy was, itself, part of the rationalization of law initiated in the Modern Times.<sup>27)</sup>

After attempting to structure the Code with the procedure before the *Tribunal de grande instance* as a starting point, it became clear that one instead had to begin the reasoning with a higher degree of abstraction, based on the civil judge himself; in other words, starting with the postulate that there is a 'standard civil procedure:' '[I]n this perspective, the procedure before the *Tribunal de grande instance* ceased to be the archetype, to become one of the parallel manifestations of the rules governing civil litigation, all civil litigation, on a generic basis. The plan was born. The vocation of the first part of the Code was to establish common rules for all courts, fundamental rules applicable notwithstanding the nature of each court. The second part was dedicated to stating the rules specific to each court, in the first instance, in appeal and in cassation. Introducing another criterion extracted from litigation, the third part was intended to add the provisions specific to certain subject-matters (divorce, possessory action, etc).'<sup>28)</sup> Then, because of its procedural and material differences from the other three parts, came a fourth part. That part dealt with arbitration. As I said previously, the new Code of Civil Procedure is therefore divided into four parts: a first part on 'Provisions Common to All Courts,'<sup>29)</sup> a second part on 'Specific Provisions Relating to Each Court,'<sup>30)</sup> a third part on 'Specific Provisions in Relation to Certain Subject-Matters'<sup>31)</sup> and a fourth part on 'Arbitration', both national and international arbitration, which has been recently reformed by a Decree N°2011-48 of 13 January 2011 (Articles 1442-1527) and the code is now composed

26) G. Cornu, *supra* footnote 23, 1995, p. 247.

27) See, especially, J. Domat, *Les loix civiles dans leur ordre naturel*.

28) G. Cornu, *supra* footnote 23, 1995, p. 248.

29) Titre 1er. – *Dispositions liminaires*; Titre 2. – *L'action*; Titre 3. – *La compétence*; Titre 4. – *La demande en justice*; Titre 5. – *Les moyens de défense*; Titre 6. – *La conciliation*; Titre 7. – *L'administration judiciaire de la preuve*; Titre 8. – *La pluralité de parties*; Titre 9. – *L'intervention*; Titre 10. – *L'abstention, la récusation et le renvoi*; Titre 11. – *Les incidents d'instance*; Titre 12. – *Représentation et assistance des parties*; Titre 13. – *Le ministère public*; Titre 14. – *Le jugement*; Titre 15. – *L'exécution du jugement*; Titre 16. – *Les voies de recours*; Titre 17. – *Délais, actes d'huissier de justice et notifications*; Titre 18. – *Les frais et les dépens*; Titre 19. – *Le secrétariat de la juridiction*; Titre 20. – *Les commissions rogatoires*; Titre 21. – *Disposition finale*.

30) Titre 1er. – *Dispositions particulières au Tribunal de grande instance*; Titre 2. – *Dispositions particulières au tribunal d'instance et à la juridiction de proximité*; Titre 3. – *Dispositions particulières au tribunal de commerce*; Titre 4. – *Dispositions particulières aux juridictions statuant en matière prud'homale*; Titre 5. – *Dispositions particulières au tribunal paritaire des baux ruraux*; Titre 6. – *Dispositions particulières à la cour d'appel*; Titre 7. – *Dispositions particulières à la cour de cassation*; Titre 8. – *Dispositions particulières aux juridictions de renvoi après cassation*.

31) Titre 1er. – *Les personnes*; Titre 2. – *Les biens*; Titre 3. – *Les régimes matrimoniaux, les successions et les libéralités*; Titre 4. – *Les obligations et les contrats*.

of 1582 articles.

As regards its principal divisions as well as its subdivisions, the Code proceeds from the general to the specific. Principles precede secondary rules and exceptions. The common provisions are set out, most of the time, before the specific provisions for each matter.<sup>32)</sup> The rules regarding pre-hearing investigations,<sup>33)</sup> like the ones on the means of recourse against judgments (Articles 528-537), are particularly significant in this respect.<sup>34)</sup> As suggested, this '*legal science option*' responded to a '*wish for legislative economy*:' '*highlighting the common beneath the diversity is a saving in texts and law*'.<sup>35)</sup> This rational order did not exclude taking into account the chronology of civil cases. This chronology reappears, for the most part, in the succession of titles composing the first part of the Code, dealing with common provisions.

Elegance of plan does not detract from elegance of style; as set out below, the new Code of Civil Procedure also has a style of its own.

**2.2. The style** of the 1806 Code conveyed the concepts, and often the ways, of the 1667 Ordinance.<sup>36)</sup> In this way, the new Code could only, at the time that it was introduced, be considered as 'modern' by the early commentators.<sup>37)</sup> It was not, however, sufficient to use words from the end of the twentieth century to ensure that the new Code would be understood by men and women of that time. In this regard, a double concern confronted the drafters of the new Code.<sup>38)</sup>

First of all, there was the concern that ambiguities regarding the polysemy of numerous

32) Most often, but not always. Occasionally, the particular provisions precede the common provisions. The most likely reason for this is that, in order to understand the latter, one first has to have prior knowledge of the former. See, for example, Articles 49-52, general provisions as regards subject-matter jurisdiction, territorial jurisdiction or jurisdiction based on the value of the claim; Articles 954-955(2), general provisions as regards appellate proceedings in contentious and non-contentious cases; Articles 1009-1022(1), general provisions for various procedures before the *Cour de cassation*.

33) See Articles 143-178, as well as Articles 204-221, proof proceedings (*l'enquête*) and Articles 232-248, in respect of any investigation carried out by a technical expert.

34) See also as regards third parties' impleaders, Articles 331-333; judgments, Articles 430-479.

35) G. Cornu, *supra* footnote 23, 1995, p. 248-249.

36) *Ordonnance civile touchant la réformation de la justice* (Saint Germain-en-Laye, April 1667), known as *Code Louis*, referring to Louis XIV, under whose reign this Ordinance was promulgated. See N. Picardi and A. Giulani (eds), *Testi e documenti per la storia del processo*, Volume I, Milan, Giuffrè, 1996.

37) See P. Catala and F. Terré, *Procédure civile et voies d'exécution*, 2nd edition, Paris, Presses universitaires de France, 1976, p. 20.

38) It should be noted that the main drafter of the Code, Dean Gérard Cornu, had a linguistic background. See his book *Linguistique juridique*, 2nd edition, Paris, Montchrestien, 2000.

words in legal language must be avoided. In the Code, a word must always mean the same thing and cannot be used for different meanings.<sup>39)</sup> For example, a ‘claim’ means the legal action by which a litigant makes an assertion and not the assertion itself. A ‘judge’ means a single judge, a ‘tribunal’ a first instance court, an ‘ordonnance’ the single judge’s decision, etc.

From there, then, follows the correlative concern of defining the fundamental notions upon which the principal rules of the Code rely. ‘It is by legal definitions’ – there are more than some thirty of them – ‘that the Code warns us of the single meaning’,<sup>40)</sup> that it gives to these notions: e.g., ‘non-contentious matter’ (Article 25), ‘summons’ (Article 55), ‘joint petition’ (*requête conjointe*) (Article 57), ‘counterclaim’ (Article 64), ‘additional claim’ (Article 65). A legal definition not only has the virtue of technical clarification of the meaning of a notion; it is also, sometimes, the expression of a substantial academic concept, as shown by the definition of action (‘action en justice’) in Article 30.<sup>41)</sup>

### **3. The political Conception of Civil Litigation in the new Code of Civil Procedure**

It is not excessive to say that the new Code of Civil Procedure is a doctrinal code.

The overall idea of civil litigation is shown directly in the core of the first twenty-four Articles of the Code. These Articles constitute the first Chapter, on Guiding Procedural Principles.<sup>42)</sup> Much has already been written about these Guiding Principles. The Code was still in its gestation when Motulsky began to dissect the Guiding Principles.<sup>43)</sup> Twenty-five years later, Dean Cornu gave the Guiding Principles the floor because ‘Guiding Principles speak of themselves.’<sup>44)</sup> It has been written that ‘their name has a doctrinal origin,’ but ‘not their substance.’<sup>45)</sup> But where do they come from, what are these principles saying and what are they exactly ?

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39) On this subject, see G. Cornu, *supra* footnote 23, 1995, p. 249.

40) *Ibidem*.

41) Defining the action as a ‘right’ (*droit*), following Henri Motulsky, who considered the action to be a ‘procedural right’ (*droit subjectif processuel*), to be distinguished from the right that forms the subject of litigation: H. Motulsky, ‘Le droit subjectif et l’action en justice,’ *Archives de philosophie du droit*, 1964, p. 215 ff.

42) G. Cornu, *supra* footnote 23, 1995, p. 250.

43) H. Motulsky, ‘La réforme du Code de procédure civile par le décret du 13 octobre 1965 et les principes directeurs du procès,’ *Semaine Juridique*, 1966, I, p. 1996.

44) G. Cornu, ‘Les principes directeurs du procès civil par eux-mêmes...,’ in *Études offertes à Pierre Bellet*, Paris, Litec (Lexis-Nexis), 1991, p. 83-100.

45) G. Cornu, *supra* footnote 44, p. 83.

### 3.1. The Origin of the Guiding Procedural Principles

The idea of beginning the Code with general principles is not a new one; it had been discussed during the formation of the Napoleonic codifications. As regards the expression ‘Guiding Procedural Principles,’ ‘canonized’ by Motulsky in 1966,<sup>46)</sup> it apparently appeared for the first time in 1932, in René Morel’s book entitled ‘*Traité élémentaire de procédure civile*’ (‘Elementary Treaty of Civil Procedure’).<sup>47)</sup> Its use was retained in the second edition of the book, as published in 1949.<sup>48)</sup> In that edition, René Morel dedicates a Chapter to ‘Guiding Principles of French Procedure,’ as a kind of a ‘free translation’<sup>49)</sup> of the German doctrine, following its propagation by R.W. Millar, a very famous American comparative scholar. Henri Vizioz took back the expression for himself by referring instead to ‘Guiding Principles of Civil Litigation.’<sup>50)</sup> It is, however, with Cornu and Foyer, then young professors at law faculties, the latter unaware of his political destiny, that the Guiding Procedural Principles formally acceded to legal life by being used in French procedural legislation. It was, indeed, in 1958 that Cornu and Foyer published, with the Presses Universitaires de France, their ‘*Themis of civil procedure*.’ It was in this publication that they highlighted the importance of the Guiding Procedural Principles. Citing Morel, Cornu and Foyer presented the Guiding Procedural Principles as laws that no text established, but that ‘everybody nevertheless accept[s];’ laws ‘that govern civil litigation evolution’ and ‘of which the rules of procedure are only applications.’<sup>51)</sup>

Notwithstanding the above, it was only when the new Code was being drafted that the actual wording of the Guiding Principles took form.<sup>52)</sup>

It is hard to determine the origin of the Guiding Principles’ substance. Some leads point towards the influence of the German Code of Civil Procedure (*Zivilprozessordnung*) and its supposedly interventionist conception of civil litigation. This conception is, in reality, more Austrian than German,<sup>53)</sup> as echoed in the big book written by Glasson and Tissier, which

46) According to G. Rouhette, *supra* footnote 12, especially p. 192 (No. 20).

47) See G. Rouhette, *supra* footnote 12, p. 159 ff, who refers to R. Morel, *Traité élémentaire de procédure civile*, Paris, Librairie du Recueil Sirey, 1932, second edition 1949, p. 345-348 (No. 424-427).

48) R. Morel, *supra* footnote 47, p. 345-348 (No. 424-427).

49) G. Rouhette, *supra* footnote 12, p. 159 ff. According to G. Rouhette this was an ‘imitation plus que vraisemblable de la doctrine allemande [...] et par une traduction libre de Grundprinzipien.’

50) H. Vizioz, *Études de procédure*, Bordeaux, Éditions Bière, 1956, p. 441. The origin of this expression is occasionally attributed to this author.

51) G. Cornu and J. Foyer, *supra* footnote 8, p. 364 ff, especially p. 372.

52) G. Cornu, *supra* footnote 44, p. 86. Their redaction is by Dean Cornu. Therefore, his article ‘Les principes directeurs du procès civil par eux-mêmes...’ (G. Cornu, *supra* footnote 44) is of historical significance.

53) See G. Rouhette, G. Rouhette, *supra* footnote 12, No. 19 ff, who underlines the arbitrary nature of this influence of the scholarly German model, and who states in particular that Henri Motulsky himself, despite his personal history, cultivated in Germany, used the German doctrine ‘avec une très grande discretion.’

René Morel joined later on.<sup>54)</sup> The search for the influences upon the Guiding Principles' substance is an even more reckless enterprise when one has to match ideas with authors and to recognize their influence in the text of the law. In the first five Articles of the Code, one may see, of course the expression of the 'impetus principle' (*principe d'initiative ou d'impulsion*) and the principle that the court cannot adjudicate beyond the statements of case 'as already discussed by Vizioz with the Italian Doctrine'.<sup>55)</sup> It is also possible to affirm, as Georges Bolard does, that 'Henri Motulsky's thesis, entitled '*Principes d'une réalisation méthodique du droit privé*' ('*Principles of a Methodical Realization of Private Law*'), constitutes the primary origin of the new Code of Civil Procedure.'<sup>56)</sup>

### 3.2. *The Meaning of the Guiding Procedural Principles*

The Guiding Procedural Principles take the form of one Chapter, divided into ten Sections. These Sections are devoted, respectively, to the judicial proceedings (Section 1, Articles 1-3), the subject-matter of the dispute (Section 2, Articles 4-5), facts (Section 3, Articles 6-8), evidence (Section 4, Articles 10-11), law (Section 5, Articles 12-13), adversarial procedure (Section 6, Articles 14-17), defence (Section 7, Articles 18-20), conciliation (Section 8, Article 21), oral arguments (Section 9, Articles 22-23) and the duty of restraint (Section 10, Article 24). This plan may appear surprising, because it seems that there is a discrepancy with the aim of the guiding procedural principles; two other approaches might have been more appropriate. If the aim was to declare, loud and clear, certain principles upon which a civil case is to be structured, one may have expected an explicit declaration of the principles to be applied in any case; for example, the principle that the court cannot adjudicate beyond the statements of case of the parties, the adversarial principle (*contradiction*), and the principle that the administration of justice should be public. If, alternatively, the objective was to establish the respective roles of the parties and of the judge in civil litigation, the role of the parties and the role of the judge could have been set out precisely. This was not the approach taken. Why not? Dean Cornu, the main drafter, explained:<sup>57)</sup>

*"The Chapter is not a work in two parts (a Section on parties and a Section on the judge). The first five of the ten Sections dividing it reflect the analytical decomposition of a court case, which, under the titles enlightening its facets, is considered successively as a proceeding (Section I), a confrontation of allegations (Section II, Subject-Matter of the Dispute), a debate on facts (Facts in the Case and Evidence, Sections III and IV), and a debate on law (Section V). In each plan, the respective role of the parties and the judge are presented in counterpoint. It is because the allocation varies from one plan*

54) See G. Rouhette, *supra* footnote 12, p. 90-192 (No. 20).

55) G. Cornu, *supra* footnote 23, 1995, p. 250, and G. Rouhette, *supra* footnote 8, p. 193 (No. 20).

56) G. Bolard, *supra* footnote 22, p. 11.

57) G. Cornu, *supra* footnote 44, p. 93.

*to the other: Parties have monopolies (delimitation of the dispute, submission of facts) and principal obligations under the vigilant eye of the judge (conduct of the proceeding, proof of facts) [...]. Turning point of the Chapter, Section VI makes up the synthesis of procedure. The adversarial principle covers all the aspects of litigation. No: it innervates litigation in all its procedural, factual and legal actions. The last four Sections put the adversarial principle in context: between protagonists (defense, defenders), before its public (Articles 22, 23), in its dignity (Article 24) and in its means of appeasement (Article 21)."*

This approach to the presentation of the Guiding Procedural Principles reveals a certain perception of litigation procedure. However, this reading also hides another one. Litigation is, above all, a procedure brought before a judge: it is the proceeding, the judicial phase of a lawsuit (Section I), with the objective of settling a dispute defined as a situation of legal uncertainty requiring a determination of the law applicable to the proven facts (Sections II, III, IV), following a contentious debate (Section VI), conducted in public (Section IX), with due respect for defense and justice (Sections VII and X),<sup>58)</sup> which does not exclude that the dispute be settled by conciliation rather than by judgment (Section VIII).

Notwithstanding what some believed following the Decree of 9 September 1971, what the Guiding Procedural Principles say has nothing to do with a simple exercise in style consisting of ‘joining and concentrating, for the edification of future law students, the satisfaction of jurists and the joy of purists, the immortal principles of procedure which resulted more or less from scattered texts, case law and the wisdom of nations.’<sup>59)</sup> This illusion was immediately denounced by Motulsky, who thought it appropriate to specify that the objective pursued was, instead, to ‘trace, in light of a divided doctrine and – above all – a hesitant, not to say contradictory, case law, the essential boundaries of the judge’s mandate and the distribution of procedural functions between the judge and the parties.’<sup>60)</sup>

Also, this ‘charter of distribution of roles between the judge and parties’ is not the establishment of an ‘interventionist’ procedural model,<sup>61)</sup> ‘inquisitorial as its dominant

58) See G. Cornu, *supra* footnote 44, p. 90, who distinguishes in them the ‘rules of the game’ (*règles du jeu*): ‘liberté de la défense (Articles 18, 19), publicité des débats (Article 22), respect de la justice (Article 24) sont, sur un idéal antique, les règles classiques du théâtre de la justice: le tribunal est le lieu d’un débat libre, public et digne.’

59) Ph. Bertin, ‘Le décret du 9 September 1971 portant réforme partielle de la procédure civile,’ *Gazette du Palais* 16 November 1971, No. 3.

60) H. Motulsky, ‘Prolégomènes pour un futur Code de procédure civile: la consécration des principes directeurs du procès civil par le décret du 9 septembre 1971’, *supra* footnote 14.

61) P. Catala and F. Terré, *supra* footnote 37, p. 20.

characteristic,'<sup>62)</sup> ‘administrative and authoritarian’<sup>63)</sup> as declared or feared after the promulgation of the Code.<sup>64)</sup> The Code is essentially a work in composition, neither adversarial nor inquisitorial; these qualifications do not suit what civil litigation fundamentally is. It is a work in composition, because it must conciliate the liberal principles of French tradition which make parties the owners of the lawsuit, and the affirmation of the powers of the judge, who must – as a procedural mandate – realize his mission to achieve the fairest solution to the dispute, which is in the general interest. Justice is a public service and impartiality is not passivity. In fact, it is justified to say that Articles 1 to 13 of the new Code define a genuine principle of co-operation between the judge and the parties in the elaboration of the judgment. This is, of course, the aim of civil procedure. This doctrine is not the fruit of a spontaneous generation, issued to satisfy some academic satisfaction. As we see, the Guiding Procedural Principles, and the conception of civil litigation that they convey, have a long history.

### **3.3. *The content of Guiding Principles of Trial***

The New Code of Civil Procedure, drafted during the 1960s and 1970s, is oriented around a certain conception of a civil trial. This conception becomes immediately apparent from a reading of the guiding principles of trial (*principes directeurs du procès*) articulated by Articles 1 to 24, with which the new Code begins, and which lay down the main principles of the civil trial. For the most part, these principles are reducible to the principle of cooperation between the judge and the parties and to the adversarial principle (le *principe du contradictoire*).

#### **3.3.1. *The Principle of Cooperation***

Articles 1 through 13 of the New Code organize the principle of cooperation. They reflect the desired, and successfully achieved, balance between the prerogatives of the parties, on the one hand, and the powers of the judge in the conduct of the trial and in bringing the dispute under control, on the other. The Code is essentially a work of composition that seeks to reconcile the liberal principles of the French tradition, which make the trial the business of the parties, with an affirmation of the powers of the judge, on whom rests the duty (rather than merely the power) to accomplish the purpose of reaching the most just solution possible of the dispute at hand. This ascendancy of judicial activism is not unique to France. The trial plays a social role and justice itself is a public service (*service public*). Thus, while the judge

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62) R. Perrot, *Droit judiciaire privé*, Paris, Les cours de droit, 1980, p. 33.

63) Doubt expressed by J. Vincent and S. Guinchard, *Procédure civile*, 20th edition, Paris, Dalloz, 1981, No. 11 and 24th edition, Paris, Dalloz, 1996, No. 41.

64) One of the drafters of the new Code of Civil procedure admitted that the only aspect which gives the judge powers which are inquisitorial in nature can be found in Article 222, paragraph 2, authorising the judge to fix the material facts that should be proved in the proceedings (*l'enquête*): G. Cornu, *supra* footnote 44, p. 87.

must be impartial, impartiality does not mean passivity. Certainly, significant prerogatives have been given to the judge in conducting the trial so as to ensure its proper progress, while also addressing the substance of the case. Procedurally, this entails the power to grant time periods for performing procedural acts and to prescribe necessary interim measures, including the power to consider even facts that the parties did not necessarily put forward in support of their allegations (art. 7, par. 2 CPC), the power to compel the production of a document (art. 11 CPC), and even the power, on the judge's own initiative, to order any legally permissible investigative measure.

This enhancement of the judge's function was innovative, since the former Code of Civil Procedure of 1806, by contrast, had put the trial in the parties' hands. While the parties still hold the power of initiative, they have acquired a certain power to modify the scope of the judge's mission, whether to limit it to making characterizations of fact and to points of law that will set the bounds of the dispute (art. 12 par. 3 CPC) or, on the contrary, to expand it by conferring on the judge the role of mediator (*amiable compositeur*) (art. 12 par 4 CPC). Moreover, the judge is required to adhere to the subject matter of the controversy (art. 4 et 5) and, above all, to '*subject himself under all circumstances to the adversarial principle*' (art. 16 par. 1 CPC).

These rules have thus re-established a certain balance. Thirty years later, the dominant if not unanimous opinion is that Articles 1 through 13 of the New Code indeed yield a genuine principle of cooperation between the judge and the parties in the crafting of the judgment toward which civil procedure is naturally oriented.

### 3.3.2. *The Adversarial Principle*

The adversarial principle (which is not an exact translation for *le principe du contradictoire*) is an essential, even indispensable, component of the right to a fair trial. It reflects the idea that all of the facts and all of the rules of law that might be taken into consideration by the judge in reaching his decision must have been brought to the attention of both parties sufficiently in advance so that each of them is effectively able to study and, eventually, challenge them. Thus, the parties must appear, or at least have been summoned (art. 14 CPC). The parties must inform each other of their causes of action and evidence in due time (art. 16 par. 2 and 3 CPC). The judge must respect and enforce the adversarial principle (art. 16 CPC). And a suitable appeal must be available in case an order has been issued without the knowledge of one of the parties. These classic requirements, to which counsel for the parties are instinctively and justifiably attached, have been substantially enhanced by European law, chiefly on the basis of Action 6 § 1 of the European Convention of Human Rights. The same logic informs the broader principle that the parties must be dealt with on equal terms, thus enabling each to have a reasonable opportunity to lay out its own case under circumstances that do not appreciably put that party at a disadvantage in comparison to the other. For the same reason, the parties also have the right to comment on all interventions

made by the State Prosecutor (*Ministère public*) on the merits of the case.

This historical perspective of French civil procedure was necessary in order to understand the regulation of French civil procedure which is the matter of the next chapter.

## **Chapter 3**

### **REGULATION OF FRENCH CIVIL PROCEDURE**

#### Contents

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#### **1. General Structure of the Civil Trial**

##### **1.1. Written versus Oral Procedures**

There is in French civil procedure a classic distinction between written and oral procedures. Written procedures are those followed in courts before which representation by an attorney is compulsory. In the *tribunal de grande instance*, representation by an attorney (*avocat*) is required. In the Court of Appeal, a litigant must be represented by a lawyer specifically licensed to appear before that court, called an *avoué*. Representation before the *Conseil d'État* and the *Cour de Cassation* can only be by a member of a special bar consisting of *avocats au Conseil d'Etat et à la Cour de Cassation*. The procedure in such courts is thus formal. The case will be subject to an investigation performed by a specialized judge known as the *juge de la mise en état* in the *tribunal de grande instance* and as the *conseiller de la mise en état* in the Court of Appeal. The presentation of causes of action, and allegations in support of them must normally take the form of written submissions. These conclusions must meet two criteria. They must, from the moment of filing the lawsuit, set forth the relief sought and a statement of factual and legal grounds for it, the qualifying

submission (*écritures qualificatives*). They must also be summary (*écritures récapitulatives*), meaning that they must regularly restate the claims and grounds since, in the event of an omission, they will be deemed to have been abandoned. The objective is to keep the case manageable, by avoiding massive and cumulative submissions, which cause the judge to waste a great deal of time reconstructing the sequence of claims and arguments. However, the written procedure does not completely displace oral presentations. At the very least, once the case is in a condition to be tried, it is ‘pleaded’ by the parties’ counsel, and these hearings are certainly oral.

By contrast, in courts before which legal representation is optional and the litigant may undertake his own defense, the procedure should be simpler and faster. It is accordingly oral. This is the case before all courts of first instance other than the *tribunaux de grande instance*. It is also the case before the Court of Appeal in certain specific subject matters, *i.e.*, in appeals in labour, social security and rural lease litigation. The oral character of these proceedings is supposed to produce a justice that is more consensual and ‘communitarian’ (*de proximité*). It is meant to favour direct contact between the parties and the judges, dialogue, and therefore amicable dispute resolution methods such as conciliation. It presupposes, more than written procedures do, the physical appearance of the parties. It also gives greater flexibility to the judge who can, through dialogue, reformulate the parties’ claims and allegations. However, it also can give rise to difficulties. One important consequence of having an oral procedure is that spoken words are considered to take precedence over writings in cases where the parties have submitted writings. For example, a motion for discontinuance of court proceedings (*un désistement d’instance*) is valid only as of the day it is made at the courtroom bar (*i.e.*, orally), and not from the day of its notification, even earlier, in writing. This may encourage bad faith by the parties who may thus elaborate in writing on motions going to the admissibility of claims (*moyens de recevabilité de l’action en justice*) or on the merits, while at the last moment, at trial, invoking a civil procedure ground such as, for example, lack of jurisdiction. Oral procedures may not foster respect for the adversarial principle since they reward the parties’ advancing of arguments at the last moment.

### **1.2. Standard Procedures versus Special Procedures**

The standard or typical procedure is adversarial in the sense that two or more parties confront each other and are either present or represented. It results in a final judgment of the case disposing of the substantive issues referred to the judge. The standard procedure, whether written or oral, exists before all courts. But not all civil procedures necessarily reflect this pattern. In addition to voluntary procedures (*procédures gracieuses*) that the Code organizes for cases without a controversy (Arts. 25 to 29 CPC), as when spouses agree to divorce and file with the judge a mutual divorce petition, there also exist special adversarial procedures, such as summary proceedings (*procédures de référé*) and *ex parte* proceedings

(procédures sur requête), both of which are very frequently used.

### **1.2.1. Summary Interlocutory Proceedings (Procédure de référé)**

This long-practiced procedure, dating to before the French Revolution, emerged to remedy the excessive slowness and complexity of proceedings. Its success has become significant lately due to the explosion of litigation and the protractedness of proceedings to which the growth in number of court cases has led. The New Code of Civil Procedure organizes summary interlocutory proceedings before all courts (with the exception, understandably, of the *Cour de Cassation*, which is not, after all, a court which decides the merits of disputes).

Traditionally, the purpose of summary interlocutory proceedings was to permit the speedy grant of a provisional remedy pending the final resolution of a case. Such protective remedies, like a temporary injunction (as in enjoining distribution of a book), a provisional suspension (as in prohibiting opening a business), or sequestration (*mise sous séquestre*), do not prejudge the ultimate outcome of the case by the judge who will be competent to decide it on the merits. The current texts maintain this classic notion of summary interlocutory proceedings, by establishing both a general (or ordinary) model for them. However, there have arisen certain special and particular summary interlocutory proceedings that, in whole or in part, are not subject to the ordinary requirements. For example, the usual requirements of urgency or of an absence of any serious dispute over the merits may not be applicable.

Such special summary proceedings may have as their purpose (i) the ordering of a pre-trial investigative measure, or *réméré in futurum* (art. 145 CPC), (ii) an order that a deposit be made which will then be deducted from a final order (in an amount that may even be equal to the total sum likely to be sought from the court hearing the case) (*réméré-provision*: e.g. Art. 809, par. 2 CPC), or (iii) protective or restorative remedies necessary either to prevent an imminent harm or to put an end to a manifestly excessive nuisance (e.g. Art. 873, par. 1 CPC for the Tribunal de commerce, *commercial court*). The judge in charge of summary interlocutory proceedings (*le juge des référés*) also has the power to order the mandatory performance of an obligation, even if it consists of a duty to act, such as repair of a consumer product or acceptance of its return. This is known in French practice as a *réméré-injonction*.

Summary interlocutory proceedings are initiated, in principle, by a summons to a hearing for that purpose at the usual day and hour for such proceedings. The petition may also be introduced, in employment law matters, via a declaration (*déclaration*) deposited with the court clerk or by voluntary appearance of the parties. Legal representation of the parties is not compulsory, but if the parties are represented, it may only be by an *avocat* (before the *tribunal de grande instance*) or by an *avoué* (before the Court of Appeal, until the 1st of January 2012 when they will merge with the *avocats*). If the case requires great speed, the summary interlocutory proceedings judge may fix a time for filing the complaint, which

may even be during a public holiday, and which may take place either at the hearing or even at the judge's residence (opened doors, *portes ouvertes*). This is referred to as summary interlocutory proceedings 'from hour to hour' (*référé d'heure à heure*), meaning fixed in the morning for the same afternoon or even sooner. Permission is obtained by petition, which is an *ex parte* request submitted without the opponent's knowledge.

Most often, the summary interlocutory proceedings judge will decide the matter on his own, and summarily. The law, however, offers him two other possibilities. First, he may transfer the case to a panel of judges from the ordinarily competent court for a hearing whose date he will fix. The decision then handed down, though collegial, will still be a preliminary one (*une ordonnance de référé*). If there is indeed an emergency, but no real need for summary interlocutory proceedings, the judge may also set a hearing date for determining the substantive issues of the case.

The summary interlocutory proceedings order does not have the authority of a final judgment (*autorité de la chose jugée*) on the merits of the case. The judge hearing the case in chief on the merits is therefore not bound by the summary interlocutory proceedings order. The summary interlocutory proceedings order is, however, not without effect. It is temporarily fully enforceable, and can be immediately enforced, despite the suspensive effect ordinarily attached to the appeal, which is available against it in the Court of Appeal. But though enforcement may not in principle be stopped, it may nevertheless be made subject to a pledge in the form of security (caution) or deposit (consignation), for example. This arrangement will give the summary interlocutory proceeding order, in fact if not in law, the character of a final decision. It is not an overstatement to say that summary interlocutory proceedings have become, in practice, the ordinary way to settle civil disputes that do not raise any substantial difficulties. It is a very successful proceeding.

### **1.2.2. Ex parte Proceedings (*Procédure sur requête*)**

Sometimes a judgment is neither adversarial nor definitive. Such is the case with *ex parte* proceedings (*procédures sur requête*). Articles 493 through 498 of the New Code of Civil Procedure organize the *ex parte* proceeding in general terms. Its purpose may be to order an investigative or provisional measure whose efficacy requires secrecy up to its issuance, as in the case of proof of adultery or a provisional seizure. But the Code also provides for an *ex parte* proceeding, pursuant to a special regime, for the issuance of injunctive measures. This may result in issuance of an injunction to pay (*injonction de payer*) in proceedings before the *tribunal d'instance* or the *tribunal de commerce*, depending on whether the unpaid debt is of a civil or commercial nature. It may also result in an injunction to 'do' concerning duties to act (*prestations*). The latter procedure, used only in the *tribunal d'instance*, has had virtually no success and consideration has been given to abolishing it purely and simply. The summary interlocutory proceedings procedure (discussed above) is more effective despite, or perhaps because of, its adversarial character. On the other hand, the injunction to pay has proven a

great success, as official statistics show. Of course, a procedure for opposing the injunctive order is available to the debtor, so that he may assert the reasons why he did not pay the debt. The case then comes back before the court, but this time in an adversarial manner and on the merits of the case, just as any other claim in court for payment. This possibility to oppose the injunctive order, which is by no means exercised in the majority of cases, does not appear to affect the efficacy of the procedure. In the absence of an opposition within the statutory time limit, the injunction will produce all the effects of an adversarial ruling on the merits and will not even be subject to appeal if the claim does not exceed a certain amount (4.000 €).

## 2. The Normal Process of a Civil Trial

### 2.1. Initiation of the Case

In principle, the initiative in bringing a case belongs to the parties, and cases begun on the judge's own initiative are rare. Every case presupposes an initial claim, which, according to the Code, starts the case. This does not necessarily mean that the claim will always be brought to the judge. How the case comes before the court follows different procedure depending on whether the initial claim takes the form of a summons (*assignation*) or a joint petition (*requête conjointe*), on the one hand, or a petition (*requête*), declaration (*déclaration*), or voluntary appearance (*présentation volontaire*) of the parties, on the other.

A summons (*assignation*) is an official form executed by a bailiff, by which the plaintiff summons his opponent to appear before the judge. The joint application (*requête conjointe*) is an official form through which both parties submit their respective allegations, the points about which they disagree, and their respective claims. Designed as an 'amicable substitute' for a summons, the joint petition is an innovation of the New Code of Civil Procedure. It is rarely used because it presupposes a minimum of agreement between the parties, which is often lacking in adversarial procedures. In any case, the signing of a joint petition or service of a complaint does not amount to a submission of the case to the judge. Submission requires accomplishing an additional formality, which entails recording the case on the court's docket (*le rôle*). This formality, known as *l'enrôlement de l'affaire*, consists of delivering the joint petition or a copy of the complaint to the court clerk's office. In some cases, the law imposes a time limit for this recording (e.g., four months in the *tribunal de grande instance*), non-compliance with which results in the complaint being null and void, and deprived of any effect.

The complaint and its submission to the judge constitute one and the same operation in those cases where initiation of the case requires the court's intervention. This is the situation with the voluntary appearance of the parties before the judge. Before the *tribunal d'instance* and the *tribunal de commerce*, submission to the judge occurs when the parties sign the report recording such voluntary appearance. Before the *conseil des prud'hommes*, mere

appearance suffices. The bureau of conciliation (*bureau de conciliation*), which intervenes first to attempt to find an amicable solution to the controversy, may hear the parties at once and try to conciliate them, which is very rare in practice because, given the great number of applications, cases are spread out over time and the parties have to be convened by the clerk's office. The same goes for the petition (*requête*) or the declaration (*déclaration*) filed by a party with the clerk's office of the competent court. This brings the matter before the court, regardless of the form of the declarations, whether written or oral; it cannot be done by telephone, facsimile or electronic mail, except in some circumstances.

For each case recorded, the clerk establishes a procedural dossier. Such a dossier becomes, in a sense, the official memory and witness of the trial. It is the dossier that will be relied upon in the case of a procedural dispute or an appeal. It is particularly important in oral proceedings in which there is in principle no writing. Everything must therefore be recorded in the dossier.

## 2.2. *The Investigation of the Case*

The investigation of the case is a major step in the civil trial, since it is the occasion on which the procedural formalities whose purpose is to prepare the case for trial and judgment are accomplished.

On one hand, the procedure does not follow the same rules in all courts. The Code provides rules peculiar to each court. For some courts, a special procedure for readying the case for judgment is set up and entrusted to a judge designated for that purpose (*juge de la mise en état* before the *Tribunal de grande instance, conseiller de la mise en état* before the Court of Appeal, who are case management judge). This is so before the *tribunal de grande instance* and the Court of Appeal, both of which follow written procedures. In other courts, the case is readied at trial. This is generally the case when proceedings are oral, such as before the *tribunal de commerce*, the *tribunal d'instance* and the *conseil de prud'hommes*. There thus may often be successive hearings, the case being sent from one hearing to another, until it is in a position to be adjudicated.

Practices tend, however, to converge, with the course of proceedings really depending on the degree of complexity of the case or the extent of its preparation at the moment when the proceedings began. There thus exist, including in the *tribunal de grande instance*, so-called 'short circuits' (*circuits courts*), which are a sort of 'fast-track' procedure, in which the case is directly sent to trial. Conversely, it occurs quite often, mostly in commercial matters, that cases are subject to a preliminary preparation. In the *tribunal de commerce*, this is done by the reporting judge (*juge rapporteur*), and in the *conseil des prud'hommes* by a judge known as the *conseiller rapporteur*.

On the other hand, and regardless of the court, the investigation always has the same purpose, namely putting the case in a state to be adjudicated. It is usually during the investigation that the parties set out the subject matter of the dispute in their respective briefs.

Above all, it is then that the parties will exchange allegations and evidence on which they rest their case, and inform the judge of them.

The rules relating to the admissibility of evidence are common to all the courts. Essentially, evidence may be established in two ways: either through documents or through investigative measures. Documents refer to evidentiary items that pre-exist the judicial intervention (such as letters exchanged between the parties and contractual documents). Investigative measures presuppose that there has been recourse to a judge. There is a hierarchy among these different evidentiary methods that must be complied with. An investigative measure should be ordered about an event only if the party alleging it does not have sufficient documents to prove it. The investigatory measure should therefore in principle be a subsidiary instrument. The use of the conditional tense suggests that the reality is different. Investigative measures are easily ordered and, most often, they take the form of an expert opinion (*expertise*), which is not really consistent with the spirit of the new Code because it is a source of delay and expense. This observation is most apt in relation to the *tribunal de grande instance* and the *tribunal de commerce*, and less so as to other courts, particularly the *conseil des prud'hommes*, which deals with a very heavy case load, while ordering few investigative measures.

### **2.3. Debates at Trial**

Unlike the investigation of the case, debates at trial are characterized by their oral and public nature.

The oral nature of debates is a feature common to all civil courts, even those, like the *tribunal de grande instance*, in which the investigative procedure is in writing. Although the *Cour de Cassation* also recognizes the right of the parties to an oral hearing, the practices there, as well as the governing legislation, minimize the importance of oral debate, which after all is not a prerequisite of an adversarial proceeding. In practice, pleadings tend to lose *their* importance before the civil courts. The oral presentations are often brief and spontaneous. They are typically responsive to the judge's questions and sometimes drastically displaced by the practice of submitting written briefs. The merger of the professions of *avocat* and *avoué* in the courts of first instance in 1971, the lengthening of the period of investigation of the case, court congestion, and the level of attorneys' fees all help explain this development, a development in which the *avocats*, reluctantly or otherwise, are accomplices.

The principle of the publicity of debates calls for no particular observations. As an aspect of the right to a fair trial, within the meaning of Article 6, par.1, of the European Human Rights Convention, the principle of publicity may be set aside only in cases provided for by statute. Thus, it does not work in voluntary proceedings (*matière gracieuse*) as well as in matters involving the legal status and the legal capacity of persons, such as divorce. As a rule, debates take place before the panel of judges that will later be called upon to deliberate

and adjudicate. However, for reasons again of economy of time, the law provides that in certain courts, debates shall take place before a single judge, provided two conditions are met. First, the parties must agree on this, and, second, the judge supervising the debates must prepare a report to the other members of the court so that the ruling that results conforms to the requirements of a collective decision (*principe de collégialité*). This same procedure may be used before the *tribunal de commerce*, the *tribunal de grande instance* and even the Court of Appeal. Nobody of course can verify the reality of the collective deliberation. Practice, therefore, suggests that the scenario of single judges is very often used.

The president of the court, who is in charge of policing the trial, moderates debates. Assisting him is the clerk (*greffier*) who keeps the trial registry (and for this reason may also be called the '*plumitif*', after the word plume for 'pen'). The registry records the events occurring at trial. The public prosecutor (*ministère public*) must be present in cases where he represents others, where his presence is required by statute and, of course, where he acts as the principal party, as in criminal prosecutions. During the trial, there is an established order of interventions, in this sequence: plaintiff, defendant and, when applicable, possible intervening parties and the prosecutor acting as a third party or *partie jointe* (i.e., when he merely states his objective opinion on how the law should be applied). The chairman and the judges may always allow counsel for the parties to speak again to provide the legal or actual explanations that they deem necessary or to clarify what may still be unclear to the court.

The president of the court declares the closing of debates as soon as the court considers itself sufficiently informed. To such closing, the law itself also attaches a certain number of effects. Notably, parties may no longer present any further submissions in support of their claims and, subject to the sanction of nullity of the judgment, the judge may not base his decision on observations or documents produced by the parties during deliberations. By way of exception, parties may be permitted to submit written observations (*notes en délibéré*) in support of their positions during the judges' deliberations, either to respond to arguments put forward by the prosecutor when he spoke last as a third party or when the president so requests so that the parties can clarify their positions. Consistent with the adversarial principle, such submissions must be communicated to the other party, who then has an opportunity to respond to them in like form. In no case, however, may these submissions change the elements of the case or be likened to conclusions. On the other hand, it is possible that the information contained in these notes will lead the president of the court to reopen the debates. Once debated, or re-debated, the case is sent for deliberation.

### **3. Judgment**

A judgment can vest three different forms. It may be rendered in an adversarial fashion (*contradictoirement*), or in a fashion 'deemed adversarial' (*réputé contradictoire*), or by default (*par défaut*). These labels are of importance in regard to the rules governing

notification of the judgment and channels of appeal. A judgment ‘deemed adversarial’ has the same effects as an adversarial judgment. It is so described to underline the fact that while the plaintiff did not appear at trial, that non-appearance has no procedural significance. By contrast, a judgment is rendered by default if the defendant did not appear and if, in addition, two further conditions are both met. First, a final judgment must have been rendered in all the available levels of judgment, so that it is no longer subject to appeal (*appel*) in the French sense. Second, the defendant must not have been personally summoned. If either of these conditions is lacking, the judgment is ‘deemed adversarial.’ The distinction matters because only default judgments are subject to a specific means of appeal called a motion to set aside a judgment (*opposition*), which, if successful, sets aside the judgment (*rétractation*) and enables the defendant to return before the judge who rendered the decision and reopen the adversarial debate. However, a judgment that is ‘deemed adversarial,’ just like a default judgment, must be notified to the defendant within six months, or else the judgment is subject to nullity.

Another classification of judgments distinguishes among final, preliminary, interlocutory (or, in French, *avant-dire droit*), and ‘mixed’ judgments. This classification has multiple significance, having to do with the *res judicata* effect of the judgment (*autorité de la chose jugée*), the termination of judicial jurisdiction over the case (*dessaisissement du juge*) and the possible avenues of appeal. A final judgment (*jugement définitif*) is one that settles the whole case or certain issues in it, or aspects other than those relating to the investigation or the issuance of provisional remedies, so that the judge has no further need to decide on these matters. It has *res judicata* effect on the principal issue, releases the judge from the case, and is subject to appeal.

Judgments said to be preliminary (*provisoire*) are those that do not settle the legal issues in the case, but rule upon a claimant’s urgent request. They do not therefore have a *res judicata* effect as to the principal issue. Interlocutory judgments (or judgments *avant-dire droit*) are issued in the course of a trial, on the occasion of either a preliminary or an investigative measure. They have no *res judicata* effect as to the principal issue, do not release the judge, and are not subject to immediate appeal. Finally, ‘mixed’ judgments, which in part decide issues on the merits and in part order a preliminary or an investigative measure, have *res judicata* effect and are subject to appeal only as to the legal issues which they are settle. Obviously, they may also have effects on that part of the judgment which is only interlocutory.

A judgment will be delivered publicly but, for reasons of speed, the judges may only read out the sentence, that is to say the final part of the judgment where the decision is expressed. The judgment can also be pronounced by making it available at the clerk’s office of the court. A judgment may be annulled only on specified statutory grounds (e.g., composition of the tribunal or notice requirements) because, as a general rule, nullification is not available as against judgments. The goal is to avoid ordering nullifications that slow the

course of justice. As a result, nullification actions are subject to case law-based presumptions of regularity (for example, that the judges who participated in the deliberations are presumed to be those who heard the arguments) as well as limitations periods. The judgment is then notified by the clerk's office or delivered by a certified bailiff. This is indispensable to enforcement of the judgment and to the running of the statutes of limitations for exercising the right of appeal. Appeals normally have a suspensive effect, so that a judgment may not ordinarily be executed at the time of its notification. By way of exception, some judgments may be immediately executory due to an overriding concern for efficiency. (This is the case, for example, with orders of provisional relief.) Indeed, some judgments even become executory upon issuance (*sur minute*), i.e., even before they are notified, as in the case of *ex parte* orders (*ordonnances de requête*). Furthermore, a judge may choose in his discretion to order execution of a judgment if he deems that doing so would be useful as well as compatible with the nature of the case.

The judgment has the effect of releasing the judge (in the sense of ending his jurisdiction over the case), except for exceptional appeals such as appeals for interpretation (*recours en interprétation*), failures to judge (*omission de statuer*), judgments *infra petita* (where the tribunal did not address all the claimant's requests) or *ultra petita* (where the tribunal granted claimant more than he sought). For reasons of legal certainty, the judgment's sentence (*dispositif*), which sets forth the judge's decision, has *res judicata* effect, but its reasoning does not. Thus decisional grounds, even though part of the holding, and even though outcome-determinative, in theory lack any *res judicata* effect. The *res judicata* effect of a judgment (to the extent it goes) has both a positive and a negative aspect. Thus, on the one hand, the judgment is obligatory due to the presumption of truth that is attached to it. On the other hand, it precludes a second judgment in the same case. This means that a party can invoke 'case preclusion' (*l'exception de la chose jugée*) to rule out a new complaint on the same dispute.

#### 4. Means of Review

##### 4.1. Ordinary Means of Review

In France, the general rule is that there must be on any subject matter of litigation a system of channels of appeals that is widely enough open to permit a dissatisfied litigant to have the case re-adjudicated by another court. From that perspective, French law is more protective than the European Convention of Human Rights requires, since it does not impose any such guarantee in civil matters. Precedents of the European Court of Human Rights are limited to requiring that any appeals procedures made available by national law comply with the rules of due process.

The appeal (*appel*) is the ordinary channel of review, reflecting the rule of 'two-levels' of jurisdiction. Appeal is normally available to any litigant who has not obtained satisfaction

from the lower court judge's decision, except of course in cases where a statute disallows it, for example, due to the small monetary value of the interests at stake. (This is generally where the amount in controversy is less than 4 000 €.) The availability of appeal as a matter of right of course explains the high level of frequency with which that channel is used, resulting in a congestion of the courts of appeal. (State budgets are inadequate to ensure the review of cases within a desirable time frame). The Court of Appeal examines *de novo*, in fact and in law, the aspects of the judgment criticized by the parties. Its judgment, being of the same nature as the decision rendered in the first instance, is subject to the same legal regime just mentioned, both as to the 'release' of the judge and the *res judicata* effect of the judgment.

All other channels of appeal are exceptional in character. The motion to set aside a default judgment (or *opposition*) enables a party who did not appear in the first instance to ask that the case be re-examined by the same judge who issued his ruling in the party's absence. But the notion of default is so strictly defined that this channel of appeal has become marginal.

#### 4.2. Extraordinary Means of Review

After the appeal, the most frequently used channel of review is the petition to the *Cour de Cassation* (*pourvoi en cassation*). It is necessary to remind that the function of the *Cour de Cassation* is to review, at a party's request, compliance of the challenged decision with the rules of law. (Generally, the challenged judgment will be a judgment of the Court of Appeal, but it may also be a first-level judgment not susceptible to appeal). By not re-examining questions of fact and by not, in theory, substituting its decision for the one submitted to it, the *Cour de Cassation* does not operate as a third-level court. It only overrules or quashes decisions that are legally erroneous. In so doing, it puts forward constructions of legal rules that will enjoy strong authority as precedents. Despite the specificity of this function, which in some European countries gives rise to only several dozen rulings each year, the French *Cour de Cassation* hears thousands. In practice, the *Cour de Cassation* has been largely diverted from its true function by affording, if not a third level of jurisdiction, at least, a third opportunity to win a case - - an opportunity of which it is quite natural for litigants to take advantage. A good portion of the recent history of the *pourvoi en cassation* is a history of attempts to contain this flow. The latest to date is the establishment of a procedure for rejecting petitions as inadmissible (*non-admissible*) or not raising a serious ground of appeal.

An appeal for reconsideration (*recours en révision*) is designed to reopen rulings obtained through fraud that caused the judge to commit a judicial error based on erroneous findings of facts. Finally, an opposition by a third party (*tierce opposition*) offers third parties a means of escaping the adverse consequences that could result for them from a judgment to which they were not parties, but that harms their interests. A successful opposition will result in the judgment being declared unenforceable as against them.

### 5. Enforcement

The term measures of execution (*voies* or *procédures d'exécution*) refers to all legal remedies that are available to unpaid judgment creditors to compel their judgment debtors to pay up, if need be with the assistance of the police. Rules of civil procedure and the measures of execution are therefore by no means necessarily intertwined. There can be a trial without execution measures, which happens whenever the judgment is voluntarily paid, and there can be measures of execution without trial, whenever such measures are used to enforce instruments other than judgments, as in the case of so-called '*authenticated documents*' (*actes authentiques*) drafted by notaries (*notaires*). Recourse to a court is thus not indispensable to the performance of measures of execution. A reform of the law of execution brought about by law of 9 July 1991 has even further detached execution procedures from judicial proceedings. Moreover, contrary to what had been initially planned, the law on measures of execution will not be introduced into a fifth and final part of the New Code of Civil Procedure, but rather will be the subject of a separate code, to be called the Code of Execution.

Still, it should not be inferred that execution procedures are free of 'judicial law' altogether. On the contrary, the 1991 reform was the occasion for bringing to life a new judge, the so-called judge of execution (*juge de l'exécution*), whose duty is to resolve all difficulties relating to writs of execution and all controversies arising from the execution, even if they bear upon the substance of the law (Arts L. 213-5 to L. 213-7 of the *Code de l'organisation judiciaire*). Likewise, the important development of collective execution proceedings - applicable to merchants, craftsmen, farmers and households in insolvency or excessive debt - also undeniably reinforces judicial powers in an important way.

Execution measures consist of seizures of both immovable and movable properties. The latter category, which is very diverse in its objects (movable property, debt, wages, etc.), requires a writ of execution, which may be an enforceable court order or a similar legal instrument (such as an arbitration award, an out-of-court settlement, a restitution order (*arrêté de débet*) or a tax charge (*titre de perception*)).

Provisional seizure of movable property simply requires that the debt appear to be legally grounded and that there be a risk as to its recovery. This is useful when, although the creditor does not yet have an enforceable claim (*titre exécutoire*), which is usually indispensable for a writ of execution (*saisie-exécution*), there is reason to stabilize the situation and prevent the debtor from dissipating assets. There is no need for provisional seizure of immovable property because it is always possible to provisionally take security against such properties. As for the seizure of goods, the law of 1991 still permits the debtor, during a one-month period, to amicably sell them. Seizures of immovable properties, by their nature, are more prolonged, costly and formalistic. They require a court order of payment, the preparation of financial accounts and a highly regulated procedure, punctuated by deadlines for notification and challenge (the latter being very common in practice, above all when the

immovable property seized is the debtor's home). When there are several competing creditors, they are subject to a ranking process, which serves to allocate among them the proceeds from the sale of the immovable property.

In this chapter I have given a short overview of the regulation of French civil procedure, since this regulation is provided by the code of civil procedure, the new one. But this code is more than 30 years old now and times are changing. So it is necessary to complete the presentation with a brief exposition of contemporary features of French civil justice.

## **Chapter 4**

### **CONTEMPORARY FEATURES OF FRENCH CIVIL JUSTICE**

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  - 2.2. Complexity
  - 2.3. Democracy

Almost two years ago at the end of 2006, France commemorated the 200th anniversary of the Civil Procedure Code of 1806 called the “old code of civil procedure,” and the 30<sup>th</sup> anniversary of the Civil Procedure Code of 1975, known as the “New Civil Procedure Code”<sup>65)</sup>. I remind you that the provisions of the 1806 code stayed in force notably for what concerns aspects of magistrate responsibility and the seizure of real estate. This is no longer the case<sup>66)</sup>. The new code of civil procedure has thus reached the age of maturity, authorizing a first tabulation of past evolutions, evolutions in progress and evolutions to come because compared to the Napoleonic codification of the 19<sup>th</sup> century, the law is subject to regular changes even competence of the government. In fact, since the promulgation in 1975, the Civil Procedure Code has been the subject of forty modifying decrees, more or less important, with the most recent period having been marked by three particularly notable

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65) L. Cadet and G. Canivet (eds), *1806-1976-2006, de la commémoration d'un code à l'autre : 200 ans de procédure civile en France*, LexisNexis, 2006. See also, in Belgium where the French Code of civil procedure was also applied, C.H. Rhee, D. Heirbaut & M. Storme (ed.), *Le bicentenaire du Code de procédure civile (1806)*, Kluwer, 2008.

66) See *supra* footnote 21.

decrees promulgated in 1998<sup>67)</sup>, 2004<sup>68)</sup> and 2005<sup>69)</sup> following the proposals made by two commissions, the *Coulon Commission*<sup>70)</sup> and the *Magendie I Commission*<sup>71)</sup>, while waiting for the texts that will likely come in the upcoming months following the *Magendie II* reports on the appeal procedure,<sup>72)</sup> and *Guinchard* on the organization of disputes in the first instance<sup>73)</sup>.

Doctrine has developed the habit of presenting texts as decrees of “dressing table,” which suggested the idea of a sort of legal “maintenance,” from which one can see the advantages but from which the disadvantages should not be hidden. The *advantages* in this manner of making procedural law hold fast have a very great reactivity to the problems that arise in legal practice; it is a certain source of efficiency. The other side of the coin is that through specific modifications motivated by practical necessities which let the categorical interests run (interests of the judges, interests of the attorneys, interests of the court bailiffs, etc.), the coherence and doctrine of the whole of the code risk to become affected by it to the benefit of a purely conjectural adaptation of procedural law<sup>74)</sup>, which does not facilitate the location of the evolution tendencies which are still not the result of deliberated legal policy. It is necessary to add that the evolution of civil procedure is not the only act of law. In French law, the case law, especially that of the *Cour de cassation*, accomplishes a creative work far from negligible by means of leading cases (*grands arrêts ou arrêts de principe*)<sup>75)</sup>. This is without speaking of the role played in this material by the *Conseil d'Etat* (*higher administrative court*), that judges the legality of decrees on procedure, the *Conseil Constitutionnel* (constitutional court) that judges the constitutionality of laws on procedure

67) D. No 98-1231 of 28 December 1998.

68) D. No 2004-836 of 20 August 2004.

69) D. No 2005-1678 of 28 December 2005, for which see S. Amrani-Mekki, E. Jeuland, Y.-M. Serinet and L. Cadet, ‘Le procès civil français à son point de déséquilibre ? A propos du décret « Procédure »’, *JCP* 2006, I, 146.

70) J.-M. Coulon, *Réflexions et propositions sur la procédure civile*, Paris, La documentation française, 1997.

71) J.-C. Magendie, *Célérité et qualité de la justice – La gestion du temps dans le procès*, Paris, La documentation française, 2004.

72) *Célérité et qualité de la justice devant la cour d'appel* (Speed and quality of justice before the Court of Appeal), May 2008, for which see ‘Entretien avec Jean-Claude Magendie’, *Gazette du Palais* 4-5 July 2008, pp. 2 *sq*.

73) *L'ambition raisonnée d'une justice apaisée*, June 2008, for which see ‘Remise du rapport de la Commission Guinchard sur la répartition des contentieux’, *Gazette du Palais* 4-5 July 2008, pp. 17 *sq*, as well as the explanations of S. Guinchard, ‘Entretien avec Serge Guinchard’, *D.* 2008, act. lég. pp. 1748 *sq*.

74) G. Wiederkehr, ‘Le nouveau Code de procédure civile : la réforme permanente’, in *Mélanges Jacques Béguin*, Paris, Litec, 2005, pp. 787 *sq*, spec. p. 788. See also L. Cadet, ‘La légalité procédurale en matière civile’, *Bulletin d'information de la Cour de cassation*, No 636, 15 March 2006, No 9-10.

75) See Y. Desdevives, ‘Les grands arrêts du droit judiciaire privé’, in L. Cadet & G. Canivet (eds), *1806-1976-2006, de la commémoration d'un code à l'autre : 200 ans de procédure civile en France*, *supra* footnote 65, pp. 227-235.

and the European Court for Human Rights that judges the conventionality of national procedural norms whether legislative, statutory or of case law. A certain complexity of procedural legality results from the ensemble of these sources, a generator of conflicts, which complicates even more the identification of the tendencies of civil procedure<sup>76)</sup>.

Having made these methodological precautions, it seems however possible to bring up to date the new tendencies of civil procedure. Certain of these tendencies are already at work; other tendencies are in a state of planning. All of these tendencies are largely in the continuity of an evolution, which plunge their roots into modern history of civil procedure, and they are all registered in the perspective of a plural system of justice destined to respond to democratic needs of a complex society. These tendencies blend a number of points of view.

I will exclude from my remarks two sorts of tendencies. Thus, in this chapter, I will not develop on the *tendencies that are not specific to French law*, even if particular aspects can be presented here, for example, the tendency towards the Europeanization and internationalization of civil procedure<sup>77)</sup>. I will not develop any more on the *tendencies which are too specific to the French system*, for example the tendency of rationalization of the territories of justice which are called in France the “judicial map” (*carte judiciaire*) that is to say the locations of implantation of the courts and their geographic divisions on the national territory, which has become the subject of an important reform<sup>78)</sup>. This Franco-French problematic is not however lacking of all interest from the point of view of comparative judicial law because it illustrates the dilemmas of contemporary evolution in matters of justice, which is to find the good equilibrium between the concern for proximity and the requirement for efficiency. This research is equally at the heart of the work begun by the government for what concerns the reorganization of civil disputes of the first instance from which the actual fragmentation turns civil procedure into something hardly understood or readable to the justiciables<sup>79)</sup>. The reform

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76) L. Cadet, Les conflits de légalité procédurale dans le procès civil, in *Mélanges Jacques Boré*, Paris, Dalloz, 2007, pp. 57-78.

77) Except as a conclusion of my lecture : See *infra in fine*, ‘To conclude’.

78) D. No 2008-145 of 15 February 2008 modifying the seat and resort of the district court, the proximity court and the *tribunal de grande instance*, *JO* 17 Feb., p. 2862 ; D. No 2008-146 of 15 February 2008 establishing the seat and resort of the commercial courts, *JO* 17 Feb., p. 2920 ; D. No 2008-235 of 6 March 2008 establishing the seat and the resort for the children’s’ courts, *JO* 9 March, p. 4383 ; D. No 2008-237 of 6 March 2008 establishing the seat and the resort of the District Courts competent to receive and register declarations of French nationality and to deliver the certificates of nationality, *JO* 9 March, p. 4389 ; D. No 2008-238 of 6 March 2008 establishing the seat and the resort of the *tribunaux de grande instance* competent to rule on disputes over French or foreign nationality for physical persons, *JO* 9 March, p. 4396 ; D. No 2008-514, 29 May 2008 modifying the seat and the resort for the Labor courts, *JO* 1er June, p. 9070.

79) L’ambition raisonnée d’une justice apaisée’, *supra* footnote 73.

envisioned should bring on a more rational division of the competences between the civil courts of first instance, in default of a regrouping of these courts at the heart of a single civil court of first instance<sup>80)</sup>.

With this basis, it is possible to take account of some new tendencies in French civil procedure by distinguishing the tendencies in progress (I) and the challenges to come (II).

### ***1. The Tendencies in Progress***

The starting point for the evolutions in progress is in the Civil Procedure Code of 1975 which was clearly thought of as a balanced work between the *liberal tradition* of French law produced from the Civil Procedure Code of 1806 and the *social function* of procedure, inherited from Germanic procedural reforms realized in the late 19<sup>th</sup> century under the inspiration of Franz Klein (1854-1926) and preached by Albert Tissier (1862-1925) in France on the threshold of the 20<sup>th</sup> century<sup>81)</sup>. In this renewed concept of civil process of 1975 (Art. 1<sup>st</sup> to 24), procedure is not something of the parties (conception called accusatory), or something of the judge (conception called inquisitorial), but *something shared* by judges and parties, this communal object imposing a permanent collaboration in determining litigious matters as well as the course of the trial<sup>82)</sup>. This defines the luminary provisions of the

80) It is the point of view that I defended before the commission charged to prepare the reform. The idea was not retained in reason of obstacles that this gathering would meet later on (weight of tradition, risk of unconstitutionality) are too important to the benefits that would result from the point of view of the relaxation in management of the arguments. One can discuss this. It is certain that the reform would be radical and that in reason of this radicalness, it maybe cannot still be acceptable to the institution in any case, the propositions made by the Guinchard report constitute a certain progress in the simplification of the jurisdictional organization of the first instance: even if certain of these recommendations bring on interrogation (like the creation of poles of enforcement relying on a division of disputes of the enforcement between the District Court in matters of chattels and the *tribunal de grande instance* in matters of real property), the integration of the proximity court in the District Courts, the constitution of a family block at the *tribunal de grande instance* around the judge for family affairs with the competence extending to the guardianship of minors and the liquidations of marriage assets, articulated by the creation of a judiciary network in family matters to better coordinate the intervention of the judges for family affairs, judges for children and judges for guardianships, and above all the creation of a universal counter of clerks that assuredly goes in the right sense.

81) On this genealogy, see L. Cadet, 'The International sources of french civil procedure', in M. Deguchi & M. Storme (eds), *The reception and transmission of civil procedural law in the global society*, Antwerpen-Apeldoorn, Maklu, 2008, pp. 261-274. From their side, the « fathers » of the New Civil Procedure Code explained several times this philosophy of civil process of work in the New Civil Procedure Code : see G. Cornu, Les principes directeurs du procès civil par eux-mêmes, fragment d'un état des questions, *supra* footnote 44. – J. Foyer, Rapport de synthèse, in Cour de cassation, *Le nouveau Code de procédure civile : vingt ans après*, Paris, La documentation française, 1998, spec. p. 321. – H. Motulsky, Prolégomènes pour un futur Code de procédure civile : la consécration des principes directeurs du procès civil par le décret du 9 septembre 1971, *supra* footnote 14.

82) See L. Cadet & E. Jeuland, *Droit judiciaire privé*, Paris, Litec, 6ème ed. 2009, No 518 *sq.*

Civil Procedure Code, “*a principle of efficient cooperation by judges and parties during the elaboration of the judgment towards what is the natural tendency of civil procedure*”<sup>83)</sup>. The intervening modifications since then have only reinforced this principle of cooperation in the concern accrued for rationalization of the process which is expressed today through the development of what one calls judiciary management or judicial case management. Reposing on the cooperation of the judge and the parties, *the management of the proceeding must be efficient and equitable*, which is expressed neatly in the Principle 11.2 of the Principles UNIDROIT of transnational civil procedure, in terms of “*the parties share with the court the responsibility to favor a solution of an equitable trial, efficient and reasonably rapid*”<sup>84)</sup>. All is said. The promotion of the efficiency principle like the principle for public action must be combined with the principles of fair trial; all reforms of civil procedure cannot today be thought of as a result of a permanent arbitration, and necessarily, between a principle of efficiency and a principle of equity. The recourse to a judge must not be considered as the first recourse but as a last resort and justice must not be without cost but an adequate cost, that is to say in the measure which does not limit substantially the requirements of equitably process. It is this new processual culture that one can attach to the triple tendency of dejudiciarization of cases (A), the rationalization of procedure (B) and the restructuring of the proceeding (C).

### *1.1. The tendency for Dejudiciarization of Cases*

Dejudiciarization is a trick word, which in truth is referencing contemporary concern in terms of public policy of favoring the voluntary arrangement of disputes, whether through this negotiated justice (that one also calls conventional, contractual, or consensual)<sup>85)</sup>. The dejudiciarization returns the soft justice back to utopia, not violently, having a vocation to deploy outside of the walls of the law courts. Thus dejudiciarization is a *deformalization* of the solution for a case in that it escapes forms of process, ways to proceed in justice and constraints of judiciary ritual<sup>86)</sup>.

But in truth, this distancing must be seen in relative terms, in at least two regards.

*In the first place*, the dejudiciarization conceived as an alternative justice to judiciary

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83) L. Cadet & E. Jeuland, *supra* footnote 82, No 518. Adde E. Jeuland, La conception du procès civil dans le Code de procédure civile de 1975, in L. Cadet et G. Canivet (eds), *1806-1976-2006, de la commémoration d'un code à l'autre : 200 ans de procédure civile en France*, *supra* footnote 65.

84) ALI/UNIDROIT, *Principles of transnational civil procedure*, Cambridge, Cambridge University Press, 2006, pp. 76-78.

85) See A. Jeammaud, V° Judiciarisation/Déjudiciarisation, in L. Cadet (ed.), *Dictionnaire de la justice*, Paris, Presses Universitaires de France, 2004.

86) See L. Cadet, *Case management judiciaire et déformalisation de la procédure*, in *Une administration pour la justice, Revue française d'administration publique* 2008, No 125, pp. 133-150, spec. pp. 147-150.

justice is not that informal. An attentive observation of contemporary evolution of alternative modes of settling disputes shows clearly that voluntary arrangements are not realized in absence of all form. Voluntary justice rolls out according to precise procedural rules; only these contractual procedures are not the ones of judiciary procedures<sup>87)</sup>. Main principles for voluntary arrangements for disputes exist for which one can observe the consecration in internal law<sup>88)</sup> as well as that in international instruments<sup>89)</sup>.

In the second place, contrary to the previous point, deformatization associated with alternative modes of settling disputes is not necessarily synonymous with dejudiciarization. The evolution of civil procedure manifests the expansion of modes of voluntary arrangements before the judge himself. If the conciliation as conceived in the Civil Procedure Code of 1806 did not respond to what was hoped by its writers, the authors of the civil Procedure Code of 1975 accepted their project of voluntary justice in permitting the start of proceedings by joint petition (Art. 57), in foreseeing the possibility for the judge to statute in a voluntary composition (Art. 12, al. 4) and above all in hoisting the judiciary conciliation up a rank to main principle for proceedings, Article 21 proclaiming clearly that "*It enters in the mission for the judge to conciliate the parties.*" Since the promulgation of the New Civil Procedure Code, the *favor accordandum*, or *conciliationis* does not cease to progress in the heart of the judiciary institution, besides being in line with recent reforms tending to the rationalization of civil procedures. I will be content to signal here : - the consecration of judiciary mediation during proceedings in the part of the code dealing with common provisions for all the courts<sup>90)</sup>; - the possibility offered to the judge to delegate his power of preliminary attempt at

87) See J. Thibault, *Les procédures de règlement amiable des litiges au Canada*, thèse Paris II, 1998, spec. No 159 *sq*, which explains the existence in the voluntary arrangements, the « rules of procedure », as in the civil procedure or arbitration procedure permitting to « structure the process » in order to guarantee the foreseeability, thus the confidence of the parties. This procedural dimension is naturally stronger in *judiciary* procedures for voluntary arrangements : see also J. Joly-Hurard, *Conciliation et médiation judiciaires*, préf. S. Guinchard, Presses Universitaires d'Aix-Marseille, 2003, spec. pp. 303 *sq*, which treats the « *Framework for judiciary negotiations by the principles of processuel law* » covering what is called « *the ethics of judiciary negotiations*. »

88) See for ex. relative to the independence and impartiality of the mediator, Art. 131-5 CPC (« *les garanties d'indépendance nécessaires à l'exercice de la médiation* ») and also, L. Cadet, ‘Procès équitable et modes alternatifs de règlement des conflits’, in M. Delmas-Marty, H. Muir-Watt & H. Ruiz-Fabri, *Variations autour d'un droit commun – Premières rencontres de l'UMR de droit comparé de Paris*, Paris, Société de législation comparée, 2002, pp. 89-109.

89) See Recommandation Rec (2002) 10 from 18 September 2002 of the Comité des Ministres du Conseil de l'Europe on mediation in civil matters (Editions du Conseil de l'Europe, Nov. 2003). Add the recent Directive 2008/42/CE of the Parlement européen & the Conseil from 21 May 2008 on certain aspects of mediation in civil and commercial matters (*Journal officiel de l'Union européenne* No L 136, 24 May 2008, p. 3), which defines mediation as a « *structured process* » (Art. 3, a) and mentions in a number of its main principles, the impartiality of the mediator and the confidentiality of the process.

90) Art. 131-1 to 131-15 CPC, réd. D. No 96-652, 22 July 1996.

conciliation to a conciliator of justice in his resort<sup>91)</sup>; - the institution of family mediation in procedures for divorce and the disputes over parental authority<sup>92)</sup> ; - and more recently since the 1<sup>st</sup> of March 2006, the possibility of the *juge de la mise en état* of the *tribunal de grande instance* to confirm, at the request of the parties, their conciliation<sup>93)</sup>. There are still important margins for progress, evoked by the *Guinchard* report, for the first proceedings<sup>94)</sup>, as by the *Magendie II* report, for the procedure of appeal<sup>95)</sup>. Some of them have recently been adopted with the Law N° 2010-1609 of 22 December 2010 introducing in French law the “*convention de procédure participative*”, a collaborative dispute resolution agreement (Articles 2062-2068 Civil Code) and the Decree N° 2010-1165, 1<sup>st</sup> October 2010 dealing with conciliation and oral proceeding in civil, commercial and social matters.

Without a doubt, different to the new rules for English civil procedure, French law does not sanction *financially* the parties who would not be able to conclude a voluntary arrangement of their case. The carrot is preferred to the stick. It is necessary to understand the extension realized in 1998 of the legal aid system for the settlements<sup>96)</sup> and the proposition made today to raise the units of value in case of voluntary solution<sup>97)</sup>. The contemporary evolution in law of the modes of resolving disputes tends incontestably to promote an offer for plural justice, combining voluntary modes and adjudicative modes, judiciary or extra-judiciary, which manifest a concern for economy of justice and management of the procedure. The development of alternative methods for resolving disputes is an instrument of judiciary management that illustrates equally the tendency towards rationalization of the procedure.

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91) Art. 832-1 to 832-10 CPC, réd. D. No 96-652, 22 July 1996.

92) In matters of divorce: Art. 373-2-10 C. civ. ; in matters of parental authority : Art. 255 C. civ.

93) Art. 768, al. 2 CPC, réd. D. No 2005-1678, 28 Dec. 2005.

94) Propositions No 47 to 54 and notably the creation of a new procedure for voluntary arrangements of cases : the participation proceedings of assisted negotiation by attorney, the development of judiciary conciliation with the generalization for all jurisdictions to possible delegation of judiciary power to conciliate to the conciliator of justice, and the reinforcement of the process of mediation as well as the incidental judiciary mediation (generalization of the power to enjoin the parties to meet a mediator after the information phase) and the family mediation (creation of a public dispositive of extra-judiciary mediation; responsibility to go into mediation for the claims tending to modify the modalities of the exercise of parental authority).

95) *Célérité et qualité de la justice devant la cour d'appel*, supra footnote 72, and more specifically, *Gazette du Palais* 22 May 2008, p. 30, favorable to the accrued integration of mediation in the jurisdictional structures (creation of units of mediation charged to put in place a measure : designation of the mediator, following the mediation, confirmation by the court eventually of the agreement; designation of a magistrate charged to watch over the sensitivities of the mediation and to connect the jurisdiction to the mediation associations).

96) L. No 91-647, 10 July 1991, Art. 10, réd. L. No 98-1163 of 18 December 1998 on access to law and to voluntary resolution of disputes.

97) J.-C. Magendie, ‘L’effectivité des droits passe par des procédures adaptées’, *JCP* (Semaine juridique) 2008, I, 145, p. 18.

### **1.2. The Tendency to Rationalize Procedure**

This tendency for rationalization of procedure was already in the works in the Civil Procedure Code of 1975; it has not ceased to develop since this time. The rationalization of procedure aims to loosen the manner to proceed (the forms of procedure) and the simplification of the acts of procedure themselves (the form of the acts of procedure)<sup>98)</sup>.

#### **1.2.1. The relaxing of the manners of how to proceed is before all else a better economy of time for the process.**

The ideal is the “made-to-measure” adjudicative way, that each affair is treated at its own rhythm. Urgent situations require immediate decisions, where the development of the summary procedures or by ex parte order; complex affairs calling for more care in the preparatory proceedings of the elements of debate than the simple files, where the institution of procedural circuits are at variable speed bringing on intervention of a specialized magistrate or not<sup>99)</sup>; the proceedings must have the principal objective to have the most rapid solution and most appropriate one for the case on the merits, where the consecration of multiple passageways, passageway for the single judge towards the panel of judges<sup>100)</sup>, passageway to the summary judgment towards the merits on a set day<sup>101)</sup>. It is necessary to permit the adjustment of the procedure without going backwards, where also the appeal to the procedure of injunction, to pay or do, for a great efficiency, relies on the technique of inversion of the disputes, which relies on the simple presumption of a well-founded claim<sup>102)</sup>.

This project has since then, never been denied. The reforms, which have followed, have all dug this furrow. The summary and injunction procedures are even more diversified<sup>103)</sup>; the passageway for summary towards the set day has been generalized<sup>104)</sup>; the practice for filing permitting to economize on the hearing for pleadings has also been consecrated<sup>105)</sup> and

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98) See L. Cadet, ‘Case management judiciaire et déformalisation de la procédure’, *supra* footnote 86, spec. pp. 139-145.

99) *Juge* or *conseiller de la mise en état*, before the *tribunal de grande instance* and the Court of Appeals, judge in charge of legal inquiry before the Commercial Court or the Labour Court.

V. spec. Art. 764, al. 1er CPC : « *Le juge de la mise en état fixe, au fur et à mesure, les délais nécessaires à l'instruction de l'affaire* eu égard à la nature, à l'urgence et à la complexité de celle-ci, et après avoir provoqué l'avis des avocats ».

100) See ex. Art. L. 212-2 COJ, about the *tribunal de grande instance* ruling as a single judge.

101) See ex. Art. 811 CPC, réd. D. No 98-1231, 28 Dec. 1998.

102) G. de Leval, ‘Les ressources de l'inversion du contentieux’, in M.-T. Caupain & G. de Leval (eds), *L'efficacité de la justice civile en Europe*, Bruxelles, Larcier, 2000, pp. 83-97. Compare R. Perrot, ‘L'inversion du contentieux (ou les prouesses de l'ordonnance sur requête)’, in *Etudes offertes à Jacques Normand*, Paris, Litec, 2003, pp. 387 sq.

103) See ex. Art. L. 123-5-1, L. 125-9, L. 225-23, L. 225-71 C. com.

104) By the decrees of 20 August 2004 and 28 December 2005 : See Art. 811, 849-1, 873-1 and 896 CPC.

105) Art. 779, al. 2 CPC, réd. D. No 2005-1678, 28 Dec. 2005.

that of the ruling pronounced by filing to the court clerk<sup>106)</sup>. The concern for sticking more to the reality of the disputes while developing the contractual techniques for managing the proceedings and the practice which has come to be evoked by filing, the consecration of the withdrawal from the case list according to the agreement of the parties for the search for a voluntary solution<sup>107)</sup>. Above all is the consecration of the procedural agreement with the agenda for the *mise en état* before the *tribunal de grande instance* and the Court of Appeals (*calendrier de la procédure*), this schedule, set with agreement of the attorneys, contains “*the foreseeable number and the date for exchanging conclusions, the date for closure, that for the debate and (...) that for the pronouncement of the ruling*”<sup>108)</sup>. The contractualization of the procedure is in the logic of the principle of cooperation of the judge and parties, if it aims firstly at the conciliation and the mediation, which must permit to discharge the judiciary institution of a certain number of cases. One sees that it does not save the management of the adjudicative procedures<sup>109)</sup>.

The tendency towards rationalization of procedure will progress more. The *Guinchard* report proposes in the field of injunction procedures the extension of the procedure of injunction to pay to the *tribunal de grande instance*<sup>110)</sup>. On the terrain of passageways, *lato sensu*, there is a transmission for judgment to the court by the conciliator of justice from the joint request of the parties in case of failure of an attempt at court-annexed conciliation<sup>111)</sup>. It is also the case for a referral to a District Court not preceded by an attempt at conciliation, the consecration of the practice of double summons<sup>112)</sup>. As for the *Magendie II* report, the modernization of procedure for appeals that it proposes to pass, notably by a rationalization of written exchanges from which efficiency supposes, “*the diligent support forms the ensemble of its actors.*” This is why beyond the rules of recommended procedure it is

106) Art. 450, al. 2 CPC, réd. D. No 2004-836, 20 Aug. 2004.

107) Art. 382 CPC, réd. D. 98-1231, 28 Dec. 1998 and already, Cour de cassation, assemblée plénière, 24 Nov. 1989, *JCP* (Semaine juridique) 1990, II, 21407, note Cadet.

108) Art. 764, al 2 CPC, réd. D. No 2005-1678, 28 Dec. 2005, the set delays in the calendar cannot be extended ‘*except in case of grave and justified cause*’ : Art. 764, al. 3, réd. D. No 2005-1678, 28 Dec. 2005.

109) See L. Cadet, ‘Les jeux du contrat et du procès’, *Mélanges offerts à Gérard Farjat*, Paris, Editions Frison-Roche, 1999, pp. 23-52 ; ‘Les accords sur la juridiction dans le procès’, in P. Ancel & M.-C. Rivier (eds), *Le conventionnel et le juridictionnel dans le règlement des différends*, Paris, Economica, 2001, pp. 34-55.

110) Propositions No 2 & 32, the examination of requests for injunction to pay being transferred from the judge to the court clerks, from which the creation is recommended (proposition No 21) or, by default to the proximity court, attached to the *tribunal de grande instance*, by delegation of professional judges (proposition No 22).

111) Proposition No 48.

112) That is to say the returning of the parties to the conciliator of justice, after the referral to the court, without formal reception of their agreement, with parties mutually setting a date for a hearing, be it the end of the ratification of their agreement if it arrives, be it at the end of the judgment, in the contrary case : proposition No 48.

suggested to appeal in response to the “*charters*” or the “*good practice guides*” elaborated at the level for each Court of Appeals in “*the dialog with the different protagonists in the appeals process*,”<sup>113)</sup> which the report names the “*co-responsibility*” of the actors in the procedure<sup>114)</sup>.

**1.2.2. As for the simplification of procedure, it is above all concerned with the procedural services, lightened and standardized, offering less of a chance for disputes.**

The legislator did not hesitate and still does not hesitate to lighten the forms of the procedural documents: citing for example: - the referral to the judge by simple declaration to the court clerk; - the notification of the services in the ordinary form by simple letter; the decisions of the judge by mention in the file; presentation, in the judgment, of the claims and the means of the parties by simple reference to the conclusions by the parties with the indication of their date<sup>115)</sup>. It happens even though the legislator uses the expressions “*by all means*”,<sup>116)</sup> and “*without form*”,<sup>117)</sup>.

Even when one speaks of this idea that “*formalism guarantees efficiency of rights to a defense and to the quality of the judgments*”,<sup>118)</sup> the standardization of procedural services, observable since 1998, rises from the simplification of procedure<sup>119)</sup>. It was already about this with the consecration of qualifying<sup>120)</sup> and summary submissions<sup>121)</sup> I mentioned above, and does not however produce all the expected effects. It will be about this with the structuralization writings for the appeal proposed by the Magendie II report<sup>122)</sup>: - recalls the facts and the previous procedure very much as a synthesis; - concentrated criticism and motivated from a judgment from appeal; - the claims and their foundations in fact and law

113) *Célérité et qualité de la justice devant la cour d'appel*, supra footnote 72, p. 32 and pp. 51-52.

114) *Célérité et qualité de la justice devant la cour d'appel*, supra footnote 72, p. 53.

115) Art. 455, al. 1er CPC, réd. D. No 98-1231, 28 Dec. 1998.

116) See ex. Art. 178, 267, 450, al. 3 CPC.

117) See ex. Art. 133, 139, 141, 168, 338-2, 704, 1051, 1052, 1061-1 CPC.

118) See *Célérité et qualité de la justice devant la cour d'appel*, supra footnote 72, pp. 64-72.

119) See the Magendie II report which evokes the « *simplifying structuralization* » from the writings : *Célérité et qualité de la justice devant la cour d'appel*, supra footnote 72, p. 70.

120) In this sense, it must contain the objective of the claim with the presentation of the facts and the legal ground on which the claims are founded (in fact and in law): Art. 56, 2°; 753, al. 1er et 954, al. 1er CPC.

121) In this sense it must be taken from the claims and arguments presented previously or invoked, to at least consider the abandoned claims and arguments: Art. 753, al. 2 et 954, al. 2 CPC.

122) In order to put in terms the « *principle of formal liberty of judiciary writings* », arrived at its « *point of breaking* » in reason of the « *generalized insecurity* » which it brings on (dispersion of claims and means, abling the involvement of the forgotten parts of the recapitulation by the attorneys or by default of response from the jurisdiction): *Célérité et qualité de la justice devant la cour d'appel* supra footnote 72, pp. 64-72, spec. p. 64-65.

presented in enumeration; - necessitating the localization of the parties' claims in the ruling from the conclusions, barely waiving the judge from responding<sup>123)</sup>.

Finally, the Civil Procedure Code contains numerous provisions susceptible to avoiding all but the formalism of the procedure driven to denunciations that are purely opportunistic of irregular forms, in order to complicate and to slow down the solution of the case. The lightening of the formalism of procedural services goes with a *light dividing up of their regular procedures of disputes* that expresses very neatly the regime of pleas of nullity to faulty drafting, organized by the Articles 112 to 116 of the CPC: “*no nullity without text*”,<sup>124)</sup>, “*no nullity with complaint*”<sup>125)</sup>, large possibilities of regularization of voided pleadings<sup>126)</sup>. By necessary default the nullities would be invoked to accomplish the acts of procedure, it can be so after the demurrer or the defenses addressing the merits of the case (Art. 112 CPC)<sup>127)</sup>. This treatment of disputes over nullification served as the departure for this other axis of rationalization of procedure that is the tendency to restructuralization of the proceedings.

### **1.3. The Tendency for restructuring of the proceedings**

The concern for accelerating the course of the proceedings, to fill the function of being efficient and definitive at the first proceedings of the case in a reasonable delay has driven the legislator, in successive reforms, to rationalize the rolling out of the proceedings, notably in reinforcing the role of the phase of preparation of the case (*mise en état*, which is not a pre-trial phase in a common law sense) and the role of the *juge de la mise en état* himself (devoted to the preparation of the case) before the *tribunal de grande instance* and, in accessory, the Court of Appeals<sup>128)</sup>. Thus this judge has the *power to rule on the ensemble of the procedural pleas and the incidents susceptible to bring the proceedings to an end* where, originally he only had the power to rule on the dilatory plea and irregularity for faulty drafting (Art. 771, 1<sup>o</sup> *in limine* CPC). Since this extension of powers of the *juge de la mise en état* is accompanied from a rule of *foreclosure* in terms of which the parties cannot be admissible to raise exceptions and the incidents of procedure once the *juges de la mise en état* is discharged (Art. 771, 1<sup>o</sup> *in fine* CPC) and, on the other hand, from the attribution of *res judicata* to the decisions of the *juge de la mise en état* ruling on procedural pleas and

123) *Célérité et qualité de la justice devant la cour d'appel*, supra footnote 72, p. 70.

124) Except for non recognition of a substantial formality or of a rule of public order, to organize the forgotten elements of the legislator: Art. 114, al. 1er CPC.

125) This obliges the party to prevail over an irregularity of form to show that it effectively has had an effect of being prejudicial in respect to the rights to a defense: Art. 114, al. 2 CPC, even when it is about a substantial formality or of public policy.

126) If this regularization is done in the required delays to accomplish the vitiated act and if it does not allow any claim to subsist to the detriment of the adversary: Art. 115 CPC.

127) See L. Mayer, *Les actes du procès et la théorie de l'acte juridique*, thèse Paris 1, 2007. Adde L. Cadet, La sanction et le procès civil, in *Mélanges Jacques Héron*, Lextenso, 2008, pp. 123 *sq.*

128) By effect of Article 910 CPC, linking to Articles 763 - 787.

the incidents susceptible to end the proceedings (Art. 775 CPC, réd. D. n°2005-1678, 28 déc. 2005), these decisions can be subject to an immediate appeal before the Court of Appeals (Art. 776, 1<sup>o</sup> and 2<sup>o</sup> CPC). This evolution tends to modify the nature of the management phase, making it form to a *model of integrated instruction*, that is to say the hypothesis of the beginning of the code from 1975, towards a *model of autonomous instruction*, the *juge de la mise en état* becoming a court apart entirely of the first hearing<sup>129)</sup>, that introduces a manner of caesura in civil proceeding. It raises the question of consecration of a *principle of procedural concentration* for the arguments and evidence, even the claims, at the level of the proceedings, which cannot be without incidence on the sort of incidental claims and the regimes of appeals. But it is necessary to underline that this evolution that equally introduces the UNIDROIT Principles of transnational civil procedure<sup>130)</sup>, does not introduce a distinction of the *pre-trial/trial type* like one finds in the countries of *common law* since the proceedings were already created between the parties and the judge who has control of this preparatory phase. The objective of this procedural concentration is to dispose of the ensemble of necessary elements for the solution of the case at the level of the proceedings and evacuate the ensemble of procedural disputes (question of competence, of nullity, even of admissibility) in order that the next part of the proceedings be entirely consecrated only to resolving the questions on the merits of the case. The concern to assure loyalty and efficiency of the debates legitimizes this approach.

Certainly, these evolutions first concerned the *tribunal de grande instance* and in some regards, the Court of Appeals. But the necessities, which drive to the progressive consecration of a principle of concentration and to the institution of a preparatory instruction step neatly marking the phase of the hearing on the merits, are not limited to the level of disputes at the *tribunal de grande instance*. Also, the ensemble of courts and procedures are concerned, written or oral. A recent reform takes this direction for the other first instance courts (Decree N° 2010-1165, 1<sup>st</sup> October 2010 dealing with conciliation and oral proceeding in civil, commercial and social matters). The procedure for appeal is also necessarily affected due to the rationalization of the procedure for the first hearing, renders the completion function of appeal less necessary and at the same time necessitates a need to be corroborated by a complementary rationalization of the appeals procedure in order to avoid that what is won in the first hearing be lost in the second<sup>131)</sup>. Such is the philosophy that inspired the *Magendie II* report<sup>132)</sup>, which registers very directly as the title testifies in the prolonging

129) S. Amrani-Mekki, E. Jeuland, Y.-M. Serinet & L. Cadet, ‘Le procès civil français à son point de déséquilibre ? A propos du décret « procédure », *JCP* (Semaine juridique) 2006, I, 146.

130) ALI/UNIDROIT, *Principles of Transnational Civil Procedure*, Cambridge University Press, 2006, spec. Principes 9 and 11.

131) *Célérité et qualité de la justice devant la cour d'appel*, *supra* footnote 72, p. 23.

132) *Célérité et qualité de la justice devant la cour d'appel*, *supra* footnote 72, p. 50

of the *Magendie I* report<sup>133)</sup>. Thus, “*by the concentration of the means of law and fact, the appellant should be obligated to present all the criticism formulated against the judgment in a determined delay (...). The procedural concentration must concern the respondent as much as the appellant: in the measure where it is informed in time of the means from his opposing party, the loyalty consists of responding in a determined delay, invoking in his turn all the pertinent arguments*”,<sup>134)</sup>. In addition, “*to avoid that inadmissibility not be judged and eventually accepted except at the issuing of the debates, the respondent should, to avoid inadmissibility, submit his conclusions of inadmissibility of appeal and communicate the justifying pieces of evidence during the month of its constitution*”,<sup>135)</sup>. In stitching all together, the decision by which it is pronounced on the admissibility of the appeal should benefit from the *res judicata* in order to avoid that the formation of the judgment by the court not be done again<sup>136)</sup>.

This principle of *procedural* concentration, in the works in legislation, is articulated without confusion<sup>137)</sup>, with a principle of *substantial* concentration, recently consecrated in case law. A leading case judged by the general assembly (*assemblée plénière*) of the Cour de cassation on 7 July 2006 posed a general rule of concentration for the valuable arguments for the ensemble of courts since it judged that the changing of the legal grounds for a claim does not cause a failure for *res judicata* when “*it falls to the parties to present the arguments that he esteems to be in nature to be grounds for the case or to justify its rejection from the beginning of the relative proceedings with the first claim*”<sup>138)</sup>. This judgment raised a lively debate, that is not alleviated. In any case if it calls for some adjustments, notably when an attorney does not assist the parties, this desired evolution was in motion since the decree of 28 December 1998 that consecrated the necessity of qualitative and recapitulative conclusions before the *tribunal de grande instance* and the Court of Appeals evoked previously<sup>139)</sup>

It is thus both a principle of *procedural* concentration and a principle of *substantial*

133) See *supra* footnote 66.

134) *Célérité et qualité de la justice devant la cour d'appel* *supra* footnote 72, p. 50.

135) *Célérité et qualité de la justice devant la cour d'appel* *supra* footnote 72, p. 64.

136) *Célérité et qualité de la justice devant la cour d'appel* *supra* footnote 72, pp. 76-78, with reserve of the deferred to Article 914 : *Célérité et qualité de la justice devant la cour d'appel* *supra* footnote 72, pp. 82-85.

137) See C. Bléry & L. Raschel, ‘Rapport Magendie : propositions pour un nouvel office des parties et du juge’, *Procédures* 2008, Alertes 28

138) Cour de cassation, assemblée plénière, 7 July 2006, *Bulletin des arrêts de la Cour de cassation*, ass. plén., No 8, completed by Cour de cassation, chambre commerciale, 20 Feb. 2007, *Bulletin des arrêts de la Cour de cassation*, IV, No 49.

139) See *supra* footnote 121, this recapitulative duty having been extended to the observations and reclamations of the parties during the operations of expertise by the decree No 2005-1678 of 28 December 2005. See Art. 276, nouv. al. 3 : « *When the last observations or reclamations are written, the parties must recall the contents of the ones previously presented. By default, they are considered abandoned by the parties.* »

concentration, which is developing, in French civil procedure. One is at the limit of the evolutions in motion and the challenges to come.

## 2. *The Challenges to Come*

History never stops. The French legal system must go face to face with new challenges, which call for responses that pass by new evolutions of civil procedure rules. I see at least three, that I will call the challenge of *technology* (A), the challenge of *complexity* (B) and the challenge of *democracy* (C).

### 2.1. *The Challenge of Technology*

In the near future from which the first realizations have already seen the day, the rationalization of civil process will be amplified under the effect of dematerialization of procedure, which goes towards computerization (or digitalization) of civil procedures, notably the putting into place of files that allow for local applications, including at the highest level of the judiciary hierarchy<sup>140)</sup>.

The modernization of our systems of justice impose the computerization of the judiciary institution and the adjudicative procedures since the elementary treatment of the text, which cause sometimes a default, arriving at telecommuting by court clerks of the courts, the virtual hearings by videoconference, in passing by the management of the procedures themselves, which includes notably the putting into place automatically of the affairs with the attorneys. One says nothing of the vitalities of the modeling of the judgments due to the resources of the expert artificial intelligence systems. This computerization, if it requires a serious investment, is an economic and efficiency factor in terms of the functioning of the justice system. It permits to diminish the cost of management of the procedures, by simplifying the forms and accelerating the course of the procedure<sup>141)</sup>.

In regards to the evolutions in course in European laws and in neighboring countries, French law for civil procedure is modifying the Civil Procedural Code to permit the use of electronic communication. Coming after the introduction of the act and of the electronic signature in the Civil Code<sup>142)</sup>, of which the provisions could not apply to acts of

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140) See Cour de cassation, *L'innovation technologique, Rapport annuel 2005*, Paris, La documentation française, 2006, spec. pp. 167 sq : ‘Innovation technologique et méthodologie jurisprudentielle – L'exemple de la Cour de cassation’.

141) V. J.-C. Magendie, *Célérité et qualité de la justice – La gestion du temps dans le procès, supra* footnote 71, spec. Quatrième partie : ‘L'informatique et la communication électronique au service de la qualité de la célérité et de la qualité de la justice’.

142) C. civ., Art. 1108-1 et 1108-2, on the validity of electronic contracts. - Art. 1316-1 à 1316-4, on documentary proof.

procedure<sup>143)</sup>, the decree n° 2005-1678 of 20 December 2005 inserted new provisions treating the dematerialization of the procedure into the first part of the Code of civil procedure. On one hand, the title XIX relative to the secretariat of the court contains an Article 729-1 with the terms: “*The general reparatory, the file and the register can be held as electronic sources*”, the system of treatment for information before “*guarantees the integrity and confidentiality and permits the assurance to conserve them*.” On the other hand, a new title, the Title XXI, constitutes Articles 748-1 to 748-6, provides precisions on the conditions and modalities according to “*the mailings and notifications of the acts of procedure, the evidence, advice, summons, reports, statements as well as copies and covered forwardings of the executive formula for jurisdictional decisions can be effected electronically*” (Art. 748-1 CPC).

The French legislator circled the introduction for electronic communication with a great number of security guarantees and for sincerity and confidentiality. These guaranties are necessary on the one hand to avoid that the weaker parties suffer from these innovations and on the other hand to facilitate the adhesion by professionals who are charged to put them in place. A prudential legislation was imposed that explains that this new dispositive should not normally enter into force until the 1<sup>st</sup> of January 2009, in order to permit the progressive putting into place of new systems and to assure good functioning. An anticipated application of these new dispositions is however foreseen by the decree by way of local agreements concluded between the heads of the courts and the auxiliaries of justice in that resort<sup>144)</sup>, which is a new illustration of contemporary development of the contractualization of justice, already evoked several times. The challenge is largely to come because computerization of procedure supposes that each court, each law firm or each study by bailiff disposes of the necessary equipment and that these different virtual networks be interconnected among them, which aims in practice at the interconnection of the *Private Virtual Attorney Network* and of the *Private Virtual Justice Network*<sup>145)</sup>.

Above all, it is necessary to see that the electronic communication has the consequence of favoring the normalization of the systems, practices and procedures. If one separates the difficulty of the digital fracture, the question of access to justice is largely renewed by the possibilities that the internet offers, as in the terms of information of the justiciable as well

143) The acts of procedure are not contracts in the sense of the Civil Code, the provisions expressly of civil procedure refer to the traditional writings in matters of procedure: See ex. Article 667 CPC disposes that the notification ‘*is done by closed envelope or closed fold, be it by post be it by the delivery of the act to the destined person against annotating or receipt*’.

144) Decree No 2005-1678, 28 Dec. 2005, Art. 73 et 88, modified by Decree No 2008-484, 22 May 2008. See ex. for Cour de cassation, Arrêté of 17 June 2008 on application for the procedure before the Cour de cassation of the provisions relative to the electronically communication (*Journal officiel de la République française* 26 June, p. 10259).

145) See G. Didier & G. Sabater, ‘Dématerialisation des procédures : « une révolution culturelle nécessaire »’, *JCP* (Semaine juridique) 2008, I, 118.

as in the terms of accomplishment of a certain number of procedural acts. It is a real form of proximity, in which the designed perspective must be assuredly registered by the *Guinchard* report for the creation of a universal counter of the court clerk. Since beyond the missions of information for the courts users already reserved at the court clerk uniquely, this universal counter would be the point of entry for the claims in justice in the first proceedings: “*referral to one of the courts of the resort (Court of Appeals at least the first time) since the procedure is without obligatory representation; registration of this claim, directly in the “ career chain ” of the competent jurisdiction,*” this supposes “*a harmony with the other dispositive of the referral to courts electronically.*” One sees again the effects of the system evoked higher up that invite it to go further. Can one conceive of a different computerization for the first proceedings and in appeal, especially in what concerns the putting into place automatically of the files? This would not make sense. One understands, in these conditions that the *Magendie II* report establishes a tight link between structuralization of appeals writings that it proposes<sup>146)</sup> and the electronic communication, given by example for the recent evolutions observed in the United States, in England and in Spain<sup>147)</sup>. The dematerialization of procedures will push towards a homogenization accrued of the procedures and organization structures, affecting judiciary institutions as well as partners of justice<sup>148)</sup>; it is already in certain regards a response to the challenge of complexity.

## 2.2. The Challenge of Complexity

In order to understand what this challenge consists of<sup>149)</sup>, it is necessary to recall beforehand even summarily, that the regime for civil procedure in the first proceeding rests on a summa divisio that is of the written procedure and of oral procedure<sup>150)</sup>.

146) See *supra* 1.2.2.

147) *Célérité et qualité de la justice devant la cour d'appel*, *supra* footnote 72, p. 66 : « *Cette structuration des conclusions est directement liée au développement des nouvelles technologies* », expliquant que « *les américains réglementent de manière très précise la forme des conclusions, qui sont totalement dématérialisées et doivent insérer des liens hypertextes pour que le juge puisse parvenir immédiatement à la jurisprudence citée, ainsi que des enregistrements vidéo accessibles à partir des conclusions, reprenant les passages des dépositions des témoins à l'appui du raisonnement de l'avocat qui les invoque* ».

148) *Célérité et qualité de la justice devant la cour d'appel*, *supra* footnote 72, p. 66 p. 69 : « *la transmission électronique ne pourra s'effectuer que sur la base de documents uniformisés. La communication structurée qui s'instaure entre les greffes et les auxiliaires de justice tend également à une structuration des écritures, car la disparition du support papier au profit d'une lecture à l'écran doit s'accompagner d'une très grande lisibilité des écritures* ».

149) See L. Cadet, ‘Le procès civil à l’épreuve de la complexité’, in *Mélanges Bruno Oppert*, Paris, LexisNexis, 2009, pp. 73-94.

150) This distinction is equally found, more or less, in the second degree of jurisdiction, before the Courts of Appeals which statute according to the written procedure, which is the principle (Art. 900-930 CPC), or according to the oral procedure, which is the exception (Art. 931-949 CPC), reserved for certain matters like for example disputes of labor. But it is more and more a question to generalize the written procedure in appeal.

*In the written procedure*, which is the rule *before the ordinary courts*, that is to say the *tribunal de grande instance* and the court of appeal, the parties are held to be represented by an attorney (or a special attorney for the court of appeal) and the affair is instructed by a judge and exchange of written conclusions done before a judge specially charged with the preparation of the file. I remind that this judge is called the *juge de la mise en état* for the *tribunal de grande instance* and the *conseiller de la mise en état* for the court of appeals. The law attaches particular effects to the opening and closing of this phase of *mise en état*<sup>151)</sup>.

*Before the other courts of first instance*, said *specialized courts*, like the *tribunal d'instance* (District Court), *tribunal de commerce* (Commercial Court) or the *conseil de prud'hommes* (Labor Court), the procedure is oral. The parties are thus not obliged to be represented and the affair is normally instructed at the hearing, by the court itself. The oral procedure is thus *a priori* a procedure that is simpler and less formal than that of written procedure.

The reason for this distinction, which is largely the result of history, is not very clear. The idea known is that the conciliation would occupy an important place before these courts; the conciliation supposes the personal appearance of the parties, thus the orality of the procedure. But this explanation does not stand up to analysis.

Moreover, the distinction between written and oral procedure does not take into account the reality because all courts are today referred to as simple affairs or complex affairs. This explains that the written procedure like the oral procedure obeys, in truth, variable rules according to the degree of complexity of the affair.

It is thus that before the *tribunal de grande instance*, the written procedure is not always subject to instruction before the *juge de la mise en état*, which is called the *long track* (Art. 763 to 787 CPC). The code foresees a possibility of instruction at the hearing (called the return to the hearing) when the affair appears ready to be judged on the merits in view of the exchanged conclusions and evidence communicated between the parties (*fast track*: Art. 760 CPC), except to order an ultimate exchange of conclusions or an ultimate communication of evidence (*medium track*: Art. 761 CPC). It is remarkable that even before the *tribunal de grande instance*, an affair can be evoked, instructed, pleaded and judged in the course of the same hearing which in theory can be the first (Art. 760, al. 3 CPC). The written procedure is thus reduced to its most simple expression and resembles an oral procedure. Implicitly, it is more or less a great complexity of the case, which commands the orientation of the procedure.

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151) Art. 763-787 CPC. See L. Cadet & E. Jeuland, *supra* footnote 82, No 892-897.

*Inversely, the instruction for the affair cannot always be at the hearing in the oral procedure in force before other courts of first instance. Before the Commercial Court, the Civil Procedure Code foresees that “if the affair is not in a state to be judged, the formation of the judgment returns it to the first hearing<sup>152)</sup> or confides to one of its members the care of the instruction in quality of reporter judge<sup>153)</sup>” (Art. 861). Before the Labor Court, the Labor Code disposes that for the same reason, “in order to put the affair in a state to be judged”, the office for conciliation or the office for judgment can “designate one or two reporter judges in view to unite on this affair the elements of necessary information to the Labor Court to rule” (Art. R. 1454-1 C. Trav.). Certainly, the procedure remains oral and the powers for instruction of the reporter judge and the reporter counsel are less spread out than that of the *juge de la mise en état*. It does not remain so that the oral procedure can borrow, like the written procedure from the different procedural circuits according to the degree of complexity of the affair. Implicitly, it is more or less the great complexity of the case that commands here like for the orientation of the procedure.*

*De lege ferenda*, these solutions invite questioning the distinction between written and oral procedure to the benefit, *before all courts*, of a distinction founded on the necessity or not to proceed to the putting into place of the affair in a preparatory sense confided to a dedicated judge for this finality<sup>154)</sup>. In the simplest affairs where the solution appears to impose, for example, in the presence of an obligation which is not seriously contestable, the simplification of procedure can lead to an inversion of the disputes in the framework of procedures for injunction to pay or to do. This type of procedure exists already, in French law, before the District Court and the Commercial Court<sup>155)</sup>; the European legislator equally consecrated the possibility in the cross-boarding cases concerning the uncontested pecuniary debts<sup>156)</sup>. It would be convenient to generalize before all the courts<sup>157)</sup>. It is not the least paradox of contemporary procedure than the written, traditionally conceived as the privileged support for complexity, to become the best support of the simplicity, as well as the orality

152) This is a sort of medium track.

153) This is a sort of multi-track.

154) If they are the reference, it does not seem that the Guinchard and Magendie II reports give all the criteria measures for the complexity, which is regrettable. The first made a criteria of the competence of the *tribunal de grande instance* (proposition No 2); the second made it a variable of adjustment of the delays of procedure, shortened when the affair is simple, as well as a factor of accrued structuralization of the writings : *Célérité et qualité de la justice devant la cour d'appel*, *supra* footnote 72, pp. 52, 59 et 70.

155) Art. 1405 - 1425 CPC (injunction to pay) and Art. 1425-1 to 1425-9 (injunction to do).

156) Règlement (CE) du Parlement européen & du Conseil No 1896/2006 of 13 Dec. 2006 creating a European order for payment procedure (*Journal officiel de l'Union européenne* No L 399, 30 Dec. 2006, p. 1).

157) It is also envisioned by the Guinchard report, which proposes the extension to the *tribunal de grande instance*.

is today a strong source of strong procedural insecurity, well identified, calling for a true reform, to which the *Guinchard* report opens the way, in condition that it enlarges the spectrum of the ensemble of the courts, when it mentions the necessity of “*securitization of oral procedures*”<sup>158)</sup>.

In truth, procedural tools are reversible and this reversibility of procedural techniques, put into service by a rationalization of the procedure in function of degree of complexity of the affair, invites the thinking that the procedural reforms are not either the mode for “ready to wear” but on that of “made-to- measure”<sup>159)</sup>. The system of justice must offer to each sort of case the type of procedure that is appropriate for it in function of the evolution of the case, which can simplify or in contrast, complicate. It must be possible to pass softly from one procedure to another by means of the “passageways” which permit to reorient the procedure in course of proceedings without having to retake it from the beginning. Diversity and flexibility are a good response to complexity. But who does not see without a doubt that one lets go of a *static* concept of the process, resting on a rigid division of work between the judge and the parties, determined by *law*, for the benefit of a *dynamic* conception, supposing in contrast a permanent cooperation with the judge and parties and rests as much as needed on the recourse to the *contract*, already evoked, as a tool for management of the procedure<sup>160)</sup>? This contemporary tendency cannot do anything but reinforce the future and become a strong axis for all reform procedure, notably in reason of dematerialization of procedures that supposes that the judiciary institution and the legal professions are made in agreement on the common protocols of computerization to interconnect their respective networks<sup>161)</sup>. We have entered into the age of judiciary management, conceived not by the expression of the all powerful judge, but as the efficient cooperation of all the actors of the proceedings, only compatible with a democratic society from which the requirements impose other challenges<sup>162)</sup>.

### 2.3. The Challenge of Democracy

The question of the democratization of civil procedure<sup>163)</sup> returns to the *development of legal aid systems*, which is a decisive game for accessing law and the right to fair trial

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158) Proposition No 27

159) See L. Cadet, ‘Le procès civil à l’épreuve de la complexité’, *supra* footnote 149.

160) See *supra* 1.1 and 1.2.

161) See *supra* No 2.1.

162) See L. Cadet, Quelle procédure civile pour quelle société civile ? Point de vue français, in C.H. Rhee, D. Heirbaut & M. Storme (ed.), *Le bicentenaire du Code de procédure civile (1806)*, *supra* footnote 65, pp. 357 *sq.*

163) On the question, more general on the democratization of justice and process, compare S. Guinchard, Vers une démocratie procédurale, in *A l'aube du IIIème millénaire. Clefs pour le siècle*, Dalloz, 2000, & L. Cadet, Justice démocratique versus démocratie judiciaire ? postface of S. Gaboriau & H. Pauliat (eds), *Justice et démocratie*, Presses Universitaires de Limoges (PULIM), 2003.

envisioned as such by the Charter of Fundamental Rights of the European Union<sup>164)</sup>, in echoing the case law of the European Court for Human Rights<sup>165)</sup>. The problem is that the resources that the collectivity is in measure to allocate to the judiciary institution are not limitless. The equilibrium not simple to find, means that it is important to find complementary solutions to public financing to justice.

So the mutualization of judiciary risk by means of a private insurance of legal protection can constitute a judicious source of complementary collective financing. But beyond the individual products actually proposed on the insurance market, it would be necessary to reflect on other formulas, from insurance groups or collective insurances, negotiated nationally or locally between representative associations for diverse interests, for example the consumer associations, and professional organizations from sectors of concerned activities. From the point of view of proceduralists, this is a true cultural revolution to accomplish, which is not without link to the development of contractualization of justice and of procedure.

One is very near to the other terrain on which the requirement for social democratization of the access to justice, of *the creation, in substantive law, of procedural mechanisms permitting the expression of diffused collective interests* must be expressed. This is identified in *common law* by *class action* or *group litigation*<sup>166)</sup> and in France by the problematic of group action.

The Civil Procedure Code of 1975, following the example of the Civil Procedure Code of 1806, remains framed on the individual conception of lawsuit, resting on the case between two parties and imposing the existence of a personal interest to act as well as the recourse to representation technique in the exercise of the right to sue belonging to the other party<sup>167)</sup>. If different from the 1806 Code and over determined in the XIXth century in the sense of liberal individualism, the 1975 Code translates the social function of the procedure by a more active role of the judge, its basic procedural schema remains that of individual cases, including the hypotheses of *litisconsortium*<sup>168)</sup>. This is why the numerous mechanisms of protection for collective interests, which exist in France since the beginning of the 20<sup>th</sup> century, are developed until present times outside of the Civil Procedural Code, in the

164) Charte No 2000/C 634/01 of 18 Dec. 2000 des droits fondamentaux de l'Union européenne (*JOCE C* 364, 18 Dec. 2000), Art. 47, al. 3.

165) See spec. CEDH 30 July 1998, *Aerts c/ Belgique*, *Dalloz* 1999, sommaires 279, obs. Fricero, & F. Rolin, Les restrictions au bénéfice de l'aide juridictionnelle remis en cause par la Cour européenne des droits de l'homme, *Dalloz* 1998, No 35, dernière actualité.

166) See L. Mullenix, New trends in standing and res judicata in collective suits - General report, Common law, in A. Pellegrini-Grinover, P. Calmon, *Direito Processual Comparado - XIII World congress of procedural law*, Rio de Janeiro, Editora Forense, 2007, pp. 500 sq.

167) See spec. Art. 31 and 117 CPC.

168) See Art. 323 and 324 CPC.

legislations of substantial law, as in labor law, in company law or in consumer law<sup>169)</sup>. The principal manifestations are the actions by the unions and the actions by the associations<sup>170)</sup>.

The group actions of which the question is about today introduces a *new dimension* in the protection of collective interests and the conception of litigation from which it reinforces the social function more<sup>171)</sup>. The group in question is in effect that of the collectivity of *undetermined* victims, and not determined *a priori*, from which the interest to obtain reparation for damage is called to be carried by a person physical or an entity, acting in an *interest that is not his*. Technically, the hypothesis touches on a certain number of obstacles now and already indentified by doctrine<sup>172)</sup>, whether or not in regards to the rules of the introduction of a proceedings (the principle of liberty to not act, the rule that no one pleads by attorney, etc.), the rolling out of the proceedings (adversary and equality of arms principles) or of the outcome of the proceedings (with the question of the extent of the *res judicata*). I am not speaking of the games of innovation in terms of *judiciary policy*, in regards to the aptitude of the civil courts dedicated to this dispute to manage, by means and in the time, this type of collective case characterized by a division of the proceeding between the declaratory phase (on the principle of responsibility) and the consecutive phase (on the individualization of the damages for each claim), which is a source of procedural complexity. Different propositions have already been made in this sense. Certain have even begun to be examined by the French Parliament, without which the Parliamentary procedure is continuing until end of term in reason of the presidential and legislative elections for the year 2007. The project had to be taken up again in the framework of a great law on modernization of the economy, but it had been definitively disassociated and returned to the discussion of the law project on the decriminalization of business law<sup>173)</sup>. Now the Government postpones again the discussion of the draft because of the announcement of a European project on group litigation in consumers and competition matters<sup>174)</sup>. We will see how French law will respond to this new source of complexity of proceedings that should be treated with efficiency in respect to the requirements of fair trial.

The reform still has margins to maneuver. Simply we hope that the reform of civil

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169) See ex. Art. L. 421-1 - L. 422-3 Consumer Code (*Code de la consommation*).

170) For a general view, see L. Cadet & E. Jeuland, *supra* footnote 82., No 363-390.

171) See L. Cadet, D'un code à l'autre : de fondations en refondation, in L. Cadet et G. Canivet (eds), *1806-1976-2006, De la commémoration d'un code à l'autre : 200 ans de procédure civile en France*, *supra* footnote 65, pp. 3 sq, spec. pp. 15-16.

172) See lastly, S. Amrani Mekki, Action de groupe et procédure civile, in *Les actions de groupe, implications processuelles et substantielles*, *Revue Lamy Droit civil* 2006, No 32, pp. 57 sq.

173) Following the report of Coulon Commission: J.-M. Coulon, *La dépénalisation de la vie des affaires*, Paris, La documentation française, 2008, spec. pp. 89-97.

174) See Réponse ministérielle (Gouvernement declaration before the Parliament) no 66004, *Journal Officiel de la République Française*, Questions, 13 avril 2010.

procedure will not be to the detriment of the Code of Civil Procedure, whose architecture, constructed from the distinction of ordinary law and of special law, of that that is ordinary and that is proper to different courts and to different litigations<sup>175)</sup>, makes it in fact the natural receptacle of the ensemble of the rules of civil procedure.

Wait and see! For this reason it is time now to temporarily conclude this lecture.

### To CONCLUDE

#### Contents

1. Forms of internationalization of French civil procedure
2. Conception of civil procedure revealed by internationalization
  - 2.1. On the macro-comparative terrain of justice systems,
  - 2.2. On the micro-comparative terrain of dispute resolution

Apart from its development in the direction of simplification, the French law of civil procedure is faced with another evolution, which is not unique to it, but may be found in varying degrees in other countries. Civil procedure is becoming more transnational.

I do not want here to develop the topic of international sources of French civil procedure because I discussed it here in Kyoto some years ago. I just want: first, to underline the forms taken by the international trends in civil procedure (1) and, secondly, to highlight the conception of civil procedure revealed by this evolution (2).

#### *1. Forms of the internationalization of French civil procedure*

International trends in civil procedure take two forms: jurisdictional and procedural. Both have consequences for the evolution of the civil trial as it is organized in France.

First, beyond the justice system of each individual State, there is progressively developing an international justice around which the international community is organizing itself. Still, there are various degrees within such international trends, which sometimes have an integrationist character. Putting aside courts that have a universal scope of jurisdiction (and which therefore do not implicate civil procedure as such), mention must be made of certain courts with a strong regional dimension. This is the case, first and foremost, of the European Court of Human Rights, which resulted from the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, a convention that

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<sup>175)</sup> See L. Cadet & E. Jeuland, *supra* footnote 82, pp. 383 *sq.*

France did not ratify until 1974. Article 6 par. 1 of the Convention provides that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.' This rule transcends the distinction between Romano-Germanic and common law approaches to the trial, which it regroups around the same principles by conferring on everybody a right to a fair trial with which all rules of procedure, including civil procedure, must comply. French civil procedure law, like the civil procedure laws of other countries parties to the European Convention of Human Rights, is thus evaluated on an ongoing basis in consideration of the requirements of a fair trial.

Some of these requirements - - like right to sue, the establishment of mechanisms of effective access to courts, or the requirement of judicial impartiality and independence - - are of an institutional nature. The requirement of impartiality and independence in particular has called into question, for example, certain combinations of judicial functions, such as when the judge for summary interlocutory proceedings who orders a provisional remedy is also called upon to decide the merits of the same case. Turning to the conduct of the trial itself, requirements like due notice of access to justice and the requirement that a case be heard within a 'reasonable' time period relate more to the framework than the content of the procedural steps, and may lead to simplifying the rules of procedure so as to accelerate the settlement of disputes.

Secondly, the European Union entails a still stronger legal and judicial integration of the member countries. The system relies essentially on the activity of the European Court of Justice, sitting in Luxembourg. Beyond its consultative tasks, this court performs above all adjudicatory functions, which include, notably, responding to preliminary questions that are submitted to it in the course of cases pending before a national court. These questions relate to the interpretation of Community law norms that embrace certain fundamental principles of procedure and, soon, the right to a fair trial as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. To be sure, the Court of Justice confines itself to 'stating the law' (*dire pour droit*) and does not determine the facts. But the Court of Justice's interpretative rulings have a general *res judicata* effect. They are binding not only on the national court in which the case that produced them was pending, but more broadly vis-à-vis parties to other disputes before any court within the Member States. This court is essential because it contributes powerfully to the cohesion of European Union law and the uniformity of its interpretation by national courts. It is accordingly a vigorous factor of integration.

Quite apart from the effects that the functioning of the European courts could have on French law, the international character of private law relationships is causing international disputes to be brought directly before the French judge and for judgments already rendered abroad to come before the French judge for recognition or enforcement. International conflicts of jurisdiction raise issues of civil procedure law at least as much as they raise issues of international law. Lying at the intersection of both disciplines, international procedural law is poised to enter both arenas. Thus, the main international jurisdictional rules

of the French courts are only the transposition, at the international level, of the domestic criteria of territorial competence. The development of rules of EU law origin for giving effect to rights in transnational litigation contributes still further to the integration of French civil procedure within a civil procedure law that is common to all EU Member States. Like the civil procedure law of other countries of the European Union, French civil procedure is becoming ‘Europeanized’ under the influence of EU regulations which are coming gradually to cover important segments of civil procedure: - jurisdiction and enforcement of judgments in civil and commercial matters (Reg. no. 44/2001 of 22 December 2000); - in matrimonial matters and matters of parental responsibility (Reg. no. 2201/2203 of 27 November 27 2003); - and in insolvency proceedings (Reg. no. 1346/2000 of 29 May 29 2000); - the gathering of evidence in civil and commercial matters (Reg. no. 1206/2001 of 28 May 2001); - the service of judicial and extrajudicial documents (Reg. no. 1348/2000 of 29 May 2000); - the European enforcement order for uncontested claims (*titre exécutoire européen pour les créances contestées*: Reg. no. 805/2004 of 21 April 2004); - the European order for payment procedure (*procédure européenne d'injonction de payer* : Reg. No 1896/2006 of 12 December 2006); - the European small claims procedure (*procédure européenne de règlement des petits litiges*: Reg. No 861/2007 of 11 July 2007); - and the jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Reg. No 4/2009 of 18 December 2008 : *compétence, loi applicable, reconnaissance et exécution des décisions et la coopération en matière d'obligations alimentaires*).

## **2. Conception of civil procedure revealed by internationalization**

The distinction between *common law/civil law* no longer expresses the reality. It seems to me outdated in the macro-comparative view of systems of justice (2.1) as well as in a micro-comparative view of dispute resolution (2.2).

### **2.1. On the macro-comparative terrain of justice systems, the genealogical distinction between common law and civil law has lost its historical sense.**

Today, the geographic proximity overrides the common genealogy of national systems. What the geopolitical evolutions in the world show today is the structuration of the ensemble of regional common development, economic and cultural as well as political and social<sup>176)</sup>.

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176) On this new regional dimension of bringing together the systems of judiciary laws, see also F. Ferrand, ‘La procédure civile internationale et la procédure civile transnationale : l’incidence de l’intégration économique régionale’, *Uniform Law Review/Revue de droit uniforme*, 2003-1/2, NS – Vol. VIII, pp. 397-436. – J. Basedow, ‘Vie universelle, droit mondial ? A propos de la globalisation du droit’, in *Mélanges Xavier Blanc- Jouvan*, Paris, Société de législation comparée, 2005, pp. 223-238, who judiciously observes: « l’augmentation du nombre d’institutions à caractère régional semble annoncer un déplacement de la législation mondiale du plan international vers le plan interrégional » (p. 237).

The European construction is from this point of view well enough advanced on the terrain of integration and things will progress more with the accession by the European Union to the European Convention for Human Rights<sup>177)</sup>. The other tentative types are not numerous, whether on the continent of South America, on the African continent or maybe in the Southeast Asia area, and do not present the same degree of development. It is necessary to applaud here the important work accomplished by the Ibero-American Institute for Process Law. I have the conviction that these regional regroupings are the way of the future. These regional organizations, particularly true in Europe, make up the original systems of justice transcending the national systems of justice to which they add these national systems issued from different families. They make it up based on the common principles, for example the principles of fair trial. This new ensemble is something other than the sum of these juxtaposed parties. This new common law in the sense of *jus commune* and not as *common law*<sup>178)</sup>, flash-backs to the systems of justice and of procedure of the member States to the power of the judgments from the European courts inviting harmonization. The national courts are moving towards a dialog amongst themselves, which can lead to the putting into place of procedural acts unknown in their proper system, notably in matters of obtaining proof<sup>179)</sup>, and the national courts discussing with European courts. Harmonization, hybridization, and coordination are the master words of this new manner of justice thinking, not in terms of *family* but in terms of *space*, which Mireille Delmas-Marty makes reference to through the notion of ordered pluralism, that expresses the unity in the diversity<sup>180)</sup>, this unity from which Albert Camus said that it's not the crushing of differences but harmony of contrasts. The European judiciary space is thus a new frame of thinking, as is the Ibero-American space, as could become an African judiciary space, an East Asian judiciary space, and why not, a Middle East judiciary space.

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177) Traité UE (*Treaty EU*), Art. 6, consolidated that appeared in *Journal officiel de l'Union européenne*, No C 115 in 9 May 2008. Le *Traité de Lisbonne* du 13 décembre 2007 (*JOUE* No C 306, 17 déc. 2007) includes a Protocol to be annexed to the EU Treaty which indicates the conditions for accession, notably to guarantee that the recourse formed by the non-member States and the individual recourse would be directed correctly against the member States and/or the Union, according to the case.

178) See M.-F. Renoux-Zagamé, *Verbo 'Jus commune'*, in L. Cadet (ed.), *Dictionnaire de la justice*, Paris, Presses Universitaires de France, 2004.

179) See ex. Regulation (CE) No 1206/2001 of the Counsel of 28 May 2001 on cooperation between the member state jurisdictions in the domain of obtaining proof in civil and commercial matters (*Journal officiel des Communautés européennes* No L. 174, 27 juin 2001, p. 1), spec. Article 10, à propos th e execution of a measure of instruction : « (...) 2. La juridiction requise exécute la demande conformément au droit de l'État membre dont cette juridiction relève. 3. La juridiction requérante peut demander que la demande soit exécutée selon une forme spéciale prévue par le droit de l'État membre dont elle relève, au moyen du formulaire type A figurant en annexe. La juridiction requise défère à cette demande, à moins que la forme demandée ne soit pas compatible avec le droit de l'État membre dont elle relève ou en raison de difficultés pratiques majeures. »

180) M. Delmas-Marty, *Pour un droit commun*, Paris, Editions du Seuil, 1994 ; *Les forces imaginantes du droit*, Editions du Seuil, II. Le pluralisme ordonné, 2006.

These new judiciary spaces are to consider by themselves, for they are in reality from their normative rulings and their jurisdictional practices and not from their references to genealogies of legal systems and judiciaries of States that they compose. So the complementary putting into place at the heart of these regional ensembles, in order to favor their mutual acculturation, from networks connecting the practitioners of the communities of formation, like in Europe with the *European Judicial Network (Réseau judiciaire européen)* and the *European Judicial Training Network (Réseau européen de formation judiciaire)*. Today more than yesterday and tomorrow more than today, the attorney, the judge and the professor of law must be attorney, judge and professor of law before that of one nationality or another. Thus writes Guy Canivet, former first president of the French Supreme Court (Cour de cassation), today member of the Constitutional Counsel (Conseil constitutionnel), “*judiciary power is by nature non-territorial, in the measure where it is less linked to a territory than to principles*”<sup>181)</sup>. In the new society fight in favor of the protection of the environment, consumers, workers’ rights and that of small investors, it is without a doubt a longer wait for international action by judges than for the long and difficult interpreting negotiations<sup>182)</sup>. From this point of view, the example cited by Linda Mullenix on *class action* submitted to the American federal jurisdiction by the shareholders of the French corporation *Vivendi Universal* is particularly clarifying<sup>183)</sup>. I am not certain that this *class action* is more compatible with French law than with German law. However, it seems to me important to underline that “*this new form of management for transnational disputes is perfectly conforming to the economic regulation function which falls to the state courts in the world order in the interest of the community of States and sometimes even in application of the common norms*”<sup>184)</sup>. From the procedural point of view, this development for international group actions marks a reinforcing of the social function of civil justice that appeared at the end of the XIXth century in the continental procedural legislation, but until then confined to the domain of national justices and in the traditional domain of individual disputes.

It is still necessary beyond these general considerations to pass from the macro-judiciary plan to the micro-judiciary plan and attempt to qualify the new models, which emerge on the terrain of procedures for settling disputes.

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181) G. Canivet, ‘La convergence des systèmes juridiques par l’action du juge’, in *Mélanges Xavier Blanc-Jouvan*, *supra* footnote 75, pp. 11-23, spec. No 27.

182) See L. Cadet, ‘Justice, économie et droits de l’homme’, in L. Boy, J.-B. Racine & F. Siiriainen (eds), *Economie et droits de l’homme*, Bruxelles, Larcier, 2009, pp. 537-567.

183) See L. S. Mullenix, American Exceptionnalism and Convergence Theory: Are We There Yet? *supra* footnote 166.

184) H. Muir Watt, ‘Régulation de l’économie globale et l’émergence de compétences déléguées : sur le droit international privé des actions de groupe’, *Revue critique de droit international privé* 2008, pp. 581 *sq*, spec. No 14.

**2.2. On the micro-comparative terrain of procedural types** in the settlement of cases, the distinction between the inquisitor type of procedure or investigative and the accusatory type of procedure or adversary does not take into account more of the contemporary procedural realities except the distinction between *common law* and *civil law* while not accounting for legal systems today.

**2.2.1.** The *reasons* that push us to progressively abandon this distinction are of a technical, economic and legal order which all refer to globalization. The technical reasons have already been evoked during the course of our preceding symposiums and congress. They will be discussed at our next meetings. This repetition is the visible sign of their importance. Is it about the development of scientific proceedings of proof and notably of the genetic proof, which was the theme of one of the sessions of our world congress in Mexico in 2004<sup>185)</sup>, or from development of the dematerialization of the process already discussed in Vienna in 1999<sup>186)</sup>, in Bahia in 2007<sup>187)</sup>, in Gandia/Valencia last year<sup>188)</sup> and which will be discussed again in Pécs next year where our work will be entirely consecrated to electronic justice<sup>189)</sup>? Maybe we have not considered the point from which scientific and technical progress which knows no frontiers, will model the judiciary procedures in a procedure for an international goal, which will leave less space to national singularities. Whether or not the judgment of value which we reserve for it is seen as both as good and bad, it is a revolution of paradigmatic type which is in the process of operating training of deritualization, even a delocalization of justice there where the rites are expressed traditionally in the pregnancy of local judiciary cultures. The *desk judge*, I mean the judge of a computerized procedure, does not need a *court house*, which puts into question the fundamental principles of democratic justice, to begin with the publicity of justice. The technical norm will model the legal rule. Giuseppe Tarzia had not missed by observing ten years ago that “*the technical evolution imposes the fixation of common rules for the admissibility of the new means of proof (the telex, fax, computer document) from which it is derived. One is in the technical sector where*

185) See L. Cadet & O. G. Chase, ‘Culture et administration judiciaire de la preuve’, Rapport général au XIIème congrès de l’Association internationale de droit judiciaire, Mexico, 22-25 Sept. 2003, in C. Gomez Lara y M. Storme, *XII Congreso Mundial de Derecho Procesal*, PUAM, t. I, 2005.

186) See H. Rüssmann, ‘The Challenge of information society : application of advanced technologies in civil litigation and other procedures’, in W. Recheberger (ed), *Procedural Law on the Threshold of a New Millennium*, XI World Congress on Procedural Law, Wien, Manzsche Verlags- und Universitätsbuchhandlung, 2002, pp. 205-249.

187) See J. Walker, G. Watson, E. Jeuland & A. Landoni Sosa, ‘Information technology on litigation’, in A. Pellegrini Grinover, P. Calmon (eds), *Direito Processual Comparado*, XIII World Congress on Procedural Law, Rio de Janeiro, Ed. Forense, 2007, pp. 119- 197.

188) See spec. S. Amrani-Mekki, ‘El impacto de las nuevas tecnologías sobre la forma del processo civil’, in F. Carpi, M. Ortells Ramos (eds), *Oralidad y escritura en un proceso civil eficiente*, Universitat de València, 2008, vol. I, pp. 93-133.

189) M. Kyengel (ed.), *Electronic Justice, Present and Future*, University of Pécs, September 23-25, 2010: [www.iapl2010.hu](http://www.iapl2010.hu)

*the diversity of historical tradition is not happy to block the formation of a common law*,<sup>190)</sup>. The computerization puts into question the traditional distinction of oral and written to which the new technology cannot reduce. It favors the cooperation of the judge and the legal practitioners, especially the attorneys, in the measure where it supposes the definition and puts into place the common protocols of data exchange in contributing to the rationalization of the functioning of the courts and the procedures. The computerization appears as an important tool of judiciary management, which translates itself into the emergence of a new economic culture of process. In some way, the market rejoins science from which it shares assuredly the quantitative culture. This process of normalization observed already in the interior of national systems traversing the interconnection of intranet networks of the bars and courts, as well as that in the European judiciary space through notably community procedures of injunction to pay and to settle small cases. Justice and procedure are referred to by technology and economy, which risks to submit to law and justice of their proper categories. The procedural efficiency research has become a major game for legislative reforms and a main principle of civil processes or to say in the English manner, an “*overriding objective*” (*Civil Rules Procedure*, Part. 1). Since the start of the 1970’s, French law imposed to limit the judge in his choice of measures of instruction “*to what is sufficient to resolve the case, in attaching what is the most simple and least onerous*” (Art. 147 CPC) and the offer of new Civil Procedure Code that Professor Andrea Proto Pisani is doing in Italy contains equally in the preliminary title some “*Principî fondamentali dei processi giuridizionali*” an Article 0.8, entitled “*Efficienza del processo civile*”<sup>191)</sup>. But it is important to underline that neither science nor the market is an end in itself. The procedure has the only goal of a just solution to the case and before observing the sentence itself, the jurists must first characterize the procedure, which drives it. If a just procedure does not protect necessarily unjust sentences, there is little chance however that an unjust procedure leads to just sentences. Procedural efficiency cannot be made at the price of fair trial. A justice of quality is a justice, which comes to combine these two logics<sup>192)</sup>. This quest is at the heart of the evaluation mission of judiciary systems confided in Europe to the European Commission for the efficiency of justice.

**2.2.2.** Still it is necessary to be precise about what substitutes for the traditional distinction of accusatory or adversary process and inquisitor or investigative process. It seems to me in response to this question that what makes contemporary evolution is the emergence of a *model of cooperative process in a plural justice system*.

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190) G. Tarzia, ‘Harmonisation ou unification transnationale de la procédure civile’, *Rivista di diritto internazionale privato e processuale*, 2001-4, pp. 869-884.

191) A. Proto Pisani, *Per un nuovo codice di procedura civile*, Il Foro italiano, gennaio 2009, V, 1 (estratto).

192) See L. Cadet, ‘Efficience versus équité ?’ in *Mélanges Jacques van Compernolle*, Bruxelles, Bruylant, 2004, pp. 25-46.

The *model of cooperative process* expresses the idea I have yet evoked that the trial is not the thing for parties nor the thing for the judge but it is the thing of the parties and the thing of the judge because the parties and the judge are necessarily led to cooperate in order to reach, in a reasonable delay, the equitable and efficient solution for the case. The idea of judiciary management takes in account this idea that it translates to a rise in powers of the judge in respect to rights of the parties who must be associated with the solution of their case, this is to remain a factor of acceptance of the judgment. It is without a doubt in most of the cases the object to pronounce on the questions of private general interest, which puts into question the respect of the laws and the social peace. In addition, the referral to the judge put into place a public institution from which the functioning and financing by the national revenue service, cannot be allowed to be the only private initiative. The budget of justice is not indefinitely extendable and the justice must not only be rendered in absolute from particular a case from which the judge has been referred. It must be in the totality of the affairs, which were submitted to him, and where the means of public justice must be equitably divided. This notion of cooperative process is at the base of the main principles for the process consecrated by the Civil Procedure Code of 1975<sup>193)</sup>. It is on it that reposes the reform of English civil procedure operated following the report of Lord Woolf<sup>194)</sup>. It is also consecrated by the European Court for Human Rights, recently in the judgment of 3 February 2009<sup>195)</sup>, as well as the UNIDROIT Principles of transnational civil procedure when they dispose of Article 11.2 that “*the parties share with the court the responsibility to favor a solution for an equitable case, efficiently and reasonably rapid*”<sup>196)</sup>. All is said in this remarkable provision. It is only necessary to add that this cooperative model has the calling to deploy by means of procedural agreements made between the judge and parties, be it in the framework of each particular case, under the form notably of individual contracts of procedure, be it in the framework of protocols of agreement, the sort of group procedural agreements more often concluded between the courts and their habitual partners, especially the bars. There are multiple examples of this growing contractualization of process and even more of justice that could be given here and there in France where it developed in a very significant manner for a number of years, like in England, of a certain point of view, traversing the *pre-action protocols*. Our Italian friends are interested in it as witnessed in the symposium and published in the *Trimestrale*, that Professor Carpi had organized in Bologna in 2007 on the theme *Accordi di parte e processo*<sup>197)</sup>. With the notion of procedural agreement,

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193) See L. Cadet & E. Jeuland, *supra* footnote 82, No 518-545.

194) See J. Bell, ‘L’Angleterre : à l’aube d’une réforme radicale de la procédure civile’, *Revue générale des procédures* 1999, pp. 307-319.

195) CEDH, 2e section, 3 Feb. 2009, *Poelmans c/ Belgium*, No 44807/06, *Procédures* 2009, No 81, obs. Fricero.

196) ALI/UNIDROIT, *Principles and Rules of Transnational Civil Procedure*, *supra* footnote 84.

197) ‘Accordi di parte e processo’, in *Quaderni della Rivista trimestrale di diritto e procedura civile*, Milan, Giuffrè ed., 2008.

we find there a true legal category susceptible to a true legal analysis, being precise in that the contractualization is not reducible to the utilization of contracts of dogmatic law, that it reposes on degraded usages or metaphors of the notion of contract because it consists of the employment of a certain procedure to elaboration of decisions, from a contractual type in this that it will call the phenomena of participation of the parties concerned, as much as accession as true negotiation. *Contrahere* more than *contractus*, from which comes in the order of the production of legal norms contractualization and proceduralization, are partially linked and combine more than oppose. Since one cannot have agreement on the common conception of the registered values in the legal norms, it is necessary to at least be able to be in agreement on the common way of saying law and for delivering justice.

This contractual dimension of contemporary process registers in the second place in a *plural system of justice*. I mean by this that the law for settling disputes is not limited to the solution of disputes by a court instituted for this effect. The judge must not be conceived as a first recourse but as a last recourse, which must be done only when it is not possible to settle the dispute in another way. It is necessary to have exhausted the possible avenues of dialog before going to the third party words of the judge. It is a civic duty and a social responsibility. The alternative modes of conflict resolution must thus be developed more, to include the process before the judge himself, to be included during the adjudicative procedure and not only at the beginning of the proceedings. To speak of a plural justice system, is to express the idea that each case must offer the mode of settlement which is convenient to it, the law must facilitate the passage of a mode to another and that each of these modes presents equivalent guarantees for good justice. The right to an equitable conciliation must respond to the right for a fair trial<sup>198)</sup>. Of course it is necessary to insert in this panorama the independent public authorities especially the authorities for regulating the markets, which exercise missions of adjudication as well as conciliation, without forgetting the role played by the collective funds of guarantee in matters of civil responsibility, especially in traffic accidents and medical accidents from which intervention which arises more correctly from distributive justice situated in the interstices of substantial law and process law. In all these registers of plural justice, the contemporary evolution invites us to think that the procedure is no more as in the mode of "ready-to-wear" but in that of "made-to-measure". The system of justice must offer to each sort of case the type of procedure which is convenient to it, summary or not, rapid or not, and at the center even of the judiciary institution, it must be possible to pass easily from one procedure to another by means of "passageways" which permit to reorient the procedure in the course of proceedings without having to redo all from the beginning, in function with the evolution of the case, which can simplify or in contrast,

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198) See L. Cadet, 'Procès équitable et modes alternatifs de règlement des conflits', in M. Delmas-Marty, H. Muir-Watt & H. Ruiz-Fabri (eds), *Variations autour d'un droit commun – Premières rencontres de l'UM R de droit comparé* de Paris, Société de législation comparée, 2002, pp. 89-109.

complicate. Diversity, flexibility and reactivity are a good response to the complexity of contemporary societies, which leads to letting go of the conception of *static* and *standard* process, relying on the rigid division of work between the judge and the parties determined by *law* to the benefit of a *dynamic* and *diversified* conception supposing to the contrary a permanent cooperation of the judge and parties susceptible to rely on the recourse to the *agreement* if needed, already evoked as a tool of management for procedure<sup>199</sup>.

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199) See L. Cadet, ‘Le procès civil à l’épreuve de la complexité’, *supra* footnote 149.

