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AMERICAN FOREIGN LAW ASSOCIATION, INC.

Panel Discussion:

“Litigation in the U.S. and in the Civil Law System: What can we learn from each other?”

Opening remarks of James R. Maxeiner*

Drake Hotel, New York City

March 15, 1995

I.

Our meeting is very timely. Civil justice reform was on the front page of the *New York Times* almost every day last week. The House of Representatives passed three law and litigation reform measures: “The Common Sense Product Liability and Legal Reform Act,” the “Attorney Accountability Act,” and the “Securities Litigation Reform Act.” According to the *Times*, “the Clinton Administration has decided to wage a vigorous fight against legislation that would drastically reshape the nation’s legal system ...”¹ The Administration apparently regards the Republican proposals as so extreme that they would “tilt the legal playing field dramatically to the disadvantage of consumers and middle-class citizens.”²

What is the drastic reshaping that the Clinton Administration is fighting? The challenged measures would “set Federal standards in all product-injury lawsuits, even those decided by state courts; would impose strict limits on punitive damages in all civil cases, and would require the loser in many lawsuits to pay the legal costs of the winner.”³ Are these reforms really so drastic? One thing we can learn from Civil Law systems, I think, is that these so-called reforms are not really so drastic. If we look to the European Union, which is not exactly known for hostility

to consumers and middle-class citizens, we see that in the EU there are Union standards for product injury lawsuits, even those decided in state courts, generally no punitive damages, and requirements that the loser pay the legal costs of the winner. On the other hand, comparison with European practices could well inform the Republicans’ proposals in at least two respects. (1) The Republican proposals are, like so much of American law reform, piecemeal and unsystematic; they address only a few small aspects of the litigation crisis and only for parts of the system. (2) The Republican proposals are generally not very well thought out. Cost-shifting is a good example of both of these points. It is to apply only to diversity cases. The proposals scarcely begin to deal with issues, such as determining the extent of the costs to be shifted, that have occupied much legislation and many decisions in those countries that have cost shifting.

II.

The subtitle of today’s meeting is: “what can we learn from each other?” The title is an optimistic one for it assumes that we are *willing* to learn from others. American lawyers have not shown much interest in learning from other systems of procedure. Almost twenty years ago, AFLA member Rudolf Schlesinger made “A Plea for Utilizing Foreign Experience” in the area of criminal procedure.⁴ His plea drew little response. Ten years ago, Professor John Langbein, now of Yale, argued for “The German Advan-

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¹ March 6, 1995.

² *Id.*

³ *Id.*

⁴ 26 *Buff. L. Rev.* 361 (1977).

tage in Civil Procedure”⁵ and drew responses ranging from (1) you’re wrong, there is no advantage,⁶ through (2) you exalt efficiency too much, inefficiency is better,⁷ to (3) you may be right, but there is no way that we can adopt what they do here.⁸ Two years ago, our distinguished moderator, Whit Gray, at a convention of the Association of American Law Schools, called on his colleagues to investigate German civil procedure. Yet all the principal reports on reform of civil procedure—the Quayle Commission, the Congressional Federal Courts Study Committee, the American Bar Association Blue Print, and the Brookings Institution Study—essentially pay foreign procedure no mind at all.

Why are we not interested in learning from foreign civil procedure? Already in 1929, Edson Sunderland, who was one of the principal drafters of the Federal Rules of Civil Procedure, explained our lack of interest as a result of (1) “professional prejudice against new ideas, based on national conservatism and the monopolistic nature of judicial agencies,” and (2) ignorance, because Americans aren’t good linguists and relevant materials are not readily available in English.”⁹ These explanations are as valid as ever. In particular, professional prejudice against new ideas is particularly pronounced in the area of civil procedure. What Professor Schlesinger wrote of criminal procedure applies equally well to civil procedure: “U.S. lawyers are possessed by a feeling of superiority that seems to grow in direct proportion to the ever increasing weight of the accumulating evidence demonstrating the total failure of our system ...”¹⁰

There is, I think, another reason why U.S. lawyers are not interested in foreign civil procedure. American lawyers tend to be a very practical bunch of individuals. Still stronger than the practical-orientation is their practice orientation. If an idea can not be plugged in to be used instantly, it does not have much appeal. Comparing U.S. civil procedure with European Civil Law civil

procedure therefore creates problems. They are two very different systems and it is very hard to look at any single element in isolation and sensibly transfer it to a discussion of civil procedure in the other jurisdiction. This problem of viewing a solution in context is not peculiar to comparative procedure, but it may be a bit more pronounced there and therefore more an obstacle in learning from others.

III.

It is, of course, a fundamental objective of our Association to strive to counteract professional prejudice against foreign legal ideas and to promote learning from foreign experiences.¹¹ On this, the 70th anniversary of our Association, I would like to draw attention to some comments of one of our association’s earliest and most steadfast of foreign members, Pierre LePaulle. LePaulle was a French *Avocat à la Cour d’Appel de Paris* who spent some time at Harvard Law School in the 1920s. When it was that he first joined the Association, I don’t know, but it was very soon after our founding. He was on the oldest membership list I have—from 1934—as one of just 75 members total and one of only three members residing abroad. He remained on the membership roster through to 1976.

LePaulle was keenly aware of the American lack of interest in foreign law in general and in civil procedure in particular. He began an article that he published in the *Harvard Law Review* in 1922 with the observation that “One of the first things to strike a foreigner who comes in contact with American lawyers is the general lack of interest in questions of comparative law.”¹²

LePaulle was, as I think most comparativists and most of us here are, a great believer in the value of comparative law even when there is no possibility or intention to borrow directly from the foreign legal system. LePaulle ended the article I just mentioned by calling attention to how knowledge of foreign law gives one new perspective on one’s own system. He stated that he never completely understood French law before coming to the United States and studying our system. “When one is immersed in his own law, in his own country, unable to see things from

⁵ 52 *U. Chi. L. Rev.* 823 (1985).

⁶ Allen, Köck, Reichenberg & Rosen, “The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship,” 82 *Nw. U. L. Rev.* 705 (1988).

⁷ Samuel R. Gross, “The American Advantage: The Value of Inefficient Litigation,” 85 *Mich. L. Rev.* 734 (1987).

⁸ Reitz, “Why We Probably Cannot Adopt the German Advantage in Civil Procedure,” 75 *Iowa L. Rev.* 987 (1990).

⁹ Book Review, 15 *A.B.A.J.* 35-36.

¹⁰ *Supra* note 4, at 363.

¹¹ Our stated goal is “to advance learning by promoting the study, understanding and practice of foreign, comparative and international law and the diffusion of knowledge in the United States and abroad devoted to the subjects mentioned ...”

¹² “The Function of Comparative Law with a Critique of Sociological Jurisprudence,” *Harvard L. Rev.* 838 (1922).

without, he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things which are simply due to historical accident or temporary social situation. ... To see things in their true light, we must see them from a certain distance, as strangers, which is impossible when we study any phenomena of our own country.”¹³ If we could persuade our American (and European) colleagues of this benefit, we would be well on the way toward answering the question, “what can we learn from each other?”

IV.

So what can we learn from each other? LePauille called on American lawyers to take advantage of what the Civil Law has done in the area of civil procedure. He expressed “his amazement at the ineffective manner in which justice is administered ... **more like a high church ceremony than a business transaction.**”¹⁴ Writing more recently of the German system of civil procedure, John Langbein made a similar comparison: “German civil proceedings have the tone not of theatre, but of a routine business meeting—serious rather than tense.”¹⁵ In the interest of full disclosure, I want to say now that in making specific comparisons, I am limiting my remarks to the two systems in which I have received formal legal schooling: the U.S. and the German. In the discussion that follows, some of the others present today may be able to say whether the comparisons I draw apply to other Civil Law systems of civil procedure.

When one sees both systems from afar, then LePauille’s distinction jumps out. One does not have to call it ceremony versus business. In a less provocative sound bite, one could draw a distinction between focusing on providing a **day-in-court** versus focusing on providing a **reasoned decision**. The integrity of the process, in the American system, rests squarely on the opportunity of the parties to participate in it.¹⁶ In the German system, the integrity of the process rests rather more on the product of that process and rather less on active participation in the process itself than does the American.

American lawyers are skeptical of an objective application of preexisting rules to a case and therefore tend to emphasize more the importance of telling one’s story to a neutral fact-finder. In discussing the Rule of Law, American jurisprudential scholars have spoken of two poles of importance in adjudication somewhat analogous to the distinction between day-in-court and reasoned decision: they speak of **courts** versus **rules**. They denigrate as a mere “pretense” the idea that “the law is a system of known rules applied by a judge”.¹⁷ For them, civil procedure is fair because the parties receive a day-in-court. As a result, our law is concerned, perhaps an outside observer might even say consumed, with what we think essential to a day-in-court. We worry about notice and hearing, about intricate questions of admissible and inadmissible evidence, about prejudicial knowledge of the trier-of-fact, and so on. We worry surprisingly little about what decision itself results. In the end, judges, both at the trial and appellate levels, are responsible for assuring that each side had his or her fair day in court rather than that the decision is correct.

The German system of civil procedure is less fixated on a day-in-court. To be sure, there is a right to be heard (“*rechtliches Gehör*”), but what the German system focuses on is the final decision of the Court. In the end, judges, again both at trial and appellate levels, are responsible for producing rationally supported decisions. The goal of German procedure is determination of a concrete legal situation in a correct judgment. The day-in-court is just incidental to that goal.

Our fixation with day-in-court I think says a lot about the political line-up of the supporters and opponents of the Republicans’ proposals. Corporations are generally little interested in getting a hearing on some novel theory of law or having an opportunity to make a pitch to a jury to get it to decide out of sympathy rather than grounded in law. Liberal and conservative activists may be more interested in getting a day-in-court to persuade a judge to come up with a novel interpretation of law. The underinsured may want to convince a jury to decide out of sympathy to award a high judgment. Ironically, however, our enthusiasm for the day-in-court has made that day-in-court so terribly expensive that it is out-of-reach to most of those who do not have the wealth of O.J. Simpson. What we can learn from civil law systems, I think, is to put more empha-

¹³ Id. at 858.

¹⁴ Quoted in Sunderland, Book Review, 15 *A.B.A.J.* 35 (1929).

¹⁵ Langbein, above note 5, at 831.

¹⁶ “Adjudication is a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments.” Lon Fuller, “The Forms and Limits of Adjudication,” 92 *Harv. L. Rev.* 353 (1978).

¹⁷E. Levi, *An Introduction to Legal Reasoning* 1 (1948).

sis on what the Court's final decision is and less emphasis on having that elusive day-in-court. I think if we do, we may achieve more justice and more days-in-court.

V.

I would like to point out some specific manifestations of **day-in-court** versus **reasoned decision** thinking. Each of these, I think, may help us realize how different our system is from others. Each of these, I think, would be fertile ground for investigation of how alternative systems work.

1. Legal education. My first manifestation may seem a bit far-fetched: legal education. But the different orientations of legal procedure are already manifested there. U.S. legal education trains law students to become advocates. Examinations test issue spotting. German legal education trains law students to become judges. Examinations focus on supporting issue resolution. One might well wonder whether this leads to Americans lawyers being more likely to find areas to dispute, and therefore, to require more days-in-court.

2. Initial stages of a lawsuit. An American lawsuit is oriented toward eventually going to trial; a German lawsuit is oriented toward reaching a final judgment. An American lawsuit begins with a complaint that has to provide no more information than "notice" that a claim is made; it may leave the defendant in the dark about what the defendant has done that supposedly warrants a judgment. In the early stages of an American lawsuit, in preparation for that day-in-court, the parties conduct discovery to learn what the content of "their case" and the content of "their opponent's case" will be. The parties need that information so that they can present their cases in the most favorable light and without surprises. In a German lawsuit, the plaintiff must file a detailed claim that spells out not only the basis for the claim, but also the evidence that the plaintiff intends to rely on. In the early stages of a German lawsuit, the judge reviews the filings of the parties to make sure that they are both "permissible" (*Zulässig*) and "sound" (*Schlüssig*). These reviews take place in every case. The judge is required to examine all bases for a claim and to permit only those to be made which can seriously be regarded as permissible and sound. A claim is permissible if it meets all formal prerequisites for litigation, e.g., proper service, jurisdiction, absence of applicable statute of limitations. A claim is sound if the individual assertions of the plaintiff's submissions satisfy the

abstract elements of the claim. Plaintiffs must substantiate their allegations. Apparently analogous American pretrial motions are not truly analogous, both since they occur only on motion and because judges are most reluctant to grant these motions which would, in effect, deny plaintiffs a day-in-court.

3. Control of the case. We speak of, in the United States, "the plaintiff's case." That concept does not fit into the German system of civil procedure. In Germany, the judge controls the sequence of the case and considers issues deemed central first. In the United States, each side's lawyers first investigate the case fully in the discovery stage. Then later, at trial, they present their cases in full, first plaintiff, then defendant. We rarely focus on just how inefficient and costly this procedure is, but comparison makes that clear. Suppose a plaintiff in the United States brings a case involving four different claims. Each claim requires proof of four different factual elements. One element is common to all, and the parties dispute it ferociously. In Germany, the judge would address the common issue first. Resolution of that issue, which could be simple and requiring hearing only a witness or two, could obviate consideration of other, possibly more complicated issues. Those other issues could consume months of discovery and weeks of trial in the United States. Similarly, because the parties control the case, they may spend a great deal of time on issues that a judge would regard as irrelevant or immaterial. They may see these issues, however, as part of their day-in-court and as useful means to persuade a jury to find in their favor.

4. Evidence. In Germany, the court has main responsibility for gathering and evaluating evidence. The judge prepares the case, serves as principal examiner and summarizes testimony. In the United States, each side prepares its own case for presentation to the court. The judge remains passive, there is no judicial preparation of the case, the parties' lawyers serve as principal examiners, and there are verbatim transcripts of testimony. It is no wonder that, as a result, depositions and trial testimony here are reckoned in days and in half days, whereas in Germany, testimony is reckoned in hours and half-hours. How long does one side really need to cross-examine the other's witness? It would seem in the O.J. Simpson trial, weeks!

5. Witnesses. In Germany, witnesses are questioned first by the judge. In the United States, they are prepared by lawyers beforehand to give testimony. Testimony there is generally unre-

heard whereas here it is staged. There judges are concerned with getting the gist of the testimony and commonly repeat back to the witness what they heard to make sure that they understand what the witness intended and not merely what the witness said. Here, we try to trap witnesses, get them to look bad, and to say things that they do not intend to say.

6. Experts. In Germany, expert witnesses are chosen by the judge and are supposed to be neutral. In the United States, experts are chosen by the parties. It should not be a wonder that they function as advocates. We want them to do that since, in expert testimony as in factual testimony, we feel that each side should have its day-in-court to present its view.¹⁸

7. Judgment. In the United States, it is not considered essential to the integrity of civil procedure that reasons be given for the decision rendered.¹⁹ Although reasons are regarded as helpful and may be required where a judge decides without jury, we have not ever generally required them, probably because of the difficulties perceived in trying to get a reasoned statement from a body of lay jurors. In German procedure, a statement of reasons is essential. It is grounds for mandatory reversal if there is no statement of reasons.²⁰ The lack of a reasoned opinion makes appeal to correct an erroneous decision difficult, since appellate judges can not know what the trial court based the decision on. It permits juries to reach compromise verdicts that can have no basis in law as well as allows them to decide contrary to law. Jury verdicts will be upheld so long as there was some evidence to support the verdict, even though contrary evidence was nearly overwhelming.

8. Costs of proceedings. The English system of cost-shifting is so controversial precisely because it is seen to threaten the access of the citizenry to courts. By imposing on the loser the costs of the proceeding, it is feared we will deter parties from presenting their cases to the courts. In most parts of the world, however, the logical force of cost-shifting is irrefutable. If the purpose of the legal proceeding is to determine a claim of right, and the claim goes against the person asserting it, it is only fair that the person who has the claim of right not be subjected to the

costs of the determination. Here, however, with our fixation of right to a day-in-court we fear, rightly, that litigants who have to pay for that day-in-court will be less likely to seek it.

9. Appeal. In the United States, appeal basically reviews whether the rules of the game were adhered to in the trial court. One could even say, whether the parties got their day in court. In the German system, on the other hand, the first level of appeal is concerned with whether the initial level's decision was correct. Consequently, the appellate court can and does hear witnesses and take other evidence. Professor Damaška of Yale has pointed out that in American law "what is actually reviewed is the propriety of the material submitted to the decision maker for decision rather than his 'correct' use of it."²¹ There are several deleterious consequences of the American approach for efficient adjudication of which now I mention only two. (1) If the appellate court finds an error was committed at trial, ordinarily all that it can do is return the whole case for a new trial to the trial court. Thus the concept of 'harmless error' to avoid having to so completely waste what has gone on before. (2) In order to avoid such a drastic consequence, a trial court is likely to err in its deliberations on the side of letting parties spend too long with witnesses and make arguments that are indeed frivolous.

VI.

If we would only look at foreign procedure, I think that we would have a much better understanding of what alternatives there are. We would realize just how myopic we are. We would see that proposed "revolutions" in our law are tame and timid responses to difficult problems.

¹⁸ See generally Maxeiner, "The Expert in U.S. and German Patent Litigation," 22 *IIC Int. Rev. of Industrial Property and Copyright L.* 595 (1991).

¹⁹ Lon Fuller, "The Forms and Limits of Adjudication," 92 *Harv. L. Rev.* 353 (1978).

²⁰ ZPO § 551 Nr. 7.

²¹ "Structures of Authority and Comparative Criminal Procedure," 84 *Yale L. J.* 480, 515 (1975).