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BRICS LAW JOURNAL (BRICS LJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *BRICS Law Journal* is the first peer-reviewed academic legal journal on BRICS cooperation. It is a platform for relevant comparative research and legal development not only in and between the BRICS countries themselves but also between those countries and others. The journal is an open forum for legal scholars and practitioners to reflect on issues that are relevant to the BRICS and internationally significant. Prospective authors who are involved in relevant legal research, legal writing and legal development are, therefore, the main source of potential contributions.

The *BRICS Law Journal* in English and appears four times per year. All articles are subject to professional editing by native English speaking legal scholars.

Notes for Contributors

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Citations must conform to the *Bluebook: A Uniform System of Citation*.

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CHIEF EDITOR'S NOTE ON CIVIL JUSTICE IN THE BRICS COUNTRIES

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The BRICS countries belong to different legal traditions. Brazil, Russia and China have civil law features as the fundamentals of their legal systems. India and South Africa, on the other hand, historically have common law legal systems. At the same time, the civil procedural history in each of these countries has some similar features and tendencies. There are common challenges. The most important is that the dynamics of civil procedural law is similar in the BRICS countries.

None of the BRICS countries has a pure civil or common law system. All of them have some mixed elements. Brazilian civil procedure shows the strong influence of US legislation. The best example is the Brazilian legislation on class actions that made Brazil one of the pioneers in this area in the civil law world. The Chinese legislator has also adopted some common law features. South Africa still has a strong connection with Dutch legislation.

All of the BRICS countries share the reception of aspects of civil procedural legislation from Western countries. The nineteenth century was the most important period for them, because during that time they passed legislation introducing their first civil procedural codes. For example, the Russian Civil Procedure Code of 1864 was the result of the adoption of French, German and Italian legislation of that time. It was one of the best civil procedural codes in Europe then, but within twenty years of its adoption it became ineffective in Russia. During the twentieth century, legislators of the future BRICS countries attempted to introduce their own approach to civil procedure. The best example is the Soviet style of civil procedure in Russia. Mauro Cappelletti called this approach the "radical solution" of inquisitorial civil procedure. In China, legislation was strongly connected with the Soviet style in the

second half of the twentieth century. Likewise, most of the BRICS countries tried to escape from European or North American sources and attempted to elaborate their own style in the twentieth century.

Each of the BRICS countries has a particular legal culture. There is the strong influence of tribal traditions and rules in Brazil and South Africa. In China and India, religion occupies an important position in all spheres of life, including civil justice. Russia is situated between the West and the East and has a cultural mix between individualism and collectivism. These cultural specificities influence civil justice. The problem is that formal legislation and actual practice in such societies are discordant. Similar legislation is executed differently in different societies in relation to the national cultural traditions and rules.

The main question is, what will the twenty-first century bring for these countries with regard to civil procedure? One of the challenges and opportunities is the cooperation between the BRICS countries. Could be useful? Could common features make for a new type of civil procedure, different from civil law as well as from common law? The authors of this special issue which is devoted to Civil Justice in the BRICS Countries attempt to find answers to these questions and predict the future of BRICS civil justice.

ARTICLES

CIVIL JUSTICE IN BRAZIL

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This study deals in a succinct way with the Brazilian model of civil procedural law. There is an historical approach specifically about Portuguese law which was in force in Brazil at the beginning (until 1832), after what there comes a brief description of the judiciary structure (courts and judges) and only then we talk about the scope of civil procedure, its fundamental principles and, in a "law in practice" approach, access to justice. The role of a judge towards deciding "according to statutes and evidence" is analysed and the current importance of case law is deeply focused, mainly according to the new CPC (in force since 2015) and so are appellate proceedings, class actions, enforcement proceedings and ADR. The last items concern the role and the importance of academia, and some interesting cultural observations, where we deal with the very serious crisis, both ethical and economic, that Brazil is living now, in the political sphere. The judiciary branch is now our only hope.

Keywords: Brazilian civil procedural law; case law; role of the judiciary; crisis; trust on the judiciary branch.

Recommended citation: Teresa Arruda Alvim Wambier & Cassio Scarpinella Bueno, *Civil Justice in Brazil*, 3(4) BRICS Law Journal 6–40 (2016).

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Introduction

This study aims to lay out, in a succinct and didactic manner, the Brazilian model of civil procedural law for jurists specialised in procedural law and other interested parties from abroad.

After a brief review of its history, Brazilian civil procedural law is presented against the backdrop of the Federal Constitution of 1988 and the recent Code of Civil Procedure, Act of Law no. 13.1015, of 16 March 2015, giving special emphasis to the most important novelties introduced by the new code, which came into effect in March 2016.

1. Brief History

In the period prior to Brazil's Independence (7th September 1822), Portuguese civil procedure laws, held in the *Ordenações Afonsinas* (laws passed under King Afonso V) of 1456, *Manuelinas* (under King Manuel I) of 1521 and *Filipinas* (under King Philip II) of 1603, were in force.

After independence, the *Ordenações Filipinas* remained in effect by Decree of 20 October 1823 of the Constitutional Convention, until such a time as Brazilian laws dealt with the subject. The first genuinely Brazilian legislation on procedural law, according with the teachings of Moacir Lobo da Costa,[1] can be found in Act of Law of 29 November 1832, the Criminal Procedure Code, whose "Interim provision on the administration of civil justice," an independent part, has 27 articles.

In 1850, still at the time of the Brazilian Empire, Rule no. 737 was drafted and was what we would now call the "Commercial Procedure Code," basically dealing with the regulation of judicial action in disputes arising from the application of the Commercial Code, Act of Law no. 556, of 25 June 1850, which had just been enacted, regulating Art. 27 of the latter. For disputes of a civil nature, that is, not commercial, the Portuguese laws were kept, with the amendments implemented by the aforementioned Interim Provision of the Criminal Procedure Code of 1832 and by a series of laws that have been drafted, since then, dealing with specific topics, that resulted in the drafting of a veritable compilation of *civil* procedural laws, initiated by virtue of the provisions of Art. 29, § 14, of Law no. 2.033, of 1871, by Councilman Antonio Joaquim Ribas. It is called *Consolidação Ribas* (Ribas Consolidation), which by virtue of the Imperial Resolution of 28 December 1876, ended up becoming obligatory.

Upon the Proclamation of the Republic, on 15 November 1889, Decree no. 763/1890 was drafted extending the rules of Regulation no. 737/1850 to disputes of a *civil* nature. In 1898, with the enactment of Decree no. 3.084, of 5 November, the "Consolidation of laws relative to Federal Justice" was approved, taking into account the provisions of Decree no. 848, of 11 October 1890, and of Law no. 221, of 20 November 1894. It was thus that a "Federal Justice" was established and consolidated, as well as a specific procedure for cases of interest to the Federal Government, which is explained by the unequivocal influence that the North American government exerted on the founders of the federative republic of Brazil at that historic moment.

The Republican Constitution of 1891, in Arts. 62 and 65, distinguished "federal justice" from "state justice" once and for all – which prevails until today – allowing the member States to legislate on the civil procedure laws that govern the actions of their own judicial bodies (Arts. 34, n. 23, and 65, n. 2). The aforementioned Decree

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1 Moacyr Lobo da Costa, *Breve notícia histórica do direito processual civil brasileiro e de sua literatura* 5 (São Paulo: Revista dos Tribunais, 1970).

no. 3.084/1898 was not applicable to the States, only to the Federal Government. While the States did not draft their own Codes, Regulation no. 737/1850 prevailed to govern their own judicial systems.

Gradually, some Brazilian States drafted their own Codes of Civil Procedure, some called "Civil *and Commercial* Procedure Code." Although there is some controversy in this respect among contemporary legal writers,[2] the following codes and the year of their enactment are correct: Pará (1905), Rio Grande do Sul (1909), Maranhão (1908), Bahia (1915), Espírito Santo (1915 and 1930), Minas Gerais (1916), Rio de Janeiro (1919), Paraná (1920), Piauí (1920), Sergipe (1920), Ceará (1921), Rio Grande do Norte (1922), Pernambuco (1924), former Federal District (1924), Santa Catarina (1928), São Paulo (1930) and Paraíba (1930). There is no mention of the States of Amazonas, Alagoas, Goiás and Mato Grosso having drafted their own Codes of Civil Procedure, although they had their own laws governing the organisation of the judiciary.

With the promulgation of the Federal Constitution of 1934, the responsibility for legislating on a single civil procedure code was again returned in the hands of the Federal Government (Art. 5, XIX, *a*), that is, the constitution then established prevented the States from legislating on the matter, attributing the Federal Government exclusive powers to legislate. Then, Art. 11 of the Interim Constitutional Provisions Act established that, with the promulgation of that Constitution, the government would appoint a committee comprising three jurists (two Supreme Court Justices, *ex vi of* Arts. 63, *a*, and 73, of the 1934 Constitution, and one lawyer) with the aim of drafting a new national Code of Civil and Commercial Procedure. Paragraph § 2 of the very same interim provision assured that, while the new civil procedural law was not drafted, the state codes would remain in effect.

The drafting of a new Code of Civil Procedure was only possible under the Constitution of 1937, which in Art. 16, XVI, kept the procedural unity (and, consequently, the legislative monopoly) in the hands of the Federal Government. It originated in a bill submitted by Pedro Batista Martins, personally revised by means of several amendments and suggestions sent, since its publication, by the then Minister of Justice, Francisco Campos, with the assistance of Guilherme Estellita. It was finally approved by Decree Law no. 1.608, on 18 September 1939, coming into force as from 1st February 1940.

The greatest criticism that was, historically, made against the 1939 Code of Civil Procedure was that it did not adequately reflect the degree of scientific progress that civil procedure in Europe had already achieved and that, while it was well drafted, it was too theoretical and led to difficulties encountered in its practical application.

In the mid-1960s, a movement arose to reform the Code of Civil Procedure which ended up being handled by Alfredo Buzaid, and led to the "1973 Code of

2 Regarding this discussion, *see Código de Processo Civil do Espírito Santo: texto legal e breve notícia histórica*, organized by Rodrigo Mazzei, subject of an abstract drafted by one of the co-authors of this article in vol. 420 of *Revista Forense (Impresso)* (2014).

Civil Procedure" (Act of Law no. 5.869, of 11 January 1973), which remained in effect until March 2016.[3]

The greatest merit of the 1973 Code is that it provided a high level of systematization of the matter, broadly encompassing all the "science" of civil procedural law produced until that date. A simple consultation of that "Code," even with the innumerable amendments that it underwent during the just over forty years that is was in effect, allows one to have a firm understanding of the scientific ideology that was predominant at the time regarding civil procedural law. It consists of five Books (parts), in the following order: Cognizance procedure (which took up almost half of the Code's provisions), Execution procedure, Provisional procedure, Special procedure and the Final and Temporary Provisions.

Due to the large number of amendments made while the 1973 Code was in effect, the President of the Federal Senate judged that he should appoint a Commission to draw up a Draft Bill for a new Code of Civil Procedure. The President of this Commission was Justice Luiz Fux, currently in the Federal Supreme Court, and his General-Rapporteuse was one of the co-authors of this article, Professor Teresa Arruda Alvim Wambier. The Draft Bill was concluded in the first semester of 2010, submitted to the Federal Senate, which approved the respective Bill at the end of the same year, upon its analysis and amendment by a Commission comprising four procedural lawyers, among them the other co-author of this article. The Senate's Bill was sent for review to the House of Representative – Brazilian legislative procedure is bicameral (Art. 65 of the Federal Constitution) which approved a clean bill in March 2014. Back to the Federal Senate – which is compulsory under the sole paragraph of Art. 65 of the Federal Constitution – the final version, approved in December 2014 was sent for presidential sanction, culminating in the promulgation of Act of Law no. 13.105, of 16 March 2015.

The new Code of Civil Procedure has a very different structure to its predecessor. It is divided into the General Part and the Special Part and ends with a Book titled "Final and Temporary Provisions." The General Part is, in turn, divided into six Books, namely: Rules of Civil Procedure, Jurisdictional Function, Parties to the Proceedings, Procedural Acts, Provisional Relief and the Commencement, Stay and Dismissal of Proceedings. The Special Part is, in turn, subdivided into three Books, each one containing various Titles. It is pertinent to point out this division of the subject: Book I is titled "Cognizance Procedure and Judgment Enforcement Procedure." Its three Titles and named as follows: "Common Procedure," "Satisfaction of the Judgment" and "Special Procedures." Book II is dedicated to "Execution Procedure" and Book III, "Procedure in the Courts and Means of Challenging Judicial Decisions," being divided

[3] There is a reasonable doubt among Brazilian legal writers regarding the exact date on which the new Code of Civil Procedure, Law no. 13.105, of 16 March 2015, came into effect, whether on 16, 17 or 18 March 2016. For more on this discussion, *see* Cassio Scarpinella Bueno, *Novo Código de Processo Civil anotado* 899–900 (2nd ed., São Paulo: Saraiva, 2016); Teresa Arruda Alvim Wambier, *Primeiros comentários ao novo Código de Processo Civil* 1.703–1.704 (2nd ed., São Paulo: Revista dos Tribunais, 2016).

into two Titles, namely: "Order of Procedures in Courts and Original Jurisdiction Procedures" and "Appeals."

2. Courts and Judges

The organisation of the judiciary in Brazil is governed by the Federal Constitution, which has a Chapter on the topic.

The Brazilian Republic's Federative nature leads to the duality between the two jurisdictions, the federal one (which deals mainly with the proceedings in which the Federal Union, and its administrative entities, have an interest, whether as a party or third party) and the state jurisdictions that settle the remaining cases. The organisation of each State is established, based on the federal model, by the respective State Constitutions.

It is Art. 92 of the Federal Constitution that sets forth which bodies make up the judiciary, of which the following pertain to civil procedure: (*a*) the Federal Supreme Court; (*b*) the National Council of Justice; (*c*) the Superior Court of Justice; (*d*) the Regional Federal Appellate Courts and Federal Judges; (*e*) the State, Federal District and Territory Courts and Judges.

The Superior Courts have, among others, appellate jurisdiction that characterises them as bodies at the top of the hierarchy of the judiciary, that is, as bodies whose role it is to standardise the interpretation and application of the law throughout Brazil. It is for this very reason that they alone have jurisdiction throughout the whole country, pursuant to Art. 92, § 2, of the Federal Constitution.

The Federal Supreme Court is the highest body of the Brazilian judiciary. It is precisely because of its predominant position in the structure of the judiciary that the Federal Supreme Court, under the head provision of art. 102 of the Federal Constitution, is the "guardian" of the Federal Constitution. The "last say" on the interpretation of Brazilian constitutional law, whose judicial review model is *mixed*,[4] belongs to the Federal Supreme Court; whether in terms of *concentrated* control of constitutionality (in the trial of direct actions of unconstitutionality, for example), or in terms of diffuse control (in the hearing of extraordinary appeals, for example). Its headquarters, as set forth in Art. 92, § 1, are in the Federal Capital, Brasília, in accordance with § 1 of Art. 18 of the Federal Constitution.

The composition of the Federal Supreme Court is determined by Art. 101 of the Federal Constitution. It is made up of eleven Justices, selected from among

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[4] Brazilian law allows the *concentrated* control of the constitutionality (judicial review) of federal laws before the Federal Supreme Court and, in the case of state and municipal laws before the State Constitutions and the State Courts of Appeals of the State and of the Federal District. It also allows, at any level of jurisdiction, the exercise of the *diffuse* control of constitutionality. Art. 97 of the Federal Constitution demands that, in these cases, the courts have unconstitutionality declared by the full bench or, where there is procedural delegation, by its special body.

citizens over the age of thirty-five and under the age of sixty-five, having notable legal knowledge and unblemished reputation, provided they are Brazilian born. The Federal Supreme Court Justices are appointed by the President of the Republic, after the choice is approved by an absolute majority of the Federal Senate.

The jurisdiction of the Federal Supreme Court is governed by Art. 102 of the Federal Constitution. There is an established understanding that its jurisdiction is *indisputably* that specified in the Federal Constitution, which means that no law, not even the Code of Civil Procedure, can either broaden or restrict it.

The Federal Supreme Court can exercise *original* jurisdiction, acting as body with a sole instance of jurisdiction. These are the cases provided for in item I of Art. 102 of the Federal Constitution, among which the following are related to civil procedural law, such as: (*a*) the judicial review of the unconstitutionality of federal or state laws or legislative instruments; the judicial review declaring the constitutionality of a federal law or legislative instrument; and (*b*) the *writ of mandamus* and the *habeas data* against the acts of the President of the Republic, the Boards of the House of Representatives and of the Federal Senate, of the Brazilian Court of Auditors, of the Public Prosecutor's Office and the Federal Supreme Court itself.

Item II of Art. 102 of the Federal Constitution deals with the *ordinary* appeal jurisdiction of the Federal Supreme Court, that is, it defines the cases in which the Federal Supreme Court acts as a review body of the decisions rendered by another Court. They are cases in which the judicial role performed by the Federal Supreme Court occurs as in a proper court of second instance. The case that is pertinent to civil procedural law is the one provided for in sub-item *a* of that provision: the *writ of mandamus*, the *habeas data* and the injunction decided at a single instance by the Superior Courts, if the plaintiff's request is denied.

Finally, item III of Art. 102 of the Federal Constitution governs the *extraordinary* appeal jurisdiction of the Federal Supreme Court. These are cases in which the Federal Supreme Court has the diffuse control of constitutionality in so-called extraordinary appeals.

The Superior Court of Justice, being a Superior Court, has jurisdiction in the whole of Brazil, pursuant to Art. 92, § 2, of the Federal Constitution. Its seat is in Brasília, according to § 1 of the same constitutional provision (Art. 18, § 1, of the Federal Constitution).

The composition of the Superior Court of Justice is regulated by Art. 104 of the Federal Constitution. The number of Justices is of, at least, thirty-three, a number which has been observed since its inauguration. They are appointed by the President of the Republic, chosen from among Brazilians who are over thirty-five and under sixty-five years of age, have remarkable legal knowledge and flawless reputation, after the choice is approved by an absolute majority of the Federal Senate (Art. 104, sole paragraph, of the Federal Constitution).

Its make-up is diversified because, according to items I and II of the sole paragraph of Art. 104 of the Federal Constitution, one third of the Superior Court of Justice

is to be made up of judges from the Regional Federal Appellate Courts and one third from among judges from the State courts of Appeals, nominated in a triple list drawn up by the Court itself, and the remaining third, in equal parts, from among lawyers and members of the Federal, State, Federal District and Territories' Public Prosecutor's Offices, alternately, nominated in accordance with Art. 94 of the Federal Constitution.

The jurisdiction of the Superior Court of Justice is regulated by Art. 105 of the Federal Constitution. Here too the prevalent understanding is that the law can neither restrict it not broaden it. It is a matter in which the Constitution is emphatic, not allowing the modification by an infraconstitutional act, not even by the Code of Civil Procedure.

An analysis of the jurisdiction of the Superior Court of Justice reveals that, like that of the Federal Supreme Court, there is a distinction between the *original, ordinary appeal and special appeal jurisdiction*.

The cases where the Superior Court of Justice acts as a "court of first instance," that is, in cases where it exercises its original jurisdiction, with regard to civil procedural law and according to item I of Art. 105 of the Federal Constitution, are those such as: (*a*) *writs of mandamus* and *habeas data* against acts of a Minister of State, Navy, Army and Air Force Commanders, or of the Court itself; and (*b*) conflicts of jurisdiction between any courts, but for the provisions of Art. 102, I, *o*, of the Federal Constitution, as well as between the court and judges not linked to the Superior Court of Justice and between judges linked to various courts.

Ordinary appeal jurisdiction is provided for in item II of Art. 105 of the Federal Constitution. The cases that are pertinent to civil procedural law are the following: (*a*) *writs of mandamus* decided at a single instance by the Regional Federal Appellate Courts or by the State, Federal District and Territory Courts, in case of an adverse decision; and (*b*) cases in which one of the parties is a foreign government or an international body, on one side and, on the other, a Municipal District or person resident or domiciled in the Country.

Finally, the *special* appeal jurisdiction of the Superior Court of Justice is provided for in Art. 105, III, of the Federal Constitution. The rule establishes the cases in which a "special appeal" is appropriate and is filed in "cases decided, at a single or last instance, by the Federal Regional Appellate Courts or by the State, Federal District and Territory Courts when the appealed decision violates federal law: (*a*) in contravention of a federal treaty or law, or denies them effectiveness; (*b*) judges to be valid an act of the local government that is contradicted by federal law; and (*c*) gives federal law an interpretation that is divergent to one attributed by another court." The role performed by the Superior Court of Justice in these cases, like that performed by the Federal Supreme Court for the purposes of extraordinary appeals, is that of an *overlapping* body, aimed, mainly, at the standardisation of the interpretation and application of federal infra-constitutional law throughout Brazil.

In Brazil, the Federal Justice system was established right after the proclamation of the Republic, under Art. 1 of Decree no. 848, of 11 October 1890. This initiative was written into the constitution in Art. 55 of the 1891 Constitution, which referred to the "Judicial Branch of the Federal Government" comprising "a Federal Supreme Court, with seat in the Capital of the Republic, and as many Judges and Federal Courts, spread throughout the country, as the Congress may determine."

It tries claims in which the parties are federal public legal entities (*personal* jurisdiction) and certain subject matters that, being deemed relevant, it was considered should be tried by the Federal Courts (*subject-matter* jurisdiction).

According to Art. 106 of the Federal Constitution, the Federal Justice system comprises Regional Federal Appellate Court and Federal Judges.

Art. 109 of the Federal Constitution defines the jurisdiction of the Federal Courts of first instance, that is, the subject matters that the federal judges, who make up the first instance of the federal justice system, will try. The cases relevant to civil procedural law are the following: (*a*) cases in which the federal government, government agency of federal public company are interested parties as plaintiffs, defendants, assistants or opponents, except for those relative to bankruptcy, occupational accidents and those subject to the Electoral Courts and Labour Courts; (*b*) cases relative to human rights, observing, in this case, the "transfer of jurisdiction incident" to be analysed by the Superior Court of Justice, referred to in § 5 of Art. 109; (*c*) *writs of mandamus* and *habeas data* against the acts of a federal authority, with the exception of the cases under the jurisdiction of the federal courts; and (*d*) disputes regarding indigenous people's rights.

The Federal Constitution also deals, as already emphasised, with the outlining of the basic model of the State and Federal District Courts. In accordance with its Art. 125, head provision, the organisation of the state and federal district courts are to observe the "principles established in this Constitution", also taking into account the express guidelines found in its paragraphs.

The National Council of Justice was established by Constitutional Amendment no. 45/2004. Its seat is in Brasília (Art. 18, § 1, combined with Art. 92, § 1, of the Federal Constitution). Although referred to in Art. 92 of the Federal Constitution as a court, its role is a merely administrative one.

According to Art. 103-B, head provision, of the Federal Constitution, the wording of EC no. 61/2009, the National Council of Justice is made up of fifteen members. They have a two-year mandate, with the possibility of being extended for two additional years. It is a diverse body, with their members originating from the most diverse bodies of the Brazilian justice system. Its composition is as follows: President of the Federal Supreme Court, one Justice from Superior Court of Justice, nominated by the respective court; one Justice from the Superior Labour Court, nominated by the respective court; one appellate judge from the Court of Appeals, nominated by the

Federal Supreme Court; a state judge, nominated by the Federal Supreme Court; an appellate judge from the Regional Federal Appellate Court, nominated by the Superior Court of Justice; a federal judge, nominated by the Superior Court of Justice; a judge from the Regional Appellate Labour Court, nominated by the Superior Labour Court; a labour judge, nominated by the Superior Labour Court; a member of the Federal Prosecutor's Office, nominated by the Federal Attorney General; a member of the State Prosecutor's Office, chosen by the Federal Attorney General from among the names nominated by competent authority of each state institution; two lawyers, nominated by the Federal Council of the Brazilian Bar Association; two citizens, with notable knowledge of the law and flawless reputation, one nominated by the House of Representatives and another by the Federal Senate.

The appointment of the members of the Council, with the exception of the President of the Federal Supreme Court, is made by the President of the Republic, after having been approved by an absolute majority of the Federal Senate (Art. 103-B, § 2, of the Federal Constitution).

3. Scope of Civil Procedure

The purpose of civil courts in Brazil, whose activities are governed by civil procedure, is to solve disputes between individuals, legal entities and natural persons, and also to solve problems generated by inappropriate activities of the government. Nowadays, we do have neutral and impartial judges. Nevertheless, circumstances, such as the huge amount of suits and appeals, and also a considerable and undesirable level of bureaucracy, sometimes create difficulties for the judiciary to achieve high levels of performance.

In the last decade, some situations encompassed by judiciary activities, hence governed by civil procedural rules, were transferred to other organs. There were attempts to simplify some of the procedures, as was noted with regard to the specific cases of amicable divorce, probate proceedings and acquisition by prescription, which can be processed without the intervention of a judge and before an extrajudicial registrar/notary.

Finally, it should be noted that in Brazil we have a mechanism (judicial proceedings) that is very similar to the judicial review, governed by civil procedure. Our Supreme Court verifies, in a specific type of action or proceedings, known as *Ação Declaratória de Inconstitucionalidade*, that a statutory law or norm does not violate or contradict the Federal Constitution. Legal writers say call this a no-party, no-claim and no-defence lawsuit.

But apart from that, the main and obvious task of civil justice in Brazil is to resolve disputes. It is considered that for the judiciary to play its role (resolving disputes) in an effective way, it has to have three functions:

1. to create or to maintain practical conditions favourable to the effectiveness[5] of a judicial decision, i.e., in order for a judicial decision to be able to generate desirable effects;

2. to state if the claimant has rights (which is a declaratory function); and

3. to carry out enforcement activities.[6]

4. Structure (Stages) of Civil Procedure

As a rule, Brazilian civil procedure starts before the courts of first instance, made up of trial judges.

In such cases, access to the courts of second instance is assured by the appeal proper/appeal from final judgment, an appeal against the final judgment. The new Code of Civil Procedure also states that certain interlocutory decisions, i.e. rendered during the proceedings, be immediately challenged by a court with jurisdiction, by means of an appeal called an "*agravo de instrumento*" or interlocutory appeal.[7] Both appeals are heard by three judges who are called, both in the State and Federal Courts, *Desembargadores* or appellate judges.[8]

After the decision of the courts of second instance is rendered, whenever there is a violation of the provisions of the Federal Constitution or of federal laws, either an extraordinary appeal or a special appeal may be lodged, before the Federal Supreme Court or before the Superior Court of Justice respectively. The rule is that these appeals be heard by five *Ministros* (the title given to the Justices of these Courts), with the aforementioned Art. 932 of the new Code of Civil Procedure also being applicable to them, in fact, a very common practice.

These courts, when hearing these appeals, play the role of the third or fourth instances. The special (Superior Court of Justice) and extraordinary (Federal Supreme

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5 The main concern of legal authors is to provide a fair trial with fair results (minimal standards related to substantial due process of law) through interpretation of statutory law and creation of new legal mechanisms. Cândido Rangel Dinamarco, *Instituições de direito processual civil. Vol. 1* (6th ed., São Paulo: Malheiros, 2009), at chs. 1 to 5.

6 José Carlos Barbosa Moreira says exactly that, also saying that this corresponds to the classification of the types of lawsuits – cognition, enforcement and urgent measures. José Carlos Barbosa Moreira, *O Novo Processo Civil Brasileiro* 3 (25th ed., Rio de Janeiro: Forense, 2007).

7 For this purpose, it is should be emphasised that the previous Code of 1973, admitted the ability of appeal against *all* interlocutory decisions, though not all immediately. The radical change in the rules governing the ability to appeal against such decisions has aroused intense discussion among jurists, as revealed by the diverging opinions voiced by the authors of this article. To this effect, *see* Scarpinella Bueno, *Novo Código de Processo Civil anotado*, at 839–841; Cassio Scarpinella Bueno, *Manual de direito processual civil* 690–692 (2nd ed., São Paulo: Saraiva, 2016); Wambier 2016, at 1.612.

8 In exceptional cases, set forth in Art. 932 of the New Code of Civil Procedure, a single judge may act in the courts. In such cases, however, there is an express provision for an appeal (known as an "internal interlocutory appeal") in order to render possible the control of the performance of a single judge before the collective body with jurisdiction. This is an extract of Art. 1.021 of the new Code.

Court) appeals decide on points of law, although they do not prevent a retrial of the case by the courts when a violation of the Federal Constitution or of federal laws is ascertained.

The State and Federal Constitutions establish, exceptionally, what is known as "*foro por prerrogativa de função*," i.e. jurisdictional prerogative, for certain politicians or government agents. The most recent example was that of the numerous writs of mandamus filed against the appointment, by the President of the Republic, of former President Luis Inácio Lula da Silva as Chief of Staff, which, to many people, was done in order to hamper the existing criminal investigation against him, in course within Carwash Operation, in the first instance. In such cases, access to the Superior Court is assured by the Federal Constitution itself, either by means of an ordinary appeal or by the aforementioned extraordinary or special appeals.

5. Fundamental Principles

The new Code of Civil Procedure, and, in fact, all Brazilian civil procedural law, are heavily influenced by what one of the authors of this article has called "the constitutional model of civil procedural law."[9] The 1st article of the new Code reads as follows: "Civil procedure shall be regulated, governed and interpreted in accordance with the values and fundamental principles established by the Constitution of the Federative Republic of Brazil, in accordance with the provisions of this Code."

From a constitutional perspective, the following principles that inspired civil procedure should be noted: access to justice (Art. 5, XXXV, of the Federal Constitution), due process of law (Art. 5, LIV, of the Federal Constitution), *audi alteram partem* (Art. 5, LV, of the Federal Constitution), the right to present evidence and to be heard (Art. 5, LV, of the Federal Constitution), court with jurisdiction (Art. 5, XXXVII and LIII, of the Federal Constitution), impartiality (Art. 95 of the Federal Constitution), two-tiered system (*implicit* principle), collective responsibility in the courts (Art. 96, I, *a*, of the Federal Constitution), and so many others.

The first articles of the new Code of Civil Procedure are connected to several of these principles. They deal with, for example, the principle of free disposition (*maxime de disposition)* in Art. 2, of the means of alternative dispute resolution in Art. 3, of the reasonable duration of proceedings in Art. 4, of the principle of *audi alteram partem* in the sense of allowing cooperation/participation in Art. 6, of the principle of equality in Art. 7, in Art. 10 and of publicity of reasoning of judicial decisions in Art. 11.

Furthermore, there are other principles in the new Code of Civil Procedure that draw our attention, such as: the preference for trial on the merits (Arts. 139, IX, and

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[9] This is shown at greater length in Cassio Scarpinella Bueno, *Curso sistematizado de direito processual civil. Vol. 1* 111–244 (8th ed., São Paulo: Saraiva, 2014), and, more recently, in a concise manner, in Scarpinella Bueno, *Manual de direito processual civil*, at 41–65.

317); the atypicality of enforcement mechanisms (Art. 139, IV); the atypicality of the production of evidence (Art. 369) and that of the attainment of evidence (Art. 371).

The *Dispositions Maxime* is also adopted.[10] The parties decide as to the commencement of the proceedings and their scope in ordinary matters. This rule has a long tradition and is often elevated to the status of a fundamental principle. Courts cannot[11] initiate proceedings or change their scope. The possibility of *cognitio ex officio* during proceedings is extremely rare in Brazilian law. Judges can determine *ex officio* some procedural matters such as lack of standing (lack of *legitimatio ad causam* and *ad processum*) or *res judicata*.

As a rule, a judge is limited by the claim[12] presented by the plaintiff, by the terms of the defence and by the evidence brought to the proceedings, which, by the way, can be brought as a result of a judge's request,[13] complementing the parties' activities.

The principle *iura novit curia* is also adopted in Brazil. A judge is limited as to the facts brought by the parties but not as to the legal aspects. He or she can win on a very different basis as far as the law is concerned.[14]

6. Access to Justice

Access to Justice in Brazil is a reality nowadays. In fact, ADR is still at their very beginning. Arbitration is normally used in Brazil to solve disputes between huge Companies, involving considerable amounts of money. So, in fact, Arbitration has nothing to do with access to Justice.

To obtain legal aid, it suffices to declare indigence/poverty, costs are not high, and there is an organ of the state which provides *pro bono* lawyers for those who cannot pay (Public Defender).

Besides common courts, there are those which are specialized in lawsuits involving small claims/amounts of money whose proceedings are fast and have no formalities.

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[10] According to Brazilian legal writers, the "*Dispositions maxime*" means also that a judge depends on the initiative of the parties to produce evidence, i.e., on which facts parties have alleged. *Iudex secundum alega et probata partium iudicare debet.* Antônio Carlos de Araújo Cintra, *Teoria geral do processo* 64 (25th ed., São Paulo: Malheiros, 2009).

[11] The "*Dispositions maxime*" has very few exceptions in Brazilian law, which are in fact not really significant. José Carlos Barbosa Moreira, *Reformas processuais e poderes do juiz*, 6(22) Revista da EMERJ 57 (2004).

[12] In fact, the *petitum* expresses simultaneously the object of the claim and what the party expects from the judiciary. Luiz Rodrigues Wambier et al., *Curso avançado de processo civil. Vol. 1* 297 (9th ed., São Paulo: Revista dos Tribunais, 2007).

[13] This corresponds to a very recent trend in Brazilian law: a judge is considered to have more powers or a stronger power in what concerns the production of evidence. This is considered to be a valid path to reach real equality between the parties. José Roberto dos Santos Bedaque, *Direito e processo: influência do direito material sobre o processo* 72 (2nd ed., São Paulo: Revista dos Tribunais, 1994.

[14] Fredie Didier Jr., *Curso de direito processual civil. Vol. 1* 290 (10th ed., Salvador: JusPodivum, 2008).

7. Forms of Actions

The 2015 Code of Civil Procedure makes a clear distinction between what it calls "common procedure" and "special procedures," the former being governed by the provisions of Arts. 318 to 512 of the Code itself. The special procedures, besides the various procedures governed by Arts. 539 to 770 of the Code, which divides them into "litigious" and "nonlitigious",[15] are governed by several uncodified laws, of which, by way of illustration, it is worth mentioning the following: the laws governing the leasing of urban property, condemnation, support, writs of mandamus and rules on class actions in general.

Common procedure must be understood as a sequence of acts ranging from the complaint to the entering of the judgment.

The 2015 Code of Civil Procedure includes the rules regarding the drafting of the complaint which, if accepted, will lead to the service of process upon the defendant so that, as a rule, he or she will appear at the conciliation and mediation hearing. Only when said hearing is impossible or thwarted, or even at the request of the parties, will the defendant's deadline to submit his or her defence (answer) start running. This is also the defendant's opportunity, if so inclined, to file a counterclaim against the plaintiff in the same suit.

Thereafter, common procedure esters the stage known as "judgment according to the state of the proceedings." In accordance with the peculiarities of each case, it is up to the judge, at this stage, to enter a summary judgement (preliminary judgment on the merits) or, merely of part of the merits (summary judgment with partial adjudication on the merits/pleadings, an important novelty introduced by the 2015 CPC) or dismiss the case without prejudice or, still, cure and organise the proceedings to make viable the start of the evidentiary stage, in which evidence will be produced.

Then, there is the entering of the judgment that is appealable by an appeal known as *apelação*, or appeal proper, which, as a rule, prevents enforcement of the judgment, i.e. it stays the execution.[16]

When the judgment becomes final, or when an appeal that does not stay the execution is filed – which, despite the *apelação,* is the norm for other types of appeal – the interested party may start the enforcement of the judgement, whether permanent or provisional, in accordance with the prior *res judicata* judgment.

With regard to the special procedures, it should be noted that the cases governed by the 2015 Code of Civil Procedure as litigious proceedings are the following: action

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[15] The distinction and nomenclature are heavily criticised by Brazilian jurists. So much so that the Draft Bill of the new Code of Civil Procedure rejected them in favour of others, which distinguished litigious and nonlitigious procedures.

[16] This was a rather controversial topic throughout the legislative process that culminated in the new Code of Civil Procedure, the traditional rule of Brazilian law prevailing nonetheless.

for payment into court, action to demand accounts, actions to recover possession, action for the partition and demarcation of private land, action for partial dissolution of a corporation, probate proceedings, third party motions to stay proceedings, opposition proceedings, proof of claim proceedings; family cases, action on a non-executory written instrument, ratification of statutory lien, general average regulation and recovery of case records.

As cases of nonlitigious proceedings, the special procedures regulated by the 2015 Code of Civil Procedure are the following: notifications and written requests of performance, judicial alienation/attachment, amicable divorce and separation, amicable dissolution of a civil union, change of the marriage regime, testaments and codicils, unclaimed estates, assets of the absent person, adjudication of mental incapacity, common provisions regarding guardianship, organization and inspection of foundations, and ratification of sea protests and procedures performed at sea with witness statements.

8. Jurisdictions

In Brazilian law, the so-called single jurisdiction prevails, inspired by the North American system, and it thus understood that there are no administrative *jurisdictional* courts.

Therefore, all administrative acts may, as a rule, be reviewed by the judicial branch, which even has specialized mechanisms to render such control viable, such as the "writ of mandamus," the "citizen suit" and the "action against misconduct in public office," which has been extensively used in the so-called Carwash Operation focused on acts of corruption committed to the detriment of one of the main Brazilian companies (whose majority shareholder if the Federal Government), Petrobrás.

There is a growing trend in Brazilian law, mainly from the perspective of jurists, to argue that the country's judiciary should also be responsible for controlling "public policies," in that way enabling the judiciary to concretely modify certain policies established by politicians and/or administrators, correct the course of those that were previously implemented or even determine that they be effectively implemented.[17]

With regard to jurisdictional *competence*, one should emphasise the specific courts for the resolution of labour, electoral and military disputes, which follow the same logic as the federal and state courts.

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17 Prof. Ada Pellegrini Grinover, Honorary President of Associação Internacional de Direito Processual and of Instituto Brasileiro de Direito Processual, is tireless defender of this movement.

9. Role of the Judge

The role of a civil judge is, according to most Brazilian legal writers (academics), to solve conflicts or disputes[18] between A and B[19] in accordance with the law.[20] When we say "in accordance with the law," in Brazil we mean statutory law, as Brazil is a civil law jurisdiction.[21] This is a typical academic approach.

Nevertheless, on many occasions civil judges, in solving problems generated by inappropriate activity of the government[22] have to decide based on norms which are verbally formulated with the use of vague or cloudy concepts and legal principles, which are sometimes not even written. In statutory law, these cases are normally solved in the context of class actions.[23]

It is exactly in this kind of conflict between society, represented by one of its bodies, and the government, that the serious issue of judicial activism arises. Judges have to "create" solutions, ways to solve problems, because in most cases they have to find a way to solve conflicts which were not previously contemplated by the legislator. Many times judges act as if they were part of the executive branch of the government (*pouvoir exécutif*).[24]

Judges sometimes act as if they were the legislative branch of the government because they have to solve disputes having the last word on a very important legal issue (*quaestio juris*). Usually, these disputes involve a large group of people (class actions), but not necessarily. In these conflicts or disputes, the final word of the

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[18] Our Code of Civil Procedure was conceived in a very individualistic society. Thus, its structure is in fact suitable to solve disputes between individuals and not group conflicts. Teori Albino Zavascki, *Reforma do sistema processual civil brasileiro e a reclassificação da tutela jurisdicional*, 88 Revista de Processo 173 (1997).

[19] Although, as will be seen below, we have a very well developed class action system, it is, however, not in our CPC.

[20] In fact, contemporary legal writers recognise that civil procedure also has social and political goals. It serves to allow individuals to exercise their citizenship. Dinamarco 2009, at 135.

[21] Although there are some typical characteristics of common law systems: e.g., small claims are treated in a special fashion and, as was said before, we also have class actions, inspired by the North American system. José Carlos Barbosa Moreira, *Notas sobre alguns aspectos do processo (civil e penal) nos países anglo-saxônicos*, 92 Revista de Processo 87 (1998).

[22] In fact, inappropriate activity of the government generates lawsuits and also their conduct during proceedings is not always ideal, but there are unfortunately not very reliable statistics on this problem.

[23] Nowadays, there are often lawsuits (normally class actions, but not only) against the government to obtain medicines (RE 607381/SC – STF) or a specific medical treatment (REsp 872733/SP – STJ) or the restructuring of hospitals and maternities for them to respond in an adequate fashion to the needs of the underprivileged (REsp 1041197/MS – STJ).

[24] The judiciary can, exceptionally, play this role, mainly when the government denies citizens access to essential goods, in relation to their social rights (*Arguição de Descumprimento de Preceito Fundamental* nº 45).

judiciary is *law* (completes the real meaning of the norm) and prevents new disputes involving the same topic.

This is a very relevant new role of the judiciary, mainly related to the courts which are at the top of the structure of the judiciary (Supremo Tribunal Federal and Superior Tribunal de Justiça).

In the year of 2004, there was an amendment to our Federal Constitution, which included in our legal system what we call "súmula vinculante." This could be roughly translated as "binding precedent" but it is not at all a precise translation, because, in fact, it is not a precedent: it is a "summary" of a line of precedents issued by the STF, which denotes its "opinion" on a specific "quaestio juris," and must necessarily be respected or adopted by all other courts and judges, and by the executive branch.

This legal concept, "súmula vinculante," is the most expressive example of this last function or role of the judiciary: "creating" law.

Thus, since the abovementioned amendment, the Supreme Court can, in a very peculiar way, create law, but always respecting the formal limits established by the Brazilian Constitution, which provides a very specific procedure that must be followed. The "precedent" is said to be "binding," because, as said before, other judges, courts and the Government must obey what has been decided by the Supreme Court, as if its decision were a rule. Of course, to understand this trait of the Brazilian legal system, it is convenient to remember that Brazil is a civil law jurisdiction, so we are not familiar with the *stare decisis* doctrine as in common law systems.

This peculiar legislative activity of the Supreme Court can take place when a controversy over a constitutional issue creates a state of uncertainty and there is a large number of claims with the same cause of action.

The Brazilian Constitution also provides a very peculiar procedure that can be used, in case a judge, court or anybody in the Government does not respect the "súmula vinculante" of the Supreme Court. It is a special claim, called *Reclamação*, that one can file before the Supreme Court (STF) and that has, as cause of action, the disobedience of a "súmula vinculante." But there are some restrictions, for instance: this claim cannot be filed, when the disobedience happens in a judicial act, which may be challenged by an appeal to the very same STF, according to procedural law.[25]

10. Evidence

Art. 5, LVI, of the Brazilian Federal Constitution assures the freedom of the means of production of evidence provided it is not unlawful or obtained unlawfully.

On an infra-constitutional level, the corresponding provision is found in Art. 369 of the new Code of Civil Procedure, worded thus: "The parties have the right to employ

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[25] Thus: Rcl 11859 AgR, Relator Ministro Teori Zavascki, Tribunal Pleno, tried on 23/05/2013, published on 14/06/2013.

all the legal, as well as morally legitimate, means, even if they are not specified in this Code, to prove the truth of the facts on which the claim or the defence is based and effectively convince the judge."

Significant novelties have been introduced by the 2015 Code, notably among them are: the admissibility of the early production of evidence regardless of the urgency (Arts. 381 to 383), the provision for "notarial minutes" to be used as evidence (Art. 384) and the extinction of the "indirect (through the judge) questioning" of witnesses (Art. 459, head provision), allowing the lawyer to question the witness directly, always under the supervision of a judge. The 2015 CPC also innovates by providing that it is the lawyer who must, as a rule, inform or subpoena the witnesses regarding the trial (Art. 455, head provision).

Oral testimony is to be produced within the scope of the trial, which will be scheduled in the pretrial order declaring the case to be ready for trial (Art. 357, V). Namely: testimony of the party (testimony of the parties themselves, with the main objective of confessing the facts that are unfavourable to them), testimonial evidence (testimony of third parties regarding the relevant facts of the case) and testimony of experts (either substituting or complementing expert evidence).

Documentary evidence, as a rule, must accompany the complaint and the answer. Expert evidence aims to investigate the technical facts, which are beyond the scope of the judge's expertise.

In Brazilian law, there is no evidence scoring system. It is, therefore, up to the judge to rate it in each particular case, a statement of reasons for the respective decision being indispensable.

Furthermore, one of most delicate issues in Brazilian legal theory concerns the balance between the wish to establish the facts correctly and the need to provide effective protection of rights in a reasonable period of time. The importance of the search for truth in the proceedings is recognized, but it is also admitted that this search cannot compromise the reasonable duration of proceedings.[26] On the other hand, one cannot state that, in Brazilian civil procedure, there is an absolute and irrevocable choice between either option.[27] In recent decades, perceptible efforts have been made by Brazilian legislators to balance the two needs, that is, to combine speed and accuracy.

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[26] One of the goals of Brazilian civil procedure is to reach the truth, but certainly not the only one, for proceedings cannot last forever. José Manoel de Arruda Alvim, *Manual de direito processual civil. Vol. 2* 379 (9th ed., São Paulo: Revista dos Tribunais, 2005).

[27] The various imperative deadlines of Brazilian civil procedure can be considered a device or a method to avoid eternal proceedings. Egas Dirceu Moniz de Aragão, *Comentários ao Código de Processo Civil. Vol. 2* 99 (2nd ed., Rio de Janeiro: Forense, 1976). To avoid eternal proceedings, there is a provision in Brazilian civil procedure saying that if the defendant does not respond within a certain deadline, facts alleged by the claimant can be considered true by a judge, depending on the context and on certain conditions. It is a technique to speed up proceedings. Cândido Rangel Dinamarco, *Fundamentos do processo civil moderno* 951 (3rd ed., São Paulo: Malheiros, 2000).

In some situations, the legislator favours the timeliness of relief and allows the party to benefit in advance from the effects which would normally only be attained in the final judgement. However, a judicial provision on these terms is an exception and presupposes the fulfilment of some prerequisites, among which is the risk of losses being incurred by the party who claims the rights and the existence of elements that, at least, appear to prove the claimed rights.

Today, Brazilian law is generous with remedies based on incomplete cognition[28] (*fumus boni iuris*). That means that a judge can advance the claimant the whole (or just a part of the) effect of the final judgment or decision, if there is urgency (*periculum in mora*). Normally, these effects are entirely or partly advanced under the condition of the possibility that the situation could turn, in case of loss, to the *status quo ante*. If these prerequisites are not fulfilled, the party must generally wait for the final judgement, based on exhaustive cognition, to then be awarded the claimed rights.

However, upon the enactment of a new bill currently under debate by the legislature, Brazilian civil procedure will undergo significant changes with regard to interlocutory relief. In fact, the new draft bill primarily sets forth that, regardless of the practical effects obtained from interlocutory relief, there will be no need to file an independent lawsuit for the party to request it. Many other changes will come about as a result.

Once interlocutory relief has been granted, based on summary cognizance, the defendant is summoned and can challenge it. Should the defendant oppose the relief granted the plaintiff, he/she has a period of 30 days (unless otherwise determined by a judge) within which to make a main claim, which will be decided by the judge upon thorough and exhaustive appreciation of the merits. However, if the defendant does not manifest himself/herself, the case will be dismissed and the decision based on summary cognizance will remain in effect for an indeterminate period. It is up to the defendant to stop such effects by filing an action for that purpose. In said action, the judge will analyse the pertinent issues based on a thorough and exhaustive appreciation of the merits, respecting adversary proceedings and the right to be heard.[29] It is said that there will thus be a stabilisation of interlocutory relief in Brazilian civil procedure.

The procedure briefly described above is not foreign to the procedural legislation currently in effect in Brazil. There are, in fact, similarities between this procedure and an action on an unenforceable written instrument, currently governed by items 1102-A to 1102-C, of the CPC, such as:

1. the rendering of the decision to grant interlocutory relief based on summary cognizance;

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28 Procedimento monitório. José Rogério Cruz e Tucci, *Tempo e processo* (São Paulo: Revista dos Tribunais, 1997), *passim*.

29 Athos Gusmão Carneiro, *O novo Código de Processo Civil: breve análise do projeto revisado no Senado*, 194 Revista de Processo 139 (2011).

2. the possibility of making a decision on the basis of the inactivity of the defendant, producing effects until there is an opposing decision, by means of an independent action filed subsequently by the defendant; and

3. the absence of *res judicata*, with regard to the interlocutory relief decision, even when it acquires stability due to the inactivity of the defendant.

It is precisely due to such similarities that some envisage an expansion of actions on unenforceable written instruments in the amendments relating to the above-mentioned interlocutory relief.[30]

11. Summary Proceedings

The new Code of Civil Procedure innovates in relation to the previous one, from 1973, by joining what Brazilian law viewed in a dichotomous manner, even from a formal point of view, making a distinction between *processo cautelar*, or provisional remedy, and *tutela antecipada*, or interlocutory relief. For Brazilian law, provisional remedies have (and continue to have in the systematics of the new Code) the sole purpose of assuring a right, rendering the timely achievement of said right possible. Interlocutory relief, on the other hand, renders possible the immediate satisfaction of the right.

It is thus that Book V of the General Part of the new Code of Civil Procedure is dedicated to what became known as "tutela *provisória*," or *provisional* relief (Arts. 294 to 311). These are rules that allow, in a general way, the granting, in advance or incidentally, measures capable of preserving or satisfying the right in dispute. The grounds for such measures may be *urgency* (in relation to actual *periculum in mora* to justify the measure) or *evidence* (the more evident right of one of the parties based on the frame of reference provided in Art. 311).[31]

Differently to the 1973 Code of Civil Procedure, the new Code does not specify which measures may be granted in order to achieve those goals. It is therefore correct to argue that, in the new Code, "the general power of the provisional remedy" (Art. 301) and the "general power of the interlocutory relief" (Art. 297) prevail in place of the now revoked specific provisional proceedings.

Another important novelty introduced by the Code of Civil Procedure of 2015 is the possibility of the interlocutory relief granted in a preliminary decision becoming

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[30] Eduardo Talamini, *Tutela de urgência no projeto de novo Código de Processo Civil: a estabilização da medida urgente e a "monitorização" do processo civil brasileiro*, 209 Revista de Processo 13 (2012).

[31] The frames of reference are the following: (*a*) abuse of the right to a defence and clearly frivolous manifesto by the party; (*b*) allegations of fact based only on documental evidence and argument based on repeat claims or binding precedent; (*c*) claim for repossession based on documental evidence of the deposit agreement; and (*d*) complaint producing sufficient documental evidence of the facts that constitute the plaintiff's right, and against which the defendant does not does file evidence capable of generating reasonable doubt.

permanent when the defendant does not file an appeal against it. In this case, both the plaintiff and the defendant may, if they so wish, file a claim against the opposing party seeking a decision based on full cognizance and able to produce *res judicata* effect. However, while this does not occur, the effects of the decision that granted the relief are preserved.

12. Appellate Proceedings

Title II of Book III of the Special Part of the new Code of Civil Procedure deals with appeals. Art. 994 names the applicable appeals: *apelação* (appeal proper), *agravo de instrument* (interlocutory appeal), *agravo interno* (interlocutory appeal to the same court/internal interlocutory appeal), *embargos de declaração* (motion for clarification), *recurso ordinário* (ordinary appeal), *recurso especial* (special appeal to the Superior Court of Justice), *recurso extraordinário* (extraordinary appeal to the Federal Supreme Court), *agravo em recurso especial ou extraordinário* (motion in special or extraordinary appeal) and *embargos de divergência* (appeal against a divergent decision).

The deadline for filing and answering the appeals is fifteen (15) working days, with the exception of motions for clarification whose deadline is five (5) working days, as stated in § 5 of Art. 1.003.

As already disclosed, the proposal of the Draft Bill to set aside the stay of execution as a rule of the appeal proper (*recurso de apelação)* (Art. 1.012, head provision), which had been admitted by the Federal Senate Bill of 2010, did not prevail in the 2015 CPC. The items of § 1 of Art. 1.012 set forth the exceptions to that rule, i.e. the cases in which the appeal proper does not produce the effect of staying the execution – along the lines of Art. 520 of the 1973 CPC, – justifying, therefore, the immediate satisfaction of the judgment.

For all other appeals, the rule that appeals "do not impede the enforceability of the decision, unless otherwise provided for by law or by a court decision" (Art. 995, *caput*) prevails, i.e. they do not produce the effect of "staying the execution." The sole paragraph of Art. 995 establishes the conditions for, as the case may be, the effect of staying the execution be determined by the judge-rapporteur "if there is a risk of grave or irreparable harm arising from its immediate enforcement, and if it is shown that there is a high probability of the appeal being granted." The 2015 CPC therefore admits the possibility of granting, *ope judicis* (by the power of the judge) rather than the *ope legis* (by the power of the law) tradition of Brazilian law, the stay of execution, but for the, unfounded, exception of the case of the appeal proper, *recurso de apelação*.

The appeal proper is the appropriate appeal against a judgment. It must also target all the interlocutory decisions that, in accordance with Art. 1.015 of the new CPC, do not admit an immediate appeal, the so-called interlocutory appeal (Art. 1.009, § 1 and 2).

The interlocutory appeal is a mechanism aimed at the interlocutory decisions expressly provided for in Art. 1.015 of the 2015 CPC or those expressly established by other laws.

The *internal* interlocutory appeal is expressly provided for in Art. 1.021, thus enabling, at the request of the appellant, all decisions rendered by a single judge within the scope of the court to be reviewed by a panel of judges.

Motions of clarification are a type of appeal that aims to clarify obscurity or vagueness, rectify omissions or contradictions and correct significant errors frequently found in court decisions.

The ordinary appeal is the one that can be lodged when the decision is unfavourable to the applicant for writs of mandamus, *habeas corpus*, *habeas data* and other situations set forth by the constitution when those proceedings have to be originally filed before a court, subject to the authority involved.

The extraordinary appeal is the one that allows the Federal Supreme Court, in the exercise of its broad control of constitutionality, to oppose the decisions of other Brazilian courts that interpret the Federal Constitution.

The special appeal is the means by which the Superior Court of Justice exercises its power to safeguard and standardise the interpretation and application of federal law throughout the whole of Brazil.

The *agravo em recurso especial e em recurso extraordinário* (motion in special or extraordinary appeal) is the appeal that opposes, in certain circumstances, the denial of the hearing of the extraordinary or special appeal before the courts with jurisdiction to entertain them.

Lastly, the appeals against divergent decisions are those which aim to overcome and standardise possible divergences that may arise between the different bodies that make up the Federal Supreme Court and the Superior Court of Justice.

13. Class Actions

They are, in fact, very useful against companies and against the government.

In Brazil, there is a very well developed class action system.[32] Generally speaking, social regulation is the task of the legislative and executive branches of government. When something does not work or works badly, the judiciary should intervene, provoked by an individual party. However, a special feature of civil justice in Brazil, is the availability of a class action, where action may be filed by an entity expressly authorized by statutory law.

In fact, complex matters, involving rights which belong to a community or to a "group," are frequently handled within in the context of class actions. In class actions,

[32] We could speak of a scientific revolution. Elton Venturi, *Processo civil coletivo* 24 (São Paulo: Malheiros, 2007).

mainly when they are filed against the government, courts have to exercise the complex function of a social regulator. For example, an action was filed against the *Prefeitura de São Paulo* (São Paulo City Council) and the judge ordered it to reserve vacancies at a day care centre for mothers to leave their children when they go to work.[33] The performance of regulatory role, often exercised by class actions, is being increasingly considered one of the main goals of civil justice in Brazil.[34]

Brazilian *class actions*[35] are a rather well-developed field of our civil procedural law. Today, we have a sophisticated system of class actions. Brazilian legislation is very detailed in what concerns the kinds of rights which are protected; *res judicata*,[36] *lis pendens*,[37] and other important aspects are expressly dealt with.

Class actions can be considered a powerful device to improve access to justice and to balance a lack of power over companies and government. Class actions are a device to solve disputes over rights or duties found in society to which no one is specially or specifically entitled, and sometimes claims of various plaintiffs revolving around some legal issue.

Which point, or points, actually make class actions different from individual ones? Mainly two points: standing and *res judicata*. Rules of standing and *res judicata* are two sides of the same coin. A class action is brought by a representative claimant (collective standing) without the express consent of all the represented persons. And the outcome of the action shall bind the group as a whole.

In Brazil, class actions can only be brought by those identified by the statute: social unions, associations, prosecutors of the Public Prosecutor's Office (*Ministère*

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33 *See* REsp 736.524/SP, Rel. Min. Luiz Fux, STJ, 21/03/2006.

34 On the subject: Rodolfo de Camargo Mancuso, *Ação civil pública* (9th ed., São Paulo: Revista dos Tribunais, 2004); Pedro da Silva Dinamarco, *Ação civil pública* (São Paulo: Saraiva, 2001); Pedro Lenza, *Teoria geral da ação civil pública* (São Paulo: Revista dos Tribunais, 2003); Ricardo de Barros Leonel, *Manual do processo coletivo* (São Paulo: Revista dos Tribunais, 2002).

35 On the subject: Antonio Gidi, *Coisa julgada e litispendência em ações coletivas* (São Paulo: Saraiva, 1995); José Carlos Barbosa Moreira, *Ações Coletivas na Constituição Federal de 1988*, 61 Revista de Processo (1991); Ada Pellegrini Grinover, *Código Brasileiro de Defesa do Consumidor: comentado pelos autores do anteprojeto* (8th ed., Rio de Janeiro: Forense Universitária, 2005); Ada Pellegrini Grinover, *Ações coletivas ibero-americanas: novas questões sobre a legitimação e a coisa julgada*, 361 Revista Forense (2002); Ada Pellegrini Grinover, *A problemática dos interesses difusos* in *A Tutela dos Interesses Difusos* (São Paulo: Max Limonad, 1984); Luis Manoel Gomes Jr., *Curso de Direito Processual Civil Coletivo* (2nd ed., São Paulo: SRS Editora, 2008); Hugo Nigro Mazzilli, *A defesa dos interesses difusos em juízo: meio ambiente, consumidor, patrimônio cultural, patrimônio público e outros interesses* (24th ed., São Paulo: Saraiva, 2011).

36 Latin for "the thing has been judged," meaning the issue before the court has already been decided by another court, between the same parties. Therefore, the court will dismiss the case before it as being useless. Example: An Ohio court determines that John is the father of Betty's child. John cannot raise the issue again in another state. Sometimes called "res adjudicate" (Dec. 20, 2016), available at http://dictionary.law.com/Default.aspx?selected=1825 access 04/07/2011.

37 Latin for "a suit pending," a written notice that a lawsuit has been filed which concerns the title to real property or some interest in that real property (Dec. 20, 2016), available at http://dictionary.law.com/Default.aspx?selected=1172 access 04/07/2011.

Public) and so on. Judges cannot evaluate the adequacy of representation on a case-by-case basis, as in the USA.

In the *res judicata* regime there is something special: specific rules of *res judicata* in Brazilian Class actions do not bind absentees if the judgment is not favourable to their interests. And, furthermore, there shall be no *res judicata* at all if there is a defeat due to insufficient evidence. The same class action can be brought again if new evidence is found and presented.

We talk about: a) diffuse rights, b) collective rights and c) homogeneous individual rights. These three types of rights correspond to three kinds of class actions, each with a slightly different procedure and scope of judgment.

1. A diffuse right[38] belongs to a universe of indeterminate people, not previously connected and linked only by factual circumstances, e.g. we all have the right to breathe clean air or live in an ecologically balanced environment.[39]

2. A collective right[40] belongs to a specific group, where persons are linked to each other by a pre-existing legal relationship, i.e. prior to the lawsuit,[41] e.g. rights which belong to a specific professional category, such as lawyers[42] or fishermen.

3. The homogeneous individual rights[43] are the "old" rights (such as the *droit subjectif* of French Law) which can be the object of a collective treatment, if they have a common origin.[44]

An example of these rights emerges from the situation of clients of a bank from whom excessive fees have been charged; or that of a consumer enticed by false advertising, for example, to acquire beverages that contain prizes in the bottle

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[38] Mazzilli 2011; Pericles Prade, *Conceito de interesses difusos* 57–58 (2nd ed., São Paulo: Revista dos Tribunais, 1987); Rodolfo de Camargo Mancuso, *O município enquanto co-legitimado para a tutela dos interesses difusos*, 12 Revista de Processo 49 (1987); Lúcia Valle Figueiredo, *Direitos difusos na Constituição de 1988*, 88 Revista de Direito Público 105 (1988); Grinover 1984, at 30–31; Celso Ribeiro Bastos, *A tutela dos interesses difusos no direito constitucional brasileiro*, 23 REPRO 40 (1981); João Carlos de Carvalho Rocha, *Notas sobre a composição do dano ambiental no Brasil e nos Estados Unidos da América*, 1 Revista da Procuradoria-Geral da República 174–175 (1992); Herman Benjamim, *A insurreição da aldeia global contra o processo civil clássico. Apontamentos sobre a opressão e a libertação judiciais do meio ambiente e do consumidor* in *Ação civil pública lei 7.347/85 – Reminiscências e reflexões após dez anos de aplicação* 93 (E. Milaré, ed., São Paulo: Revista dos Tribunais, 1995).

[39] On this subject: REsp 28222/SP 1992/0026117-5 rel. Mina. Nancy Andrighi (Dec. 20, 2016), available at: https://ww2.stj.jus.br/revistaeletronica/ita.asp?registro=199200261175&dt_publicacao=15/10/2001.

[40] On this subject, *see* Luiza Dias Cassales, *Ação Civil Pública*, 48 Revista da Ajufe (1996); Benjamim 1995, at 94; Mazzilli 2011.

[41] Kazuo Watanabe, *Código Brasileiro de Defesa do Consumidor: comentado pelos autores do anteprojeto* 803 (8th ed., Rio de Janeiro: Forense Universitária, 2005).

[42] REsp 331403/RJ – Rel. Ministro João Otávio de Noronha, DJ 29/05/2006. Lawyers could only claim for something related to their professional group.

[43] Mazzilli 2011.

[44] Dinamarco 2001, at 60.

tops but that, due to printing errors, nullify the right to the prize; and also those consumers who purchase vehicles produced with factory defects; or people who take loans that contravene national legislation or omit essential information.[45]

Those who can take the initiative of filing claims against (or suing) the state companies etc. "represent" a group of persons, the community or the whole society. They are specifically mentioned or named by statutory law. In Brazil, we did not adopt the system of adequate legitimacy or standing.

The effects of the final decision on the case affect all those who are "represented" unless the decision is based on a lack of evidence. In this case, the claim can be presented again.

The inversion of the burden of the proof is also possible, that is, it is possible for a judge to decide not to apply the rule, according to which, each of the parties has to produce evidence of the allegations of fact that he or she made. These proceedings are normally employed in environmental matters, consumer law, and in general questions or problems related to financial institutions.

14. Costs and Funding

Both the proceedings pending before the Federal Courts and those pending before the State Courts incur costs and expenses. There is a federal law, Act of Law no. 9.289/1996, that regulates the matter from the perspective of the Federal Courts. Each state has its own laws that deal with the matter regarding their respective courts.[46]

Despite the variation of the amounts in dispute, the rule of the head provision of Art. 82 of the 2015 Code of Civil Procedure is that "…the parties have to bear the expenses of the acts they perform or request in the proceedings, paying them in advance, from the start of the proceedings until the final judgment, or in the execution proceedings, until the acknowledged right has been fully satisfied." In the same provision, there is an express proviso relative to the "provisions concerning free legal aid," which are dealt with in great detail in Arts. 98 to 102 of the same code and have been introduced to replace the old legislation, still from the 1950s, which dealt with the subject, and was expressly revoked by Art. 1.072, III, of the Code.

Therefore, the rule is that the expenses incurred by those acts be paid for *in advance* by the one who requests the performance of the act or even when the

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[45] TRF 2ª Região. Agravo em Ação Civil Pública 2006.02.01.004411-3, rel. Desembargador Federal Frederico Gueiros, DJ 13/06/2007.

[46] A recent survey reveals, for this purpose, the disparity that exists between the various Brazilian states, where it is possible to find, for the same claim value (the survey uses as a reference a claim of R$ 100,000.00, equivalent to US$ 25,000.00, using an exchange rate of R$ 4,00 to the US$ 1,00), a difference of almost R$ 7,000.00 (equivalent to US$ 1,750.00) in the payment of court costs between the States of Piauí (the most expensive) and the Federal District (the cheapest) (Dec. 20, 2016), available at http://www.migalhas.com.br/Quentes/17,MI235925,91041-PI+e+Estado+com+custas+judiciais+mais+caras+do+Brasil.

act is performed at the request of the Public Prosecutor's office as "inspector" of the legal system (*custos legis*). When the judgment is entered, it is determined who is responsible for the payment, which is, in accordance with the majority of jurists, based on *causality*, i.e. it is the one who gave rise to the *cause of action* who must pay the expenses and not necessarily the one who is defeated in court.[47]

According to Art. 84, procedural costs include the costs of procedural acts, reimbursements for trips, compensation of the retained expert and witness allowances. Besides those, counsel fees will also be determined in the judgment – known as loss of suit fees, – which will be paid upon conclusion to the lawyers themselves and not to the parties (Art. 85). The values of these fees vary, in disputes involving natural persons, from 10 to 20% of the amount in dispute and, when it involves legal persons, percentage that vary in the same range from 10 to 20% and from 1 to 3%, in accordance with the value involved in the action.

An important innovation introduced by the new Code of Civil Procedure in this regard is the possibility of increasing the loss of suit fees when there is an appeal. Although the sums cannot exceed the percentage limits mentioned, the idea is that the possibility of increasing the fees will lead to a reduction in the number of appeals.

As has already been mentioned, the new Code of Civil Procedure introduces extensive rules regarding free legal aid, thus establishing one of the chief constitutional principles of civil procedural law, Art. 5, LXXIV, of the Federal Constitution. According to the head provision of Art. 98, "a natural or legal person, whether Brazilian or foreign, who lacks sufficient funds to pay court costs, procedural costs and counsel fees will be entitled to free legal aid, pursuant to the law." Paragraph 1 of the same provision states that free legal aid includes: "I – judicial fees and costs; II – postage stamps; III – publishing expenses in the official press, waiving publication in other media; IV – compensation due to the witness who, when employed, shall earn a full salary from the employer, as if working; V – expenses incurred with genetic testing – DNA and other tests that may be deemed essential; VI – fees of counsel and court-appointed expert, and the compensation of the interpreter or translator appointed to submit the Portuguese translation of a document drafted in a foreign language; VII – the cost of preparing a statement of calculation, when required for instituting execution proceedings; VIII – the deposits required by law to lodge appeals, file actions and the performance of other procedural acts inherent to the exercise of the right of due process and the right to be heard; IX – the fees owed to notaries or registrars arising from the performance of registrations, declarations or any other notarial act required for the enforcement of a judicial decision or for the continuity of the judicial proceedings in which the benefit of free legal aid has been conceded."

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[47] While this is the understanding of the majority, one of the authors of this article has proposed that the subject be reanalysed in view of the important novelties introduced by the new CPC on this matter, including, but not only, § 2 of Art. 82. On this discussion, *see* Scarpinella Bueno, *Manual de direito processual civil*, at 145–150.

A claim formulated by a natural person is presumed to be true, with the certainty that if doubts arise and in other cases, the judge must make a decision regarding the request after duly hearing the other side, in accordance with the principle of *audi alteram partem*.

15. Enforcement Proceedings

The 1973 Code of Civil Procedure innovated when it unified the procedure and system for the enforcement of *judicial* and *extrajudicial* enforceable instruments.

Over the more than twenty years that the code was in effect, however, profound legislative changes were made and the distinction between the procedure and system of the two became redundant. The new Code of Civil Procedure ended up assuming this profound transformation, clearly distinguishing between what it generally called the "enforcement of the judgment" and the "enforcement proceedings."

The so-called "satisfaction of the judgment" must be understood to be the phase of the proceedings in which the judge's enforcement activities prevail aiming to realise that which was acknowledged in the judicial enforceable instrument. According to Art. 515 of the new Code of Civil Procedure, judicially enforceable instruments are: "I – decisions rendered in civil proceedings that acknowledge the enforceability of the obligation to pay a sum, to do, not to do, or to deliver something; II – the ratification by the court of a resolution by the parties; III – the ratification by the court of an out-of-court resolution of any nature; IV – the final judgment of distribution and the distribution certificate, exclusively in relation to the administrator, the heirs and successors, by way of partial or universal succession; V – the claim of the officer of the court when the court costs, emoluments and fees have been approved by a court order; VI – a final judgement of conviction; VII – an arbitral award; VIII – a foreign judgment confirmed by the Superior Court of Justice; IX – a foreign interlocutory decision after the granting of the exequatur of the letter rogatory by the Superior Court of Justice."

The rule is that, at the request of the judgment creditor, the debtor will be notified through his or her lawyer to pay, do, not do or deliver the things, in accordance with provisions of the judicially enforceable instrument. Should said determination not be complied with, enforcement procedures, which will vary according to the type of obligation, will be initiated. When dealing with obligations to do or not to do, the imposition of a coercive penalty is extensively regulated by the new Code of Civil Procedure. As regards the obligation to deliver a thing, the preferred means of enforcement is the search and seizure (for movable property) or the taking of possession (for immovable property). When the obligation refers to the payment of a sum, there is a broader range of techniques that seek to expropriate, within limits, the assets of the judgment debtor. Among these, the provisions of Art. 854 should be noted, with the so-called "*on-line* levy of execution," i.e. electronic, carried out with the exchange of information between the judge and the Banco Central do Brasil (Brazilian Central Bank),

the highest Brazilian monetary authority, postponing the testimony of the debtor until after the effective freezing of funds held by the debtor. When the levy of execution involves assets other than money, it is necessary to appraise them and to adopt measures for their alienation so that, with its acquisition or by raising the respective sum, the judgment creditor's claim will be satisfied. The preferred mechanism of expropriation of the new Code of Civil Procedure is the electronic auction (Art. 882).

The possible defence of the judgment debtor – known as "challenge" – is filed in the same proceedings and does not depend on the prior posting of a bond (required only for the suspension of the performance of enforcement acts).

The so-called "enforcement proceedings" are based on the *extrajudicially* enforceable instruments, understood to be those that do not depend on the declarations or agreement of the courts to be established and enforced. The instruments provided for in Art. 784 of the Code of Civil Procedure are the following: "I – drafts (bills of exchange), promissory notes, bills, bonds and cheques; II – public deeds or other public documents signed by the debtor; III – private documents signed by the debtor and by two (2) witnesses; IV – transaction instruments ratified by the Public Prosecutor's Office, by the Public Defender's Office, by the Attorney General's Office, by the lawyers of the parties to the transaction or by a conciliator or mediator accredited by the court; V – the contract guaranteed by a mortgage, pledge, antichresis or other secured interest and that guaranteed by a bond; VI – the life insurance contract in case of death; VII – the claim arising from emphyteusis; VIII – the claim, proven with documental evidence, arising from the rental of real property, as well as associated charges, such as condominium fees and expenses; IX – a certificate of overdue tax liability of the Tax Authorities of the Federal Government, State Governments, Federal District and Municipal Districts, corresponding to the liabilities registered pursuant to the law; X – the debts relative to ordinary and extraordinary contributions to a residential condominium, set forth in the respective condominium bylaws or approved at a general meeting, provided there is documentary evidence to prove them; XI – a certificate issued by a notary public or registry office relative to fees and other expenses due for acts performed by them, as determined in the fee schedule established by law; XII – all other instruments to which, by express provision, the law attributes enforceability."

In these cases, as the proceedings are initiated with the submission of the extrajudicially enforceable instrument by the judgment creditor – Arts. 798 and 799 of the new Code of Civil Procedure indicate the rules that must be observed in the drafting of the complaint, – the judgment debtor is to be *summoned* in order to perform the obligation, the deadline varying in accordance with the type of obligation. If the obligation has not been performed by the end of the deadline, the enforcement acts are commenced in an identical manner to the satisfaction of the judgment.

The defence of the judgment debtor is effected by means of the so-called "motion to stay de execution" the filing of which does not depend on the prior posting of a bond and does not automatically suspend the performance of enforcement acts.

In order to suspend the performance of the enforcement procedures, it is necessary to post bond, in addition to showing relevant grounds and losses that will be incurred by the judgment debtor. When dealing with the payment of a sum, the judgment debtor may choose, as an alternative to the filing of a motion to stay the execution, to deposit 30% of the value of the debt and request that the remainder be paid in six monthly instalments adjusted for inflation and with interest of 1% per month added, pursuant to art. 916. Hence, the precise terms of default on payments.

16. Arbitration and ADR

Brazilian jurists have, gradually, been advocating the need to give a broad interpretation to item XXXV of Art. 5 of the Federal Constitution, according to which "the law shall not exclude any injury or threat to a right from the consideration of the Judicial Power,"[48] to include in it not only access to state courts, provided by the judicial branch, but also other forms of dispute resolution, even if not in the sphere of the states or, more restrictively, not judicial.[49]

In this context, the paragraphs of Art. 3 of the new Code of Civil Procedure should be emphasised, according to which the use of *alternative* means of dispute resolution is expressly encouraged, with the explicit mention made of mediation, conciliation and arbitration, which *do not exclude* other methods to achieve the same end.

To achieve that goal, the new Code of Civil Procedure implemented profound changes to the structure of common procedure, making it a rule to summon the defendant no longer to file a defence but, otherwise, to appear at a conciliation and mediation hearing. The deadline for the answer to be filed, in order to strengthen the importance of that act, shall only start running upon the breakdown of the negotiations conducted at the hearing.

Such hearings, it is important to note, must be carried out at a location other than the judicial chambers – at the so-called "Judicial Centres for the Amicable Dispute Resolution" – and be conducted by mediators and conciliators, elevated, not by chance, to "officers of the court" by Arts. 165 to 175 of the new Code of Civil Procedure.

Notwithstanding, item V of Art. 139 is explicit in authorising the judge to "foster, at any moment, an amicable resolution, preferably with the assistance of court conciliators and mediators" as can be seen, for example, at the start of the trial. The reading of Art. 359 is rather significant in this regard: "At the outset of the trial, the judge shall attempt to reconcile the parties, regardless of any previous usage of other methods of amicable dispute resolution, such as mediation and arbitration."

On the other hand, during the *vacatio legis* of the new Code of Civil Procedure, there was the enactment of Law no. 13.140/2015, which governs extrajudicial

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48 Available at http://www2.senado.leg.br/bdsf/item/id/243334.

49 To this effect, *see* Wambier 2016, at 63; Scarpinella Bueno, *Manual de direito processual civil*, at 91–92.

mediation to be carried out by administrative persons[50]. Some amendments were also made to Law no. 9.307/1996, which governs arbitration, to broaden its scope, with special note to the viability of political and administrative persons opting for that way of resolving their disputes, which had been until that moment restricted, though not without some controversy, to private persons.

17. The Role of Academia

The situation of academia in Brazil is rather special. Its role is very significant. In Brazil, there are more than 1,400 law faculties. It is easy to figure out the quantity of professors needed. Among them all, not just a few become important figures. It is also interesting to mention that professors are usually also lawyers, judges, i.e., they have another occupation related to the practice. Although this can, according to the government bodies which control the quality of Brazilian universities, compromise academic activities, this is our reality with just a few exceptions.

Legal writers have a great deal of influence in the result of legal disputes. Academic books are referred to and sometimes, very often, extracts are quoted in judicial decisions. Very often, law suits contain legal opinions written by academics, which can have an expressive influence on the decision

An overview of the Brazilian situation shows that law is a concept supported by statutory law, case law and legal writing.

18. Statistics

The drafting of the new Code of Civil Procedure was not officially based on any statistics. Its amendments are much more the product of some consensus between scholars and practitioners than a response to statistical studies that preceded it, and that may have pointed to possible problems or bottlenecks in the system.

For that very reason, Art. 1.069 of the new Code of Civil Procedure determines that "The National Council of Justice shall periodically conduct statistical surveys in order to evaluate the effectiveness of the rules set forth in this Code," a rule which has been applauded by commentators of the new law[51].

With regard to the methods of alternative dispute resolution, our attention is also drawn to § 4 of Art. 167 of the new Code of Civil Procedure, according to which the results attained by conciliators, mediators, as well as by mediation and conciliation chambers are to be disclosed and assessed at least annually.

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[50] As it is a federal law, the rules contained in Arts. 35 to 40 concern federal administrative entities, that is, the Federal Government itself and its respective administrative entities. Arts. 32 to 34 of said Law, however, reveal the pragmatic nature of those rules for the federal entities with the aim of incentivising them to create, through their own rules, a similar system.

[51] Consult, among others, the following works: Wambier 2016, at 1.721.

However, the above affirmations do not mean that there are no statistics of procedure in Brazil. There are a number of initiatives of the National Council of Justice and of the courts themselves that allow for the analysis of statistics that enables one to draw conclusions, based on those facts, on the workings of certain modifications introduced more recently in the Brazilian system. This is the case of, for example, the statistics disclosed by the Federal Supreme Court regarding general repercussion, a true filter of the admissibility of the extraordinary appeal lodged before said court and which enable the visualisation of a notable reduction in the number of those appeals.[52]

Within the scope of the National Council of Justice, the survey named "justice in numbers" deserves mention due to its importance, being the main source of official statistics of the judicial branch and which, since 2004, has been publicizing "the reality of Brazilian courts in great detail with regard to structure and litigation, in addition to the essential indicators and analyses needed to support Brazilian Judicial Management."[53]

19. Comparative Observations

A quick word is needed to criticize a certain trend which exists now in Brazil to assert that our country is being transformed into a Common Law jurisdiction: it is by no means true. This is said because our New Civil Procedure Code (2016) creates three cases where the precedent is binding. These three precedents are those decisions given in lawsuits where the question of law is the same (absolutely the same) for a whole community, as usually happens in consumer law. So, according to the new CPC, the precedent has to be used as basis for all the future decisions on the same question of law.

On the one hand, this is not something entirely harmonious with civil law traditions. On the other hand, it is not enough to say we are becoming a Common Law country. In countries like Germany or Austria it would be considered "natural" or it would perfectly respond to fair expectations to respect a precedent given or produced to solve a question of law which involves hundreds people not only to solve their personal cases but also to solve future identical cases.

In Brazil, the rule that every judge should decide according to his or her own views on what would be the right interpretation of statutes was taken too far. This is why a few provisions were conceived by the legislator creating three hypotheses where it is obligatory to follow precedent, under penalty of "reclamação." *Reclamação* is a special kind of process specially conceived with the sole purpose of challenging decisions that disrespect the authority of courts, including these precedents.

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52 Available at http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=REAIProcessoDistribuido. Even so, there are, in April 2016, 41,326 extraordinary appeals and appeals derived therefrom pending trial before the Federal Supreme Court (Dec. 20, 2016), available at http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=acervoinicio.

53 Available at http://www.cnj.jus.br/programas-e-acoes/pj-justica-em-numeros.

Furthermore, the new Brazilian CPC (2016) has several provisions stating the obvious, such as: courts should produce consistent and stable case law.

A considerable number of our legal writers say that this has nothing to do with Common Law and they are right. These efforts of the legislator just show there is an evident intention of correcting this severe distortion: to say that a judge can base her or his decision on his own understanding of law does not mean at all that case law of superior courts must not be respected. And also, more importantly, superior courts cannot change their opinions very often. Case law must change to adapt law to social changes and those take decades and sometimes centuries to take place, not weeks or months.

So, all these new provisions, of the new Brazilian CPC which came into force on 18 March 2016, and which could at first sight be seen as a "trend" towards Common Law, are nothing but a way of controlling the lack of consistency of Brazilian law, the lack of uniformity and stability of case law and mainly the lack of predictability.

20. Cultural Observations

From a cultural point of view, it is worth noting that many of the novelties introduced by the new Code of Civil Procedure depend, in order to become effective, on a profound alteration in the performance of the professionals and scholars of Brazilian civil procedural law.

In this regard, two points should be highlighted: the stimulus given by the Code, from Art. 3, to the means of alternative dispute resolution and the observance of decisions rendered by the superior courts, regardless of their binding nature or of the express constitutional provision to this effect.

In relation to the first point, one should recall that the common procedure of the new Code of Civil Procedure introduces, as a rule, the service of summons upon the defendant to appear at a conciliation or mediation hearing. This act is so important that the deadline for the defendant to file his or her defence will only start running if a possible amicable resolution between the parties fails. In order for the rule to have effective applicability, it is important that law professionals, both the new officers of the courts, conciliators and mediators (Arts. 165 to 175 of the new CPC), are fully aware of the advantages and usefulness of said act.

As to the observance of the decisions of the superior courts, the change in culture and attitude must come from the courts themselves. For over fifty years, the Federal Supreme Court has been publishing precedents with the purpose of not only disclosing its understanding on the matters adjudged but also so that they, in some way, be observed by the other courts. However, there is no indication that this model has brought about any improvement or greater efficiency in the Brazilian civil procedure system, much to the contrary. As this constitutes a fundamental point for the success of the new Code of Civil Procedure, it is important for law professionals in

general establish the conditions required for the proper establishment, application and prevalence of these precedents.

21. International Matters and BRICS Cooperation in Civil Procedure Perspectives

The new Brazilian Code of Civil Procedure innovates when it expressly establishes rules of "international cooperation" in Arts. 26 to 41, including direct assistance.[54]

By "international cooperation" one means the set of techniques that allow two states to cooperate with each other for the enforcement, outside their borders, of court orders issued by one of them.

Art. 26 establishes that international cooperation be governed by Treaties to which Brazil is a party – and, in the absence of a Treaty, on the basis of reciprocity manifested by diplomatic means (§ 1), except in the case of the confirmation of a foreign judgment (§ 2),[55] – in compliance with the principles listed in its items: respecting the guarantees of the due process of law in the requesting State; equality of treatment of citizens and foreigners, resident or not in Brazil, with regard to access to justice and the prosecution of the actions, assuring legal assistance to the needy; procedural publicity, except in the cases of confidentiality as provided for in Brazilian legislation or in the requesting State; the existence of a central authority for the receiving and conveyance of the cooperation requests and spontaneity in the conveyance of information to foreign authorities.

International cooperation may have, in accordance with Art. 27 of the new Code of Civil Procedure, the following subject matters: summons, subpoenas, and judicial and extrajudicial notifications; the gathering of evidence and information; ratification and enforcement of decisions; the granting of urgent judicial relief; international legal assistance or even any other judicial or extrajudicial measure that is not forbidden under Brazilian law.

Conclusion

Currently, Brazil is living a very serious crisis both ethical and economic, in the political sphere, and the population puts all its hope in the judiciary branch. Brazilian

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[54] According to Art. 30 of the new Code of Civil Procedure, direct assistance may deal with, in addition to those arising from Treaties to which Brazil is a party, the following subject matters: "I – obtaining and furnishing information regarding the legal system and the administrative or court proceedings, whether pending or closed; II – gathering of evidence, unless the remedy is adopted in proceedings, pending abroad, over which Brazilian courts have exclusive jurisdiction; III – any other judicial or extrajudicial remedy not forbidden by Brazilian statutory law."

[55] The court with jurisdiction to ratify the foreign judgment and for the concession of the *exequatur* to the letters rogatory is the Superior Court of Justice (Art. 105, I, "i," of the Federal Constitution), which will, to these ends, observe both the procedure established in Arts. 36 and 960 to 965 of the new Code of Civil Procedure, and the provisions of its own Internal Regulations.

judges have a career, which begins by passing a public admission exam where there is no political bias. In recent years, they have shown that they are independent and entirely fulfil the needs and expectations of Brazilian society.

In the last twenty years, civil procedure has been experimenting with a deep and structural process of change. These changes have led to the creation of the new CPC (2016) which encompasses several novelties adapted to the Brazilian reality, even if sometimes clearly inspired in comparative law. The excessive quantity of lawsuits and existing appeals is a problem that no statutory law is able to solve. But, from another perspective, this means that access to justice is widespread in Brazil, which can evidently be seen as a positive aspect.

The authors hope that the general lines drawn have managed to achieve their aim, which is to enable foreign scholars of procedural law to become acquainted with Brazilian civil procedural law, its functions and the challenges that the new Code of Civil Procedure, which came into effect in March 2016, brought about for Brazilian civil procedure lawyers and scholars.

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OVERVIEW OF RUSSIAN CIVIL JUSTICE

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Contemporary Russian civil procedure is not a pure Continental model because it also has procedural features of the common law system, as well as some other original and exceptional features. This article examines the main aspects of Russian civil justice: its main principles; judicial organization, including the structure of the courts and the division between courts of general jurisdiction and arbitrazh (commercial) courts, and the Intellectual Property Court; sources of procedural law; bar organization; the jurisdiction of the courts; actions and proceedings; legal costs; evidence; administrative procedure; class actions; enforcement proceedings; and arbitration and mediation.

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Introduction

Similar civil procedural outlines exist today in Continental and Anglo-Saxon legal systems. Before addressing which attributes exist in Russia, it is necessary to note that contemporary Russian civil procedure is a mixed jurisdiction. Historically, it adhered to the civil law tradition.[1] The French Code of Civil Procedure influenced Russian pre-revolution (1917) civil procedural legislation.[2] During the Soviet era judges became much more active and this model was fairly labeled "the radical Communist solution" to the Continental civil procedure.[3] In Russia, the court could not act passively because of the widespread collective views in society.[4]

According to the Soviet patriarch of jurisprudence Andrei Vyshinsky, law is entirely and completely directed against exploitation and exploiters in the Soviet state; it is used as one of the means of the struggle for socialism.[5]

There are Continental features in Russian law such as case management, the absence of a jury in civil cases and the absence of class actions. Some common law features also exist in Russian civil procedure, for example the passive role of the judge in the process of proof-taking. Exceptional features of Russian civil procedure

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1 John H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 121 (1969).

2 Don W. Chenworth, *Soviet Civil Procedure: History and Analysis*, 67 Transactions of the American Philosophical Society 3 (1977).

3 Mauro Cappelletti, *Social and Political Aspects of Civil Procedure: Reforms and Trends in Western and Eastern Europe*, 69 Michigan Law Review 847 (1971).

4 Harold J. Berman, *Justice in the USSR: An Interpretation of Soviet Law* 216–220 (New York: Vintage Books, 1963).

5 Andrei Vyshinsky, *The Law of the Soviet State* 50 (New York: Macmillan, 1948).

are the role of the procurator in the civil process and the review of judgments in the "supervisory" instance.

In summary then, contemporary Russian civil procedure is not a pure Continental model because it contains features of the common law procedural system as well as some other original and exceptional features.[6]

The 1990s in Russia were marked by major political and economic reforms. Those significant transformations inevitably changed relations within society, and the legal regulations that were supposed to control them demanded a considerable change as well.

A grandiose legal reform which affected all branches of law was carried out. The transformations in the sphere of civil procedure which began in the early 1990s are still ongoing today and have included the introduction of new legislation, from the Civil Procedural Code of the Russian Federation to enforcement laws.

1. Distinction between the Types of Procedure

There are three different types of procedure: civil, arbitrazh (commercial) and administrative. Each type of procedure is regulated by a separate code. In addition to the Civil Procedural Code (2003), there are the Arbitrazh (Commercial) Procedural Code (2002) and the Code of Administrative Procedure (2015).

The Civil Procedural Code regulates procedure relating to the disputes arising from civil, housing, family, labor and other legal relationships. Arbitrazh (commercial) procedure relates to justice in the sphere of entrepreneurial (business) and other economic activities, and the settlement of economic disputes. Administrative procedure relates to the consideration of cases arising from public legal relations. For example, consideration of applications challenging legal regulations, cases relating to electoral rights protection or cases relating to the protection of the right to participate in a referendum by citizens of the Russian Federation.

Consideration also relates to cases in which the issue is to establish certain legal facts, the legal status of a person, the presence or absence of the indubitable rights which could be proved by a court decision. The *ex parte* proceeding also names the mandative proceedings as a proceedings arising from indubitable claims. For example, claims based on notarized transactions are considered mandative proceedings.

2. Brief Historical Perspective

Current Russian civil procedural law is the result of mixing the Soviet style of adjudication with the pre-revolutionary laws of the nineteenth century, as well as with modern international standards. Some features are unique, with their roots in

[6] Dmitry Maleshin, *The Russian Style of Civil Procedure*, 21 Emory International Law Review 545 (2007).

ancient Russian laws and traditions. Moreover, the specificity of the legal culture should also be taken into account.

Historically, Russian civil procedure has been close to the European continental system. Different parts of the Russian system were adopted in different historical periods: Byzantine law (9th–10th century); Swedish law (18th century); French law (18th–19th century); and German law (19th–20th century).

The first written legal act was the trade agreement entered into between Prince Oleg and the Byzantine Empire in 911. Byzantium had a significant economic, trade and cultural influence on the Kievan Rus during that time. Slavs adopted many Byzantine legal institutions, especially criminal procedure and evidence.

Codified acts play the key role in the subsequent history of Russian civil procedure. Some of them are completely devoted to civil legal proceedings, some contain only a special section on this matter. Those documents are:

– Russkaia Pravda, 11th century;
– The Pskov Judicial Charter (Pskovskaia Sudnaia Gramota), 1397;
– The Novgorod Judicial Charter (Novgorodskaia Sudnaia Gramota), 1471;
– The Law Code (Sudebnik), 1497;
– The Law Code (Sudebnik), 1550;
– The Sobornoe Ulozhenie, 1649;
– The Civil Procedure Code of the Russian Empire (Ustav Grazhdanskogo sudoproisvodstva), 1864;
– The Civil Procedure Code of the RSFSR (Russian Soviet Federative Socialist Republic), 1923;
– The Civil Procedure Code of the RSFSR (Russian Soviet Federative Socialist Republic), 1964;
– The Civil Procedural Code of the Russian Federation, 2003.

Russkaia Pravda contains a number of rules on civil evidence and litigation. The power to consider cases belonged only to the Prince. Some rules on evidence were original, some were adopted from Byzantine law.

With the adoption of Christianity, canon law (also from Byzantium) began to play a very important role. It regulated marriage, divorce and all family conflicts.

Two key acts entered into force in the fourteenth–fifteenth century: the Pskov Judicial Charter (Pskovskaia Sudnaia Gramota) of 1397 and the Novgorod Judicial Charter (Novgorodskaia Sudnaia Gramota) of 1471. They were enacted despite the dominion of the Tatar-Mongol Yoke; most legal procedures originated from the Russkaia Pravda, and Mongol litigation practices were not adopted.

The Judicial Code (Sudebnik) of 1497 and the Judicial Code (Sudebnik) of 1550 started to regulate the judicial procedure in a more detailed manner than previously. The main judicial power belonged, as before, to the Prince. There were also regional governors who had the right to consider some cases, but their decisions could be appealed to the Prince. There were also different judicial officials who assisted in the

consideration of cases. The main evidence used in civil cases was witness testimony. Judicial duels were also widespread. Proceedings during that time were adversarial.

The Sobornoe Ulozhenie of 1649 is the most important legal act of medieval Russia. It is an example of the first structural codification of civil procedural law in Russia. It was influenced not only by previous norms based on Byzantine law, but also by the legislation of the Lithuanian Code of 1588. That same Code, moreover, directly applied in a number of north- and south-western Muscovite territories.[7] The proceedings remained adversarial in nature.

The next important step was the modernization of the Russian legal system by Peter the Great. Modernization during that period is usually described as Westernization. Sweden served as an example for many changes, including legal changes. Civil procedure was also updated in accordance with Swedish legislation. This ended the adversarial model and introduced an inquisitorial model.

The Great Judicial Reform of 1864 was a major legal event in the pre-revolutionary period. It was initiated by Tsar Alexander II and is treated as a part of his Great Reforms in accordance with his political and economic reforms agenda. It abolished previous legislation and established a new model. Civil procedure became oral and adversarial. Justices of the peace and professional attorneys were introduced. Courts and judges acquired genuine independence. Practices of litigation changed radically.

The Reform concerned the judicial system; but civil and criminal procedure, as well as civil and criminal laws, were also reformed within a few years of its launch. It was a very important reform for Russian society. Most legal institutions were not only updated, but re-established. A new legal landscape was created for the huge country.

The Reform touched the territory not only of contemporary Russia, but also of the modern countries of Poland, Finland, Ukraine and Belorussia, and the states of the Caucasus and the Baltic regions. Its legal background has not only Russian national juridical roots, but also French, German, Austrian and Italian influence. Therefore, the Reform has not only national (Russian) dimensions, but also a common trans-European sense. It should be seen as a common European and Eurasian legal event, one that influenced the legislation and legal culture of many countries in the region during a substantial time period. For example, the Russian Civil Procedure Code was in effect until 1933 in Poland[8] and until 1940 in Lithuania[9] (sixteen and twenty-three years after the collapse of the Russian Empire). Most of its parts were copied, with only the names changed, by the Soviet authorities during the drafting of the USSR codes.

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7 Maxime Kovalevsky, *Modern Customs and Ancient Laws of Russia* 51 (London: David Nutt, 1891).

8 Piotr Rylski & Karol Weitz, *The Impact of the Russian Civil Judicial Proceedings Act of 1864 on Polish Civil Proceedings*, 2(4) Russian Law Journal 82 (2014).

9 Dalia Mikulėnienė & Valentinas Mikelėnas, *Reception of Russian Statute of Civil Procedure of 1864 in Lithuania during 1918–1940*, 2(4) Russian Law Journal 105 (2014).

The Great Judicial Reform is treated as one of the most successful innovations of Tsar Alexander II. It was undertaken owing to the influence of the West on Russia.[10] It began in November 1864, but it was preceded by more than ten years of intricate drafting work. The drafting committee was established at the beginning of the 1850s and included a number of well-known Russian lawyers. The first result of this work was the prepared conception of innovations that was adopted by the Tsar on 29 September 1862. The document was titled "General Provisions of Judicial Reforms," and after publication it received huge public discussion: 446 proposals were submitted to the drafting committee from judges, prosecutors and attorneys. Final drafts were signed by the Tsar on 20 November 1864. Four statutes were adopted: Statute of Judicial Institutions; Criminal Procedure Code; Civil Procedure Code; Statute on Punishments. A few years following implementation of the reform all of the drafting papers were collected into seventy-four volumes.

The drafts were greatly influenced by the ideas of the Russian jurist Michael Speransky (1772–1839) who tried to reform Russian law in 1820s, as well as by the new European codes of the second half of the nineteenth century. The main idea of the Reform was expressed by Alexander II in his statement that he wished "to introduce into Russia legal proceedings that are swift, just, merciful and equal for all" (Decree of 20 November 1864).

The new Russian judicial system of that time was based on the following principles: an independent judiciary, oral and adversarial trial, equality of all before the law, introduction of legal representation, an educated legal profession, an independent bar association, jury trial for serious criminal cases and justices of the peace.

Judicial Reform marked a shift in Russian from an amorphous, corrupt system of procedure to an independent, modern system as liberal as any nation in Europe.[11] However, two aspects of the Reform can be viewed in a negative light. First, the Reform was realized in the main towns of the country and did not extend the court system into the villages, where traditional peasant justice continued to operate with minimal influence from the government. The new court system was effective, but it was realized only with respect to 20 percent of the population, because 80 percent were peasants.

Second, the codes did not have effective practice. They were among the best European codes, but were unsuccessful in Russia. One may reasonably agree with many Russian and foreign scholars who argue that norms which are successful for Europe do not necessary work properly in Russia.[12] The Civil Procedure Code is

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[10] Vladimir Przhilenskiy & Maria Zakharova, *Which Way is the Russian Double-Headed Eagle Looking?*, 4(2) Russian Law Journal 12 (2016).

[11] Brian Conlon, *Dostoevsky v. the Judicial Reforms of 1864: How and Why One of Nineteenth-Century Russia's Greatest Writers Criticized the Nation's Most Successful Reform*, 2(4) Russian Law Journal 8 (2014).

[12] Berman 1963, at 216.

a good example. Twenty years after its adoption, a special drafting committee was established to prepare a new code.

In spite of these negatives, the Reform made the Russian judicial system open, adversarial and more professional. It could be treated as the starting point of a new period in the history of the Russian judiciary that continues to the present day. Contemporary Russian civil and criminal procedure, notary, justices of the peace, juries, etc.: all of the major aspects of these institutions have their roots in 1864.

Soviet civil procedure (1917–1991) was radically inquisitorial. Soviet judges were more active than their European civil law counterparts. Proceedings were overseen in accordance with the principle of "objective" (material) truth. Objective truth is usually used in civil procedure doctrine in contrast to formal truth. Material truth was an important part of Soviet legality. This principle was crucial in evidence gathering. The main task was to find objective truth. A judge was obliged to ascertain the truth and, therefore, had the power to obtain any evidence that he needed to consider the case.

In addition to the judge's activity, there were some other particular features of Soviet civil procedure. Firstly, procurators had immense powers. The Procurator General could initiate the inspection of any case considered by a court. Secondly, there was an additional appeals stage called "supervisory proceedings." Supervisory proceedings were similar to cassation but could be initiated by certain official authorities as well as the parties.

The new Constitution of the Russian Federation was approved in 1993. It was adopted by national referendum on 12 December 1993 with 54.5 percent of the vote, and it took effect on the day it was published – 25 December of the same year. The new Constitution set out the fundamentals of government as well as proclaiming the rule of law, the ideological neutrality of the state, political pluralism, competitive elections and separation of powers, and guaranteeing fundamental human rights to the Russian people. It also proclaimed a number of important principles of civil procedure such as the independence of judges, adversarial proceedings and orality.

The new Civil Procedural Code was adopted in 2003 after ten years of official drafting. There is also the Arbitrazh (Commercial) Procedural Code (2002) and the Code of Administrative Procedure (2015).

International accords are also a source of civil procedural law. Russia is a party to nearly forty multilateral and bilateral international treaties, conventions and agreements on legal aid rendering in civil and commercial cases, binding the Russian Federation and more than one hundred signatory states with international obligations.

Some of the most considerable multilateral international treaties containing legal procedural norms are the following:

- Hague Convention of 1 March 1954, on Civil Procedure;
- Hague Convention of 15 November 1965, on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters;

– Hague Convention of 18 March 1970, on the Taking of Evidence Abroad in Civil or Commercial Matters.

The Soviet Union joined the Convention of 1954 in 1967, and the Russian Federation joined the Conventions of 1965 and 1970 in 2001. Forty-one states currently participate in the Hague Conventions. A considerable number of bilateral international treaties were signed by the Soviet Union, and Russia is a party to those as the successor state.

3. Judicial Organization

3.1. General Information

The Russian judiciary is regulated by special chapter 7 "Judiciary" of the Constitution as well as by the special laws "On the Judicial System" (1996), "On Courts of General Jurisdiction" (2011), "On Commercial Courts" (1995) and "On the Status of Judges in the Russian Federation" (1992).

All judges of the federal courts are appointed to their position according to Article 128 of the Constitution. Depending on the level of the courts, some judges are appointed by the Federation Council of the Federal Assembly of the Russian Federation and others by the President of the Russian Federation. In order to become a judge a person must be a citizen of Russia, be at least twenty-five years old, have a university degree in law and have at least five years of legal service. Before presenting the applicant for the judge's position, there is a preliminary coordination of the candidacy with the qualifications commission of judges. The Highest Qualifications Panel of judges is a non-governmental organization of the Russian judiciary that plays a key role in the appointment, promotion and dismissal of judges.

The Chairman of the Supreme Court of the Russian Federation is nominated by the President of Russia and appointed by the Federal Council of the Federal Assembly of the Russian Federation for a six-year term. The deputy chairmen of the Supreme Court and other judges of the Court are appointed similarly, but the President's nomination is based on the nomination by the Chairman of the Supreme Court.

All other federal judges – from chairmen of the regional courts to judges of district courts – are appointed to their positions by the President upon nomination by the Chairman of the Supreme Court in coordination with the qualifications commission of judges and with the opinion of the regional parliaments.

According to the Constitution (Art. 118), justice in Russia is administered by the courts alone. The independence of judges is considered a separate constitutional principle (Art. 122) as it concerns the personal security of the judge, members of his family, his dwelling and property, and also his office. The judge is granted the right for the storage and carrying of firearms. The financing of the courts comes from the federal budget and must provide for the possibility of the full and independent implementation of justice. Additionally, there is a special law "About Additional

Guarantees of Social Protection of Judges and Workers of Courts' Offices of the Russian Federation" (1996).

3.2. Structure of the Court System

Today the Russian civil judiciary is composed of the courts of general jurisdiction, military courts, commercial courts and the Intellectual Property Court. The main law governing the fundamental principles of the Russian court system is the Law "On the Judicial System of the Russian Federation" (1996).

Arbitrazh (commercial) courts are charged with settling economic disputes, while courts of general jurisdiction handle disputes between individual citizens. The arbitrazh court system was established in 1991 after the collapse of the Soviet Union and the adoption of a market economy. Arbitrazh courts are structured as a three-tier system. The main law governing the activity of arbitrazh courts is the Law "On Arbitrazh Courts in the Russian Federation" (1995). Arbitrazh courts also have exclusive jurisdiction over the recognition and enforcement of foreign court decisions and arbitral awards. There are four levels in the system of arbitrazh courts: 85 regional courts, 21 appellate courts, 10 territorial courts and the Supreme Court.

The competence of the courts of general jurisdiction includes civil disputes, appeals of administrative actions, labor and employment disputes, family law and consumer protection, among other types of cases. There is a general rule that all cases not referred to the arbitrazh courts are handled by the courts of general jurisdiction. The main law governing the activity of the courts of general jurisdiction is the Law "On the Courts of General Jurisdiction of the Russian Federation." There are three levels in the system of the courts of general jurisdiction: district courts, regional courts and the Supreme Court. District courts are established based on the administrative divisions of a region and regional courts operate on the level of the region (i.e. a subject of the Federation). There are eighty-five regions in Russia.

Justices of the peace handle property disputes with an amount of claim under 50,000 RUR and some types of family cases.

Military courts deal with civil cases that fall under the jurisdiction of the courts of general jurisdiction that occur while service in the military services is involved.

Owing to its adherence to international treaties, Russia is subject to the jurisdiction of the European Court of Human Rights and the Court of the Eurasian Economic Community.

3.3. Supreme Court of the Russian Federation

The Supreme Court is the highest court for all courts in Russia. It was established in 1923 as the Supreme Court of the USSR and in 1992 it began to function as the highest court of the Russian Federation.

Depending on the case, the Supreme Court may handle appeal, cassation and supervisory cases, as well as act as a court of first instance. One of the tasks of the

Supreme Court is the harmonization of judicial practice. In carrying out this task it reviews and analyzes court practice, and as a result of this activity it may issue clarifications and interpretations of the law.

The most important and widely reported legal event in Russia of the last five years was the reform of the Supreme Court, which in fact saw the unification of the Supreme Court and the Supreme Arbitrazh (Commercial) Court.

Until 2013 there had been two parallel supreme courts in Russia: the Supreme Court and the Supreme Arbitrazh (Commercial) Court. This changed in 2014 when the two courts were united. This reform was undertaken at the initiative of President Vladimir Putin under the bill titled "About the Supreme Court of the Russian Federation and Prosecutor's Office of the Russian Federation," which regulates the structure of the Russian judicial system, and which changed the Constitution for the second time since its adoption. The Supreme Arbitrazh (Commercial) Court was abolished and its functions transferred to the Supreme Court. This reform idea proved highly controversial. With advantages and disadvantages, it was hotly debated among lawyers and members of the judicial community, attracting criticism from some. More than 100 law offices signed a petition to stop the reform's progress, arguing that the work of the Supreme Arbitrazh (Commercial) Court had been most effective. On the other hand, authors of the reform asserted the need to eliminate differences and contradictions in the judicial practice of both supreme courts.

The new united Supreme Court of the Russian Federation began its work in August 2014. It has a new structure and consists of 170 judges, including the Chief Justice, and chairmen of six chambers, which are: an Appeals chamber, a Judicial chamber for criminal cases, a Judicial chamber for civil cases, a Judicial chamber for economic cases, a Judicial chamber for administrative cases, and a Military chamber. The Supreme Arbitrazh Court had its functions suspended in August 2014, but the entire arbitrazh court system is still working. The Judicial chamber on economic cases acts as the final instance for economic cases considered in arbitrazh (commercial) courts.

The Plenum of the Supreme Court consists of all judges of the Supreme Court. The Plenum deals with the most complicated matters regarding the functioning of the general jurisdiction courts and the administration of justice. The Plenum reviews and clarifies information on the application of legal practice and decides matters on the introduction of legal initiatives as well as on requests to the Constitutional Court of the Russian Federation regarding constitutional law and the verification of other legal acts. The Plenum also approves the composition of the judicial chambers, the panels and the secretary of the Plenum, and the Scientific and Consulting Council under the Supreme Court of the Russian Federation. The Prosecutor General and the Minister of Justice can participate in the Plenum sessions. They or their substitutes have the right to make correspondent introductions to be heard during the Plenum sessions. They also have the right to express their opinions on the matters in discussion. Plenum sessions should be organized to take place at least once every four months.

The Presidium of the Supreme Court is the highest and the final judicial instance for cases viewed under general jurisdiction. The Presidium consists of the Chief Justice and his deputies. Among the members of the Presidium of the Supreme Court are some of the most respected judges of the Supreme Court. The total number of Presidium members is thirteen. The composition of the Presidium is approved upon introduction by the President of the Russian Federation, based on the presentation of the Chief Justice and a positive resolution by the Highest Qualification Panel of judges. The Presidium of the Supreme Court hears cases when the majority of its members are present. The Supreme Court has original jurisdiction in certain cases. Those cases include: challenges to individual acts of the Federal Assembly and decrees by the President of Russia and the government of Russia; challenges to delegated legislation of governmental agencies; termination of political parties and all-Russian NGOs; challenges to actions of the Central Electoral Commission of Russia when organizing presidential elections, State Duma (Russia's parliament) elections or referendums. The Supreme Court may also hear criminal cases against members of the Federation Council of Russia and the State Duma, and federal judges, at its discretion. Presidium sessions should be organized to take place at least once each month.

The Academic Consultative Council is a body created to assist the Supreme Court in various legal and academic matters. It comprises members of the Supreme Court itself, academics, practicing lawyers and law enforcement officers. Its composition is approved by the Plenum; it is presided over by the Chief Justice. The Scientific and Consulting Council elaborates scientifically based recommendations on the most complex and important issues of judicial practice. These recommendations may be elaborated as preparation for the clarifications by the Plenum on issues of judicial practice, law projects and preparation of other legal acts, and in respect of specific case trials.

There is also a large number of clerks working in agencies and departments who deal with matters such as the analysis of judicial practice, legislation, personnel and state services, administration, planning and finance, economics, legal information and international law.

3.4. Intellectual Property Court

The Intellectual Property Court (IP Court) is a specialized Russian court. It acts as a part of the commercial courts system. The scope of its competence covers disputes connected to intellectual rights.

This category of disputes is notable not only for the complexity of the legal analysis but also for the complexity of technical issues connected with the specifics of intellectual rights. Handling a case not only requires serious experience in legal practice but also requires skills in technical spheres. The judge considering such a case usually needs to understand some technical issues connected with intellectual property rights. The specialized IP Court provides efficiency of judicial proceedings by

means of specialization of judicial practice in this area. Narrow specialization of judges increases the quality of judicial work, and reduces the consideration time of a case.

The Russian Intellectual Property Court was established in 2011. However, the idea of a specialized IP court was announced for the first time in the late 1980s. Prior to its creation, there were a number of drafts on this topic and even some laws supported this idea and contained the provisions concerning the necessity to establish a specialized IP court. The creation of the Patent Court of the USSR was stipulated in the 1988 Law "On Inventive Activity in the USSR" (Arts. 55, 56), in the 1991 USSR Law "On Inventions in the USSR" (Arts. 14, 15, 25, 42, 43), in the 1991 USSR Law "On Industrial Models" (Art. 26), in the 1991 USSR Law "On Trademarks and Service Marks" (Art. 32). The USSR Law "On the Patent Court of the USSR" did not come into force. The Concept of Judicial Reform in the Russian Federation (1991) designated a need for court specialization and judicial specialization. The 1992 Law "On Trademarks" provided for the creation of the Patent Court of the Russian Federation. However, the legislator refused this idea in favor of an administrative order on dispute settlement in this area. In 2010, the project of the Federal Constitutional Law "On Patent Courts of the Russian Federation" providing for the formation of an independent patent court system was brought to the State Duma, but was not accepted. The initiative for creating today's Intellectual Property Court was that of the Supreme Commercial Court of the Russian Federation, which even adopted a special Plenum Resolution in 2013 on this court's functioning.

The IP Court sits in Moscow. The structure of the Court consists of the presiding judge, two deputies, a presidium and two judicial panels. There is also an Academic and Advisory Council. The Court uses the Arbitrazh (Commercial) Procedural Code as the procedural rules for considering cases.

The IP Court acts as both a court of first instance and a court of cassation. Despite the fact that the IP Court is part of the commercial court system, the criteria of jurisdiction of commercial courts do not apply to it: its competence does not depend on the nature of the dispute (economic or personal) or on the status of the subject to a dispute (citizen, legal entity or sole trader).

As a court of first instance, the IP Court considers: cases of contest of legislative acts of the federal government in the sphere of intellectual property; and cases of disputes on intellectual property activity. As a court of cassation, it considers: cases previously considered in the IP Court as a court of first instance; and cases in the sphere of intellectual property decided by arbitrazh (commercial) courts.

3.5. Juries

Jury trial is one of the controversial questions of the Russian legal system. Jury trial was first introduced to Russia in the second half of the nineteenth century. It was a part of the Great Judicial Reform of 1864, together with the introduction of professional judges and attorneys, notaries public, and civil and criminal procedural reforms.

Anglo-Saxon legislation served as the model for the Russian jury at that time. These early jury trials were only implemented in Saint Petersburg and Moscow. Only men could be appointed as jury members. The court with jury had the power to consider 410 offenses according to the Russian Criminal Code. That is around 20 percent of all offenses. In 1878, several offenses were excluded from the competence of the jury, e.g. murders of officials and breaches of the peace. A jury consisted of twelve persons; it was independent from the professional judge and did not participate in civil cases.

In 1917, jury trials were abolished by the Soviet government and lay assessors replaced juries. This model was borrowed from the German Schöffen model. Two lay assessors considered criminal and civil cases together with a single professional judge. They served for a term of two and a half years. In contrast to the jury member, the Soviet lay assessor had the power to consider, together with a judge, not only the determination of a fact, but also the meaning of a law.

In 1993, jury trial was reintroduced in Russia by the Constitution (Arts. 20, 32, 47, 123). The current Russian jury system is a mix of the nineteenth century-model and Anglo-Saxon legislation. A jury's jurisdiction is limited to aggravated murder, racketeering, aggravated bribery and crimes against justice. Juries are not involved in civil cases and cannot consider crimes against the state.

At trial, a jury consists of twelve members. They are selected from a list of fifty candidates who must be at least twenty-five years of age and must not have criminal records. The judge pronounces the decision in the case on the basis of the jury's verdict. In December 2015, President Putin proposed reducing the number of jurors to between five and seven.

Here are some interesting jury-related statistics. Pilot juries were implemented in 1993–1994 in nine federal regions. Currently, jury trials operate in all regions. The last region to introduce trial by jury was Chechnya in 2010. In 1993, juries considered two cases, in 1994 they considered 173 cases. Currently they consider around 500 cases annually, which is approximately 1 percent of all criminal cases.

3.6. Judicial Statistics

In Russia in 2013 there were around 2,500 courts of general jurisdiction and 111 arbitrazh (commercial) courts; and around 30,000 judges, including 4,000 arbitrazh (commercial) judges and 7,400 justices of the peace.

Cases in arbitrazh court, whether in a court of first instance, appellate instance or cassational instance, last around nine months. In practice, the court may accelerate the proceedings and the claimant may not pass through all judicial stages, so cases often last around five or six months. Cases in a court of general jurisdiction last two or three months for a simple case, such as one for recovery of costs for damage caused by a car accident, and can last some years for complicated cases, such as one over inheritance or a real estate dispute, but generally last around six to eight months.

4. Stages

There are several stages of the court proceedings.

4.1. The Institution of a Civil Case

The institution of a civil case in court can be carried out by submission of a claim, complaint or statement. The judge is obliged to decide on the initiation of proceedings in a case within five days from the moment of receipt of the claim. The judge issues a ruling by which the civil case is instituted in the court of the first instance. Generally, all the necessary steps for the acceptance of the claim and institution of a civil case have to be taken on the same day the plaintiff appealed to the court.

When accepting the claim the judge has to check whether the person concerned has the right to an appeal to the court for judicial protection and whether it is carried out according to a certain due process. The conditions for the initiation of the proceedings are:

1) following a pre-trial dispute resolution procedure by the plaintiff;
2) jurisdiction over the subject matter to a particular court;
3) procedural capacity of the plaintiff;
4) having the authorities for the administration of the case;
5) following the requirement of a written form of the claim;
6) payment of the state tax.

If any of these conditions is missing, the judge has either to return the claim, or to refuse its acceptance, or to leave the claim without progress.

5.2. Preparation for the Trial

The institution of a civil case is followed by the second stage – preparation for the trial. The purpose of this stage is to provide the prompt and correct adjudication of the case within one court session, to eliminate the judicial red tape and bureaucracy in legal proceedings. This stage consists of the following procedural actions.

The plaintiff transfers to the respondent a copy of the evidence, and files motions for the discovery of the evidence if it cannot be received without the aid of the court.

The respondent can clarify the claim and the actual grounds of the claim with the plaintiff, present the objections to the claim before the plaintiff and the court, transfer the evidence that proves the objections and file motions for the discovery of the evidence if it cannot be received without the aid of the court.

During the preparation stage the judge:

– guides the proceedings and explains to the parties their procedural rights and duties;
– examines the plaintiff or his attorney on the claim and offers to introduce the additional evidence, if necessary;

- examines the respondent on the circumstances of the case, determines whether there are objections against the claim and what the basis is for the objections;
- resolves an issue of the co-plaintiffs, co-defendants and the third parties joining the proceedings, an issue of the replacement of an improper defendant, or an issue of joinder or separation of separate claims;
- takes measures to reconcile the parties, to reach the settlement agreements and explains to them the right to apply to the arbitration court for dispute settlement;
- informs the persons and the organizations concerned on the time and the place of the trial;
- resolves an issue of the summon of witnesses;
- commissions an expert assessment and the experts;
- resolves an issue of subpoena to appear as an expert or a translator;
- discovers the evidence which parties cannot receive independently on request of the parties and persons participating in the case and other persons participating in the case;
- makes view of the premises;
- takes provisional measures application;
- appoints the preliminary court session.

4.3. Trials

The third stage is the trial. In this stage consideration of the merits takes place and usually it ends with adjudication. Trials consist of four parts: (1) preparatory part; (2) consideration of the case on the merits; (3) judicial pleadings; and (4) adjudication and announcement of the decision. All of them, having a certain independence, are closely connected and consistently follow each other.

The task of the court in the preparatory part is to examine whether there are the necessary conditions for the trial in the particular court session. For this purpose the court has to resolve three issues: (1) whether consideration of the case is possible with the particular composition of the court; (2) whether hearing of the case is possible if any of the persons participating in the case are not present during the court session; and (3) whether consideration of the case is possible with the present evidence.

At a certain time the chairman opens the court session and announces which case is subject to consideration. Then the court session secretary reports who from the persons summoned before the court is present, whether absent participants were informed about the case hearing and what the reasons for their absence are. In practice, these procedural actions are quite often made by the chairman himself.

The witnesses present leave the courtroom prior to their interrogation. It is explained to them that they will be recalled into the courtroom for testifying. The chairman ensures measures so that the witnesses interrogated cannot communicate with others not interrogated.

The chairman announces the composition of the court – the prosecutor for the case, the attorneys of the parties, the third parties, the expert, the specialist, the translator, the court session secretary – and explains their right to self-recusals and recusals. The judge, the prosecutor, the court session secretary, the expert, the specialist and the translator cannot participate in the trial and are subject to recusal if they have a personal, direct or indirect interest in the outcome of the case or if there are other circumstances raising doubts as to their impartiality. The judge cannot hear the case if (1) in the previous consideration of the same case he participated as a prosecutor, attorney, witness, expert, specialist, translator, court session secretary; (2) he is the relative of any participant in the case, or their attorney; or (3) he has a personal, direct or indirect interest in the outcome of the case or if there are other circumstances raising doubts as to the objectivity and impartiality of the judge.

The chairman asks whether the participants have any motions or statements. If there are any statements or motions on evidence discovery or on other issues connected with the case trial, the court is obliged to hear the opinion of other participants in the case. The statements and motions are resolved by issuing a court ruling, by which the motions are granted or dismissed. These rulings have to be reasoned. The judge is obliged to announce the issued ruling immediately.

The second part of the trial – consideration of the case on the merits – begins with the report of the chairman. In the report, the judge has to state briefly: (1) who the plaintiff is, who the respondent is and what the grounds for the claim are; (2) whether there are written objections of the respondent and what their essence is; and (3) all the evidence available in the case.

All administrative actions made by the parties in the courtroom have to be recorded accurately. The plaintiff's statement of renunciation of the suit, recognition of the claim by the respondent or the conditions of the settlement agreement of the parties have to be placed on record and signed, respectively, by the plaintiff, the respondent or both parties. If the administrative actions mentioned are expressed in the written statements addressed to the court, these statements have to be added to the case materials and placed on record.

For the sake of ascertaining to the fullest extent possible the facts and circumstances, the persons participating in the case are granted the right to ask each other questions. The questions are set with the permission of the chairman, who has to ensure that the questions concern the merits of the considered case. The judge rejects the questions which do not concern the merits of the considered case.

Having heard and having announced the explanations of the persons participating in the case, the court has to establish the sequence of further evidence discovery, an order of interrogation of witnesses, experts and the order of discovery of other evidence. The court resolves this issue, having listened to the opinions of the persons present and participating in the case. Most often, the court begins the evidence discovery with the interrogation of witnesses. Each witness is interrogated separately.

The chairman, having revealed the relation of the witness to the persons participating in the case, invites the witness to report everything that he or she knows personally that relates to the case. The witness testifies in a free form about the circumstances he or she knows. After the testimony the witness can be asked questions. The party and the party's attorney who called for the witness ask first, and then the other persons participating in the case and their attorneys may ask their questions. The witness called at the initiative of the court is asked by the plaintiff first. Judges can ask the witness questions at any time. At the interrogation of witnesses under the age of fourteen and witnesses between the ages of fourteen and sixteen by court order their teacher will be called. In case of need parents, adoptive parents, trustees or curator are called. The mentioned persons can ask questions of the witness with the permission of the chairman.

For the sake of the protection of personal correspondence, written evidence can be revealed (announced) and investigated in a public hearing only with the consent of the person who is the author of the correspondence. Otherwise a private hearing will take place and the court will issue a special ruling.

The court examines the material evidence, and it is shown to the persons participating in the case.

Unlike the former Civil Procedure Code of 1964, the new Code allows examination of audio or video recordings during the court session.

After the examination of all the evidence the chairman gives the floor to the prosecutor. The prosecutor draws general conclusions on the merits of the case. The prosecutor has to:

- briefly state the public importance of the considered case;
- analyze in detail the examined evidence and specify which evidence can be considered reliable;
- state which facts were established in court and which should be considered unspecified.

To conclude, the prosecutor is obliged to refer to the legal norms that have to be applied in the consideration of the case, and to specify how in his opinion the case needs to be adjudicated based on the presented norms.

After the conclusions of the prosecutor, the judge asks the parties to the case or their attorneys whether they wish to present additional explanations. In the absence of such statements, the chairman announces the consideration of the case on the merits to be completed, and the case passes to the judicial pleadings.

The next part of the court proceedings – the judicial pleadings – aims at summing up the results of the examination of the evidence. The persons participating in the case state and give reasons for their conclusions about which evidence should be considered reliable, which facts of the case should be considered established and which unspecified, what the content of the dispute is, which law should be applied and how the case should be adjudicated.

The judicial pleadings consist of the statements of the parties to the case and their attorneys. In the judicial pleadings the plaintiff and his attorney come first, then come the respondent and his attorney. Following the statements of all participants in the judicial pleadings, they can make remarks regarding their statements. The right of giving the final remarks always belongs to the respondent and his attorney. The participants in the judicial pleadings have no right to refer to circumstances that were not investigated in the court session, nor to refer to the evidence that was investigated. After the judicial pleadings the chairman announces that the court will retire to chambers to consider its decision.

The next part of the trial is the delivery and announcement of the decision. During the discussion and the delivery of a decision only the judges who are part of the composition of the court for the case are allowed in chambers. The presence of other persons in chambers is not allowed. Such order creates the conditions for excluding additional pressure on the judges during adjudication. Violation of the secrecy of meetings of judges is the unconditional grounds for the reversal of judgment. All the issues arising during the trial are resolved by the means of majority voting. When considering each issue, none of the judges has the right to abstain from voting. A judge not in agreement with the solution of the majority can state a dissenting opinion, which is added to the case material.

In chambers, the judges have to analyze and evaluate the seized evidence based on comprehensive, complete and objective examination of all the facts of the case presented in the court session, being guided only by the law and their sense of justice.

The court adjudicates the case based on the requirements declared by the plaintiff. However, in some cases provided by law, the court can go beyond the declared requirements. The court is obliged to deliver the decision immediately after the trial. When dealing with a particularly difficult case the delivery of the reasoned decision can be postponed up to five days, but in this situation the operative part of the decision has to be announced in the same court session that the case trial ended. After signing the decision the judges return to the courtroom where the chairman announces the decision.

The structure and contents of the decision are regulated by the Civil Procedural Code. This consists of four parts stated in strict sequence: the introductory part, the descriptive part, the rationale for the judgment and the operative part.

The introductory part has to contain the time period taken for adjudication, the place of adjudication, which is defined by the location of the court hearing for the case, and the name of the court that delivered the decision as well as the court's composition.

The descriptive part of the decision has to contain the requirements stated in the claim, and the circumstances confirming the requirements. It reflects the respondent's position. If there are objections from the respondent, the reasons for the claim's non-recognition are stated briefly.

The rationale for the judgment has to contain the actual and legal justifications for the court's conclusions. It also contains the facts of the case established by the court, the evidence on which the conclusions are based, the argumentation for the court's rejection of the evidence if so determined and the laws on which the decision is based.

In the operative part of the decision the results of the judicial proceedings are presented in a concise and final manner: a conclusion about the satisfaction of the claim or the dismissal of the claim in full or in part. The operative part clarifies what the court has decided on each issue separately and on the counterclaim, which of the parties enjoys the challenged right, and what actions need to be taken by the liable person.

Generally, the trial of a civil case ends with the decision. But in some cases it ends without it. There are two forms of the termination of proceedings without a decision: discontinuance of proceedings and leaving the claim without consideration.

These forms differ both in terms of the grounds and in terms of the legal consequences of them. The discontinuance of proceedings generally takes place when the plaintiff does not have the right to judicial protection. Therefore, the discontinuance of proceedings excludes the possibility of instituting a second proceedings for the same case. Leaving the claim without consideration may occur when the plaintiff or the applicant has the right to judicial protection but the conditions of its realization were not met. In the case of leaving the claim without consideration the plaintiff or the applicant does not lose the right to initiate identical proceedings in court again after the elimination of the defects.

4.4. Review Proceedings

A court decision may contain errors or simply be unjust or even illegal. The right to appeal and review judgments is one of the basic rights that is recognized by most procedural systems. Appellate review is the opportunity for the parties to try to correct an injustice that may be contained in a judgment. Two different systems of review are widespread in the world. Which one is used depends on the kind of judicial errors that are considered by a court of the review instance: errors of fact or errors of law.

The Russian system of review is influenced by continental European legislation, especially by French and German law. Such legislation provides for appellate and cassational procedures. However, uniquely, the Russian system also provides for supervisory proceedings. Russian review proceedings are divided into four categories:

1) appeal;
2) cassation;
3) supervisory proceedings;
4) an appeal founded on new or newly discovered facts.

The decisions of a court of the first instance that have not yet entered into force may be appealed through the appeals procedure. The appellate court rehears the

case with full authority to review all the circumstances in the case. The court will assess all evidence presented in the first instance, as well as any new evidence. Cases in a court of an appellate instance are examined by panels of judges, not by a single judge. An appeal has to be filed within one month of the date on which a court of the first instance issued the decision in its final form.

A court of cassation is not entitled to consider matters if they were not established by a court of the first instance. It does not review the circumstances of the case and does not admit new evidence, rather the court will only consider the correct application of material and procedural law and the legal reasoning behind the application. Nor can it rule on the credibility of evidence. Parties to the case cannot ask the court to consider new evidence; they can only present the evidence that was examined by the court of the first instance. It is required to base the factual deliberations on the facts as established by a court of the first instance. A court of cassation can also remit a case for retrial.

After the cassation process, a supervisory appeal may potentially be filed. A supervisory procedure is an exceptional feature of Russian civil procedure. Review by way of supervision is a special procedure that allows additional re-examination of judgments which have already entered into legal force. It stems from legislation of the Russian Empire of the seventeenth, eighteenth and nineteenth centuries.

During the Soviet period, the right to apply to a supervisory court belonged only to a limited number of officials, such as chief judges and their deputies and the Procurator General and his deputies. Parties to a case did not have such right. In 1980 8,618 decisions were revoked by way of supervision. In contrast, 12,500 were revoked by way of supervision in 1989.

In modern Russia, review by way of supervision is regulated in a different manner. It is stipulated in the Constitution and in the new 2003 Civil Procedural Code. It exists in addition to the appeal and cassation instances and allows for the re-examination of judgments which have already entered into legal force and which may have already been decided under a cassational appeal. The right to apply to the court of supervision belongs only to the parties to the case and any other persons whose rights were abused by the judgment. Appeals via supervision may only be considered by the Presidium of the Supreme Court, by military assembly of the Supreme Court, by judicial tribunal of the Supreme Court for civil cases, by presidium of a military court, and by Presidium of the Supreme Court of a "subject" (state) within the Federation. It is possible to appeal to a court of supervision within three months of the date on which a judgment enters into legal force.

When reviewing a case by way of supervision, the court considers only questions of law on the basis of materials available in the case. Although the supervisory instance may refuse to accept lower courts' findings of fact, it has no power to establish new facts or to consider new evidence. As a general rule, the court verifies the correctness of the application and interpretation of provisions of material law and norms of procedural

law by the courts of the first and cassational instances only within the limits of the arguments contained in the appeal. However, in the interest of legality, the higher court may also go beyond the limits of the appeal. The court of the supervisory instance may render a new judgment when it is not necessary to consider additional facts or evidence. Some 300,000 appeals a year are considered by the courts of general jurisdiction by way of supervision. In 1996 15,215 decisions were cancelled in the supervisory instance and 20,270 in 2002. That is one-third of all annulled decisions. In contrast 17,482 decisions were annulled in the supervisory instance in 2004 (after the adoption of the new Civil Procedural Code). That is 20 percent of all annulled decisions.

The possibility of re-examining a judgment which has already entered into legal force is a moot point. Does this conflict with the principle of *res judicata*? There are two points of view. Some scholars believe that the supervisory instance is an additional opportunity to correct the decision and rectify judicial errors. Others emphasize that it conflicts with the principle of *res judicata*. The position of the European Court of Human Rights is interesting in this context. In *Ryabykh v. Russia*, No. 52854/99 dated 24 July 2003, it simultaneously maintains two different positions on the Russian supervisory instance. On the one hand, it believes that review by way of supervision conflicts with the principle of *res judicata* (Arts. 52, 55–57 of *Ryabykh v. Russia*, Art. 25 of *Pravednaya v. Russia*). On the other hand, it does not conflict with it because it is used to rectify judicial errors (Arts. 25, 28 *Pravednaya v. Russia*, Art. 52 of *Ryabykh v. Russia*).

Meanwhile, Russian supervisory procedure was reformed in 2010 and the right to appeal was limited to a strict number of cases. Nowadays, the supervisory appeal is the exception to the rule.

An appeal due to newly discovered facts is one of the ways of legal examination of the consideration of the case. Newly discovered facts are the facts that existed at the time of the consideration of the case and that are of significance for the correct adjudication of which the applicant or the court had no, and could not have had any, knowledge. The main objective of the court is to determine the existence or absence of newly discovered facts and to establish whether they affected the decision issued.

The decisions that have entered into legal force, court rulings of the first instance court and of the justice of the peace can only be the object of revision on newly discovered facts. The revision is carried out by the court that delivered the decision.

The grounds for the revision of decisions due to newly discovered facts are the following:

1) circumstances significant for the case, of which the applicant had no and could not have had any knowledge;

2) falsification of evidence, deliberately false expert opinion, deliberately false witness testimony, deliberately incorrect translation that resulted in the delivery of an unlawful or an unsubstantiated decision on a given case and established by an effective court sentence;

3) criminal deeds of a person participating in the case or of his attorney, or criminal deeds of a judge, committed during the consideration of the given case and established by an effective court sentence.

Having considered the application, the court either satisfies it and reverses the decision, or refuses the revision. In case of reversal, the case is considered on the merits in the general proceedings.

5. Administrative Procedure

In 2015, a new Code of Administrative Procedure was adopted in Russia. Such a code has never existed before in Russian legal history. Historically in Russia, in contrast to some other countries, as soon as cases stemming from administrative relations became an allowed subject for judicial inquiry, their hearing was included in civil procedure, and certain sections were added to the Code of civil procedure.[13]

In 1993, the Constitution of the Russian Federation established separate legal proceedings for civil, administrative and criminal cases. Administrative procedure did not exist in practice until 2015 though related amendments were already being proposed in the mid 1990s. The Code of Administrative Procedure was approved by the Russian President on 9 March 2015 and entered into force on 15 September 2015.

With the adoption of the new Code, a number of laws and regulations concerning legal proceedings for the investigation of administrative cases have changed. The provisions regulating proceedings arising out of administrative cases have been excluded from the Civil Procedural Code, along with provisions on consideration of applications for compensation due to violations of the right to legal proceedings within a reasonable time, and on compulsory hospitalization of citizens in psychiatric hospitals.

Unlike the codes of civil and commercial procedures, the Code of Administrative Procedure emphasizes the active role of the courts. This is motivated by the unequal positions of the parties in relevant cases. In particular, if necessary, the court can call for evidence itself; and it can go beyond the bases and arguments of the declared requirements when checking the legality of legal statutory acts, decisions, actions and omissions.

Another innovation of the Code is the demand for confirmation that the participants in a trial have a higher legal education. The parties to administrative proceedings will also have additional expenses. However, all expenses, including attorneys' fees, any state duty and other expenses connected with the proceedings will be borne by the defeated party. Therefore, it is quite possible that it will be more expedient for many potential plaintiffs to pay penalties rather than risk incurring

13 Dmitry Tumanov, *Public Interest and Administrative Legal Proceedings*, 3(3) BRICS Law Journal 64 (2016).

additional expenses and spending time on an administrative trial. On the other hand, officials will sometimes have to think twice before making a decision, as those additional expenses can also be collected from the state, which could be very unpleasant for the government.

Finally, the new Code provides additional guarantees for access to justice, and it makes the procedure more professional and specialized.

6. Class Actions

Among different types of group actions only public and organizational group actions are possible in Russia.

Since Soviet times, public group litigation has existed in Russia. The 2003 Civil Procedural Code provides for special regulation. According to its Art. 45 the attorney general can go to court to defend the interests of an indefinite group of persons. Organizational group actions are regulated in the same manner by Art. 46. These rules are expanded by special regulation in specific fields of law. For example, the Consumer Protection Law of 1992 (Art. 46) and the Securities Law of 1999 (Art. 19) contain similar rules to protect consumers rights. The problem is that the laws simply stipulate the right for the attorney general or organizations to sue. Specific (procedural) rules are not provided.

At the same time, there is a vibrant academic discussion regarding the introduction of private group actions. This discussion started along with the beginning of judicial reform in the 1990s. The relevance of improvement of groups rights protection mechanisms and mechanisms of protection of an unspecified number of persons are not called into question by the majority of procedure scholars. However, many researchers warn against the introduction of the Anglo-Saxon model of private class actions in Russia.

There have been several steps in the attempt to introduce private group actions in Russia. First, one option was offered while developing the Civil Procedural Code of 2003, but it was rejected by the working group

Second, in July 2009 Federal Law No. 205-FZ "On Amendments to Certain Acts of the Russian Federation" was adopted according to which the special order of case hearing on group rights and legitimate interests protection was established in the Arbitrazh (Commercial) Procedural Code. This law introduced quasi-private group actions. Special provisions (Chapter 28.2 "Consideration of the Cases of Protection of Rights and Legal Interests of a Group of Persons") regulate the proceedings in such cases.

The claim has to concern not only personal, but also collective rights of other participants and, additionally, it has to be supported by at least five persons. Only at observance of these two conditions will the case be heard according to these special rules of the Arbitrazh (Commercial) Procedural Code.

The person who appealed to the commercial court is the key participant in the class action proceedings. This person has the rights and performs the procedural duties of the claimant and is obliged to conscientiously protect the rights and legitimate interests of all members of the group. He can act without power of attorney, under documents on other persons' accession to the claim, which can be the written statement of one person, or the decision of several persons to accession. His powers can be stopped due to his renunciation of suit, or on request of most of the members of the group. In case of discontinuance the court postpones the judicial proceedings for its replacement. He has to notify other members of group if the need arises of carrying out replacement independently. If no member of the group agrees to act as this person, the court stops the proceedings on the class action.

Special rules of preparation for the court proceedings work for such cases as category hearings. The main specifics concern the procedure in respect of other persons joining in the statement of claim. In this stage the court has to define an order of formation of a group, joined to the claim. For this purpose it establishes the term during which it is necessary to make the proposal to other persons to join the class action, and also the term during which these persons can join it.

The duty to make such proposal, and also to inform the court on the joined persons and to provide the relevant documents falls on the person who initially appealed to the court. Such offer is to be made publicly. The court determines the concrete way of placement of the offer but, by the general rule, it is published in the mass media, or goes by mail with recorded delivery. The expediency of such order raises doubts. First, the duty of notice is assigned not to the court, as is established for notice of participants in the case, but to the initiator of the claim. Second, the list of ways of notice is open, which allows to reduce them to a formality and by that to limit membership of the group.

The existing rules insufficiently clearly define the status of the persons joined to the claim. If the initiator of the claim has the rights of the claimant and performs the claimant's duties as it is directly specified in Art. 225[12] of the Arbitrazh (Commercial) Procedural Code, the legal status of the joined persons is not defined.

The class action has to be considered within five months from the date of rendering of the ruling on the initiation of proceedings of a claim. The established procedure of filing and hearing of the class action raises a number of remarks. The general condition of filing of the claim gives the chance for various interpretations: members of the group, except for the initiator of the claim, have almost no procedural rights; it is unclear whether members of the group have the right to appeal the decision; etc.

Unlike the classic Anglo-Saxon model of private class actions where the participants in the group do not always have to be clearly defined during the hearing, the Russian Arbitrazh (Commercial) Procedural Code establishes a necessary condition – formation of a group prior to judicial proceedings, at a preparation stage. Such regulation changes the nature of the classic construction of the class action.

Therefore, on the one hand, the established procedure gives a chance to create a group, but, on the other hand – participants of this group have to be listed prior to the case hearing. Differences between this order and the institute of joinder of parties are minimum. The established rules of formation of a group do not contradict the norms of joinder of parties. Therefore, this procedure, in fact, is not an innovation of the Arbitrazh (Commercial) Procedural Code, it only concretizes the regulation of joinder of parties.

The third attempt to introduce private group actions in Russia is the initiative of the Federal Anti-competition Agency. Its group action amendments to the procedural codes and anti-competition legislation were drafted in 2012–2014.[14] According to its 2012 Road Map "Developing Competition and Improving Anti-competition Policy," group actions should be introduced before the courts of general jurisdiction as well as the commercial courts. Finally, the amendments were formulated in the draft of the federal law "On Amendments to Certain Acts of the Russian Federation Regarding Settlement of an Order of Case Hearing on Group Rights and Legitimate Interests Protection (Group Proceedings)," but this law was never adopted.

The fourth attempt, in 2015, was the adoption of a new Code of Administrative Procedure. Such a code has never existed before in Russia. The Code entered into force on 15 September 2015. As already mentioned, due to the adoption of the new Code, a number of laws and regulations concerning legal proceedings for the investigation of administrative cases have changed. One such novelty is the new regulation on group litigation under Article 42 "Collective Administrative Claim." According to this article, the court should initiate group proceedings if at least twenty persons have joined the claim. They must select a person who will participate in the proceedings on behalf of the group. If somebody has filed a similar claim with similar subject matter and grounds, the court proposes to join the collective claim. This procedure cannot truly be defined as group litigation, because it requires an exact number of parties. Rather, it should be considered more a joinder of parties.

Therefore, today Russian legislation consists of only organizational and public class actions. There were a few attempts to introduce private class actions, but they failed.

7. Enforcement of Judgments

Winning a court case is usually not enough to obtain money or other relief from a debtor. It is only the beginning of a lengthy and challenging process of enforcement of court judgments and collecting debts. Therefore, the final part of a civil action is execution of the judgment. Without execution the goal of procedure is not achieved. The execution is regulated not only by the procedural codes, but also by special laws "On Execution" (1997) and "On Bailiffs" (1997).

[14] Dmitry Magonya, *Class Actions in Russia*, 1(1) Russian Law Journal 63 (2013).

The execution of the judgment is carried out by the court and bailiff service. In Russia, the big reform was initiated in 1997 when the Federal Bailiff Service was established. It became a part of the system of agencies of the Ministry of Justice. The Director of the Federal Bailiff Service is appointed by the President of the Russian Federation. The Federal Bailiff Service has been a member of the International Union of Judicial Officers since 2015. In order to become a bailiff a person must be a citizen of Russia and be at least twenty-one years old. There are no requirements concerning a university degree in law. Before presenting an applicant for the bailiff's position, there is a preliminary coordination of the candidacy with a medical commission.

There are four stages of the execution of the judgment: initiation of the execution, preparation for the implementation of measures of compulsory execution, implementation of measures of compulsory execution, and termination. The law provides for a general two-month deadline for the entire enforcement procedure. However, there are no sanctions for violation of this deadline, thus enforcement, in practice, could last much longer.

The initiation stage consists of the issuance of a writ of execution, its filing with the bailiff service and delivery of the court ruling on the initiation of the execution. The enforcement is mainly initiated on the basis of an enforcement order, which is issued by a court as soon as the decision comes into force. A writ of execution is the basic document which confirms the judgment creditor's right to enforce the court judgment. A writ of execution can be presented within three years from the entry of a judgment into legal force; however, the court has the power to grant an additional three months for presentation of the writ of execution. Writs of execution that contain requirements for periodic payments can be presented within the entire term for which payments are awarded, as well as within three years after the end of this term. A writ of execution is presented for enforcement at the place of execution of the judgment, which is usually the debtor's place of residence or the place where the debtor's property is located.

The preparation stage includes performance of the actions aiming at voluntary execution and establishment of the debtor and his property location. A five-day term for voluntary execution is established by a bailiff. After expiration of this period, enforcement is started. The debtor bears an enforcement fee (7% of the amount claimed) in a case of refusal of voluntary execution without reasonable cause. There also could be expenses for enforcement actions and bailiff's fines. The bailiff also send inquiries to different state and non-state authorities and agencies such as the tax service, the police and registration offices for searching the debtor's assets.

Implementation of the measures of compulsory execution consists of garnishment (seizure), property disposal and distribution of the collected money. The garnishment (seizure) includes performance of two obligatory actions such as taking inventory of assets and imposing an injunction on the rights of disposal thereof, and, if required, three optional actions such as restricting the right to use the property, the inventory

of the property and a ban on disposal of the property. The amount obtained by the bailiff from the debtor is transferred for satisfying the creditors' claims in the following priority: first, claims regarding alimony and compensation for accidental and death-causing injuries; second, employees' claims arising out of contractual relations; third, claims regarding payments to state non-budget funds; and fourth, all other claims.

The termination can either be a return of the writ of execution without execution, or the termination of execution. The latter requires an additional court ruling.

There are a number of particular measures in Russian enforcement procedure. First, one of the most popular indirect enforcement measures of recent times is the prohibition to leave the country. This measure has been effective since 2007. The bailiff can prohibit the debtor from traveling abroad if the debt is more than 10,000 RUR. This measure was performed in relation to 2 million debtors in 2016, 50 percent of them were claims regarding alimony.

It is necessary to note that unlike many countries criminal arrest of debtors in relation to civil cases is not used in Russia. This appeared in Russian case law in 2013.

Among indirect enforcement measures there is also *astreinte* in Russian legislation.[15]

A special enforcement procedure is established in relation to official state authorities if they act as debtors. This concerns the government, ministries, official agencies, etc. The general rules are excluded in this case, and special legal regulation has been established. The Budget Code (1998) provides the rules concerning the enforcement of such judgments. The Federal Bailiff Service does not have authority to enforce them. A writ of execution should be delivered to the Treasury Department, which acts as the enforcement organ.

Finally, some statistics (2015). There are 25,000 bailiffs in Russia. On average, about 2,200 cases are pending with each bailiff every year. Thirty million cases are initiated every year by the bailiffs. There were around 324,000 garnishments (seizures) of property performed by the bailiffs.

8. Arbitration

First of all, it should be kept in mind that justice in the Russian Federation is conducted solely by courts, which means that no other authority other than the court has the power to render an obligatory decision to parties at trial.

Russia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The USSR was one of the original member states to sign the convention in 1958. There is a distinction between international and domestic arbitration. Arbitration in Russia is regulated by Federal Law "On Arbitral Tribunals in the Russian Federation" (2003) (domestic arbitration), and also by Federal Law

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15 Francesca Ferrari & Natalya Bocharova, *The astreinte in the Italian and Russian Administrative (Judicial) and Civil Proceedings*, 3(3) Russian Law Journal 24 (2015).

"On International Commercial Arbitration" (1993) (international arbitration); this law was drafted on the basis of the UNCITRAL Model Law on International Commercial Arbitration.

The general rule of arbitrability states that any dispute is arbitrable unless otherwise directly stated by law. The arbitrators cannot be state court judges; if the panel consists of three members, then at least one of them should be a lawyer. It is possible to appoint foreign nationals as arbitrators in international arbitral proceedings. A court cannot intervene in the selection of arbitrators. An arbitral tribunal can decide on its own jurisdiction. The parties have the right to agree on the procedure to be followed by the arbitral tribunal in conducting proceedings. Parties are free to agree on a language other than Russian being used in the proceedings. An arbitration award cannot be appealed. A party can make an application to the competent court for enforcement of the award and that application should be heard within three months.

The following disputes cannot be resolved by arbitration, but only by state commercial courts: corporate disputes (before 2016); intellectual property disputes; bankruptcy; public law disputes, among others. There is also a risk of non-arbitrability of other types of disputes due to the lack of legal regulation and different courts' interpretations. For example, Russian courts recently confirmed that disputes arising from government-related contracts are not arbitrable.

Most arbitration in Russia is institutional. Ad hoc procedures are not popular. There are around 500 arbitral institutions in Russia and only seven to ten of them could be considered important, with their own set of rules and the option of cross-border disputes resolution. The leading such institution is the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation in Moscow (ICAC). Its history dates back to 1932 when the USSR founded the Foreign Trade Arbitration Commission. It is the most frequently used court for international arbitration in Russia and handles an average of 200 to 250 cases per year. In 2013, the National Russian Arbitration Association was created as an independent arbitration institution and an alternative to ICAC.

The previous system of arbitration had several disadvantages. One of them was the dramatic increase in the number of arbitral institutions over the last fifteen years. Many arbitral institutions were established by major corporations and are influenced by them; this is known as a "pocket" arbitration.

The most recent reform of arbitration in Russia started in 2014. The first draft law on arbitration was introduced by the Russian Ministry of Justice in January 2014, but it was returned by the government for revision. In May 2015, the government introduced a revised draft law in parliament. Finally, the President signed Federal Law "On Arbitration in the Russian Federation" and Federal Law "On Changes to Related Laws of the Russian Federation." The first law regulates domestic arbitration, while the second concerns international arbitration.

There are three important aspects to the recent reform: first, the arbitrability of corporate disputes; second, the more detailed regulation of the arbitral proceedings; and third, the licensing of the arbitral institutions.

Corporate disputes were non-arbitrable before the reform. This rule was stipulated not by the legislation but by court practice. The new laws determine the arbitrability of this category of disputes. However, there are some limitations. For example, the seat of arbitration of corporate disputes must be only in Russia.

The new laws establish a number of administrative requirements for arbitral institutions. They introduce very strict rules of arbitration. The new laws are similar to procedural codes. State courts have more influence over arbitration, which could eventually lose its effectiveness as an alternative form of state litigation. Many details are now stipulated in the legislation. For example, the duty of an arbitral institution to publish information about its cases on the internet.

Most of the institutions must obtain the licenses provided by the government. All foreign arbitral institutions should also obtain certification from the government. The new Council of Arbitral Development is established under the supervision of the Ministry of Justice. It gives preliminary approval in the licensing proceedings. In general, the new laws make ad hoc arbitration less preferable than institutional arbitration due to the increasing control by the state courts over them as well as a number of restrictive rules, for example, by excluding ad hoc arbitration in corporate dispute resolution.

There are other novelties in the laws. They allow retired judges to act as arbitrators. There is also a very important regulation that clarifies that a foreign arbitral award, which does not require enforcement, is recognized in Russia automatically without any recognition proceedings.

It could be concluded that the general trend of the reform is the increasing state control over arbitration. However, the new regulation is very important; it makes huge changes and could be qualified as the start of a new era in arbitration in Russia.

Conclusion

The global era of today is the time of the increased role of civil justice. Different procedural systems are spread across the modern world. The most common are the Continental, Anglo-Saxon and mixed systems. The frontier between the two classic models of civil procedure has blurred, and it appears that a unified procedural system is emerging. At the same time, some distinctive and unique procedural systems still exist. The Russian system of civil procedure is one of them.

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CIVIL JUSTICE IN INDIA

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In India the concept of civil justice is not new. It has existed since time immemorial. A large number of related provisions are found in Manu, who compiled the then existing justice system in India of thousands of years ago in his fourteen-volume work titled Manava Dharma Shastra. The concept of justice is also found in detail in the Vedas, which are from a very ancient time. In both these scriptures the rule of law was adequately provided. Today, however, the Indian civil justice system resembles its common law counterparts. It features a coordinated, pyramid structure of judicial authority, emphasizing formal procedural justice dominated by litigants of equal status engaged in adversarial processes, and provides binding, win-lose remedies.

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1. Historical Background of the Judicial System in India

1.1. Civil Justice System during the Ancient Period (until the Muslim Period)

The history of the Indian judicial system goes back to the ancient time when Manu and Brihaspati gave Indians *Dharma Shastras*, Narada the *Smritis*, and Kautilya the *Artshastra.* A study of these memorable books would reveal that in ancient India there was a fairly well-developed and sophisticated system of administration of justice. In broad outline, there is considerable similarity between the system now in force and civil judicial proceedings in ancient India. During the ancient period legal procedure, including that of case filing, was called *vyavahara*. The equivalent of modern "complaint" was called *purvapaksha*, and that of "written statement" *uttar* (or "reply" in modern civil procedure). The trial was called *kriya* and verdict *nirnaya*. The profession of lawyers, or advocates, was unknown during this period. Trial by jury and trial by ordeal were the two types of trials that existed then. The ancient Indian and constitutional system had established a duty-based society. It postulated that everybody from the king to the lowest of society was bound to fulfil his or her duty towards society. This was true for the

whole of India, notwithstanding the existence of larger and smaller kingdoms, and that the supremacy of *dharma* (law) over the kings as declared in the authoritative texts was respected in letter and in spirit. Thus there were no absolute monarchies. The modern concept of "the King can do no wrong" did not apply. The king was equally bound by the same law. He was equally liable for civil and criminal actions.[1] The king's court was the highest court, next to which came the court of the chief justice (*pradvivaka*). The king's court was the highest court of appeal as well as an original court in cases of vital importance to the state. In the king's court the king was advised by learned people such as *Brahmins*, the ministers, the Chief Justice, etc. The appeals system was practised and the king was the highest body of appeal. One significant feature of the ancient Indian legal system was the absence of lawyers. Another notable feature was that a bench of two or more judges was always preferred to administer justice rather than a single individual being the sole administrator of justice. This form of justice continued in several Hindu princely states even before the Independence of India.

1.2. Civil Justice System during the Muslim Period

The advent of Muslim rule in India began in the 12th century when Muhammad Gouri attacked India and occupied the throne at Delhi. In the beginning, the Muslim rulers were not very much interested in establishing a civil justice system in India. They continued to administer civil justice to Hindus in consultation with Hindu advisors who were considered specialists in Hindu law. The Tughlaq period saw the compilation of the code of civil procedure, which was called *Fiqha-e-Feroze Shahi*. The code prescribed details of the procedure and the law in several matters. It was written in Arabic and was translated into Persian under the orders of Feroz Shah Tughlaq. The procedure laid down in this book was followed until the reign of Aurangzeb when it was replaced by *Fatawa-i-Alamgiri* written in 1670. According to *Fatawa-i-Alamgiri*, the Qazi first prayed and craved God's help in the administration of justice. He was assisted by *Katib*. The *Qazi* was obliged to see that the evidence was correctly recorded. The plaintiff was called the *muddai* and the defendant *muddaa allaih*. The complaint was called *daawa*, whereas the complaint in criminal cases was called *Istaghasa*. A party could have an agent as *vakil* or an attorney to represent his case.

1.3. Advent of Mughals in India

The advent of the rule of the Mughals was important so far as the civil justice system in India is concerned. The Mughals played a very significant role in the judicial system in India. They brought new changes to the judicial system and had a great impact in India. The Mughals first of all tried to establish a strong and well-organized government contributing to peace and order. Secondly, they also tried to establish a highly centralized form of government with extensive administrative machinery. The duties of a Muslim king in an Islamic state required him to rule in accordance with the

1 *See* Rama Jois, *Seeds of Modern Public Law in Ancient Indian Jurisprudence* 1–2 (Lucknow: Eastern Book Company, 1990).

Quranic law and to enforce *shariah* in his kingdom. Under the Muslim king, the subjects were divided into two sections, believers and non-believers, and a duty was imposed on the king to see that believers lived as true Muslims and non-believers remained in the position allotted to them as *Zimmis,* a position which denied them equal status with Muslim subjects but guaranteed them security of life and property, and the continuance of their religion and religious practices under certain defined conditions. Therefore a Muslim king, besides performing the ordinary duties connected with his office, also had to uphold the dignity of his religion through defined channels and to rule according to Islamic law. The second aspect of the Islamic system which guaranteed peace and security of life and prosperity to non-believers included impartial justice, and this aspect of kingship was emphasized. One of the most important agencies in the administration of justice was the institution of *Qazi*. He held court and gave justice. However, in all cases the king was still above the law. The king's court was the highest appellate court in the empire, imparting civil and criminal justice.

1.4. Civil Justice System during the British Period (under the East India Company)

The advent of British rule in the beginning of the 17th century ushered in a new era of civil justice in India. The Royal Charter of 1600 established the English East India Company in India. The charter effectively brought the people living there under the Company's control. The British located themselves in the presidencies of Calcutta, Madras (now Tamil Nadu) and Bombay. From 1661 to 1726 laws based on equity, justice and good conscience in conformity with the laws of England were followed. There was no codified law. On the request of the Company, the Charter of 1726 granted it special powers. Under this charter Mayor's Courts were established in the presidencies and these courts applied English law to the people living there. Later these courts were converted into the then Supreme Courts and later on renamed High Courts in different presidencies.

1.5. Acquisition of the Zamindari System in Bengal in 1765

In 1765, the Company acquired Zamindari (collectors of revenue) from the rulers of Bengal Bihar and Orissa and as such it had to establish a parallel judicial system in the mofussil (i.e. areas, rural localities, outside the three presidencies mentioned earlier). Under its Plan of 1774, *diwani adalats* (civil courts) were established in each district. The areas of Bengal, Bihar and Orissa were divided into six districts. From *Diwani Adalats* appeals lay to *Saddar Diwani Adalats.* After the Revolution of 1861, High Courts were established at Bombay, Calcutta and Madras and all other *Saddar Diwani Adalats* and the Mayor's Courts established in 1726 were abolished. Later on High Courts were established at other big cities of India.

1.6. Law Applied by the Courts during the British Period

The following law was applied by the Supreme Courts in the three presidency cities: (i) common law as it prevailed in England in 1726; (ii) statute law that prevailed

in England in 1726, including law subsequently enacted by Parliament; (iii) regulations made by the Governor General in Council prior to the Act of 1833 and also the Acts by the Governor General in Council under the Act of 1833; (iv) Hindu law and usages in respect of Hindus, and Muslim law and usages in respect of Muslims. So far as other communities, e.g., Christians, Parsees, Jews, etc., were concerned, English law in use was to apply to them.

1.7. Law in the Mofussil

According to the Plan of Warren Hastings of 1772, in suits regarding inheritance, marriage, caste and other religious usages and institutions, laws of the Quran, with respect to Muslims, and those of the *Shaster*, with respect to Hindus, were invariably to be adhered to. Maulvies or Brahmins were, respectively, appointed to expound the law. So far as other communities, e.g., Christians, Parsees and Jews, etc., were concerned, their disputes were decided according to equity, justice and good conscience. For Anglo-Indians, the law of England was applied. This situation was changed after the Charter Acts of 1833 and 1853 of the British Parliament. Subsequent to these Acts, a process of compilation and codification began. Law Commissions were appointed in the matter. These Commissions were always assisted by Indians in the formulation of the codes.

2. Courts and Judges Today

There is a network of judicial courts in India. The Supreme Court is the highest independent court. The judges of the Court are appointed by the President of India on the recommendation of the Collegium of the five most senior judges of the Supreme Court. The Supreme Court has (i) original, (ii) appellate and (iii) advisory jurisdiction. Under original jurisdiction, the Supreme Court decides disputes "between the Government of India and one or more [s]tates or between the Government of India and any [s]tate or [s]tates on one side and one or more [s]tates on the other or between two or more [s]tates."[2] The Court also decides the disputes relating to the election of the President and Vice President. It has concurrent jurisdiction with the High Courts in the enforcement of fundamental rights. The Supreme Court has exclusive jurisdiction to decide only those disputes between states which arise in the context of the Constitution and the federal structure as established under it. As regards appellate jurisdiction, appeals lie to the Court in (i) constitutional matters; (ii) civil matters; (iii) criminal matters from a judgment of a High Court where it has granted a certificate for making such appeal. However, under Art. 136 of the Constitution an individual can seek the special leave to appeal without such a certificate. Under Art. 143(1), the President of India may seek advice from the Supreme Court on any

[2] Supreme Court of India, Jurisdiction of the Supreme Court (Dec. 20, 2016), available at http://www.supremecourtofindia.nic.in.

question of law or fact which in his opinion is of such a nature and public importance that it is expedient to obtain the Court's opinion.

Every state or two or more states have High Courts which have the highest judicial power in the state. The judges of the High Courts are appointed by the President of India on the recommendation of the Collegium of the Supreme Court. The High Courts have the following powers: (i) superintend the subordinate courts and tribunals within its jurisdiction; (ii) hear matters relating to fundamental rights and other rights; (iii) remove a case from a subordinate court regarding interpretation of the Constitution; (iv) hear appeals in civil and criminal matters. In addition to the High Court in a state, there is a network of subordinate courts deciding civil and criminal cases.

3. Scope of Civil Procedure

Section 10 of the Code of Civil Procedure, 1908 (CPC) provides that the courts shall, except for the provisions otherwise provided, have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or implicitly barred. A suit is of a civil nature if the principal question in the suit relates to the determination of a civil right. There are certain suits which are barred by specific Acts of the legislature or on the grounds of public policy. For example, there are the Acts dealing with matters relating to cooperative societies, labour disputes, transport matters, etc. Similarly there are suits which are barred on the grounds of public policy, e.g., renting a house for the purpose of prostitution, enforcement of an agreement to suppress criminal prosecution, suits to enforce an agreement to suppress an unlawful agreement, etc.

4. Structure (Stages) of Civil Procedure

There is a detailed procedure laid down for filing a civil case. If the procedure is not followed, then the registry has a right to dismiss the suit. First, the complaint, along with *vakalatnama* (a kind of power of attorney) and any necessary court fee, is filed. After the receipt of the complaint, notices are issued to the defendants for reply. The defendants submit their reply, which is known as the written statement. Afterwards, the plaintiff submits a rejoinder to the written statement. The court, after examining the complaint, the written statement and the rejoinder, determines the points of contention, which is known as framing of the issues. Thereafter, both parties submit documents and a list of witnesses in order to substantiate their contentions. Subsequently, witnesses are examined and oral arguments between the advocates of the parties take place. Thereafter, judgment is pronounced.

When an order is passed against a party to the suit, it is not that the party has no further remedy. The party can further initiate proceedings by way of appeal, revision or review.

Appeal. An appeal is filed in the form prescribed, signed by the appellant, along with a true certified copy of the order. The appeal should contain the grounds of

objection under distinct headings, and such grounds will be numbered consecutively. If the appeal is against a decree for payment of money, the court may require the appellant to deposit the disputed amount or furnish other security. A ground/ objection which has not been mentioned in the appeal cannot be taken up for arguments without the permission of the court. Similarly, any point or act which was not taken up by the appellant in lower court cannot be taken up in appeal except with the permission of the appellate court. An appeal before a High Court can be filed before the High Court within 90 days and before other courts within 30 days.

Revision and Review. In revision, a High Court can call for the record of any case which has been decided by any subordinate court in which no appeal lies thereto, if such subordinate court appears to (i) have exercised a jurisdiction not bestowed on it by law or (ii) have failed to exercise a jurisdiction so vested or (iii) have acted in the exercise of its jurisdiction illegally or with material irregularity. A review of the judgment is made by the same court that decided the case. Any person considering himself aggrieved by (a) a decree or order from which even though appeal is allowed no appeal has been referred or (b) a decree or order from which no appeal is allowed may apply for a review of the judgment to the court that passed the decree or issued the order, either on the discovery by the applicant of new and important material or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced at the time the decree was passed or the order issued, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

5. Fundamental Principles

The fundamental principle of the Code of Civil Procedure is to consolidate and amend the laws relating to the procedure of the courts of civil jurisdiction. The Code of Civil Procedure is deemed to be one of the primary procedural laws in India which is involved neither in taking away rights nor in engendering them, it is solely involved in regulating court procedure. It is designed to facilitate justice and further its ends. The Code has been divided into two parts, viz., (1) substantive law from section 1 to section 158, and (2) procedural law in 51 Orders. The first part contains provisions of a substantive nature that lay down the general principles and create jurisdiction, while the second part contains provisions that relate to procedure and indicate the mode in which jurisdiction created by the body of the Code has to be exercised. The first part is fundamental and it cannot be altered except by Parliament, whereas the High Courts are empowered to annul, alter or add to all or any of the said rules embodied in the second part, provided such annulment, alteration or addition is not inconsistent with the provisions of the first part.

The Code of Civil Procedure acknowledges the powers of, along with the limitations on, the courts, but there are some powers that are vested in the courts but not prescribed in the Code, and they are the inherent powers. The inherent powers of the court are in addition to the powers specifically conferred by the Code on the court.

They are complimentary to those powers. The court is free to exercise them for the ends of justice or to prevent the abuse of the processes of the court. The reason is obvious. The powers of the court are not comprehensively set down for the simple reason that the legislature is incapable of contemplating all the possible situations that might arise in future litigations. Inherent powers come to the rescue in such unforeseen circumstances. They can be exercised *ex debito justitiae* in the absence of provisions in the Code. But they need to be exercised with due care and not arbitrarily.

6. Access to Justice

From the very beginnings of Indian society people had access to justice. During the Hindu period and also the Muslim period even the poorest could directly gain access to justice. Under British rule, however, it was not so. Access to justice became very expensive because of heavy court fees, high fees charged by advocates and other expenses. For ordinary people this amounted to the virtual denial of access to justice. Against this backdrop, provisions for indigent persons were made in Order XXXIII of the Code of Civil Procedure stipulating that a person who does not have property worth 1,000 rupees (Rs.1,000) can file suit without payment of the court fee.

Legal Aid. Art. 39A of the Indian Constitution enjoins the government to provide legal aid to poor persons. The legal aid movement received a boost with the setting up of the Committee for Implementation of Legal Aid Schemes (CILAS) in 1980. CILAS evolved a model scheme for the legal aid programme which includes:

(i) the promotion of legal literacy and creation of legal awareness among weaker sections of the country;

(ii) organization of legal aid camps;

(iii) training of paralegals for the purpose of providing support to the legal aid programmes;

(iv) setting up legal aid clinics in universities and law colleges;

(v) public interest litigation;

(vi) holding of *Lok Adalat* (people's court);

(vii) enforcement of and support to voluntary organizations and social action groups by the state in operating legal aid programmes.

At present, legal aid programmes are being implemented throughout the country by the states and advisory boards which have been set up in all the states.

7. Forms of Actions

There are various levels of the judiciary in India and there are different types of courts, each with powers that vary depending on the tier and jurisdiction bestowed on them. This creates a strict hierarchy of importance of the courts, and, in line with the order of the courts in which they sit, for the judges, beginning at the top with the Supreme Court of India, followed by the High Courts of the respective states,

the District Courts, and civil judges and magistrates, and civil judges of the Senior and Junior Divisions at the bottom. Courts hear criminal and civil cases, including disputes between individuals and the government. The judiciary is independent of the executive and legislative branches of government according to the Constitution of India. There are different writs in the nature of *habeas corpus, mandamus, prohibition, certiorari, quo warranto*, etc., by which the Supreme Court and High Courts deal with violations of fundamental rights. The forms of action govern the pleadings under the Code of Civil Procedure. The different forms of action include recovery of debt, deciding cases of contract and matrimonial disputes, among others. A litigant can sue for money due on an account, make a demand for a certain sum of money or demand a specific item of personal property. The action of trespass is common because a form allowing the claim that force had been wrongfully used could cover a wide variety of injuries. Similarly, every decree for payment of money may be executed even by ordering detention in civil prison of the judgment debtor or by the attachment and sale of his property, or by both. It may also be executed by arrest and detention in prison, not exceeding the period of three months, of civil imprisonment in cases where the sum of money exceeds Rs.5,000. Where a decree is for the payment of a sum of money exceeding Rs.2,000, but not exceeding Rs.5,000, the period for civil imprisonment will not exceed six weeks. In cases where the decree is for specific movable property, it may be executed by seizure of that property and delivery thereof to the party to whom it has been adjudged or by civil imprisonment of the judgment debtor or by the attachment of his property for a period of three months, or by both. The enforcement of restitution of conjugal rights can be made only by the attachment of property of the judgment debtor, where the debtor refused to obey the decree. Another form of action is injunction, where the party is prohibited from performing an act and if the party disobeys the injunction, the remedy for the plaintiff is the detention of the defendant in civil prison, or by attachment of his property, or by both. Fundamental rights are given to citizens under Part III of the Constitution; Arts. 32 and 226 provide the right to constitutional remedy. The enforceability of rights depends on capacity, jurisdiction and defences available, including immunities.

8. Jurisdiction

The Indian legal system is based on the fundamental principle of *ubi jus ibi remedium*, which means "where there is a right, there is a remedy" has been adopted in the Indian legal system. Where a litigant has a civil dispute, he can institute a civil suit in the competent civil court unless the cognizance is either expressly or implicitly barred by a statute. Section 9 of the Code of Civil Procedure primarily deals with the question of a civil court's jurisdiction to entertain a cause. It lays down that, subject to what is contained in sections 10, 11, 12, 13, 47, 66, 83, 84, 91, 92, 115 of the CPC, a civil court has jurisdiction to entertain a suit of a civil nature except when its cognizance is expressly barred or barred by necessary implication. A civil court has jurisdiction to try

a suit only if two conditions are fulfilled: firstly, the suit must be of a civil nature and, secondly, the cognizance of such a suit should not have been expressly or implicitly barred. The exclusion of the jurisdiction of a civil court is not to be readily inferred and such exclusion must be clear. Defect in the jurisdiction cannot be cured by consent of the parties, and a judgment or order issued by a court is null and void and the validity thereof can be challenged at any stage. A decree issued by a court without jurisdiction is a *coram non judice*. A decree issued without jurisdiction is a nullity and its invalidity could be established whenever it is sought and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. Where a court has jurisdiction to decide a dispute, the same cannot be taken away or ousted by consent of the parties. An agreement to oust absolutely the jurisdiction of the court would be unlawful and void, being against public policy.

Jurisdiction of the courts is divided in the following ways.

1. Jurisdiction on the basis of the subject matter: certain courts are precluded from having jurisdiction on the basis of the subject matter. Small cause courts can try only such suits as a suit for money due on account of an oral loan or under a bond or promissory note, or a suit for work performed, etc., but it has no jurisdiction to try suits for specific performance of contracts, for dissolution of partnership, for an injunction, suits relating to immovable property or defamation.

2. On the basis of local or territorial jurisdiction: every court has its own limits, fixed by the government, beyond which it cannot exercise its jurisdiction. Thus, the district judge is in charge of the district and cannot exercise his powers beyond that district. Similarly, the civil judge (Junior Division) is in charge of the areas assigned to him. The High Court has jurisdiction over the whole territory of the state within which it is situated.

3. Pecuniary jurisdiction: there are throughout India a large number of civil courts of different grades having jurisdiction to try suits or hear appeals of different amounts or value. Some of these courts have unlimited pecuniary jurisdiction. Thus, the High Court and courts of district judges have unlimited pecuniary jurisdiction. The civil judge of a Junior Division can hear suits valuing not more than Rs.200,000 and the civil judge of the Senior Division can try suits valuing up to Rs. one million.

4. Original or appellate jurisdiction: the High Courts have only appellate jurisdiction, except in the case of writs; whereas District Courts have both original and appellate jurisdiction. Original jurisdiction only: this applies with respect to a civil judge of a Senior Division and a civil judge of a Junior Division.

9. Role of Judges

A judge is the presiding officer of a civil court.[3] Judges use their knowledge and experience of the law to ensure that a trial is conducted in a fair and legal manner.

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[3] Sec. 2(8) of the CPC, 1908.

The roles played by judges differ from case to case and court to court. Civil cases are handled differently than criminal cases. In civil cases, the judge encourages cooperation between the two sides so as to settle the case and suggests alternative ways of solving the legal problem underlying the case. In India, judges are independent from the police and the government, and make their own decisions according to the law. If a party has an objection against a judge's decision, he may appeal to a higher court. Laws are created by Parliament, and the judges are empowered to ensure that people are punished if they break those laws, but judges of the Supreme Court and sometimes judges of the High Courts also make law by way of interpretation, and also apply such law, which is law that has grown out of decisions by judges in court cases over decades and even centuries. Decisions made by judges in higher courts are recorded, and judges of lower courts use those decisions to help them make their own rulings in court cases. When judges announce a sentence on a convicted criminal, they must work within guidelines set by the legislature. This process helps to ensure that decisions are fair. In civil cases, judges play a very important role in deciding the outcome of the case as well as in deciding the amount of damages that a plaintiff is entitled to. They also manage the cases in which they are involved to ensure efficiency, and they hear appeals on the finding of liability and the amount of damages awarded. When a case is presented, the judge decides on the facts and applies the relevant law to these facts. This includes taking evidence from key witnesses involved in order to come to a final decision. There is huge responsibility on judges to ensure that both parties have equal opportunity to have their case presented. Once the judgment has been announced it is up to the judge to decide on the damages that will be awarded to the winning party. In case of injunction or any other matter the role of the judge is to decide on an appropriate resolution to the case. When a civil case takes place, there is always the question of costs that are incurred by both of the parties involved, and so another role of the judge will be, after the judgment is announced, to deal with the costs. The role of a judge does not just stop at arriving at a judgment and awarding damages, he or she also plays a very active role in the execution of the proceedings. The judge also helps the parties to settle the case not only by deciding the judgment but also by encouraging the use of alternative dispute resolution (ADR), such as negotiation, mediation and arbitration in the civil justice system. The judges who sit on the higher courts, such as the Supreme Court, interpret the law.

10. Evidence

Evidence is an integral part of the law of civil procedure in India. If the plaintiff wants to prove his case, he has to submit evidence in support of his claim. According to Order XVIII, rules 2 and 3 of the Code of Civil Procedure, the party having the right to begin states his case on the date fixed for the hearing of the suit and produces his evidence in support of the issues which he is bound to prove. Then the other party states his case and produces his evidence and addresses the court, generally on the whole case.

When there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party.

The evidence from witnesses, according to Order XVIII, rule 4, shall be taken orally in open court in the presence and under the personal direction and superintendence of the judge. It will be given in the language of the court, ordinarily in the form of narrative and, when completed, shall be read over in the presence of the judge and the witness, and the judge shall sign it. Where the evidence has been taken down in a language different from that in which it is given, and the witness does not understand the language in which it has been taken down, the evidence so recorded shall be interpreted to him in the language in which it is given.

In non-appealable cases, and also in appealable cases, under Order XIII, rules 8 and 13, where the evidence is not taken down in writing by the judge (or his dictation in open court or recorded mechanically in his presence), he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the judge and shall form part of the record.

Where a judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor, under Order XXXVIII, rule 15, will deal with the evidence or memorandum taken down or made as if such evidence or memorandum had been taken down or made by him and proceed with the suit from the stage at which his predecessor left.

At the trial the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff, and where the defendant admits only some of the facts alleged by the plaintiff, it does not give him the right to begin. Sections 101–114 of the Indian Evidence Act, 1972 deal with the burden of proof; section 102 of the Evidence Act, 1972 provides that the burden of proof lies on the party who would fail if no evidence at all were given on either side.

11. Summary Proceedings

Order XXXVII of the Code of Civil Procedure provides summary procedure in respect of certain suits, such as suits based on negotiable instruments or where the plaintiff seeks to recover debt or a liquidated amount. Order XXXVII, rules 1 to 7 contain the various provisions which deal with summary proceedings. Rule 1 of Order XXXVII applies to the High Courts, city civil courts, courts of small causes and other courts, in respect of which the High Court may, by notification in the Official Gazette, restrict the operation of this order only to such categories of suits as it deems proper. Order XXXVII covers within its purview certain classes of suits such as suits based on a bill of exchange, *hundies* (a kind of demand draft) and promissory notes; or suits in which the plaintiff seeks only to recover a debt or a liquidated demand in money payable by the defendant, with or without interest, arising from a written contract,

or from an enactment; or from a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only.

Institution of summary suit. Order XXXVII, rules 2 and 3 provide the procedure of summary suits. The complaint in a summary suit must contain the averments mentioned in clauses (a) and (b) of sub-rule (1) besides other averments as in an ordinary complaint, and the complaint must bear the inscription mentioned in clause (c) of sub-rule (1) of this rule. The summons in summary suit must be in form No. 4 in appendix B or in such form as may be prescribed from time to time. The defendant has to file an appearance within ten days of service of summons in summary suit and if the defendant does not enter such appearance, he is not entitled to defend the suit.

(a) Procedure for the appearance of the defendant.

If the defendant appears, the plaintiff has to serve on the defendant the summons for judgment under sub-rule (3) of rule 3, and thereafter under sub-rule (5) of rule 3, on such summons for judgment, the defendant can apply for leave to defend the suit. The application for leave to appear and defend must be made within ten days from the date of service of summons for judgment on the defendant while entering of appearance is mandatory under Order XXXVII, rule 3, filing of address for service and giving notice to the plaintiff or his counsel of entering appearance are mandatory. He must apply for leave to defend within ten days from the date of service of summons upon him and such leave will be granted only if the affidavit filed by the defendant discloses such as the court may deem sufficient for granting leave to the defendant to appear and defend the suit. If no leave to defend is granted, the plaintiff is entitled to a decree. In summary suit, "the trial" really begins after the court or judge grants leave to the defendant to contest the suit.

(b) Power of the court to set aside the decree.

Order XXXVII, rule 4 provides that the court may set aside the decree and stay the execution and may grant the defendant to appear and defend the suit. Thus, if a case comes within the ambit of rule 4, there is no scope to invoke section 151 of the Code of Civil Procedure for setting aside such a decree. Order XXXVII, rule 6 provides that the court may order the bill, *hundi* or demand notice on which the suit is founded to be forthwith deposited with an officer of the court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the cost thereof. There is no bar against revision or an appeal in a decree passed in summary suit.

12. Appellate Proceedings

Appellate provisions. The Code of Civil Procedure provides for right to appeal and also procedure for appeal, i.e., where shall the appeal lie in civil suits. Order XLI of the Code deals with the provisions of appeal. Under Order XLIII, rule 1 no appeal can lie against a mere finding. Provisions of law governing appeals are envisaged in sections 96 to 112 and Orders XLI to XLV of the Code of Civil Procedure. Section 96 of the CPC gives right to appeal from an original decree. Section 100 of the CPC gives

right to appeal from an appellate decree in certain cases. Section 109 of the CPC provides right to appeal to the Supreme Court in certain cases. Further, section 104 of the CPC provides right to appeal from orders as distinguished from decrees. Any party to the suit who is adversely affected by the decree or the transferee of interest of such party has been adversely affected by the decree, provided his name was entered into record of a suit, may file an appeal or an auction purchaser from an order in execution of a decree to set aside the same on the grounds of fraud or any person who is bound by the decree and the decree would operate *res judicata* against him. Order XLI prescribes the procedure relating to appeals from an original decree. An appeal is to be preferred in the form of a memorandum having grounds signed by the appellant or his pleader and presented to the court. Section 107 of the CPC and Order XLI, rules 23 to 29 and 33 deal with the powers of an appellate court, which include the power to pronounce the judgment, to remand a case with the direction as to what issue or issues should be tried in the case so remanded, to frame or try any issue or to determine any question of fact, which the trial court has omitted to frame, or try any issue and which appears to the court essential for the right decision, to take additional evidence, etc.

Appeal from an original decree under section 96 of the CPC. Sections 96 to 99-A of the CPC and Order XLI deal with the provisions in respect of appeals from an original decree. Section 96 confers the right to appeal against every decree passed by any court exercising original jurisdiction. No appeal lies against the decree passed by a small cause court, if the value of the subject matter does not exceed Rs.10,000 except on appeal a question of law. No appeal shall lie where a decree is passed on the basis of the consent of the parties.[4] An aggrieved party can file appeal against an *ex parte* order under section 96(2) or seek review of a decree under Order IXVII, rule 1 or file an application under Order IX, rule 13 for setting aside the *ex parte* decree. The right of first appeal is a matter of right where the parties have a right to be heard both on questions of law and on questions of fact. Section 97 enables the aggrieved party to appeal against the preliminary decree, but he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree if he does not appeal from the preliminary decree. All the grounds shall be set forth in the memorandum of appeal, but the appellate court in deciding the appeal need not be confined to the grounds of objections set forth in memorandum of appeal or taken by the leave of the court. Order XLI, rule 16 provides that the appellant has the right to begin hearing on the day of the hearing. The court may dismiss the appeal if the appellant does not appear on the fixed day, but the court may allow the appellant and re-admit the appeal on showing and proving sufficient cause for non-appearance. Where the appellant appears and respondent does not appear and when the appeal is called on for hearing, the appeal will be heard *ex parte* against the respondent. Where the *ex parte* decree is made the respondent may apply to the appellate court

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4 Sec. 96(3) of the CPC, 1908.

to again hear the appeal and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing, the court may rehear the respondent against whom the *ex parte* decree was made.

Second appeal (appeal from an appellate decree), section 100 of the CPC. Section 100 of the CPC provides the conditions precedent for entertaining a second appeal and the specific manner of its disposal. According to section 100 of the CPC, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

Appeals to the Supreme Court under section 109 of the CPC. Subject to the provisions in Chapter IV of Part V of the Constitution, an appeal shall lie to the Supreme Court from a High Court, if the High Court certifies:

(i) that the case involves a substantial question of law of general importance; and

(ii) that in the opinion of the High Court the said question needs to be decided by the Supreme Court. Art. 136 of the Constitution provides the provisions for special leave to appeal to the Supreme Court from any judgment order in any matter from any court or tribunal.

13. Class Actions

Definition. A class/collective action is a lawsuit in which a single person or small group of individuals represent the interests of a larger group before the court. A class action is also a procedural instrument which enables one or more claimants to file and prosecute litigation on behalf of a larger group, class or entities with common rights and grievances.

Class action in the CPC. Order I, rule 8 of the CPC is quite clear so far as class actions are concerned. The general rule is that all persons interested in a suit ought to be made parties, but there is an exception to this general rule where one or more persons may sue or defend on behalf of all having the same interest in the suit. Such suits are called representative suits and are governed by Order I, rule 8 of the CPC, which provides where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of one or for the benefit of all persons so interested. But the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct. Further, any such person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the court to be made a party to such suit.

The object of this rule is to afford convenience in suits where there is community of interest, among a large number of persons, so that a few should be allowed to

represent the whole, in order to save trouble and expense and to ensure a convenient trial of questions to which a large body of persons are interested, while avoiding multiplicity of suits and harassment to parties.

A decree passed in a representative suit operates as *res judicata.* In a subsequent suit against such interested persons although they may not have been added as parties to the suit, Explanation VI to section 11 provides that where persons litigate *bona fide* in respect of a public right or a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Writ jurisdiction. In writ jurisdiction, representative actions or actions brought in the public interest via public interest litigation (PIL) have gained much popularity and are widely used to the Supreme Court for the enforcement of fundamental rights under Art. 32 of the Constitution, or to the High Courts for the enforcement of fundamental rights or any other legal right under Art. 226 of the Constitution of India.

14. Costs and Funding

Costs. "Cost of any proceedings or cost incidental to any proceedings" means the cost of any proceedings such as may be determined at the conclusion of the hearing and not payable in advance or to be incurred in future by a party. Where a court has jurisdiction to deal with the question of cost, no separate suit will lie to recover costs, but where it has no jurisdiction to order the costs and costs are incurred, cost may be made the subject of consideration as to damages in a subsequent suit. The person who lacks sufficient funds to pay court costs, procedural costs and counsel fees will be entitled to free legal aid which includes mostly judicial fees and costs, postage stamps, the fees of counsel and experts, and the compensation of the interpreter or translator for the cost of instituting execution proceedings, the deposits required by law to lodge appeals and the fees owed to notaries or registrars arising from the performance of registrations, declarations. An appeal lies on cost only in a few cases.

Kinds of costs:

(a) general costs (section 35, CPC);

(b) miscellaneous costs (Order XX-A, CPC);

(c) compensatory costs for false and vexatious claims (section 35-A, CPC);

(d) costs for causing delay (section 35-B, CPC).

General costs. Section 35, CPC deals with general costs. It aims to secure the litigant the expenses incurred by him in the litigation. The courts have been given the discretion to decide the cost on the basis of legal principle.

Miscellaneous costs. Order XX-A, CPC empowers the court to award costs in respect of certain expenses incurred in giving notices, typing charges, producing witnesses, inspection of records, etc.

Compensatory costs. Section 35-A, CPC provides the provisions for compensatory costs. Under this section, if the court finds that litigation is inspired by vexatious motive

or false claims, it can indemnify the aggrieved party. The maximum amount that can be awarded by the court is Rs.3,000. This section applies only to suit and not to appeals or to revisions; however, an order awarding compensatory cost is appealable.

Costs for causing delay. Section 35-B, CPC is added by the Amendment Act of 1976. This section enables the courts to impose compensatory costs on the parties who are responsible for causing delay at any stage of the litigation.

Other miscellaneous provisions relating to costs in the CPC are:

1. Order XI, rule 3 – cost of interrogatories.
2. Order XII, rule 2 – costs of proving any document.
3. Order XXI, rule 72(3) – cost of setting aside the sale where decree holder purchases property without the permission of the court.
4. Order XXXII, rule 1(3) – costs relating to appointment of guardian *ad liteum*.
5. Order XXXIII, rules 10, 11 and 16 – costs relating to suit by indigent persons.
6. Order XXXV, rule 3 – costs relating to inter pleader suit.

15. Enforcement of Proceedings

Execution of decree. The execution is the last stage of any litigation. In India, the term "execution" has not been defined in the Code of Civil Procedure. Under Indian law, execution of decrees, whether foreign or domestic, is governed by the provisions of the Code of Civil Procedure. A decree or order will be executed by the court which has passed the judgment. In exceptional circumstances, the judgment will be implemented by another court having the competency in that regard. The Code of Civil Procedure contains elaborate and exhaustive provisions for dealing with the enforcement or execution of the decree. The numerous rules of Order XXI of the CPC take care of different situations providing effective remedies not only to judgment debtors and decree holders but also to claimant objectors, as the case may be. Provisions of the CPC relating to execution of decree and order are made applicable to both appeal and suit. The following persons may file an application for execution:

(a) decree holder, according to Order XXI, rule 10;

(b) legal representative of decree holder, as per section 146 of the Code;

(c) any person claiming under the decree holder, as per section 146 of the Code;

(d) transferee of decree holder to whom the decree must have been transferred by an assignment in writing or by operation of law.

Procedure of execution. The procedure in execution or mode for execution is provided in sections 51 to 54 of the CPC. Besides these sections, the process for execution is provided under Order XXI, rules 24 and 25. There are various modes of execution of decree in the CPC. A decree may be enforced by delivery of any property specified in the decree, by attachment and sale or by sale without attachment of the property, or by arrest and detention in civil imprisonment, or by appointing a receiver, or by effecting partition, or any such manner which the nature of relief may require. The CPC recognizes the right of the decree holder to attach the property of the judgment

debtor in execution proceedings and lays down the procedure to effect attachment. Sections 60 to 64 and rules 41 to 57 of Order XXI of the CPC deal with the subject of attachment of property. Section 60 specifies properties which are not liable to be attached or sold. Whereas section 46 of the CPC provides for issuance of "precept." A decree may be executed by attachment and sale or sale without attachment of any property. Sections 65 to 73 of the CPC and rules 64 to 94 of Order XXI of the CPC deal with the subject relating to sale of movable and immovable property. Section 52 of the CPC provides the enforcement of a decree against legal representative of the judgment debtor. Section 54 deals with a case where, though the civil court has the power to pass a decree, yet it is not competent to execute the same. The period of limitation for the execution of a decree other than a decree granting a mandatory injunction is twelve years from the date of the decree.[5] The limitation period for the execution of a decree for mandatory injunction is three years from the date of the decree.[6] It is the proceedings by which the decree holder seeks to reach money or property of the judgment debtor in the hands of a third party (debtor of judgment debtor). Women, judicial officers, the parties, their pleaders, members of legislative bodies, minors or a judgment debtor where the decretal amount does not exceed Rs.2,000, these persons cannot be arrested and detained in civil imprisonment.

Execution of a foreign decree. Under Indian law there are two ways of getting a foreign judgment enforced. Firstly, by filing an execution petition under section 44A of the CPC and secondly by filing a suit against the foreign decree. Under section 44A of the CPC, the decree of the superior court of any reciprocating territory is executable as a decree passed by the domestic court. The reciprocating territory is notified by the central government in the Official Gazette. In case the decree pertains to a country which is not a reciprocating territory then a fresh suit will have to be filed in India on the basis of such a decree or judgment, which may be construed as a cause of action for the said suit and in such suit the said decree will be treated as another piece of evidence against the defendant. Section 13 of the CPC specifies certain exceptions under which the foreign judgment becomes inconclusive and is therefore not executable or enforceable in India. They are the following circumstances:

(a) where it has not been pronounced by a court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;

(d) where the proceedings in which judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India.

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5 Limitation Act, 1963, Art. 136.

6 Limitation Act, 1963, Art. 133.

16. Arbitration and ADR

Arbitration. Arbitration is one of the modes of ADR prescribed by section 89 of the CPC. Prior to incorporation of section 89 in the Code of Civil Procedure the parties to litigation, with mutual consent, could take recourse to arbitration as a mode of resolution of their dispute under the Arbitration and Conciliation Act, 1996. This Act, however, did not contemplate a situation as in section 89 of the CPC, where the court asks the parties to choose any ADR mechanism and the parties choose arbitration as their option. Section 89 of the CPC now provides for reference of a dispute in a *sub judice* matter to arbitration. The provisions of the Arbitration and Conciliation Act, 1996 shall apply to the proceedings provided as though the proceedings for arbitration were referred for settlement under the provisions of that Act. Arbitration commences with the consent of all the parties. Arbitration effectively puts an end to the dispute. Unlike conciliators, arbitrators do not need the consent of parties in order to issue an award that legally binds the parties. If reference is made to arbitration under section 89 of the CPC, the Arbitration and Conciliation Act, 1996 would apply only from the stage after reference and not before the stage of reference when options under section 89 of the CPC are given by the court and chosen by the parties. The arbitration process results in an award, which is enforceable as the decree of civil court, and the parties are bound by the same. Thus, the decision of the forums specified under section 89 shall be as effective, having the same binding effect as court orders or decrees and arrived at a relatively cheaper cost and within a short span of time. The object of the Act is to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards.

ADR (alternative dispute resolution) system. ADR is formulated with the purpose of reducing the burden of the already burdened system and render expeditious justice. Section 89 of the Code of Civil Procedure was introduced with the purpose of amicable, peaceful and mutual settlement between parties without intervention of the court. At the commencement of the Code of Civil Procedure, a provision was provided for alternate dispute resolution, but the same was repealed by the enactment of the Arbitration Act, 1940 under section 49 and Schedule 10. Section 89 of the CPC came into being in its current form on account of the enforcement of the CPC Amendment Act, 1999 with effect from 1 July 2002. Later on, new alternatives were added which were not restricted to arbitration only. Section 89 along with rules 1A, 1B and 1C of Order X of the first schedule have been implemented by sections 7 and 20 of the CPC Amendment Act, 1999 and cover the ambit of law related to alternate dispute resolution. The clauses under Order X are specified to ensure proper exercise of jurisdiction by the court. Sub-section (1) refers to the different mediums for alternate resolution and sub-section (2) refers to various Acts in relation to the mentioned alternate resolutions. According to section 89 of the CPC where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and

give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for arbitration; conciliation; judicial settlement including settlement through *Lok Adalat* (people's court); or mediation. For arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply and the rules can be made under Part X of the CPC for determining the procedure for opting for "conciliation" and up to the stage of reference to conciliation. Similarly in case where the dispute is referred to *Lok Adalat* the provisions of section 20(1) of the Legal Services Authority Act, 1987 shall apply and for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. While judicial settlement through *Lok Adalat*, as under sections 89(1)(c) and 89(2)(c), could only be in terms of Legal Services Authority Act, 1989.

Cases for which ADR is effective. All other suits and cases of a civil nature, in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums), are normally suitable for ADR process:

(i) all cases relating to trade, commerce and contracts;

(ii) all cases arising from strained or soured relationships;

(iii) all cases where there is a need for continuation of the pre-existing relationship in spite of the dispute;

(iv) all cases relating to tortious liability, and

(v) all consumer disputes.

Thus it is effective to deal with the problem of the enormous arrears of cases, appeals, procedural shackles and the adversarial system which results in the failure of justice.

17. Role of Academia

The role of academia in India has always been significant in the evolution and development of the present structure of the Code of Civil Procedure. Before the First Code of Civil Procedure of 1859, there were Acts and Regulations which regulated civil procedure of the mofussil courts. The various Law Commissions which were set up to codify the laws in India always took the assistance of the various jurists of India. A large number of scholars and writers made contributions to the development of the civil procedural law in India. Among them were D.F. Mulla, Supto Sarkar & Manohar, Palmtop, B.M. Prasad & Manish M. Valechha, Woodroffe & Ameer Ali, P.S. Narayana, Suranjan Chakraverty, Bholeshwar Nath & M.M.L. Singhal, K. Padmanabhan Nair and N. Ajith, A.N. Saha, and others.

18. Statistics

Two Law Commissions of India recommended increasing the proportional strength of judges to fifty per million of the population. The current sanctioned numerical strength, however, of the subordinate judiciary is 20,214 judges, while that of the

twenty-four High Courts is 1,066; and the backlog of cases has remained abnormally high at 31 million.

As against the sanctioned strength of the subordinate strength, there are more than 4,600 vacancies for judges in the subordinate judiciary, which is more than 23 per cent of the strength. There are at present 21,805,869 cases pending before the courts.

The condition in the High Courts is worse with almost 52 per cent (549) of the posts of the judges lying vacant. The Supreme Court too has six vacancies on a sanctioned strength of 31. The Law Commission of India in its 20th Report found that at the current rate of disposal, High Courts required at least an additional 58 judges to break even and an additional 942 judges to clear the backlog. It may be pointed out that the current judge-population ratio stands at 17 on its sanctioned strength, i.e., one judge per over 58,800 of the population.

19. Comparative Observations

The Indian civil justice system resembles its common law counterparts. It features a coordinate, pyramid structure of judicial authority, emphasizes formal procedural justice dominated by litigants of equal status engaged in adversarial processes, and provides binding, win-lose remedies. Emphasis is placed on the law laid down by the Supreme Court. India follows the doctrine of precedent as against the importance of law enacted by Parliament, which prevails in civil law countries.

The practical application of this system in India has achieved mixed results. Some observers have recently emphasized the positive role played by a strong Indian judiciary in increasing the accountability of democratically elected people. Yet, others believe the adversarial procedural justice system in India has failed from its inception. As India celebrates its seventieth year of independence, and as it pursues economic liberalization efforts, it is time to assess its civil justice process and to facilitate the design of long-needed reforms. Based on the views of a broad array of legal experts in India, the judiciary in India is the sole arbiter of the Constitution, the authoritative interpreter of the will of the people, and the protector of the freedom and liberty of the people.[7] The Indian civil justice system features a civil service of court administrators, an independent judiciary, a rich supply of professional legal talent and a modern procedural code. However, the system also exhibits a general failure to manage effectively the dispute resolution processes of a democratic, socially diverse and newly market-oriented society. Specifically, inefficient court administration systems, excessive judicial passivity in an adversarial legal process, and severely limited alternatives to a protracted and discontinuous full trial frustrate the very purpose of justice. Whatever may be one's position, India has adopted the adversarial procedural system. As against inquisitorial proceedings, India follows adversarial proceedings. In civil law countries, in a typical inquisitorial proceeding, the trial is dominated by the presiding judge,

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7 H.R. Khanna J. in ADM Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207.

who determines the order in which evidence is taken and who evaluates the content of the gathered evidence. In those proceedings, the court determines the credibility and relative weight of each piece of evidence without being constrained by strict rules in that respect. By contrast, in a typical adversarial system, the case is organized and the facts are developed by the sole initiative of the parties. The process develops through the efforts of the litigants before a passive decision maker who reaches a decision on the sole basis of the evidence and motions presented by the litigants. As the adversarial system has been so established in the judicial system of India, it is now, if not impossible, most difficult to adopt an inquisitorial system howsoever it may be beneficial to the people of India.

20. Cultural Observations

India is a country of multiple cultural and religious traditions in which there is a complete unity in diversity. Culture and religion have no influence on civil procedure nor does the latter have any influence on the former. India as a whole is a secular country.

21. International Matters and BRICS Cooperation in Civil Procedure Perspectives

In India, there is no statute relating to the matter of conflict of laws. Many provisions relating to private international law have been incorporated in the Code of Civil Procedure. For example, section 13 of the CPC lays down that, with some exceptions, a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim in litigation. Similarly, section 44-A deals with the provisions relating to the execution of a foreign judgment, i.e., foreign judgments may be enforced by a suit. They may also be enforced by proceedings in execution in certain specified cases which are mentioned in section 44A of the CPC. Besides this aspect, international cooperation in the field can be in matters relating to summons and to some judicial matters.

Conclusion

India is a huge country geographically and the second largest in the world by population. The problems it faces are great as well and they are multifaceted. The country, at present, has a growing economy and is gradually becoming a highly industrialized nation. And along with this economic development, a multitude of commercial and industrial development problems, among many others, appear. Also appearing is the increase in litigation of many kinds that is seriously affecting the law relating to civil procedure. Civil procedural law will have to adapt to the needs of the time, and for this to occur better and suitable provisions from other countries will need to be borrowed.

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CIVIL JUSTICE IN CHINA

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This article presents a basic and comprehensive introduction of Chinese civil justice. It gives a complete picture of Chinese civil justice, including the brief history, the court and judge system, the outline of the procedure, and the internationalization. Through the introduction, one can find that Chinese civil procedure law is a mixture of Soviet procedural concept, Chinese local culture, and western procedural concept and rules. It is still a developing procedure and experiences a process from resisting western procedural concept to gradually accepting and learning from it. It used to be a supra-inquisitorial trial model with overwhelming focus on conciliation, but is now transforming to a party disposition trial model with preference to conciliation under the premise of voluntariness. With the globalization of economy, the international cooperation of China, especially with the BRICS countries, will also become more and more important.

Keywords: China law; civil procedure; court system; civil justice; conciliation.

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Introduction

This article aims at making a basic introduction of Chinese civil justice under the comparative view, giving special emphasis to the unique features of Chinese procedural system under the influence of Chinese traditional culture, the socialist ideology and the procedural system of the Soviet Union the Western Countries. Generally, the development of Chinese civil justice of New China (after 1969) can be divided into 4 stages: (1) 1949–1982 when there wasn't a written Civil Procedure Law; (2) 1982–1991 while the "Test" Civil Procedure Law operated; (3) 1991–2012 as the first formal Civil Procedure Law of China operated, together with general judicial reforms aimed to adjust the roles of judges vs. parties; and (4) post 2012 as the enactment of the 2012 amendment of the Civil Procedure Law and the 2015 "Interpretation" of the law issued by the Supreme Court, together with general judicial system reforms aimed to adjust the roles of judges vs. administrative leaders and court staff.

1. Brief History

When the People's Republic of China ("PRC") was founded on Oct. 1, 1949, in order to draw a clear demarcation between the new socialist country and the old capitalist

society, it overthrew everything that belonged to the Kuomintang's government, including the republican legal system which oriented from the civil law system but had not fully integrated into the general legal practice or merged into the Chinese legal culture.[1] Before 1954 when the Constitution and the Organic Law of Courts were enacted, the judicial system of China had long been used as the tool to fight against the new government's enemies, including the political ones and the criminal ones. For civil disputes in which no "enemies" stood out, they would most be resolved by the neighborhood community (which is an autonomic organization led by the Chinese Communist Party), the respectable individuals nearby or the party cadres in the neighborhood. Even for those civil cases that made their way into the courts, which comprised mainly of the property disputes arising out of the Agrarian Reform (土地改革), the divorce disputes and the personal injury disputes, they would also be conciliated rather than adjudicated by the judge.[2] Formal trials were quite rare and adjudication was generally neglected by the judges as a procedural option.[3] The "no civil trial" situation became even worse during the Cultural Revolution, when legal nihilism prevailed.

The absolute superiority of conciliation for civil disputes lasted until 1982, when the Civil Procedure Law of People Republic of China (for Trial Implementation) ("1982 CPL") was finally enacted. Although the Law still emphasized the conciliation, it required the judge to enter judgment in time if parties failed to reach consensus in mediation (Art. 6). Due to the fact that the legislation of the 1982 CPL referred much to the Criminal Procedure Law (which was enacted in 1979), the judge of the civil proceeding held as much authority as the criminal judge and played an extraordinary active role in the adjudication process, leaving extremely limited room for party disposition. This lead to the supra-inquisitorial trial mode of Chinese civil procedure in which the court took control of everything, including initiatively searching for evidence with no limitations and making investigation beyond the parties' claim.

In 1991, a new Civil Procedure Law was released as the first and so far the only civil procedure code of China ("1991 CPL"), replacing the 1982 code. The new code largely strengthened the protection of the parties' litigation rights and the limitation of the court's authority. It explicitly provided the principle of party disposition (Art. 13), vested parties the right to appeal against the court's decision on unreasonably shutting out lawsuits and abusing jurisdiction (Art. 140), and limiting the appellate court's

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1 Yulin Fu & Zhixun Cao, *The Position of Judges in Civil Litigation in Transitional China-Judicial Mediation and Case Management* in *Towards a Chinese Civil Code* (L. Chen & C.H. van Rhee, eds., Leiden; Boston: Martinus Nijhoff Publishers, 2012).

2 Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 California Law Review 1201–1202 (1966).

3 Judicial Review, *The Trial of Civil Cases Should be Emphasized*, in 6 Reference Materials on the Courts' Litigation Procedure in the PRC (Renmin University Trial Section, ed., Beijing: People University Internal Reference, 1957).

examination authority within the parties' appellate claim (Art. 151). The 1991 CPL also weakened the priority of conciliation by stressing the voluntariness and legitimacy of the conciliation (Art. 9). Along with the enactment of the 1991 CPL was the judicial reform initiated by the Supreme People's Court ("SPC") and widely participated by the scholars. It started from the transition of the trial mode, introducing western procedural concepts into Chinese civil justice, such as the party presentation, the party disposition, the adversary system and the burden of proof. The reform experience was concluded in judicial interpretations[4] such as the *Several Provisions of the SPC on the Issues Concerning the Civil and Economic Trial mode Reform* issued in 1998 and the *Some Provisions of the SPC on Evidence in Civil Procedures* issued in 2001.

Entering the 21st Century, with the massive explosion of lawsuits and petitions concerning with lawsuits, the judicial reform turned back to the conciliation as an important means for the courts to dispose the litigation cases. During the first decade, the SPC issued a series of judicial interpretations to broaden the application of the conciliation. The *Some Provisions of the SPC on Trying Civil Cases Involving the People's Conciliation Agreements* promulgated in 2002 emphasized the evidential effect of the conciliation agreement presided by the People's Conciliation Committees. The *Several Provisions of the SPC on the Application of Simplified Procedures in the Trial of Civil Cases* promulgated in 2003 created the prerequisite mediation for certain categories of cases (Art. 14). The *Provisions of the SPC about Several Issues Concerning the Civil Mediation Work of the People's Court* issued in 2004 regulated some methods to further intensify the conciliation. Moreover, in accordance with the supreme policy of the CCP to build up a harmonious society under the *CCP Decision Concerning Major Questions in the Building of a Socialist Harmonious Society* passed in 2006, in 2007 the SPC announced the *Some Opinions of the SPC about Providing Judicial Protection for the Construction of a Socialist Harmonious Society* and the *Several Opinions of the SPC on Further Displaying the Positive Roles of Litigation Mediation in the Building of a Socialist Harmonious Society* to stress the importance of conciliation.

Meanwhile, the legislators were concerned with the disordered application of the adjudication supervision procedure (AKA the Chinese reopening procedure) and the high failure rate of enforcement in judicial practice, and amended the 1991 CPL in 2007. The amendment further specified the statutory triggers of trial reopening (Art. 179) and extended the time limit of the application of the trial reopening under

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[4] In China, the Supreme People's Court has the right to make judicial interpretation for the law. Its effect is commonly binding to the courts of all country. It can be divided into the normative interpretation and the individual interpretation. The normative interpretations are abstract, general normative legal instruments stipulated in the name of "Interpretation on XXX," "Provision on XXX," or "Opinion on XXX." The individual interpretations, on the other hand, are short legal opinions made under the request of lower courts to guide the trial for individual cases. Such interpretations are called "Reply." The normative judicial interpretation is usually made to unifying judicial practice and specifying, clarifying or supplementing the flawed statutes which is often questioned as exceeding the judicial function of the court and replacing the function of the legislature.

special circumstances (Art. 184). For enforcement, the 2007 amendment added a series of regulations to ensure its realization, such as the immediate enforcement without noticing the debtor in advance (Art. 216, para. 2), the debtor's duty of property report (Art. 217), and the enforcement objection suit (Art. 202). Keeping up with the amendment, the SPC correspondingly issued the *Interpretation of the SPC on Several Issues Concerning the Application of the Adjudication Supervision Procedure of the Civil Procedure Law* and the *Interpretation of the SPC of Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law* in 2008, guiding the judicial practice of adjudication supervision and enforcement.

The 2007 amendment, however, was insufficient to satisfy the demands of the practice since the 1991 CPL had fallen far behind with the development of China. The request for a comprehensive amendment became stronger and stronger and was finally realized on 31st August, 2012, when the Standing Committee of the National People's Congress (National People's Congress: "NPC"; Standing Committee of NPC: "NPCSC") passed the new amendment for the 1991 CPL. The 2012 amendment has so far been the latest and most comprehensive amendment for the 1991 CPL. It absorbed some of the regulations provided in the judicial interpretations as the regulations of judicial reforms, such as the parties' optional right to choose the simplified procedure by consent under the *Several Provisions of the SPC on the Application of Simplified Procedures in the Trial of Civil Cases*. And the introduction of the public interest litigation and the small claim litigation make the proceedings more diverse. The main tendency is still to restrict the judges' discretion, increase procedural transparency and maintain the principle of party presentation and disposition.

The 2012 CPL has 4 parts, 27 chapters and 284 articles. Except for the supplement of new chapters, the main structure of the current CPL remains the same with the 1982 CPL. The first part is the General Principle part, which contain 11 chapters: Purposes, Scope of Regulation and Basic Principles; Jurisdiction; Trial Organization; Recusal of Adjudicating Personnel; Litigation Participants; Evidence; Time Periods and Service; Conciliation; Perpetuation and Advance Enforcement; Compulsory Measures against Obstruction of Civil Actions; Litigation Expenses. The second part is the Trial Procedure part, including: Ordinary Procedure of First Instance; Simplified Procedure; Procedure of Second Instance; Special Procedure; Procedure of Adjudication Supervision; Procedure for Hastening Debt Recovery; Procedure of Public Summon. The third part is the Enforcement Procedure, including: General Provisions; Application and Referral of Enforcement; Enforcement Measures; Suspension and Termination of Enforcement. The last part is the Special Provisions of the Civil Procedures Involving Foreign Elements, including: General Principles; Jurisdiction; Service and Time Periods; Arbitration; Judicial Assistance.

Closely following the comprehensive amendment of the CPL, the SPC issued the *Interpretation of the SPC on the Application of the Civil Procedure Law* ("ICPL") to guide the application of the revised code. This interpretation replaces the former

interpretation for the 1991 CPL issued in 1992 (*The Opinions on Several Issues concerning the Application of the Civil Procedure Law*) as the new solely judicial interpretation for the whole CPL rather than partial provisions. It absorbs some of the regulations from the scattered judicial interpretations issued before, revises some other regulations which is no longer consistent with the amended code, and provides more detailed regulations for new types of litigations introduced by the 2012 amendment. A notable thing is that, the ICPL only has the effect to repeal *The Opinions on Several Issues concerning the Application of the Civil Procedure Law*. For other judicial interpretations issued before, only the articles that have discrepancies with this interpretation shall be repealed.

2. Courts and Judges

The Constitution of PRC was passed in 1982 and latest amended in 2004. The provisions about the court system include: the provision of announcing the people's courts as the judicial organs of the state (Art. 123), that of establishing the basic structure of court system (Art. 124), that of requiring public trial (Art. 125), and that of announcing judicial independence (Art. 126). Under the provisions of the SPC, it functions as the highest judicial organ and supervises the adjudication work of all lower courts (Art. 127). It is responsible to the NPC and NPCSC, while local people's courts at various levels are responsible to the corresponding people's congress and its standing committee which created them (Art. 128). The tenure of the President of the SPC is the same as that of the NPC members. The President shall serve no more than two consecutive tenures (Art. 124). The election and the removal of the President of the SPC should be made by the NPC (Art. 62), while the appointment or removal of the vice president, judicial committee and trying judges of the SPC, and the presidents of the military courts should be made, at the recommendation of the President of the SPC, by the NPCSC (Art. 67).

More detailed regulations on courts and judges in China are mostly provided in the *Organic Law of the People's Courts* passed in 1972 and latest amended in 2006, and the *Judges Law of the People's Republic of China* passed in 1995 and latest amended in 2001. According to the Organic Law, Chinese court system consists of ordinary courts, special courts and military courts (as shown in the figure below).[5] As the core structure of the court system, ordinary courts compose of four levels: the basic people's courts, the intermediate people's courts, the high people's courts and the Supreme People's Court. They are respectively placed in county-level administrative regions, municipal administrative regions, provincial administrative regions and the capital Beijing. Each level of courts has jurisdiction of criminal cases, civil cases and administrative cases as the court of first instance.

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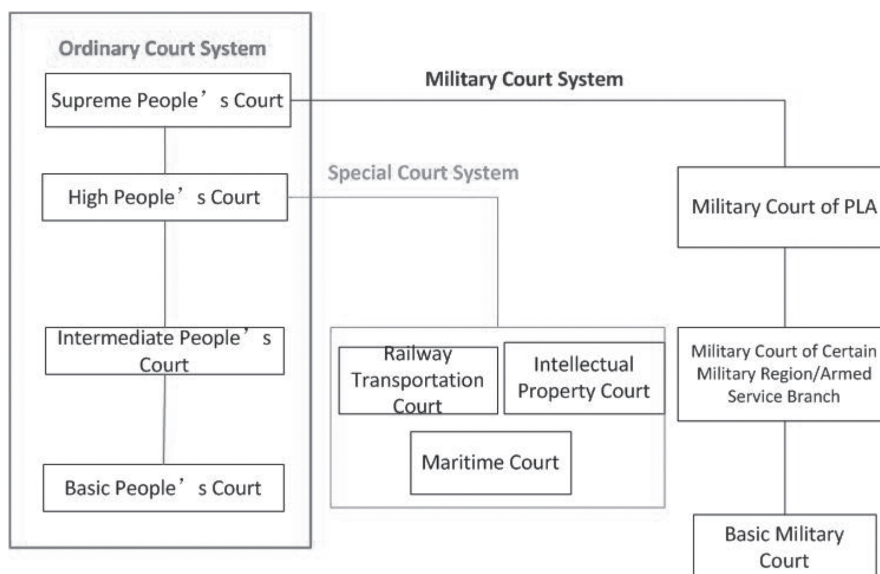
5 The figure *see* Yulin Fu, *Functions of the Supreme People's Court in Transition*, 3(2) Peking University Law Journal 301 (2015).



The special courts in China are intermediate courts specialized for certain types of case. Their establishment is generally authorized by the Supreme People's Court in accordance with civil procedure law. So far the special courts are maritime courts, intellectual property courts and railway transportation courts. These special courts are not established in every administrative region, instead, they have trans-regional jurisdiction over cases. Their decisions shall be appealed to the high court in the province where the special court is located. As an ordinary court, the high court usually assigns cases from special courts to adjudication divisions which are responsible for civil cases.

The military courts are separated from ordinary courts and have their own court system. The military court system has its own basic court (basic military court), intermediate court (military court of certain military region or armed service branch), and high court (military court of PLA).

In China, the judges of different court levels are not regulated separately under different doctrines for election, appointment, evaluation and removal. According to the Judge's Law, except the military courts, whose judges shall all be decided by the NPC and NPCSC, the presidents of other courts are all decided by the people's congress at the same administrative region level, and other judges are decided by the corresponding standing committee under the recommendation of the presidents (Art. 11). There are no regulations about who has the right to nominate judge candidates and how to nominate them. The qualifications that the judge of all courts need are the same, which are the Chinese nationality, the age of over 23, the abidance by Chinese Constitution, the fine political and professional quality, the good conduct and the good health (Art. 9). The assessment and examination of the

judge is made by the court which the judge belongs to (Art. 21). The court will form a commission for examination and assessment of judges (Art. 48), the chairman of which shall be assumed by the president of the court it belongs to (Art. 49).

The judge compositions of various levels of courts are also basically the same. According to the Organic Law of People's Courts, a basic people's court is composed of a president, several vice-presidents and judges (Art. 19). Other levels of the court, including the SPC, are all composed of a president, several vice-presidents, chief judges and associate chief judges of divisions, and judges (Arts. 24, 27, 31). None of the level of court is regulated a precise number of judges.

3. Scope of Civil Procedure

According to the CPL, the civil disputes in China are specified as disputes on rights and obligations arising from property, personal injury or family matters between equal parties (Art. 3). The limitation of the scope of disputes and the emphasis on the equality of parties are used to distinguish the disputes from "administrative disputes." Such differentiation results from the dualism of public and private law as well as the individual existence of administrative procedure law.

4. Structure of Civil Procedure

The structure of civil procedure in China adopts the "four-level and two-instance" system. The "four-level" system means that there are four levels of courts in China, which are the basic people's courts, the intermediate people's courts, the high people's court and the SPC. The "two-instance" system means that the first instance judgment and certain rulings, which are the ruling on refusing to accept the lawsuit, the ruling on dismissing the lawsuit, and the ruling on jurisdiction objections, can be appealed, while the decision made by second instance court is final and cannot be appealed. It is the higher court next to the first instance court that has the appellate jurisdiction as the court of second instance. The two-instance system, however, has an exception, which is the adjudication supervision procedure or the reopening of proceedings as remedy for effective decisions. In practice, the adjudication supervision procedure is quit commonly applied to quash the finality of the second instance decision. After experiencing a drastic lowering of the level of court of first instance, nowadays most courts of first instance are basic courts and intermediate courts, while most reopening trials and some appeals are made by high courts and the SPC.

5. Fundamental Principles

The fundamental principles of the civil procedure are all regulated in the CPL. They are the principle of equal litigation rights (Art. 8), the principle of full argument

(Art. 12), the principle of party disposition (Art. 13, para. 2), the principle of court's conciliation (Art. 9), the principle of good faith (Art. 13), the principle of receiving supervision from the procuratorate (Art. 14), and the principle of direct hearing.

The principle of equal litigation rights is considered as an embodiment of Art. 33 of the Constitution, which provides that "citizens are all equal in front of the law." Art. 8 of the CPL claims that "all parties of the civil litigation shall have equal litigation rights. The people's courts shall, when adjudicating civil cases, guarantee and facilitate all parties to exercise their litigation rights, and apply the law equally to all parties."

The principle of full argument in China is different from the doctrine of adversary trial. It only ensures the parties' right to make argument in trial (Art. 12), but does not request the court's fact finding to be bound by the parties' claims and evidence presented during the argument.

The principle of party disposition regulated in para. 2, Art. 13 allows the parties to dispose their civil rights and litigation rights within the scope subject to law.

The principle of court's conciliation is a unique principle of Chinese civil procedure. It shows the important role of the conciliation in the litigation. Art. 9 asks the court to conduct conciliation according to the principles of voluntariness and lawfulness. To avoid endless conciliation and litigation delay, the article requires the court to render judgment immediately if no mediation agreements can be reached. Under this principle, the conciliation is implemented throughout the whole civil proceeding from the filing of lawsuit to the enforcement phase, from the first instance procedure to the adjudication supervision procedure. Unlike adjudication, the conciliation can exceed the parties' claim and reach agreement beyond the tried disputes.

The principle of good faith is a new principle introduced by the 2012 amendment of 1991 CPL to restrain the excessive growth of false statement, fabrication of evidence, collusive lawsuit and malicious lawsuit. The concrete application of this principle, however, remains to be studied and explored in practice.

The principle of receiving supervision from the procuratorate stresses the procuratorate's role as the supervising organ for the court. Before the 2012 amendment, the CPL's provision of this principle was "the people's procuratorate has the authority to implement judicial supervision towards the civil adjudication activities," limiting the supervision within adjudication. The 2012 amendment changed it into "the people's procuratorate has the authority to implement judicial supervision towards the civil proceeding," intending to include the enforcement into the procuratorate's supervision too. There are three aspects of the procuratorate's supervision on civil proceedings. Firstly, the procuratorate shall supervise the judge's illegal actions such as embezzlement, bribe-taking, and malpractice. Finding these actions, the parties or other relative persons can impeach the judge to the procuratorate. The procuratorate can also take actions *sua sponte*. Secondly, the procuratorate has the authority to ask the court to correct effective decisions through a protest or a procuratorial suggestion. Receiving a protest, the court shall initiate the adjudication supervision

procedure in time. The procuratorate will participate in the proceeding to support its protesting reason and supervise the litigation process. The procuratoratial suggestion, however, is only a suggestion without any forcible effect. Lastly, the procuratorate shall supervise the enforcement. So far, there have not been any detailed regulations on how the procuratorate shall supervise the enforcement. The *Rules for the Supervision over Civil Proceedings by the People's Procuratorates (for Trial Implementation)* issued by the Supreme People's Procuratorate in 2013 only mentions that the procuratorate shall issue procuratoratial suggestions on enforcement problems.

The principle of direct hearing is not explicitly regulated in the CPL. It is, however, scatteredly presented concrete provisions on trial. For example, Art. 68 provides that evidence shall be presented and cross-examined by the parties in court; Art. 72 provides that any entity or individual that knows something about the case has the obligation to testify at court; Art. 139, para. 2 provides that with the permission of the court, the parties may cross-examine witnesses, expert witnesses, and inspectors at court. In practice, however, the principle of direct hearing is not implemented very well. In China, each court has a judicial committee. According to the Law on the Organization of the People's Courts, it is a committee formed by the president of the court and other experienced judges that practices democratic centralism when fulfilling the task of summing up judicial experience and discussing complicated cases or other judicial issues (Art. 11). When a judge considers a case complicated, he can turn to the judicial committee for help. In theory, the judicial committee should only serve as a supervisor or guider of trial. It can only "discuss" the cases instead of "deciding" them. There is no legal obligation for the adjudicators to follow its advice. In practice, however, the judicial committee's decision must be obeyed. The legal reality is that the judicial committee is often the substantial adjudicator behind the judges who preside over the trial and leave their names on the judgment. Therefore, the existence of the judicial committee often breaks the principle of direct hearing. In addition, in China, the witness are often absent from the court due to the traditional hatred of "snitch" and the lack of regulations on forcing the witness to court and protecting them from being hurt after court, making the trial more of a reading of documentary evidence. The fact that the parties' argument does not influence the judge's decision also makes the principle of direct hearing unimportant for the adjudication.

6. Access to Justice

In China, the plaintiff used to have the problem of getting the court to accept the suit filing. The court would make a substantive examination on the suit filing, asking the plaintiff to prepare overmuch materials and evidence to support his suit filing. When the plaintiff failed, the court could refuse to accept the suit filing. Such refusal did not need to be made in any written form. To decrease the case load, the courts would use the excuse of supplementing pleading to delay case docketing, or make

an oral ruling on refusing to accept the suit filing to shut the cases out of the court. Some courts arbitrarily refused to take "difficult" cases which were unclear, sensitive, high-profiled, easy to be interfered by local government, or easy to trigger petitions. These illegal practices made the case docketing really difficult. To solve this problem, the 2012 amendment of the Civil Procedure Law specially adds a sentence to Art. 123, emphasizing that "the people's court shall safeguard the parties' right to institute litigation by virtue of law." The amendment also changes the words describing the court's acceptance of the suits from "shall accept the lawsuits" to "must accept the lawsuits," enhancing the court's duty of ensuring litigation rights. In addition, in 2014, the Fourth Plenary Session of the Eighteenth Central Committee of the Communist Party of China announced that, the docketing of court shall be changed from the "docketing examination system" to the "docketing registration system," meaning that the procedure of examining the suit filing should be as simple as registration. In response to this, the SPC issued the *Provisions of the SPC on Several Issues concerning the Registration and Docketing of Cases by People's Courts* in 2015. It provides that all pleadings shall be accepted with a written document indicating the date of the receipt (Art. 2). After receiving the pleading, if the court cannot make a decision on docketing immediately, it may have at least 7 days[6] to examine the filing conditions prescribed in CPL and decide whether to docket the case (Art. 8). Even if the court decides to refuse to docket the case, it shall still issue a written ruling to the plaintiff. According to the director of the docketing division of the SPC, one year after the reform of case docketing, up to 95% of the case were docketed immediately upon receiving the pleading. The problem of delaying or refusing to docket the case is basically solved.

The civil legal aid system in China is not quite developed. So far, there has not been a statue on legal aid. The only systematic regulation on legal aid is the *Regulation on Legal Aid* enacted by the State Council in 2003. The *Criminal Procedure Law* and the *Lawyer's Law* do have special provisions on legal aid, but the *Criminal Procedure Law* is only applied in the criminal procedure, and the *Lawyer's Law* only has one article generally regulating the lawyer's duty to perform the legal aid in accordance with the state regulations (Art. 42). According to the *Regulation on Legal Aid*, in the civil procedure, only the plaintiff who claims for state compensation, social insurance treatment, minimum life alimony treatment, survivor's pensions or relief funds, maintenance for supporting parents, grandparents or children, payment of labor remunerations, and civil interests arising from the brave act of righteousness can apply for legal aid when he needs an agent ad litem and fails to entrust one due to economic difficulties (Art. 10). The standard of "economic difficulty" is set down by the government of the provincial level and usually can only be reached by the

[6] For the lawsuit filed by a person to revoke a judgment in which he is not a party concerned but his interests are violated, the time will be extended to 30 days; for the lawsuit filed by a person to object an enforcement in which he is not a party concerned but his interests are violated, the time will be extended to 15 days.

poorest people. The legal aid institution is established by the judicial administrative department of the government of the provincial level.

7. Varity of Procedures

There are two major types of procedures regulated in the "adjudication procedure" part of the CPL: the contentious procedures and the non-contentious procedures. The contentious procedures are the ones in which the parties need to confront with each other in court to help the judge make the decision, including the ordinary procedure of first instance, the simplified procedure of first instance, the appellate procedure, and the adjudication supervision procedure. The non-contentious procedures are the ones in which there are no disputes between two specific parties and there is no need for the court to hold a trial for making decision. The CPL contains three chapters providing the non-contentious procedures of China. These three chapters are Chapter 15 "Special Procedures," Chapter 17 "Procedure for Hastening Debt Recovery" and Chapter 18 "Procedure for Public Summons." Among them, the Special Procedures include the procedure for cases concerning the voter qualification for the member of the people's congress; the procedure for declarations of missing or dead person; the procedure for cognizing natural persons' capacities in civil conducts as no capacity or limited capacity; the procedure for cognizing property as ownerless; the procedure for confirming mediation (conciliation) agreements; the procedure for realizing security interests over asset.

In the contentious procedure, if the defendant refuses to come to court for trial without reasonable reasons, the court will enter a default judgment. It should be noted, however, that such default judgment will not be induced by the defendant's failure to file defense, because China does not have the forcible defense institution for the defendant. Even if in a default judgment, the court cannot simply enter the judgment based on the plaintiff's case. It will still need to investigate the facts and examine the evidence. If the court finds that the evidence provided by the plaintiff is not sufficient, it may still enter a judgment against the plaintiff even if the defendant is absent from trial.

It should also be mentioned that there is no interim judgment in the contentious procedure. Substantive issues in dispute can only be resolved by final judgment, while procedural issues in dispute that need to be resolved in advance will be decided through court's ruling. However, Chinese Civil Procedure Law allows the existence of "advance judgment," which is the judgment regarding part of the facts that have been clear. Chinese scholars think that the advanced judgment is different from the interim judgment. While the interim judgment is a temporary decision regarding disputed issues and is not res judicata, the advanced judgment in China is a final decision on part of facts and can be appealed like a full judgment. In practice, advanced judgment is actually rarely used. There is also no consent judgment in China. If the parties reach

an agreement or accept the mediation (conciliation) held in court, the lawsuit shall be terminated by the plaintiff's withdrawal of the complaint or by the court's mediation (conciliation) award. In China, there is also no summary judgment applied to dispose of a case without trial when there is no dispute as to the material facts of the case. The judgment of the simplified procedure is also a judgment made after resolving the substantive disputes through trial. It is only slightly different from the judgment of the ordinary procedure. The judgment of a simplified procedure will be entered immediately in court, while the judgment of an ordinary proceeding is generally entered by serving the judgment on the parties. The content of the judgment for the simplified procedure can also be simpler under certain circumstances.

In China, the composition of bench varies from the type of the procedure. For ordinary procedure of the first instance, the adjudicator must be a collegiate bench. It consists of either judges and people's assessors[7] or only judges. Members of the collegiate bench must be in odd number. For the simplified procedure, including the small claim procedure, the bench can be a single judge. For most non-contentious procedures, they can be held by a single judge. But for the procedure for cases concerning the voter qualification for the member of the people's congress and other complicated non-contentious procedures, the bench shall also be collegiate.

8. Jurisdictions

The court's jurisdiction in China mainly concerns with the jurisdiction by level of courts and the territorial jurisdiction. The "jurisdiction by level of courts," meaning the specific level of court has the original jurisdiction over a certain case, depends on the claim amount and the influence of the case. According to the CPL, a basic people's court shall have jurisdiction over cases that are not within the jurisdiction of people's courts at other levels (Art. 17); an intermediate people's court shall have jurisdiction over the major cases involving foreign elements, cases that have major impacts in the area of its jurisdiction, and cases under the jurisdiction of the intermediate people's courts as determined by the Supreme People's Court (Art. 18); a high people's courts shall have jurisdiction over cases that have major impacts on the areas of its jurisdiction (Art. 19); the Supreme People's Court shall have jurisdiction over cases that have major impacts on the whole country, and cases that the Supreme People's Court deems should be adjudicated by itself (Art. 20).

[7] In China, when the case is adjudicated by a collegiate bench, the bench can be composed by a judge presiding at trial and two "people's assessors." The people's assessor is a lay person from the local community who joins the adjudication like a juror. They do not rule on matters of law but can find the facts of the case with the judge. They will participate in the discussion of the case but will not participate in making the judgment. Unlike the juror in the common law system which is elected by the lottery and is only responsible for one case at a time, the people's assessor in China is a part time job that needs to employ people. The person elected as the people's assessor will generally keep this identity for 5 years.

In practice, high people's courts rarely exercise their original jurisdiction and the Supreme People's Court has never heard first trial cases up to now.

Territorial jurisdiction refers to jurisdiction over cases arising in or involving persons residing within a defined territory. In China, the establishment of territorial jurisdiction is based on the defendant's domicile, subject to certain exceptions. According to the CPL, the doctrine of jurisdiction may change from the defendant's domicile to the plaintiff's domicile when the defendant is in custody; the defendant of a personal status case is not in China or missing; the defendant's household registration is cancelled;[8] or the defendant's domicile is not as clear as the plaintiff's domicile in maintenance cases and divorce cases (Arts. 6, 22). In tort and contract cases, parties are given more jurisdiction choices. Besides courts that are located where the defendants have their domiciles, courts that are located where facts of the case occur have the authority to hear the case as well (Arts. 23, 28). In addition, the jurisdiction over certain types of disputes is specially regulated in law to exclude the domicile doctrine. Such disputes include real estate disputes, port operation disputes and inheritance disputes. The jurisdiction of these disputes is exclusive and cannot be changed by jurisdiction clauses. For real estate disputes, they shall be under the jurisdiction of the court located in the place where the real estate is located (Art. 33 (1)); for disputes concerning harbor operations, they shall be under the jurisdiction of the court located in the place where the harbor is located (Art. 33 (2)); for inheritance disputes, they shall be under the jurisdiction of the court located in the place where the decedent had his domicile upon his death, or where the principal portion of his estate is located (Art. 33 (3)).

Parties of disputes involving property rights are entitled to choose by written agreement to be under the jurisdiction of the people's court in the location which have actual connections with the dispute, provided that the provisions on hierarchical jurisdiction and exclusive jurisdiction are not violated.

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[8] The household registration system, or the Huji system (户籍制度), is a special system of China (including Taiwan). It origins from the ancient China. A household registration record (Hukou, 户口) officially identifies a person as a resident of an area and includes identifying information such as name, parents, spouse, and date of birth. A hukou can also refer to a family register in many contexts since the household registration record is issued per family, and usually includes the births, deaths, marriages, divorces, and moves, of all members in the family The system serves 3 key functions in China. First, the system registers residents, collects and stores information about the populace, and provides personal identification and certifies relations and residence. Second, the system is the basis for resource allocation and the provision of subsidies for selected groups of the population (mainly the urban hukou holders who are a clear minority). This function has shaped much of Chinese economic development in the past half-century by politically affecting the movement of capital, goods, and human resources, heavily favoring the urban centers with investment and subsidies. Third, the system allows the government to control and regulate internal migration, especially rural-to-urban migration. Permanent, large scale migration to urban areas in China, as a consequence, has been relatively small and slow compared to its economic development level. China's urban slums are also relatively small and less serious, compared to those in many other developing nations such as Brazil or India. *See* Feiling Wang, *Renovating the Great Floodgate: The Reform of China's Hukou System* in *One Country, Two Societies: Rural-Urban Inequality in Contemporary China* 335–364 (M.K. Whyte, ed., Cambridge, MA: Harvard University Press, 2010).

In China, a court which has accepted the suit can transfer the case *sua sponte* to other courts when it finds the case is beyond its jurisdiction. It shall transfer the case to the people's court that does have jurisdiction over the case. Such transfer, however, can only be applied once. The people's court to which a case has been transferred shall accept the case and shall not transfer the case to another people's court without authorization even if it considers that the transferred case is not under its jurisdiction. It shall report to the higher court of the wrong jurisdiction and wait for the higher court to designate the right lower court to exercise the jurisdiction. The higher court's designation of jurisdiction can also take place when a people's court which has jurisdiction over a case is unable to exercise the jurisdiction for a special reason, or when a dispute over a jurisdiction among people's courts cannot be resolved through consultation.

A defendant, on or before the last day of his or her time to plead, may file an objection to quash filing of the suit on the ground of lack of jurisdiction of the court over him or her. The jurisdiction objection can only aim at the jurisdiction of court of first instance. The jurisdiction of the appellate court is decided by which court becomes the court of first instance, and the parties have no right to raise objection towards the appellate jurisdiction. The jurisdiction objection will be decided in ruling and can normally be appealed unless it is a small claim procedure.

9. Role of the Judge

According to the Judges Law, Chinese judges are the judicial personnel who exercise the judicial authority of the State according to law (Art. 2). They must faithfully implement the Constitution and laws, and serve the people wholeheartedly (Art. 3). The "laws" here not only include the statutes passed by the NPC and NPCSC, but also include the regulations enacted by national administrative departments such as the State Council, and the judicial interpretations enacted by the SPC. As a civil law jurisdiction, there are no precedents in China. However, the SPC establishes the guiding case institution by issuing *the Provisions on Case Guidance* in 2010 to develop Chinese case law. According to this provision, the "guiding case" means "cases whose judgments have come into force after satisfying the following conditions: 1. attracting wide attention from society; 2. the law applied is principled; 3. the case is typical; 4. the case is complicated or is a new type; 5 the case has other guiding function" (Art. 2). The Case Guidance Office of the SPC will choose cases from lower courts and uniformly publish them as the guiding cases. As to the effect of guiding cases, Art. 1 and Art. 7 of the Provision respectively provides that the guiding cases have a "guiding function" for trial and enforcement by courts throughout the country and that courts at all levels "shall refer to the guiding cases" when they are trying similar cases. The exact meaning of the "guiding function," however, remains unclear. There is also no clear direction on how exactly the courts shall "refer to" these

guiding cases. In practice so far, it is a common phenomenon for the local courts to ignore the guiding cases in adjudication. Therefore, as a new institution, the guiding case system is yet to be developed.

10. Evidence

The rule of evidence of civil procedure in China is scattered in the CPL, the Interpretation of the CPL, and the *Several Rules of the Supreme People's Court on Evidence in Civil Procedures* ("RECP") issued by the SPC in 2001. The CPL classifies the evidence into statements of the parties concerned, documentary evidence, physical evidence, audio-visual materials, electronic data, witness' testimony, expert opinions and written records of the inspection. Any evidence that can be adduced to court shall be the evidence that can fall into one of the categories above. On the other hand, as long as the evidence falls into one of the categories above, it can be adduced to court. China does not have the custom of precluding incompetent evidence from trial. The court will examine all evidence provided by parties in trial and will decide whether to adopt it after the evidence examination. The adoption result will not be known until the court finish adjudicating the case. It will be presented in the judgment, along with the court's fact finding and law application.

In China, witnesses seldom appear at trial. Most of the testimony is made into a written statement which will be read by the court clerk at trial. Therefore, although there is no explicit regulation disallowing the testimony from an absent witness to be adduced to court, in practice, the court often refuses to accept it. Even if the witness does attend the trial, the bench may still be reluctant to attach enough importance to his testimony. This is because in China, there is no litigation allowing judges and parties to examine the witness's credibility. The sanction for false testimony also lacks legal basis and is rarely put into practice.

The documentary evidence is the most commonly-used and the most important kind of evidence in Chinese civil procedure. The expert opinion is also usually presented, and there are no regulations limiting the production of expert opinion, except that it will not be adopted if the court asks the expert to come to court but the expert refuses. Like other civil law jurisdictions, the expert publishing the expert opinion should serve the court with a neutral and objective standpoint. The parties, however, can also hire experts as "expert assistant" to help them. Unlike the expert publishing the expert opinion, the expert assistant is on the side of the party who hires him. His opinion will be considered as part of the party's statement rather than the expert opinion.

The inspection is an examination of the disputed object or the place where the dispute took place made by the court under the parties' application or on a *sua sponte* basis. There is no explicit regulation on under what circumstances should the court make the inspection.

The physical evidence and audio or visual reference materials are rarely produced to court in Chinese civil proceedings. Digital data is a new form of evidence added to the CPL in 2012. It refers to information stored in electronic media in the form of e-mail, chatting record, blog, micro-blog, text message, electronic signature or domain name.

Under certain circumstances, the court can collect evidence which the parties do not produce on a *sua sponte* basis. According to Art. 15 of RECP, these circumstances are: the circumstance when the case is concerned with national interests, social public interests, or other persons' legitimate interests; and the circumstance when the evidence to be collected is for the procedural matters that have nothing to do with the substantial dispute, such as the addition of the parties or the suspension of the litigation. According to Art. 17, the parties can also apply for the court's collection of evidence when they have difficulty in collecting them. This includes the evidence which is kept by a national authority and can only be accessed by the court; the evidence which is concerned with state secrets, commercial secrets or personal privacy; and other kinds of evidence that cannot be collected by the parties due to objective reasons.

There is a time limit for adducing evidence. Such time limit can be extended under the parties' application. If a party fails to adduce evidence during the time limit, the court shall ask the party to explain. If the reason is objectively justified, or if the other party does not object to the late submission of evidence, the court shall consider such submission as a timely submission. If, on the other hand, the party fails to adduce evidence in time due to intentional misconduct or gross negligence, the court shall not accept the evidence. But if such evidence is concerned with the basic fact of the case, the court shall still accept the evidence, but it can sermonize or fine the party in accordance with law. If the party fails to adduce evidence due to the fault other than intentional misconduct and gross negligence, the court still need to accept the evidence, but can sermonize the party for his late submission (CPL Art. 65; ICPL Arts. 101, 102).

The RECP regulates a series of provisions on how the court should evaluate the evidence, such as what evidence cannot be solely used as decisive evidence (Art. 69), and what evidential force a certain piece of evidence will have (Arts. 70–76). It also makes a sequence for the evidential force of different types of evidence. According to Art. 77, generally, the documents formulated by state organs or social bodies shall be more forceful than other documentary evidence; the physical evidence, archive files, expert opinions, inspection recordings and the documentary evidence that have been notarized or registered shall be more forceful than other documentary evidence, audio-visual materials and testimonies; the original evidence shall be more forceful than the derivative evidence; the direct evidence shall be more forceful than indirect evidence; the testimony of a witness who has a relation with a side of the party and who is testifying to support that side of party shall be less forceful than the testimony of other witnesses.

11. Ordinary Procedure of First Instance

The ordinary procedure of first instance is the basis of other types of procedures. The litigation process is mainly as follows:

Step 1. Filing of a suit – Court's examination to the complaint – The acceptance or denial of the suit filing (if the complaint is denied, the plaintiff can appeal)

Step 2. Service of complaints on the defendant by court – Service of pleadings from the defendant in 15 days after receiving the complaints (In China, it is a right, not an obligation, for the defendant to reply to the complaints, therefore it is acceptable for the defendant not to reply)

Step 3. Preparatory proceedings

Step 4. Trial – allegation, examination of evidence, argument, closing statements

Step 5. Judgment

Conciliation can be held by judges through the whole process.

The trial will be conducted under the sequence of the parties' allegation, the examination of evidence, the parties' debates and their closing statements. During the process of evidence examination, the court will ask the parties to list their evidence and express their opinion on the evidence listed by the opposing party. The court, however, will forbid the parties to debate and will ask the parties to leave the disputed issues to the debate process. During the debate process, on the other hand, the court will forbid the parties to present evidence again. This causes the unclear link between the evidence and the parties' case, making trouble in finding the disputed issues between the parties. Therefore, in 2015, the ICPL allows the court to combine the investigation phase and the debate phase with the leave of the parties.

12. Provisional Remedies

In China, the court may make certain temporary orders to protect a party from irreparable damage while a lawsuit or petition is pending. Such orders have interim effect towards the parties until the court issues a final judgment. The provisional remedies have two kinds, one is "perpetuation," the other is "advance enforcement." Perpetuation is the preservation of the status quo until final disposition of a matter can occur, while advance enforcement is the realization of claim before final judgment.

The perpetuation regulated in the CPL includes the perpetuation of evidence, the perpetuation of property, and the perpetuation of act. Perpetuation of evidence is a procedure employed to assure that proof will be available for possible use at a later trial. Perpetuation of property is a procedure employed to prevent the losing party from avoiding enforcement of the judgment by disposing his property. The common measure of property perpetuation is to restrict the disposition of the disputed property or object, so that when the judgment becomes effective, there will

be enough property for enforcement. Perpetuation of act is a preliminary injunction to restrain a party from going ahead with a course of conduct or compelling a party to continue with a course of conduct until the case has been decided.

The perpetuation can be made either before the initiation of the litigation or during the litigation. The pre-litigation perpetuation can only be initiated by the parties' application when the situation is so urgent that the applicant of the perpetuation will suffer irreparable damage without an immediate application of perpetuation. The applicant has to provide security. The perpetuation during the litigation, on the other hand, can also be initiated by the court *sua sponte* and only needs security when the court deems it necessary.

The advance enforcement is a special institution with a restrictive application scope. In accordance with Art. 106 of the CPL, it can only be applied to cases involving claims of maintenance, claims of labor remuneration, or urgent circumstances that require enforcement in advance. The urgent circumstances are when and only when it is necessary to cease the infringing act or eliminate the interference immediately; when it is necessary to stop committing an act immediately; when the advance enforcement is to ask payment from insurance company to restore business; when it is necessary to recover payment from social insurance or social relief immediately; or when the life or business will be seriously influenced if the payment is not immediately recovered.

The order of provisional remedies cannot be appealed, but can be applied for reconsideration to the court making the order. Such reconsideration can only be applied once. Neither can the party object to the court's refusal of reconsideration, nor can they ask the court to reconsider again once it has reconsidered its provisional remedy order.

13. Simplified Procedure

The simplified procedure in China is a procedure where certain steps taken in an ordinary procedure may be simplified. According to the CPL, the ICPL and the *Several Rules of the SPC on the Application of the Simplified Procedures in the Adjudication of Civil Cases* ("SPR"), it can only be applied by the basic people's courts to the cases of the first instance. In practice, most cases in the basic courts are tried through the simplified procedure.

For those cases in which the facts are clear, the relations of rights and obligations are definite, and the disputes are minor, the court can adopt the simplified procedure *sua sponte* (CPL Art. 157, para. 1). According to the Art. 256 of ICPL, "facts are clear" means that both parties present similar cases regarding their disputes and are able to provide reliable evidence, and the court does not need to collect evidence to find facts and distinguish right and wrong; "the relations of rights and obligations are definite" means that it is unarguable on who should bear the liability and who should enjoy the rights; and "disputes are minor" means that there is no essential

dispute regarding right and wrong on the case, liabilities, and other subject matters of the litigation. For cases which do not fall into the application scope of statutory simplified procedure, the CPL provides that they can still be tried summarily if the parties agree on applying the simplified procedure (CPL Art. 157, para. 2), and the litigation do not have the situation provided in Art. 257 which makes the simplified procedure inappropriate, such as the situation where the whereabouts of the defendant is unknown, or the situation where either one party or both parties have a large number of litigants in a joint action.

The basic characteristic of simplified procedure is its simplification and convenience compared with the regular procedure. It simplifies the filing of suit, the summoning, the composition of bench, the preparatory proceeding, the trial, and the judgment. For example, it can be tried by a single judge instead of a collegiate bench. The investigation and debate process of trial can be simplified as long as the rights of the parties to make statements are guaranteed. Although judgments made in ordinary procedures are usually entered on a fixed date after the bench finishes its discussion of the case, the judgments in simplified procedures have to be pronounced in court immediately after trial, unless the court thinks it inappropriate to pronounce in court. The facts finding part and the reason part of judgment can also be simplified under certain circumstances. The adjudication time period of ordinary procedure is 6 months, while the adjudication time period of simplified procedure is 3 months.

The court can initiate a simplified procedure *sua sponte*, but the parties can raise an objection to the court. If the court thinks that the objection is justified, the proceeding will be transformed from simplified procedure to ordinary procedure. For cases that shall be tried through ordinary procedure and do not fall into the types of disputes that cannot be tried summarily, the parties can apply for simplified procedure. But the ordinary procedure cannot be transformed to simplified procedure if the trial has already begun.

The small claims procedure in China is a special type of simplified procedure. Therefore, the applicable disputes shall meet both the general requirements of the simplified procedure and the special requirements of the small claims procedure. The small claims procedure can be applied to the monetary case in which the claim amount is lower than 30% of the annual average salary of employees of the relevant province, autonomous region or municipality directly under the Central Government of the previous year. It cannot, however, be applied to the cases concerning with the confirmation of personal status or property status, cases concerning with foreign affairs, cases concerning with the intellectual property, and the cases that need to hire expert for expert opinion (ICPL Art. 275).

The court will conduct the small claim procedure *sua sponte*. The parties have rights to raise objection on the application of small claims proceeding, but the objection shall be raised before trial. If the court thinks of the objection as justified after examination, the proceeding shall be transformed to the general simplified

procedure. Since the decision of the small claim procedure cannot be appealed, in practice the court rarely applies this procedure.

14. Appellate Procedure

Since China implements the "two instances of trial," the proceeding of second instance is the only appellate procedure and the last instance of trial. The appellate procedure is independent of proceeding of first instance, but it is not a necessary proceeding for all litigations. For cases going through non-contentious procedures and the small claim procedure, there is no second instance of trial; if the parties are satisfied with the adjudication of first instance or fail to appeal within the prescribed time period, the decision made in the proceeding of first instance will become final; if the court of first instance is the SPC, or if the dispute is resolved through conciliation or settlement during the proceeding of first instance, parties also cannot appeal.

By and large, the parties' right of filing the appeal for the first time is not restricted by any substantive requirements. This is why the appeal in China is called "the appeal regardless of reasons." The appeal will be granted as long as the application meets the following formal requirements:

(1) The appealed judicial decision should be the appealable judgment or ruling made by the court of first instance. By virtue of law, all judgments for substantive matters of the case can be appealed. The appealable rulings for procedural matters are the ruling on the court's rejection of docketing the lawsuit, the ruling on the parties' jurisdiction objection, and the ruling on the court's dismissal of plaintiff's accusation;

(2) The appeal is made within the prescribed time. For judgments, the time period is 15 days after the service of judgment; for orders, the time period is 10 days after the service;

(3) The appeal is made to the next higher level of the court. But the appellate pleading shall be serviced to the appellate court through the court of first instance. In China, the parties cannot make a leapfrog appeal. Neither can they ask the original court to adjudicate the appeal;

(4) The appeal is made in written, clarifying the name of the parties, the name of the original court, the case number of the original decision, and cause of action. The appellate pleading shall also state the claim and reason of the appeal;

(5) The appellate fee is paid to the court within the prescribed time. Otherwise the appeal will be considered as being withdrawn.

The CPL provides that the appellate court shall review both the facts finding and the law application of the original court within the scope of the appellate claim (Art. 167). The ICPL, however, provides that the appellate court may exceed the appellate claim if the judgment of the first instance violates prohibitive regulations or does harm to national interest, social interest or other people's legitimate interest (Art. 323). In addition, the appellate court in China is not restrained from conducting

independent fact finding on the case. The new fact finding can be either based on evidence adduced in the court of first instance, or new evidence adduced in the appellate court.

The appellate procedure shall be conducted by collegiate bench, the members of which shall all be professional judges. People's assessors cannot join the collegial bench of appeal. In principle, the adjudication of appeal shall be made by trial. But if the appellant does not mention new facts or evidence in the appellate pleading and the collegial bench considers it unnecessary to adjudicate the case by trial, the case can be reviewed through written hearing. During the appeal, the appellate court can conduct conciliation like the court of first instance. If a conciliation agreement is reached, the original judgment will be considered as being withdrawn once the agreement instrument is received by the parties. As long as the parties accept the conciliation, the appellate court can even deal with matters that exceed the appellate claim.

15. Adjudication Supervision Procedure

In China, if some serious error listed under the Civil Procedure Law (Art. 200) in a judgment or ruling which has taken effect, the reopening proceedings shall be moved under "Procedure of Adjudication Supervision." It is a procedure established as the supplement of the two instances system to correct wrong effective decisions. It is also called the "reopening procedure" or the "retrial procedure," but there is a difference between the retrial procedure of the civil law system and the adjudication supervision procedure in China. The retrial procedure of the civil law system is a special remedy mechanism established for the protection of private rights. The initiator of the procedure can only be the party of the original proceeding. The adjudication supervision procedure, however, originates from the socialism legal system and is a special remedy mechanism established for the protection of common good. The initiator of the procedure used to be limited to the national organs which have the authority to supervise the adjudication of court. These national organs include the people's procuratorate and the court itself. When the people's procuratorate finds that a legally effective decision has a defect regulated in law that can initiate the adjudication supervision procedure, it can lodge a protest or raise a procuratorial suggestion to the court. The protest will start an adjudication supervision procedure, while the procuratorial suggestion is only a suggestion without any coercive effect to the court. If the president of a people's court at any level discovers that a legally effective decision made by the court he works in indeed contains an error and deems it necessary to have the case retried, he shall refer it to the judicial committee for discussion and decision. If the SPC discovers that a legally effective decision made by a local people's court at any level indeed contains an error, or if a people's court at a higher level discovers that a legally effective decision made by a people's court at

a lower level indeed contains an error, they shall also have the power to reopen the case themselves or direct the people's court at a lower level to reopen the trial.

Nowadays, since the adjudication supervision procedure in China also starts to aim at protecting private rights and individual justice, the CPL allows the parties of the effective litigation to initiate the adjudication supervision procedure too. However, due to the public nature and the original intention of the adjudication supervision procedure, the party's motion for retrying the case cannot directly bring any procedural effect for the case. The court shall examine the application to decide whether the proceeding needs to be initiated. By contrast, if it is the national organ that requires adjudication supervision, the retrial procedure will be directly initiated without needing the court's examination.

Art. 200 of the CPL lists 13 statutory defects that can initiate the adjudication supervision, which can be classified into four categories: factual defects [(1)–(5)(12)], legal defects [(6)], procedural defects[(7)–(11)] and judicial behavioral defects [(13)]. The factual defects are the error in fact finding or evidence adoption and the finding of new evidence or new condition; the legal defects are the wrong application of law; the procedural defects are serious defects that may violate the parties' procedural rights or influence the substantial result of the litigation; the judicial behavioral defects are misconducts made by the trial judge, such as embezzlement, bribes, malpractices.

The reopening of the trial shall be restricted to the defects claimed in the application or protest. If the parties apply for adding or changing the claims and such application exceeds the claim of the original case, the court shall not combine these claims into the adjudication supervision procedure, except that these claims concern with national interest or social interest, or that these claims were mentioned by the party in the original case but were not tried by the original court and cannot form a separate lawsuit. It is worth mentioning that the parties of the adjudication supervision procedure shall be the parties of the original litigation, regardless of whether the adjudication supervision procedure is initiated by the parties, procuratorates or courts.

The reopening procedure shall follow the procedure applied in the defective litigation. This means that if the legally effective decision being reviewed is made in the proceeding of first instance, the reopening proceeding shall be the proceeding of first instance; if the legally effective decision that is being reviewed is made in the appellate proceeding, the reopening proceeding shall be the proceeding of second instance.

If the reopening proceeding follows the procedures of the first instance proceeding, the collegial bench shall also be formed based on regulations for the collegial bench in court of first instance, except that in the reopening proceeding, the case cannot be tried by a single judge like that in the simplified proceeding. The parties can appeal if they are unsatisfied with the result. In principle, the reopening proceeding shall be made in trial, but if the proceeding follows the procedures of

the appellate proceeding, the parties have fully expressed their opinions through other ways and make a written agreement on trying the case through documents, the court can reopen the case through written hearing.

Where the court holds that the decision being reviewed is wrong, it shall modify the original decision. For reopening proceeding following the appellate procedure, if it is easier for the court of first instance to verify facts and eliminate disputes, the court reopening the trial can revoke the defective decision and remand the case to the court of first instance. If any party required to participate in the litigation was missed in the trial of first instance and no conciliation or settlement is conducted in the adjudication supervision procedure, or if it is inappropriate to make a substantive adjudication in the reopening proceeding due to the violation of procedural law in the trial of first instance, the court shall also remand the case to the court of first instance. In principle, the reopening court should make a substantive decision to the case and should not remand the case to the court of first instance.

16. Public Interest Action

The class action in China is so far restricted to actions on public interest. It is therefore called "public interest litigation." It is newly provided by 2012 amendment of CPL. Art. 55 of the statue provides that "relevant organs and organizations prescribed by law may bring a suit to the people's court against acts that cause environmental pollution, acts that harm consumers' legitimate interest and rights, and other acts that undermine the public interest." The statue arranges the public interest litigation regulation to the "Parties" section to reconcile the contradiction between the plaintiff of public interest litigation and the traditional theory on standing to sue. According to the traditional theory, a party can only file a lawsuit when his own rights are infringed or under the threat of being infringed. The plaintiff of public interest litigation, however, may not sue for his own interest. Therefore, it is necessary to additionally regulate public interest litigation in the "Parties" section as an exception of allowing the third party standing.

According to Art. 55 of the CPL, only "relevant organs and organizations prescribed by law" can become the plaintiff of public interest litigation. The CPL itself does not authorize any organ the power to file public interest litigation. So far only the *Marine Environment Protection Law of the People's Republic of China* amended in 2013, the *Environmental Protection Law of the People's Republic of China amended in 2014*, and the *Interpretation of the SPC on Several Issues concerning the Application of Law on Environmental Civil Public interest litigations* promulgated in 2015 has vested certain organs and organizations to be the plaintiff of public interest litigation. In 2014, the 4th plenary session of 18th CPC Central Committee passed the *Decision of the CPC Central Committee on Major Issues concerning with Comprehensive Promotion of the Rule of Law*, releasing a series of legal reform. The decision mentions to "explore the establishment

of systems for procuratorates to raise public interest lawsuits," suggesting that the procuratorate will become a competent plaintiff of public interest litigation in the future. In response, the NPCSC issued the *Decision on Authorizing the Supreme People's Procuratorate to Launch the Pilot Program of Initiating Public Interest Actions in Certain Areas*, authorizing the procuratorate the right to initiate public interest litigation.

So far, Art. 55 is the only regulation on public interest litigation in CPL. The regulation is criticized to be too abstract to put into practice. ICPL makes up the shortage, using eight articles (Arts. 284–291) to illustrate detailed procedures of the public interest litigation, including the acceptance of the complaint by court, the jurisdiction of court, the mediation (conciliation) and settlement in the litigation, the withdrawal of the plaintiff, and the preclusive effect of the judgment.

In order to be accepted by court, the public interest litigation shall not only satisfy the normal requirements of filing lawsuit (which are having clear defendants, having specific claims, and being within the jurisdiction of the court which receives the pleadings), but also satisfy a special requirement on evidence. The plaintiff has to establish a prima facie case on the defendant's violation of public interest. When the court accepts the case, it shall notify relevant administrative departments in written within 10 days. Other organs and organizations that have the capacity to file the litigation can apply for participation of the litigation before the trial and become co-plaintiffs if the court grants. During the public interest litigation, the parties are still able to make settlement or accept conciliation from the court. The settlement or conciliation agreement, however, shall be publicized for no less than 30 days. After the publication, the court shall examine whether the agreement infringes the public interest. The plaintiff still has right to withdraw the case, but such right will be restricted if the oral argument has finished. The court will not grant withdrawal after the oral argument.

The judgment of public interest litigation is preclusive to later public interest litigations of the same cause of action. If any organ or organization which is qualified as the plaintiff of the public interest litigation initiates another public interest action for the same case after the judgment of the former public interest action takes effect, the court shall make a rule of not accepting such action, except as otherwise provided by law. However, the acceptance of a public interest action by the court does not prevent the victim of the same case from initiating another suit to the court.

17. Litigation Costs

The litigation costs in China are the costs which should be paid to the court for the litigation. According to Art. 118 of the CPL, the litigation costs are classified into the case handling fee and other litigation expenses. In 2006, the State Council promulgated the *Measures on the Payment of Litigation Costs* ("MPLC"), providing more detailed regulation on the litigation costs. According to Art. 7 of this regulation, the case handling fees shall be paid in not only the procedure of first instance, but also the

appellate procedure and the adjudication supervision procedure. According to Art. 8, for cases applying special procedures, cases in which the court rules to reject the acceptation of the case, dismiss the accusation or appeal due to procedural matters, and cases in which the party appeals for the rulings on the rejection of the acceptation of the case, the dismissal of the accusation due to procedural matters or the objection of jurisdiction, the party does not need to pay for the case handling fee.

According to Art. 13, the rate of the case handling fee varies from the type of the case. If the case occurs due to the dispute on property rights and interests, the case handling fee shall be calculated on a regressive rate in proportion to the amount of the litigation claim. With the increase of the litigation claim amount, the proportion will decrease. For each divorce case, 50 Yuan up to 300 Yuan shall be paid. If property partition is involved, and the total amount of properties does not exceed 200,000 Yuan, no additional fee shall be paid; for the part more than 200,000 Yuan, the fee shall be paid at the rate of 0.5%. For each case on the infringement of personality, 100 Yuan up to 500 Yuan shall be paid. If compensation for damage is involved, and the compensation amount is not more than 50,000 Yuan, no additional fee shall be paid; for the part of more than 50,000 Yuan up to 100,000 Yuan, the fee shall be paid at the rate of 1%; for the part of more than 100,000 Yuan, the fee shall be paid at the rate of 0.5%. For each civil case on intellectual property right, if there is no disputed amount or price, 500 Yuan up to 1000 Yuan shall be paid; if there is any disputed amount or price, the fee shall be paid at the rate for property cases. For each labor dispute case, 10 Yuan shall be paid. For other non-property case, 50 Yuan up to 100 Yuan shall be paid.

The "other litigation expenses" includes the application expenses for non-contentious procedures and intermediate measures in trial or enforcement, the expenses for summoning witness, experts or interpreters, and the expenses for copying case files and legal instruments. The standard of the application expenses is regulated in MPLC, while the expenses for summoning witness, experts or interpreters, which are the traffic expense, accommodation expense and other relevant compensation for the coming to court, are charged by the court on behalf of the witness, experts or interpreters in accordance with the national expense standards for these expenses. The expenses for copying shall be charged in accordance with the actual cost of copying.

The litigation costs shall be borne by the party that loses the lawsuit, unless the party that wins the lawsuit bears the costs at his free will. Where the party concerned partially wins the lawsuit and partially loses it, the court may, at its discretion, decide on the amounts of litigation costs to be borne by the parties respectively. Where the parties reach a settlement or accept a conciliation by court, the litigation costs shall be borne through the negotiation between the parties or decided by court if the negotiation fails.

Where a party concerned really has difficulties in paying litigation costs, he may apply to the court for the judicial relief of postponement, reduction or exemption

of the litigation costs. The exemption of litigation costs, however, may only apply to natural persons.

The amount of the litigation costs will be determined and recorded at the end of the judgment. The parties cannot solely appeal for the litigation costs. They can, however, ask for reconsideration. If the party has objection to the decision on litigation costs, he may apply to the president of the court that makes the decision for reconsideration. If the party agrees with the decision but thinks that the calculation of the litigation costs is wrong, he may apply to the court that makes the decision for reconsideration. If there is really any error in the calculation, the court that makes the decision shall correct it.

18. Enforcement

In China, the main structure of enforcement is provided by Part III of the CPL with 35 articles ranging from Art. 224 to Art. 258. The supplement regulations are Art. 462 to Art. 521 of the ICPL, the *Interpretation of the SPC on Some Issues of the Application of the Enforcement Procedure of the CPL* implemented in 2009, and the *Regulations on Some Issues on the Enforcement of the People's Court (For Trial Implementation)* implemented in 1998. The enforcement organ is the enforcement bureau established in the court of all levels. They are responsible for the enforcement of civil decisions and the property part of criminal decisions that have become legally effective.

The enforcement basis should be an effective legal instrument. According to Art. 463 of ICPL, the effective legal instrument to be enforced shall meet the following conditions: (1) the subjects of rights and obligations are definite; (2) the content involving the payment is specific. This mainly includes the effective decisions made by court; the decisions made by foreign courts or arbitration organizations and acknowledged by Chinese court; the decisions made by the administrative organs; the debt instruments made by notary organs; the arbitration awards and mediation instruments made by the arbitration organization.

The initiation of the enforcement can either be made by the party's application or made by the court's *sua sponte* transferring the decision to the enforcement bureau. According to para. 2, Art. 19 of the *Regulations on Some Issues on the Enforcement of the People's Court (For Trial Implementation)*, the court can only transfer to the enforcement bureau the legal instruments concerning with the payment of alimony, child support or elder support, the decisions concerning with civil sanctions, and the civil part of the criminal decisions.

The enforcement measures mainly include inquiring, detaining, freezing, transferring, and selling off the properties of the person subject to enforcement. Where the judgment is a compulsory eviction from a building or a plot of land, the president of a people's court shall sign and issue a public announcement to order the person subject to enforcement to perform his obligations within a designated period

of time. If the person fails to do so within the designated time, the enforcement officer can force him to leave. The court can also adopt or notify relevant units to assist to adopt measures such as restricting going board, making records on the credit system, and publishing non-performance information to push the enforcement.

If a party or any interested party considers that the enforcement is in violation of legal provisions, he may raise a written objection to the court in charge of the enforcement. If the objection is tenable, the court shall rule to cancel or correct the enforcement; and if the objection is untenable, the court shall rule to reject the objection. If the party or interested party is not satisfied with the ruling, he may apply for reconsideration to the court at the next higher level within 10 days after the ruling is served.

If, during the course of enforcement, a person who is not involved in the case thinks that he has a substantive right towards the subject matter of the enforcement and that the enforcement is infringing this substantive right, he can raise a written objection to the court making the enforcement. If the objection is tenable, the court shall rule to suspend the enforcement on the subject matter; and if the objection is untenable, it shall be rejected. Where the person raising the objection or the party of the enforcement is not satisfied with the ruling, if the objection is concerned with an error in the original decision, he shall apply for a adjudication supervision procedure; if the objection is irrelevant to the original decision, he may file a lawsuit to the court making the enforcement within 15 days after the ruling is served.

19. ADR

The main forms of the ADR in China are the conciliation outside court and the arbitration. The arbitration is quite popular in the commercial area, while the conciliation outside court is not quite commonly used due to the fact that the court can also conduct conciliation and can form an enforceable conciliation instrument, while the conciliation instrument made outside the court has to be confirmed by the court before it becomes enforceable.

In contemporary China, conciliation can be held by industry associations, organizations, commissions, professional mediators and conciliation centres. Among them only the People's Conciliation Commissions are regulated by legislation and linked up with judicial proceedings. The *People's Conciliation Law of the People's Republic of China* adopted in 2010 refers to the People's Conciliation Commissions as "mass-based organizations legally formed to settle disputes among the people" (Art. 1). The Commission conducts the "people's conciliation" by "persuading the parties to reaching a conciliation agreement on the basis of equal negotiation and free will to solve the dispute between them" (Art. 2). Only the agreement made under the conciliation of the People's Conciliation Commission can go through a proceeding called "judicial confirmation" in court to be accepted as an enforceable instrument.

There are mainly two types of arbitration in China: one is the commercial arbitration, the other being the labour arbitration. The two types of the arbitration are of different

nature and conducted by different arbitration organizations. The labour arbitration does not need arbitration agreements to initiate. It is a mandatory proceeding for labour disputes to go through before they are brought to the court. In this sense, it cannot be considered as an ADR. The commercial arbitration, on the other hand, is an arbitration conducted by the commercial arbitration commissions under the written arbitration agreement made by the two parties. The award made by the commission is enforceable and cannot be appealed. In other words, a valid arbitration agreement has legal effect to exclude the judicial litigation as dispute resolution. Even if one of the parties hides the arbitration agreement from the court to file a suit and get accepted, the court shall still dismiss the suit at the request of the other party, unless the agreement is invalid or the other party fails to raise the objection. Such finality of the arbitration regulated in statutes is consistent with the international treaties[9] China has signed.

20. Role of Academia

The legal scholars in China play an important role in legislation. Take the 2012 amendment of the CPL as an example. Before its enactment, multiple seminars were held between the legislators, the judges from the SPC, and the scholars to discuss the details of it. The scholars' suggestions are important reference for the legislators and even the state rulers. Their opinions are also influential for judicial interpretations and other regulations. Judges, on the other hand, show less interest into the scholars' work. Few, if any, judges will quote scholars' ideas in their judgments. They often think that the scholars' research is too theoretical to be linked with the real world of law and does little help for judicial practice. However, judges are accustomed to consulting legal scholars for opinions when trying a complicated case. The parties also often submit legal professors' opinions of the case as evidence to support their cases. It should be noted that the opinions on how to try the case are not considered as expert opinion, but as a simple support for the party's statement that shall not weigh too much. The court also often hires professors to give speeches or lectures to the judges to improve judicial skills.

21. Comparative and Cultural Observations

By and large, the civil procedural system of China belongs to the civil law system. The current civil procedural system is not a self-generating product, but a combination of imported laws and local circumstances. The modern civil procedure of China did not emerge until the early 20th century and still have difficulties in merging with Chinese tradition culture. When the Qing Dynasty introduced the western procedural

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[9] China has so far joined two conventions on international arbitration. One is *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, the other is *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.

regulations into its legal code, the Empire was already in its final stage. The law was only put into practice for a few decades before the Dynasty was overturned. Since then, China had been in a constant status of war and had no space for the implementation of civil procedure law. Without the chance of constant practice, the civil procedure with modern elements from western countries had never succeeded in merging into China as a widely known and accepted procedural culture. This situation was maintained until 1949, when the PRC, which held a hostile attitude towards all western ideology, was established. The former statutes were naturally abolished and the new legislation put its basis on the socialist legal ideology learning from the Soviet Union. The procedural regulations, however, did not refer much from the Soviet Union, but considered more on the Chinese local characteristics and the CCP's policies. For example, considering the Chinese culture and the CCP's policy on harmony, the law paid more attention on conciliation and less focus on the procedure. Therefore, although using the law of Soviet Union as reference, the civil procedure of China shares little links with the law of Russia, especially the law of Russia after 1989.

After the 1980s, however, China once again turned to the western concepts of law during its judicial reform. Since then, China has been continually learning modern procedural systems from western countries. It not only introduces modern procedural concepts and institutional structures from Germany and Japan, but also learns evidential law, ADR and commercial adjudication from the USA. The American style of legal education and the formation of lawyers and judges also influence the judicial practice and legal culture of China. The transplantation from both the civil law system and the common law system may have blurred the affiliation of Chinese civil procedure law, but the outlook of Chinese civil procedure still belongs to the civil law system.

22. International Matters and BRICS Cooperation in Civil Procedure Perspectives

In China, for international matters, the signed international conventions and treaties are superior to the national law, unless the provisions are the ones on which China has announced reservations. There are a number of bilateral treaties on the civil legal assistance between China and other countries such as France, Italy and Korea. So far, China has signed bilateral treaties on legal assistance for civil matters with 30 countries.[10] Without conventions or treaties, if the foreign country has a reciprocal relationship with China, the court may also recognize and enforce the judgment, as long as it does not contradict the basic principles of the China's law or the national, social, and public interest of China. Besides bilateral treaties, China also signed the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.*

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[10] *See* the website of the Department of Judicial Assistance and Foreign Affairs (Dec. 20, 2016), available at http://www.moj.gov.cn/sfxzws/node_219.htm.

China has always been treasuring the cooperation with the BRICS countries. There are civil legal assistance treaties with Brazil and Russia. China also establishes a BRICS Dispute Resolution Centre in Shanghai, specially dealing with commercial dispute resolutions between the BRICS countries. On March 28th, 2015, a BRICS Chief Judge Forum was held in Sanya, China, for the discussion of the judicial protection for environment. The top judges signed a statement to promote judicial cooperation, raising cooperation among the five member countries to a new level.

Conclusion

The civil procedure law of China is undoubtedly still in its initial stage of development. The government and the society are gradually accepting the modern concepts of procedure law, and the Chinese legislation keeps learning from western institutions. The 2012 amendment and the 2015 Interpretation of Civil Procedure Law shows a positive tendency of the development of Chinese civil procedure. Meanwhile, with the globalization of economy, the international cooperation of China, especially with the BRICS countries, will certainly become more and more frequent.

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CIVIL JUSTICE IN SOUTH AFRICA

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The South African adversarial system of civil procedure in the High Court owes its origin to that of England. As with all civil procedural systems, the South African system is not stagnant. Its primary sources, namely Acts of Parliament and rules of court, are constantly amended in an attempt to meet the changing needs of society. Court delay and cost-inefficient procedural mechanisms, however, contribute to public dismay. The High Court, in the exercise of its inherent power to regulate its process, do so with the purpose of enhancing access to justice. The advantage of the system lies in the fact that it is not cast in stone but could, subject to the Constitution of the Republic of South Africa, 1996, be developed to make it more accessible to the public whilst protecting the public's fundamental rights entrenched in the Constitution and, in this regard, particularly the right to a fair trial embedded in sec. 34 of the Constitution. This contribution gives an overview of the system with reference to the court structure, the judiciary, the process in the High Court and its underlying principles, appeals, class actions and alternative civil dispute resolution mechanisms.

Keywords: court structures; judiciary; civil procedure in the High Court; appeals; class actions; South Africa.

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Introduction

South African law distinguishes between substantive law and procedural law. Substantive law essentially deals with the contents of a person's rights, obligations and remedies in a given factual situation. Procedural law, including the law of civil procedure, deals with the enforcement of rights, obligations and remedies.

South African law is mainly of Roman-Dutch origin. Its civil procedural law has, however, since the beginning of the 19th Century, assimilated to English methods.[1]

In this contribution, the focus will eventually be directed at the South African adversarial system of civil procedure in the High Court which owes its origin to that of England, but which has steered an independent course in its development since its implementation by the English in 1828.[2]

Civil procedure is not stagnant. The word "*procedure*" inherently means "*going forward*."[3] Viewed as such, civil procedure not only aims at moving forward the dispute between the parties up to the point of its eventual determination by a court, but also aims at reflecting the evolution (i.e. change) of society and its needs. Since all legal systems are closely linked to the historical, cultural, socio-economic and

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[1] Hennie Erasmus, *The Interaction of Substantive and Procedural Law: The Southern African Experience in Historical and Comparative Perspective*, 1 Stellenbosch Law Review 348 (1990).

[2] Hennie Erasmus, *Historical Foundations of the South African Law of Civil Procedure*, 108 The South African Law Journal 265 (1991), where, amongst others, the following is stated: "South African civil procedure 'owes its origin to and is essentially that of England.' The forms of procedure devised under the First and Second Charters of Justice of 1828 and 1834 for the Supreme Court of the Colony of the Cape of Good Hope display the fundamental features characteristic of proceedings at common law, namely, the adversary character of the system and the predominant role of the parties in the conduct of the litigation, the passive and neutral role of the court, and the 'morality, immediacy and publicity of its proceedings.'"

[3] Wolfgang Bernhardt, *Das Zivilprozessrecht* (3rd ed., Berlin: De Gruyter, 1968), correctly states that a legal procedure is "als Lebensvorgang betrachtet, ein Verfahren. Daher kommt auch der Name: processor (procedure – vorwärtsschreiten)."

political milieu in which they have developed and find application, the character of a civil procedural system must necessarily depend upon a variety of factors, juridical and non-juridical, that determine its character. This is especially so in the case of South African civil procedural law which migrated from a superimposition of English procedural law upon Roman-Dutch procedural law to a constitutional dispensation where the Constitution of the Republic of South Africa, 1996 ("the Constitution"), reigns supreme and, accordingly, every rule of civil procedure must be viewed and applied through the prism of the Constitution.

1. Sources of South African Civil Procedural Law

South African civil procedural law is not codified. Its main sources are:

(a) The Constitution of the Republic of South Africa, 1996;
(b) The Superior Courts Act 10 of 2013;
(c) The inherent jurisdiction of the Superior Courts derived from sec. 173 of the Constitution;
(d) The Magistrates' Courts Act 32 of 1944;
(e) The Small Claims Court Act 61 of 1984;
(f) Rules of Court;[4]
(g) Practice directives;
(h) The common law (i.e. the Roman-Dutch law to the extent that it has not been repealed or abolished);
(i) Case law.

2. The Court Structure

In terms of sec. 166 of the Constitution, the courts in South Africa consist of:

(a) The Constitutional Court;
(b) The Supreme Court of Appeal;
(c) The High Court;
(d) The Magistrates' Courts;
(e) Any other court established or recognised in terms of any Act of Parliament.

The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.[5]

No person or organ of state may interfere with the functioning of the courts.[6]

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[4] These rules consist of the rules of the Constitutional Court, the rules of the Supreme Court of Appeal, the Uniform Rules of Court in force in the various divisions of the High Court and the Magistrates' Courts Rules.

[5] Sec. 165(2) of the Constitution.

[6] Sec. 165(3) of the Constitution.

Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[7]

Sec. 34 of the Constitution guarantees to everyone the right of access to court. It provides:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

3. Specialised Courts

The following specialised courts are established or recognised in terms of Acts of Parliament as contemplated in sec. 166 of the Constitution:

4.1. Courts having admiralty jurisdiction: in terms of sec. 2(1) of the Admiralty Jurisdiction Regulation Act,[8] each division of the High Court of South Africa has jurisdiction (i.e. admiralty jurisdiction) to hear and determine any maritime claim, including in the case of salvage, claims in respect of ships, cargo or goods found on land, irrespective of the place where the claim arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of the ship's owner.

4.2. The Labour Court: in terms of sec. 151 of the Labour Relations Act,[9] the Labour Court is established as a court of law and equity[10] with powers equal to that of the High Court.[11] As a general rule, the Labour Court deals exclusively with disputes arising from employment and other labour relations.[12]

4.3. The Labour Appeal Court: in terms of sec. 167 of the Labour Relations Act,[13] the Labour Appeal Court is established as a court of law and equity[14] with powers equal to that of the Supreme Court of Appeal.[15] The Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court.[16]

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[7] Sec. 165(4) of the Constitution.

[8] 105 of 1983.

[9] 66 of 1995.

[10] Sec. 151(1).

[11] Sec. 115(2).

[12] Sec. 157.

[13] 66 of 1995.

[14] Sec. 167(1).

[15] Sec. 167(3).

[16] Sec. 167(2).

4.4. The Competition Appeal Court: in terms of sec. 36 of the Competition Act,[17] the Competition Appeal Court is established as a court with a status similar to that of the High Court.[18] The function of the court is to review any decision of the Competition Tribunal or to consider an appeal arising from the Competition Tribunal.[19]

4.5. The Land Claims Court: in terms of sec. 22 of the Restitution of Land Rights Act,[20] the Land Claims Court is established as a court of law[21] with powers equal, in relation to matters falling within its jurisdiction, to that of the High Court.[22] The Land Claims Court, to the exclusion of the High Court, has the power, amongst others, to determine:

(a) a right to restitution of any right in land in accordance with the provisions of the Restitution of Land Rights Act;[23]

(b) approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition of such land in terms of the Restitution of Land Rights Act;

(c) the person entitled to title to land contemplated in sec. 3 of the Restitution of Land Rights Act;

(d) whether compensation or any other consideration received by any person at the time of any dispossession of a right in land was just and equitable.

4.6. Equality Courts: in terms of sec. 16 of the Promotion of Equality and Prevention of Unfair Discrimination Act,[24] every division of the High Court is an equality court for the area of its jurisdiction.[25] Equality Courts deal with inquiries into allegations concerning unfair discrimination, hate speech or harassment.[26]

4.7. The Electoral Court: in terms of sec. 18 of the Electoral Commission Act,[27] the Electoral Court, with the status of the High Court, is established.[28] The Electoral

[17] 89 of 1998.

[18] Sec. 36(1)(a).

[19] Sec. 37(1)(a) and (b). The function of the Competition Tribunal is to adjudicate any conduct that is prohibited under the Competition Act and to hear appeals from, or review any decision of, the Competition Commission (sec. 27).

[20] 22 of 1994.

[21] Sec. 22(1).

[22] Sec. 22(2)(a).

[23] 22 of 1994.

[24] 4 of 2000.

[25] Sec. 16(1)(a).

[26] Sec. 21(1).

[27] 51 of 1996.

[28] Sec. 18.

Court has jurisdiction to review any decision of the Electoral Commission[29] and to hear and determine an appeal against any decision of the Commission in so far as such decision relates to the interpretation of any law or any other matter for which an appeal is provided by law.[30]

4.8. Children's Courts: in terms of sec. 42 of the Children's Act,[31] every Magistrate's Court is a Children's Court for its area of jurisdiction.[32] A Children's Court may adjudicate any matter involving, amongst others:

(a) the protection and well-being of a child;
(b) the care of, or contact with a child;
(c) paternity of a child;
(d) support of a child;
(e) maltreatment, abuse, neglect, degradation or exploitation of a child, except criminal prosecutions in that regard;
(f) the temporary safe care of a child;
(g) the adoption of a child, including an inter-country adoption.[33]

4.9. Maintenance Courts: in terms of sec. 3 of the Maintenance Act,[34] every Magistrate's Court (for a district) is, within its area of jurisdiction, a Maintenance Court. A Maintenance Court has jurisdiction to hold an inquiry into the provision of maintenance, and to make an order against the person legally liable to maintain any other person, to pay maintenance in respect of such latter person.[35]

4. The Judiciary

5.1. The Constitutional Court, the Supreme Court of Appeal and the High Court: sec. 174(1) of the Constitution provides that any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer and, further,

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29 The Electoral Commission is established by sec. 3 of the Electoral Commission Act 51 of 1996 to strengthen constitutional democracy and promote democratic electoral processes. The functions of the Commission include to –

(i) manage any election;
(ii) ensure that any election is free and fair;
(iii) promote conditions conducive to free and fair elections;
(iv) promote knowledge of sound and democratic electoral processes;
(v) promote voter education.

30 Sec. 20(1)(a) and (b).

31 38 of 2005.

32 Sec. 42(1).

33 Sec. 45(1).

34 99 of 1998.

35 Secs. 10 to 18.

that any person to be appointed to the Constitutional Court must also be a South African citizen.

5.2. The Labour Court: the Judge President and the Deputy Judge President of the Labour Court must be judges of the High Court[36] and must have knowledge, experience and expertise in labour law.[37]

A judge of the Labour Court must be a judge of the High Court[38] or be a person who is a legal practitioner[39] and have knowledge, experience and expertise in labour law.[40]

5.3. The Labour Appeal Court: the Labour Appeal Court consists of:

(a) the Judge President of the Labour Court,[41] who, by virtue of the provisions of sec. 153(2) of the Labour Relations Act,[42] must be a judge of the High Court and must have knowledge, experience and expertise in labour law;

(b) the Deputy Judge President of the Labour Court,[43] who, by virtue of the provi-sions of sec. 153(2) of the Labour Relations Act,[44] must be a judge of the High Court and must have knowledge, experience and expertise in labour law;

(c) such number of other judges who are judges of the High Court as may be required for the effective functioning of the Labour Appeal Court,[45] and each of whom, by virtue of the provisions of sec. 174(1) of the Constitution, must be an appropriately qualified woman or man who is fit and proper to be appointed as a judge of the High Court.

5.4. The Competition Appeal Court: the Judge President of the Competition Appeal Court and each of its judges must be a judge of the High Court,[46] who, by virtue of the provisions of sec. 174(1) of the Constitution, must be an appropriately qualified woman or man who is fit and proper to be appointed as a judge of the High Court.

5.5. The Land Claims Court: the President of the Land Claims Court and each of its judges:

(a) must be a fit and proper person to be a judge of the Land Claims Court;[47] and

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36 Sec. 153(2)(a) of the Labour Relations Act 66 of 1995.

37 Sec. 153(2)(b) of the Labour Relations Act 66 of 1995.

38 Sec. 153(6)(a)(i) of the Labour Relations Act 66 of 1995.

39 Sec. 153(6)(a)(ii) of the Labour Relations Act 66 of 1995.

40 Sec. 153(6)(b) of the Labour Relations Act 66 of 1995.

41 Sec. 168(1)(a) of the Labour Relations Act 66 of 1995.

42 66 of 1995.

43 Sec. 168(1)(b) of the Labour Relations Act 66 of 1995.

44 66 of 1995.

45 Sec. 168(1)(c) of the Labour Relations Act 66 of 1995.

46 Sec. 36(2) of the Competition Act 89 of 1998.

47 Sec. 23(b) of the Restitution of Land Rights Act 22 of 1994.

(b) must be a judge of the High Court or be qualified to be admitted as an advocate or attorney,[48] and has, for a cumulative period of at least 10 years, practised as an advocate or an attorney or lectured in law at a university;[49] or

(c) by reason of his or her training and experience, has expertise in the fields of law and land matters relevant to the application of the Restitution of Land Rights Act[50] and the law of the Republic.[51]

5.6. Equality Courts: only a judge, magistrate or additional magistrate who has completed a training course as a presiding officer of an Equality Court may, subject to the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act,[52] be designated as a presiding officer of an Equality Court.[53]

5.7. The Electoral Court: the members of the Electoral Court consist of:

(a) a chairperson, who is a judge of the Supreme Court of Appeal;[54] and

(b) two judges of the High Court;[55] and

(c) two other members who are South African citizens.[56]

5.8 Children's Courts: the presiding officer of a Children's Court must be a magistrate.[57] In terms of sec. 10 of the Magistrates' Courts Act,[58] any appropriately qualified woman or man who is a fit and proper person may be appointed as a magistrate.

5.9 Maintenance Courts: any appropriately qualified woman or man who is a fit and proper person may be appointed as a magistrate.

5.10 In order to fulfil the need for the education and training of judicial officers, a South African judicial education institute was established by the South African Judicial Education Institute Act[59] to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts by providing judicial education for judicial officers.

5.11. Traditionally, the function of a judge in South Africa is to express or declare the law and not make law – *iudicis est ius dicere sed non dare*.[60] Under sec. 173 of the

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48 South Africa has a divided Bar similar to that of England, i.e. attorneys (solicitors) and advocates (barristers).

49 Sec. 23(c)(i) of the Restitution of Land Rights Act 22 of 1994.

50 22 of 1994.

51 Sec. 23(c)(ii) of the Restitution of Land Rights Act 22 of 1994.

52 4 of 2000.

53 Sec. 16(2) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

54 Sec. 19(1)(a) of the Electoral Commission Act 51 of 1996.

55 *Id.*

56 Sec. 19(1)(b) of the Electoral Commission Act 51 of 1996.

57 Sec. 42(2) of the Children's Act 38 of 2005.

58 32 of 1944.

59 14 of 2008.

60 Lucas C. Steyn, *Die Uitleg van Wette (Interpretation of Statutes)* 1 (5th ed., Cape Town: Juta, 1981).

Constitution, the Constitutional Court, Supreme Court of Appeal and High Court, however, have the inherent power to develop the common law,[61] taking into account the interests of justice. In addition, sec. 172 of the Constitution provides as follows in respect of the powers of the Superior Courts in constitutional matters:

(1) When deciding a constitutional matter within its power, a court –
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including –
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
(2)(a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

5. The Process

Under this heading the following will be briefly discussed:
(a) The principles underlying the process;
(b) A typical opposed action in the High Court;
(c) A typical opposed application in the High Court;
(d) Evidence in civil proceedings;
(e) Appeals;
(f) Class actions;
(g) Alternative civil dispute resolution mechanisms.

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[61] The South African common (i.e. substantive) law is of Roman-Dutch origin.

5.1. The Principles Underlying the Process[62]

The *audi alteram partem* principle prevails, in other words, throughout the process the parties must be afforded an equal opportunity to present their respective cases to each other and to the court. This entails that each party is entitled to be informed of the other party's case so as, eventually, not to be taken by surprise at the hearing of the case.

Each party is in control of its case, in other words, the decision to institute or defend a case, and to determine the scope of the disputes, rest with the parties. Each party also decides on the evidentiary material to be presented to court in support of its case.

The hearing of the case must, as a general rule, take place in public.

In action proceedings, the principle of orality prevails. This means that at the hearing of the case, the parties and their witnesses give oral evidence.

The judge presiding over a case may not enter the arena and should be impartial and unbiased.

The judge is under an obligation to give a reason and legally motivated judgment within a reasonable time.[63]

The following principles apply in respect of the rules of court:

(a) Formalism in the application of the rules of court is not encouraged by the courts;[64]

(b) The object of the rules is to secure the inexpensive and expeditious completion of litigation before the courts: they are not an end in themselves;[65]

(c) The rules should be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their disputes in as speedy and inexpensive a manner as possible;[66]

(d) The rules exist for the court, not the court for the rules;[67]

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62 *See, in general*, Wouter le R. de Vos, *Civil Procedural Law and the Constitution of 1996: An Appraisal of Procedural Guarantees in Civil Proceedings*, 3 Journal of South African Law 444 (1997); Estelle Hurter, *Seeking Truth or Seeking Justice: Reflections on the Changing Face of the Adversarial Process of Civil Litigation*, 2 Journal of South African Law 240 (2007).

63 *See, for example*, Strategic Liquor Services v. Mvumbi NO 2010 (2) SA 92 (CC) and Exdev (Pty) Ltd v. Pekudei Investments (Pty) Ltd 2011 (2) SA 282 (SCA).

64 Trans-African Insurance Co Ltd v. Maluleka 1956 (2) SA 273 (A) at 277A-B; Maharaj v. Barclays National Bank Ltd 1976 (1) SA 418 (A) at 423E; Federated Trust Ltd v. Botha 1978 (3) SA 645 (A) at 654C; Rabie v. De Wit 2013 (5) SA 219 (WCC) at 222E-223A.

65 Hudson v. Hudson 1927 AD 259 at 267; Federated Trust Ltd v. Botha, *supra*, at 654C-E; Eke v. Parsons 2016 (3) SA 37 (CC) at para. [40].

66 Ncoweni v. Bezuidenhout 1927 CPD 130.

67 Republikeinse Publikasies (Edms) Bpk v. Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 783A-B; Standard Bank of South Africa Ltd v. Dawood 2012 (6) SA 151 (WCC) at 159E; Mukaddam v. Pioneer Foods (Pty) Ltd 2013 (5) SA 89 (CC) at para. [32]; Eke v. Parsons, *supra*, at paras. [39]–[40].

(e) The court has inherent power to read the rules applicable to procedure in a manner which would enable practical justice to be administered and a matter to be handled along practical lines;[68]

(f) The rules are devised for the purpose of administering justice and not of hampering it – the primary purpose of the rules is the attainment of justice;[69]

(g) Technical objections to less than perfect procedural steps should not be permitted, in the absence of substantial prejudice, to interfere with the expeditious and inexpensive decision of cases on their merits.[70]

5.2. Proceedings in an Opposed Action

In a typical action in the High Court, which commences with the issue and delivery of a summons,[71] it is for the parties to take all the necessary steps to initiate the action and to prepare the case for trial, while the function of the judge is merely to consider requests for interim relief by the parties. Even at the trial, the parties play a leading role. They determine what evidence is to be presented to the court and they conduct their examination (questioning) of the witnesses. The function of the court is to see to it that the proceedings are conducted according to the prescribed procedure and to deliver a judgment at the conclusion of the trial.

The pre-trial phase is characterized by the exchange of pleadings between the parties and certain procedures, such as discovery, whereby they prepare themselves for the trial. The trial, in turn, is a continuous process which is characterized by the immediate (direct) and, mainly, oral presentation of evidence. On this occasion the parties present all the evidentiary material at their disposal to establish their respective cases, whereafter the judge gives a judgment based upon such material.[72] The proceedings are dominated by the advocates appearing on behalf of the parties, while the function of the judge is merely to ensure that the advocates keep to the "rules of the game." After both parties have closed their cases they get the opportunity, in turn, to present their arguments to the judge. The purpose of these arguments is twofold: first,

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[68] Republikeinse Publikasies (Edms) Bpk v. Afrikaanse Pers Publikasies (Edms) Bpk, *supra*, at 783C-D.

[69] Republikeinse Publikasies (Edms) Bpk v. Afrikaanse Pers Publikasies (Edms) Bpk, *supra*, at 783A-B; Mukaddam v. Pioneer Foods (Pty) Ltd, *supra*, at para. [32].

[70] Trans-African Insurance Co Ltd v. Maluleka, *supra*, at 278F-G.

[71] In High Court procedure there also exists an application procedure on notice of motion, supported by, in the event of an opposed motion, the respective parties' affidavits (i.e. founding, answering and replying affidavits).

[72] Judges in South Africa do not have the power to search for the truth on their own motion, but is constrained to base their findings on the evidence presented to them by the parties. It follows that South African judges can hardly aspire to find the objective truth. They must necessarily contend themselves with the formal truth or, at best, a combination of the objective and formal truth (Wouter le R. de Vos & Daniel E. van Loggerenberg, *Activism of the Judge in South Africa*, 4 Journal of South African Law 592, 598 (1991)).

to persuade the judge to make a factual finding in favour of the party concerned and, secondly, to make submissions in regard to the relevant legal principles, substantiated by legal authority. The advocates play a leading role in presenting their arguments, but the court does not hesitate to put questions to them, to raise problematical points and to draw their attention to any authority that they have overlooked. Although it is for the advocates to appraise the judge of the legal authorities upon which they rely in support of their submissions, the principle of "judicial unpreparedness" is not very strictly adhered to. The result is that "the court has a duty to ensure that it ascertains the correct legal position regarding any points of law actually raised and argued by the parties."[73] The court, however, has no power or duty to decide a civil dispute on the basis of what it believes to be the "truly relevant" legal issues arising from the facts placed before it. This is the prerogative of the parties.

Once the advocates have concluded their arguments, the court may proceed to deliver an *ex tempore* oral judgment, but it happens more often that the judge reserves judgment for consideration and delivers it at a later stage in written form. The judgment must be recorded and it has become an established practice that courts motivate their judgments regarding both the facts and the law.[74]

5.3. *Proceedings in an Opposed Application*[75]

A typical opposed application will commence with a notice of motion supported by a founding affidavit. In the notice of motion:

(a) the division of the High Court in which the application is brought will be indicated;

(b) the parties to the application will be identified;

(c) the order sought by the applicant (i.e. the relief claimed) will be set out;

(d) the time periods within which the respondent party has to give notice of intention to oppose the application and to file an answering affidavit will be stated.

In the founding affidavit the facts upon which the applicant relies must be set out simply, clearly and in chronological sequence, without argumentative matter. The statement of facts must at least contain the following information:

(a) the applicant's right to apply, that is, the applicant's *locus standi in iudicio*;
(b) the facts indicating that the court has jurisdiction;
(c) the course of action on which the applicant relies;
(d) the evidence in support of the application.

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73 Lawrence G. Baxter, *Civil Litigation and Jura Novit Curia*, 96 South African Law Journal 531, 536 (1979).

74 This practice is based upon considerations of fairness to the parties and it also facilitates the process of appeal.

75 *See, in general*, Daniel E. van Loggerenberg, *Erasmus Superior Court Practice. Vol. 2* (2nd ed., Cape Town: Juta, 2015).

The opposing papers in an opposed application will, generally, consist of:

(a) a notice to oppose;

(b) an answering affidavit.

In response to the answering affidavit, the applicant is entitled to file a replying affidavit. As a general rule, all the necessary allegations upon which the applicant relies must appear in the founding affidavit, as the applicant will not be allowed to supplement the founding affidavit by adducing supporting facts in the replying affidavit.

There are normally only the abovementioned three sets of affidavits in application proceedings. The court will, however, in the exercise of its discretion permit the filing of further affidavits against the backdrop of the fundamental consideration that a case should be adjudicated upon all the facts relevant to the issues in dispute. A fourth set of affidavits will only in exceptional circumstances (e.g. where something unexpected or new emerged from the applicant's replying affidavit) be allowed.

Legal argument, based on the facts contained in the affidavits, will orally be presented by the legal representatives to the court at the hearing of the opposed application although it is standard practice that written heads of argument be filed prior to the hearing of the application.

6. Evidence in Civil Proceedings[76]

The South African law of evidence is not based on Roman-Dutch authority. The rules of evidence are found in Acts of Parliament and, where these are silent on a specific issue, the English Law of evidence which was in force in South Africa on May 30, 1961 serves as the common law. There exists a substantial body of local case law on evidence which, as already stated above, are binding in terms of the doctrine of judicial precedent.

Sec. 35(5) of the Constitution provides that evidence obtained in a manner that violates any right in the Bill of Rights (which is contained in the Constitution) must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

The degree of proof required for a case to be decided in favour of the party who asserts is known as "*proof on a balance of probabilities.*"[77]

In a typical opposed action, after the close of pleadings, the action proceeds through the next stage where the emphasis is on discovery of documents, the procedural requirements in regard to expert evidence, the steps to be taken by the parties in order to obtain statements of witnesses in support of their respective

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76 *See, in general*, David T. Zeffertt and Andrew P. Paizes, *The South African Law of Evidence* (2nd ed., Durban: LexisNexis, 2009).

77 Ocean Accident and Guarantee Corporation Ltd v. Koch 1963 (4) SA 147 (A).

cases,[78] and steps to be taken in order to ensure the presence of witnesses at the trial. Traditionally the preparatory stage is also dominated by the parties. It is for the parties to take the initiative in regard to all these procedures.[79] As a general rule the court exercises no control over the development of this phase of the proceedings, except in so far as it may be called upon to resolve a dispute relating to one or the other of the procedures involved.

The trial is a "single continuous drama" where the parties present all the evidentiary material at their disposal to establish their respective cases. As a general rule, evidence is given orally and each witness is subject to cross-examination by the legal representative of the other party, whereafter the judge gives a judgment based upon such material. During the trial the judge is constrained to adopt a passive and neutral attitude lest it be seen that the judge "*descends into the arena and be liable to have his vision clouded by the dust of the conflict.*"[80] The judge may, however, put questions to a witness in order to clarify obscure points and it is the judge's duty to see to it that the legal representatives appearing on behalf of the parties behave themselves seemly and comply with the prescribed procedure. The judge is not allowed to go beyond this, by, for example, putting questions to witnesses in the form of cross-examination or to call witnesses not called by the parties out of his own accord.

Over the years the "powers" of the parties in taking and presenting evidence[81] have indirectly been evolved by the Legislature and the courts. Examples of such evolution include the following:

(a) Whenever a commercial bank claims payment of money said to be owing to it by a customer who enjoys overdraft facilities on a current account which fluctuates, possibly from day to day, it must needs rely on its books of account and other records of transactions in order to establish the amount due to it by the customer or by a person who bound himself as surety and co-principal debtor. To prove every one of the many entries in the books, which may have been made from time to time by a large number of different employees, might for obvious reasons sometimes be extremely difficult. It has, therefore, become customary for commercial banks to

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78 The witness statements are privileged and are not disclosed to the court or the other party/parties.

79 *See, in general*, Hurter 2007. At 242 Hurter, *inter alia*, states:

"The parties interview witnesses (including experts) and alone decide which of these will be called upon to testify and in what order. The preparation and presentation of the case before and at the trial are thus in the hands of the parties."

At 243 Hurter states:

"To summarise: under the adversarial system it is the parties who dictate at all stages the form, content and pace of proceedings."

80 Per Lord Greene in Yuill v. Yuill 1945 All ER 183 (CA); and *see* Hamman v. Moolman 1968 (4) SA 340 (A) at 344E-G.

81 The South African law of evidence is based on that of England as at May 30, 1961. *See, in this regard*, Zeffertt & Paizes 2009, at13 *et seq*.

include in its agreements with customers and sureties, a clause to the effect that a certificate purportedly signed by any manager of the bank would constitute *prima facie* evidence of the nature of the debt and of the amount due by the debtor to the bank and, further, that such certificate would on its mere production in a court constitute such evidence. In *Senekal v. Trust Bank of Africa Ltd*[82] the Appellate Division (now the Supreme Court of Appeal) approved of the use of such certificates.[83]

(b) The Electronic Communications and Transactions Act,[84] *inter alia*, provides[85] that a data message[86] made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil proceedings admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract. Pursuant to this provision commercial banks are, for example, empowered to prove bank statements by means of its mere production in civil proceedings.

(c) Sec. 3 of the Law of Evidence Amendment Act[87] empowers the parties to take and present hearsay evidence under certain conditions. It has revolutionised the approach to hearsay evidence.[88] Sec. 3 reads as follows:

> 3. (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
> (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
> (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
> (c) the court, having regard to –
> (i) the nature of the proceedings;
> (ii) the nature of the evidence;
> (iii) the purpose for which the evidence is tendered;

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82 1978 (3) SA 375 (A).

83 It is upon the debtor to rebut the *prima facie* evidence. If the *prima facie* evidence remains unrebutted at the close of the case, it becomes sufficient proof of the facts set out in the certificate.

84 The Act came into force on August 30, 2002. For a more comprehensive treatment of the law, *see* Julien Hofman, *South Africa* in *Electronic Evidence: Disclosure, Discovery and Admissibility* (S. Mason et al., eds., London: LexisNexis, 2007).

85 In sec. 15 thereof.

86 25 of 2002. Sec. 1 of the Act defines "data" as meaning "electronic representation of information in any form" and a "data message" as meaning "data generated, sent, received or stored by electronic means and includes – (a) voice, where the voice is used in an automated transaction; and (b) a stored record."

87 45 of 1988.

88 *See, in general*, Zeffertt & Paizes 2009, at 389 *et seq*.

(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account,
is of the opinion that such evidence should be admitted in the interests of justice.
(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.
(4) For the purposes of this section –
"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
"party" means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

(d) Inspections *in loco* are principally intended to enable the court to follow and apply the evidence, but may also include some real evidence that is led in the trial. In *Kruger v. Ludick*[89] the practice in these matters was described as follows:

It is important, when an inspection **in loco** is made, that the record should disclose the nature of the observations of the court. That may be done by means of a statement framed by the court and intimated to the parties who should be given an opportunity of agreeing with it or challenging it, and if, if they wish, of leading evidence to correct it. Another method, which is sometimes convenient, is for a court to obtain the necessary statement from a witness, who is called, or recalled, after the inspection has been made. In such a case, the party should be allowed to examine the witness in the usual way.

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89 1947 (3) SA 23 (A) at 31.

In the premises, there is currently no talk in South Africa of "going forward" as far as the powers of the judge regarding taking of evidence are concerned. The parties remain in control of the taking of evidence, and distinctly so.

7. Appeals

The Superior Courts Act[90] provides for a system of appeals in the Superior Courts. Sec. 16(1) of the Act caters for the following situations:

(a) an appeal against any decision of a single judge of a division of the High Court, sitting as a court of first instance, upon leave having been granted, either to the Supreme Court of Appeal or to a full court of that division (sec. 16(1)(a)(i));

(b) an appeal against any decision of more than one judge of a division of the High Court, sitting as a court of first instance, to the Supreme Court of Appeal (sec. 16(1)(a)(ii));

(c) an appeal against any decision of a division of the High Court on appeal to it, to the Supreme Court of Appeal (sec. 16(1)(b));

(d) an appeal against any decision of a court of a status similar to the High Court, to the Supreme Court of Appeal (sec. 16(1)(c)).

In each of the aforesaid situations an appeal lies only upon leave to appeal having been granted by the court of first instance or the Supreme Court of Appeal, as the case may be.

In accordance with the general rule laid down in *Zweni v. Minister of Law and Order of the Republic of South Africa*,[91] a "decision" contemplated in sec. 16(1) of the Act has three attributes:[92]

(i) it must be final in effect and not susceptible to alteration by the court of first instance;

(ii) it must be definitive of the right of the parties, i.e. it must grant definite and distinct relief; and

(iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[93]

In terms of sec. 17(1) of the Act, leave to appeal may only be given where the judge or the judges concerned are of the opinion that –

(a) the appeal would have a reasonable prospect of success (sec. 17(1)(a)(i));

(b) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration (sec. 17(1)(a)(ii));

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[90] 10 of 2013.

[91] 1993 (1) SA 523 (A) at 532I-533B.

[92] Cf. South African Broadcasting Corporation Soc Ltd v. Democratic Alliance 2016 (2) SA 522 (SCA) at 557I-558D.

[93] *See also* Van Streepen & Germs (Pty) Ltd v. Transvaal Provincial Administration 1987 (4) SA 569 (A) at 586I-587B; Marsay v. Dilley 1992 (3) SA 944 (A) at 962C-F.

(c) the decision sought on appeal will have a practical effect or result (in other words, if the issues are of such a nature that the decision sought to be appealed against will have no practical effect or result, leave to appeal will be refused) (sec. 17(1)(b));

(d) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties (sec. 17(1)(c)).

An appeal to the Constitutional Court in a matter other than a constitutional matter is subject to leave to appeal by the Constitutional Court on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by the Constitutional Court.[94]

The operation and execution of a decision which is the subject of an application for leave to appeal or an appeal, is suspended pending the decision of the application or appeal.[95] A court may, however, on application by a party who proves on a balance of probabilities that such parties will suffer irreparable harm if the operation and execution of a decision are not suspended (and that the other party will not suffer irreparable harm), order that a decision which is the subject of an application for leave to appeal or of an appeal be executed.[96] If a court so orders, the aggrieved party has an automatic right of appeal to the highest court, which court must hear such an appeal as a matter of extreme urgency.[97]

8. Class Actions

Anyone listed in sec. 38 of the Constitution has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

Neither the common law nor legislation made provision for a class action in non-constitutional claims not directly based on the alleged infringement of a fundamental right in the Bill of Rights.

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94 Sec. 167(3)(b)(ii) of the Constitution.

95 Sec. 18(1) of the Superior Courts Act 10 of 2013.

96 Sec. 18(1), (2) and (3) of the Superior Courts Act 10 of 2013.

97 Sec. 18(4) of the Superior Courts Act 10 of 2013.

In *Children's Resource Centre Trust v. Pioneer Food (Pty) Ltd*[98] the Supreme Court of Appeal developed the common law to allow for the use of a class action in non-constitutional claims.[99]

The reasoning that led the Supreme Court of Appeal to this development was that it would be irrational to allow class actions for constitutional matters and not non-constitutional claims, because of the similarities involved.

The Supreme Court of Appeal laid down the following requirements for a class action involving non-constitutional rights:

(a) *Certification*[100].

The party seeking to represent a class must apply to a court for it to certify the action as a class action. Thereafter it may issue summons. The court faced with the application need consider and be satisfied of the presence of the following factors, before certifying the action –

(i) the existence of a class identifiable by objective criteria;

(ii) a cause of action raising a triable issue;

(iii) that the right to relief depends on the determination of issues of fact, or law, or both, common to all members of the class;

(iv) that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;

(v) that where the claim is for damages, there is an appropriate procedure for allocating the damages to the class members;

(vi) that the proposed representative is suitable to conduct the action and to represent the class;

(vii) whether, given the composition of the class and the nature of the proposed action, a class action is the most appropriate means of determining the claims of class members.

(b) *Class definition*[101].

The applicant for certification must define the class with enough precision for a class member to be identified at all stages of the proceedings.

(c) *A cause of action that raises a triable issue*[102].

The applicant must show a cause of action with a basis in law and the evidence. That is, the claim must be legally tenable, and there needs to be evidence of a *prima facie* case.

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98 2013 (2) SA 213 (SCA).

99 The Supreme Court of Appeal acknowledged the source of its power to do so in sec. 173 of the Constitution, which provides that the Constitutional Court, the Supreme Court of Appeal and the High Court each has the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice.

100 At 226H-227B, 228B-E and 229C-E.

101 At 229E-H and 213F-G.

102 At 232A-E and 233B-236B.

(d) *The procedure to be adopted in an application for certification*[103].

The application must be accompanied by draft particulars of claim setting out the cause of action, the class, and the relief sought. The affidavits need to set out the evidence available to support the cause, as well as evidence it is anticipated will become available, and the way it will be procured.

(e) *Common issues of fact or law*[104].

There must be issues of fact, or law, or fact and law, common to all members of the class, and which are determinable in one action.

(f) *The representative plaintiff and his lawyers*[105].

The representative plaintiff may be a member of the class or a person acting in its interest. This applies both to class actions based on a constitutional right and to other class actions. The representative's interests cannot conflict with those of the class members; and he or she must also have the capacity to properly conduct the litigation. The capacity requirement entails the ability to procure evidence, to finance the litigation and to access lawyers. The payment arrangement with the lawyers need also be disclosed, and cannot give rise to a conflict of interest of the lawyers and the class members.

On the same day that the Supreme Court of Appeal delivered judgment in the *Children's Resource Centre* case, it delivered judgment in a related matter, *Mukkaddam v. Pioneer Food (Pty) Ltd*,[106] involving a bread distributor seeking permission to institute a class action against the bread producers who allegedly made themselves guilty of unlawful, anti-competitive, price-fixing. The reasoning in the *Children's Resource Centre* and *Mukkaddam* cases was materially synchronic. Because the applicant in the *Mukkaddam* case, however, sought to pursue an "*opt-in*" class action in terms of which claimants who join the class as a matter of individual choice, the Supreme Court of Appeal held that the circumstances of the case did not warrant a class action since joinder under rule 10 of the High Court's rules of court allows multiple plaintiffs to join in a single action. The Supreme Court of Appeal recorded that the only advantage in favour of a class action which was advanced on the applicant's behalf was that he would be insulated against personal liability for costs. The court did not consider this to be adequate to move it to authorize the institution of a class action where access to court may equally be achieved by means of a joint action such as that contemplated by rule 10.

The *Mukkaddam* case went on appeal to the Constitutional Court *sub nomine Mukaddam v. Pioneer Foods (Pty) Ltd*.[107] The Constitutional Court held that:[108]

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103 At 236A-F.

104 At 236F-237D.

105 At 237D-238D.

106 2013 (2) SA 254 (SCA).

107 2013 (5) SA 89 (CC).

108 At 99D-101C.

(a) pursuant to sec. 173 of the Constitution, which alludes to the "interests of justice," the standard which must be applied in adjudicating applications for certification to institute class actions, is the "interests of justice";

(b) the requirements laid down by the Supreme Court of Appeal in the *Children's Resource Centre* case must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. They must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise;

(c) none of the abovementioned factors is decisive of the issue;

(d) in the light of sec. 34, read with sec. 38 of the Constitution, there can be no justification for elevating requirements for certification to the rigid level of prerequisites for the exercise of the power confirmed, without restrictions. In this regard, sec. 173 of the Constitution does not limit the exercise of the power nor does it lay down any condition, except that what is done must be in the interests of justice. Compelling reasons would therefore be necessary for introducing inflexible requirements;

(e) courts must embrace class actions as one of the tools available to litigants for placing disputes before them. However, it is appropriate that the courts should retain control over class actions. Permitting a class action in some cases may, as the Supreme Court of Appeal has observed in the *Mukkaddam* case, be oppressive and as a result inconsistent with the interests of justice. It is therefore necessary for courts to be able to keep out of the justice system class actions which hinder, instead of advance, the interests of justice. In this way prior certification will serve as an instrument of justice rather than a barrier to it;

(f) what is said about certification that must be obtained before instituting a class action of a non-constitutional nature, must not be construed to apply to class actions in which the enforcement of rights entrenched in the Bill of Rights is sought against the state. Proceedings against the state assume a public character which necessarily widens the reach of orders issued to cover persons who were not privy to a particular litigation. In these circumstances, it is neither prudent nor necessary to pronounce on whether prior certification must be obtained for class actions instituted in terms of sec. 38 of the Constitution, without interpreting the section. That aspect therefore lives for another day.

Class actions put new demands on South African judges and courts to be multi-skilled and multitasked in order to guarantee multi-access to large numbers of litigants who are joined in such actions. To this extent, and in order to guarantee access to court to the individuals forming part of a class action, judges will need the necessary expertise (through experience and training) to ensure that they remain multi-skilled and well-equipped to perform the multi-tasks that are inherently part of class actions.

9. Alternative Civil Dispute Resolution Mechanisms

South African law provides for three forms of alternative civil dispute resolution mechanisms, namely:

(a) negotiation;
(b) mediation;
(c) arbitration.[109]

It is a new trend to provide in legislation pertaining to commerce to provide for alternative dispute resolution mechanisms and alternative forums such as tribunals to deal with disputes arising from such legislation.[110]

10. Reform

Under the new socio-political and economic dispensation that came about in South Africa after the fall of apartheid in 1994, South African civil procedural law is constantly under pressure to change in order to meet the changing needs of society. The greatest challenge facing South African lawmakers is that of making litigation less costly and the courts more accessible to a far greater number of people. More and more South Africans are dismayed by, amongst others, court delay and cost-inefficient procedural rules. Their dismay is fuelled by high costs of litigation, late settlements, restricted resources and the like. The advantage, however, of the South African civil procedural system is that it is not cast in stone but could, subject to the Constitution, be developed to make it more accessible to the public whilst protecting the public's fundamental rights entrenched in the Constitution and, in particular, the right to a fair trial embedded in sec. 34 thereof.

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[109] In terms of the Arbitration Act 42 of 1965. *See also* John A. Faris, *The Procedural Flexibility of Arbitration as an Adjudicative Alternative Dispute Resolution Process*, 41 De Jure 504 (2008). Arbitration proceedings can be conducted by a formal national or international arbitration body such as, for example, the national body known as the Arbitration Foundation of South Africa.

[110] *See, for example*, ch. 7, pts. C and F of the Companies Act 71 of 2008; ch. 7 of the National Credit Act 34 of 2005; secs. 70 and 75 of the Consumer Protection Act 68 of 2008.

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BOOK REVIEW NOTES

THE BRICS SUPERPOWER CHALLENGE. FOREIGN AND SECURITY POLICY ANALYSIS*

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The authors are reviewing the book by Kwang Ho Chun "The BRICS Superpower Challenge. Foreign and Security Policy Analysis," published by Ashgate Publishing Ltd. (England, USA). All in-all, this is a welcome contribution, providing a comprehensive analysis of the potential of separate states of the BRICS to become a "superpower" in the sense of disseminating information about this international organization among legal professionals. Yet this contribution harbors several limitations, such as a *de facto* concentration on the foreign policy of Brazil, Russia, India and China and a reliance on the criterion of soft power when approaching the potential of the BRICS, both of which are rather significant in terms of the success of the book with respect to the foreign and security policy of a regional organization. The concluding chapter also concentrates on summarizing the potential of separate BRICS states to develop into "superpowers." The authors of this review assert that due to the said methodological

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* Reviewed book: Kwang Ho Chun, *The BRICS Superpower Challenge. Foreign and Security Policy Analysis* (Farnham, Surrey, UK; Burlington, VT: Ashgate Publishing Ltd., 2013).

limitations, the book by Kwang Ho Chun does not adequately present an analysis of the foreign and security potential of BRICS as a regional organization.

Chung Kwan Ho has become known for his publications in English, dealing with the issues of security and defense policy and studying these issues with respect to the examples of Iran, Kosovo or China[1]. Hence, the analysis of the BRICS policy is a continuation of the authors' previous studies on security and defense, in general, and on China, in particular. The author should be commended for writing this analysis in English, which is more likely to reach the audience both within the BRICS states and internationally. Since the topic is relatively fresh and there is still no established corpus of scholarly research on the BRICS organization, this book could require further methodological clarifications.

One of the most obvious methodological limitations of this analysis is its *de facto* focus on the domestic jurisdictions of Brazil, Russia, India, and China. Moreover, the comparative analysis of the said jurisdictions appear to lack any common criteria for detailed comparison. Although the author intends to assess the BRICS potential to effectively pursue its own policy as an international law entity, this question cannot be satisfactorily answered by a detailed analysis of national policy frameworks. Furthermore, the concluding chapter focuses largely on the predictions regarding the "superpower" success of Brazil, Russia, India, and China. The conclusion regarding the prospects of the BRICS as a separate regional organization on p. 210–211 of the book is too general and not sufficiently discussed, as it takes less than half a page.

Another methodological limitation of this book is the application of the criterion of cultural influence (soft power) in approaching the "superpower" potential of the BRICS. The authors of this review came across this book by Chun Kwang Ho while working on a project studying possible avenues for individuals to engage in implementing foreign policy.[2] Participation in implementing foreign policy is customarily viewed in academic literature through the prism of representation. Yet there are opinions favoring, albeit limited, direct avenues of participation in implementing foreign policy, the most prominent authors advocating direct participation in foreign policy being Thomas M. Franck[3] and David Held.[4] Individual engagement in foreign policy

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1 *See, for example,* Chun Kwang Ho, *Kosovo: A New European Nation-State?*, 18(1) Journal of International and Area Studies (2011); Chun Kwang Ho, *Nuclear Iran: Dealing Options for International Community*, 16(1) The Korean Journal of Security Affairs (2011); Chun Kwang Ho, *The Future of Common Security and Defence Policy in Europe*, 15(2) Journal of European Studies (2010); Chun Kwang Ho, *Analysing China's Energy Security: A Source for Conflict?*, 23(1) The Journal of East Asian Affairs (2009).

2 Project "Individual Participation in Implementing Foreign Policy of the Russian Federation towards the Nordic States," commissioned by the Russian Foundation for Humanities, grant number No. 15-03-00626.

3 Thomas M. Franck, *The Empowered Self: Law and Society in an Age of Individualism* (Oxford: Oxford University Press, 2000).

4 David Held, *Democracy and the New International Order* (London: Institute for Public Policy Research, 1993).

can take the mode of e.g., membership in NGOs or utilizing freedom of expression and, in particular, the media which, according to the opinion of the European Court of Human Rights, can also be a "critic and a watchdog" in the sphere of foreign policy.[5] Finally, a means for public participation in foreign policy is promoting soft power, which is supposed to be targeted not at public officials but at ordinary citizens of other states. Moreover, understanding soft power as one of the indicators measuring the validity of the BRICS "superpower" is reflected in the analyzed book, which we could not fully support. In particular, the author bases his analysis *inter alia* on four parameters for assessing superpowers designed by L. Miller, i.e., political, military, economic, and cultural (soft power) "axes" (p. 17). On p. 30 of the book the author adds the "diplomatic" parameter to the existing parameters, summarizing: "The power system here encompasses various aspects of power, including economic, military, political, cultural, and diplomatic." Notwithstanding the author's intention to employ five criteria for his analysis, Chapter II of the reviewed book concentrates on "the politics, foreign policy, and military power" of the BRICS.

From our perspective, employing a soft power parameter in order to approach the superpower dimension of the BRICS organization is not entirely justified. According to the 2012 index of World soft power, organized by Monocle, a global affairs magazine, of all the BRICS states, only Brazil was mentioned as a soft power state while being ranked number 17 out of 20.[6] That index, which was widely accepted when the analyzed book by Chun Kwang Ho had been published, ranked nations according to the amount of soft power influence a country has in the world. Taking into account the results of the said index and also Russia and China's firm reliance on hard power in respect of foreign policy, assessing the BRICS "superpower" potential on the basis of soft power criteria seems questionable. Although the assessment of soft power potential is among the core criteria for the analysis, the concluding chapter lacks any general comments on the cultural policy of the BRICS states, except a statement on p. 212 that "Russia should also temper its aggressive and uncooperative tendencies towards the West."

The concluding chapter mostly refers to economic and military (not diplomatic, cultural and political) indicators with respect to Russia, Brazil, India, and China and is based on anecdotal evidence. There are also serious factual errors in the book, e.g., on p. 4 the population of South Africa is stated to be "under 50 million" yet it reached over 52 million in year 2010. True, this contribution is a good comparative collection of data on the individual states of BRICS. However, due to the serious methodological

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5 European Court of Human Rights, Stoll v. Switzerland, Appl. No. 69698/01, Judgment of December 10, 2007, para. 128.

6 *Who Rules the World? – Monocle's Top Twenty (Overview)*, How To Attract Publics & Influence States (Dec. 20, 2016), available at http://howtoattractpublicsandinfluencestates.wordpress.com/2012/11/20/who-rules-the-world-monocles-top-twenty-overview.

limitations outlined above, this work does not do justice to the foreign and security potential of the BRICS as a regional organization.

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CONFERENCE REVIEW NOTES

LAW, POLITICS AND ECONOMY IN THE MODERN WORLD: CHALLENGES OF THE XXI CENTURY

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1. Background and Objectives of the Euro-Asian Law Congress

The Euro-Asian Law Congress was inaugurated in 2007 at the initiative of the Association of Lawyers of Russia. It was established as a specific forum for representatives of the state, business, social groups and the professional legal community to discuss vital legal issues and in this way to promote efficient Euro-Asian cooperation. The idea of the Congress was born when Russian lawyers were searching for opportunities for further professional development and they wanted their research results to be effectively implemented in practice. The Congress now serves as an umbrella organization working on a regular basis. Unlike traditional conferences and seminars, it has created permanent bodies – committees, commissions, working groups – standing for the entire period between the sessions of the Congress and presenting their results at a subsequent session of the Congress.

The participants at the Euro-Asian Law Congress are law researchers and practitioners from member states of the Eurasian Economic Community and the Shanghai Cooperation Organization, and politicians and representatives of public authorities and business. The main forum for their work are the sessions of the Congress, which are held annually in Yekaterinburg, Russia. The objective of the Congress is to consolidate research and professional resources to develop solutions to current global problems in the fields of law, economics and politics. The sessions of the Congress determine the

priority issues and focus the participants' special attention on them, thus the projects of high priority are outlined and Expert Groups are formed. The experts carry out further research and project work throughout the ensuing year and submit their results for discussion at the next session of the Congress. Preliminary studies on the projected topics are carried out in the format of working groups and seminars within the BRICS Law Institute. The problem-focused approach helps to build up professional networking and attracts a large number of specialists interested in the research.

In addition, one of the main achievements of the work taken up by the Congress is the progressive cooperation of Russian law schools and legal professionals with their colleagues from BRICS countries. Much of this collaboration is performed through the BRICS Law Institute, which was founded on June 17, 2015 in Yekaterinburg. The Memorandum on the establishment of the BRICS Law Institute was signed by the representatives of the leading universities of Yekaterinburg, Sao Paulo, Brazil, Beijing, China, Jodhpur, India and Pretoria, South Africa. The Institute carries out research and educational projects in the field of comparative and international law in relation to the jurisdictions of the BRICS countries and operates mediation groups and ad hoc arbitration to the extent provided for by the national law of the partner states and international agreements.

Over the last ten years the Euro-Asian Law Congress has made a significant contribution to the cooperation between Russia and its international partners. Thus, through the efforts of the specialists of the Ural State Law University, the BRICS Law Institute and foreign experts the concept of employment regulations of the Eurasian Economic Community was worked out along with tax and budget legislation, and certain steps to develop EurAsEC legislation on the securities market were taken. The virtue in this, when it comes to the systematic work of the Congress, is the possibility for the Sverdlovsk Region to take the lead in international cooperation in the field of law: together with the geographical and geopolitical advantages of the region it "builds a legal bridge" between Europe and Asia.

2. Overview of the Tenth Session of the Euro-Asian Law Congress

The Tenth Session of the Euro-Asian Law Congress took place in Yekaterinburg on June 9–10, 2016. The venue was the main building of the Sverdlovsk Regional Government. The topic of the Tenth Session was *Law, Politics and Economy in the Modern World: Challenges of the XXI Century*. The event involved more than 600 people with a record high number of international participants. The session enabled the participants to engage in working groups and join seminars on related issues, to introduce their organizations, and to partake in the debates and discussions. The Tenth Session of the Congress was attended by representatives of Russian federal and regional authorities, eminent legal scholars, leading experts from the BRICS countries, as well as those from Azerbaijan, Belarus, Hungary, Germany, Israel, Italy, Kazakhstan, Kyrgyzstan, Macedonia, Poland, Serbia, the USA, Uzbekistan, France, Sweden, Estonia and Japan.

The participants discussed issues related to the role of law in the development of national economies and in international economic relations, debated the effective legal mechanisms and political processes in intergovernmental cooperation, and expressed their understanding of the socio-economic and political-legal nature of the challenges of the twenty-first century.

3. Program and Summary of the Tenth Session

The Congress was opened by Pavel Krasheninnikov, the Chairman of the Association of Lawyers of Russia. Krasheninnikov noted that new demands and challenges have been placed on the world's political agenda and thus the expertise of qualified specialists in the field of international law is highly required. He illustrated these new challenges with the example of the "meldonium scandal," which resulted in dozens of the best Russian athletes being barred from participating in the Olympic Games. He remarked, "The goal of Russian lawyers is to tackle the problem… [through] effective legal instruments."

One of the most prominent lawyers of Russia – Veniamin Yakovlev, the Co-Chairman of the Association of Lawyers of Russia and an adviser to the Russian President – noted that the Congress took global issues to the floor of its annual sessions. "To foster cooperation between Asia and Europe is a key task of the global legal community and the leading role of law is to settle internal and international conflicts," he noted.

The meeting of an *expanded coordinating Council of the BRICS Law Institute* was also scheduled the first day of the Congress. Veniamin Yakovlev, in addition to his position just mentioned, Chairman of the Academic Council at the BRICS Law Institute, Viktor Perevalov, Chairman of the Executive Committee of the Euro-Asian Law Congress and Research Supervisor of the BRICS Law Institute, and Danil Vinnitsky, Director of the BRICS Law Institute and Director of the Eurasian Research Center for Comparative and International Finance Law, headed the meeting. The meeting brought together representatives of the BRICS countries whose aim was to discuss a list of four key issues:

1. International law of tax contracts in the BRICS countries.
2. Coordination of prospective research projects, academic and practice arrangements for BRICS law experts.
3. The crisis of WTO regulations and additional legal mechanisms for supporting stable development and potential conflict resolution in the modern world.
4. Economic integration of states and legal aspects of the creation of exclusive tax zones.

The work of the Congress continued in the forum of group meetings, where the experts debated international law and policy as well as domestic legal regulations in the core areas.

The Expert Group *Politics. Law. Security* discussed the threats to the security of the Russian Federation; models of world patterns and threats to international security; foreign policy and international law resources for the minimization of national

security threats; problems relating to the protection of private interests and those interests of the state and society vis-à-vis the Internet; and other related issues.

The Expert Group *Constitutional regulation of political and economic processes in Eurasian region states* coordinated by Professor Marat Salikov touched upon the following issues: the main approaches of the constitutional modernization of political and economic systems in Eurasian region states; the correlation and interference between constitutional law and political science; the protection of basic political and economic rights through the means of constitutional justice; the dynamics of the organization of political parties in Eurasian region states; the constitutional mechanisms of political conflict resolution in Eurasian region states, among others.

As stated by the Expert Group *International and national standards on regulation of business activities*, the top priority areas of business activity regulations are national and international investment regulations, international standards of banking activities, insurance activities, audits and security markets.

The members of the Expert Group *Development of civil and administrative justice in the post-Soviet Union region* shared their views on development trends of judicial organization in the sphere of civil and administrative justice. Additionally, they discussed the question of national and cross-border bankruptcy in a period of economic crisis and the issues of national and international enforcement procedure, mediation and notary mechanisms.

The presentations by the Expert Group *Impact of politics and economics on the realization of labor law functions* focused on labor law as the form of realization of social policy and an economic support mechanism. The experts suggested legal solutions for the modernization of labor law and social security law in the modern political and economic conditions, and for state policy on population employment and legal means of impacting the labor market.

Discussing *Private law in modern Russian economic policy*, the experts expressed their views on modern trends in the development of private law within the national legal system along with the priorities of private law in the current economic conditions. They consider that political and economic factors influenced the development of private law.

The members of the Expert Group *Criminal law culture: modern status and prospects* were involved in debates on the criminal legal culture as an essential part of world cultural rights.

The members of the Expert Group *Cooperation between legal systems: modern international law discourses* brought to the floor the issues of international integration, international security and responsibility, and the protection of human rights.

The second day of the Congress was organized into round tables aimed at deeper group discussion in various research fields. Specifically, the Congress participants touched upon three priority topics:

1. Modernization of the legislation on control and surveillance activities, and the legislation on administrative violations in the Eurasian legal space.
2. High legal education and tools to ensure its quality.
3. Russian and Chinese investments.

The Tenth Session of the Euro-Asian Law Congress was the forum for youth organizations – All-Russian NGO "For quality education," All-Russian Public Movement "Volunteers of Victory" and the Sverdlovsk regional public organization "The association of students of the Sverdlovsk Region." Their meeting was supported by the Commission on Quality Education Council of the Ministry of Education and Science of the Russian Federation for Youth Affairs. The young people and future lawyers discussed the topics of legal education in Russia and the quality of education in the Urals Federal District, which are relevant and crucial for them. In the framework of the session two youth round tables were arranged – *The role of law in addressing contemporary global crises and Legal education in Russia: development trends*.

The last day of the Congress provided the opportunity for the Expert Groups to sum up the results achieved and to present them at the closing plenary session. In their closing remarks the Congress participants summarized the effective and beneficial work of the two-day gathering and expressed hope for the Congress materials to become an actual and legitimate tool for the productive and effective collaboration of the BRICS countries. The speakers highlighted the importance of the Congress for Russia's leading position in the Euro-Asian region, and the increasing role of the cooperation among international lawyers in the solution of specific professional problems.[1]

4. The Results of the Meeting of the Coordination Committee of the BRICS Law Institute and of the Expert Group on Legal Support to Inter-State Partnership and Integration on Economics, Finance, Taxation and Customs

The central event of the Tenth Session was the annual meeting of the Coordination Committee of the BRICS Law Institute and the Expert Group aimed at promoting the results of their prior research.

At the core of their discussion was the issue of national sovereignties in international relations. The Coordination Committee and the Expert Group analyzed the impact of the coordination of national sovereignties and outlined possible paths for promoting the rule of law concept in the framework of forming an inclusive global legal order. They believe that this will prevent shocks connected with sporadic political crises and enhance the proactive role of the BRICS countries as a bridge between developing and developed countries. Based on the scientific analysis carried out over the past few years by the members of the Coordination Committee Session of the BRICS Law Institute and the Expert Group, the following areas were identified as key directions that could contribute significantly to a global legal order:

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[1] Detailed program and materials of the Tenth Session "Law, Politics and Economy in the Modern World: Challenges of the XXI Century" is available at the Euro-Asian Law Congress official website (Dec. 20, 2016), http://www.lawcongress.ru/programma/delovaya-programma/%D0%BE%D0%B1%D1%89%D0%B0%D1 %8F%20%D0%BF%D1%80%D0%BE%D0%B3%D1%80%D0%B0%D0%BC%D0%BC%D0%B0%20(%D0%B0%D0%BD%D0%B3%D0%BB%D0%B8%D0%B9%D1%81%D0%BA%D0%B8%D0%B9%20%D0%B2%D0%B0%D1%80%D0%B8%D0%B0%D0%BD%D1%82).pdf.

a) establishing an effective global system for the settlement of cross-border economic disputes along the format of the BRICS countries forum;

b) promoting an inclusive global framework that preserves the effectiveness of national sovereignty and legal policy without external interference in respect of genuine economic practices, including when states decide to foster economic development through special economic zones;

c) promoting joint action by the BRICS countries in order to enhance the effectiveness of global justice and achieve solutions that broaden the legitimacy of international solutions and adapt them to the needs of both the developed and the developing countries, respecting the rights of the latter to pursue their right to economic development;

d) establishing a Permanent Forum for Discussion on Economics, Finance, Taxation and Customs among experts under the aegis of the Coordination Committee of the BRICS Law Institute and the BRICS Legal Forum.

The Coordination Committee of the BRICS Law Institute and the Expert Group had been successfully working on the four issues, and the results of their joint research were brought together at the Tenth Session of the Congress.

4.1. The Importance of Supplementing WTO Regulations with Alternative Mechanisms for the Support of Sustainable Economic Development and Settlement of Economic Disputes in the Modern World

Recent developments show that the global instruments of WTO regulations do not appear to be particularly effective in the field of finance, taxation and customs. In particular, unilateral measures, such as economic sanctions or compensation for lower taxation, produce negative effects on the legal framework established under the WTO agreement. In the absence of effective mechanisms to settle cross-border economic disputes, the format of BRICS could be used as an international forum for settling cross-border economic disputes of differing character, which supplements those already available under WTO regulations. Moreover, the modern global economic system suffers from a crisis of trust. Global regulators of economic activity have a dubious or disputed status in international law. Such unclear status renders their regulatory mechanisms ineffective, which fail to take into consideration the sovereign interests of developing countries. While acknowledging the global impact of the recent recommendations and decisions offered by the OECD and the G20, it can be noted that, in the situations of distinct contradiction to the interests of more developed and less developed countries, the outputs rarely favor or fully take into account the economic interests of the latter. Consequently, there are clear and urgently serious reasons to institutionalize the format of BRICS as an international organization and a counterbalance to the OECD to more effectively consider the interests of more-developed and less-developed countries towards building the new architecture of the global economic and legal order.

4.2. Special Economic Zones in BRICS

Under the conditions of implementing the Base Erosion and Profit Shifting Action Plan (BEPS Action Plan), special economic zones are becoming the focus of attention

especially in regard to the assessment of the tax regime which they provide for their residents. On the one hand, the risk is recognized that they (special economic zones) may be used in harmful tax competition between jurisdictions and may be used for tax evasion/avoidance in cross-border situations in contradiction to the growing participation or commitment of jurisdictions to automatic exchange of tax information. On the other hand, properly constituted and monitored special economic zones can be effective mechanisms for intervention in the economy and for economic development through the offering of justified tax incentives. The BRICS countries reflect in their economic systems the features of both developed and developing countries; for this reason there are grounds to believe that they are a proper international forum for finding the appropriate balance between the regulation of the activities in special economic zones and the implementation of the BEPS Action Plan as recommended and approved by the G20 and the OECD.

4.3. The Practice of Regulating Taxation of Cross-Border Investments in BRICS

The analysis shows that in regard to many aspects the BRICS countries have comparable economic advantages or, on the contrary, disadvantages: with respect to many activities and economic sectors BRICS are net exporters of capital and technologies and for others net importers of capital and technologies. Being positioned between more-developed and less-developed economies adds legitimacy to the call by BRICS for an agenda for the development of an international legal system in order to derive a coordinated approach and necessary legal regulation for the global economy. However, analysis of the legal policy of regulating international investment and tax relations shows that the positions of BRICS countries which are reflected in their bilateral treaties (tax and investment) and also in the commentaries to the OECD and UN Model Conventions (in particular, in respect of tax matters) have serious differences that quite often are not sufficiently stipulated, neither by these states' individual interests realized nor by their common interest to act as a joint forum that represents not only the developed countries but also those which are striving to develop. This statement can be supported by some particular examples (given in the supplementary materials of the Congress). The discrepancies may produce difficulties when defining a uniform position of the BRICS states on the issues of developing a multilateral instrument when implementing Actions 14 and 15 of the BEPS Action Plan approved by the OECD and the G20. Nevertheless this unity, or at least the coordinated position, is important so that the approaches of the OECD non-member states are implemented at the stage of establishing the global system of regulation of direct taxation and the situation in which many major countries of the world were dismissed from developing the rules of world trade (as happened in the development of the GATT rules and later those of the WTO) is not repeated.

4.4. Creation of a Permanent Format of Expert Discussions

On the basis of the discussions held, the members of the Coordination Committee of the BRICS Law Institute and the Expert Group came to a conclusion on the effectiveness

of the format chosen and on the importance of holding expert discussions on an annual basis. The founders and other participants in the BRICS Legal Forum offered (beginning at the Third Forum, which will be held in India) to coordinate the topics and directions of the research conducted and in 2017 to hold a joint meeting of the Coordination Committee of the BRICS Law Institute and the BRICS Legal Forum in Russia, in Yekaterinburg, where the format of BRICS was implemented for the first time in 2009. It is also proposed to inform interested state authorities and public and business associations about this forum of expert work, which is of an open character and invites the involvement of all interested parties in the organization of a competent dialogue, and to facilitate the discussions between state authorities, experts, practitioners and civil society activists.[2]

Conclusion

The Tenth Session of the Euro-Asian Law Congress was a milestone in the development of a legal framework in the top priority areas of the Euro-Asian region. During the two-day discussions among the highly qualified Expert Groups a broad range of topics were raised and effective legal solutions and mechanisms were suggested. The Congress program enabled the participants to become engaged in effective collaboration and determination of topics for joint research projects and upcoming discussions.

All speakers emphasized that the Expert Group discussions within the framework of the Congress were a significant step towards creating beneficial partnerships in legal areas encompassing joint research projects and extended professional cooperation. The Final Summary of the discussion within the Meeting of the Coordination Committee of the BRICS Law Institute and the Expert Group on Legal Support to Inter-State Partnership and Integration on Economics, Finance, Taxation and Customs is a concrete result of the Congress. The document enables the international legal community to take further steps in creating an effective legal framework for the operation of international and national political and economic systems.

The main idea of the Euro-Asian Law Congress is to launch a large-scale collaboration in the field of law and policy with the concentration on the issues particularly important to the BRICS countries. Moreover, the annual and systematic work of the Euro-Asian Law Congress significantly contributes to the strategic goals of Russia's entry into the global governance arena.

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[2] Final Summary of the discussions is available at the official website of the Euro-Asian Law Congress (Dec. 20, 2016), available at http://www.lawcongress.ru/fotogalereya/1%20-%20Summary%20of%20the%20Discussion%20-%209%20-%2010%20June%202016%20(1).pdf.

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