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Values in Civil Procedure

I.

This contribution is based on the lecture I gave at the occasion of becoming a proud *doctor iuris honoris causa* of Uppsala University. To be true, it was rather a speech than an actual lecture and therefore, this paper is rather an essay than an academic research paper. It is, however, based on almost three decades of academic work in the field of civil procedure and reflects a few insights and convictions which I have developed over these years, which is also the reason why I will cite my own publications a number of times in the following.

This speech started with the obvious, that is, an expression of my gratitude towards Uppsala University and its Law Faculty, which I also want to repeat here in writing: The most obvious way of expressing gratitude is a simple “thank you”. If we knew each other well enough, this would suffice in order to express the thoughts and emotions which I have today. As this, however, is not the case, I would like to add a few words before addressing the subject of my lecture. *Georg Friedrich Wilhelm Hegel* said that people recognize each other as recognizing each other.¹ And indeed, I am very grateful for the recognition expressed in the honorary doctorate simply because of the excellent recognition of Uppsala University and its Law Faculty. The value of such a doctorate obviously depends upon the value of the institution from which it comes. Therefore, I have to thank you for a very valuable recognition, as Uppsala university is recognized as one of the leading places for teaching and research in the field of law at least all over Europe. In particular, Uppsala University is also known for its excellence in the field of civil procedure. *Per Olof Ekelöf* is of course fa-

¹ Hegel, *Phänomenologie des Geistes* (Suhrkamp Verlag 1973) 147.

mous far beyond the Nordic countries – and today, Professors *Lindblom*, *Lindell* and *Andersson* are the Swedish proceduralists you know when you are interested in European development in this field. Over the past decade, I have also met a few of your doctoral candidates in this field, and all of them made an excellent impression. In particular, I was always amazed by what seems to be a specific combination of a very sound basis in legal theory, exact thinking, and realistic approaches to practical legal problems. I assume that all this is required to earn a doctorate in Uppsala. Therefore, I am very proud to share this honour. Thank you very much!

II.

Discussing “Values in Civil Procedure” requires some explanation. I am normally very reluctant to talk about values, mainly for two reasons: Some believe that creating general principles of all kinds of meta levels is the most dignified thing an academic lawyer can do. I do, however, rather believe that climbing meta levels of law is just a way out in case of emergency, that is, when you do not find clear answers on lower levels of argumentation, and I also believe that it is also a dangerous thing to do, simply because principles have an obvious tendency to get out of control.² Second, referring to “values” has had a clear ideological undertone at least where I come from for a long time – quite often, it simply stands for a certain kind of bigotry which I do not share.

Many jurisdictions already have a certain established list of procedural principles, and some states – such as France³ or Switzerland⁴ – even expressly provide for these principles in their codes of civil procedure. In addition, you can of course also derive fundamental principles of civil procedure from the case law of certain courts, for example from the case law of the European Court of Human Rights on Art 6 of the Convention⁵

² See, for a more detailed explanation of this methodological approach from my perspective Oberhammer, ‘Kleine Differenzen – Vergleichende Beobachtungen zur zivilistischen Methode in Deutschland. Österreich und der Schweiz’ (2014) 214 AcP 155, 163 et seq.

³ See Art 1 et seq of the French Code de Procedure Civil.

⁴ See Art 52 et seq of the Swiss Zivilprozessordnung.

⁵ Cf. eg. Grabenwarter, *European Convention on Human Rights* (C.H. Beck Hart Nomos Helbing Lichtenhahn Verlag 2014) Art 6 EMRK 100 et seq; Meyer-Ladewig/Harren-dorf/König, ‘Art 6 EMRK’ in Meyer-Ladewig/Nettesheim/von Raumer (eds), *Europäische Menschenrechtskonvention* (4th ed, Nomos 2017) margin note 1 et seq; Schabas, *The European Convention on Human Rights* (OUP 2015) Art 6 EMRK 270 et seq.

or from the ECJ's decisions on European Civil Procedure.⁶ I am not trying to do something like this here, simply because it would, of course, go far beyond the scope of this lecture. Rather, I would like to address a few aspects which I personally believe should be discussed more often.

III.

Addressing values is obviously something people do when they grow old, and there is no use denying that this is exactly what I am into here. After all, I have been trying to explain the law to both students and practitioners for roughly 25 years now. It seems to me that the law is so complicated that not really understanding it (according to the standards which we academics think are appropriate) is not the exception, but rather the rule in daily practice. Or, to put it in a more positive perspective, the actual law happening in reality is not quite what we think it should be. Rather, there is a very broad variance of outcomes in reality. This is troubling, because foreseeability of legal consequences is the very core of the rule of law. We are not primarily good lawyers under the rule of law because we strive for a higher justice in every single case, but because we manage to achieve consistency – and obviously, we seem to fail in this respect rather often. Some say believing that “you can get it right” is simply an illusion. Such a relativistic, or some might say, realistic approach might be a convincing finding in legal theory, but it simply does not do the trick in practice. In practice, we need a notion of what is the right and what is the wrong interpretation in a certain situation, a notion on which we can agree even if it is only on the basis of mere rhetorics – which is not a bad thing after all, as long as it does the legal trick, which includes that you know what you can expect. All this is, of course, not at all new. I am, however, under the impression that both the growing complexity of the law and growing diversity of our societies have increased the problem significantly in the recent past. Lack of orientation seems to be more and more common in many senses. This is where values might play a role, because this fact cannot be changed by even more learning and training on technical details, by even tougher exams, longer textbooks, extended internships etc. All this can neither change the law nor the people, and we have to respect

⁶ Cf. eg. Pontier/Burg, *EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters according to the case law of the European Court of Justice* (T.M.C. Asser Press 2004).

both actual law and actual people. Some time ago, a colleague of mine said that his job as a law professor is basically the same as the job of his tennis instructor, because he teaches the technique of correctly applying the law. Out of a sudden, I heard myself answer that I do not believe that at all, and that giving a lecture for students is also about representing a certain attitude, a certain approach to being a good person as a lawyer and that this should not be separated from teaching law. So, to my own surprise, I finally started to address values.

One way to face the growing complexity of the law as an academic is to become more and more specialized, until we end up as nerdy clerks who know every single court decision in a very narrow field of law and nothing else. Such specialists, however, do very often already exist in practice, for example because the recent growth of law firms allowed such specialization. More importantly, by secluding ourselves in such tiny niches of expertise, we would fail our profession to teach law. In order to stay relevant in today's legal environment, I believe we have to find what one might call dialectical ways of both specializing in the details and to talk about the bigger picture. (This is also one reason why I do believe that subjects such as, for example, legal history or legal philosophy should not be underestimated in our academic curricula.)

IV.

One way of discussing overall policies in civil procedure is trying to identify the purpose of procedure.⁷ One might hope that, as soon as such a purpose is identified, you would have sound basis for making fundamental choices. A well-known example of such an approach is the classical discussion whether to follow a more “social” or a more “liberal” approach in civil procedure. I understand that this is a discussion which we know very well both in Sweden and in Austria. One could say that the courts and accordingly procedure are a common good of a society and that disputes among members of a society are an evil which needs to be taken care of by society⁸ – or you could say that a lawsuit between a seller and

⁷ See for the German discussion Brehm, ‘Einleitung’ in Stein/Jonas (eds), *Kommentar zu den Zivilprozessgesetzen* (23rd ed, Mohr Siebeck 2014) margin note 5 et seq with many further references.

⁸ This is, of course, the well-known approach of Franz Klein, which influenced legal thinking far beyond Austria; see, eg, Böhm, ‘Die österreichischen Justizgesetze von 1895/96’ in Hofmeister (ed), *Kodifikation als Mittel der Politik* (Böhlau 1986) 59 et seq;

a buyer of a car is about their money and their car and, accordingly, the dispute is their property. Such approaches might result in hugely different approaches in practice: A jurisdiction believing in the “social” aspect might provide that judges have to ask questions in order to establish the facts of the case; it might not easily respect that parties expressly or tacitly agree on the facts; it might not allow parties to agree on the way the proceedings shall be conducted or on the court where the case should be tried; it might even be inclined to perform a review even of settlements etc. Jurisdictions based on a “liberal” approach will decide such issues the opposite way.⁹

This is about the ideological scheme which was the basis of my training as a lawyer. What troubles me about these approaches is (inter alia), that they do not exclude each other: Of course, the judiciary is a public function; and of course, most of the cases relate to private matters. Therefore, the question which approach you prefer does not really depend on insights into the reality of civil procedure, but rather upon general political notions which do not really reflect what procedure is about. (It is telling that these notions became rather irrelevant in the discussion of the salient procedural discussions of the past decade such as, for example, the role of ADR or the issue of collective redress.)

This may be even more true for another classical fundamental issue: Generations of procedural lawyers have discussed whether civil procedure is about establishing “formal” or rather “material” truth.¹⁰ In this context, “formal truth” is a record of facts created by a certain interaction between the parties and the court within a procedure, while the “material” (or “substantive”) truth is, well, something more true, the “true truth” (under whatever concept of truth) so to say. On the one hand, it is hard to see

Oberhammer, ‘Richtermacht, Wahrheitspflicht und Parteienvertretung’ in Kralik/Rechberger (eds), *Konfliktvermeidung und Konfliktregelung* (Veröffentlichungen des Ludwig Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen XIII, Manz 1993) 31 et seq.

⁹ See, eg, Oberhammer, ‘Richterbild im Zivilprozeß: Zwischenbilanz eines Jahrzehnts der Reformen in Mitteleuropa’ in Oberhammer (ed), *Richterbild und Rechtsreform in Mitteleuropa* (Manz 2001) 131 et seq; Oberhammer, ‘Die Aufgabenverteilung zwischen Gericht und Parteien – Überlegungen à propos „Een nieuwe balans“ aus Sicht des deutschen Rechtskreises’ in Ingelse (ed), *Commentaren op fundamentele herbezinning* (Ars Aequi Libri 2004) 81 et seq.

¹⁰ See, eg, Uzelac, ‘Evidence and the Principle of Proportionality’ in van Rhee/Uzelac (eds), *Evidence in Contemporary Civil Procedure* (Intersentia 2015) 18 et seq.

how anybody can expect material rather than formal truth on the basis of a process where after the submission of a few documents and a hearing with some witnesses and maybe an expert, a judge makes up her mind about what is more convincing. If we really wanted to have results that are as accurate as possible in the sense of “material truth”, the first thing we should do is to establish a special “private law police force” which investigates every civil case just like a murder case. Obviously, no reasonable person would like to have such “private law police forces”. Accordingly, no reasonable person wants the actual “material truth” as a basis for civil judgments. On the other hand, the concept of a formal truth is also based on slightly absurd notions. Some argue that in a system based on this approach, parties will exercise their freedom by consensually making dispositions on the factual basis of the case. They will expressly or tacitly agree to leave out certain unpleasant facts or they will agree that something has happened. This is a rather unrealistic idea as well: In almost all cases, the parties compete to convince the judge that their narrative is the correct one, and they only agree on facts which are quite clear anyway. It is true that sometimes, both parties fail to address relevant facts. Most of the time, however, this simply happens because they misunderstood the facts or did not understand what is relevant rather than because they made joint deliberate choices.

Talking about purposes of civil procedure, some suggest that civil procedure does not have an independent purpose, but is only about the implementation of substantive law.¹¹ Accordingly, all relevant values can be derived from private law, while procedural law is only a technical tool to implement values expressed by substantive law. One will not be surprised that a proceduralist does not at all share this view. As a matter of fact, it is rather an expression of ignorance with respect to procedure, that is, with respect to the many political choices lawmakers and courts have to make also in this field of law. Let me put it in rather simple terms: A person having bought something is under an obligation to pay the purchase price both in the USA and in Sweden. The procedure to “implement” this obligation, however, differs strongly between these two jurisdictions. The reason for that is not that being under an obligation to pay the purchase price is something completely different under US and Swedish law. Obviously, it is a jurisdiction’s, a society’s approach to the resolution of

¹¹ See on the intricate relation between private and procedural law the seminal treatise by Henckel, *Prozessrecht und materielles Recht* (Mohr Siebeck 1970).

disputes which makes the difference. It is, however, also true that you cannot reasonably discuss procedure without understanding substantive law. There are many issues where private law matters. As a matter of fact, quite often nobody really knows whether a certain provision is substantive or procedural in nature. Well-known examples relate to the field of evidence,¹² but you can argue about the characterisation of provisions as either substantive or procedural in many aspects, which is a well-known fact among international lawyers. The relation between procedural and substantive law is indeed a rather intricate issue. Many lawyers might think that there are two parallel, but distinct systems of law, one providing rules, and the other providing for their implementation, and that the latter somehow mirror or represent the former. However, as legal rules do have to contain a sanction, you may also say that there is only one set of rules containing orders and sanctions, and that the sanctions in civil law – such as the ones in criminal law – also contain all necessary court activities. So substantive law and its values obviously matter, but probably not in the sense that private law is the “superior order” providing for the fundamental values of what we call procedure. There is, however, also a completely different approach saying that civil procedure is public law and, accordingly, it should be governed by public law principles, whatever they may be. All in all, this approach has a tendency to result in solutions where form prevails over substance. It is of course true that court proceedings are a state activity and that they, therefore, have to comply with the constitution and human rights. This is not as trivial as it might seem – for example, there has been a strong sentiment of German lawyers against the case law of the Constitutional Court in civil law and civil procedure matters and the notion that there is an overall principle of due process at least in the past.¹³ In the past, many civil and procedural lawyers seem to have believed that civil law and civil procedure are based on ancient principles which are, therefore, somehow immune against constitutional or fundamental rights considerations, which they thought were merely “political” in nature. As already stated above, I am not going to discuss the impact of constitutions or the European Convention on Human Rights on civil procedure here. Some twenty years ago, I published

¹² See, eg, the excellent study of Coester-Waltjen, *Internationales Beweisrecht* (Gremer 1983).

¹³ See, as a blatant example, Lerche, ‘Zum „Anspruch auf rechtliches Gehör”’ (1965) 78 ZZP 1 et seq.

a number of articles with the purpose of convincing Austrian courts that they are bound by the constitution and, in particular, the Convention on Human Rights. Believing that civil law or procedure is somehow above or outside the constitution is simply unconstitutional. I do, however, hope and believe that this is more or less generally accepted today. Apart from that, the fact that civil procedure can be described as a part of public law does not in itself contain a message on the underlying values (and probably anything else), and it does not even help a lot when it comes to the interpretation of procedural law.¹⁴

Accordingly, I conclude that candidates such as the overall purpose, the social function, the pursuit of the truth, the implementation of private law or the nature of civil procedure as public law are less interesting subjects for discussing “values in civil procedure” than many procedural lawyers (including myself) have thought in the past. As a matter of fact, these were about the “fundamental” notions of procedure which were discussed when I started my academic career in Austria. Of course, the aspects stated above are an extremely sketchy analysis in this respect, but discussing all this in more detail would arrive at the same result: None of this is wrong as such, but all in all, one should not expect much help from such concepts as starting points for today’s or tomorrow’s discussion of actual problems and developments.

V.

Both the idea that civil procedure is simply about implementing private law in trial and enforcement proceedings and that it is a matter of state authority over the individual have also been questioned from a different angle in recent times. As is generally known, the Alternative Dispute Resolution movement¹⁵ is based on rather different concepts. In essence, this approach relies on the assumption that entering into a settlement is the better way of resolving disputes than having the case tried until a final judgment. Some argue that this is simply economic common sense – having a settlement always saves time and cost and, accordingly, is more

¹⁴ See F Bydlinski, *System und Prinzipien des Privatrechts* (Springer 1996) 85.

¹⁵ See with respect to the following the excellent critical analysis from the access to justice perspective (with which I fully agree) Lindblom, *Progressive Procedure* (Iustus 2017) 393 et seq. From a German perspective, see the excellent analysis of Stürner, ‘Die Rolle des dogmatischen Denkens im Zivilprozessrecht’ (2014) 127 ZZZ 271, 310 et seq who identifies the ADR movement as a “manifestation of modern neoliberalism”.

efficient. This is of course true in many individual cases, but I doubt whether this insight should serve as a conceptual basis for civil procedure reform. There are two arguments against that: First, it might quite often be more attractive to win the case than to settle it, and you might be entitled to do so under substantive law. ADR people all over the world cannot stop telling the story of the two people having a dispute about an orange. After a while, a mediator shows up and finds out that one party only wants the fruit pulp in order to make juice while the other party only wants the orange peel in order to bake a cake, and so they end up in a win-win-situation and live happily ever after. The problem about this story is first that it assumes that people are stupid and do not know what they want, while some outsider having a degree in mediation will know better. Second, and more important, in real life both parties normally simply want the orange, and having only half of it is worse than having the whole orange from an economic perspective. Finally, one of them will very often simply be entitled to get the orange while the other one is not.

The second argument against an economy-based approach in favour of ADR is simply that proceedings may not only be about efficiency, but also about fairness or even justice. Not only trying a case until the final judgment, but also entering into a settlement or accepting some conciliation authority's preliminary decision takes place against a certain economic backdrop which might make this practice substantially unjust. Parties simply do not have identical bargaining powers, and the best ADR training in the world will not make the underlying economic inequalities between the parties disappear.

There has been a lot of legislative and other state activity on ADR in the past decades, providing for all kinds of institutions and proceedings in order to get rid of small cases without actual civil proceedings. One should not be naive about that: The reason why states and the EU are promoting such approaches is quite often simply to get rid of the case load without complying with due process because just any procedure might help. In this context, you should be aware that all this can also result in the creation of second-class proceedings for the poor, or as *Per Henrik Lidblom* put it, in an "opiate of the legal system" – and maybe it is not even that, but only a way of "alternative medicine" relying completely on a legal placebo effect.

I do not, however, believe that mere economic considerations are the actual and only basis for the ADR movement. Rather, it also seems to be based on the idea that resolving a dispute by an agreement between the

parties is the better way of dispute resolution in an ethical sense. (This might be only one of many cases where we gradually got used to the general trend of disguising moral choices as economic efficiency considerations.) There may be different reasons for such an approach: One might be of the opinion that it is good behaviour in a moral sense to end a dispute by agreement because a dispute is an evil thing and you are not complying with your society's moral standards when you drag on a conflict until it is decided by a superior court. This might be considered not to be peaceful, integrated behaviour, but rather some form of violence. Of course, at the end of the day, the law is all about preventing violence of some kind. However, having a dispute and bringing it before the courts is not violence, but rather competition, and political and economic competition are the basis for democracy and freedom. The same is true for competition before the courts. Rather, I tend to agree with another pro-ADR-argument: Managing to resolve your disputes without delegating them to the state is of course also a way to exercise your private autonomy, and therefore your freedom. In a way, the ADR movement is therefore also an emancipatory movement in the sense that people may reclaim their ownership of their private disputes from the state and get rid of an authority telling them what to do.

When it comes to private autonomy as an argument, one must of course always be critical whether this autonomy actually exists for all parties involved. This might be true for commercial arbitration in international business disputes: Big companies resolving their disputes in private arbitration are indeed in rather far-reaching possession of their conflicts and celebrate their individual freedom by not referring their disputes to a state authority. On the other end of the spectrum, consumers entering into a settlement before some mediation, conciliation, or ombudsman authority simply because they cannot afford court proceedings obviously do not celebrate their individual freedom by doing so. However, the ADR movement has been the fashionable approach in the past two decades in particular with respect to small claims proceedings. This took place to the detriment of another movement which was hip before that time, roughly in the seventies and eighties: the access to justice movement. Unfortunately, this movement has gone out of fashion to some degree – that is, claiming “access to justice” for everybody in the sense that everybody has access to the same kind of justice – and not just to second-class proceedings for the poor.

In Europe, we tend to look down on the American discussion on health care issues – how can a wealthy and civilized nation even think of not having a system where everybody is entitled to the best medical services by law? Isn't it cynical to say that everybody can get private insurance or simply pay for such services? In the field of procedure, however, many European states have exactly the same approach. At least this is true where I come from.¹⁶ Of course, everybody is entitled to legal aid already under Art. 6 of the ECHR. In Austria, however, the legal services you can obtain on the basis of legal aid are not the ones you would expect if you hire a lawyer on the market, simply because the lawyer appointed under the Austrian system of legal aid receives no actual compensation for his or her services – the state only makes contributions to the general pension fund of the Austrian bar. So there is no equal access to justice. Under such circumstances, it is cynical to tell people that ADR is better anyway. Only if everybody has a realistic chance to pursue their claims before the courts, it is fair to try to convince them that mediation or conciliation might be a better way out of the dispute.

However, even if you accept that reaching a settlement is better than obtaining a judgment, this does not really help when you try to identify other values governing civil procedure. If the parties do not enter into a settlement, the idea that settlements are great does not help you to find out what values really matter in civil procedure.

VI.

You may have noticed that at least some of the political approaches to civil procedure which I have discussed above were somehow outcome-oriented, saying that the outcome should be, for example, the true implementation of substantive law based on the material truth found out in a process controlled by the state which makes sure that the outcome is both the “true truth” and the correct application of the law, or that the outcome should always rather be a settlement than a judgement etc. Such outcome-oriented thought has a fundamental problem in the field of civil procedure. I have addressed the problem of identifying what is procedure and what is substance before. In this context, the German proceduralist *Ludwig Häsemeyer* once made an interesting attempt by saying

¹⁶ See in this context Oberhammer, 'Zugang zum Recht – aus zivilrechtlicher Sicht' in Österreichischer Juristentag (ed), *Zugang zum Recht* (Manz 2014) 24 et seq.

that procedural law is what applies under conditions of uncertainty while substantive law is what applies under conditions of certainty.¹⁷ I doubt whether you can really draw a line between procedure and substance on this basis. However, this reminds us of the fact that you have to make procedural choices in a situation where you do not know the outcome. Therefore, an outcome-oriented approach to procedural issues is always a flawed one to some extent, because when you talk about procedure, you always basically say: “I do not know the outcome, but my next step will be the following” – simply because if you already knew the outcome, you would either be at the end of the proceedings and would not need to proceed any further, or you would simply be biased because you would already know the outcome at the outset of the procedure or at least before everything is said and done.

This is not as theoretical as it may sound. Let me give you a practical example from a recent European discussion: Art 7 (2) of the Brussels Regulation provides for a venue for claims based on tort law at the place where the harmful event occurred. So if you claim damages on the basis of some harm done to you in Sweden by an Austrian resident, you have a choice whether you wish to do so at the respondent’s general place of jurisdiction in Austria or in Sweden where the harmful event occurred, and of course, you might be inclined to choose the Swedish courts. In some cases, however, the alleged wrongdoers – and not the alleged victim – commenced the proceedings with an action for negative declaratory relief, that is, they wanted a declaratory judgment that they were not liable for the damages, and they did so before the courts of their home country arguing that this was the place where the harmful event occurred. Some commentators argued that this should be impossible because it is contrary to the objective of said Art 7 (2) of the Brussels Regulation and against good faith that a wrongdoer can commence proceedings against the victim at the wrongdoer’s domicile based on a provision which is meant to protect the victim of a tort. Others took different, more subtle approaches in order to arrive at the same result. For example, it was argued that if you allege that no tort has occurred, there also is no place where “the harmful event occurred”; this, for example, was roughly the argument of the advocate general in the *Folien Fischer* case before the

¹⁷ Häsemeyer, ‘Prozessrechtliche Rahmenbedingungen für die Entwicklung des materiellen Privatrechts – Zur Unvertauschbarkeit materieller und formeller Rechtssätze’ (1988) 188 AcP 140, 146 et seq.

ECJ.¹⁸ It was clear, however, in any event, that also such arguments were based on the feeling that there is something wrong with offering a procedural advantage to a wrongdoer.¹⁹ The ECJ, however, arrived at the correct conclusion that this approach is wrong.²⁰ It is indeed wrong for different reasons. One of them is that there is no status of a “tort victim” or of a “wrongdoer” independent of the outcome of the case when you have to make up your mind about jurisdiction at the outset of the proceedings. This is also one of the reasons why the objective of the venue under Art 7 (2) is not the protection of victims, but the efficiency of the proceedings.²¹ It is also incorrect to say that there is no actual place where the harmful event occurred in such a case. There can be such a place, or there can be no such place both in cases of payment claims for damages or where a party is seeking negative declaratory relief. All places and damages are only allegations when you have to make up your mind about this procedural issue in any event.

Thinking about the outcome or an outcome-oriented purpose is no good advice if you think about procedural issues in general. In procedure, the journey is the destination. Therefore, I suggest that we should not focus on the outcome, but rather on how we shall proceed when we think about fundamental values of civil procedure. Obviously, a proceduralist would have a lot of things to say on how to proceed. I would like to address just one very obvious aspect here: When I give a lecture on civil procedure for beginners, I normally spend the first five minutes asking the students what they think is so special about court proceedings. Hopefully, after a short while, one student will say that is the courts’ independence and impartiality. Court systems work because people believe that what happens in the proceedings is legitimate, and the first main reason why people think that all this is legitimate is independence and impartiality.²² (The second one, I believe, is respect for the right to be heard.)

¹⁸ Case C-133/11 *Folien Fischer* ECLI:EU:C:2012:664, Opinion of AG Jääskinen.

¹⁹ See in this context Domej, ‘Negative Feststellungsklagen im Deliktsgerichtsstand’ (2008) 6 IPRax 550 et seq.

²⁰ Case C-133/11 *Folien Fischer* ECLI:EU:C:2012:664.

²¹ See, eg, Case C-194/16 *Bolagsupplysningen and Ilsjan* ECLI:EU:C:2017:766; Case C-618/15 *Concurrence SARL* ECLI:EU:C:2016:976; Case C-12/15, *Universal Music International Holding* ECLI:EU:C:2016:449 and many others.

²² See, eg, Oberhammer, ‘What Kind of Judiciary for what Kind of Society?’ in van Rhee/Heirbaut/Storme (eds), *The French Code of civil procedure (1806) after 200 years. The civil procedure tradition in France and abroad* (Kluwer 2008) 399 et seq.

If you look at this from what we might call a textbook perspective, independence and impartiality seem to be relatively simple concepts: Judges must not be involved in the case or with the parties, and they must not take orders, in particular not from the administration or from politicians. In reality, independence and impartiality are hard to achieve. In particular, impartiality means (inter alia) that you only make up your mind on what to believe after having taken evidence in the way provided for by the code of civil procedure. Of course, judges will always have preliminary impressions at earlier stages of the proceedings, but these impressions must always be subject to further revision, and they must not be the basis for procedural decisions on how to continue the fact-finding process. This may sound trivial, but it truly is not – let me give you three examples from the jurisdictions I am familiar with.

According to Swiss case law, judges are entitled to perform a so-called “anticipated evaluation of evidence” in some situations: As soon as they are convinced that an allegation is true, they do not need to take further evidence in case they are already convinced that their view will not be affected by such evidence anyway.²³ Swiss lawyers believe that this is an expression of the principle of the free evaluation of evidence – as soon as judges are convinced that they will not change their minds even if the last remaining witness says something which is contrary to what they believe is true, it is within their discretion not to examine this last remaining witness.

According to German law, a party cannot simply be examined just like a witness. Rather, the German code of civil procedure only provides for specific situations where this is possible, the most important one being that the judge has already developed a certain degree of conviction that the allegations of this party are true; then he or she may examine this party as a witness. (Legal historians will easily recognize the background of this.)²⁴ According to the original understanding of the German code of civil procedure, evidence which might be decisive can only be taken in case you succeeded in convincing the judge without that evidence; and it is tough luck if this is your only evidence. This has been the situation

²³ See for a critical discussion of this approach Oberhammer, ‘Antizipierte Beweiswürdigung: Verfahrensmangel als Prozessgrundsatz?’ in Forstmoser/Honsell/Wiegand (eds), *Festschrift für Hans-Peter Walter* (Stämpfli 2005) 507 et seq.

²⁴ Cf. Oberhammer, ‘Parteiaussage, Parteivernehmung und freie Beweiswürdigung am Ende des 20. Jahrhunderts’ (2000) 113 ZJP 295 et seq.

in Germany until recently (and it still is the letter of the law today). In its decision in the case *Dombo Beheer*,²⁵ the European Court of Human Rights, however, decided that similar provisions of Dutch law resulted in a violation of Art. 6 of the Convention. After an intensive debate, German courts followed suit and developed ways to circumvent said provision.²⁶ If you look at this development as a whole, it is surprising how much thought and time was spent in order to find out that you simply should ask everybody who might know something instead of speculating in advance whether this person's testimony might be sufficiently convincing.

A striking example of what I want to talk about in this context emerged from a recent Austrian litigation: Investors had brought a collective lawsuit against a bank alleging that certain fraudulent activities of the respondent caused a loss of their investments. They wanted to prove these allegations by referring to a report by the Austrian national bank which criticized the bank for these activities; this report was commissioned by the Austrian financial markets regulatory agency in the course of administrative proceedings. The Viennese appellate court arrived at the conclusion that this "evidence" was inadmissible simply because it is required by law that courts take the evidence themselves and do not simply refer to such documents created in parallel administrative proceedings instead. The Austrian Supreme Court, however, was of a different opinion.²⁷ The Court held that it may be true that the code of civil procedure does not allow the court to take evidence by simply referring to such documents. However, the Supreme Court held that it follows from Art 6 of the European Convention of Human Rights that an exception must be made in this specific case, because it would have been very complicated for the claimants to prove the facts covered in the national bank report, and that it would therefore result in a denial of justice if they were not able to prove their claims by referring to the national bank report. Again, the problem here is that the court has already made up its mind before availing itself of the means of evidence provided for by procedural law. The court was under the impression that the claimants' allegations were

²⁵ *Dombo Beheer/Netherlands* (1993) Series A no 274.

²⁶ Berger, '§ 448 ZPO' in Stein/Jonas (eds), *Kommentar zu den Zivilprozessgesetzen* (23rd ed, Mohr Siebeck 2015) margin note 22 et seq; Schreiber, '§ 448 ZPO' in Krüger/Rauscher (eds), *Münchener Kommentar zur ZPO* (5th ed, Beck 2016), margin note 3a.

²⁷ Austrian Supreme Court 22 October 2015, 1 Ob 39/15i.

true and they actually had claims, and the court was so in advance, that is, before the actual taking of the evidence, and therefore, it found new ways outside the code of procedure in order to allow the claimants to also “prove” what the court thought they should get.

I believe it is easy to see the joint problems of all these situations: Judges already know before they ought to know. A couple of years ago, a Swiss judge proudly told me how expediently he handled his cases by saying “I only need to read the complaint for ten minutes and then I know”. “Knowing it all” is a common human vice; it is very common among lawyers and maybe it is the typical *déformation professionnelle* of judges. Advocates know that: A good action and any other good submission consists of two elements: First, a brief explanation why the other party is to blame for all kinds of reasons, and second (and apart from that), a factual and legal toolkit for the judges which helps them to hold the party that is to blame according to element no 1 legally liable. Behavioural economists tell us that the human brain thinks in two different modes, that is, “fast and slow”, to refer to the title of a well known book²⁸ – that means, based on fast intuition as a shortcut and based on slow analytic thought. Of course, the slow analytic approach is the one provided for by law and the other one, based on opaque notions of justice, is not. One way to fight this is of course a training of lawyers and a selection of judges both providing that proceedings are dealt with by fast legal thinkers who are able to “think slowly” very fast. Nevertheless, we also have to convince judges not simply to follow their gut feelings, but to go the extra mile in order to obtain an acceptable record of the facts and, in particular, a correct application of the law. This will only work if judges are culturally convinced that this is the way to do it (and of course, if we have enough judges).

In other words, this might be a value we should try to teach at our universities and to implement in our legal communities: You may call it curiosity; or respect for the individuality of each and every case and its parties; or doing away with prejudices; or simply respect for the rule of law and a certain humility with respect to one’s commonsense and moral convictions. As a matter of fact, it might be a mixture of all these virtues which is necessary in order to achieve real impartiality. I believe educating a generation of open-minded lawyers could be the starting point for all this.

²⁸ I.e. Kahneman, *Thinking Fast and Slow* (Farrar, Straus & Giroux 2011).

When I was a legal intern with a criminal court in Vienna, a judge asked me about my future plans. I told her that I was interested in private law and might, among other things, try to pursue an academic career. She said “then I guess you are one of these people who like to see things from different angles”; when I indeed agreed she said: “Well, I am not, and this is why I am a judge at this criminal court.” This is about what I wanted to address: We should really educate a generation of open-minded lawyers and, of course, we should become aware of how prejudiced we are in reality. Universities should therefore be places where people become aware that changing your mind is a fun thing to do.

VII.

Initially, I also wanted to address three additional issues here: The right to be heard as the *raison d'être* of the authority, legitimacy and binding effect of the judgment (rather than the state's authority); the values underlying policy choices in the field of jurisdiction, and the nationalism of courts (which is often underestimated, for example by many voicing criticism against investor-state arbitration or arbitration as such). Instead, I could only address one aspect – open-mindedness as a prerequisite for independence and impartiality – in some detail, although still in a rather sketchy fashion.

I am grateful that I could do so in front of fellow Europeans from another member state. Such a transnational conversation can help to avoid idiosyncratic approaches. Moreover, the present development of both European case law and legislation in the field of civil procedure urgently demand such a discussion, because we do not sufficiently manage to develop comprehensive, value-based concepts on a comparative basis. For example, the European law-makers answer to access to justice in small claims cases is a rather bureaucratic one, doing away with oral hearings as far as possible and relying on the power of uniform forms.²⁹ This might be the correct approach, but this was done without a proper discussion about our common understanding of the importance of oral hearings – a

²⁹ See Kern, 'Das europäische Verfahren für geringfügige Forderungen und die gemeineuropäischen Verfahrensgrundsätze' (2012) 8 JZ 389, 394 et seq; Hau, 'Zur Entwicklung des Internationalen Zivilverfahrensrechts in der Europäischen Union in den Jahren 2005 und 2006' (2007) 2 GPR 93, 96; Stürner, 'Mündlichkeit und Schriftlichkeit im europäischen Zivilprozess' in Geimer/Schütze (eds), *Festschrift für Athanassios Kaissis* (Verlag Dr. Otto Schmidt 2012) 1003 seq.

“day in court” might be more important than mere efficiency. The ECJ’s case law on procedure is based on a large number of “principles” which were never the subject of broader discussion, but were rather simply made up on the basis of superficial common sense considerations of the court. For example, the case law (beginning with *Gubisch/Palumbo*³⁰) on the broad *lis pendens* effects under the Brussels Regulation was solely developed on the basis of the principle of mutual trust and the objective of mutual recognition and enforcement, but did not at all take into account the intolerable effects of broad and long-lasting *lis pendens* effects on the parties’ access to justice. The infamous “torpedo action” is a direct consequence of this one-sided approach. In *Seagon/Deko Marty Belgium*,³¹ the ECJ invented a venue for actions of an insolvency receiver in the state where the insolvency proceedings were opened only on the basis of the argument that this is more practical for the insolvency receiver – surprisingly, the court completely failed to take into account that this also has effects on the legitimate jurisdictional interests of the respective respondents. Both decisions are cases where the principles and interests involved – one might say: the values – were not sufficiently taken into account by the court, and these are, unfortunately, not the only examples. – There is an obvious need for procedural thought and discussion in Europe today.

³⁰ Case C-144/86 *Gubisch Maschinenfabrik KG/Giulio Palumbo* ECLI:EU:C:1987:528. See for a record of the subsequent case law eg Rogerson, ‘II. *Lis Pendens* and Related Actions in Another Member State’ in Dickinson/Lein (eds), *The Brussels I Regulation Recast* (OUP 2015) margin note 11.19 et seq. In its decision C-116/02 *Gasser* ECLI:EU:C:2003:657 the ECJ still failed to understand the practical consequences of his one-sided approach in a case where both these problems and a straightforward solution was brought before the court by the appellate court of Innsbruck.

³¹ Case C-339/07 *Christopher Seagon/Deko Marty Belgium NV* ECLI:EU:C:2009:83. See for a critical analysis by the author: Oberhammer, ‘Europäisches Insolvenzrecht: EuGH *Seagon/Deko Marty Belgium* und die Folgen’ in Apathy/Bollenberger/Bydlinski/Iro/Karner/Karollus (eds), *Festschrift für Helmut Koziol* (Jan Sramek Verlag 2010) 1239 et seq.