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IMPROVING ACCESS TO JUSTICE IN EUROPE

Marcel Storme

Dr h.c. Marie Curie-Sklodowska University Lublin
Honorary President of the International Association of Procedural Law

Summary. The Author is one of the initiators of work on harmonization of procedural law of the EU countries. According to the European Convention on Human Rights, each citizen has a right to a „fair trial within a reasonable time before an independent and impartial judge", therefore the Author is of opinion that harmonization of law is especially necessary in the area civil law. The provisions of the Amsterdam Treaty, Article 65 in particular, constitute a breakthrough in civil procedural law. Tampere Agenda of 1999 emphasizes the importance of easier access to justice, which can be effected by setting minimum standards for cross-border disputes and harmonization of judicial procedure, enabling court decisions to be mutually recognizable.
The Author mentions the European Order for Payment, whose structure is based on a report by a team of experts led by the Author in 1993, as an example of a successful attempt at harmonization of procedural law. Next, he presents a comparative study of two European regulations, namely the procedure of payment order and regulations on small claims. In the final part, he provides a list of conclusions drawn from the comparison.

Key words: procedural law, European Convention on Human Rights, Tampere Agenda, cross-border dispute, harmonization of law, European Order for Payment

Since I got active in the International Association of Procedural Law, I have always been impressed by the quality of the Polish Science of Procedural Law. I had already met in 1966 when I taught in Krakow, two of the most eminent scholars, namely our colleagues W. Siedlecki (Krakow) and J. Jodlowski (Warszawa)[1]. The input of the Polish proceduralists was in those days remarkable: one could say that in civil procedure the Polish squadron was as important as the Polish squadron during World War II.

In the world wide family of scholars in procedural law, it was my privilege to build a close relationship with excellent Polish colleagues. One of them was and still is Professor Mieczyslaw Sawczuk. In 1993 we organized in Lublin an international symposium of civil procedural law (22–25 august) on „*unity of civil procedural law and its national divergences*".

[1] P. Osowy. Nieprzemijające dzieło Profesora Władysława Siedleckiego. *Rejent* 2009, nr 6.

And in 1995 I got the doctorate honoris causa of the Marie Curie-Sklodowska University, thanks to the proposal of Professor Sawczuk.

All this explains why I am so glad to publish an article in „*Iura scripta sunt vigilantibus*" in honour of our colleague.

It is my purpose to examine the actual need for further harmonization of civil procedural law, after the submission of the of the so-called Storme-report (1993) and the starting law-making process on the subject of procedural law.

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Throughout my career, I have cherished the ideal of a universal code applicable throughout the world, particularly in the field of civil procedure.

The major issues in this regard can be said to be practically the same throughout the world-costs, duration and irritation.

As long ago as 1949 – no fewer than 60 years ago – one of my tutors at Ghent University announced that a world-wide system of law would only come about when we came under attack by extra-terrestrials.

However, since then we have, from 21 July 1969 onwards, witnessed various ventures into outer space which have demonstrated the non-existence of such creatures, thus removing the opportunity to create a new world order on this basis.

It is true that we have entered the era of globalization. However, even in this globalizes world it is hard to detect institutions which would be capable if initiating, promoting and completing the process of unifying the law on this planet.

Nevertheless, I have kept alive my dream of harmonising the law. Although I may have toyed with the notion of a code of law which would apply on a world-wide basis, I have gradually come to cherish the notion of a European code, more particularly in the field of civil procedure.

This is particularly the case because, unlike those which apply under the substantive law, the basic requirements for an efficient system of civil procedure are the same everywhere – or at least at the European level. These are the requirements wchich are, as is were, chiselled in the bedrock of Article 6 of the European Convention on Human Rights (ECHR), i.e. a „fair trial within a resonable time before an independent and impartial Judge". Naturally, it is necessary to add the explicit qualification – actually implicit in the notion of a fair trial – that this should be achieved „at a reasonable cost"[2].

[2] The tremendous influence of art. 6 ECHR on the case law of the Council of Europe countries was also, among others, the issue raised in Prof. Marcel Storme's speech on uniform procedure rules in Europe, given in three languages (German, French and English) during I.A.C.P.L. International Symposium of Civil Procedural Law: „Unity of Civil Procedural Law and its National Divergencies" organised in Lublin, 22–25 August 1993. See: M. Storme, *Uniform Procedure Rules in Europe* [in:] M. Sawczuk (ed.), *Unity of Civil Procedural Law and its National Divergencies*, Lublin 1994, p. 306 and its Polish version: *Ujednolicenie zasad cywilnego prawa sądowego w Europie* [w:] M. Sawczuk (red.), *Jednolitość prawa sądowego cywilnego a jego odrębności krajowe*, Lublin 1997, s. 357 (editorial note formulated by prof. M. Sawczuk's doctoral student- Judge Grzegorz

Ever since the first World Congress of the International Association for Procedural Law, which it was my privilege to organise in Ghent in the year 1977, the notion of formulating a European code has constantly gained in stature.

Thus is was that, 24 years ago in Milan, I made a plea for the unification of procedural law throughout the European Union[3]. This was the first time anyone had dared to challenge the taboo which hitherto had killed stone-dead any such project in the field of civil procedure, i.e. the notion that procedural law was the law which applied to the courts – which, in turn, could only be regulated by the sovereign domestic legislation of the EU member states.

The rest, as they say, is history. A working party was set up consisting of 12 experts – one for each of the member states of that day. Once the European Commission had announced its support for this initiative[4], we started operations in 1987. As one of the EU officials confided in me later:

This was by far the best and cheapest working party which the European Community had ever know.

The resulting report[5] was, in the course of 1993, submitted to a senior official – however, he happened to be the Director in charge of economic policy within the European Union! Small wonder, then, that it was only at a much laterate that the realisation dawned that Europe should start to develop an interest in civil procedure.

It also emerged later that the Treaty of Amsterdam of 2/10/1997 (which entered into effect on 1/5/1999), and more particularly Article 65 thereof, would represent a significant breakthrough in this regard.

Since the turn if the century, the EU lawmaking authorities have been far from inactive, adopting as they did, *inter alia*, the following regulations:

– Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. The Regulation on Insolvency Proceedings (the Insolvency Regulation)[6];

– Regulation (EC) No 1393/2007 of the European Parliament and the Council of 13 November 2007 on the service in the Members States of judical and extrajudicial documents in Civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000[7];

Borkowski seconded to the Ministry of Justice as a main specialist in Strasburg cases in which Poland is a responding state.

[3] „Preroazione per un diritto giudiziario Europeo" in [1986] *Rivista di Diritto Processuale* 293 et seq.

[4] This suport was restricted to the travelling expenses of the steering group members for every meeting.

[5] Approximation of judiciary law In the European Union, Dordrecht 1994.

[6] OJ L160,30/6/2000, 1.

[7] OJ L324,10/12/2007, 79. On this subject see, the recent comments made In Sudecki, B., „Nieuwe ontwikkelingen op her gebied van de betekening van het gerechtelijke stukken in de Europese Unie" [2007] *NIPR* 229, 240.

– Council Regulation (EC) No 44/2001 of 22/12/2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EEX Regulation or Brussels I Regulation)[8];

– Council Regulation (EC) No 1206/2001 of 28/5/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (Evidence Regulation)[9];

– Council Regulation (EC) No 2201/2003 of 27/11/2003 concerning jurisdiction and the recognition and renforcement of judgments in matrimonial matters and the matters of parental responsability, repealing Regulation (EC) No 1347/2000 Brussels II b Regulation)[10];

– Regulation (EC) No 805/2004 of the European Parliament and the Council of 21/4/2004 creating a European Enforcement Order for uncontested claims (EEO Regulation)[11].

All this resulted directly from the conclusions drawn up at the European Council at Tampere (15–16 October 1999). These conclusions emphasize the importance of improving access to the courts by the introduction of, amongst other techniques, common minimum standards for cross-frontier disputes, as well as the enhanced mutual recognition of court decisions by harmonising legislation and adopting rules of judicial procedure.

In this connection, it is quite remarkable that the report which I submitted to the Commission in 1993 had remained apparently unnoticed, until, unexpectedly, the Green Paper on a European Order for payment procedure, dated 20/12/2002, made reference to the Storme Report in the following terms:

> In 1993, a working group of experts on procedural law, presided by Professor Marcel Storme, presented to the Commission a draft proposal for a Directive on the approximation of laws and rules of the Member States concerning certain aspects of the procedure for civil litigation (the so-called Storme Proposal)[12]. This first comprehensive attempt at addressing the most fundamental features of civil procedure, clearly based on an internal market rationale, comprises a section setting up detailed rules of an order for payment procedure, thus recognizing the particular importance of harmonization in that area. Although this proposal was never converted into a legislative initiative of the Commission, it is valuable point of reference and source of inspiration.

It would seem that this was the starting point for a system of truly uniform procedural rules throughout Europe, and therefore also for the harmonisation of judicial procedures.

The first set of uniform procedural rules was the EC Regulation (1896/2006) which created a European order for payment procedure, followed

[8] OJ L12, 16/1/1001, 1.
[9] OJ L174, 27/6/2001, 1.
[10] OJ L338, 23/12/2003, 1.
[11] OJ L143, 30/4/2004, 15.
[12] The text of this proposal was published in 1994: Storme (ed.), *Rapprochement du droit judiciaire de l'Union Européenne – Approximation of judiciary law in the European Union* Dordrecht/Boston/London.

by the EC Regulation (861/2007) which established a European Small Claims Procedure.

The first of these regulations entered into effect on 12/12/2008, whereas the second became effective on 1/1/2009. It is therefore fair to state that 2009 represented the definitive breakthrough for a European system of civil procedure – an outcome of which I, and the members of my Working Party, had dreamed of as far back as 1987!

This is why I believe that the time has come to examine whether this initial exercise in harmonising court procedures in Europe has been a succes, or whether it should be described as a false start.

Following a comparative analysis of the two European procedures in question, I will first of all examine what should be the object of harmonising procedural law, then attempt to discover how this object is to be achieved.

Finally, I will, in my conclusion, make certain policy proposals for the future of European procedural law.

COMPARATIVE ANALYSIS OF THE TWO REGULATIONS ON EUROPEAN PROCEDURAL LAW

The most remarkable aspect of these regulations is that, although they set similar objectives and operate within a similar area, they do so each in an entirely different manner. The structure and headings are different, and their subject-matter and scope are formulated in such a way that one needs to re-read them twice over in order to understand their meaning and areas of agreement. They also abolish interlocutory exequatur procedures (sic).

If I understand the position correctly, the European procedures are to be used as alternatives to the judicial procedures which apply in the various member states.

What this means is that, in the event of cross-frontier disputes, one has a choice between the European and the national procedure. Therefore, domestic disputes would be governed exclusively by national rules of procedure, which is obviously unacceptable.

Not only is it wrong to use the notion of cross-frontier disputes within the European Union – more of this later – but, in addition, most domestic disputes are capable of being converted into cross-frontier litigation by transferring the residence or registered seat of one of the parties to a neighbouring member state.

As regards their scope, it is remarkable that both regulations equally exclude certain types of claim (four in total), whereas the first Regulation makes provision for one additional exception, the second regulation adding five more exceptions.

The following are most remarkable conclusions to emerge from a comparison between the two regulations (OP refers to the payment order procedure, SC refers to the small claims regulation):

1. In each case, the claims are brought by means of an application which is drawn up in accordance with a standard form. However, the OP regulation describes in detail the contents of this application, whereas the SC regulation makes implicit reference to form contained in the appendix. The interesting thing about this is that the court may provide the claimant with the opportunity subsequently to amend or supplement the written application.

Accorddingly, the authors of the regulation consciously opted for the application procedure.

Would it not therefore be eminently sensible in legal policy terms to lay down a general rule for the commencement of court proceedings – as indeed suggested in our approximation proposal (see Article 2.1 et seq. Commencement of proceedings)?

2. One of these regulations stipulates explicity that the procedure shall be a written one (Article 5 SC), whilst it may be assumed that, given the nature of the procedure in question, this will also be the case in relation to payment orders.

3. An interesting feature is the introduction of a new *sui generis* procedure, i.e. that of review in exceptional cases (Article 20 OP, Article 18 SC).

This procedure can be applied for by the defendant in certain circumstances. Here too, it is legitimate to ask the question whether it would not have been preferable to include this very specific legal remedy in the context of a general system of European procedural law.

4. The OP procedure concludes with the first truly European order, in that the relevant court order has become directly, and without any further application being necessary, a European order. The SC procedure, on the other hand, requires the applicant to make a specific application to the court – as is indeed the case under the EEO Regulation.

5. There is a possibility of shunting proceedings towards the domestic procedural law. Where a defence is entered during the payment order procedure, the latter is continued in accordance with the ordinary rules of civil procedure (Article 17 OP). The same occurs where, during a small claims procedure, a counterclaim has been entered for an amount higher than €2,000.00 (Article 5 SC).

In addition, the procedural issues which are not regulated by the regulation will be governed by the national procedural rules (Article 26 OP; Article 19 SC).

This entanglement presents certain problems.

6. The first regulation (OP) contains no provisions regulating the use of language; however, the standard form attached, which introduced the procedure, does mention that the form should be completed in the language of the member state to which application has been made, or in one of the languages accepted by souch a member state.

The second regulation (SC), on the other hand, does contain a clear set of rules on the use of language.

7. Finally, both regulations make provisions for reviewing the manner in which the procedure applied has operated. What is remarkable here is that the object is to discover what is best practice (see Article 32 OP and Article 28 SC), and That this will be assessed on the basis if cost, speed of the procedure, efficiency and ease of use. The review report, which must be completed within five years of its entry into effect, must also contain a comparison with the internal procedural rules applying within the member states.

As a matter of fact, this compulsory review is, in my view, the best part of both regulations. It is unfortunately too rare an event for new procedural rules to be assessed after a certain time has elapsed. In addition, it is very probably a comparative assessment which will enable the discovery of real „best practice", which could prompt the abandonment of this all too hybrid twin-track policy.

HOW SHOULD EUROPEAN PROCEDURAL LAW BE REGULATED?

1. The elaboration of a European system of procedural law was not inspired by harmonising dogma, but by the very essence of the European union, which is to give all European citizens equal access to the courts.

There should not be any discrimination in areas such as court costs or trial duration.

As matters stand at present, such discrimination is only tackled where it takes place within a member state. Discrimination as between citizens of different member states is, wrongly, missing from the agenda.

Neither of the regulations under review removes such discrimination. Thus, for example, no domestic payment order procedure is available in the Netherlands, whereas most EU member states do make provision for such a procedure[13].

2. It is clear that booth regulations have, wrongly, attributed a narrow interpretation to the notion of „cross-border implications".

Article 65 of the European Treaty reads as follows:

Measures in the field of judicial co-operation in civil matters having cross-border implications, to be taken in accordance with Article 73o and insofar as necessary for the proper functionning of the internal market, shall include:

(a)improving and simplifying:

– the system for cross-border service of judicial and extrajudicial documents;

– co-operation in the taking of evidence;

– the recognition and renforcement of decisions in civil and commercial cases, including decisions in extra-judical cases;

[13] Freudenthal M., *Grensoverschrijdende erkenning en tenuitvoerlegging* [2009] Den Haag, 205.

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) eliminating obstacles to the good functionning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

(a) It is abundantly clear that the term „*matters having cross-border implications*" has the broadest possible meaning and, in essence, concerns all types of dispute. The differences between the member states as regards their rules governing dispute settlement invariably have – at least potentially – cross-border implications (*l´incidence transfrontière*) within the European Union.

Thus if the rules on dispute settlement are better in one member state, this will cause a distortion if less effective rules apply elsewhere.

(b) When dealing with provisions of this nature, it is also appropriate to apply an interpretation which views each rule against the background, or better still the policy objectives, of the entire legal system.

It cannot seriously br maintained that the effective operation of civil procedures should only be a requirement for the so-called gross-border disputes – a contention which is all the more fanciful when comparing the number of cross-border disputes with the abundance of domestic disputes occuring within the member states.

It might be appropriate in this context to apply the old legal method rule devised by Von Jhering, to wit his *Durchbruchspukte* theory: legislators make laws for situations as they present themselves at the time, without, however, necessarily excluding other situations which have yet to arise. It is not possible to deny altogether that the drafters of Article 65 initially had in mind the occurrence of cross-border disputes.

(c) However, discrimination would indeed arise if one were to restrict oneself to a narrow interpretation of Article 65, since this would entail that the object was to devise a more efficient set of procedures for cross-border disputes, thus ignoring the various domestic civil procedures.

This would mean that the intention was to create a paradoxical situation. Initially – and this was undoubtedly the objective pursued by the „Approximation of Judiciary Law in the European Union" working party – the object was to achieve a degree of approximation which would enable the citizens of all the member states to have the benefit of similarly efficient procedural rules. Now, a narrow interpretation of Article 65 would restrict inprovements in litigation to citizens involved in cross-border disputes.

(d) Finally, there has been an important decision by the European Court of Justice which entirely supports the line or argument taken above[14].

The Court of Appeal (England and Wales) had requested the ECJ to give a preliminary ruling on the question whether the Treaty of 27/9/1968 (Regula-

[14] Case C-281/02, H. v. Osuvu (1/3/2005).

tion of 22/12/2001) could be applied to a national dispute between two British citizens. Although the defendant, as well as the British Government, claimed that Brussels I did not apply to internal disputes, the Court held that the Treaty was in fact applicable.

In a significant passage of the decision, the ECJ ruled that the uniform rules on jurisdiction contained in the Treaty of Brussels were not intended to apply exclusively to situations which have a real and sufficient link with the operation of the internal market – which would imply a requirement of connecting factors with other signatory states to the Treaty.

3. The fundamental criticism I have of the law-making process in the European Union on the subject of procedural law concerns the issue of vertical harmonisation, under which a wide range of loose procedures – such as those covered by the regulations discussed above – are simply dumped alongside each other in the storage room of EU legislation.

We urgently need to find our way towards horizontal harmonisation under which a coherent set of procedural rules could be drafted in accordance with the model which we designed in 1993.

4. Essentially, any policy choice to be made will remain at the level of the twin-track approach, to wit the relationship between the European and the domestic rules of procedure. In my view there are three possible options here:

(a) either we follow the (bad) example set by the regulations discussed above, and we allow both the European and the national procedural rules to exist side by side, each with their own field of application;

(b) we impose a European system of procedural law, to replace the national procedural law of each of the member states. This is a proposition which is, in my view, totally unrealistic;

(c) Or we give the citizen – even when operating within the national legal order – a choice between the national and the European rules of procedure – in other words, we „let the best win".

If the latter approach is adopted, it is the „best practice" which will ultimately win, and we will experience a new era in which the European citizen will succed in creating the most satisfactory and specific system of procedural law. This is the si-called 28th regime.

In the course of writing this paper, I became acquainted with the magnificent work authored by the French philosopher Rémy Brague – Professor not only of medieval and Arabic philosophy, but also of religious philosophy in both Paris and Munich – entitled *Europe, la voie romaine* (Paris, 1992). In this book, he seeks to demonstrate – in my view, in an entirely convincing manner – that it is *La romanité* which determined both the specifity and the identity of Europe. It introduced the Greek and Hebrew culture, as well as its legal system, into Europe and enabled it to reach every corner of this continent. It is perhaps

a matter for regret that the authors of the European Constitution do not appear to have read any of Brague´s work.

In the light of the thoughts expressed above, the following passage from the said work appears to be highly apposite:

A la différence des Grecs qui revendiquent avec fierté une prétendue autochtonie, les Romains rattachent leur origine à une non-autochtonie, à une foundation, à une transplantation dans un sol nouveau.

Is this not in fact our ultimate aspiration – the creation of a non-native system of procedural law throught Europe?

CONCLUDING PROPOSALS

It is very encouraging to note that the recently published *Stockholm Programme for an area of Freedom, Security and Justice serving the citizen* has launched an ambitious project under which a wide variety of measures are proposed which are very significant in the areas of justice, legislation and procedural law.

Where do we go from here?

One option could be to operate on a regional basis – the Baltic states, Benelux, the Scandinavian countries, etc. There could also be a civil law/common law split.

I would be inclined to take it as a defeat if we did not involve all 27 member states in this process. However, I am willing to contemplate the stages set out below.

First of all, a group of experts from all the member states, drawn from the ranks of both academics and practitioners, should develop a global vision for European procedural law and to set out the ways and means in which this can gradually be translated into concrete legislation.

Subsequently a new group should proceed to draft a general section, which would contain fundamental principles, rules on the normal conduct of civil proceedings and a number of necessary special procedures.

All this should result in the adoption if a *Codigo Tipo Europeo,* or a Framework which would follow the model developed for the European Contract Law project.

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Doing all this we can impart a new impetus to a major project for *Improving Access to Justice in Europe.*

When contemplating the current course on which European procedural law is set, I can only conclude that we are going about it the wrong way.

The first two truly European procedures are wrong in design.

They have mistakenly been restricted to cross-border disputes, so that they exist side-by-side with the widely varying rules on procedure which apply in the 27 member states. Moreover, both regulations reveal a number of gaps which need to be filled and supplemented by each of the 27 national legislatures.

As a result, the national interpretation of the European regulations will lead to a system which differs from member state to member state as regards cross-border disputes.

Paraphrasing Roscoe Pound, we could almost drscribe the current position as a „*Popular dissatisfaction with the Administration of Justice in the European Union*". There is therefore an urgent need for a group of experts in procedural law to develop a vision and method for a European law of civil procedure.

Ghent, 1 mei 2010

UŁATWIENIE DOSTĘPU DO WYMIARU SPRAWIEDLIWOŚCI W EUROPIE

Streszczenie. Autor jest jednym z inicjatorów prac nad harmonizacją prawa procesowego krajów unijnych. Według Europejskiej Konwencji Praw Człowieka każdy obywatel ma prawo do „sprawiedliwego procesu w rozsądnym terminie przed niezawisłym i bezstronnym sędzią", dlatego Autor uważa, że harmonizacja prawa jest szczególnie konieczna w zakresie prawa cywilnego. Zapisy traktatu amsterdamskiego, szczególnie artykułu 65, stanowią przełom w dziedzinie cywilnego prawa procesowego. Z kolei Agenda z Tampere (1999) podkreśla znaczenie łatwiejszego dostępu do wymiaru sprawiedliwości, co można osiągnąć poprzez ustalenie minimalnych wymogów dla sporów transgranicznych i harmonizację prawa w zakresie procedury sądowej, co umożliwi wzajemne uznawanie wyroków sądowych.
Autor podaje przykład Europejskiego Nakazu Zapłaty, którego konstrukcja opiera się na raporcie zespołu ekspertów pod przewodnictwem Autora z 1993 r., jako dowód udanej harmonizacji prawa procesowego. W dalszej części, przedstawia studium porównawcze dwóch regulacji w Europejskim prawie procesowym, mianowicie procedury nakazu płatności i regulacji w sprawie roszczeń drobnych, a w podsumowaniu prezentuje szereg wniosków płynących z porównania.

Słowa kluczowe: prawo procesowe, Europejska Konwencja Praw Człowieka, Agenda z Tampere, spór transgraniczny, harmonizacja prawa, Europejski Nakaz Zapłaty