ADVERSARIAL AND INQUISITORIAL MODELS OF CIVIL PROCEDURE

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There is a widespread belief in this country that while England and the other common law countries have an adversarial system of civil procedure, continental countries use the inquisitorial system. The fact is, however, that the only kind of situation in which a truly inquisitorial procedure can be envisaged is exemplified when a policeman who, arriving at the scene of a fracas, opens the proceedings with the time honoured formula, 'What's going on here?' Short of that, there is nothing to which an inquisitorial judge can direct his inquiry unless and until a complaint of some kind is addressed to him. Even writers on French administrative law, whose procedure is claimed to be inquisitorial, find it difficult to avoid language that might be thought more appropriate to an adversary system. So for example, it is said that notice of the complaint must be given to all those whom the claimant indicates as his *opponents*.[1]

It is a little easier to conceive of a purely adversary process, in accordance with which the judge is expected to listen to what the opposing parties present to him by way of support of their respective positions and to pronounce the winner at the end of the day. In fact a purely adversarial process is no more capable of existing in the real world than a purely inquisitorial one, because, though we may speak of a contest between the parties, the winner of contested litigation cannot be determined objectively like the winner of a race: the judge is bound to exercise his judgment—that is what he is paid to do. We must recognise that the most that can be said is that some systems are more adversarial—or more inquisitorial—than others. There is a scale on which all procedural systems can be placed, at one end of which there is the theoretically pure adversary system and at the other the theoretically pure inquisitorial.

It is a reasonable speculation that something more like the adversary system than the inquisitorial emerged in primitive society as centralised power developed along with the will to prevent the violence that goes with self help. Maitland has said,

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[1] Lenoan, *La procédure devant le Conseil d'Etat* (1954), 109.

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> Had we to write legal history out of our own heads, we might plausibly suppose that in the beginning law expects men to help themselves when they have been wronged, and that by slow degrees it substitutes a litigatory procedure for the rude justice of revenge. There would be substantial truth in this theory.[2]

The Uruguayan jurist Edouardo Couture made the point most graphically when he said

> primitive man's reaction to injustice appears in the form of vengeance, and by 'primitive' I mean not only primitive in a historical sense, but also primitive in the formation of moral sentiments and impulses. The first impulse of a rudimentary soul is to do justice by his own hand. Only at the cost of mighty historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted to authorities. A civil action in final analysis, then, is civilisation's substitute for vengeance.[3]

If parties to a dispute are to be persuaded to submit to the non-violent dispute settlement process of a court, is it not reasonable to suppose that such a process will prove the more acceptable the more it is constructed so as to allow each party to fight his own corner so that, in effect the court becomes a non-violent substitute for the duelling ground? The parties present their respective cases to the judge or judge and jury, who act as a kind of referee or umpire and decide which of them has carried the day.

Mention of the jury leads me to point out briefly that, even if this speculation about the remote origin of the adversary system is without foundation, something like it was virtually inevitable once the common law had settled on the jury as sovereign judge of fact in civil as well as criminal cases. Any interference by the judge with the parties' preparation and presentation of the factual aspects of their cases would have been to deprive the jury of its sovereignty over the facts, and the sheer impracticability of calling the members of the jury together for a number of short hearings and the implausibility of expecting them to come to their conclusion on the basis of documents made the oral presentation of the evidence at a trial a necessary feature of our procedure.

A procedure that uses the common law type of trial as a distinct and separate episode in the proceedings has the great advantage that it effectively ensures the automatic observance of the basics of procedural justice—of paramount importance to the success of a dispute resolution process, for the purposes of which, what really matters is that that at the end of the day, the parties—and especially the losing party—shall feel that they have had a fair hearing. For example in France, where there is no equivalent of a common law trial, it has been found necessary to recognise and legislate for a specific principle known as the *principe de la contradiction*,[4] whose effect is to ensure that

[2] P& M, II 574. See also *D v NSPCC* [1978] AC 171, 230, per Lord Simon of Glaisdale.

[3] 'The Nature of Judicial Process' (1950) 25 *Tulane Law Review*, 1, 7.

[4] *Nouveau code de procédure civile*, Art 16. Unless otherwise stated, future references to articles are to articles of this code.

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the judge takes nothing into account for the purposes of his decision that has not been open to contradictory debate by the parties. No such principle needs explicit recognition by English law,[5] for the simple reason that the information on which the decision will be based is presented—in the classic adversary process—orally by the parties in open court.[6] It is therefore subjected automatically to contradictory debate.

The fairness of such contradictory debate is inevitably dependent upon reasonable equality of arms between the parties. Their legal representatives must at least be able to ensure that their clients do not suffer from what Roscoe Pound called the 'sporting theory of justice which leads amongst other things to 'vested rights in errors of procedure'.[7] What can happen if adequate legal representation is not available to the parties is dramatically described by Professor Devis Echandía of Colombia, writing of a society very different from our own. He denied that under an adversary type of procedure the judge administers justice according to law: 'In reality the judge is limited to recognition of the justice that the parties obtain by their own efforts or to the formalisation of the injustice which they suffer in consequence of their mistakes, their incompetence or the limitations to which their poverty or ignorance subjects them in their choice of representatives, in the evidentiary contest or in the exercise of their rights of appeal.'[8]

We can legitimately expect that things were never quite so bad, or ever will be, in this country, and on this basis we can concede that the adversary system is well adapted to the resolution of disputes. We must ask, therefore, whether it is well adapted to be anything more than a satisfactory dispute resolution system, and whether dispute resolution is all that we want of our courts in the twenty-first century.

On the first point it is a major defect of the adversary system that the judge has no duty to try to ascertain the truth. It is true that there are those who maintain that the clash of contrary argument enables the judge to find the truth, and Wigmore claimed that cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth'.[9] The claim is, however, difficult to accept: that cross-examination can discover and reveal untruth is certain; that it can actually reveal the hitherto unrevealed truth is much more doubtful. It is also the case that many people would be surprised to learn that

[5] The principle is similar to but goes further than the familiar *audi alteram partem.*

[6] See IH Jacob, *The Fabric of English Civil Justice* (London: Stevens & Sons, 1987), 19. The admission of documentary material in evidence is now more widespread than previously, but if a jury is engaged, orality is essential.

[7] 'Causes of Popular Dissatisfaction with the Administration of Justice' (1906) 40 *Am LR* 729, 738–9. Note Lord Denning's remark in *Burmah Oil Co v Bank of England* [1979] 1 WLR 473, 484, when he said 'In litigation as in war. If one side makes a mistake, the other can take advantage of it. No holds are barred.'

[8] 'Facultades y deberes del juez en el moderno proceso civil', in *Revista Iberoamericana de Derecho Procesal* (1968), 393, 395–6.

[9] JH Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd edn (Boston: Little Brown, 1940), para 1367.

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a court operating the adversary system has no duty to the truth. In this connection it may be noted that the definition of the overriding principle of the CPR that the rules are to enable the court to deal with cases 'justly' relates only to procedural matters because, according to the draftsman's own footnote, 'seeking the truth about the matters in issue is so obviously part of the court's role that it does not need to be stated expressly in the Rules'.[10]

The true character of the English adversary system was really put beyond doubt by the Court of Appeal and the House of Lords in *Air Canada v Secretary of State for Trade*.[11] In an action brought by most of the major airlines of the world in respect of the charges made for the use of the airport at London Heathrow, the plaintiffs sought disclosure of certain documents for which the Secretary of State claimed public interest immunity, and the critical question was whether disclosure of the documents was necessary for the fair disposal of the action. At first instance Bingham J, as he then was, ordered disclosure essentially on the ground that documents are necessary for fairly disposing of a cause or for the due administration of justice if they give substantial assistance to the court in determining the facts upon which the decision in the cause will depend.

> The concern of the court must surely be to ensure that the truth is elicited, *not caring whether the truth favours one party or the other*, but anxious that its final decision should be grounded on a sure foundation of fact.[12]

The importance of the words which are italicised above is that the plaintiffs could not show that disclosure of the documents would assist them either by providing support to their own case or undermining that of their opponents. This Bingham J considered to be irrelevant, but the Court of Appeal and the House of Lords disagreed. The main reason for this conclusion was their understanding of the adversary system and their insistence that that is what we have in this country. In the Court of Appeal Lord Denning held that

> when we speak of the due administration of justice this does not always mean ascertaining the truth of what happened. It often means that, as a matter of justice, a party must prove his case without any help from the other side. He must do it without discovery and without putting the other side into the witness box to answer questions.[13]

Lord Wilberforce pointed out that it often happens that from the imperfection of evidence or the withholding of it that an adjudication has to be made which is not and is known not to be the whole truth of the matter:

> yet if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done. It is in aid of justice in this sense that discovery may be ordered, and it is so ordered upon the application of one of the parties who must make out his case for it. If he is not able to do so, that is an end

[10] CPRr 1.1 and footnote to the Third Revision.
[11] [1983] 2 AC 394.
[12] [1983] 2 AC, at 410, as quoted by Lord Denning.
[13] Ibid, at 411.

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> of the matter. *There is no independent power in the court to say that, nevertheless, it would like to inspect the documents with a view to possible production for its own assistance.*[14]

Lord Edmund-Davies made the lack of interest in the truth under the adversary system even plainer:

> It is accordingly insufficient for a litigant to urge that the documents he seeks to inspect are *relevant* to the proceedings. For although relevant, they may be of merely vestigial importance, or they may be of importance (great or small) only to his opponent's case. And to urge that, on principle, justice is most likely to be done if free access is had to all relevant documents is pointless, for it carries no weight in our adversarial system of law.[15]

It is clear that the 'justice' that Lord Wilberforce had in mind was procedural justice and that he and his brethren were concerned with the 'justice' of a dispute resolution system. Lord Woolf's objective was to cure the adversary system of the ills of excessive complication, cost, and delay that it had developed. These evils were consequent, in his view, on the development of an 'adversarial culture',[16] but he was nevertheless anxious to repudiate the suggestion that he sought a departure from the 'adversarial and oral tradition in England and Wales'.[17] There is little in his Reports to dispel the impression that he envisaged civil litigation as little if anything other one of a number of dispute resolution systems, the others compendiously described as alternative dispute resolution—a phrase whose widespread use tends to confirm an equally widespread belief that dispute resolution is all. Sir Peter Middleton in his report to the Lord Chancellor leaves no doubt that that is his view.[18] 'Civil Justice,' he says, 'is essentially concerned with the resolution of disputes', and he concludes that 'Justice—by which I mean the satisfactory resolution of disputes—is part of the service sector of the economy.'

In an important and recent article, the Chief Justice of New South Wales—J J Spigelman[19]—strenuously denies that the courts deliver a 'service'. The courts administer justice in accordance with law. They no more deliver a 'service' in the form of judgments and decisions than a parliament delivers a 'service' in the form of debates and statutes. Courts serve the people but they do not provide services to litigants. The proposition that courts serve people must not be understood in any immediate populist sense. Courts serve the people understood as a historical continuum with debts to prior generations and obligations to succeeding generations. The administration of justice does in fact resolve disputes. In doing so it serves the public as a whole, not merely the litigants.

[14] Ibid, at 438. Emphasis added.
[15] At 441. Emphasis in original.
[16] Interim Report, 7.
[17] Interim Report, 19, Final Report, 14.
[18] *Review of Civil Justice and Legal Aid* (1997), 9.
[19] The Honourable JJ Spigelman AC 'Judicial Accountability and Performance Indicators' (2002) 21 *CJQ* 18, 26.

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> A court is not simply a publicly funded dispute resolution centre. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct by a public process with public outcomes—these are all public purposes served by the courts, even in the resolution of private disputes. An economist might call them 'externalities'. They constitute collectively, a core function of government.

It is difficult to withhold applause from such recognition—however belated—that Her Majesty's judges do more today than provide a 'service'. But if that is right—as surely it is—it cannot also be right that we should continue to nail our flag to the mast of the adversary system. This does not mean that we should try to devise a procedure equivalent to that of the policeman, but there is still a large and important area for debate in determining what should be the respective roles of the parties and the judge in civil litigation. However, a dramatic shift in the balance occurred when the managerial judge who came with the introduction of case management replaced the passive judge of the adversary system.

If all that were involved in case management was that the managerial judge took steps to ensure that the parties observed the applicable time limits, the parties could retain full control of the handling of *their* dispute, and the adversary system could survive virtually intact. However, the judge of the new Civil Procedural Rules is much more than what has been called elsewhere a '*calendrier parlant*'. As a result of a variety of changes that could not have been and were not brought about until civil trial by jury had long ceased to be the norm, the idea inherent in the adversary process that the best judge is the judge who, like a jury, knows nothing of the case he is to try until the trial itself begins has been finally killed off, and judges are showing a measure of discomfort if not more at the spirit of the *Air Canada* case. In a case decided in 1987, Sir John Donaldson MR said, 'Litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have *all* the relevant information, it cannot achieve this object.'[20] There can be little doubt that the Master of the Rolls had substantive, not merely procedural justice in mind.

I. MODERN ENGLISH CHANGES

I turn now to some of the changes that I believe spell such evisceration of the basic notions of the adversary system as will lead to its effective demise in this country, after which I refer briefly to French experience following the introduction in France of case management—a process that began in 1935.

The changes in English procedural law that are important for present

[20] *Davis v Eli Lilly and Co* [1987] 1 WLR 428, 431.

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purposes fall into three groups. First, there are those that have given us the informed judge. Secondly, there are those—principally to be found in the new Civil Procedural Rules ('CPR')—that substantially increase the powers of the judge. Thirdly, there are those that are intended to keep out of the courts as many as possible of the disputes which may prove susceptible to resolution by means other than litigation.

In the first group we have the virtual abolition, for civil cases, of the rule against hearsay evidence. This is important because it allows the use in evidence of a variety of documents whose disclosure does not have to await the trial. Next, we have the greatly enlarged use of written experts' reports, we have the exchange of written witness statements, and we have skeleton arguments. These changes actually came before Lord Woolf began his work, and they led to the production of a great deal of information in written form about the case—evidence to be adduced included—that is available to the parties and the court during the pre-trial stage. There was originally no obligation on the judge to read these documents before the trial, though 'pre-reading' was encouraged, but on the introduction of case management judicial reading of the documents became essential. The CPR stress the need for the court to be well informed from the inception of the action, and make appropriate provision to that end; Lord Woolf actually recommended that time should be allocated to enable the judge to 'pre-read the papers'.[21] It was essentially this development that led to the replacement of the judge who remains largely ignorant of the case he is to try until the trial begins, by the judge who knows in advance, and is expected to know, a great deal about all aspects of the case.

The second group consists of the various rules that provide for a substantial increase in the judge's powers of control of the case at the expense of those of the parties. Under the CPR the judge can even go so far as to dispose summarily of a case, not only on application but also on his own initiative, if he considers that the claim or defence 'has no real prospect of success'.[22] The judge also has the power to control evidence, which he may do by giving directions on the issues on which he requires evidence, on the nature of the evidence that he requires to determine those issues and on the way in which the evidence is to be placed before the court.[23] This manifestly runs counter to the freedom of the parties to present their cases as they wish—which is inherent in the classic adversary system.

In the third group we have the increased and strengthened devices for persuading the parties to resolve their disputes outside the courts. The old system of payment into court has been expanded in Part 36 of the CPR so as to enable claimants as well as defendants to make offers of settlement in a form having implications for the allocation of costs. Alternative Dispute Resolution is encouraged to the extent that a stay can be ordered to enable the parties to resort to ADR. A principal object of the pre-action Protocols and,

[21] Final Report, 29. [22] CPR, r 24. [23] CPR, r 32.1.

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indeed, of case management generally is to assist and encourage settlement at the earliest possible stage. All this is in keeping with Lord Woolf's stated view that disputes should, wherever possible, be resolved without litigation.

What comes out of all this? To take the last point first. It is, of course, true that without a dispute there can be no contested litigation, so that litigation does resolve disputes. But it has become clear that litigation is no longer the preferred method of dispute resolution—as it was when the only alternative was self help—and, that being so, there is no longer any reason for dogged adherence to the adversary system, a system which is particularly well suited to dispute resolution, but less so to the production of 'correct' decisions. 'Correct' decisions are, however, necessary if the courts are to fulfil the role attributed to them by Chief Justice Spigelman.

What, then, is a 'correct' decision? The correctness or otherwise of judicial decisions cannot be tested objectively—an appellate confirmation is no guarantee of correctness—and it is not intended to suggest that the courts can always discover and apply the law to the absolute truth of the matters in controversy between the parties. It would, however, be extremely odd to describe as 'correct' a decision that the judge suspects—or actually knows—to be wrong because he was deprived of information he considered to be relevant. To quote Sir John Donaldson again, real justice cannot be achieved if the court does not have *all* the relevant information. The nearest thing to a 'correct' decision is, therefore, one that is reached by a judge who has at his disposal all the information that he considers necessary about the facts and the law. Distasteful though it may to the traditional common lawyer, we need a procedure that is further along the line towards the inquisitorial than is the traditional adversary system.

Most significant of all in bringing to its end the *Air Canada* understanding of the adversary system is the advent of the informed judge. As we have seen, not every judge has always been content to swallow whole the doctrine of *Air Canada*, and now, any judge who is so minded can use his knowledge of the case and the powers given to him for the purpose of case management to ensure that he gets the information he needs to create a real prospect that the decision will be based on the nearest approximation possible to the truth. It will take time for the change in the character of civil litigation that has occurred in this country to be fully appreciated, but when it is, the adversary system as we know it will effectively have been replaced by something closer to what common lawyers are all too prone to dismiss as inquisitorial.

Is there any need for us to fear that the evisceration—if not more—of the classic adversary system that is happening in this country spells the end of the right and freedom of the parties to a dispute that comes before the court, a freedom which they certainly have under the adversary system, to restrict the court to the issues that they wish the court to deal with? I come shortly to the French experience, but it is clear that in England there is a move away

from the *Air Canada* disinterest in ascertainment of the truth. This has brought with it a reduction in the power of the parties to restrict the court to consideration of only such available evidence as they are willing to have taken into account—which is, in truth, little less than a power to force the court into an incorrect decision. The change is no more than is called for now that litigation is no longer a favoured method of dispute resolution but is used by society for ulterior public interest purposes. Nor is there any reason to fear that there will be loss of procedural justice. In France, as we have noticed, it was found necessary to recognise and protect the *principe de la contradiction*. Interestingly enough, the problem came up in relation to points of law taken by the judge. An article of the code purported to allow the judge to raise a point of law and apply it of his own motion, without giving the parties the opportunity to debate the point. The article was struck down by the Conseil d'Etat.[24] After a celebrated disagreement between Lord Denning MR and Bridge LJ in 1977,[25] the law has been settled in much the same sense as that of the revised French code[26] by a decision of the Privy Council in 1995.[27]

In an article published not long after the appearance of Lord Woolf's Interim Report,[28] Neil Andrews identified no fewer than twelve matters that, in the traditional adversarial principle, are controlled by the parties. Of these most are as much controlled by the parties in an avowedly inquisitorial system, and certainly in the civil procedures of continental European countries. These include the initiation of the action, the settlement of the action and the decision to appeal. The matters described by Andrews as 'the framing of the action', especially the drawing up of pleadings; the selection of material facts (which is not very different), and what he calls 'the reception of evidence at trial' are those that call for attention. They enshrine two ideas that are central to the adversary system. First, that it is for the parties to define the subject matter of their dispute, ie, the substance of the action. Secondly, that it is for them and for them alone to determine the information on which the judge may base his decision. The first of these ideas is essential to preservation of the dispositive principle—the principle that the parties are (generally) free to dispose of their rights and that it is not for the judge to readjust the terms of the litigation to make it conform to his view of the substance of the dispute between the parties. The second is put in question by developments here and in France, amongst other countries.

[24] 12 octobre 1070, D. 1979, 606 Note Bénabent; JCP 1980 II, 19288, concl Franc, Note Boré; Normand, 1980 Rev trim dr civ, 145.

[25] *Goldsmith v Sperrings Ltd* [1977] 478.

[26] Art 16.

[27] *Hoechon Products Ltd v Cargill Ltd* [1995] 1 WLR 404.

[28] 'The Adversarial Principle: Fairness and Efficiency', in A Zuckerman and R Cranston, *Reform of Civil Procedure* (Oxford: Clarendon Press, 1995), 169.

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II. THE FRENCH EXPERIENCE[29]

Never having known the civil jury, France has never had an equivalent to the English trial. There is a final audience, at which argument is heard, but the information on which the decision will be based is contained in documents put in by the parties and the records of a variety of fact finding procedures—*mesures d'instruction* authorised by the judge such as the hearing of witnesses and the obtaining of experts' reports. This process is known as the *instruction*, and the final audience cannot be held until the *instruction* is complete.

This procedure as originally instituted, and confirmed by the code of civil procedure of 1806, had nothing of the inquisitorial about it. The court's role was essentially passive and was no more than to decide between the rival contentions of the parties. In the words of one well-known writer, control of the progress of the action was 'abandoned to the parties'.[30] The litigation was *theirs*, and it was for them to bring it before the court at their convenience.

Such a procedure was no less 'liberal' than the adversary system of the common law, and has nothing to offend the most die-hard supporter of that system, but like the common law system it led to practical disadvantages—adjournments, delays, deliberate use of dilatory tactics, and inadequate preparation of the *instruction* and for the final audience, in particular. Commentators had started complaining about this kind of thing by the end of the nineteenth century, but nothing was done until 1935, and then what was done was a half-baked flop. The attempt was made to persuade the parties to conduct their cases more efficiently by appointing a judge to 'follow' the proceedings and encourage the parties to observe time limits and so on. This judge, who was described as 'the *juge chargé de suivre la procédure*', could summon the parties and their lawyers to appear before him, but he could not make binding orders and he could do nothing that might prejudge a question of substance. There was to be no departure from the traditional notion that the litigation belonged to the parties and the judge under this procedure had no power in relation to the *instruction*, not least, as has been said, for fear that he might otherwise forget that he was no more than the arbiter of private interests.[31] Not surprisingly this half-hearted attempt to combine the freedom of the parties with court control achieved very little.

Thirty years later, by a decree of 1965, the *juge chargé de suivre la procédure* was replaced by a more effective judge, now known as the *juge de la mise en état*. Unlike his predecessor, the *juge de la mise en état* has real power. He can make orders binding on the parties and impose sanctions. He can lay

[29] See JA Jolowicz, 'The Woolf Report and the Adversary Process' (1996) 15 *CJQ* 198.

[30] R Morel, *Traité Elementaire de Procédure civile*, 2nd edn (Paris: Librairie du Recueil Sirey, 1949), no 425.

[31] Solus et Perrot, *Droit judiciaire privé, III Procédure de première instance* (1991) (hereafter 'Solus et Perrot), no 344.

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down time limits and he can make orders relating to the *instruction;* when it comes to the hearing of witnesses, even if ordered on the application of a party, the judge decides what are the relevant facts to be proved, and it is he who examines the witnesses. In addition, since the parties are not themselves competent witnesses, the judge has power to summon them personally to appear before him for examination. The code still requires that the parties must prove their allegations, but the *juge de la mise en état* can actually order a fact-finding procedure of his own motion. What is more, the decree of 1965 introduced a form of discovery of documents, which had never previously existed. Associated with this, but of much wider import, the civil code itself—not just the code of civil procedure—was amended to introduce the following text as Article 10 'Everyone is bound to co-operate with the administration of justice with a view to revelation of the truth.' In addition the parties are explicitly required under an amendment to the code of civil procedure to cooperate in the conduct of fact finding measures ordered by the judge.[32]

The enhancement of the powers of the French court to control the progress and preparation of cases for the final audience has coincided as a matter of chronology with recognition in France that the truth is important to the administration of justice. It is part of my thesis that this is not a matter of coincidence, but that there is a relation of cause and effect. Realisation that one may never be able to discover the absolute truth does not mean that judges should not strive to come as near to it as reasonably possible. On the contrary, once it became possible for French judges to issue binding directions to the parties in the course of preparation for the final audience, it also became likely that, from time to time, they would go beyond the mere attempt to expedite matters and keep down the costs. They would wish to see that their final decisions were based on the best possible approximation to the truth. The natural desire of a judge to strive for substantive as well as procedural justice has achieved overt recognition in France.

In France, as now in England, the parties' control over the evidence is much reduced by comparison with what it once was, but this has by no means deprived the parties of their right to determine the substance of their dispute. French law recognises a basic concept of the *objet du litige,* which lies at the heart of the matter. The *objet du litige* includes but does not consist exclusively of the remedy sought by the claimant. The phrase is used to refer to the subject matter of the action, that is to say, the substance of the dispute of which the judge is seised by the parties. The '*objet du litige'*, says the code,[33] 'is determined by the respective pretensions of the parties', and these are the claim, which sets the proceedings in motion, and the defence. The *objet du litige* can be modified by the parties through their incidental claims or defences, but is binding on and unalterable by the judge, who must decide on everything that is claimed and only on what is claimed.[34]

[32] Art 11. [33] Art 4. [34] Art 5.

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This seems clear enough, and the principle that the parties determine what comes before the judge is subject to only a few exceptions, where statute has stepped in, but there is a problem created by a different and equally important principle, namely that the judge should be master of the applicable law. According to the code, 'The judge decides the case in accordance with the rules of law that are applicable to it', which clearly means the rules of law that he considers applicable (*jura novit curia*).[35] He is required, amongst other things to give the correct legal qualification of the facts, however they may have been qualified by the parties; the legal qualification of fact is itself a matter of law.

The reconciliation of these two opposing principles, which admittedly does not solve all possible questions, is to insist on the distinction between fact and law—fact for the parties and law for the judge. It has even been argued that the demand of a claimant need not be expressed in legal language—whether debt or damages, for example; the claimant need do no more than demand payment of a sum of money.[36] Though valid in theory (English as well as French), however, it has never been possible to adhere to it completely in practice.

Be this as it may, the code, which, as we have just seen, places the law in the hands of the judge, places the facts firmly in the hands of the parties. They must allege the facts necessary to substantiate their pretensions;[37] and the judge may not found his decision on facts that have not been bought into the debate.[38] Finally, the parties are required to prove the facts necessary to the success of their pretensions. But there we come to the second of Andrews' principles—that it is for the parties to control the reception of evidence by the court.

On this question French law seems to be of two minds.

On the one hand, it charges the parties with the proof of the facts that they allege,[39] and the code provides that a *mesure d'instruction* should not be ordered in respect of a fact unless the party alleging that fact lacks (documentary) means of proving it; in no case should any *mesure* be ordered to cure the culpable failure of a party to equip himself with the necessary proofs.[40] On the other hand, it is specifically provided by the code that the judge may, at any stage of the proceedings, order—on application or *ex officio*—all lawful *mesures d'instruction*.[41] The explanation given by the leading treatise[42]—which does not entirely resolve the apparent contradiction, but gives proper weight to the search for the truth—is that, within the limits set by the respective pretensions of the parties

[35] Art 12.

[36] H Motulsky, 'Le rôle respectif du juge dans l'allégation de faits', in H Motulsky, *Ecrits* (Paris: Dulloz, 1973), 33.

[37] Art 6.

[38] Art 7. Le juge ne peut fonder sa décision sur des faits qui ne sont pas dans le débat. Parmi les éléments du débat le juge peut prendre en considération même les faits que les parties n'auraient pas spécialement invoqués au soutien de leur prétentions.

[39] Art 9.

[40] Art 146.

[41] Art 10.

[42] Solus et Perrot, no 731.

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the judge must be in a position to discover the truth without being dependent on the parties. In addition, the judge has a number of powers directly related to fact-finding, but not regarded as strictly matters of proof. For example, as we have seen, he can summon the parties before him for examination. Since they are not witnesses, the procedure for hearing witnesses is not appropriate, and what they say is not, technically, evidence. But obviously the results of the examination are likely to be of considerable assistance to the judge in coming to his conclusion on the facts that are in controversy.

The French system accepts, therefore, the first of the two critical principles mentioned by Andrews, namely that it is the parties who determine the scope of the litigation that is brought before the court. It is also, of course, the case that the parties alone can bring proceedings and that they can terminate them before they are extinguished by judgment or by operation of law.[43] Indeed, the right of discontinuance is more closely circumscribed in English law[44] than in French.[45] It is clear for France, however, that it is not exclusively for the parties to control the 'evidence' that comes before the court for its decision. Likewise under the CPR, the parties' freedom in that regard is much more closely circumscribed than it was before. In short, despite the major differences in actual procedural method, on matters of underlying principle the French and English systems of today have more in common than they did in the past. This is not to say, however, that the problems faced by the French system, or the proposed solutions, still less the details of procedure, are the same as those in England.

In December 1996 the report of Président J-M Coulon[46] commissioned by the Minister of Justice, was published.[47] Unlike Lord Woolf's reports, this was not immediately seized upon by Government for speedy implementation. Certainly it has not led to a rewriting of the code of civil procedure or to an avowed intent to change the culture of litigation.[48] Nevertheless, both before and since publication of the report, there have been some interesting reforms, two aspects of which may be mentioned here.[49]

1. Easing the task of the judge. An intriguing and possibly controversial idea introduced with the object of reducing delay is to try to ease the task of the judge. This is to be done mainly by increasing the burden of 'pleading' placed on the parties. So, for example, in his claim, the claimant must set out the grounds for his claim, both factual and legal: he must 'plead law',[50] and the same is true for all written submissions (*conclusions*).[51] In fact there never

[43] Art 1. [44] CPR, Part 38. [45] Arts 394–9.

[46] President of the Paris Tribunal de Grande Instance (court of first instance).

[47] 'Réflexions et propositions sur la procédure civile.' For a relatively early comment, see A Garapon, 'Vers une nouvelle économie politique de la justice?', D 1997, Chron 69.

[48] S Guinchard, ' L'ambition d'une justice civile rénovée', D 1999, Chron 65, no 1.

[49] What follows owes much to Guinchard, loc cit, n 49.

[50] Art 56, as amended in 1998.

[51] Art 753, as amended in 1998. For appeals see Art 954.

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was, in France, an actual prohibition against the pleading of law, and, at least in theory, no challenge is presented to the basic principle that, at the end of the day, the law is for the judge.[52] Finally, in their final submissions, the parties must recapitulate the arguments and pretensions put forward in any or all of their earlier submissions under penalty that those that are omitted will be treated as abandoned.[53]

2. Alternative Dispute Resolution.[54] There is nothing new for French law in the idea that the court should be involved in an attempt at conciliation. The original code of civil procedure of 1806 provided generally that a preliminary attempt at conciliation before a *juge de paix* should be a condition of the admissibility of most claims before a court of first instance.[55] Although this proved relatively unsuccessful, it survived in the law for more than 100 years, and a decree of 1935 sought to give it new life. It was too late, however, and the rule was finally removed from the law in 1949.[56] Nevertheless, the decree leading to the 'new' code of civil procedure of 1975 authorised the judge to attempt conciliation, and the new code makes detailed provision for this.[57] To show the value now attached to conciliation, the first part of the code, dealing with its governing principles, includes the proposition that the conciliation of the parties is included in the mission of the judge.[58]

More recently, in 1996, mediation, as distinct from conciliation, was brought within the purview of the courts. With the consent of the parties, the judge may appoint a third person to hear the parties and to confront each other with their respective points of view so as to enable them to find a solution to their dispute.[59] An indication of the importance now attached to out of court settlement may be found in an amendment to the law on legal aid. Since 1998, legal aid may be granted with a view to enabling the parties to reach a settlement before proceedings are begun.

There have, of course, been other changes, many of which are technical and intended to produce improvements in efficiency. These are, obviously, directly related to the details of French procedure. It cannot really be suggested that, at the level of actual practice, there is marked convergence between the two systems. And, at a more general level, such is the volume of cases passing through the courts and given that it is likely to increase, it would

[52] Guinchard loc cit, n 49, no 21. It may be, however, that these changes will give greater weight than heretofore to the legal submissions of the parties.

[53] Arts 353 and 954. For criticism, see JJ Bourdillat, 'La réforme des conclusions récapitulatives ou la quête du succès improbable' D 2000 Chron 427. For the position when such *conclusions récapitulatives* were merely voluntary. See Solus et Perrot, *Droit judiciaire privé, III* (1991), no 68. The judge's task in drawing up judgments is eased by allowing performance of his duty to set out the parties' pretensions and arguments by a simple reference to their *conclusions*: Art 455.

[54] *Modes alternatifs de règlement des conflits ('MARC')*.

[55] Code de procédure civile (1806), Art 48.

[56] Law of 9 *fév*. 1949.

[57] Arts 127–31.

[58] '*Il entre dans la mission du juge de concilier les parties'*, Art 21.

[59] Arts 131-1–131-15.

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be unrealistic to argue that dispute resolution has ceased to be a principal function of civil litigation, as it has in England.[60] Between 1975 and 1995, the number of cases started at first instance rose from what was an already high base, by 122 per cent, and those taken to appeal by 208 per cent.[61]

It is, rather, the changes in England, which have brought the two systems closer together in terms of general principle Both have for long recognised, the one implicitly, and the other explicitly, the *principe de la contradiction*,[62] but now it is true for both systems that the parties no longer have full control of the proceedings and as a result, both recognise the relevance of the search for the truth in litigation. The changes from this point of view began in France with the timid introduction in France of case management through the *juge chargé de suivre la procédure* in 1935.[63] Recent reforms in England have now moved the English system away from the classical adversary system, and to that extent have brought it closer to the French.

The adversary system has been the corner stone of English civil procedure for a very long time. Couture's statement that the civil action is civilisation's substitute for vengeance is a historical truth that still has some truth in it today, but it is no longer the whole truth of the matter. The adversary system that we knew of old is an admirable system for the resolution of disputes. Between parties of equal strength it ensures procedural justice, but in its nature it is less well suited to ensure substantive justice in accordance with law. Dispute resolution is no longer the principal function of civil litigation in modern England. We must not continue to pretend that it is and must accept that a procedure that places less emphasis on the freedom of the parties, and rather more on achievement of correct decisions is required. If this means that a few diehards will object that English procedure is on the slippery slope leading away from their beloved adversary system to the hated inquisitorial system, the rest of us can live with that.

[60] Above 288.

[61] Figures taken from Guinchard, loc cit, n 49, no 1. Despite increased productivity by the judges, the number of cases awaiting disposal multiplied by 3.5 in 20 years.

[62] Above 282.

[63] Above 290.

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