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Is Federal Rule of Civil Procedure 19(b) Too Discretionary?

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IS FEDERAL RULE OF CIVIL PROCEDURE 19(B) TOO DISCRETIONARY?

COMPARATIVE REFLECTIONS ON THE COMPULSORY JOINDER OF INDISPENSABLE PARTIES.

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I. INTRODUCTION

In an 1854 decision, *Shields v. Barrow*, the United States Supreme Court concluded that those *indispensable* parties who must be joined in pending litigation are remarkably defined as those "who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."[1] Even though Rule 19 of the Federal Rules of Civil Procedure only partially echoes this definition,[2] this article begins by drawing on this statement since it represents one of the most exciting issues for in-depth investigation.[3] The primary goal of this article is to isolate the components of a court's decision on whether a Rule 19 motion should be granted and to study their interrelated functions. That analysis yields two conclusions. First, the court's power to determine whether to continue the litigation without the person who should be joined or to dismiss the action because a party cannot be joined is too discretionary. The second conclusion lays the groundwork for reframing the court's discretion as a means of avoiding repetitive litigation, inconsistent judicial decisions, and impairment of absent persons as well as those already before the court.

The article's second aim is to answer classic and traditional questions concerning the required joinder of parties through the lens of comparative analysis. Such analysis provides needed assistance in formulating a doctrine that is intended to rationalize and reduce the court's discretion in applying the standards of Rule 19. In particular, the consideration of the Italian and German legal systems allows us to reframe the requirements set forth by Rule 19(b). Comparative analysis suggests reducing judicial discretion in deciding whether or not an absent person should be joined in pending litigation. The European legal rules are narrowly crafted in order to authorize the required joinder of parties only when the interest of the absent person is deeply embedded in the factual specificities of the case.

1. *See* Shields v. Barrow, 58 U.S. 130, 139 (1855).

2. *See* FED. R. CIV. P. 19; *see also infra* Part I.

3. The distinction between necessary and indispensable parties depends on the fact that the latter category refers to those parties whose joinder is always compelled, even at the dismissing action, and traditionally represents a classic framework for the compulsory joinder of parties in the introductions of several textbooks. *See, e.g.*, JACK H. FRIEDENTHAL, MARY KANE & ARTHUR MILLER, CIVIL PROCEDURE 342 (5th ed. 2015).

Indeed, the early definition of indispensable parties implied by the holding of *Shields*[4] reflects the early distinction between necessary and indispensable parties within the context of compulsory joinder of parties.[5] Such a distinction is particularly amenable to comparative analysis because it encourages civil lawyers to compare the civil law legal tradition—that is, its academic literature and jurisprudence—with the American tradition. In particular, the occasion for a comparative analysis based on the civil law legal rules derives from the consideration that "[d]etermining whether a party is indispensable requires the careful exercise of judicial discretion on a case-by-case basis."[6] Civil law countries share a similar discretionary attitude toward the question of whether the court should dismiss the case or continue without the person who arguably should be joined. Nevertheless, such discretion is exercised as a matter of legal requirement rather than legal interpretation. As further discussed below, in civil law countries the theoretical and doctrinal framework restricts the court's substantial discretion more than the regulatory regimes seem to dictate.

This article provides neither a reason for categorizing the existing doctrine of compulsory joinder of parties nor a reason for redefining it across the common law and civil law legal systems. To the contrary, the article aims to join the debate regarding the appropriate level of discretion when the court decides whether to continue the suit or dismiss it in the necessary party context. The article is also aimed at determining whether the debate about the court's discretion to decide when a party to a litigation is "indispensable" can be critically reviewed from the broad and far-reaching view offered by the comparative legal analysis. In fact, the comparison between civil law and common law legal systems may provide fodder for the interpretation of the domestic rule, despite the traditional limit in such a comparative evaluation concerning the

4. *See* John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 340 (1957). *See also* Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961); Howard P. Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403 (1965); Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 749 (1987); Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1 (1989).

5. *See* Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204–05 (1966); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 361–62 (1967). *See also* Brandon R. Coyle, *The Proper Standard of Review for Required Party Determinations Under Federal Rule of Civil Procedure 19*, 84 FORDHAM L. REV. 1117, 1121–27 (2015).

6. *See* FRIEDENTHAL, KANE & MILLER, *supra* note 3, at 348.

meaningful and enduring differences between the two legal traditions.[7] In particular, the article aims at suggesting that discretion should be guided by fundamental principles that drive the European application of the law on compulsory multiparty litigation. These principles are respect for the Due Process Clause, in terms of the right to be heard, on the one side and the purpose to avoid separate litigations between some indispensable parties on the other.

There is no doubt that the structural differences between common law and civil law legal systems on procedural matters might leave legal scholars sitting on the fence. Nevertheless, the differences in the regulatory regimes of joinder of parties as well as other procedural matters[8] make the issue of judicial discretion largely a question of properly balancing opposing policies—that is, the consistency and adequacy of judicial decisions versus the reasonable length of civil proceedings. On the one hand, the decision to continue the litigation without the person who should be joined or to dismiss the action because the party cannot be joined must be governed, respectively, by the harmful consequences of inconsistent judgments and the risk of individual impairment. On the other hand, the court's decision can be affected by the implications of joining an additional party in the proceedings on grounds of the time that is necessary for the court to decide the case.

Thus, while legal scholars and practitioners have gradually developed the historical distinction in *Shields* to satisfy the demand for consistency that the American legal system properly makes upon its judges, it is worth providing an additional view based on the comparative analysis of law. Such an analysis may offer some notable support for rethinking the most difficult issues in a Rule 19 motion. In particular, the comparative analysis of law raises thorny questions relating to the manner in which the court should exercise its discretionary power to determine whether to continue the litigation without the person who should be joined or to dismiss the action because the party cannot be joined under Rule 19(b).[9] From this comparative analysis, we determined discretion should

7. *See, e.g.*, Helen Hershkoff, *Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum*, 56 J. LEGAL EDUC. 479 (2006); Kevin M. Clermont, *Integrating Transnational Perspectives into Civil Procedure: What Not to Teach*, 56 J. LEGAL EDUC. 524 (2006). *See also* Joachim Zekoll, *Comparative Civil Procedure*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1306, 1307 (Mathias Reimann & Reinhard Zimmermann eds., 2nd ed. 2019) (stating that "comparative research in procedural areas is still at a relatively early stage"); Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133 (2008).

8. *See* Cesare Cavallini & Marcello Gaboardi, *How to Reduce the Gap? A Comparative View on the Policies Behind the Intervention Rules*, REV. LITIG. (forthcoming Winter 2020).

9. *See infra* Part I.

be driven by the twofold fundamental principles which drive the European application of the law on compulsory multiparty litigation. First, answering the question of whether or not a person should be joined depends in part on the fact that the law protects the right to be heard in favor of all persons substantially interested in pending litigation. Second, an indispensable party is certainly a person substantially interested in pending litigation, and therefore must be entitled to take part in the proceedings to avoid the intricacies of separated litigations on the same matter.

This article proceeds in five stages. Part I explains how the notion of indispensable parties has become a crucial, as well as troubling, issue in compulsory joinder of parties in the United States. Part II approaches the sensitive and difficult task of determining whether the principle, the inherent rules, and the policies of the compulsory joinder of parties under the European laws suggest a new theory of interpretation that helps to find a *less discretionary* solution to the puzzle of the "interest" required by Rule 19.[10] Part III adds precision by examining the boundaries of joinder of parties in Italian and German legal systems. At the center of this Part is the question of how civil law legal systems (1) place the concept of indispensable parties into the realm of civil litigation and (2) regulate the judicial power to dismiss the action between the original parties. Having provided a descriptive account of the scope of required joinder of parties in the most representative civil law legal traditions, this article turns in Part IV to evaluate judicial discretion under Rule 19(b) and compare it with the more restrictive approach emerging from civil law tradition.

The Conclusion outlines the differences and similarities between the legal systems at issue. In particular, it evidences that Italy, Germany, and the United States have a great deal in common in that they need to *reduce* judicial discretion used to decide whether or not a party is indispensable, thus facilitating cross-border legal comparisons on such a procedural matter.

II. THE COMPULSORY JOINDER OF INDISPENSABLE PARTIES IN THE UNITED STATES

The inquiry into the indispensability of parties is essentially a question of how legal systems address fundamental issues concerning the joinder of parties. The factors that drive this analysis in the United States

10. *See* FED. R. CIV. P. 19(a)(1).

are largely based on Rule 19. Therefore, it is worth taking a moment to examine the underlying theories that Rule 19 reflect.

A. Rule 19: An Overview

Rule 19(a) describes when a court is required to order the joinder of a person who is not a party to the case.[11] If the court decides a person should be joined, the court must then evaluate whether the person can be joined under principles of jurisdiction and venue.[12] If joinder is not feasible because of a lack of subject matter jurisdiction, personal jurisdiction, or venue, Rule 19(b) provides the factors that the court must evaluate to decide between dismissing the case or continuing without the person who should be joined.[13]

Rule 19(a) makes it feasible for the court to order the joinder of persons who should be parties when their absence impedes the court's ability to provide justice for those already parties or damages the non-parties. Whether or not a party is necessary or indispensable can be described as a "fact-specific" question,[14] that usually arises when the claimant has not joined everyone potentially affected by the claim and the defendant files a motion to dismiss the claim under Rule 12(b)(7)—that is, for failure to join a person who should be a party.[15] The court is empowered to order joinder of parties and deny a motion to dismiss when complete relief cannot be granted in the absence of indispensable parties because their interest in the litigation makes it practically or legally harmful to proceed without them.[16] The court, faced with a motion to dismiss under Rule 12(b)(7), will look first to the standards of Rule 19(a) to consider whether the court may join necessary parties. Three alternatives exist: (1) the court may order the joinder of an absentee party, a person who is not yet a party to the case when her absence impedes the

11. *See id.*

12. *See id.*; *see also id.* 19(a)(3).

13. *See id.* 19(b).

14. *See* United States *ex rel.* Hall v. Tribal Dev. Corp., 100 F.3d 476, 481 (7th Cir. 1996). *See also* Gonzales v. Metro. Transp. Auth., 174 F.3d 1016, 1019 (9th Cir. 1999) ("Whether a party is necessary and indispensable is a pragmatic and equitable judgment, not a jurisdictional one.").

15. *See* FED. R. CIV. P. 12(b)(7). *See also* HS Res., Inc. v. Wingate, 327 F.3d 432, 438–39 (5th Cir. 2003).

16. *See generally* Hammond v. Clayton, 83 F.3d 191, 195 (7th Cir. 1996) ("Rule 19 is designed to protect the interests of absent persons, as well as those already before the court, from duplicative litigation, inconsistent judicial determinations, or other practical impairment of their legal interests."); CP Nat'l Corp. v. Bonneville Power Admin., 928 F.2d 905, 911 (9th Cir. 1991).

court from granting "complete relief" to the existing parties;[17] (2) the court may order the absentee party joined even when her interest in the dispute may be impaired either practically or legally;[18] and (3) the court may order the absentee party joined in order to mitigate the "risk of incurring double, multiple, or otherwise inconsistent obligations" when several persons have overlapping interests in a party's property.[19]

The court is asked to conduct a two-step assessment. While the first step is entirely based on the standards of Rule 19(a), the second step requires the court that found the joinder of parties essential to the case[20] to determine whether the Rule 19(b) factors make dismissal appropriate.[21] To guide the inquiry into whether a person who should be joined cannot actually be joined because the joinder would defeat jurisdiction or venue, Rule 19(b) enumerates an array of factors that must be considered as "not exhaustive"[22] because additional factors can be important in particular cases.[23]

The court must weigh the four factors listed in Rule 19(b) as a whole.[24] The first factor requires the court to determine whether legally or practically troubling consequences may result by proceeding without the person qualifying for joinder under Rule 19(a).[25] The consequences of proceeding without such a person must be evaluated, taking into account both the interest of persons already parties and the interest of persons not

17. *See* FED. R. CIV. P. 19(a)(1)(A). *See, e.g.*, Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 867 (9th Cir. 2004) ("In conducting the Rule 19(a)(1) analysis, the court asks whether the absence of the party would preclude the district court from fashioning meaningful relief as between the parties."); Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 998 (10th Cir. 2001).

18. *See* FED. R. CIV. P. 19(a)(1)(B)(i). *See*., *e.g.*, Davis v. United States, 192 F.3d 951, 958 (10th Cir. 1999) ("Rule 19, by its plain language, does not require the absent party to actually *possess* an interest; it only requires the movant to show that the absent party '*claims an interest* relating to the subject of the action.'"); Torcise v. Cmty Bank (*In re* Torcise), 116 F.3d 860, 865 (11th Cir. 1997); Shermoen v. United States, 982 F.2d 1312, 1318 (9th Cir. 1992) (Rule 19(a)(1)(B)(i) excludes those claimed interests that are "patently frivolous").

19. *See* FED. R. CIV. P. 19(a)(1)(B)(ii). *See, e.g.*, Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1157–58 (9th Cir. 2002) (action to set aside lease or contract threatens non-party's interest in lease, thereby raising Rule 19(a)(2)), *cert. denied*, 537 U.S. 820 (2002); Harris Tr.& Sav. Bank v. Energy Assets Int'l Corp., 124 F.R.D. 115, 117 (E.D. La. 1989) ("[W]here interpretation of a contract is involved, parties to that contract must be joined.").

20. *See*, *e.g.*, Snap-on Tools Corp. v. Mason, 18 F.3d 1261, 1267 (5th Cir. 1994).

21. *See*, *e.g.*, HS Res., Inc. v. Wingate, 327 F.3d 432, 439 (5th Cir. 2003).

22. *Cf.* Gardiner v. V.I. Water & Power Auth., 145 F.3d 635, 640 (3d Cir. 1998). *See also* Rhone-Poulenc Inc. v. Int'l Ins. Co., 71 F.3d 1299, 1301 (7th Cir. 1995) ("Rule 19(b) sets forth a standard, not a rigid rule.").

23. *See Davis*, 192 F.3d at 960.

24. *See* Delgado v. Plaza Las Ams, Inc., 139 F.3d 1, 2–3 (1st Cir. 1998).

25. *See* FED. R. CIV. P. 19(b)(1).

joined. While those who are already parties may be damaged by the risk of inconsistent judgments if the absent person is not joined, those who are not yet parties may be damaged by the risk of collateral estoppel because their interests are affected, possibly significantly, by the outcome of the case.[26] According to the second factor under Rule 19(b), the court is asked to examine whether the decision to refuse joinder can occur without significant damage to those who are already parties and to non-parties because means for reducing potential damages exist and are available to the court.[27]

While these two factors revolve around the adverse implications of refusing to join a person who should be joined, the other two factors depend on the adequacy of a judgment rendered in such a person's absence and the availability of another forum in which the claimant can sue both the existing defendant(s) and the person(s) who cannot be joined. In particular, the judgment is considered adequate and in the public interest when it ensures an efficient and conclusive decision of the legal dispute.[28] The judgment must be final, thus it can be considered inadequate when it leaves related claims by (or against) the absent person partially or fully undecided.[29] Similarly, the court is asked to decide whether another forum is available in which to sue both the person who cannot be joined as well as those already parties in the case. If another forum is not available, it means that the claimant cannot have an adequate remedy "if the action were dismissed for nonjoinder."[30] In this case, the court generally proceeds with the action.[31]

B. The Historical Path of Rule 19(b)

Having provided a rough sketch of the American legal framework, it is useful to inquire into the court's discretion under Rule 19(b) by examining three crucial factors. In so doing, we move from the American historical development of Rule 19 to how it is relevant for the civil law statutory regulations and their interpretations. Those factors are (1) the

26. *See, e.g.*, Estate of Alvarez v. Donaldson Co., 213 F.3d 993 (7th Cir. 2000); Schulman v. J.P. Morgan Inv. Mgmt., Inc., 35 F.3d 799, 806 (3d Cir. 1994).

27. *See* FED. R. CIV. P. 19(b)(2). *See also* Laker Airways, Inc., v. British Airways, PLC, 182 F.3d 843, 849 (11th Cir. 1999).

28. *See* FED. R. CIV. P. 19(b)(3).

29. *See, e.g.*, Provident Tradesmens Bank & Tr. Co. v. Patterson, 390 U.S. 102, 111 (1968) (emphasizing "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies" under Rule 19(b)).

30. *See* FED. R. CIV. P. 19(b)(4).

31. *See Donaldson*, 213 F.3d at 995; *see also* Angst v. Royal Maccabees Life Ins. Co., 77 F.3d 701, 706 (3d Cir. 1996).

reason why the distinction implied by the holding in *Shields*[32] led to the introduction of Rule 19 in 1938; (2) how the Advisory Committee amended this rule in 1966; and (3) the issues the current rule still raises.

The first factor has been developed by American legal literature. The holding of *Shields* is considered the main step to understanding the provision of Rule 19 and its debatable interpretation and application by the courts.

Necessary and indispensable parties was rigidly applied by the courts, since it led judges to the so-called "jurisprudence of labels" or "sloganeering process."[33] What do these words mean? Moreover, why were these words considered harmful and described as having an "unhappy history"?[34] The answer unexpectedly seems quite easy and clear, particularly coming from a civil law perspective. Necessary and indispensable are very similar qualifications of parties. They tend to get confused in the eyes of the judge because they do not clearly distinguish the two different roles that the parties can play in the proceedings. They simply suggest the parties' involvement in the proceedings is *essential* to adjudicating the case. A party can be depicted as necessary to the proceedings in the same cases in which she can be qualified as indispensable. Efforts to distinguish these two nuances only produce empty classifications that can be filled with any discretionary meanings. Such an answer opens, however, the door to a partially different evaluation.

Criticism of the *Shields*' distinction strictly depends on the abstract way of reasoning by the courts after *Shields*. In particular, the decisions on the compulsory joinder of parties before 1938—when the first version of Rule 19 was written—were usually focused on a general definition of the interest that affected the joinder of multiple parties. That interest was defined as "joint," "common," or "united" in accordance with the *nature of the right* involved in the lawsuit.[35] As noted above, this legal reasoning was ultimately considered too abstract and rigid because courts did not consider the consequences to the supposed indispensable parties. In other terms, the courts should have encouraged the dismissal of action whenever indispensable parties were not joined,[36] even though the courts ascertained the "joint interest" case by case in light of the peculiar

32. Shields v. Barrow, 58 U.S. 130 (1854).

33. *See* Kaplan, *supra* note 5, at 362; *see also* Tobias, *supra* note 4, at 749 and Coyle, *supra* note 5, at 1122.

34. *See* FRIEDENTHAL, KANE & MILLER, *supra* note 3, at 343.

35. *See* Kaplan, *supra* note 5, at 362.

36. *Id.*; *see also* Coyle, *supra* note 5, at 1122.

characteristics of the facts and the rights involved in the lawsuit.[37] In reality, courts were often reluctant to dismiss the action whenever the indispensable party could not be joined. This reluctance resulted from the fact that resolving the issues on the merits required time and expense that would have been wasted if the action had been dismissed. It has, thus, been noted that under the original version of Rule 19—written in 1938—a conflict hid within the judge's determinations.[38] On the one hand, courts often recognized the "joint interest" of the parties as creating indispensable parties; on the other hand, when the indispensable party was recognized, the dismissal of the action was at odds with the natural task to resolve disputes on the merits.

As we will see below, this kind of conflict encompasses the essence of the compulsory joinder of parties and, therefore, might also be investigated from a comparative perspective. Despite the differences between common law and civil law legal traditions, the essence of a required joinder of parties is similar for both legal systems. Therefore, it seems to us crucial, at this point, to understand how the amendments to the Federal Rules of Civil Procedure approved in 1966 significantly changed Rule 19.

C. Towards the Court's Discretionary Power: The Pimentel Case

As written in 1938, Rule 19 failed in its scope.[39] This conclusion was clearly stated in the Advisory Committee Note accompanying the 1966 amendments to Rule 19.[40] It is worth noting that the balance of the new rule moved toward considering the consequences of the recognized indispensable parties to the lawsuit in terms of potential dismissal of the action that was brought between the original parties.

The amended rule revolves around twofold guidance. On the one hand, the main issue involved in the rule is the *feasibility* of the compulsory joinder of a "required party." In theory, when a party is *required* to join in pending litigation—that is, when a party should be joined—the compulsory joinder of that party would always be *feasible*.

37. *See, e.g.*, Note, *Indispensable Parties in the Federal Courts*, 65 HARV. L. REV. 1050 (1952).

38. *See* FRIEDENTHAL, KANE & MILLER, *supra* note 3, at 344 nn.164–65.

39. *See* Katherine Florey, *Making Sovereigns Indispensable*: Pimentel *and the Evolution of Rule 19*, 58 UCLA L. REV. 667 (2011); Kaplan, *supra* note 5, at 363; Tobias, *supra* note 4, at 750; Hazard, *supra* note 4, at 1258; Fleming James, *Necessary and Indispensable Parties*, 18 U. MIAMI L. REV. 68 (1963).

40. FED. R. CIV. P. 19 advisory committee's note to 1966 amendment § (2), 39 F.R.D. 69, 90 (1966) (hereinafter "Advisory Note").

However, courts cannot exercise subject-matter jurisdiction over *all* parties. In other words, subject-matter jurisdiction is the key to feasibility. Indeed, a common jurisdiction is the answer to solving the compulsory joinder of parties.

On the other hand, if the precondition of the compulsory joinder of the parties is the jurisdiction, it is not relevant when the parties who should be joined are *indispensable*. While Rule 19(a) requires the so-called "three-step process"[41] to determine the parties to be joined, Rule 19(b) provides the feasibility for the compulsory joinder of parties. Therefore, the new rule gives up the old, rigid provisions on compulsory joinder of parties, even though it indirectly promotes this interpretation. In fact, beyond the feasibility or infeasibility of the compulsory joinder of parties, what allows the court to qualify the joinder of parties as compulsory is exclusively the notion of *indispensable* parties. So, the court has exclusive discretion to determine whether or not a party is indispensable on a case-by-case basis "in equity and good conscience."[42]

The amended rule suggests a case-by-case approach to the consequences of the compulsory joinder of *indispensable* parties. The discretionary power of the court allows it to pragmatically determine if the parties are *indispensable*. In so doing, the court decides what action to take. Once again, however, the lack of jurisdiction emerges as the mainstay of the compulsory joinder of parties. The required joinder of parties cannot change the court's jurisdictional authority, which is the main reason why the judicial decision to join a non-party in pending litigation can be considered feasible or infeasible.[43]

Having discussed the history of Rule 19, we now address the ongoing issues and analyze the factors that should guide the judge in considering if a person should be joined in existing litigation under Rule 19(b).

We begin by analyzing the statement of the Supreme Court in *Philippines v. Pimentel* with respect to the judge's decision regarding

41. *See* Coyle, *supra* note 5, at 1123.

42. FED. R. CIV. P. 19(b). *See* Provident Tradesmens Bank & Tr. Co. v. Patterson, 390 U.S. 102, 118–19 (1968) ("Whether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation. . . . The decision whether to dismiss . . . must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." (footnote omitted)); Niles-Bement Co. v. Iron Moulders' Union, Local No. 68, 254 U.S. 77, 80 (1920) ("There is no prescribed formula for determining in every case whether a person . . . is an indispensable party or not."). *See also* Florey, *supra* note 39, at 677–78; Coyle, *supra* note 5, at 1127–28.

43. *See* FRIEDENTHAL, KANE & MILLER, *supra* note 3, at 347. The lack of jurisdiction may occur whenever: (1) there is no personal jurisdiction over the non-party to join; (2) there is no subject-matter jurisdiction of the court; (3) there is a valid objection by the non-party to compulsory be joined.

"equity and good conscience" under Rule 19(b).[44] First, the Court noted that "[t]he design of the Rule . . . indicates that the determination whether to proceed will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations."[45]

This statement reveals the tendency of the Court to favor a discretionary judicial power. This conclusion also stems from the so-called pragmatic approach of the Court. According to this approach, the judge is asked to evaluate if:

> the fact that the determination of who may, or must, be parties to a suit has consequences for the persons and entities affected by the judgment; for the judicial system and its interest in the integrity of its processes and the respect accorded to its decrees; and for society and its concern for the fair and prompt resolution of disputes.[46]

This conclusion has become part of the mainstream view of Rule 19(b). Thus, cases involving compulsory joinder of parties raise recurring issues not present in traditional, bilateral litigation. The first issue concerns the potential conflict between the interests of those original parties who can be damaged if other persons should be joined but are not, and the interests of those absent parties who can be harmed by the final judgment if they are joined.[47] Therein also lies a second important issue. In *Pimentel*, the Supreme Court noted that the compulsory joinder of parties can be considered as a necessary means of avoiding the risk of the defendant being exposed to multiple and fragmented adjudications.[48] This risk could, in some cases, be considered a breach of the Due Process Clause, since it exposes the absent party to multiple liability payments upon the same obligation.

To summarize, the rationale of Rule 19 as amended in 1966 can be described in terms of "what harm may accrue if party joinder is not ordered, rather than what policies should be satisfied through joinder."[49] Phrased in these terms, Rule 19 clearly shows the reason for the judge's discretionary power in determining whether a party is *indispensable* and must be joined. It also leads to coherent identification of the main consequence of the infeasible joinder of parties which is the judicial order to dismiss the action.

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44. *See* Philippines v. Pimentel, 553 U.S. 851 (2008).
45. *Id.* at 862.
46. *Id.* at 863.
47. *See* FRIEDENTHAL, KANE & MILLER, *supra* note 3, at 343–45.
48. *See* W. Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961). *See also* Kaplan, *supra* note 5, at 368.
49. *Cf.* FRIEDENTHAL, KANE & MILLER, *supra* note 3, at 345.

It is also worth reviewing the factors that guide the court in determining whether the person who should be joined is indispensable under Rule 19(b). In particular, employing the lens of comparative analysis reveals that the four standards established in Rule 19(b)[50] require the court to evaluate the motion to dismiss the action on a case-by-case basis. These four standards appear heterogeneous and allow the court to decide the case in "good conscience."[51] Nevertheless, such a discretionary power can be an obstacle to the systematic background of the compulsory joinder of parties particularly when the non-parties are *indispensable*.

D. Indispensable Parties and the Standard of Review

As noted above, the required joinder of parties involves the judicial evaluation of whether a non-party should be considered as necessary or indispensable. The answer to this question derives from the discretionary evaluation under Rule 19(b), in which the court must decide whether "in equity and good conscience" the case may be continued among the existing parties or whether the case must be dismissed because the absentee party cannot be joined.[52] The substantial discretion of the district courts in deciding whether a non-party is necessary or indispensable is compounded by the standard of review of the majority of circuits. The decisions of courts of appeals emphasize the required joinder of parties as an instrument for achieving the uniformity and predictability of the law. Different ways of interpreting non-parties as necessary or indispensable result in different ways of applying Rule 19(b).

If the court determines in its Rule 19(b) analysis, that the action should be dismissed, the absent person is thus regarded as *indispensable*. The court considers a non-party who should be joined under Rule 19(a) as an indispensable party only if the court's discretionary decision is to dismiss the case so it may not be continued between only the original parties.

The standard of review applied to the district court's discretionary evaluation under Rule 19(b) will often be "outcome determinative," since an abuse of discretion standard will most often permit the district court's decision to stand, while a *de novo* review will allow for much more frequent appellate oversight.[53] Courts have debated whether the Rule

50. *See supra* Part I.

51. *See* Fed. R. Civ. P. 19(b).

52. *See supra* Part I.

53. *See* Peter Nicolas, *De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531, 531 (2004) (footnote omitted) (quoting Kearney v. Standard Ins., Co., 175 F.3d 1084, 1095 (9th Cir.

19(b) decision should be subject to *de novo* review or *abuse of discretion* review. The Supreme Court has not yet provided a clear statement on the matter.[54] While the majority of the courts of appeals use the abuse of discretion standard, given that the courts are making fact-based, discretionary decisions based on equitable factors,[55] the Sixth Circuit Court of Appeals uses *de novo* review.[56]

The reason for this unbalanced debate, with more circuits favoring the abuse of discretion review, is understandable. Since Rule 19(b) "requires the district court to analyze various equitable considerations within the context of particular litigation, rather than to decide a purely legal issue,"[57] the courts would generally use the abuse of discretion standard.[58]

In contrast, the Sixth Circuit Court of Appeals uses the *de novo* standard of review.[59] The main reason for its opposite position is that it views the determination of whether a party is *indispensable* as "represent[ing] a legal conclusion reached after balancing the prescribed factors under Rule 19[(b)]."[60] Accordingly, this issue is considered an issue of law "which the court reviews *de novo*."[61]

1999)) (noting that the standard of review "is often 'outcome determinative,' in the sense that the difference between victory and defeat on appeal can turn on whether the standard by which the appellate court reviews the trial court's decision on an issue is plenary or deferential."); Coyle, *supra* note 5, at 1132.

54. *See* Coyle, *supra* note 5, at 1138–40.

55. *See* Walsh v. Centeio, 692 F.2d 1239, 1242 (9th Cir. 1982). *See also* Picciotto v. Cont'l Cas. Co., 512 F.3d 9, 14–15 (1st Cir. 2008); Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 132 (2d Cir. 2013); Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 403 (3d Cir. 1993); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Rite Aid of S.C., Inc., 210 F.3d 246, 250–54 (4th Cir. 2000); Hood *ex rel.* Miss. v. City of Memphis, 570 F.3d 625, 632–33 (5th Cir. 2009); Extra Equipamentos e Exportação Ltda. v. Case Corp., 361 F.3d 359, 361 (7th Cir. 2004); Scenic Holding, LLC v. New Bd. of Trs. of Tabernacle Missionary Baptist Church, Inc., 506 F.3d 656, 665 (8th Cir. 2007); Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1022 (9th Cir. 2002); N. Arapaho Tribe v. Harnsberger, 697 F.3d 1272, 1277 (10th Cir. 2012); Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 847 (11th Cir. 1999); Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491, 1495 (D.C. Cir. 1995).

56. *See* Local 670, United Rubber v. Int'l Union, United Rubber, 822 F.2d 613, 619 (6th Cir. 1987); *see also* Keweenaw Bay Indian Cmty.v. Michigan, 11 F.3d 1341, 1346 (6th Cir. 1993).

57. *See Walsh*, 692 F.2d at 1242.

58. *See, e.g.*, Cloverleaf Standardbred Owners Ass'n v. Nat'l Bank of Wash., 699 F.2d 1274 (D.C. Cir. 1983).

59. *See Local 670*, 822 F.2d at 619.

60. *Id.*

61. *Id. See also Keweenaw*, 11 F.3d at 1346 ("[W]e made clear that the distinct indispensability analysis under rule 19(b) is inherently a legal question."). This conclusion has been feebly considered, although it is within the abuse of discretion review standard, which is also used by the Seventh Circuit; *see also* Sokaogon Chippewa Cmty. v. Wisconsin, 879 F.2d 300, 304 (7th Cir. 1989) ("It can be argued that the finding of indispensability is so fell in its consequences, requiring as it does the

Pierce v. Underwood enumerated several factors for choosing the appropriate standard of review.[62] In particular, *Underwood* focused on the use of general factors that guide the choice between the two standards. *Underwood* concluded, as the Supreme Court also concluded in *Cooter & Gell v. Hartmarx*, that the "abuse of discretion" review is appropriate when the decision of a district court is based on "issues rooted in factual determinations" as well as in the "reasonableness under the circumstances."[63]

Most of the courts of appeals have also so concluded in the Rule 19(b) context. As in *Walsh v. Centeio*,[64] the analysis of the appropriate standard of review for Rule 19(b) issues has focused mainly on the language of the rule and its required conclusion based on a non-exhaustive list of equitable factors. Moreover, the decisions of the courts of appeals have highlighted the relationship between Rule 19's history (until the 1966 amendment) and its current discretionary and pragmatic evaluation of the material facts, instead of the abstract characterization of the nature of rights and obligations involved in the lawsuit. Because the decision of whether to proceed with an action when the joinder of a required party is infeasible may lead to dismissal of the action, the reviewing court should be more deferential to the district court's discretionary power.[65] Even if dismissals for failure to join a person who should be a party involve legal issues, such as inducing the claimant to bring a lawsuit in his own forum or damaging the defendant by continuing the litigation, the *de novo* review must only apply to the compulsory joinder of parties regardless of whether it is feasible or not. In contrast, if the decision on the dismissal of the action depends on a "fact-dependent legal standard,"[66] appellate courts use the abuse of discretion standard.

E. Rationale Behind Rule 19(b)

While the original Rule 19 conclusion that a party was an *indispensable* party provided for the automatic dismissal of the action, the court now defines the potential party as indispensable only after it has

dismissal of the entire suit, that the appellant should receive a broader scope of review."). It is worth noting that the Seventh Circuit holds a similar conclusion although it has been more nuanced. *See* Pasco Int'l (London) Ltd. v. Stenograph Corp., 637 F.2d 496, 505–06 (7th Cir. 1980).

62. Pierce v. Underwood, 487 U.S. 552, 557–64 (1988).

63. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401–02 (1990). *See also Underwood*, 487 U.S. at 559.

64. *See* Walsh v. Centeio, 692 F.2d 1239, 1242–43 (9th Cir. 1982).

65. *See* Coyle, *supra* note 5, at 1146–49.

66. *See Cooter & Gell*, 496 U.S. at 402.

already concluded that it is inappropriate to decide the case in her absence. Rule 19(b) provides that once it is established which party is required to be joined but that joinder is not possible because of jurisdictional or venue obstacles, the discretionary power of the court is implemented when deciding whether or not the pending litigation must be dismissed or may proceed in the absence of the required party.[67] The courts are empowered to refer to non-exhaustive considerations and make the decision based on further considerations of "equity and good conscience."[68]

Moreover, it is relevant for the following comparative analysis to underline two considerations. The first one emerges from the nature of the factors generally related to the court's determination of whether the action must be dismissed or may proceed without the absentee/required party. Whether one observes the four factors established by Rule 19(b) singularly or as a whole, the outcome is the same: the factors are related to the effectiveness and the efficiency of the decision rendered in the absence of the parties who were required to be joined if feasible.

Second, even though the trial courts possess a discretionary power to determine whether the case will proceed without the party to be joined if feasible, it seems less relevant to argue about whether the decision is wrongful. This consideration indirectly finds justification in the decision by the majority of courts of appeals to review a Rule 19(b) decision under the deferential abuse of discretion standard. In other words, even assuming that the abuse of discretion permits overturning a Rule 19(b) decision rendered "in equity and good conscience," in some instances, reversal would represent less a conclusion that the trial court's decision

67. *See supra* Part I.C. for a discussion on the non-exhaustive criteria under Rule 19(b).
68. *See* Fed. R. Civ. P. 19(b).

was an erroneous judgment on the merits[69] than a factual conclusion based on a pragmatic decision of the appeals court.[70]

These considerations open the door to a very fascinating comparative evaluation within the civil law legal systems. A civil lawyer is thus facing a very particular example of American law, although multiparty litigation (particularly when it is based on the compulsory joinder of parties) represents a classic and debated framework of the European civil procedure since the origin of the common law legal rules on this topic have been traced, at least indirectly, to Roman law. It is worth noting that the evolution of Rule 19 eloquently emphasizes—also considering the timeliness—the Legal Realism era that is undoubtedly the main reason for the shift to the approach to required joinder of parties and away from abstracted categories and conceptual references, as it was the notion (and the automatic application) of indispensable party practice before the 1966 amendment.

Therefore, Rule 19(b) is discretionary since it shows the prevalence of empirical criteria (obtainable from the decisions) rather than conceptual categories. It is also discretionary because factor 19(b)(1) permits the court to consider multiple pragmatic issues in making its Rule 19(b) decision. The court needs to answer the question, under Rule 19(b)(1), whether the absence of an indispensable party could be harmful not

69. *See* Washington v. United States, 87 F.2d 421, 427–28 (9th Cir. 1936) ("[T]he nonjoinder of an indispensable party is *fatal error*, and the court cannot proceed to a decree in the absence of such indispensable party, notwithstanding the fact that the joinder would oust the court of jurisdiction. Neither the statute nor the equity rule, quoted above, permit the court to proceed in the absence of an indispensable party." (emphasis added). It is worth noting that that decision was the first attempt to define the indispensable parties, as it follows: "There are many adjudicated cases in which expressions are made with respect to the tests used to determine whether an absent party is a necessary party or an indispensable party. From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience? If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable." *Id.*). It is worth noting how such determinations are translated in the current Rule 19(b), such as the guidelines merely for the court to define pragmatically the consequence of the action brought without all the indispensable parties.

See also Hanson v. Denckla, 357 U.S. 235 (1958); W. Union Tel. Co. v. Pennsylvania 368 U.S. 71 (1961). It is worth noting that, in these cases, the decision made in absence of an indispensable party has been considered as not only void and null but also as made in breach of the Due Process Clause (particularly in breach of the right to be heard).

70. *See* Kaplan, *supra* note 5, at 367.

merely (or even often) for the claimant's interest to achieve a suitable decision, but harmful to the defendant's interest to avoid a double liability. Second, Rule 19 also considers the non-party's interest to avoid pragmatic harm from the decision rendered in her absence, even if that decision cannot exert its binding force on her. The court's discretionary power to evaluate a non-party as required to be joined also considers the public interest in reaching a stable, effective, and efficient decision, as opposed to a hollow or contradictory adjudication that might result from multiple litigations if the absentee were not joined.

These arguments—currently underlying a court's Rule 19(b) decision—grant too much discretion to the court, particularly if the decision is examined through the lens of the civil law legal tradition. To the contrary, a few divergent opinions—as emerged during the debate on the 1966 amendment to the Federal Rules of Civil Procedure—gave rise to different considerations.

For example, Professor Howard Fink suggested that American courts have always decided indispensible party actions upon discretionary factors.[71] This type of decision-making would not have avoided the formulation of a strict rule on qualifying the parties as indispensable in order to imperatively determine whether the action must be dismissed or not.[72]

In an attempt to reduce the discretionary power of the court, others argued that employing the Restatement of Judgment of 1940 could have resolved these issues.[73] The Restatement would have addressed arguments for critically assessing as necessary or indispensable the role played by the non-parties in the proceedings. Those arguments would have been strictly related to the nature of the rights involved in the subject-matter of the action brought between the original parties. In particular, reframing the inquiry into the role played by the non-parties in the proceedings in terms of interpretative analysis of the Restatement highlighted that the interest of an absent party to be joined always depends on the limits posed by the law. And this is true whenever the non-party is a co-owner of the right involved in the action between the original parties. This specific subjective nature of the action cannot leave to the court any discretionary

71. *See* Howard P. Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403 (1965).

72. *See id.* at 410.

73. *See* RESTATEMENT OF THE LAW OF JUDGMENTS (AM. LAW INST. 1940).

power to determine the consequence of the pending action because it must be dismissed.[74]

As noted above, it must not surprise the reader that references to the old legal literature and the arguments used before the amendment of 1966 remain salient. Exploring a new comparative view and, in this way, trying to propose a renewed evaluation of the legal framework in the United States and in the European legal systems, we will discover the usefulness of those references, even though American legislators neglected them in the following acts.

III. THE COMPULSORY JOINDER OF PARTIES IN THE CIVIL LAW LEGAL TRADITION

Why might compulsory joinder of parties under Rule 19 and, more precisely, the notion of indispensable parties interest civil lawyers and inspire a comparative analysis? The answer comes from Rule 19(b) as amended in 1966. For this reason, in Part II, after first explaining the required multiparty process within the Italian and German legal systems, we consider whether both civil law and common law traditions can be compared to better understand and to find better solutions in order to limit or at least to justify the American courts' discretionary power under Rule 19(b).

A. Compulsory Joinder of Indispensable Parties Within the Civil Law Legal Systems: A Premise.

First, we introduce a general overview of the joinder of parties in the European civil process context. Then, we proceed to analyze the specific rules under Italian and German laws as well as the most relevant jurisprudence and legal scholarship that these legal systems have developed on this topic.

An introduction to the joinder of parties in European law can start from the conceptual premise of the specific civil trial framework, due to the rights-focused system as the prominent and essential structure of civil proceedings. As we have already argued, "the specific legal framework that characterizes the civil law procedural system compels us to consider the subject matter of the lawsuit—that is, the cause of action—which is traditionally described as an individual right recognized by the law."[75]

74. *See* John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 483 (1957) (noting that the prejudice is merely in fact, irrespective of the nature of the interest to be joinder).

75. *See* Cavallini & Gaboardi, *supra* note 8 (manuscript at 13) (on file with author).

Concentrating on the rights-focused system, instead of the remedies-focused system of common law legal systems, is the necessary premise to appropriately compare civil law and common law, particularly when the comparison revolves around a specific procedural issue, as in this case of the Rule 19(b) decision.

This distinction, however, does not impede the comparison. In fact, even acknowledging that legal remedies within common law jurisdictions depend on judicial decisions does not mean that those legal systems do not recognize individual rights. To the contrary, "legal systems inspired by remedies imply that the remedies are the principal and irreplaceable part of the individual right. This implication ultimately ensures both the enforcement of decisions set forth by judges and compliance with the rule of law."[76]

This methodological reminder is exceedingly relevant to the comparison of the compulsory joinder of indispensable parties with the aforementioned considerations of the American legal background.

One should consider the main difference, within the European legal context, between permissive and compulsory joinder of parties. The difference stems (not exclusively) from the specific nature of the rights involved in the lawsuits. It mainly concerns the distinction between the *one right* brought in the action by the plaintiff (characterized by a joint co-ownership by several parties) on the one hand, and two or more (different and autonomous) rights involved in the same proceeding between several parties where the rights of each party are related by the connection of each right's title or each remedy advocated to the court) on the other.

To be clear, whenever we discuss the compulsory joinder of parties within the European legal context, we usually refer to the first situation described above. The subject-matter generally involved in a compulsory multiparty litigation is, in other words, a *single* right filed by the plaintiff and characterized by a joint co-ownership of several parties. Nevertheless, in some cases the law dictates a compulsory (and not merely permissive) joinder of parties when the multiple claims are not equally related to the subject matter involved in a multiparty litigation. In these cases, the compulsory joinder of parties does not depend on the fact that two or more parties can together claim a common, single right. Instead, in these cases the multiparty litigation is based on different but closely related rights so that compulsory joinder of parties depends on the need to ensure a uniform enforcement of the decision despite the specificities of each claim. When

76. *Id.* (manuscript at 15).

the subject matter of the proceedings is a right common to all parties, the uniformity of the decision's enforcement is automatically ensured by the fact that the cause in dispute is unique. On the contrary, when the subject matter of the proceedings is a set of different, although correlated, rights, the uniformity of the decision's enforcement depends on whether and to what extent the judge qualify the rights filed in the lawsuit are closely related.

Just as in the American legal system, the traditional European legal rules on the compulsory joinder of parties do not specify substantial requirements, leaving legal scholarship and the courts to qualify them on a case-by-case basis. As we will show in the next Part, Italian and German laws only give us a limited provision on the compulsory joinder of parties. In so doing, the European legal provisions focus on the nature and enforcement of the decision that should be made with a compulsory joinder of parties. They determine specific requirements of the multiparty litigation but avoid specific guidelines to determine those indispensable parties to be joined.

Therefore, the structural divergence of the European and American legal systems— particularly the difference between the American remedies-focused law and the rights-focused civil law—does not impede a comparison of the two systems. On the other hand, a court's discretionary power to determine the essence of the compulsory joinder of parties in civil litigation looks like a standard reference for both systems. There are indeed differences in the rulings, differences in defining the boundaries of compulsory multiparty litigation, and also some differences in structuring the court's decisions in the absence of an indispensable party. However, these differences, as we will see shortly, are not an obstacle in comparing the two systems; to the contrary, these differences give a chance to evaluate from a new point of view some critical but crucial aspects of each, eventually aiming to fine-tune a prospective rule.

IV. THE COMPULSORY JOINDER OF INDISPENSABLE PARTIES IN COMPARISON

A. Italian Law

Italian law features a specific rule on the compulsory joinder of parties. Article 102 of the Italian Code of Civil Procedure establishes:

> Where a judgment cannot be rendered but toward more parties, all of them shall commence action or be defendants in the same action. In this

> event, if the action is commenced only by some of them or against only some of them, the judge orders the parties who appeared before him to call the other parties to join to proceeding by a final time limit that he establishes.[77]

This rule applies where more parties are involved in the proceedings, and all are indispensable in this sense. Where all of the indispensable parties have not been called to join the proceeding, the judge, also *ex officio*, orders the existing parties to call the others to join as indispensable. When this issue is raised by the Court of Appeal or even by the Supreme Court of Cassation, the proceeding is restarted with all required parties, because it was never judged on the merits.[78]

To the contrary, if the power to shape a compulsory joinder of indispensable parties is waived, the judge should *extinguish* the proceeding.[79] The absence of all indispensable parties to the proceeding determines the *invalidity* of the proceeding itself, and the judgment eventually rendered on the merits shall not be valid against the existing parties nor against the absentee (but indispensable) party who was not joined.

The judgment delivered in the absence of all the indispensable parties is considered (first by the doctrine, then by the jurisprudence) as "*inutiliter datum*."[80] This Latin idiom, that has, remarkably, existed for two millenia, means that the same action has to be considered as never brought; in other words, the judgment must be considered as *nonexistent* (even if formally provided by *res judicata*) since it represents the conclusion of a void and nonexistent proceeding.

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77. *See* Art. 102 Codice di procedura civile [C.p.c.] (It.)., *translated and reprinted in* SIMONA GROSSI & MARIA CRISTINA PAGNI, COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE app. B, at 152 (2010) (hereinafter "Italian Code").

78. *See*, *e.g.*, Cass., sez. 6, 15 marzo 2017, n. 6649, http://www.ilcaso.it/. 2017, (It.)..

79. *See* Italian Code, supra note 80, at 272 ("Besides the cases provided under the previous paragraphs, and unless where the applicable law provisions provide otherwise, the proceeding extinguishes also where the parties that shall renew the complaint, or continue the proceeding, or reinstate, or integrate the proceeding, do not do it by the final time limit provided by the applicable law provisions or by the judge authorized by the applicable law provisions to schedule such time limit. When the applicable law provisions authorize the judge to schedule the time limit, this cannot be shorter than one month and not longer than three months. The proceeding's extinction derives automatically from the applicable law provisions, and it may be declared by the investigating judge, also *sua sponte*, or by the panel of judges, by judgment.").

80. *See* GIUSEPPE CHIOVENDA, PRINCIPII DI DIRITTO PROCESSUALE CIVILE [PRINCIPLES OF CIVIL PROCEDURE LAW] 1078 (2nd ed. 1965); GIORGIO COSTANTINO, CONTRIBUTO ALLO STUDIO DEL LITISCONSORZIO NECESSARIO [CONTRIBUTION TO THE STUDY OF THE REQUIRED JOINDER OF PARTIES] 234 (1979); SERGIO MENCHINI, IL PROCESSO LITISCONSORTILE [THE MULTIPARTY LITIGATION] 9 (1993). *See also* Italian Supreme Court of Cassation no. 25454 of November 13, 2013.

Accordingly, the third party who should be compulsory joined can always autonomously bring the lawsuit she could have brought in the multiparty litigation if she was actually joined. Indeed, *ne bis in idem* principle cannot be applied to the absentee party. *Ne bis in idem* dictates that a party cannot bring the same lawsuit she has already brought before another court. But the third party who is not joined in a pending litigation can be considered a person who has not brought her lawsuit, thereby she is not subject to the *ne bis in idem* principle. For this reason, the Italian legal rules governing the compulsory joinder of parties focuses exclusively on the cases in which the necessary parties are absentee. The consequence appears severe, as it is a dismissal of the action.

However, this provision must be considered a blank standard of whatever it means to be indispensable parties.There are no specific requirements in Italian law that should guide the judge (and, even before, the plaintiff in bringing the action) in determining the compulsory instead of the permissive, joinder of parties. Given this commonality with American law, it is worth approaching a more in-depth comparative evaluation, starting from this standpoint: the court's discretionary power to qualify an absent party as indispensable is a relevant and methodological commonality between both systems.

The first element of the compulsory joinder of parties in Italian law is traditionally considered the relation between the validity of the judgment and the scope of the right when the plaintiff's action was brought in order to achieve a specific effect on the individual right filed in the lawsuit. When the scope of the jurisdiction is to shape a new individual right according to the multiparty right filed in the lawsuit, all parties who are co-owners of this right must be compulsorily joined in the proceedings. For example, when the judge is asked to declare the unfulfilled multiparty contract invalid, the decision must be necessarily applied to each party.[81] Otherwise, the legal system should accept that the unfulfilled contract remains valid for the absent persons, even though the contract has been declared as void and unenforceable towards the parties to the proceedings. Everyone, we believe, would agree that this is an unacceptable conclusion.

The above-mentioned example evidences that substantive and procedural matters—individual rights and individual remedies—are strictly interrelated in the rights-focused civil law systems. The first element is given by the *unity* of the substantive situations—individual rights—claimed in the proceedings. The second element can be described

81. *See*, *e.g.*, Cass., sez. 2, 05 maggio 2016, n. 9042, http://www.ilcaso.it/. 2016, (It.).

as the *effects* that the plaintiff seeks when bringing the lawsuit in court: these effects necessarily affect all the co-owners of the claimed right. If the judgment does not affect all the co-owners, the plaintiff does not obtain the outcome he demands; to obtain what the plaintiff wants, the judgment must necessarily produce its binding effects on all the co-owners.[82] So, in light of the adversarial principle and the due process right to be heard, each co-owner must be entitled to participate in the proceedings as an *indispensable* party—a party who must be joined. In other words, if the judge does not pronounce enforceable rules towards a plurality of subjects, the plaintiff does not obtain the outcome he demands.

The gap between the Anglo-American legal systems and the European one—that is, the difference between the rights-focused civil law system and the remedies-focused common law system—is reduced if we pay attention to these arguments. Indeed, the relevance of remedies instead of rights stems from the legal framework of the compulsory joinder of indispensable parties when we consider the traditional criteria guiding the judge to order the compulsory joiner of the indispensable absentee parties.

In particular, two factors drive the discretionary qualification of parties as *indispensable* . According to the rights-focused system, the first criterion is the specific right the plaintiff asks the court to enforce: two or more parties, in fact, must be the co-owners of that right. According to the remedies-focused system, the second criterion derives from the fact that the court's evaluation of the compulsory joinder of parties must also be related to the specific remedy asked by the plaintiff. Whenever the remedy sought implies a substantial modification of the pre-existing rights of the co-owners, there are no alternatives for the court: all the indispensable parties must be compulsorily joined. Otherwise, the judge is called upon to dismiss the action.

Essentially, the rationale of these arguments is *procedural*, even if it is strongly related to the substantial nature of the involved (pre-existing) rights. The reason is the full and necessary respect due to the procedural right to be heard, which is a basic principle of the due process of law in the European legal.[83] All parties are *indispensable* whenever the plaintiff's requested remedy requires an effective measure against all of

82. *See, e.g.*, Cass., sez. 2, 03 febbraio 2017, n. 2935, http://www.ilcaso.it/ 2017, (It.).

83. *See* Art. 24 Costituzione [Cost.] (It.)., *translated and reprinted in* ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT app. I, at 247 (Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia & Andrea Simoncini eds., 2016) ("Everyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defense is an inviolable right at every stage and instance of legal proceedings.").

them. At the same time, the order for a compulsory joinder of parties aligns with the plaintiff's interest to achieve a favorable decision on his claim since such a decision can be valid and enforceable only if all parties are entitled to discuss the case in the proceedings. In summary, the decision is effective only if the given remedy follows the right to be heard for all indispensable parties.

In some cases those who are entitled to claim their rights jointly cannot demand to be joined as indispensable parties to the proceedings. For example, in a case concerning a claim of joint liability of debtors, all of them need not be considered indispensable parties, particularly from the perspective of the plaintiff's interest, to achieve a favorable decision on his loan.[84] The creditor can obtain the full payment against one of the debtors, thereby satisfying his interest and avoiding any risk of duplicative litigation. In fact, this conclusion does not imply a violation of the Due Process Clause (with respect to the right to be heard). Each debtor can be asked to fully satisfy the creditor, so that even when a single debtor is involved in the proceedings, the interest of the plaintiff is fully satisfied without prejudice for the absent co-debtors who cannot be considered indispensable parties.

In sum, Italian law recognizes a significant value in the compulsory joinder of parties. The framework of such multiparty litigation is due to the strict relationship between the substantial nature of the right filed in the claim (made subjectively complex by the joint co-ownership) and the effects on these parties of the on-going decision. The link between these cornerstones is the respect due to the right to be heard. That justifies the severe consequence of the end-proceeding. The compulsory dismissal of the action, or otherwise, the invalidity of an eventual decision on the merits is the bread and butter of the due process clause: the court's discretionary power to determine the constitutional need of a compulsory joinder of parties finally seems less discretionary than what might appear from the rule.

B. German Law

Section 62 of the German Code of Civil Procedure (hereinafter "German Code") provides as follows:

(1) Where the legal relationship at issue can be established vis-à-vis all joined parties only uniformly, or where the joinder of parties is a

84. *See*, *e.g.*, Cass., sez. U, 27 luglio 2016, n. 15547, http://www.ilcaso.it/ 2016, (It.).

necessity for other reasons, those of the joined parties who have failed to comply with procedural rules shall be deemed to have been represented by those who did not so fail.

(2) The joined parties who have failed to comply with procedural rules shall continue to be involved also in the later proceedings.[85]

The essence of compulsory joinder of parties within German law turns on the necessity of a *uniform* judgment on the merits, whenever the action brought by the plaintiff involves a multi-holder right. In fact, the same notion of uniform judgment inevitably reveals the policy behind the rule: to necessarily avoid the risk of potential contradictory judgments (and the consequential logical and practical conflict of *rei iudicatae*).

However, to understand this provision, we must briefly trace the yearslong debate found within German legal doctrine. This will create a picture of the commonalities with Italian law and hopefully, the usefulness in comparing and evaluating both laws with Anglo-American legal systems.

First, German law recognizes a strict relationship between substantial and procedural rules, which has been described as the essential framework of the European legal tradition. Accordingly, the prominent role assumed by the compulsory joinder of parties stems from the specific right involved in the lawsuit. As Section 62 and the inherent doctrines developed the so-called «*Eigentlich Notwendige Streitgenossenshaft*» (actually necessary joinder of parties), in necessary multiparty litigation highlights that the consequential decision must have the same enforceability on all the parties. These parties are thus required to join the proceeding as needed for just adjudication.

On this point, there is no difference from Italian law. Primarily, the need for a multiple compulsory party litigation refers to a strict relationship between the subject-matter of the plaintiff's claim and the effectiveness of the prospective adjudication, in which sense it ought to be considered valid. Nevertheless, the German Code does not provide consequences for failing to compulsorily join parties.[86] This enhances the discretionary power of the judge to (1) determine when parties are indispensable, and (2) set forth the consequence to the absentee of those indispensable parties. Despite that, we can recognize the policies that still

85. *See* Zivilprozessordnung [ZPO] [German Code of Civil Procedure], § 62, *translated at* https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.) [https:// https://perma.cc/S95R-NR73].

86. *See* PETER L. MURRAY & ROLF H. STURNER, GERMAN CIVIL JUSTICE 202 (2015).

govern the compulsory joinder of parties in German law, in so finding the similarities with Italian law, and that mainly represent the rules' balance of this issue within the European context of civil law.

First, the object has long been to determine when the decision must be uniform; in other words when the right involved in the lawsuit does not tolerate being regulated in a different way for each of the several parties. For many years, the doctrine's result has been, homogenously interpreting and thinking—the need for one-size-fits-all decisions for the several parties is founded only when any divergent decision might resolve a practical conflict of judgments (*rei iudicatae*). Hence, only when the right involved in the lawsuit is in co-ownership with several parties could it result in different decisions, mostly considering the practical enforceability of the judgments.[87]

These considerations need clarification, however, to reveal the policy behind the German legal rules. Given the joint co-ownership of the right involved in the lawsuit, as the marker of the possible compulsory joinder of all the indispensable parties, one's attention must focus on the consequential consideration that each party's multiple rights—once litigated—do not compel the plaintiff to order the necessary joinder of all the parties for just adjudication.

It is, thus, a twofold situation that makes the compulsory joinder of parties an excellent framework for civil procedure, driving the discretionary power of the judge to require joinder of parties as indispensable. First, cases of multiple rights need each co-owner of those rights (active or passive) to be an indispensable party to the proceeding. These cases specifically consider either a litigated situation of common property (*Gemeinschaft zur gesamten Hand*—community of joint owners) or a subject-matter involved in an action aimed at changing a pre-existing multiple right, for example, an action pursuing a partnership winding up.

Second is an exceptional situation in the European civil justice system where German law grants the same consequence of a compulsory multiparty process even though the proceeding has not joined, as indispensable parties, all the co-owners of the action. According to an old but prominent doctrine,[88] the absence of all the indispensable parties can

87. *See* Friedrich Lent *Die notwendige und die besondere Streitgenossenschaft*, 90 JHERINGS JARBÜCHER 27, 58 (1942); *see also* WOLFRAM HENCKEL, PARTEILEHRE UND STREITGEGENSTAND IM ZIVILPROZESS 201–03 (1961). Such an interpretation can be considered a cornerstone of the compulsory multiparty litigation in German law; *see, e.g.*, Eberhard Wieser, *Notwendige Streitgenossenschaft*, 2000 NJW, 1163, 1163–65; EBERHARD SCHILKEN, ZIVILPROZESSRECHT 324–25 (7th ed. 2014); IOANNIS MANTZOURANIS, DIE NOTWENDIGE STREITGENOSSENSCHAFT IM ZIVILPROZESS, 144–48 (2013); CHRISTOPH G. PAULUS, ZIVILPROZESSRECHT 44–46 (6th ed. 2016).

88. S*ee* MAX HACHENBURG, DIE BESONDERE STREITGENOSSENSCHAFT (1889).

be compensated by the extension of *res judicata* issued only to the parties present. It is worth noting that this doctrine, initially restricted to the confines of the law, has progressively grown outside strictly *ex lege* provisions into concrete application through recent scholarship.[89]

This means the policy behind the rule is once again the purpose of avoiding any possible conflict between judgments, and also preventing, on the one hand, the risk of multiple litigations, and on the other hand, the action dismissal, as the most undesirable end of the civil process. Undoubtedly, this way of thinking and interpreting the compulsory joinder of parties, in German law and Italian law, clearly reflects the specific rights-focused system as it informs civil procedure rules. At the same time it is worth emphasizing how the rights-focused system serves the remedies-focused system in regard of the compulsory multiparty litigation application. It also realizes the maximum result for the combined role between substantive provisions and procedural rules.

V. COMPARATIVE PERSPECTIVES: IS RULE 19(B) TOO DISCRETIONARY?

It is time to turn back to American law in order to compare it to the above-mentioned European legal systems. We first attempt to figure out what makes sense in evaluating such different systems and rules, specifically regarding the relevant framework of civil litigation. The answer to this question is, however, quite easy. The comparison clearly shows several common points between the Anglo-American legal system and the European one, despite the structural dichotomy between the remedies-focused system and the rights-focused system.

One might observe, primarily, that both systems assign the court the discretionary power to imply, case-by-case, the notion of indispensable parties, so as to order the compulsory joinder of them. Neither system recognizes, and probably does not want to recognize, a preliminary notion of an indispensable party. This relief stems in part from the European legal systems and is informed by the rights-focused system. In other words, an American legal scholar could expect, focusing on Italian and German laws, a stricter provision on that notion, since even the strict relationship between the action and the pre-determined right brought by plaintiff's claim would allow for a sort of list of situations in which the litigation must be multiparty.

To the contrary, as noted above, the European legal systems avoid ordering the compulsory joinder of parties in this precise sense and instead

89. *See*, *e.g.*, HENCKEL, *supra* note 91, at 200.

provide a general rule. That means irrespective of any different framework of the civil justice system as a whole, the *discretionary* activity of the court is the essence of the compulsory joinder of parties as a central and irremissible cornerstone of the civil trial proceeding. In so recognizing, the crucial point is *how* this judicial discretionary power is respectively defined and *if*, finally, the comparative evaluation might suggest a sort of *best rule*, mutually taking specific considerations from each system.

The question raised by this paragraph—as the title eloquently shows—intends to softly approach a possible re-evaluation of Rule 19(b), at least as it stands in the current debate of jurisprudence and legal scholarship.

The first possible impact on American law that could represent the twofold policies behind the compulsory joinder of parties' rules highlights the European legal system. Italian and German laws adopted similar rules, even though they reflect different policies (but are not incompatible with each other). While Italian law bases its compulsory multiparty litigation's *ratio* on the due process clause, as the right to be heard between all co-owners of the specific right filed by the plaintiff's action, the German law focuses on the judgment's effectiveness. As noted above, the parties—co-owners of the right involved in the lawsuit—must be considered indispensable, and thus compulsorily joined in the same proceeding, even though separate and autonomous actions could eventually deliver different decisions, which are unenforceable between all the parties.

In sum, the European legal systems, even providing similar rules, offers to the scholar and to the judge different perspectives, but also a twofold guideline, to drive the discretionary power to determine the notion of indispensable parties. It is worth noting, however, that these different *ratios*, involving *prima facie* different policies behind each country-specific rule, are not so different, and are surely not incompatible. It means that, once again, a comparative evaluation must go beyond the specific rules governing each system and try to highlight, if possible, the commonalities of the policies behind the rule, which are the reasons that inspired the rule-maker.

Applying this method to the compulsory joinder of parties, we reach a conclusion. The European system of civil justice, which is structured by a rigorous rights-focused paradigm, obviously assigns to the specific (subjective and objective) nature of the right in the action a sort of litmus test of the necessity or not of multiple parties in the lawsuit. In other words, the rights-focused framework of the European legal systems gives

meaning directly to the judge's role in deciding how many parties have to be compulsorily joined in the pending litigation. Accordingly, if (even only) one of all indispensable parties is initially absent in the lawsuit, the action will be dismissed whenever the plaintiff, once ordered by the court, has not compulsorily added the absentee party to the proceeding.

Therefore, the rights-focused approach plays undoubtedly a vital role in determining the discretionary power of the judge on the required joinder of parties for its adjudication.[90] At the same time, from in-depth perspectives of European legal scholars, that approach—even existing—must not be overestimated. Mainly, it does not impede a useful comparative evaluation referring to the remedies-focused legal system of the United States, if only we consider a different methodological approach, due to the policies beyond the rules and, to some extent, the actual significance, in the European legal context, of the usual dichotomy rights/remedies mentioned above.

Accordingly, the question is: might we find a common policy behind the American legal rules and the most important European ones? The answer must ultimately be positive, if we consider the real impact of the *rationale* of Rule 19(b), as it was mentioned above.[91] The compulsory joinder of multiple and indispensable parties seeks the same goal both in Anglo-American legal systems and in the European ones: avoiding, if possible, an unfortunate end to the proceeding, which is undoubtedly the action dismissal. That is unquestionably the first common point that embraces the two legal systems.

This common point, indeed, justifies the reasons under which, in both systems, even ruling slightly differently, the evaluation of a party as indispensable is inevitably a *discretionary* evaluation by the judge on a case-by-case approach. On the one hand, within the American legal system, the evaluation of the potential conflict for which the original parties can be damaged if joined by other parties and the harm that affects the absentee because of the final judgment can only be raised by a peculiar knowledge of each matter in law, as it is brought to the court. It refers to the evaluation of the judgment's impact set forth without all the indispensable parties. On the other hand, concerning the rights-focused European systems and the right filed in the claim, the same evaluation of the above-mentioned potential conflict is delegated to the judge, case-by-case. As noted above, there are, of course, some differences in ordering

90. *See also* Helen Hershkoff, *Aggregation of Parties, Claims, and Actions*, *in* CIVIL LITIGATION IN COMPARATIVE CONTEXT 481, 491 (2nd ed. 2017).

91. *See supra* Part I.

that kind of compulsory multiparty litigation. Nevertheless, we can glimpse a general, but crucial commonality: whereas a couple of principles work well for both systems as main guidelines in such a discretionary evaluation, the judge must respect the Due Process Clause right to be heard between all the parties and the judge should take up the task to avoid any potential parallel proceeding risking a conflict of *rei judicatae*.

The difference between Anglo-American and European legal systems can be seen instead in the provisions of the decision-making regarding such evaluation. The rights-focused system characterizes the European frameworks of civil justice, in so focusing the main criteria on evaluating the compulsory joinder of parties for just adjudication primarily on the nature of the right involved, and consequently on the type of decision asked by the plaintiff. Conversely, the remedies-focused system informs the American legal framework. Moreover, it explains the reason why Rule 19(b) explicitly focuses its attention on the "adequate remedy" that the plaintiff still obtains "if the action is dismissed for non-joinder."[92] Even more, the evaluation to consider a non-party as indispensable, also reflects the remedy system in requiring the preliminary evaluation—one that considers "appropriate judicial provisions" and adequately avoids the prejudice of a decision "outlined in the absence of the non-party."[93]

The starting point establishes that both systems assign the court a discretionary power to evaluate, case by case, the necessity for compulsory multiparty litigation. Accordingly, having recognized the different frameworks due to the dichotomy right/remedy, it is worth emphasizing how this dichotomy underscores each different provision as to how the court's discretionary power must be carried out, while both systems once again share the same central policies behind the rules as underlined above.

The second point is not, however, less relevant: given these premises, one can note that the difference between the two legal systems stems from the more discretionary power of the Anglo-American courts. To be clear, the remedy framework creates a discretionary power to determine the indispensable parties of an action, but at the same time aligns with the following important consideration: "when broad discretion is desirable (with or without factors), rule-makers should guide that discretion by supplying general principles to assist the trial judge in making the

92. FED. R. CIV. P. 19(b)(4).

93. *See supra* Part I.

necessary normative judgments. Indeed, this fourth method—channeling discretion through general principles—is an important adjunct to all types of discretionary delegation."[94] One might conclude, therefore, that those general principles are indeed the same principles that govern the policies behind the European rules of the civil trial with many indispensable parties. These principles undergird both legal systems' potential constitutional concerns, and they serve the constitutional policies regarding the litigation scope, irrespective of the peculiar legal framework, regarding the right *versus* remedy dichotomy that usually distinguishes the two legal systems. But these common general principles emerge as *natural* principles that reflect common legal customs and practices: they deal with the effectiveness of the adjudication as the goal of (every) trial process—that is, being respectful of the due process clause and "rendering complete justice with as little litigation as possible."[95]

This convergence between the Anglo-American legal systems of compulsory multiparty litigation and the European systems rest on the main argument: what we currently know about the American *pragmatic approach*[96] to the compulsory joinder issue, as well as on the discretionary court's power to determine an absent party as indispensable, is manifestly the evolution of the historical notion of the ideal lawsuit structure. Such an evolution as it was conceived by Professor Pomeroy's doctrine[97] and through which the right-remedy dichotomy approach turned, until recently, to the pragmatic approach of Rule 19(b).[98]

This point deserves a particular mention, if we consider the comparative evaluation as an additional method to understand the current American law. It is not an accident that the features of Pomeroy's right-remedy approach to that ideal lawsuit structure stems directly from the debate on the *multiplicity-of-suits* jurisdictional doctrine.[99] In fact, it is also worth considering what Professor Robert. G. Bone wrote: "In those cases that exhibited privity, cases involving rights or obligations shared

94. *See* Robert. G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2017 (2007).

95. *See* FRIEDENTHAL, KANE & MILLER, *supra* note 3, at 343.

96. *See* Bone, *supra* note 4, at 9 n.12 (emphasizing the notion of "pragmatic approach" that can be defined as the "functional approach concerned primarily with evaluating practical results").

97. *See* John N. Pomeroy, A TREATISE ON EQUITY JURISPRUDENCE §§ 244, 259–60 (San Francisco, A.L. Bancroft & Co. 1881). It is worth noting, for example, how Pomeroy focused on the case by which several plaintiffs claim different primary rights without having privity connection. The case involves "numerous owners of distinct parcels of land seeking to enjoin a common wrong that arose for all at the same time and from the same tortious act of the defendant (for example, separate actions to enjoin a common nuisance)."; *cf.* Bone, *supra* note 4, at 33.

98. See the in-depth historical overview offered by Bone, *supra* note 4, at 27–47.

99. *See* Note, *Bills to Prevent Multiplicity of Suits*, 3 VA. L. REV. 545, 546 (1916).

group-wide, the relationship that justified consolidation involved a *legal connection* among primary rights or duties that existed *prior* to the dispute."[100]

Therefore, how does one not see, in Pomeroy's doctrine, a commonality with the (still current) legal framework of the *ratios* behind the European rules on the compulsory joinder of parties? Is the *one unitary decree*,[101] that decides the rights involved in the multiparty litigation, so far from achieving the policies behind the European legal rules, as to grant consistent decisions to each right while also respecting the Due Process Clause's right to be heard? The response is clearly in a sense finding a strict similarity, above all, since it was underlined how a unitary remedy has to fit "the rights network exactly."[102]

VI. CONCLUSION

The final question, and the conclusive evaluation, is thus to wonder if, by the turn of the right-remedy view in the pragmatic approach, the current Rule 19(b) makes a court's power too discretionary when determining indispensable parties, in so moving away from the comparative correspondences just achieved.

In this way, we must underline what the pragmatic approach means, primarily considering the scientific origin. It means, in short, achieving Pound's and Clark's legal theories, which manifestly were the beginning of changing civil procedure. Although it is not time to rerun those theories,[103] it seems to us appropriate to outline the main difference between the pragmatic approach and judicial discretion. The need to make civil procedure more flexible has been and still is the cornerstone and the mechanism in shifting the right-remedy approach into the new role of the procedural rules to give efficiency to relevant facts.[104] Regarding the multiparty litigation context, traditional judicial discretion has been the key to understanding the pragmatic approach to the ideal lawsuit structure,[105] and to deal with the current Rule 19(b), particularly after the 1966 amendment. From consolidating adjudication to efficient trial

100. *See* Bone, *supra* note 4, at 36.

101. *Id.* at 34.

102. *Id.* at 77. It is worth also noting that the Pomeroy's doctrine was remedy-focused, not rights-focused, even he devotes his attention to the primary rights network in order to prove and justify the compulsory joinder of parties in terms of the one unitary decree (or consolidating adjudication) as the best result in deciding primary multi-rights.

103. *Id.* at 80–98.

104. *See, e.g.*, Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 399 (1910); Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 302–03 (1938).

105. *See* Bone, *supra* note 4, at 102.

management, the pragmatic approach privileges the case-by-case decision, for which the court's role should have an urgent appointment.

The comparative scenario traced above gives us a clear conclusion. While the American pragmatic approach has also pervaded the compulsory joinder of parties, as Rule 19(b) eloquently shows, the result has been to increase the judge's discretionary power in holding the absent party indispensable. Such a result, however, leads to the sort of legal uncertainty that reduces the actual perceived degree of predictability and efficiency in the judicial process. In other words, judicial discretion in assessing the indispensable party should be governed by precise criteria. Within this context, where the indispensable party to join has become a matter for judicial decision, the European legal rules and its policies can offer some standard criteria to drive American courts through the case-by-case decision of the Rule 19(b) requirements. With deference to judicial discretion as the cornerstone of the pragmatic case-by-case evaluation, we believe that discretion should be driven by the twofold fundamental principles which drive the European application of the law on compulsory multiparty litigation—respect for the Due Process Clause, in terms of the right to be heard, and the purpose to avoid separate litigations between some (indispensable) parties. The risk for several inconsistent and pragmatically unenforceable decisions, in other words, could represent a breach of the due process of law, in terms of lack of effectiveness rather than the efficiency of the trial process.

The legal framework emerging from the Italian and German legal systems and their similar approach to the compulsory joinder of parties suggests reframing the relevance of factors the court is asked to consider under Rule 19(b) when it decides whether the action must proceed among the existing parties or must be dismissed. As noted above, Rule 19(b) is intended to afford broad opportunities for the compulsory joinder of parties because the court has substantial discretion to decide whether to continue the litigation without the person who should be joined or to dismiss the action. After all, the party cannot be joined.[106] The court's discretion entirely depends on the factors listed in Rule 19(b). However, these factors are considerations to be weighed by the court, because the rule does not provide an order of importance or priority among them. According to the cases, each factor can be considered more important than others. Moreover, the rule does not encompass an exhaustive list of

106. *See supra* Part I.A.

factors. According to the cases, it is possible that additional factors not listed in Rule 19(b) could also be relevant.[107]

These structural features of the factors under Rule 19(b) provide a relevant obstacle to reducing the court's discretion and achieving legal certainty and predictability. A remedy against the court's excessive discretion is to consider the factors listed in Rule 19(b) as exhaustive. This consideration leads the court to take into account a limited number of factors so that in a given case the court is reasonably asked to interpret additional factors as encompassed in one of the considerations listed in Rule 19(b). This conclusion reflects the approach to the compulsory joinder of parties under the Italian and German legal systems. As noted above, these legal systems tend to reduce the considerations to be weighed by the court to (1) a given situation such as that ownership is factually and legally common to non-parties, or (2) the absence of a person reduces the likelihood that the court can provide justice for those already parties.[108]

Another remedy against the court's excessive discretion is to provide an order of importance among the factors listed in Rule 19(b). For instance, it should be appropriate for the court to give more importance to the factor under Rule 19(b)(3) than others because the adequacy of a judgment has maximum impact on the public interest in the efficient and final disposition of legal disputes. A judgment must be deemed as inadequate when the party is asked to relitigate to recover against absent persons. Undecided claims require time and expense to relitigate them.

To the contrary, the factors under Rule 19(b)(1) and (2) should be applied only when the adequacy test under Rule 19(b)(3) is positively passed. The consideration of adverse consequences that may result from proceedings without a party as well as the consideration of alternative means of avoiding potential damages for the parties takes into account private interests that the court should be asked to assess when the satisfaction of public interest to adequate judgments has been ensured. This conclusion is suggested by comparing Rule 19(b) to the Italian and German legal systems. Indeed, the comparison has shown how the European legal tradition tends to reduce the court's discretion by giving importance to public interests in determining the scope of compulsory joinder of parties.[109] While these factors are worth maintaining in the mentioned order of importance, the factor under Rule 19(b)(4) does not seem essential in guiding the court's decision. Its application requires that

107. *See supra* Part I.A.
108. *See supra* Parts III.A, III.B.
109. *See supra* Parts III.A, III.B.

the court examines whether another forum is available in which the claimant can sue both existing parties and persons who cannot be joined. There is no trace of this factor in the Italian and German rules. In these legal systems, the problem is solved by making a unique forum available when two or more parties are sued by the claimant. On the other side, when another forum is not available to the claimant, even the U.S. courts, in most cases, proceed with the action.[110]

Finally, the aim of this comparative analysis can be described not only as an effort to envision possible arguments in reducing the gap between common law and civil law legal systems but also to underline—within the fascinating topic of the compulsory joinder of indispensable parties—an unexpected common track of the methodological approach to the fundamentals of both systems.

110. *Cf.*, *e.g.*, Estate of Alvarez v. Donaldson, 213 F.3d 993 (7th Cir. 2000); Angst v. Royal Maccabees Life Ins. Co., 77 F.3d 701, 706 (3d Cir. 1996).