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Global Civil Justice

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ABSTRACT

The growing interest of law schools in various International, Transnational, or even Global Law programs underscores the close relationship between research and teaching. This connection holds even when focusing on fields traditionally viewed as domestic and primarily associated with national legal frameworks, such as civil procedure. Civil procedure is one of the most pivotal areas in this regard. One proposal worth considering is to rebrand this field as "International, Transnational, or Global Civil Procedure" or "International Dispute Resolution", although the latter may not be entirely appropriate. However, changing the course title does not resolve the underlying issues, such as course content and its relevance to students' education.

This essay aims to delve deeper into this matter. First and foremost, it seeks to provide a more accurate interpretation of the usual term "international civil procedure" by appending the words "global civil justice". It is not merely a matter of terminology but a fundamental and primary objective of what international civil procedure should aim to achieve. This addition enables us to identify the core principles that should guide the litigation rules, transcending the specifics of each country's legal traditions. Since the goal is not to prepare students exclusively for domestic bar exams, which inherently reflect national patterns, but rather to equip them with the foundational knowledge of civil procedures and the judiciary across various legal systems; teaching activities must be rooted in rigorous research in comparative civil justice.

Consequently, a well-considered cross-comparison becomes essential. Above all, it necessitates a deep appreciation of the fundamental domestic rules and general principles. This transformation from "procedure" to "justice" advocates for a novel approach to studying and researching civil procedure as a primary field for social sciences.

In essence, the focus should not solely be on the international or transnational aspects of the technical rules but on genuine global justice that identifies differences within a shared foundation of principles and objectives. The outcome of this approach is precise and groundbreaking. It heralds a new era for civil procedure (and justice) among scholars worldwide, with teaching naturally evolving due to this innovative research. Comparing the legal systems of the two families prepares students to navigate various jurisdictions, emphasizing commonalities over differences. Simultaneously, it encourages scholars to establish universal principles in addition to specific rules, aiding domestic policymakers in redefining the vision and scope of civil justice judiciously.

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INTRODUCTION

This essay explores the existence and relevance of the "global civil justice" concept. It questions whether this phrase reflects a growing trend in some law schools worldwide or if it remains a mere expression of novelty. Indeed, the essay may acquire greater depth if one assumes a positive response to this provocative initial question.[1]

It is widely acknowledged in the global discourse that "civil procedure" primarily operates within domestic realms, both in terms of scholarly examination and practical implications.[2] The essence of this assertion is readily understandable, as it accurately portrays the country-specific models and regulations that underlie various civil procedural codes or acts. Additionally, owing to historical traditions separating civil law from common law systems, the local framework in this domain persists, despite efforts to cultivate a broader perspective that transcends strict boundaries of localized and parochial legal norms.[3]

The rationale behind this classical and predominantly domestic approach to learning, studying, and teaching civil procedure is apparent and pragmatic to a certain extent. One of the most crucial issues that emerges at the start of an international lawsuit primarily concerns the choice of applicable law, as opposed to the jurisdiction under which the selected law is utilized to resolve the case. When jurisdiction becomes a pertinent factor, it is determined by the country's laws where the case is initially filed. This implies that the case will be subject to the jurisdiction of one specific country, which is inherently domestic. Prospective lawyers, typically students in classical law degree programs, study "Civ. Pro." by the specific legal framework of the country

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[1] I must premise that this topic aims to respond to a growing need, primarily in the Continental educational pattern. Still, this essay should not be considered merely a follow-up of a prior study on the value of teaching U.S. civil procedure in Europe, *see* Cesare Cavallini & Marcello Gaboardi, *Should We Teach (A Bit Of) U.S. Civil Procedure in the European Law Schools?*, 2 COURTS & JUST. L.J. 1 (2020). The primary distinction between the present essay and the initial one arises from the intended audience of the educational program in which these subjects may be taught. To clarify, discussing global civil justice and procedure topics does not inherently require prospective students to be practicing lawyers. Therefore, the program can be designed to accommodate a diverse range of students, including those pursuing a general bachelor's degree, along with other social science disciplines, or even those enrolled in an LL.M. program in Global Dispute Resolution and Arbitration. In the latter case, it is an introductory course (to international litigation or arbitration) for individuals originating from various legal systems. Nonetheless, this topic soon reveals a fascinating outcome in terms of research: somewhat beyond comparative law, but relatively that civil procedure must be afforded everywhere.

[2] *See* Cesare Cavallini & Emanuele Ariano, *Issue Preclusion Out of the U.S. (?) The Evolution of the Italian Doctrine of Res Judicata in Comparative Context*, 31 IND. INT'L & COMPAR. L. REV. 1, 5 (2021) (writing that civil procedure as a field has been usually considered as a "a *hortus conclusus*, an enclosed garden virtually impermeable, for cultural and institutional reasons, to foreign legal solutions, models, and styles[]"), also *quoted in* Helen Hershkoff, *The Americanization of the Italian Civil Proceedings?*, 57 N.Y.U. J. INT'L L. & POL. (forthcoming 2024).

[3] *See* Kevin M. Clermont, *Integrating Transnational Perspectives into Civil Procedure: What Not to Teach*, 56 J. LEGAL EDUC. 524. *See also* John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMPAR. L. 545 (1995) (more focused on the research pattern); Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133 (2008).

where the law school offers the program. In other words, despite the growing transnational boundaries of civil disputes, the process is always set within a domestic framework.[4]

Nonetheless, when considering the significance of studying and subsequently teaching "Civ. Pro." as an international field, it is important to note that prospective students may not necessarily aspire to become lawyers. Conversely, some may already hold legal qualifications but are interested in exploring various civil justice systems. I aim to discuss a distinct degree program that caters to the unique goals of these students, highlighting the need to approach "Civ. Pro." not solely as a purely domestic field.

Given this premise, it becomes evident that an alternative approach to "Civil Procedure" (Civ. Pro.) is necessary. Moreover, transitioning from a domestic civil procedure to a civil procedure that addresses the diverse academic achievements of geographically dispersed students implies that the degree program primarily aims to establish a global educational foundation rather than a purely domestic one. Consequently, discussing the potential interpretation of "Civ. Pro." on a global scale may seem incorrect or, at the very least, prone to misunderstanding. Suppose this interpretation aims to align with the previously defined scope. In that case, it should not be classified under the terms "international" or "transnational" civil procedure, nor be rapidly seen in the traditional and well-known light as "comparative" civil procedure.

This essay aims to explore the role of "Civil Procedure" within the broader context of "civil justice" and how "Civil Procedure" should adapt to different scenarios, whether in terms of students' needs or the program's scope. This approach to change requires that research and, more importantly, teaching establish a cohesive thread that can illustrate how various legal systems worldwide can identify shared values and general principles. Furthermore, it should elucidate how these principles can be implemented in the context of prospective civil justice reforms and contribute to a less technically oriented but robust education, one that can be aptly referred to as "global civil justice".

Therefore, "global civil justice" must be distinguished from "global civil procedure" for various reasons and distinct purposes. As highlighted in a recent article, "global civil procedure" originates from a different context, serves a different purpose, and can be viewed as a continuation of the initial framework within the context of global civil justice. [5] It addresses unique needs and approaches distinct challenges, tailored explicitly for educational programs and job markets catering primarily to lawyers and judges. Yet, while "[g]lobal civil procedure includes the procedural rules, practices, and social understandings that govern transnational litigation and arbitration[,] [a] global civil procedure norm is a norm adopted across courts or arbitration

[4] *See* Clermont, *supra* note 3, at 528 (writing, "[t]ransnationalism does not appear expressly in that statement of the course's goals. Nevertheless, some integration of transnational perspectives could help reach those goals, while helping also to satisfy the presumed need to increase the overall coverage of transnationalism.").
[5] Alyssa S. King, *Global Civil Procedure*, 62 HARV. INT'L L.J. 223 (2021).

providers to make that jurisdiction or provider more competitive in attracting transnational litigation or arbitration."[6] The framework of global civil justice involves recognizing in advance how a global procedural norm can be established. This recognition is based on a proper understanding of the defining attributes of a procedural norm. These attributes include the country-specific origin, tradition, and social context within which rules must operate. It is essential to emphasize that this understanding is not limited solely to American law, as procedural norms encompass diverse legal traditions worldwide, primarily in the Anglo-Saxon and European context.[7]

In framing the global civil justice pattern, Part I endeavors to comprehend the role and constraints of recent soft-law regulation in this area, namely, the European Law Institute (ELI) and its collaborative effort with the International Institute for the Unification of Private Law (UNIDROIT) in formulating the Model European Rules of Civil Procedure.[8] This section seeks to ascertain whether this finalized project holds the potential to elevate the concept of "global civil justice" or whether it simply serves as a condensed summary of diverse country-specific regulations governing domestic civil procedures. Part II aims to identify the critical foundational elements of civil proceedings, whether specific to the civil law system or common law traditions. The objective is to identify shared characteristics and distinctions, thereby contributing to the argument that advocating for a global civil justice system requires a comprehensive analysis of the structure of each legal tradition while acknowledging their diverse origins and regulatory scopes.

I. THE ROLE AND THE LIMITS OF THE SOFT LAW

As previously mentioned, the ELI/UNIROIT Model European Rules of Civil Procedure is a significant endeavor led by private organizations and scholars to establish a unified set of procedural rules across the European region. This model offers a potential solution for establishing a common framework of rules and principles and a standardized technical language to harmonize the diverse aspects of civil procedure law that vary across countries. While the European context is distinct from a global one, it is worth noting that this model, developed in part by U.S. scholars serving on various committees, should be considered seriously in the context and content of this essay's purpose.

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[6] *Id.* at 224.

[7] The previously outlined differentiation between global civil procedure and global civil justice also elucidates the varied contexts in which they could be taught. The latter is primarily tailored for bachelor students who may not aspire to become lawyers or judges but intend to pursue degrees in diverse social sciences.

[8] *See Modern European Rules of Civil Procedure (with the International Institute for the Unification of Private Law, UNIDROIT)*, EUR. L. INST., www.europeanlawinstitute.eu/projects-publications/completed-projects/completed-projects-sync/civil-procedure/. *See also* ELI-UNIDROIT MODEL EUR. RULES OF CIV. PROCEDURE (OXFORD UNIV. PRESS. 2021).

First and foremost, the project methodology aimed to mirror its underlying objective: the establishment of uniform regulations for civil procedure model rules across European member states. Specifically, the methodology provided a set of rules "in fields where a move towards harmoni[z]ation and approximation was likely to be met with a sufficient degree of acceptance to motivate European and national legislature to take the proposed rules as a basis for an innovative harmoni[z]ing legislation."[9]

Unlike model codes, which require a uniform and constant level of detailed regulation, model rules offer flexibility in terms of detail across various sections. This flexibility considers the current level of alignment and the potential for future regulation in specific areas. The ELI/UNIDROIT Model European Rules of Civil Procedure (Model Rules) aims to balance by focusing on essential aspects of civil procedure while incorporating differing degrees of regulation in different sections when deemed appropriate. This implied the need to address specific crucial issues, primarily related to ensuring consistency in terminology. This was imperative because the ultimate goal of the Model Rules is to furnish guidance for future adaptation and reforms at the national level.

Although this essay is not intended to criticize projects of this nature, it is essential to acknowledge that when discussing global civil justice, its content, scope, and whether it is used for research or primarily teaching purposes, we must recognize it as a potential examination subject. Upon reviewing the introductory remarks regarding the scope of this essay and the concept of a possible "global civil justice", one could initially perceive this project as an attempt to identify shared elements among diverse legal systems. However, this effort aims to preserve individual countries' unique traditions while harmonizing regulations across various facets of civil proceedings and judicial administration. However, given that the ultimate objective of this project is to provide guidance (and potentially even require in the context of a prospective EU Directive) for member states to align their domestic codes with European standards as closely as possible, it is worth noting that this endeavor does not align well with the primary focus of this essay.

Firstly, it is essential to acknowledge that every European regulation, especially in the case of a potential directive, ultimately has implications at the domestic level. Therefore, our current objective is to maintain country-specific civil procedure codes rather than harmonize them, possibly in simplified model rules. Secondly, our current objective is undoubtedly not to individuate a common core of civil procedural rules, maybe less technical than usual Codes Rules, nor to rewrite domestic rules even harmonized. Conversely, the "global civil justice" concept aims to introduce a novel type of course. Rather than being a mere comparative procedural course, it begins with a comparative perspective to educate students about the fundamental principles of various legal systems.

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[9] *See* ELI-UNIDROIT MODEL EUR. RULES OF CIV. PROCEDURE, *supra* note 8, at 6 (citations omitted).

Furthermore, the course seeks to equip students with the skills needed to navigate across different jurisdictions since they may be called upon to work within a global context, fulfilling roles such as lawyers, regulators, and public administrators. Another critical point is that offering a course of this nature entails a fresh examination of comparative procedural law. This, in turn, could pave the way for a more deliberate process of internationalizing a traditionally domestic field. Ultimately, such an endeavor could also prove highly beneficial for policymakers and legislators seeking to reform existing litigation rules, even if it is not a primary task.

II. "FOUNDATION STONES": A COMPARATIVE ANALYSIS OF CIVIL PROCEEDINGS FOR A GLOBAL CIVIL JUSTICE

In this chapter, titled "Foundation Stones", I aim to meticulously dissect the foundational elements of civil proceedings arising from two distinct legal traditions. Through a step-by-step examination, my objective is to establish a shared framework of principles while also highlighting and appreciating the unique differences and specificities inherent in each legal family. In doing so, the objective is to only comprehensively address some aspects typically governed by civil procedural codes, particularly from a European perspective. The aim is to highlight certain pivotal moments within civil proceedings that predictably emphasize the fundamental principles applicable to regulations in any given country despite structural and historical differences. This analysis begins with a broad overview of the civil justice system's constitutional foundations.

A. *DUE PROCESS OF LAW*

First and foremost, I believe that the initial step in shaping civil justice is addressing what is commonly called the "due process of law". This leads us to question of whether this concept can be universally embraced, albeit with variations in interpretation and implementation across different regions. Hence, discussing the idea of due process on a global scale ultimately involves formulating a universal constitutional framework within which each country's legislature can oversee the administration of civil justice.

This task is indeed challenging, as the term "due process of law" initially had its roots in the Anglo-Saxon legal tradition and has only more recently found its place in the civil law realm, as exemplified by Article 111 of Italy's constitution, which was recently revised to incorporate this concept, at least in the title of the article.[10] Hence, we should initially understand the

[10] *See* art. 111 COSTITUZIONE [CONST.] (It.) ("Jurisdiction shall be implemented through due process regulated by law."), https://www.senato.it/sites/default/files/media-documents/COST_INGLESE.pdf [https://perma.cc/W94S-NZRZ]. It is essential to highlight that the Italian constitution is unique in including its inclusion of the translation of "due process of law" within its constitutional framework. However, this particular concept is further elaborated

fundamental essence of the Anglo-Saxon idea of due process, primarily as it pertains to U.S. law.[11]

Contrary to what one might expect, due process has no precise definition. Also, U.S. literature does not provide much assistance in constructing a comprehensive theoretical framework for due process, mainly when it is related to civil procedure and justice.[12] The legal principle known as "due process of law" is established by the Fifth and Fourteenth Amendments of the U.S. Constitution.[13] Essentially, it mandates that substantive and procedural laws must be guided by fairness and efficiency when safeguarding citizens' life, liberty, and property. The evolution of the due process clause, particularly about procedural law, has closely paralleled the gradual separation of substantive law from procedural elements. This division has functioned as a noteworthy hallmark in tracing the development of common law within the U.S. legal system from its inception. It symbolizes the gradual liberation of substantive law "that was finally able to stand on its own[.]"[14]

While this essay does not delve deeply into the extensive interpretations of due process by the U.S. Supreme Court over more than a century,[15] its primary objective is to offer a concise overview. This overview aims to facilitate an evaluation of the significance of this legal concept on a global scale. This entails exploring potentially analogous principles in other constitutions. Ultimately, the central focus is to distill the essence of the (procedural) due process clause, striking a balance between the fairness, reasonableness, and efficiency of civil proceedings, all while preventing the unjustifiable infringement of citizens' fundamental rights, such as life, liberty, and property.

In more practical terms, although the due process clause is a flexible concept, its core principle revolves around the right to have a fair opportunity to be heard before a final decision is made concerning the

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upon by other originally established constitutional provisions. Specifically, we can observe this in Article 24 of the Italian Constitution, and the overarching principle articulated in Article 3, as I will deeply specify in this paragraph.

[11] The U.K. justice system must know a specific due process of law provision. However, the origin is generally attributed to Clause 39 of the Magna Carta, in which John of England promised,"[n]o free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived or deprived of his standing in another way, nor we will proceed with force against him, or send other to do so, except by the lawful judgment of his equals or by the law of the land." MAGNA CARTA (G.R.C. Davis ed., British Library 1995) (1215), *The Text of the Magna Carta*, FORDHAM UNIV., INTERNET HISTORY SOURCEBOOKS PROJECT, https://origin-rh.web.fordham.edu/halsall/source/magnacarta.asp [https://perma.cc/GWQ2-ZUKM]. Despite this general provision, the term "due process of law" does not pertain to the English Law, which law, that is merely and indirectly informed to the natural justice principles, as it is well explained by Geoffrey Marshall in his essay *Due Process In England*. Geoffrey Marshall, *Due Process In England*, 18 NOMOS 69 (1977).

[12] *See* Simona Grossi, *Procedural Due Process*, 13 SETON HALL CIR. REV. 155 (2017).

[13] *See* U.S CONST. amend. V; *see also* U.S. CONST. amend. XIV.

[14] Grossi, *supra* note 12, at 158 (explaining the separation process, which is described as the decline of the original writs and forms of actions (quoting THEODORE F. T. PLUCHNETT, A CONCISE HISTORY OF THE COMMON LAW 381–82 (5th ed. 1956))).

[15] *See, e.g.*, Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1 (2006); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993).

aforementioned fundamental rights;[16] accordingly, due process also means the fair and "accurate determination of decisional facts, and informed unbiased exercises of official discretion[,]"[17] that require—as a further core principle of the due process in civil cases—the neutrality of the decision-maker.[18]

One recent criticism against the jurisprudential concept of procedural due process, which deals with the delicate balance between fairness and efficiency when assessing the competing interests of parties, is that it appears overly broad.[19] Precisely, the grounds for critiques of the *function* of the due process, are traditionally viewed as unfavorable. It means that a "due process analysis would factor in the past, but would not lead the past control the present, a result that would clearly be inconsistent not only with due process but with the very essence of the common law system, a system designed to be flexible, in service of the people, evolving with the people."[20]

On the contrary, the function of due process should be *positive*, which means that it must inspire legislative reforms and mainly impose "an obligation on the states to provide a judicial system that is fair, efficient and just."[21]

While the broader implications of this viewpoint undeniably pertain primarily to the United States, given their logical connection to a thorough examination of the existing civil procedure rules, doctrines, and jurisprudence,[22] it is noteworthy that, within the scope of this essay, the suggested interpretation of U.S. due process could potentially serve as a robust foundational element for a global vision of justice. Yet, a firmly established set of principles to steer reforms, regulations, and legal decisions is apparent in various continental legal systems, especially in those endowed with a written constitution, such as France, Spain, Germany, and Italy. Frankly, these foundational principles, which can bestow constitutional legitimacy to legal sources and jurisprudence, have steadily evolved within these systems after World War II. In Italy, they have been further bolstered in recent decades through constitutional reform and numerous decisions rendered by the Italian Constitutional Court.[23]

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[16] *See* Davis v. Scherer, 468 U.S. 183, 202 (1984) (Brennan, J., concurring) (stating that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner[]'" (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965))).
[17] Grossi, *supra* note 12, at 169 (quoting O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 797 (1980)).
[18] *See, e.g.*, Marshall v. Jerico Inc., 446 U.S. 238, 242–43 (1980) (emphasizing that the Court has "jealously guarded" the due process requirement of a neutral decision-maker by applying this requirement "in a variety of settings," including warrants issued by justices of the peace, state optometry board disciplinary hearings, and parole revocation proceedings).
[19] Grossi, *supra* note 12, at 177.
[20] *Id.* at 178.
[21] *Id.* at 180.
[22] *Id.* at 184–202.
[23] *See* Corte cost., 22 marzo 1971, n. 55, (It.), *in* RIV. GIUR COST. I, 824 (A compelling demonstration of the widespread pertinency of the core principles of due process raised in a pivotal early pronouncement by the Italian Constitutional Court concerning the right to be heard, the primary cornerstone of due process. This concept is linked to the subjective limitation of res judicata to the original parties, as third parties lacked the opportunity to participate in the proceedings and be heard prior to the judge's decision.).

In summary, regardless of one's viewpoint regarding fairness and efficiency as the fundamental principles of American due process of law, continental legal systems include these criteria in their sources of law. However, the level of detail may vary. This approach guarantees that these systems contribute to a due process guarantee that avoids criticism for being excessively vague and general. Additionally, these systems naturally guide every legal provision concerning due process, often directly through the *rationale* of case decisions.

Regardless of how due process is defined (or also formally not, as in France), it can be asserted that the core principle is universally recognized, albeit with variations in its application due to the distinct legal frameworks and sources of law established by each legal system. This disparity highlights a fundamental difference between the Anglo-Saxon legal tradition and the civil law context of regulation. In this regard, it is noteworthy that due process in civil proceedings is generally acknowledged within the civil law tradition through various legal sources. These sources include constitutions, the codes of civil procedure, and fundamental provisions established by the European Convention on Human Rights.[24]

Therefore, it is evident, beyond a strict comparison, that certain general principles underpin the foundation of due process in civil proceedings within civil law. These principles are articulated differently in each country's specific legal sources and regulations. Still, they are more detailed than the U.S. ones, even if they share the same common core. I can summarize, at minimum, them as follows:

> 1. *Right to be Heard*: Parties must have an opportunity to be heard and present their side of the case before a neutral and impartial tribunal. This principle includes the right to present evidence, cross-examine witnesses, and make legal arguments.
> 2. *Impartial Judge or Jury*: Civil cases are typically heard by judges or juries, and these decision-makers must be unbiased and impartial. Parties have the right to

[24] *See* Eur. Consult. Ass., *European Convention on Human Rights*, art. 6 (1948), *amended by* Protocols No. 11, 14–15, *supplemented by* Protocols No. 1, 4, 6–7, 12–13, 16, https://www.echr.coe.int/documents/d/echr/Convention_ENG [https://perma.cc/7WAM-2RMW], (signed by Italy, Germany, France, and Spain, for instance), which states:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order, or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

This article safeguards the right to a fair and impartial trial, a fundamental aspect of European human rights protection. It ensures that individuals have access to justice and can hear their cases before a competent, independent, and impartial tribunal.

challenge judges or jurors if they believe there is a potential for bias.

3. *Access to the Court*: Individuals can access the court system to seek redress for their grievances. This principle includes accessing the necessary legal procedures, forms, and assistance.

4. *Fair and Timely Proceedings*: Due process requires that civil cases are conducted fairly, efficiently, and without unnecessary delay. Parties should not be subjected to undue procedural burdens or delays.

5. *Equal Protection*: Due process also incorporates the principle of equal protection under the law, ensuring that all individuals are treated equally regardless of race, gender, religion, or other protected characteristics.

6. *Enforceability of Judgments*: Parties can enforce court judgments, including collecting damages or enforcing court orders.

Given that, anyone can note that these principles represent the natural common grounds for civil justice globally, as the reflection of a democratic judicial system. Hence, while the French, Spanish, and German constitutions do not use the term "due process of law" explicitly, they establish fundamental rights and principles that protect individuals' rights in civil proceedings.[25]

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[25] More specifically, in *France*, the concept of "procedural due process of law" is known as "le droit au procès équitable". It is a fundamental principle enshrined in the French legal system, which ensures that individuals involved in civil disputes are afforded certain rights and protections to provide a fair and just resolution of their cases. A key provision of the French Constitution, 1958 CONST. (Fr.), https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958 [https://perma.cc/9SKQ-6WC2], are worth underlining:

> Article 1 of the French Constitution states, "France shall be an indivisible, secular, democratic, and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race, or religion." *Id.* art. 1. This principle underscores the importance of equal treatment under the law, a fundamental aspect of due process.

The *German* legal system places a strong emphasis on protecting the rights of individuals involved in civil cases, starting with some key provisions of the Constitution, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW] (Ger.), *translation at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf [https://perma.cc/SW99-Y2J2], as follows:

> Article 2 guarantees the right to personal freedom, including a fair hearing: "Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law." *Id.* art. 2.
>
> Article 3 ensures equal treatment: "All persons shall be equal before the law." *Id.* art. 3.
>
> Article 103 protects the right to a fair trial, including court access and the right to be heard. "In the courts every person shall be entitled to a hearing in accordance with law." *Id.* art. 103.

The *Spanish* legal system places a strong emphasis on protecting the rights of individuals involved in civil cases, specifically through a couple of constitutional provisions, C.E., B.O.E., Dec. 27, 1978 (Spain), https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf [https://perma.cc/4TFE-9KEK]:

The Italian constitution incorporates a comprehensive framework that explicitly encompasses the concept of due process of law, also terminologically.[26] This framework embraces a series of principles that collectively govern the due process of law, including the "statement of reasons" and the accessibility of the Court of Cassation as an ordinary instrument for judicial review regarding matters of law, thereby reinforcing constitutional guarantees that uphold the concept and substance of due process.

Hence, it becomes evident that the initial step in shaping and ultimately educating on global civil justice involves recognizing that various democratic systems, despite their distinct structures, hold shared principles for governing civil proceedings. These principles can serve as a foundation for upholding the due process of law, transcending its terminological and substantive origins across different jurisdictions. However, the globally

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Article 24 guarantees the right to a fair trial in civil (and criminal) matters, including access to courts, the right to be heard, and the right to legal representation:

> 1. Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended.
> 2. Likewise, all persons have the right of access to the ordinary judge predetermined by law; to the defen[s]e and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defen[s]e; not make self-incriminating statements; not declare themselves guilty; and to be presumed innocent.

Id. art. 24.

Article 117 establishes the independence of the judiciary and its role in ensuring due process: "1. Justice emanates from the people and is administered on behalf of the King by Judges and Magistrates of the Judiciary who shall be independent, irremovable, and liable and subject only to the rule of law." *Id.* art. 117.

The more detailed civil justice system in terms of procedural due process is undoubtedly the *Italian* system.

[26] *See* art. 111 COSTITUZIONE [CONST.] (It.), *supra* note 10, stating that for civil proceedings:

> Jurisdiction shall be implemented through due process regulated by law. All court trials shall be conducted with adversary proceedings, and parties shall be entitled to equal conditions before a third-party and impartial judge. The law shall provide for a reasonable duration of trials. . . .
> All judicial decisions shall include a statement of reasons.
> Appeals to the Court of Cassation in cases of violations of the law shall always be allowed against sentences and measures affecting personal freedom pronounced by ordinary and special courts.

These set of principles are usually integrated by Article 24, which generally states that:

> Anyone may bring cases before a court of law to protect their rights under civil and administrative law.
> Defense is an inviolable right at every stage and instance of legal proceedings.
> The poor are entitled by law to proper means of action or defense in all courts.
> The law shall determine the conditions and forms regulating damages in case of judicial errors.

Id. art. 24.

shared principles that guide due process in civil cases are not exclusive to the adversarial system, which is well-known in the Anglo-Saxon region, particularly in U.S. procedural law.[27] As demonstrated, these principles naturally transcend various civil justice systems, whether adversarial or inquisitorial, challenging the classical dichotomy that has traditionally, but to some extent mistakenly,[28] been presented.

Looking at it from another perspective, this research endeavor can adopt this commonly held viewpoint to scrutinize country-specific technical regulations. Within a comparative framework, it can delve into how these regulations have addressed and adhered to the principles of due process. In doing so, it contributes to the evolution of comparative law in its contemporary and essential role in shaping policies and guidelines for reforming domestic laws of civil procedure to pursue the evolving needs of society and economy.

B. *RIGHTS VS. REMEDIES?*

Traditionally, the distinction between rights and remedies underpins the traditional understanding of civil law and common law, emerging from the role of law in safeguarding rights and yielding remedies. Civil law systems protect individual rights as delineated by legislative frameworks. In contrast, common law systems empower courts to use their judgments to adjust existing legal norms in response to profound societal shifts. Civil law courts are characterized as declarative, with remedies seen as legislative solutions to specific issues. In contrast, common law courts are *perceived* as inventive in their remedies, providing a judicial response to evolving circumstances of society and economy.[29]

However, the foundational cornerstone of global civil justice might be aptly characterized as the progressively diminishing gap between "rights and remedies", a traditional distinction between the legal traditions of common law and civil law. It is a widely acknowledged view among comparative legal scholars that a significant distinction between common law and civil law, although sometimes overstated, is that common law systems are often perceived as evolving through judicial decision-making. In contrast, European civil law systems are entirely constructed around the legal provision of individual rights.[30]

This overarching assumption needs more complete accuracy. Instead, it necessitates a redefined framework for the conventional dichotomy.

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[27] *See* Kuckes, *supra* note 15, at 11–12.
[28] *See* discussion *infra* Section II.D.
[29] *See* Joseph Dainow, *The Civil Law, and the Common Law: Some Points of Comparison*, 15 AM. J. COMPAR. L. 419, 427 (1967) ("[W]hile the common law starts with a case-law basis it also includes legislative encroachments, and while the civil law starts with a legislative basis, it incorporates developments of case-law."). For a recent critical approach to this specific topic, *see* Cesare Cavallini & Marcello Gaboardi, *Rights vs. Remedies: Towards a Global Model*, 28 U.C. DAVIS J. INT'L L. & POL'Y 171 (2022) [hereinafter *Rights vs. Remedies*].
[30] *See* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMPAR. L. 1, 23 (1991). *See* Dainow, *supra* note 29, at 423–24.

To begin with, it is crucial to start with the European civil law context, which a presumed clear distinction between the rights system and remedies system has distinctly influenced.[31] It is a common assumption in civil law that *remedies hinge upon rights*. This assumption implies that an individual holding a right is entitled to seek judicial relief;[32] and it is based on the preliminary categorization of the civil law system as a framework that arranges rights according to established legal provisions delivered by the legislature, government, or administrative agencies.[33] In other terms, "[r]ights – or better yet, their legal consecrations – logically and chronologically precede remedies."[34] While the assumption that remedies depend on rights has a historical reason, due to the classical *codification* of the civil law systems[35] as a complete set of written legal provisions that can be brought before a court,[36] in the civil law context, remedies directly enforce the rights that are considered worthy of being protected by those codes. The judicial remedy concretely conceives what abstractly is provided by the law as individual rights.

Hence, also the function of the claim and the inherent civil proceeding structure is according to that assumption: legislative bodies have the authority to define individual rights and establish their legal frameworks, while courts are responsible for ascertaining whether a particular right, as outlined by the law, exists or is absent in a specific case.[37] Nevertheless, a widely held view asserts that the court's role is more inclined toward conservatism than innovation within the civil law framework. This perception stems from the court's obligation to interpret and uphold rights by the legislature's abstract and pre-established framework. The court's conservative function becomes evident when adjudicating factual and legal matters pertinent to a lawsuit. This arises from the court's primary focus on preserving the current legal system rather than introducing radical changes.[38]

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[31] *See* INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Cappelletti et al. eds., 1985).
[32] *See generally* Matthias Ruffert, *Rights and Remedies in European Community Law: A Comparative View*, 34 COMMON MKT. L. REV. 307 (1997).
[33] *See* MARTIN VRANKEN, WESTERN LEGAL TRADITIONS: A COMPARISON OF CIVIL AND COMMON LAW 16, 21 (1st ed. 2015).
[34] Cavallini & Gaboardi, *Rights vs. Remedies*, *supra* note 29, at 176–77 (citing JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (3d ed. 2007) and Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 588 (1983)).
[35] *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 34, at 27.
[36] *See* Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 456 (2000). *See also* Gewirtz, *supra* note 34, at 588(who elucidates that civil law systems exhibit a closely knit structure defined by the interplay between written codified laws and legislative mandates).
[37] *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies-And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006).
[38] *See generally* Peter G. Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, 46 LA. L. REV. 241 (1985); *see also* Dainow, *supra* note 29, at 425. It is worth noting that the civil law courts' role of merely applying legal rules was the direct consequence of the Montesquieu doctrine called "mouthpieces of law", *see* CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 159 (Thomas Nugent trans., Hafner Publ'g Co. ed. 1949) (1748). *See also* Abram Chayes, *How Does the Constitution Establish Justice*, 101 HARV. L. REV. 1026, 1027 (1988) ("The judge was the mouthpiece of the law, nothing more**,** confined to the mechanical task of announcing consequences in particular *cases*." (emphasis added)).

However, even though the formal role of courts within the civil law framework expanded under the declaratory judgment doctrine, commonly regarded as the "mouthpieces of the law", in practice, the frequent adjudication inevitably entailed a substantial and discretionary interpretative function concerning the current legal provisions.[39] This interpretation must address every legal issue presented to the court, often not solved by the specific legal provisions since legal provisions seem inconsistent with other rules or, vice versa, the single case needs the concrete evaluation of general clauses, such as unfairness or good faith, in determining the meaning of the law as generally laid down by the legislature.[40]

Given the unexpectedly rapid pace of social changes, courts have expanded their role in addressing unprecedented legal issues and compensating for the legislature's slower adaptation. Courts predominantly utilize constitutional principles as the primary tool for interpreting the law in similar cases,[41] since the case cannot be decided under the existing legal provisions, and it needs to be approached differently but according to the general concepts provided by the applicable constitution. Definitively, whenever legal rules cannot resolve a new legal issue, or the legal issue exists. Still, it is controversial and unprecedented; the court's decision is driven by implementing constitutional principles: the so-called "'*constitutionally oriented interpretation*' of the existing statutory law."[42] made by the inferior courts on their own, permitted by the same constitutional court.[43]

The approach to deciding cases arising from social changes, driven by the judiciary's imperative to address evolving circumstances, not only extends to the safeguarding of citizens' expectations beyond the individual rights outlined in statutory law but is influenced, to a certain degree, by practical considerations. This shift has gradually steered civil law courts towards redefining the traditional dichotomy between rights and remedies. The judicial protection appears no longer a chronological outcome of a judicial declaration of existing rights: remedies, on the contrary, stem from the "appropriate judicial reaction to overwhelming social changes."[44]

While scrutinizing the continental law of precedent alongside the common law doctrine of stare decisis may aid in bridging the gap within this dichotomy, as explained in the following paragraph, it is crucial to emphasize that the reduction of this gap extends to common law systems as well, particularly in the context of the U.S. legal framework. While the issue

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[39] *See generally* Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of Constitutional Justice*, 35 CATHOLIC U. L. REV. 1 (1985); *see also* Cass R. Sunstein, *There Is Nothing That Interpretation Is*, 30 CONST. COMMENT. 193 (2015).
[40] *See* Frederick Schauer, *Constructing Interpretation,* 101 B.U. L. REV. 103, 115–16 (2021); Chris Willett, *General Clauses, and the Competing Ethics of European Consumer Law in the UK*, 71 CAMBRIDGE L.J. 412, 412 (2012).
[41] *See* Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 749 (1995).
[42] Cavallini & Gaboardi, *Rights vs. Remedies*, *supra* note 29, at 189 (quoting Corte. cost., 27 luglio 1989, n. 456, Foro it. 1990, I, 18 (It.)) (emphasis added), including footnotes, especially nn. 135–44, regarding a concrete illustration of how this methodology is applied in making decisions in cases that fall outside the direct protection of statutory law.
[43] Regarding the Italian system, *see* Corte cost., 27 luglio 1989, n. 456, Foro it. 1990, 1, 18 (It.).
[44] *See* Cavallini & Gaboardi, *supra* note 29, at 194.

might be one of proportion, it is undeniable that precedents continue to bear substantial influence on legal frameworks despite the inevitable expansion of statutory law in the U.S. due to societal complexity. Consequently, both statutory law and precedents, albeit in different proportions, tend to align towards a global model of remedial law, emerging as the preferred approach to address new cases arising from the evolving societal demands for protection.

C. *THE ROLE OF THE FIRST HEARING*

The role of the first hearing, one of the critical aspects defining the enduring impact of the dichotomy between common law and civil law systems, is unquestionably linked to the framework of civil proceedings and the pivotal role played by the first hearing before the judge. It reflects the divergent structure of the civil proceeding, also known as *adversarial* in the Anglo-Saxon legal tradition and *inquisitorial* in the civil law context. The contrast between the adversarial and inquisitorial models of civil justice is widely recognized in comparative discussions.[45] However, there is a need to revisit and clarify what this dichotomy truly signifies and implies within the broader context of global civil justice.

Generally speaking, the contrast between the two systems is traditionally rooted in the judge's function during the legal process and in resolving the case. The adversary system is conventionally viewed as an adjudication system where the involved parties govern procedural actions and the adjudicator plays a primarily passive role.[46] On the contrary, an inquisitorial system emphasizes the significant role of the judge in overseeing and directing the trial proceedings.[47] This dichotomy has reflected the differences, more than the commonalities, between the Anglo-Saxon legal systems and the Continental ones, and the most relevant difference has been marked by the interpretation of the purported *principle of concentration*, particularly among Anglo-Saxon scholars.[48]

It is essential to highlight the distinct perspectives from which the principle of concentration, extending beyond the literal interpretation of the

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[45] *See, e.g.*, MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 3–6 (1986) [hereinafter THE FACES OF JUSTICE]; Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT'L & COMPAR. L. REV. 1 (2011); Linda S. Mullenix*, Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 4 (2001).

[46] *See* DAMAŠKA, THE FACES OF JUSTICE, *supra* note 45, at 74; *see also* Franklin Strier, *What Can the American Adversary System Learn from an Inquisitional System of Justice*, 76 JUDICATURE 109 (1992); *see also*, recently, ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 127 (2d ed. 2019).

[47] *See, e.g.*, Benjamin Kaplan et al., *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193 (1958); Benjamin Kaplan et al., *Phases of German Civil Procedure II*, 71 HARV. L. REV. 1443 (1958).

[48] *See, e.g.*, OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 5 (2d ed. 2017) (noting that "[t]he concentration, orality, and immediacy of procedure, especially at the proof taking stage, are certainly related to the presence of the jury, as well as a passive role for the judge and the markedly adversarial nature of the proceeding."); *see also* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 524, 529–30 (2012); Benjamin Kaplan*, Civil Procedure-Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 419 (1960).

idiom, has been interpreted by both legal traditions.[49] Despite these varying interpretations, the principle maintains consistent significance under the consideration of U.S. scholars. It plays a similar role within the framework of the common law civil proceedings, and ultimately only in the U.S.

Contrary to this perception, the global perspective, which encompasses Continental rules and traditions, presents a different reality. It becomes evident that, since the Codification Era, the emphasis on ensuring concentration, immediacy, and orality has been vital to secure the most precise case decisions. This emphasis has been reinforced by the structure of civil proceedings, even in the absence of jurors, and in the formal separation between pretrial and trial phases.[50] Furthermore, the initial hearing, or the preliminary conference (akin to U.S. terminology), has increasingly become a distinguishing feature in modernizing the civil procedural model within the Continental context.[51] Simultaneously, the U.S. provision addressing this pivotal issue (Rule 16 of the Federal Rules of Civil Procedure)[52] has demonstrated a growing significance of the pretrial conference or even multiple such conferences as needed. These conferences are crucial for judges to efficiently manage claims and the evidence gathered during the discovery phase. They offer opportunities to resolve lawsuits through alternative means beyond jury trials, such as summary judgment and judicially-led settlements.[53] Hence, anyone might affirm that the principle of

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[49] Traditionally, Anglo-Saxon scholars have regarded the principle of concentration as a unique characteristic of common law systems, attributing its emergence to the pivotal role of jurors in England's courts of equity. Consequently, this historical principle, which initially implied that jurors made decisions based on a single hearing of evidence, evolved into a distinctive feature of civil proceedings structured by both the pretrial phase and trial by jury. Notably, it remains a fundamental aspect of the U.S. civil process framework. *See* Langbein, *supra* note 48, at 529; *see also* Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMPAR. L. 277, 293 (2002):

> A concentrated trial is virtually mandatory when a group of lay people is required to take time out of their work lives to hear and help decide a dispute, but is hardly necessary when the facts will be heard by a professional judge who will be at the court daily.

[50] More specifically, *see* Cesare Cavallini & Stefania Cirillo, *Reducing Disparities in Civil Procedure Systems: towards a Global Semi-Adversarial Model*, 34 FLA. J. INT'L L., (forthcoming 2023–24):

> More specifically, the principle of concentration indicates that a case should be treated in a single hearing[,] or in a few closely spaced oral sessions before the court, carefully prepared through a preliminary stage in which writings were not necessarily to be excluded. . . . [T]he principle of immediacy refers to a direct, personal, open relationship between the adjudicating organ and the parties, the witnesses, and the other sources of proof. Finally, the principle of orality means an efficient, swift, and simple method of procedure, based essentially on an oral trial in which the adjudicating body is in direct contact with the parties (not only with their counsel) and the witnesses.

according to GIUSEPPE CHIOVENDA, ISTITUZIONI DI DIRITTO PROCESSUALE CIVILE [FOUNDATIONS OF CIVIL PROCEDURAL] 371–72 (1934).

[51] *See* Cesare Cavallini & Stefania Cirillo, *The Americanization of the Italian Civil Proceedings?*, 57 N.Y.U. J. INT'L L. & POL. (forthcoming 2024), on the reform of the 2022 Italian civil justice, and the full-renewed framework of the first hearing, in so resembling the U.S. model. *See also infra* pp. 20–22.

[52] *See* FED. R. CIV. P. 16.

[53] *See* Langbein, *supra* note 48, at 542.

concentration today represents the primary tool to guarantee the "day-in-court,"[54] equivalent to the trial by jury phase. On the contrary, it is widely recognized that this principle shapes the course of the pretrial phase, by delegating managerial authority to the judge to delineate the lawsuit's parameters and guide it towards a swift and efficient resolution.

The 2022 Italian reform on civil justice serves as tangible evidence of the redefined significance of the principle of concentration, now recognized as a universal foundation within civil justice systems, transcending the unique procedural frameworks of specific countries. The reform introduces a novel element to the Italian legal system by assigning a distinct role to the initial hearing, which deviates from the conventional Continental model. Before the reform, Italian legal proceedings lacked a clear distinction between pretrial and trial phases. Parties were permitted to introduce facts and evidence right from the outset of the proceedings, subject to specific time constraints stipulated by the Code of Civil Procedure, which expired as the proceedings unfolded. The process commenced with introductory pleadings, followed by the inaugural hearing, during which parties typically sought permission to submit up to three pleadings, a request usually granted by the presiding judge.[55]

Since the first hearing was void, the 2022 reform alters the function of the first hearing, aiming to elevate it as the primary forum for discussing the claims. The first hearing signifies the point at which the judge formally enters the proceedings to address the dispute and explore potential solutions.[56] These solutions may encompass traditional adjudication and alternative approaches such as judicially guided settlements or expedited resolution methods.

Therefore, under the reform, the first hearing takes place, and the judge steps into the scenario, acknowledging the lawsuit's parameters, but only after the parties have submitted their pleadings. During this hearing, the judge is presented with various options, which are justifiable given the comprehensive understanding of the claim at this stage. One option is to arrange one or more hearings to examine witnesses and engage with the parties, following a review of the admissibility and relevance of the parties' oral evidence requests. Alternatively, the judge may facilitate a judicial settlement between the parties.[57] In another scenario, the judge can opt for

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[54] DAMAŠKA, THE FACES OF JUSTICE, *supra* note 45, at 51.

[55] The parties could outline or revise their claims and defenses in the initial pleadings, which had to be filed within 30 days of the judge's order. In the subsequent round of pleadings, due within 30 days after the expiration of the first set, the parties could respond to the initial pleadings and introduce requests for evidence. In the third round of pleadings, to be submitted within 20 days following the expiration of the second set, the parties could request counterevidence to contest the evidence presented by the opposing party in the second set of pleadings. These successive pleadings delineated the scope of the dispute regarding factual matters, documentary evidence, and requests for non-documentary evidence. *See* CODICE DI PROCEDURA CIVILE [C.p.c.] [CODE OF CIVIL PROCEDURE], § 183, ¶¶ 1–3 (It.), *in* SIMONA GROSSI & CRISTINA PAGNI, COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE 203 (2010).

[56] Specifically, the 2022 reform mandates that, during the initial hearing, the parties must establish the final set of facts to be proved and claims, a task that the first hearing can fulfill because it also necessitates that the parties define the parameters of the facts, evidence, and claims before the hearing begins.

[57] *See infra* Section II.G.

summary adjudication[58] or, if the case is prepared for a decision, initiate the conventional adjudication phase, which involves a final exchange of written submissions between the parties.

Hence, the essence of the new structure hinges on the comprehensive and definitive resolution of the factual aspects of the dispute and the corresponding requests for relief before the first hearing. While it may not appear groundbreaking or novel compared to the traditional U.S. pretrial phase guided by the Federal Rules of Civil Procedure and its provision for a preliminary conference, it does mark a distinct shift from the perspective of the Italian judge.

However, the pivotal aspect is the expanded significance assigned to the first hearing under the reform, and it is this alteration that draws parallels with the outcomes of the U.S. pretrial phase. Without a doubt, in both systems, the most influential tool in this transformation has been the broadened scope of the preliminary conference—the first hearing, and the expanded role and authority of the judge during and following this crucial event. This shift emphasizes the growing importance of managerial judging and the associated authority granted to the pretrial judge to succinctly encapsulate pertinent facts, evidence, and legal arguments.[59]

Therefore, it is inaccurate to label the U.S. pretrial phase as purely adversarial, given that the judge's active involvement in discovery control and the pivotal role of the preliminary conference extends beyond merely preparing for the trial phase. In most cases, this phase is where disputes are resolved without resorting to conventional adjudication and formal trials.[60]

Moreover, this expanded focus on the central role of the first hearing is further substantiated by the German model of the first hearing and the ELI/UNIDROIT Model European Rules of Civil Procedure. [61] Both models, with the first representing established rules and the second embodying an unofficial legal framework, establish a civil litigation structure emphasizing a *two-phase system*. This system involves a first hearing of substantial density, with a primary focus on the pivotal role of the judge in devising swifter methods for resolving the dispute.

Yet, German law provides that the civil proceeding structure is dominated by a well-prepared "*main* hearing" (*Haupttermin*),[62] by which the

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[58] *See infra* Section II.F.

[59] *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 825 (1985).

[60] *See* Cavallini & Cirillo, *The Americanization of the Italian Civil Proceedings?*, *supra* note 51. We tried to demonstrate that today even the U.S. model of civil proceeding (as defined by the 1938 Federal Rules of Civil Procedure) is switching to a quite different *semi-adversarial* model, in so converging towards a spontaneous but global outreach of the new predominant trend of the civil justice model.

[61] *See infra* Section II. It is important to highlight that when it comes to more intricate matters, specifically within the context of the judge's responsibilities in managing legal proceedings, the framework proposed by the ELI uniform rules, while categorized as a form of soft law, could indicate a growing trend towards a more comprehensive global civil justice model.

[62] *See* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 272, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0999 [https://perma.cc/7XHU-GRYQ] (Ger.):

judge, after hearing the parties, can take some different determinations to put the dispute in the decision's pipeline. Similarly, the uniform civil proceeding model embraced by the ELI is founded on a two-phase system, albeit with a greater emphasis on flexibility, contingent upon the complexity of the specific case.[63] Nonetheless, this standardized model places its primary focus on a "final hearing", effectively supplanting the German "main hearing" model, and is designed to guide the resolution of disputes through various procedures established by the judge's case management. [64]

Conclusively, one can say that a more universally acknowledged element of the global civil justice framework shall be symbolized by the growing significance of the first hearing, which, although named differently in each country's specific civil procedure laws, plays a vital role in shaping the trajectory of the proceedings and the end-types dispute resolution, balancing effectiveness with efficiency and following the due process duties, but seriously looking at a quick dispute resolution.

D. *FACT-FINDING AND DISCOVERY*

As the civil litigation framework gradually adopts a more globally semi-adversarial approach, variations persist in the fact-finding and discovery phase across different legal systems. This particular aspect presents the most significant challenge to comprehensively understanding the fundamental principles of global civil justice despite some persistent differences in technicalities and traditions. Although the traditional contrast between the adversary and inquisitorial models in civil proceedings can be linked to a shared sense of values and policies, reconciling these differences remains complex, especially in fact-finding and discovery.

This chapter assesses whether the existing divergence in procedural frameworks for discovering and taking evidence, as we can observe between the adversarial justice model and non-adversarial approaches (representative of the contrast between the Anglo-Saxon and Continental systems), should be redefined and partially aligned. This evaluation also takes into account the 2022 Italian reform of civil justice.

1. *Adversarial vs. Inquisitorial Model?*

(1) As a general rule, the legal dispute must be dealt with and terminated in a hearing for oral argument that has been comprehensively prepared for (main hearing).
(2) The presiding judge shall either make arrangements for an advance first hearing at which oral argument is to be heard (section 275) or shall have preliminary proceedings conducted in writing (section 276).
(3) The conciliation hearing and the oral argument should be arranged as early as possible.
(4) Matters entailing the vacation of premises are to have priority and shall be conducted on an expedited basis.

[63] *See also* Remo Caponi, *Le regole modello europee Eli-Unidroit sullo sfondo della riforma italiana del processo civile*, 76 RIV. TRIM. DIR. PROC. CIV. 717, 751–53 (2022).
[64] *See* ELI-UNIDROIT MODEL EUR. RULES OF CIV. PROCEDURE Rules 61–64, *supra* note 8, at 8.

Firstly, it is necessary to establish the distinct fundamental structures usually employed in both legal systems to shape the so-called *discovery phase*, as they are essentially shaped above the dichotomy between the adversarial model and the inquisitorial one. The first is the legal realm of the lawyers, since it conventionally stems from an adjudicative framework, wherein the involved parties wield control over procedural actions. At the same time, the adjudicator typically assumes a passive role.[65] Furthermore, the adversarial system is characterized by distinct phases: the pretrial and the trial. During the trial phase, the jury holds the responsibility for decision-making. The jury stands as a distinctive feature of "adversarial legalism."[66]

In terms of discovery and evidence collection, this system places exclusive responsibility on the litigants and their attorneys to pursue evidentiary material, ready it for trial, and present it in court without direct involvement from the judge.[67]

On the contrary, an inquisitorial system highlights the judge's significant involvement in overseeing and managing the trial process. There exists no difference between pretrial and trial phases: a claim denotes a singular event, the trial, which is organized across multiple hearings, even if the recent 2022 Italian civil justice reform moves differently, assigning to the first hearing a crucial and, in some cases, exclusive role.[68] In Continental Europe, the concept of a jury trial is absent; the sole decision-maker in this context is a judge.[69] Regarding the initial stage of a legal case and the process of gathering evidence in an inquisitorial system, the decision-makers assume a more comprehensive role collecting and evaluating evidence.

However, this classical division is noteworthy and deserves further clarification. The primary distinction arises from the structural differences in civil proceedings, with the civil law framework appearing to be more pertinent in comprehending the intricacies of the matter in question. Indeed, it is essential to recognize that within every Continental system, rooted in the civil law tradition, there exists multiple significant stages for disclosing and discovering information. Hence, a close link exists between the initial and subsequent stages, primarily involving pleading and responses. Here, despite certain country-specific variations and the absence of a clear demarcation between pretrial and trial stages, parties can introduce new facts and corresponding evidence to bolster their claims.[70] The judge has been

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[65] *See* MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 74 (1997); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 4–8 (2d ed. 1977); Robert W. Millar, *The Formative Principles of Civil Procedure*, 18 ILL. L. REV. 1, 9–24 (1923); Franklin Strier, *What Can the American Adversary System Learn from an Inquisitorial System of Justice?*, 76 JUDICATURE 109, 109 (1992); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 127 (2d ed. 2019).
[66] *See* KAGAN, *supra* note 65, at 127.
[67] *See* DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 65, at 74. *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 381 (1982) (explaining the historical pattern of the limits placed on the judges by the adversarial model).
[68] *See infra* Section II.D.
[69] *See* Strier, *supra* note 65, at 109–11.
[70] *Id.* For further technical details, mainly on the German and Italian Code of Civil Procedure, *see* Cesare *Cavallini* & Stefania Cirillo, *Reducing Disparities in Civil Procedure Systems: Towards a Global Semi-Adversarial Model*, 34 FLA. INT'L L.J. 6–9 (forthcoming (2023–24)). Even after the

involved since the beginning of the process, and it justifies the role taken by the judge in selecting the non-documentary evidence and counterevidence requested by the parties during the previous phases. The judge's active role in collecting admissible and relevant evidence, and their task in evidence-taking, need some subsequent hearings; this task is deeply rooted in the Continental systems, different from the Anglo-Saxon adversarial model.

Therefore, it is crucial to emphasize the existing disparities between these two systems, regarding, for example, taking evidence from a witness presented by the parties: in the U.S. system, for instance, the lawyer has the power to prepare a witness (and expert), and can scrutinize them directly through cross-examination.[71] Conversely, under Continental regulations, the judge directly gathers evidence from witnesses and experts, occasionally allowing certain lawyer activities in cross-examination, always with prior permission from the judge.[72]

Ultimately, is this difference in the fact-finding process, regardless of the civil proceeding structure, substantial enough to hinder the establishment of a global pattern across legal systems?

2. *The Fact-Finding Semi-Adversarial Model as a Global Tendency*

The response to the preceding question is sophisticatedly pessimistic. The essence of this statement extends beyond simply comparing the two legal systems and their traditional dichotomy between adversarial and inquisitorial systems. The argument would have been approached differently if it were solely about this comparison.

The traditional dichotomy needs to be revised; it has merely served as a characterization of both systems, and frequently, has represented an oversimplified, irreducible contrast that hampers a more comprehensive vision and understanding of the subject matter. However, discussing an adversarial proceeding essentially involves delineating the distinction between pretrial and trial-by-jury systems, regardless of whether civil or criminal cases are at hand. In simpler terms, it signifies that the increased involvement of the parties (primarily the lawyers) stemmed from the framework of civil proceedings. The resulting decreased participation of the judge is a direct outcome of this structure. Jurors were instituted to hear all factual issues and evidence orally during the proceedings. They were held responsible for adjudication during a particular stage of the process—the trial phase—following the "dialectical paradigm of truth-seeking"[73] to the fullest extent. In this phase, parties and lawyers could influence the course

2022 Italian civil justice reform, the dual-stage process of presenting facts and evidence persists, despite alterations to the civil procedural framework and the enhanced significance of the initial hearing. *See infra* Section II.D.

[71] *See* FED. R. CIV. P. 26, 27, 30.

[72] *See* CODICE DI PROCEDURA CIVILE [C.p.c.] [CODE OF CIVIL PROCEDURE], art. 262 (It.); DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 65, at 105–08.

[73] KAGAN, *supra* note 65, at 127.

of the proceedings and even waive procedural rules through mutual agreement.[74]

Initially, the U.S. system operated as described. However, significant changes swiftly ensued. These changes encompassed the crisis of the so-called notice-pleading, the rise of managerial judging during the pretrial phase, exerting control over the discovery phase to prevent abuse and high costs for the involved parties,[75] and a noticeable decline in the party's (and lawyers') interest in relying on jurors for adjudication.[76]

These relevant changes in the conceptualization and practice of the civil justice system in the U.S., together with the UK Lord Wolff civil justice reform in the late '90s [77] have unavoidably broken the traditional dichotomy between adversarial and inquisitorial systems as the main prerogative of the fundamental gap between the two legal families.[78]

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[74] *Id.*

[75] *See* Cesare Cavallini, *Determination of the U.S. Pleading from the Civil Law Perspective*, 21 WASH. U. GLOB. STUD. L. REV. 155 (2022).

[76] *See* Marc Galanter, *The Decline of Trials in a Legalizing Society*, 51 VAL. U. L. REV. 559 (2017); Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 27 (2017); Langbein, *supra* note 48; Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013).

In the U.S., less than 1% of the filed civil cases are resolved through a trial at the federal level. *See U.S. District Courts–Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2018*, DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2018.pdf [https://perma.cc/RF6Z-544W] (in 2018–19, just 0.9% of federal civil filings reached trial); *U.S. District Courts–Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12s-Month Period Ending September 30, 2021*, www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2021.pdf [https://perma.cc/Z87Z-3T2N] (in 2020–21 just 0.5% of federal civil filings reached trial).

See Herskhoff, *supra* note 2, (manuscript at 6) (mainly considering how, in reality, "many have argued that US procedure "is much the worse . . . in normative terms" because of its exceptionalism, underscoring the expense of US litigation and the litigiousness of American legal culture.").

[77] *See* John A. Jolowicz, *The Woolf Report and the Adversary System*, 15 CIV. JUST. Q. 198 (1996); more recently, *see also* JOHN SORABJI, ENGLISH CIVIL JUSTICE AFTER THE WOOLF AND JACKSON REFORMS 107 (2014).

Jolowicz's work likely explores the implications of the Woolf Report, a significant review of the civil justice system in England and Wales conducted by Lord Woolf. This report led to substantial reforms in the late 1990s to enhance access to justice, efficiency, and fairness within the civil justice system. Jolowicz might discuss how these reforms affected the traditional adversary system, a cornerstone of the English legal system, and whether they altered the balance between adversarial and inquisitorial elements.

Sorabji's book likely provides an updated analysis, focusing on the impact of the Woolf reforms (initiated by Lord Woolf) and subsequent reforms led by Lord Jackson. The book may delve into the changes in civil justice procedures, case management, costs, and access to justice resulting from these reforms. Specifically, it might explore how these reforms have affected the traditional adversary system and whether they have introduced elements more aligned with an inquisitorial approach, given the overarching aim of making the system more efficient and user-friendly.

Both Jolowicz's article and Sorabji's book are likely valuable resources for understanding the evolution of the English civil justice system, how it has responded to the need for reforms, and the impact of those reforms on the *traditional notions of adversarial proceedings*. They may also shed light on whether these changes have bridged the gap between the adversarial and inquisitorial approaches in pursuing better justice administration.

[78] It is worth summarizing that the adversarial system, primarily employed in common law countries like the United States, emphasizes the role of opposing parties that present their cases before an impartial judge or jury. This system relies heavily on the parties gathering evidence, examining witnesses, and advocating for their positions.

On the other hand, the inquisitorial system, more commonly found in civil law jurisdictions like many European countries, features judges taking a more active role in investigating and

However, with evolving legal reforms and changing practices, many legal systems have adopted elements from both systems to create a more flexible and efficient approach. For instance:

> *a. Managing Judge and Case Management Reforms:* The U.S and UK have implemented the managing judge and case management reforms aimed at streamlining procedures, encouraging pre-trial settlements, and ensuring cases move through the system more efficiently. These reforms often involve active judge involvement in case management, particularly in the discovery phase.[79]
> *b. Evidence Gathering Procedures:* While adversarial systems historically placed the burden of evidence gathering on the parties, modern reforms have seen judges play a more active role in managing evidence and fact-finding procedures. Many jurisdictions have introduced changes in procedural rules to encourage cooperation

determining the facts of a case. The judge plays a more proactive role in examining evidence and questioning witnesses.

[79] The idiom and the idea of a managing judge in the U.S. has grown in the early '80s, principally from the iconic article written by Judith Resnik, *see* Judith Resnik, *Managerial Judges,* 96 HARV. L. REV. 374 (1982), even partially criticizing the phenomenon, already at stake in those years. The U.S. legal system has evolved from its purely adversarial nature to reflect aspects of the Continental civil law model. This shift is evident during different stages of the pretrial phase, where judges are increasingly involved in managing the discovery process. This increased judicial participation aims to address criticisms of lawyers engaging in what is referred to as a "fishing expedition", which had led to excessive costs over time. *See, e.g.*, Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994). It is worth noting, also, that the so-called "abuse of discovery" has been one of the essential reasons raised by the U.S. Supreme Court in transforming the pleading's determination. *See* Cavallini, *supra* note 75, at 166.

In conclusion, U.S. judicial activism has yet to focus primarily on penalizing excessive discovery. Instead, it has influenced the way legal claims are presented. This influence resembles the Continental judicial practice of identifying claims and reshaping U.S. pleading content. As a result, it establishes a significant boundary on party discovery within the U.S. legal framework. The amendments introduced in 2006 and 2015 that pertain to various elements within the discovery process, alongside the overarching framework of Rule 26(f) that highlights the importance of pretrial discovery plans, collectively complement Rule 16 as managerial instruments. These tools aim to streamline case proceedings, fostering an environment conducive to rendering decisions based on the intrinsic merits of the case. *See also* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010).

Moreover, the importance of judicial management within the reformed English legal system, particularly in cases of substantial value and complexity, underscores the pivotal role of the judge in guiding the process right from its inception. Consequently, the English legal process now bears a resemblance, in broad terms, to the initial crucial involvement of judges seen in many Continental systems. Similar to the United States, the downsizing of the traditionally adversarial-based Anglo-Saxon legal system undeniably reflects a gradual convergence with aspects of the Continental legal tradition. *See, e.g.*, ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE – PRINCIPLES AND PRACTICE 277 (4th ed. 2021).

> between parties [80] and early disclosure of evidence,[81] borrowing aspects from adversarial and inquisitorial systems.

As a result of these reforms and changes, the strict dichotomy between adversarial and inquisitorial systems has become less pronounced. Legal systems now often incorporate elements from both approaches to better serve the goals of justice, efficiency, and fairness. The traditional divide between these systems is increasingly seen as a spectrum rather than a rigid binary classification.

Therefore, if we consider the so-called inquisitorial model, one might only perceive the Continental judge's responsibility as choosing the non-documentary evidence collected by the involved parties; [82] we can recognize that this way of proceeding is in contrast with the Anglo-Saxon system, which permits lawyers to prepare witnesses and examine them through cross-examination.[83]

Instead in the so-called adversarial model, the evidence may be deemed inadmissible if it is considered irrelevant or if it aligns with the criteria outlined in the "exclusionary rules."[84] Specifically, evidence connected to a fact relevant to proving the case is considered pertinent.[85] Apart from adhering to strict exclusionary rules, judges possess discretionary authority to exclude evidence based on regulations to prevent the admission of evidence that could undermine the fairness of the proceedings.[86]

Considering the considerations above regarding the primary role of the initial hearing on a global scale, it is crucial to note Stephan Subrin's assertions in his thought-provoking article: "Active case management in the

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[80] *See*, in the U.K., the Allocation Questionnaire and the Subsequent Allocation Hearing outlined in CIVIL PROCEDURE RULES [CPR], 26–29 (UK). These mechanisms emphasize collaboration between legal representatives and the judge, shifting away from the conventional adversarial model. Instead, they underscore the judge's managerial role in ascertaining the appropriate trajectory for the lawsuit through cooperative engagement among all parties involved. The potential triple allocation of lawsuits into small-track, fast-track, and multi-track hinges on the proactive involvement of the judge. This role supports the adversarial role the parties' lawyers assumed, particularly concerning pre-action disclosure. The Civil Procedure Rules (CPR) entail crucial responsibilities for the judge, including issuing orders, providing directions, and overseeing case management, all aimed at guiding the lawsuit toward the most efficient resolution possible.

[81] In the United States, early disclosure of evidence refers to the procedure wherein parties engaged in a legal matter are either mandated or opt to share pertinent information and evidence at the outset of legal proceedings, sometimes even before formally initiating a lawsuit. This practice is intended to foster openness, ease dispute resolution, and streamline legal proceedings by enabling each party to access relevant information promptly. Early disclosure typically includes exchanging documents, witness statements, expert reports, or other materials crucial to the case. Its purpose is to encourage fair negotiations founded on comprehensive information, potentially leading to settlements and minimizing prolonged litigation. The specific protocols and guidelines governing early disclosure of evidence may differ among jurisdictions and might be governed by court regulations, local practices, or agreements among the involved parties.

[82] For instance, the Italian judge needs to assess whether the facts that the witness is required to testify about are crucial for resolving the case and hold legal relevance (for example, the witness is unable to testify about contracts exceeding a value of 2.58 Euros) CODICE DI PROCEDURA CIVILE [C.p.c.] [CODE OF CIVIL PROCEDURE], art. 244 (It.); CODICE CIVILE [C.c.] [CIVIL CODE], art. 2721 (It.).

[83] *See* FED. R. CIV. P. 26, 27, 30.

[84] DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 65, at 125.

[85] IAN DENNIS, THE LAW OF EVIDENCE 5 (4th ed. 2010).

[86] *Id.* For further considerations, *see* Cavallini & Cirillo, *Reducing Disparities in Civil Procedure Systems: Towards a Global Semi-Adversarial Model*, *supra* note 70, at 9–11.

United States, including early control of discovery in some courts, *begins to resemble the judicial control exerted in civil law countries*."[87]

Furthermore, considering that Subrin's pertinent viewpoint was expressed before the recent Supreme Court pronouncements on pleading determination and the gradual departure from the initial concept and purpose of notice pleading,[88] it is evident that the increasing limitations on liberal discovery were initially associated with notice pleading. And "the difficulty of obtaining a dismissal for failure to state a claim,"[89] aligns with the corresponding SCOTUS amendments[90] in the revised concept of plausible pleading and the streamlined procedures for motions to dismiss and summary judgments.

The traditional dichotomy between adversarial and inquisitorial systems is reshaped, specifically regarding the fact-finding and discovery phase. Indeed, the ongoing discussion among U.S. scholars regarding the existing dichotomy eloquently shows that the issue encompasses the judge's managerial function in litigation, the credibility of the implausible pleading doctrine, the interpretation of the concentration principle, and, lastly, the significance of pretrial efficiency and efficacy as the best output of a litigation within the adversarial context. Our pivotal findings on these matters reaffirm that judicious utilization of a judge's managerial authority does not contradict a process that allows parties to engage in advocacy. It is crucial to rectify the distortions within this adversarial framework.

As I have outlined in the chapter on the global sense of the first hearing, due also to the recent civil justice reform in Italy (a typical continental and inquisitorial system, from the Anglo-Saxon viewpoint), the early stage of a lawsuit, involving the collection of evidence and a broad obligation of disclosure, does not inherently create a distinct separation between pretrial and trial phases. Stated differently, the practical function of a thorough initial phase we outlined can be carried out as an ongoing process. Additionally, we demonstrated that a preliminary phase predominantly managed by the involved parties does not contradict a system where the judge assumes a significant role in overseeing the lawsuit, particularly regarding methods of evidence collection.

Indeed, while there has been a move towards moderating adversary frameworks by incorporating a more active role for judges in the United States, this evolution has not forsaken the traditional adversarial nature inherent in the Anglo-American legal procedure, which primarily revolves around the lawyers' contest, albeit under judicial supervision.

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[87] Stephan N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 306 (2002) (emphasis added). The author reruns some common law countries' specific rules of fact gathering and evidence, and underlines how, in most cases, the court allows judicial permission or control of documents, discovery, and non-parties' depositions (Canada and Japan, for instance). *See also* Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMPAR. L. 153, 185 (1999); Edward F. Sherman, *The Evolution of American Civil Trial Process Towards Greater Congruence with Continental Trial Practice*, 7 TUL. J. INT'L & COMPAR. L. 125 (1999).

[88] *See infra* p. 26 and note 76.

[89] Subrin, s*upra* note 87, at 311.

[90] *See infra* note 122–23.

Conversely, the emerging autonomy of attorneys in managing the preliminary phase before the judge's direct intervention reflects a characteristic of the Continental non-adversarial system. Nevertheless, this novel approach has yet to consider the judge's involvement in overseeing the lawsuit. Instead, it has shifted the judge's participation to a subsequent stage, his crucial role in the first hearing differently than in the past.

A novel system, termed "semi-adversarial", has surfaced, affirming the compatibility of these two distinct structures.

A global new semi-adversarial system is now at stake.

E. *JUDICIALLY-LED SETTLEMENT*

The increasing alignment of the judge's role in both legal systems, while some distinctions persist in the structure of civil proceedings, is particularly marked when we observe the rising prevalence of in-court settlements as a common way to resolve disputes.[91] What sets in-court settlements apart from other mechanisms that encourage agreements instead of formal adjudication, such as mediation, is the ongoing involvement of the judge in steering the resolution of the dispute. In this scenario, the judge assumes a dual role as a facilitator of the settlement and the ultimate decision-maker.

A global trend for in-court settlements stems from the recent Italian civil justice reform. While this reform implements the opportunity to reconsider the convergence of systems, putting into action the revised role of the initial hearing or preliminary conference,[92] the renewed Italian system has strengthened the judge's ability to facilitate settlements by instituting a procedure after defining the dispute's boundaries, similar to the practice in the U.S.[93]

Specifically, a provision titled "the conciliation attempt" provides that the judge, upon request of the parties, must schedule a hearing to discuss the possibility of settlement.[94] Moreover, under the provision titled "judge's conciliation proposal", the judge, during the first hearing or until the taking of evidence ends, may outline a settlement proposal and invite the parties to consider it, based on the nature and the value of the dispute, and only if the subject of the lawsuit allows easy and prompt legal solutions.[95] The Italian reform bolstered in-court settlements through two fundamental changes.

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[91] *See*, recently, Cesare Cavallini & Stefania Cirillo, *In Praise of Reconciliation: The In-Court Settlement as a Global Outreach for Appropriate Dispute Resolution*, 2023 J. DISP. RESOL. 52 (2023).
[92] *See infra* Section II.D.
[93] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEG. STUD. 459, 459 (2004); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 552 (1986); Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEG. STUD. 949 (2004); ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL (2009); Langbein, *supra* note 48, at 529; John H. Langbein, *The Demise of Trial in American Civil Procedure: How it Happened, is it Convergence with European Civil Procedure*, *in* CORNELIS H. VAN RHEE & ALAN UZELAC, TRUTH AND EFFICIENCY IN CIVIL LITIGATION 119 (2012).
[94] CODICE DI PROCEDURA CIVILE [C.p.c.] [CIVIL PROCEDURAL CODE], § 185 (It.).
[95] CODICE DI PROCEDURA CIVILE [C.p.c.] [CIVIL PROCEDURAL CODE], § 185 *bis* (It.).

Initially, it mandates the personal presence of the parties during the first hearing, enabling the judge to initiate conciliation attempts. The judge can discretionally consider nonattendance by a party as a further element of evidence on the facts brought before the court by the opposite party. This amendment effectively makes the judge's conciliation attempt mandatory under Italian law.

Secondly, the reform extends the judge's authority beyond the initial hearing, allowing them to propose settlements even during the final stages of litigation, such as when referring the case to decision.[96] Comparably to the U.S. system, the distinctive aspect of in-court settlements, divergent from other methods such as mediation that encourage agreement over adjudication, lies in the continued involvement of the judge. In this process, the judge serves dual roles as both a facilitator in settling and the ultimate decision-maker for resolving the dispute.

Becoming a global outreach, the judicially-led settlement must face several issues and concerns, primarily due to the unchecked managerial role it assigns to judges. In the United States, for instance, extensive literature criticizes the advocacy for in-court settlements due to the inherent dangers and drawbacks of judges' uncontrolled managerial responsibilities. The primary reservation of the "against settlement"[97] approach revolves around the potential for coercion, wherein parties and their attorneys might feel pressured into settling due to the judge's directive powers. This influence could impede the parties' freedom to choose whether to settle, as there might be apprehension that refusal to conciliate could unfavorably impact the final decision. Another concern relates to the disparity in resources between the parties.

Since parties often possess unequal bargaining power, encouraging settlements might force the weaker party to accept an unjust deal.[98] More importantly, there needs to be more concern about how involvement in settlement activities could affect a judge's independence. This potential influence raises worries about the judge's ability to maintain impartiality and neutrality regarding the case.[99]

In this regard, it is important to highlight that, unlike the U.S. system, Italian law mandates a distinct and compulsory settlement hearing conducted in the presence of the involved parties. This hearing occurs within the trial proceedings, which inherently focus on adjudication.[100] The evolution towards a "structured" in-court conciliation signifies a mandatory aspect within civil law countries' legal processes. This conciliation is now governed by the civil procedure code, ensuring a regulated and mandatory

[96] For an in-depth analysis of these two aspects of the Italian reform, *see* Antonio Carratta & Cesare Cavallini, *Judicial settlement e modelli di tutela a confronto*, 2 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 427 (2022).
[97] *See*, expressly, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984); *see also* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 552 (1986); Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 108 (1986).
[98] *See* Resnik, *supra* note 67, at 426–31.
[99] *See id.*
[100] *See id.*

presence in these proceedings; exploring the dialectical and competitive interplay between adjudication and in-court settlement involves analyzing their dynamic relationship within legal proceedings.[101]

Furthermore, a distinct and precise regulation that effectively oversees in-court settlement and encompasses the aforementioned aspects can solve the questions about the impartiality of the judge (the trial judge, in both systems). Indeed, if the judge is required to document the negotiation proceedings, along with the evident and persistent intent of the parties to resolve the dispute, the same judge's equidistance is assured, as the Italian law, for instance, provides a specific and autonomous rule.[102]

Apart from the recent Italian legislative reform, the backing for judicially-led settlement initiatives is expanding internationally, which seek to advocate for this type of dispute resolution on a broader spectrum. This pattern is demonstrated by the laws in Germany and France, where the trilateral negotiation of disputes before the court is widely considered suitable and shared.

The German legal system thus provides in Section 278 of the German ZPO (Code of Civil Procedure) that the judge can seek an agreeable resolution of the dispute: "In all circumstances of the proceedings, the court is to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue."[103] This occurs at the beginning of the first hearing, during which the judge reconstructs the facts alleged by the parties, considers the legal arguments of each party, and then asks both parties if they are willing to enter into a settlement agreement. At the conciliation hearing, the judge endeavors to achieve an agreeable resolution of the legal dispute, provided that efforts have yet to be made to reach an agreement out of court, or decides that conciliation holds no prospect of success. The judge discusses the circumstances, facts, and dispute status up to that point with the parties, assessing all cases without any constraints and posing questions where necessary. The appearing parties must be personally heard on these aspects.

If this initial attempt is unsuccessful, a second phase begins in which German judges reintroduce the attempt at a conciliatory solution after witness testimony has been taken. Even after a first-instance judgment has been issued and the losing party appeals, the German appellate court will again attempt to encourage the parties to reach a conciliatory agreement.

Despite all these advantages and options for resolving the dispute through conciliation, there is no obligation for the parties to reach an amicable solution. Instead, incentives are provided to reduce legal costs if

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[101] *See* Michele Taruffo, *I modi alternativi di risoluzione delle controversie*, *in* LUIGI P. COMOGLIO ET AL., LEZIONI SUL PROCESSO CIVILE 152 (1998). *See also* Cavallini & Cirillo, *In Praise of Reconciliation: The In-Court Settlement as a Global Outreach for Appropriate Dispute Resolution*, *supra* note 91, at 81.

[102] CODICE CIVILE [C.c.] [CIVIL CODE], § 185 *bis* (It.).

[103] ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 278 (Ger.), *translation at* https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1032 [https://perma.cc/6GJR-9HBV]. *See also* Rolf Stürner, *Mediation in Germany and the European Directive 2008/52/EC*, *in* LA MEDIAZIONE CIVILE ALLA LUCE DELLA DIRETTIVA 2008/52/CE 45 (Nicolò Trocker & Alessandra De Lucaeds eds., 2011).

the parties agree to the conciliation proposal. Hence, in the German legal system, mediation only partially stands as an alternative to proceedings before state judges. It thus becomes an internal or near-court mediation, merging with the same process within the civil proceeding and the judge's activities. The judge either directly assumes the role of a *facilitator* or suggests that the parties engage in a mediation process before another judge acts as a mediator. In essence, it is not a dispute resolution method used solely to address excessive delays in legal proceedings, but rather a method to achieve a more balanced and fair solution in disputes that possess characteristics, making their resolution through legal processes unsatisfactory for the involved parties.

Equally noteworthy from this perspective is the *French legal system*. Yet, among the tasks generally assigned to the judge is also reconciling the parties (Article 21 of the French Civil Procedure Code).[104] The French legal system, however, seems even more encouraging than judicially-led settlement, explicitly focusing on the so-called *mediation judiciarie*. Article 131-1 thus states, "[a] judge seized of litigation may, after [obtaining] the consent of the parties, appoint a third person who will hear them and confront their points of view to help them resolve the dispute dividing them."[105] It is the judge who sets the duration of the mediation procedure and can end it at any time upon either party's request, at the mediator's initiative, or even *sua sponte*, when it seems that the possibility of settling is compromised.[106]

Ultimately, the regulations within the realm of civil law demonstrate a shift in the judiciary's role from being an indirect coercive force in private matters to becoming a mechanism focused on restoring relationships among involved parties. Additionally, the judge's inclination to consider interests to achieve a conciliatory resolution highlights a more significant disparity between the legal response and the customary conflict resolution. This characteristic particularly exemplifies the French judicial system's diverse and inclusive justice model.[107]

Owing to the challenges brought about by globalization, nations worldwide are undertaking reforms within their civil procedural systems. These reforms primarily focus on introducing new institutions, such as Alternative Dispute Resolution (ADR), to address the inefficiencies and ineffectiveness prevalent in civil processes. Among these reforms is promoting judicially-led settlements, which stands out as an alternative tool, despite taking place within the courtroom. The widespread adoption and support for settlements indicates a global shift towards a new procedural philosophy gaining traction globally. Furthermore, approaches like judicially-led settlement, which bolster conciliation, should be viewed as

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[104] Article 21 of the French Code of Civil Procedure states, "[t]o conciliate parties is part of the mandate of the judge." CODE DE PROCÉDURE CIVILE [C.p.c.] [CIVIL PROCEDURE CODE], art. 21 (Fr.), *translation at* https://allowb.org/acts_pdfs/CPC.pdf [https://perma.cc/662F-7GBV].
[105] *Id.* art. 131.1.
[106] *Id.* art. 131-10.
[107] *See* Francois Ruellan, *Les modes alternatifs de resolution des conflits: pour une justice plurielle dans le respect du droit*, SEMAINE JURIDIQUE 135 (1999).

something other than adversaries to adjudication. Adjudication and settlements complement each other; they are not mutually exclusive justice tools. On one hand, conciliation offers advantages to the involved parties by considering the interests and requirements of the litigants. Additionally, for the benefit of society, it strives to promote peaceful resolutions and strengthen, rather than weaken, the role of legal precedents, contributing positively to reducing caseloads and assisting judges in establishing sound precedents. These robust precedents serve as guidelines for shaping the terms of future settlements.

The necessity of addressing delays, costs, and limited access to justice has underscored the importance of introducing a new primary focus within the judicial process—one that extends beyond solely pursuing the truth, moving from substantive to distributive justice as a twofold but complementary framework. Hence, the judicial system's role extends beyond solely rendering just decisions based on law and facts; it also involves equitably allocating resources among all individuals seeking justice. The endorsement of in-court settlements as an effective means to improve efficiency and access to justice aligns seamlessly with this evolving philosophy in civil procedure.[108]

In summary, a global readiness exists within society for a fundamental shift in litigation culture and a fresh perspective on civil justice.

F. *STARE DECISIS, PRECEDENT, AND THE RULE OF LAW*

One of the most significant global civil justice principles is stare decisis (*et non quieta movere*). Although this principle classically means the "court's practice of following precedent, whether its own or that of a superior court[,]"[109] it basically "refers to the requirement on judges to treat like cases alike, which means treating past judicial decisions as sources of law."[110] Furthermore, stare decisis, often regarded as a hallmark of Anglo-Saxon legal systems where it explicitly serves as a legal source, has historically evolved to be intrinsically linked with the rule of law. This connection eagerly pursues the imperative of consistency while harmonizing the necessities of stability amidst evolving law.[111] Indeed, while the U.S. Supreme Court stated and is continuously repeating, "[*s*]*tare decisis* is not an inexorable command[,]"[112] the primary function of stare decisis is "to

[108] *See* ADRIAN ZUCKERMAN, CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 12 (1999); ALEXANDRE BIARD, JOS HOEVENAARS, XANDRA KRAMER & ERLIS THEMELI, NEW PATHWAYS TO CIVIL JUSTICE IN EUROPE: CHALLENGES OF ACCESS TO JUSTICE 1 (2021); SAMUEL ISSACHAROFF, CIVIL PROCEDURE 196 (2011).
[109] Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1016 (2003).
[110] Nina Varsava, *Precedent, Reliance, and Dobbs,* 136 HARV. L. REV. 1845, 1848 (2023).
[111] *See* Roscoe Pound, *Book Review*: *Precedent in English and Continental Law. An Inaugural Lecture Delivered before the University of Oxford*, 48 HARV. L. REV. 863, 863–64 (1935).
[112] Payne v. Tennessee, 501 U.S. 808, 828 (1991); *see*, recently, Dobbs v. Jackson Women's Health Org., 142 U.S. 215, 218 (2022), *overruled* Roe v. Wade, 410 U.S. 113 (1973).

make law stable and predictable."[113] "Stability and predictability are integral to the rule of law."[114]

While the classical definition suggests that overturning precedent might appear to breach citizens' trust, it is crucial to recognize that it represents a complex yet inherent element in upholding the rule of law, albeit in exceptional and carefully considered circumstances, to address evolving legal issues. The Supreme Court's act of overruling precedents is an ongoing process, albeit infrequent, and aligning with legislative directives as a legal foundation allows for the possibility of change when such overruling takes place. This reflects the understanding that change is a reasonable outcome in the evolution of legal matters.[115]

These general considerations shed light on numerous resemblances between stare decisis and civil law systems, where the function of precedent has progressively become a vital instrument, compensating for the legislature's limitations in effectively governing a dynamic and evolving society.[116]

To begin with, it is worth mentioning a recent statement of the Italian Supreme Court of Cassation. It states that "while reiterating the formal position that precedent does not constitute a source of law, nonetheless, cannot fail to note how the consideration to be given to precedent has grown . . . in the main civil law systems."[117] In addition, the Italian Constitutional Court also recognized that consolidated judicial precedents become intricately woven into the legal provision, nearly indissoluble from it.[118] Yet, the commonalities between the two legal families regarding precedent law and the stare decisis principle are growing within both systems, interpreting both through the crucial role of the jurisdiction of the realm of the rule of law.[119]

Continuing along the same path and aiming to narrow the gap between the two legal systems, the U.S. Supreme Court demonstrates a multifaceted approach to the law of precedent and the stare decisis doctrine. Recent decisions eloquently assert that stare decisis is a cornerstone of the rule of

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[113] Varsava, *supra* note 110, at 1849.
[114] *Id. See, e.g.*, Walton v. Arizona, 497 U.S. 639, 673 (1990). In this regard, *see* Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368 (1988); Richard H. Fallon, Jr. & Michael W. McConnell, *The Supreme Court, 1996 Term*, 111 HARV. L. REV. 54, 111–13 (1997); A.L. Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 58 (1934); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 946–47 (2008). Joseph Raz, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW 210, 215 (2d ed. 2009); Sebastian Lewis, *Precedent and the Rule of Law*, 41 OXFORD J. LEGAL STUD. 873, 874 (2021).
[115] *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1554 n.49 (2000).
[116] This significant correlation and its noteworthy implications find its origins in Italian legal literature. *See, e.g.*, Andrea Pin, *Rule of law, certezza del diritto e valore del precedente*, DPCEONLINE 67 (2021).
[117] Cass. civ., sez. un., 3 maggio 2019, n. 11747, 13.6, 13.7 (It.).
[118] *See* Corte cost., 1997, n. 350, 2 (It.). *See also* MERRYMAN & PÉREZ-PERDOMO, *supra* note 34, at 47 (emphasizing how civil law courts do not act much differently towards case law decisions than courts in the United States do); Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice"*, 35 CATH. U. L. REV. 1, 6 (1985).
[119] *See* MERRYMAN & ROGELIO PEREZ-PERDOMO, *supra* note 34, at 157; James Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 4–5 (2012).

law. They emphasize that while precedents may be overturned, such action should not occur solely based on being wrong or unjust,[120] usually by abstaining from aligning with the legislative process, and, conversely expressing disappointment over a precedent's misinterpretation of earlier rulings or its inability to be practically applied.[121]

Yet, the possible clash between the judiciary and the legislature concerning the evolution of the law has been recently recognized, leading to an alternative approach to what is known as evolutive or creative jurisprudence. This slight shift brings the common law closer to the role of precedent law in Continental systems. This slow path is more recognizable in the U.S. than in the UK, because in the U.S. they are traditionally more severe in defending the separation of powers and the original scope of the common law as a system essentially devoted to solving conflict rather than regulating society.[122]

The reflections above, drawn from the cases of *Bell Atlantic Corp. v. Twombly*[123] and *Ashcroft v. Iqbal*,[124] which overturned *Conley v. Gibson*[125] align closely with the assumptions made in *Planned Parenthood v. Casey*.[126] Specifically, the decision to overturn the previous ruling on pleading determinations was rooted in eliminating the old rule's grounds for application or justification. This pertained directly to the original intention behind the concept of notice-pleading and its interaction with the discovery phase. It crafted a restructured framework for the pretrial phase within the U.S. federal civil process.

This apparent evolution of stare decisis within the context of the rule of law, while confined to the original realm of common law, aligns with the similar conceptual evolution seen in the role of precedent in civil law systems, such as in Italy, in the last two decades. The Court of Cassation expressly affirms that, also, the statutory law (as a prerogative of the Continental system, that is based on the Codes essentially) must be interpreted not by exclusively referring to itself and the tight context in which rules were written, but, even when deciding a single case, looking at the dynamic evolution of the system in line with social changes.[127]

However, despite advancements, specific theoretical disparities persist regarding the influence exerted by precedent law, particularly concerning the application of the doctrine of stare decisis within the framework of implementing the rule of law. These distinctions primarily stem from theoretical perspectives rooted in the historical divergence between the judiciary and the legislature concerning their roles in lawmaking. Therefore, in civil law systems, the foundation predominantly rests upon statutes, with

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[120] Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014); Allen v. Cooper, 589 U.S. 248 (2020).
[121] June Med. Serv. L.L.C. v. Russo, 591 U.S. _ (2020).
[122] *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013).
[123] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
[124] Ashcroft v. Iqbal, 556 U.S. 662 (2009).
[125] Conley v. Gibson, 355 U.S. 41 (1957); *See infra* Section II.D.2.
[126] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S 883 (1992).
[127] *See* Cass. civ., sez. un., 11 luglio 2011, n. 15144 (It.).

the judiciary historically focused on interpreting laws established by the parliament. Conversely, common law systems traditionally limit statutory interpretation to areas where judicial law fails to suffice, particularly in cases necessitating system modernization.[128] Nonetheless, despite this historical divergence and the thriftiness of overruling in common law systems, it illustrates a hesitancy to admit to creating law.[129] The actual situation demonstrates a gradual convergence of both systems. The role of precedent, and the judiciary's creative function in shaping law progressively aligns, indicating a global trend in the judiciary's responsibility.

G. *RES JUDICATA: GLOBAL CONVERGENCIES*

Res judicata demonstrates that global civil justice is more effective than one could have considered. "The doctrine of res judicata is a principle of universal jurisprudence forming part of the legal systems of all civilized nations." [130] While civil procedure laws vary among countries, the points outlined in the text demonstrate that res judicata is a universally applicable doctrine. These considerations highlight how, despite some variations, there is a growing convergence in interpreting shared values and policies, making it more of a global principle with commonalities rather than disparities.

"American res judicata is much *more expansive* than res judicata law in other countries."[131] This sentence could represent the initial stage for comprehensively examining res judicata law worldwide. Despite its diverse origins, sources, and evolution, there is a growing recognition of commonalities, indicating that res judicata is emerging as a fundamental element of global civil justice.

Understanding that sentence involves assessing two fundamental aspects. Initially, it requires retracing the inception of the res judicata doctrine in both legal traditions, addressing the traditional differences concerning the binding effects of res judicata in subsequent litigation. Secondly, it allows for observing increasing similarities in the dominance of judge-made law in both systems.

To begin with, the U.S. system acknowledged a conceptual classification since the origins of common law. This classification emerged from the doctrine of *former adjudication*, which has always distinguished between res judicata and *estoppel by judgment*.[132] It encompassed within the principle of *ne bis in idem* (the identified goal of preventing re-litigation): both claim preclusion and direct or collateral estoppel, relating to the internal

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[128] *See generally* H.P. GLENN, LEGAL TRADITIONS OF THE WORLD 143–44 (2d ed. 2004).
[129] *See* Pin, *supra* note 115, at 121.
[130] ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA (2001) (quoting ABRAHAM C. FREEMAN, A TREATISE OF LAW OF JUDGMENTS 1321 (5th ed. 1925)).
[131] *Id.* (emphasis added).
[132] *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 616 (6th ed. 2021).

and external 'judgment' on issues (questions of fact or law) already decided in a previous legal process. [133]

The Restatement (Second) of Judgments, under the coordination of Professor Vestal, went beyond the traditional divide of common law. It advocated for consolidating both res judicata—embracing initially only claim preclusion—and issue preclusion (including direct and, to a large extent, collateral estoppel) into a *unified doctrine*.[134] This formulation established a notion of final decision that broadened the scope of *ne bis in idem* not solely for the claim or cause of action but also for the pivotal issues fixed upon resolving the dispute. Res judicata was ultimately separated into two distinct concepts: claim preclusion and issue preclusion, although there was not universal adoption of this specific terminology across all courts.[135]

Furthermore, since the inception of the doctrine of res judicata (or former adjudication), one of its primary purposes has been to discourage parties from bringing up related issues that ought to have been presented in the prior action.[136] This purpose evolved into the core principle of the res judicata doctrine, principally known as claim preclusion, a concept that persists to this day.[137]

I specifically mention this U.S. res judicata content because the same occurs in the UK legal system, which is well known as the rule provided in *Henderson v. Henderson*,[138] as well as the same concept of res judicata, divided in claim and issue preclusion.[139] Despite this apparent convergence, the Henderson principle, as it has been restated, reposes on the same public policy consideration, "namely that there should be finality in litigation, and that a party should not be twice vexed in the same matter[,]" [140] and it involves specifically a matter of abuse of process.[141]

However, irrespective of the varied policies that support it, this principle is directly linked to the res judicata doctrine in the U.S. system and indirectly connected to the UK system.[142] Through this association, a broader common

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[133] *See* RESTATEMENT (FIRST) OF JUDGMENTS §§ 47, 48 (AM. LAW INST. 1942). *See also* Edward Clearly, *Res Judicata Reexamined*, 57 YALE L.J. 339, 342–43 (1948).
[134] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 131 (AM. LAW INST. 1982). *See also* Allan Vestal, *Res judicata/Preclusion/Expansion*, 47 SO. CAL. L. REV. 357, 359 (1974); FRIEDENTHAL ET AL., *supra* note 129, at 617.
[135] *See* FRIEDENTHAL ET AL., *supra* note 132, at 617.
[136] *Id.* at 616.
[137] *Id.* at 621. *See* Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc., 590 U.S._ (2020); RESTATEMENT (SECOND) OF JUDGMENTS §§ 17 cmt. b, 19 (AM. LAW INST. 1982). It is worth noting that this principle constitutes one of the main aspects of claim preclusion, distinguishing it from the issue preclusion doctrine that precludes parties from relitigating an issue *previously decided* and essential for that judgment. However, this principle is a crucial part of the U.S. res judicata doctrine, different from the same aspect ruled by the UK legal system, as it follows in the text.
[138] This rule precludes a party from raising in subsequent proceedings matters what could *and* should have been raised in earlier proceedings. *See* Henderson v. Henderson (1843) 3 Hare 100, 115. The rule was restated in 2002, *see* Taylor v. Lawrence (2002) EWCA (Civ) 90, QB 528, [6]; *see also* Johnson v. Gore Wood & Co (2002) 2 AC 1, (HL) 31.
[139] *See* NEIL ANDREWS, ON CIVIL PROCESS, COURT PROCEEDINGS 463, 468, 474 (2013). *See also* Arnold v. Nat'l Westminster Bank, [1991] 2 A.C. 93 (HL) 104–05.
[140] *Id.* at 485.
[141] *See* Johnson v. Gore Wood & Co., *supra* note 138, at 30–31.
[142] *See* ANDREWS, *supra* note 139 (underlining that "in short, *Henderson* principle can be regarded as an adjunct to res judicata; but this principle should not be confused as an aspect of res judicata[]").

ground emerges, highlighting the historically expansive concept of res judicata as a public value in private matters.[143]

The continental systems diverged significantly in the origin. While rooted in Roman law, the evolution of civil law systems specifically dealt with the profound implications of the separation of powers in political theory. Continental systems were meticulously structured around written law and the development of code systems.[144] Res judicata followed this path also. Hence, while the Anglo-Saxon pattern is correctly defined as a system that "favors a *broad* scope [res judicata],"[145] the Continental one is described as a "*narrow*-scope . . . model[.]"[146] These effects prevent re-litigation only per the specific right presented and decided upon in court. This is usually regardless of the issues of fact the judge discusses and is argued between the parties to resolve the dispute. Accordingly, also the common law principle (well-known generally as the Henderson principle) is adapted to the Continental right system: it pertains seclusively to the specific "right" brought before the court, and it is known as a matter of *chronological* stability of res judicata, at least in the Italian law.[147]

Initially, res judicata was not supported by specific policies and differed from common law systems. Following the dogmatic civil procedure framework, it was considered a theoretical result of the "right" system. It was primarily seen as a tool for ensuring legal certainty, focusing on when an adjudication reached its finality rather than its implications. The "right" system inherently led to the establishment of the binding effects of res

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[143] NEIL ANDREWS, PRINCIPLES OF CIVIL PROCEDURE 501–12, 511 (1994), summarizing that:

> [t]he 'principle of finality' is rooted in several inter-related policies. If a decision were not treated as final, many inconveniences would result: the dispute would continue to drag on; greater legal expense and delay would result; scarce 'judge-time' would be spent re-hearing the matter; inconsistent decisions might follow; litigation would cease to be a credible means of settling disputes; finally, it would be a hardship on the victorious party if the first case were to be re-opened; the victor is entitled to assume that at the first action he was not merely attending a dress rehearsal for further performances.

Id. (quoting Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*, 21 DUKE L. J. 353, 362 (2011).)

[144] *See* Par. 3.2. *See also* Robert W. Millar, *The Premises of Judgment as Res Judicata in Continental and Anglo-American Law*, 39 MICH. L. REV. 1, 8 (1940); MAURO CAPPELLETTI & JOSEPH M. PERILLO, CIVIL PROCEDURE IN ITALY 254–55 (1965).

[145] *See* Sinai, *supra* note 143, at 363 (emphasis added).

[146] *Id.* at 356 (emphasis added). Regarding the only German law, *see* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). *See also* Benjamin Kaplan et al., *Phases of German Civil Procedure* II, 71 HARV. L. REV. 1443, 1443–72 (1958). *See generally* Cesare Cavallini & Emanuele Ariano, *Issue Preclusion out of The U.S. (?) The Evolution of The Italian Doctrine of Res Judicata in Comparative Context*, 31 INDIANA INT'L & COMPAR. L. REV. 1 (2021) (properly addressing the development of the res judicata pattern in the civil law context and the recent reducing gap with the Anglo-Saxon area).

[147] *See* the very consolidated rule set forth by the Italian Court of Cassation, namely the principle of "*res judicata* copre il dedotto e il deducibile" (res judicata covers alleged facts and facts that should have been alleged), even related to the individuated "right" brought before the Court. For Italian law, *see*, recently, Cass., 12 settembre 2022, n. 26807 (It.); Cass., 4 marzo 2020, n. 6091 (It.). German law, differently, expressly provides a specific rule, ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 322, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1032 [https://perma.cc/MSF9-7ZBW] (Ger.), which states, "[j]udgments are able to attain legal validity only insofar as the complaint or the claims asserted by counterclaims have been ruled on."

judicata solely on the rights presented before the court rather than prioritizing policies to enhance the effectiveness or efficiency of civil justice and the adjudication system.[148]

Over time, the civil justice systems in the Continental region increasingly rely on economic assessment, essentially adopting efficiency as a guiding principle. This shift is particularly noticeable in legal systems grappling with prolonged proceedings, explicitly addressing the extensive duration of final adjudication.[149] This approach has been vast, initially stemming from the increasing dominance of judge-made law within civil law systems, sometimes followed by its subsequent legislative incorporation. This shift has prompted a reexamination of the traditional assumptions surrounding res judicata. As a result, it has initiated a trajectory toward a more expansive and comprehensive concept resembling the conventional configuration of common law systems.

A visible shift is minimal within the Italian civil justice legal system, particularly jurisprudence. There is a hasty evolution toward embracing a more expansive explanation of res judicata, seemingly to the common law traditional interpretation.[150] Hence, the Italian Supreme Court of Cassation, emancipating res judicata from the limitations of parties' claims,[151] broadens its preclusive influence to include prejudicial matters, thus acknowledging a form of typical common law issue preclusion doctrine.[152] The rationale

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[148] Otherwise, I cannot wholly agree with the general consideration on this point raised by Mirjan Damaška, *see* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE, *supra* note 45, at 178–79 (1986), who explained in terms of "implementation of government policy" the narrow concept of res judicata, if compared to the broader concept of the common law systems.

[149] The French and Italian legal systems are prime examples highlighted in the Doing Business Report expanded by the World Bank since 2005. This report notably emphasized that the inefficiencies within the civil justice system significantly contribute to the economic shortcomings of a state in attracting foreign investments and fostering a more robust economy and society.

Recent observations have pointed to the Italian legal system: *Doing Business in the European Union 2020: Italy*, WORLD BANK, https://archive.doingbusiness.org/en/rankings/italy [https://perma.cc/C8MY-FGKA].

Efficiency standards have become crucial in addressing this problem. Courts and legal institutions are under pressure to streamline their processes, reduce backlogs, and expedite the resolution of cases. There's a growing recognition that prolonged legal proceedings can have adverse economic effects, impacting the parties involved and the justice system's overall functioning and economy.

Efforts are being made in various jurisdictions to reform and modernize civil justice systems to enhance efficiency. These reforms might involve changes in procedural rules, technology to facilitate quicker case management, alternative dispute resolution methods such as mediation or arbitration, and measures to ensure the timely disposition of cases.

The focus on efficiency doesn't necessarily compromise the fundamental principles of justice. Instead, it seeks to balance the need for a fair trial with timely resolution, aiming to provide effective remedies to litigants within a reasonable timeframe.

However, it is important to note that while efficiency is crucial, it should not come at the expense of due process and the quality of justice. Striking the right balance between efficiency and the protection of rights remains a significant challenge for legal systems as they evolve to meet the demands of contemporary society.

[150] *See* the landmark decisions set forth by Cass., sez. un., 12 dicembre 2014, n. 26242, 26243, Giur. it. 2015, I, 70 (It.). *See also* Cass., 15 maggio 2018, n. 11754, Riv. Dir. Proc. 2020, 1, 411 (It.).

[151] It is worth remembering that the res judicata Italian system is traditionally grounded on the principle ruled in the Article 112 I- C.c.p., which provides that "the judge shall decide upon all the claims and within its limits; he shall not sua sponte decide upon exceptions which may be raised only by the parties." *See* CODICE DI PROCEDURA CIVILE [C.c.p.] [CIVIL PROCEDURE CODE], art. 112 (It.).

[152] *See* Cavallini & Ariano, *supra* note 146, at 31, recognizing that:

behind these groundbreaking rulings has been notably unexpected when contrasted with the traditional reasoning employed by continental judges. In these instances, policy considerations have outweighed the strict adherence to Code of Procedural Law provisions, marking a significant shift towards a need, if not an obligation, to expand res judicata to encompass a more comprehensive concept and content. This approach prioritizes *decision stability* and *judicial efficiency* in interpreting written law.

A similar attempt to extend res judicata beyond the formalist provisions set forth at the Continental level can be recognized within the French legal system. French courts "have long extended the *autorité de la chose jugée* to the motives forming the so-called *antécédent logique necessaire de la décision*, that is to those issues that were the necessary steps to reach a final decision and support the holding (*motives decisifs* [(decisions)])."[153] Although German law seems to be stricter in observing the res judicata content as strictly connected to the claim (and the right) brought before the court, despite a few different ideas in the literature,[154] it is evident that notable global shifts are occurring, particularly concerning the controversial yet crucial subject of worldwide civil justice: res judicata.

CONCLUSION

Exploring the fundamental pillars underlying the civil process within the two primary legal frameworks—foundational structures that significantly influence the majority of legal systems globally—enables a reasonable transition from the somewhat nebulous realm of international or transnational civil procedure, subject to varied interpretations based on the prevailing sentiments, towards a more crucial concept: global civil justice. This initial exploration asserts that global civil justice transcends mere terminology. Instead, it signifies a fresh approach to researching the core elements that underpin every civil procedural system. This pursuit necessarily encompasses historical trajectories and inevitable transformations, culminating in establishing universally shared principles—more than mere technical regulations. These principles are open to reciprocal

> [i]t may well happen that the Court ascertains nullity and submits it to debate between the parties even though neither the plaintiff nor the defendant demand for a ruling on the question, instead of limiting themselves to request a decision on the merits on the original main claim (e.g., performance, termination for non–performance)). In the latter case, if the court acknowledges the presence of a vitiating factor that makes the contract void, it will have to reject the main claim, declaring the nullity in the motives but not in the holding. However, this judgment on the issue of nullity will produce res judicata effects to conclusively establish the nullity of the contract in any subsequent action between the same parties.

[153] *Id.* at 27–28. (quoting LOÏC CADIET & EMMANUEL JEULAND, DROIT JUDICIAIRE PRIVÉ 623–24 (10th ed. 2017)).

[154] *Id.* at 28 n.143 ("claiming that prejudicial questions dealt with in a first lawsuit could be covered by res judicata and so precluded from being relitigated insofar as there is a teleological connection between them and the subject matter of the second suit" (quoting ALBRECHT ZEUNER, DIE OBJEKTIVEN GRENZEN DER RECHTSKRAFT IM RAHMEN RECHTLICHER SINNZUSAMMENHÄNGE (1959))).

interpretation, fostering a deeper understanding of domestic procedural law.[155]

Global civil justice marks the conclusion of an era during which common law and Continental legal systems contended for supremacy in shaping the most effective and equitable legal framework for resolving citizens' rights. The semi-adversarial model has subtly emerged within the global landscape of civil proceedings' organization, gradually moving away from the traditionally rigid division between rights and remedies in law and the differing role of the judge in overseeing lawsuits. Universal principles governing due process, alongside the acknowledged significance of judicially-driven settlements as a suitable means of resolving disputes, have significantly narrowed the gap—perhaps more in storytelling than in concrete legal practice—between legal families. This shift has been eloquently and finally exemplified in the interpretation and application of res judicata.

The latest global challenges that have surfaced, such as the influence of AI on decision-making and legal processes and the necessity for worldwide collaboration in establishing overarching regulations, present an opportunity to begin global civil justice.

[155] *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS vii (1980); John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMPAR. L. 617, 636 (1998).