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COURT PRACTICE AND PROCEDURE UNDER STRAIN: A COMPARISON

Professor Zeidler, Vice-President of the Constitutional Court of the Federal Republic of Germany, visited the Law School on 13th and 14th July, 1981. He delivered the following lecture to staff and students. The Chancellor of the University, Dr J J Bray, and members of the South Australian Bar attended as specially invited guests.

I am grateful for the opportunity to address you on a matter which concerns responsible lawyers everywhere: the need to adapt our procedural systems, rooted in national experience and moulded by strong traditions, to the changing needs of modern societies.

People from different countries tend to approach each other with certain expectations based upon assumed national characteristics. Allow me to illustrate this tendency. In a lonely African wildlife park an American, an Englishman, a Frenchman, an Italian, and a German were working together with the aim of preserving the elephants. Their period of service came to an end, and at their farewell party they made a plan: after three years they would meet again, and each would bring with him a written work on the elephants. They departed, and met again as arranged three years later. The Italian showed his friends one single sheet of text with the heading: "The trumpet noise of the elephant." The Frenchman presented three pages: "Observations on the love life of elephants." The Englishman had produced thirty pages: "My adventures in hunting elephants." The American put forward a book of 300 pages: "Marketing studies on the increasing export of canned elephant meat." Finally, the German laid three heavy volumes on the table, 3,000 pages in all: "Studies on the history of the idea of the elephant."

Let me follow in the steps of this unknown German, and talk about the history of the idea of procedural law. It was around the year 1500, when the reception of the Roman law had been completed, that the "common procedure" came into existence on the Continent. This procedure reflected the simultaneous discovery that the law possessed the qualities of a dogmatic science and that it was also a useful instrument for the purposes of government. These aspects mutually conditioned each other. The doctrinal elements and the authoritarian touch in German law, which you will have noticed if you have studied civil law systems, can be traced to these sources.

The rulers of that time, secular and ecclesiastical alike, used the law to strengthen and monopolize their own functions and powers. Traditional ancient law was deprived of its popular elements, transformed into an esoteric science and its administration was exclusively entrusted to the rulers' learned servants. The democratic aspects of the law therefore disappeared, and the gap developed between the civil law and the common law systems.

The administration of justice thus became a purely governmental right and duty, solely performed by learned jurists appointed by the rulers, all

other influences and participatory rights being excluded. Dispensing justice as between people was understood, not as a task to be carried out by the people themselves, but as a subject for the paternalistic, authoritarian welfare policies of the State.

Thus the administration of justice became a part of political sovereignty. The scientific character of the law served the purpose of rationalizing governmental activities and preventing an excess of arbitrariness.

All legal procedures in those days were conducted secretly and in writing. There was no public trial and no exchange of oral argument. The common civil procedure on the Continent was based on an intellectual analysis of proceedings as such: a jurisprudence of theoretical conceptions. Each conceptual element was separated and isolated from the others and transformed into a procedural institution of its own: the ideas were transformed into formally defined and prescribed procedural steps. No step was to be taken before the preceding step had been completed. So it was a "sliced-up" procedure, the last traces of which are still in evidence in contemporary German court-rooms. The necessary communication between court and parties was brought about by sending back and forth written pleadings, records, and other statements. As most of the required interlocutory decisions were separately open to appeal, a case could easily last for many years. For the common man this often resulted in a practical denial of justice, but for those who could afford to wait for many years, it solved their controversies on a high, intellectual level. The system was distinguished by intellectual brilliance, but, at the same time, by a lack of practical effectiveness.

For the social responsibilities of the modern State and for the needs of trade and commerce in the period of industrialization the system was inadequate. After the Napoleonic wars which caused upheavals in the law as they did in other areas of life, and after a further long period of uncertainty and confusion, the old system was replaced by the codes of 1877. These codes, heavily amended, still provide the basis of the German system of procedure, which I prefer to describe as "investigatory" in nature, rather than "inquisitorial".

In a modern society the adjudication of conflicts, the application of the law to the individual case, takes place under conditions of mass production: this year the number of judges in West Germany reached the frightening level of 16,657. These judges produce more than one million court decisions annually. I might remind you, however, that "judges" includes officials whose functions and positions would correspond in Anglo-American terminology to those of members of tribunals, commissions and supervisory boards, to masters, registrars, magistrates and the like. The words "court" and "judge" are applied to nearly all institutions and persons engaged in the process of resolving conflict by legal means.

The primary problem lies in the amount of work necessary to decide a law suit: the work of all those involved in the actual litigation; the preparatory conferences and interviews; the legal research in libraries; the technical work in busy offices. This raises the decisive question: who is going to do the work and who is going to pay for it? The answer to this question will determine the realities of access to justice.

Litigation is expensive in all legal systems. In some ways that is no disadvantage, for it stops the busy-bodies and self-appointed vigilantes of

the public good, and it reserves judicial resources for those who show a legitimate and legally worthwhile interest. However, it also has the consequence that those who are financially well off and who are educated and have social and political connections will have better chances than those without such advantages. The crucial question for state and society is to what extent such differences should be allowed to influence the administration of justice.

Lord Devlin has framed the issue in rather drastic terms. I quote from page 6 of his book *The Judge*:

“Lawsuits between ordinary citizens of limited means are so uncommon that it is difficult to find out anything about them. The main reason why they are uncommon is, I think, because cost would be prohibitive.

For the ordinary citizen ... a lawsuit is financially quite out of the question. The citizen who is up against an insurance company or a trade union, or any other powerful litigant must take what is offered to him and be glad that he has got something. If he is up against one of his own kind, the result depends on bluff and brinkmanship rather than upon justice.”

It seems to me that this comment on the hard and real facts of civil procedure fits all systems to a certain degree, but it remains an open question whether it is possible to mitigate this situation. The investigatory model of procedure is an attempt to do so. This system assigns most procedural responsibilities to the judge, and lets him do most of the work connected with the lawsuit. Judges' salaries are paid by the taxpayer. Correspondingly the work and responsibility of counsel, normally paid for by the client, become less important. The handicap of those with limited resources is therefore reduced, particularly when they can obtain qualified legal advice and competent representation through legal aid.

The centre-piece of the system is section 139 of the German Code of Civil Procedure. This section requires the presiding judge to ensure:

“that the parties make full statements regarding all the relevant facts and move appropriate motions, in particular that the parties enlarge upon insufficient factual statements and that they indicate their means of proof. To this end, so far as may be necessary, he shall discuss factual and legal aspects of the case and make appropriate inquiries. The presiding judge shall point out doubts concerning any matter which has to be considered *ex officio*.”

In addition section 278 para 3 provides that “the court may not found its decision on points of law, which a party appears to have overlooked or regarded as irrelevant, unless that party has been given an opportunity to make appropriate submissions”.

The assumption which underlies these provisions is that the court makes an independent assessment of the legal issues raised by the case, advances the proceedings in all legal and technical respects and even ensures that the correct and proper motions are put forward by the parties. As far as possible the court seeks to compensate for any omission, mistake or eventual deficiency caused by insufficiently qualified and incompetent representation by counsel. The judge feels it his duty to protect the client against his advocate, if necessary. Thus the judge's role has a civil service-like, bureaucratic character; there is an element of

paternalistic guardianship intended to ensure substantive justice. This introduces an element of welfare and social protection into the proceedings.

The autonomy of the parties is, in my opinion, not unduly infringed by these procedural principles. It is for them to initiate an action, to withdraw or acknowledge the claims or to find compromise settlements inside or outside the court-room. The court does not investigate like a police officer or a detective but normally confines itself to the framework sketched by the parties through their factual allegations and their offers of proof. The assistance of the court is not forced upon the parties; they are free to ignore the court's advice. Parties are perfectly free to lose their cases if this is what they choose to do.

Please do not look upon me as someone advertising his own products. This would not be honest salesmanship, for I must admit quite frankly that our system is slowly but surely moving towards total collapse!

The large number of judges in the Federal Republic will surprise you. Although, as I said, we have nearly 17,000 judges, there are long delays in the disposal of cases. About 25,000 judges would be needed if the judicial function were to be performed according to classical judicial standards. Such an increase is out of the question, if only for financial reasons.

The system has been driven close to breaking point under the political, social and economic conditions of modern society. The fields of conflict which require judicial attention are increasing in number; controversies seem to be growing more intense and this leads to more and more litigation. Going to court is no longer the privilege of a small, educated and wealthy minority. The newly appointed Chief Justice of the Supreme Labour Court in Germany recently made a blunt speech on the occasion of his leaving his former appointment as Chief Justice of the Superior Court in Frankfurt. He quoted the following statistics: in the last ten years the number of judges has increased by 28%, the staff in the courts by 19%; in the same period the number of civil cases in the district courts has grown by 80%, the number of appeals by 62%, the number of procedural complaints by 30%; the number of cases involving capital crimes has grown by 155%, and other criminal proceedings in the first instance have increased by 78%. He called it intellectual dishonesty for politicians to promise to preserve customary standards in the administration of justice. On the contrary, he said, a drastic deterioration in the operation of the rule of law is to be expected. This situation is fraught with danger, not only for the administration of justice, but for the whole political condition of the country.

In an attempt to grapple with these problems our procedure was reformed in 1977. The aim was to promote the efficient and expeditious disposal of civil cases. The new law requires that a lawsuit should normally be disposed of in one comprehensively prepared session. The presiding judge either sets a date for an early oral hearing, or he decides in favour of a written pre-trial procedure (s 272 of the Code of Civil Procedure). The court is under a duty to press for the timely preparation of the case by the parties. At all stages of the proceedings it must urge the parties to make the necessary declarations expeditiously and comprehensively (s 273). To achieve this objective the court will set tight deadlines for supplementary pleadings. The court and the parties are almost regarded as a team united in a common cause: the proper and

expeditious disposal of the lawsuit. The Code of Civil Procedure postulates a special obligation for all the members of this "team": a co-operative attitude and faithful adherence to all procedural requirements in order to ensure the expeditious completion of the proceedings (*Prozessfoerderungspflicht*). Non-compliance with this obligation may result in severe penalties: belated averments are admitted only if, in the court's opinion, their admission would not delay the proceedings or if the defaulting party establishes a sufficient excuse (s 296).

These rules are not entirely new, but if the courts in fact applied them in daily practice, their severity would create a new atmosphere in German courtrooms. Such an atmosphere will be different from the traditions and customs of the past, whereby the court always sought the substantive truth and tried to protect the parties from the shortcomings of their legal representatives. Many judges will find it difficult to accept a situation in which they will have to disregard the truth just because it was produced one day late. They will feel that the law is seeking to compel them to make wrong and unjust decisions.

The application of the new rules is entirely at the court's discretion. Thus, it is difficult to predict the extent to which the new rules will in fact be applied. However, it is interesting to note that the Constitutional Court has recently been receiving a growing number of constitutional complaints against other courts from parties whose cases have been lost because of their lawyers' non-compliance with the new rules. These lawyers try to extricate themselves from such embarrassing situations by appealing, as a last resort, to the Constitution; but this seldom meets with success. In practice if not in theory these reform measures cause the style and technical appearance of procedures in our civil law courts to resemble more closely than ever those of the common law. The needs of the present appear to have bridged the gap between our different legal cultures.

Outwardly German procedure in criminal courts resembles that in common law countries. There is one coherent and continuous trial session. Even if it lasts for several days and even weeks, with technical intermissions, it is still considered one session in strict legal definition. As in civil procedure, the presiding judge is the dominating figure. He directs the course of events, he hears the accused and he examines witnesses and experts. He may even become involved with counsel for the prosecution or for the defence in disputes about petitions to introduce additional evidence.

The external image resulting from the court-room atmosphere under such circumstances may occasionally remind the uninformed observer of a hunter pursuing his prey. Presumably it is from this that a misunderstanding, widespread in common law countries, stems: that the court is hostile and eager to convict the accused who must prove his innocence. Such a view ignores the pre-trial history of the case.

Public prosecutors have had the same legal education as the judges, and their special civil service status is rather similar to judicial status. The two careers are interchangeable, so that a great number of judges, at least in their junior years, will have served as prosecutors. Conversely, most of the senior prosecutors in the higher ranks have been judges for a considerable part of their working lives. This system of interchanging

careers leads to an almost identical professional approach to cases. The prosecutor is under a duty to be neutral: he must extend his investigation to factors which favour the accused. The objectivity of the prosecutor can be gauged from the fact that more than three-quarters of the complaints and police reports which come into his office never go any further. There will be no charge or indictment unless, after a very thorough scrutiny, the prosecutor is quite certain that a conviction will result. In the old days in Prussia the prosecutors used to call themselves "the most objective authority in the world". One wonders how much of the world outside Prussia they had seen before they made this pronouncement, but at least the phrase shows their perception of their ethos and function.

A prosecutor feels professional pride at the fact that charges which he decides to bring rarely end in acquittals: this indicates his ability to predict the outcome of the trial. The second filtering function at the pre-trial stage lies in the court's authority to decide whether to admit the case for trial. The court evaluates *ex officio* whether a conviction is probable; if not, it rejects the indictment, or, in case of doubt, demands more and better evidence. A rejection usually occurs when the court disagrees with the prosecutor on points of law. In such circumstances the prosecutor usually appeals to the superior court. From time to time it happens that the superior court reverses and remands the matter, and issues a decree ordering the lower court to admit the case for trial. Thus a case goes on trial on the assumption that all the facts will be proven, the legal relevance of which has already been tested by prosecutor and court independently. The proceedings therefore follow a rather narrowly drawn line; ie to find out whether this assumption is correct. This explains the rather investigative character of the criminal trial. When the prosecutor has finished his investigation counsel for the defence is given full access to all the prosecutor's files. He is allowed to take them into his office where he may study them and take photocopies. At this stage he may make a written submission to the court, based on law and fact, to the effect that the charge should not be admitted to trial. This will succeed occasionally. It will be a major victory, for it will save his client from the anguish of having to go through the trial.

At the trial itself the accused may prefer to remain silent. In former days this was a rare occurrence; it happened only in cases with political ramifications or in private matters of a delicate nature. Nowadays to remain silent is a typical pattern of behaviour for terrorists, unless they prefer to shout obscene abuse until they are removed from the courtroom. Usually the accused tells his side of the story and the judge asks pertinent questions. This cannot be avoided by pleading guilty, as the court's responsibility to find the truth is not affected by the defendant's admissions. The German system is based on the principle that the accused cannot use the court as an instrument against himself, as this would violate fundamental rules of public policy. An accused person's plea of guilty may be false, perhaps motivated by the desire to protect another person or to protect himself against conviction for another, more serious crime still undiscovered. It may be the expression of a masochistic or suicidal desire for self-punishment. The experienced judge therefore doesn't ask for a confession; he simply elicits those facts which only the accused could know. Such an interrogation will take place even if the defendant does not deny having committed the crime with which he is charged.

As a strict rule, the accused cannot become a witness; he cannot be heard under oath. For him lying is not a criminal offence; it is a privilege of which he may avail himself without fear of punishment. In this, German practice differs greatly from common law procedure, where the accused is often confronted with the cruel alternative of either having to forgo the chance to tell his story in his own words, or of facing the risk of unwittingly speaking against himself and of becoming involved in the dangers of possible perjury. The rigidity of the common law tradition in this matter seems incompatible with some basic elements of human nature, of which the continental principles take account in an appropriate way.

The more dynamic, competitive style of common law procedure, which is the result of these and other rules, yields a more visible demonstration of the judicial process. The dramatic tension which it involves may have a stimulating effect on the participants' efforts and skills. It is not by accident that crime novels and police stories all over the world feature court-room scenes in which common law procedural rules are applied. The tactical skills of a Perry Mason would fall on barren ground in German court-rooms, and the scenes there would have much less entertainment value. But, on the other hand, the tedious and bureaucratic style applied there might, from time to time, have a mitigating and humanizing effect upon those whose fate and existence are at stake. Another fundamental difference between the two systems is to be found in the role of experts in German courts. They do not come into the proceedings with a partisan perspective, but as neutral assistants to the court, supplying it with technical knowledge not otherwise available to the judges themselves. Their impartiality may be challenged on the same grounds as that of the judges. The courts have lists of experts on all possible subjects, generally and formally admitted and sworn in, some of them working professionally and permanently for the courts. In the course of time they gain valuable experience, but on the other hand there are also special dangers. Judges tend to overestimate the authority of experts whom they regularly see and hear in court. Some of the worst miscarriages of justice during recent decades in Germany are to be attributed to experts, who provided the courts with circumstantial evidence in the fields of medicine and the natural sciences. In a number of recent cases in which people had been convicted of murder and manslaughter, their counsel continued to protest their innocence, and, on retrial, succeeded in proving that the experts in the first trials had given mistaken opinions. As there is no capital punishment in Germany, those who had been convicted were released from prison and were granted generous financial compensation for the years of freedom they had lost. For the common law jurist, it might be worth noting that, in their first trials, some of these people had pleaded guilty.

The hearing of evidence is governed by no specific rules, apart from rules about privilege (relatives, physician, advocate, priest etc.). The paramount principle is that of free evaluation of evidence. This part of the proceedings is free from all those procedural technicalities which are so characteristic of common law procedure. Words such as "objection", "sustained", "overruled" are never heard in German court rooms. There is no scope for such objections and rulings, for it is the presiding judge who examines witnesses most of the time. The principle of free evaluation of evidence leaves everything to the experience and

responsibility of the judges. As long as they do not violate the basic rules of logic, there is little chance of success for appeals based on alleged errors in the finding of facts. One must admit that the appeal courts have been most ingenious in developing new rules of logic when they are dissatisfied with judgments of lower courts, and on these grounds more cases are reversed and remanded than one might expect.

One consequence of the absence of rules of evidence is the fact that hearsay evidence is not excluded. It is the court's responsibility to decide how much weight it will attribute to this kind of testimony. In the last few years problems involving hearsay evidence have become more and more serious, especially in the field of the international intelligence struggle, international terrorism and organized crime. Police and security authorities sometimes have no way of collecting important information other than by promising to potential informants a complete new identity, so as to protect them from being killed in revenge by their former companions. Once these prospective witnesses have received their new identity they can no longer appear in court, as this would frustrate the whole system of protection devised for them. The practice has developed of accepting their non-availability and of hearing as in-court witnesses the police officers who interrogated them. In this way the knowledge of the declarant is introduced into court proceedings as substantive evidence. Sometimes police officers also submit written statements made by the non-available declarant. If the court wants to know more about the issue, it formulates written questions, which, in due time, are answered anonymously, the identity of the answerer being unknown even to the judges. All this must seem appalling to most of you, but there is a conflict of values. This seems to be the only way in which one can protect the community against serious dangers from types of crime which were unknown to our predecessors. I have been told by criminologists that in some countries organized crime is invincible because of the dangers for in-court witnesses, and because of the hearsay rules which prevent testimony being made available to courts in a less direct way.

A case of the kind I have been discussing was decided recently by the Federal Constitutional Court. It involved the conviction of a member of the State Parliament of Bavaria for conspiring with a foreign intelligence service. The defendant challenged the constitutionality of his conviction on the grounds that his rights of due process and fair trial had been violated. The conviction was based, *inter alia*, on incriminating testimony given by a witness who was an escaped top intelligence officer of just this alien service. The German security authorities knew about a plan entertained by this service to kidnap or kill their former member. In order to protect him they decided not to disclose his new identity and to declare him not available for the purposes of the proceedings. The information given by him was introduced by police and security officers who appeared as in-court witnesses, and testified as to statements made by the declarant in examinations they had conducted. The court and the defendant's counsel also put written questions to the declarant, which he answered in writing. The police officers again testified as to the authenticity of his signature.

The Federal Constitutional Court dismissed the constitutional complaint and upheld the conviction. It noted, however, that this procedure constituted an exception to the normal principles of the separation of powers, for the executive branch substantially determined the manner in which the judiciary was able to hear the evidence.

The court went on to outline several requirements for the validity of a conviction founded on such an exceptional procedure:

- 1 The executive decision to declare the prospective witness non-available in court must be taken at the highest executive level, normally by a department directly headed by a member of the government;
- 2 Reasons must be given for this decision so as to enable the court to make an independent evaluation of its plausibility; the reasons must be as full as they can be without disclosing the secret to be protected.
- 3 There must be corroborating evidence confirming the hearsay evidence.
- 4 In its free evaluation of evidence the criminal court must take into account that hearsay evidence is of less value than evidence heard in court directly and immediately.
- 5 In the reasons for its decision the criminal court must give a full and satisfactory explanation of its conclusion that these requirements have been met.

As the case stood, the Federal Constitutional Court found that all these conditions had been complied with. It considered that the *in camera* disclosure of the secret information was not a possible solution. The constitutional guarantee of a legal hearing in court (Article 103 section 7 of the Basic Law) is indispensable and belongs to the essential elements of due process. It includes the right of the defendant to know and comment on all the facts on which the decision is founded, including all evidence which has been brought forward. Therefore, when the court knows something relevant, the defendant and his counsel must also be informed of it. All the evidence must be heard in open court, for the proceedings are oral. Even if the judges, the prosecutor and counsel for the defence know the material, it must still be formally produced, and "introduced into the proceedings". There is thus no room for surprise as a procedural tactic. Whenever a surprise situation emerges, which may happen however carefully the trial has been prepared, the affected party has a right to an adjournment so as to have time to prepare his response. If the prescribed time limits for trials cannot be observed, a completely new trial has to take place; otherwise any resulting conviction will be quashed on appeal. This is one of the most frequently used arguments for a successful appeal on the grounds of procedural error. However, many of the less capable lawyers miss this chance, as they have become accustomed to leaving to the court the responsibility for their clients' well-being.

The compelling reason for the rule that all evidence must be heard in open court, regardless of the fact that it is already available in the files, is that two lay judges sit on the bench with three professional judges and they have equal votes with the professional judges on all questions of fact and law. They are what remains of the jury in our procedural system.

One of the results of the 1848 Revolution was the splitting (as in common law countries) of the functions of judge and jury. However, the jury system did not work well in Germany and was abandoned in 1924. One reason for this failure of the jury system was the quality of German law as a dogmatical science, characterized by abstract doctrinal theory,

rather closely related to theology, philosophy and even mathematics. The common law, on the other hand, has preserved more of the characteristics of a pragmatic skill. So in the civil law system the laymen found themselves far more inhibited in taking over judicial functions than was the case in common law countries. It also seems likely that the country's political condition and standards of education did not help the cultivation of that spirit of citizenship and responsibility which is a necessary foundation for any jury system.

Our comparison of the two systems leads to some reflections upon prospects for the future.

There are three inter-related aspects of the judicial process: quality, social equality and quantity. Under "quality" we must ask how we can ensure that the largest possible number of cases can be decided correctly, ie without any miscarriage of justice. Under "equality" we must ensure that the chances of success must be just as good for the uneducated and the poor as they are for the educated and the rich. Under "quantity" we must inquire how best to make use of our limited resources of legally trained personnel to bring about as many legally correct decisions as possible in as short a time as possible. To achieve the optimal combination of these three ends we must adopt a combination of our two procedural systems.

As regards quality, I believe that common law procedure has considerable advantages. Even in our mechanized, industrialized and equalized world the administration of justice is still an intellectual process which requires not just expert know-how and technical knowledge but also the gift of imagination, creativity in the realm of ideas, and the shaping of the structures of society. This task cannot be accomplished by social institutions and organizations; it requires outstanding individuals. The best arena in which to unfold and develop such talent is the common law trial: its dynamic and competitive character is a powerful stimulus to individual effort. By comparison the German system, whilst not preventing individual brilliance, does not supply the right background to encourage it. At a recent annual conference of the German-British Jurists' Association Professor Koetz of Hamburg compared the two procedural systems by using a parable: common law procedure is what a shining Rolls Royce car is amongst automobiles, whereas German procedure may be likened to a dusty little Volkswagen. I agree, but the question remains: what can you afford to pay, and how often and in what situations are you in need of a Rolls Royce or a Volkswagen?

This leads me to those aspects of common law procedure which in my view constitute its handicaps. Most of the work is done by advocates, and the parties have to pay for it accordingly. This means that people with education, money and social and political connections have a better chance of success than the majority who have no such advantages. In Germany most of the legal work is done by judges, whose salaries are paid by the taxpayer, so differences in the social or educational levels of the parties are much less significant. A party may of course fall into the hands of a bad judge just as in common law countries he may be at the mercy of a bad advocate. However, there still is a difference. Your counsel you select yourself: the selection of the judge is a matter of luck. The chance of having a good judge does not depend on social status: it is the fair and equal chance of an honest gambling table.

Another problem is that posed by the jury system. In conversation with chief justices in the United States I was told that their main problem is the large number of jurors needed. The American founding fathers, who made the right to be tried by jury a constitutional essential, certainly did not visualize juries made up of old and retired people rather than of active middle-aged people. A system which makes less frequent use of juries seems to me better adapted to our modern mass-turnover conditions in the courts.

The common law system of procedure and evidence places heavy reliance upon evidence by witnesses. I frankly admit to scepticism. I myself have been mistaken too often to believe in the reliability of other peoples' memories. Too many psychological tests have shown the inaccuracy of observations made by human beings. And what about the obligation to tell the truth? The oath is a declaration in which a person speaks a curse against himself if he does not tell the truth. This is a safeguard only on the assumption that this person believes in the possibility of eternal damnation. Do a sufficient number of people believe in this nowadays? I shocked my colleagues many years ago when, as a young judge, I refused to pay any attention to the difference between sworn and unsworn testimony. Yet another element must be considered in evaluating the reliability of evidence given by witnesses. In former times people lived in close social groups and in small neighbourhoods where they knew about each others' activities. This system of strict mutual social interaction made it difficult to lie in public. Nowadays people tend to live in anonymity and there is little knowledge of one's neighbours. In big modern apartment houses tenants hardly notice even when the person next door dies. In such a social system, it is much easier to resort to falsehood than it used to be.

For all those reasons I believe circumstantial evidence to be of greater value. I have more trust in the reliability of natural science, modern technology and the capacity of the judicially trained mind to draw logical conclusions, than I have in the conscience and aptitude of people appearing in court as witnesses. Therefore, under present social conditions and today's social philosophy, I tend to prefer those procedural systems which are geared towards the use of circumstantial evidence and do not rely so much on evidence given by witnesses.

In all economically and socially developed and industrialized societies, the quantity of court business is steadily growing. Conflicts are increasing in number and intensity: the prevailing political culture demands conflict resolution not by use of political or economic power, but by use of the judicial process. At the same time, people demand that court decisions be made in time to solve their actual problems rather than too late to have much practical impact. All the systems therefore have to face the aggravating problems of capacity and efficiency. It is not surprising that the German Association of Judges, to which most judges belong, plans that the theme for the next convention will be: "Limitations on the granting of justice." Common law procedure is in some ways better equipped for the future than the investigatory model, as it sets its aim in a manner of realistic self-limitation according to the standards of possibility, and not the standards of desirability.

This divergence in approach was made very clear to me when I once had a most cordial discussion with an eminent English lawyer who had served at various times as counsel for the prosecution, as defence counsel

and as judge. I asked him: "Looking back on all your work in the courts, how many serious miscarriages of justice do you think have been brought about under your responsible participation?" This is a question which, I think, judges should ask each other from time to time. He said: "I have never asked myself this question. I have always felt that I wanted to be sure that there had been a fair trial and that all the rules of procedure had been properly applied and strictly observed. I have not been concerned about anything beyond that." My feelings on hearing these words were a mixture of horror and admiration. Horror, because I had always understood procedural rules to be merely a means to an end, viz substantive justice. In his approach I felt that the means was taken to be an end in itself. At the same time I admired the wisdom which contented itself with doing what is possible rather than trying to accomplish the impossible, a definite and absolute substantive justice on earth. It was a conversation amongst jurists. How would the ordinary citizen view these issues?

Our time is characterized by a tendency to make ever-increasing demands on the services which the State provides for the people. The draft of the new Constitution in Switzerland shows this trend in a way which is significant, for that country certainly is not renowned for its progressive outlook. The draft contains programmatic declarations concerning the social purposes of government: social security and health, education and the protection of nature. The German Constitution also states that the social obligations of government have equal rank with the rule of law. Thus new social values are raised to the level of constitutional principles. The question must be asked: If clean water and fresh air, for example, become an issue of constitutional dignity, will people accept the value of material justice as being of reduced importance and weight? Can we expect them to be satisfied with the promise of the proper application of procedural rules, not demanding at the same time a guarantee of correctness and of substantial justice? To meet such demands, our laws will have to undergo permanent changes, in harmony with the changes in the political and social world. Law reform is not one great event such as a giant leap, but consists of many small, slow and careful steps. For its accomplishment we need to draw upon all the experience collected in other legal systems. That does not mean that we may adopt a foreign system as we buy ready-cooked meals in a super-market. But we should study the ingredients used elsewhere, in order to find out whether they might serve as a useful spice in our home-cooked food.

Mr Justice Kirby has tried to promote in lawyers a greater readiness to accept reform by asking Shakespeare's question: "Do we really have to kill all the lawyers first?" About two hundred and fifty years ago the Prussian king knew an answer just short of killing them. He decided to suspend the professional licences of about 50% of them, thus driving them out of their professional positions. For the remaining half, the statutory tariff for their services was reduced to about one third, and all practising advocates were ordered to wear a special black mantle whenever they appeared in public in or out of court. As the King explained: "Now everybody will recognize the scoundrels even at a distance." Perhaps Mr Justice Kirby will accept this model as a compromise worth trying at least as a beginning.

Let me conclude with a quotation from the book on Comparative Law by Professor Schlesinger:

“In our brief survey of the differences between common law and civil law systems we have found that most of these differences have their roots in the political and social conditions of bygone ages, and not in the realities of our day. No present-day schism separates the social, religious, moral and political presuppositions of the common law from those of the civil law. The terminological and institutional divergencies between the two systems, though they have become realities for the international practitioner and for the student of comparative law, are realities forced on us by the dead hand of the past. Behind the façade of these divergencies, comparative studies uncover more and more basic similarities in the actual handling of 20th century problems.”

This leads me to a prophecy. When, a hundred years from now, our successors organize a conference on the same topic, the speakers will have difficulties in discovering significant differences between the two systems.