THE CULTURE AND SCIENCE OF OBTAINING INFORMATION AND PROOF-TAKING

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I. INTRODUCTION

The title of this Session of the Congress is at once intriguing and problematic. Each of the four terms that appear in the title, "The Culture and Science of Obtaining Information and Proof-Taking", could itself engage the attention of sophisticated comparatists or, indeed, of serious scholars from any discipline. Consider the complexity of these concepts: "Culture", "Science", "Obtaining information", and "Proof-taking". One of the most fascinating objects of the trans-national study is to gain and convey appreciation of the different meanings conveyed in different systems by the same terminology. I will therefore begin this Report by commenting on the titular concepts, and then proceed to examine them in the light of the informative National Reports.

Preliminarily, however, it is important to note the method that the Co-General Reporters (Professor Loic Cadiet, and I) have used in preparing these General Reports. As Professor Cadiet explains, the National Reporters were asked to prepare reports on the basis of the general theme of this session in the light of their national experience. Each of the General Reporters then compiled a preliminary report based on separate groups of the national reports, divided according to the language in which those reports were prepared. This Report is based on the informative National Reports prepared by the following Scholars, to whom we are extraordinarily grateful:

- Professor Neil Andrews, University of Cambridge.
- Professor Peter Gottwald, University of Regensburg.
- Professor Michele Taruffo, University of Pavia.
- Doctor Flora Triantafillou-Albanidou, University of Athens and Professor Kalliope Th. Makridou, University of Thessaloniki.
- Professor Michael K. Treushnikov and Professor Dmitry Y. Maleshin, Moscow State University.

In preparing this Report, I have had the benefit of the scholarly General Report prepared by Professor Cadiet.

II. Conceptual and Definitional Issues

2.1 Members of this Association are of course familiar with the importance in modern procedural regimes of "obtaining information" and "proof-taking". We are also well aware of the variety of means found throughout the world that give life to these concepts. Questions arise about both of these.

2.2 In all of our systems decision-makers depend on "information" to achieve a just result, for an essential ingredient of the modern notion of justice is that judgments should be based on the facts, as they really are, or, at least, to the best of our ability to know what they are. But what information do/should decision-makers want? What information should be "obtained"? From whom, by whom, and for whom? To what extent shall this enterprise be aided by the court, and with what sorts of powers? To what extent must it be authorized —even if not aided— by the court? And should some such efforts prohibited altogether? Every system must address these questions. Different answers —not surprisingly— emerge from the National Reports.

2.3 "Proof-taking" is obviously connected to "information gathering", but not identical with it. By implication, proof is what the decision-maker uses to make up her mind.[1] Thus, "information" can become "proof", *i. e.*, a means of supporting a legal contention. Not every variety of information can become proof, at least in the legal sense, for all systems filter informa-

[1] See the discussion of *preuve* in Prof. Cadiet's report at §§5-8. The French *preuve* is by no means synonymous with the English word "proof".

tion before anointing it as legitimate. When legitimated for this purpose, we refer to it as "evidence" Here again, our systems often differ and questions arise. What kind of information can become evidence, and thus, proof? Who controls the process by which this transformation is effected? What is the role and status of information that cannot qualify as proof?

2.4 What of "science"? In this context it is an elusive concept, but the post-Enlightenment world seems to share a sense of what we mean by science. This view was captured by the U.S. Supreme Court in the course of setting standards for the admissibility of scientific testimony.

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry". See also C. Hempel, Philosophy of Natural Science 49 (1966) ("[T]he statements constituting a scientific explanation must be capable of empirical test"); K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability").[2]

The "science" in the title of this session implicates questions of a particular kind. What do we mean when we talk about a "science of obtaining information and proof-taking?" Is the "science" of "obtaining information" the same as "the science" of "proof-taking"? To return to the point I made earlier about variations in concepts and language, the use of the word science in this context reflects a division between common law and civil law proceduralists. The more I have been exposed to the discourse of my friends from the civil law world, the greater I have become aware of how deeply the idea of a science of process differs. Civilians speak comfortably of a science of civil procedure;[3] not so those of us from common law side,

[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993).

[3] See, *e. g.*, Report of Prof, Treushnikov and Prof. Maleshin (Russia) at 3 ("In Russia the question of the degree of activity of a court in a civil process was virtually always discussible as in science and in practice ambiguous decisions were taken."; National Report of Dr. Triantafillou-Albanidou and Prof. Makridou (Greece), at 1 ("In the science of procedural law questions concerning proof are of great importance, for the proof gives life and substance to the law".) See also id. at 10 ("The progress of science and technology affects decisively the law of evidence".)

at least, certainly not we Americans. Perhaps we have blinded ourselves to the utility of thinking "scientifically" about process. I look forward to learning more about this approach.

2.5 "Culture", is the most unruly of these titular problem children. Professor Cadiet has elucidated its problems and discusses three possible meanings, see Cadiet Report §§ 9 and 10. He pithily captures the definitional difficulty when he says of the concept of culture, "Elle se montre rebelle à tout enfermement dans un concept". § 9.The term needs not only defining and some defending as well.[4] The principal difficulties spring from the inherent vagueness of the concept, its potentially misleading message of immutability of practice and belief, and its failure to acknowledge individual departures from, and even opposition to, a social orthodoxy.[5] These problems must be acknowledged and care taken to avoid the pitfalls. In any event these issues do not trump the utility of the concept. I agree with Amsterdam and Bruner: "We seem to need a notion of culture that appreciates its integrity as a composite —as a system in tension unique to a people not in perpetuity but at a time and place".[6]

For what purpose do we "need" this notion of culture? I suggest that it is in part because it serves as a short-hand way of referring to commonalties in practices, values, symbols, and beliefs of groups of people that form some sort of collectivity. We need it too, I argue, for its power to explain why remarkably different institutions arise in different societies to deal with problems that are essentially the same. I embrace a concept of culture that entails commonalities that persist over time but are hardly eternal and that are widely, but not uniformly, shared by a definable collectivity.[7] To quote Kroeber and

[4] Sally Engle Merry, "Law, Culture and Cultural Appropriation", 10 *Yale J. of the Law and Humanities*, 575, 579 (1998) (notes problematic aspects of culture). For a powerful recent defense of the concept of culture and its explanatory power, see Richard Shweder, *Why Do Men Barbecue* (Harvard U. Press, 2003), 3-26.

[5] See, *e. g*., Sally Engle Merry, *supra*, at 578-588.

[6] Anthony G. Amsterdam and Jerome S. Bruner, *Minding the Law*, Cambridge, Mass. Harvard University Press 2000, p. 231. The authors adopt a view of culture that combines "social-institutional" and the "intepretive-constructivist" conceptions of culture. "The former serves to mark the importance of the forms of institutionalization and legitimation that all societies require for the establishment and maintenance of canonicity; the latter highlights the ubiquitous pressure exerted by both solitary and communal *possible-world* construction on institutionalized canonicity". *Id*.

[7] On the utility of culture as a concept despite its difficulties, see also Roger Cotterrell, *The Concept of Legal Culture, in Comparing Legal Cultures* (David Nelken, Ed., 1997) at

Kluckhohn, "the essential core of culture consists of traditional (*i. e.*, historically derived and selected) ideas and especially their attached values; culture systems may, on the one hand, be considered as products of action, on the other as conditioning elements of further action".[8]

More specifically, the definition of culture used here includes the "traditional ideas, values and norms" that are widely shared in a social group.[9] Culture includes propositions of belief that are both normative ("killing is wrong except when authorized by the state") and cognitive ("the Earth is spherical").[10] Culture also includes among it shared ideas the symbols that represent those mentalities for its people (the figure of Justice with her scales; a desktop globe). Does culture properly defined also include the institutions and social arrangements that are particular to a society (law courts; astronomy faculties)? The answer must depend on the purposes of the definition. In the context of this Report, disputing practices and institutions, such as obtaining information and proof-taking, are one variable. The hypothesis is that this variable both explains and is explained by other variables, one of which is culture (ideas, values, norms). The two therefore cannot be conflated and disputing practices must be seen as a separate concept.

We must nevertheless also deal with "legal culture", as Prof. Cadiet also points out, invoking Bourdieu's concept of "habitus". See Cadiet Report at § 9. I take legal culture to mean the shared understandings, symbols, and values of this particular professional community. The debate rages: Is law and its attendant institutions and processes primarily a product of this elite group of specialists, or does a more general culture provide the raw material on which law builds?[11] As we shall see, the National Reports cast light on this question.

13, 29: "In certain contexts, however, the idea of an undifferentiated aggregate of social elements, co-present in a certain time and place, may be useful and even necessary in social research. This idea is expressed conveniently in the concept of culture".

[8] A. L. Kroeber and Clyde Kluckhohn, *Culture; a Critical Review of Concepts and Definitions*, 357 (1952).

[9] Melford E. Spiro, *Culture and Human Nature*, New Brunswick, Transaction Publishers, 1994 at viii.

[10] Spiro at 32.

[11] For a useful and insightful review of this debate, see Brian Tamanaha, *Towards a General Theory of Law and Society* (2000), Chapters 4, 5.

III. The Science of Procedure: A Further Inquiry

1. *The Search for Truth in the Courtroom*

3.1 Having sketched out a few of the definitional problems we encounter, I want to explore the relationship between them. Begin with the science of information gathering and proof-taking or, to generalise, the science of civil procedure.

We might take this to be a call for the application of the scientific method to the truth-finding process. In most domains of modern life we count on the scientific method to help us sort truth from falsehood. And the just resolution of civil litigation is often said to depend on finding the truth about a contested past. Thus, witnesses are sworn to tell the truth, the genuineness of documents must be proved, and experts must be properly credentialed if their report is to be accepted.

3.2 Nonetheless, neither scientists nor judges can realistically claim to know truth in an absolute sense. Prof. Cadiet speaks for many when he says, "For a judge, telling the truth does not mean enunciating a true proposition, it means identifying, among the various propositions in contention … the one which seems the most convincing". § 6. Prof. Taruffo takes this a step further, arguing that a "rhetoric" conception of evidence and truth is widespread in the legal systems of the world. In this model, "proof is not concerned with knowledge, truth and so forth, because it is based on the idea that evidence is just a set of arguments and devices that are used to persuade a judge that things are 'so and so.' Then the core of this conception is persuasion and belief rather than information and knowledge".[12]

But how different is this "rhetoric" approach to legal truth different from scientific truth? In the U.S. Supreme Court opinion in the *Daubert* case, from which I have already quoted, the Court speaks of science in terms similar to those used for legal truth. The contingency of even scientific knowledge is admitted.

Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. … "Indeed, scientists do not assert that they know what is immutably 'true'— they are committed to searching for new, tem-

[12] Report of Prof. Taruffo, § 2.3.

porary, theories to explain, as best they can, phenomena"… But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method.[13]

Conceding the fallibility of scientific knowledge, the Court then faced the problem whether and when it could be admitted into evidence. It held that the trial judge should rule on admissibility, case-to-case, using the following factors to determine whether the proffered testimony was sufficiently reliable to be helpful to the trier of the facts: (i) whether it has been tested empirically; (ii) whether it has been subjected to peer review and publication; (iii) whether the error rate is high or low; (iv) and whether it has achieved general acceptance in the scientific community.[14] All of these factors are intended to help the judge determine the reliability of the evidence. The issue is not whether the science-based evidence is "true" but whether it is persuasive or not. In this sense, scientific truth resembles legal truth even if we adopt the "rhetoric" model proposed by Prof. Taruffo.

3.3 On the other hand, it is also recognised that the search for the truth of a court room is not precisely the same as the search for scientific truth. I again quote from *Daubert*: It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past.[15]

I have long thought that it is the last phrase of the quoted text that captures the incommensurability of the scientific method and the truth-seeking of litigation. The former depends on the replication of experiments (see § 2.4, *supra*, while the latter involves "a particular set of events in the

[13] *Daubert*, 509 U.S. at 590.

[14] *Daubert*, 509 U.S. at 594. If the scientific evidence is admitted, it will be up to the jury (or judge if it is not a jury trial) to evaluate the persuasiveness of the evidence. It is not in automatically binding on the trier of the fact.

[15] *Daubert v. Merriell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596-597 (1993).

past" that cannot be replicated. For this reason, the disputed past will forever remain unknowable, and the probable accuracy of the contentions cannot be tested by the classic scientific method.

3.4 Since, like Socrates, we know only that we "know nothing," most legal systems accept probability as the next best thing to truth. Professor Andrews notes the importance of accuracy in fact-finding, even expressing the perhaps overly ambitious hope that judicial decisions will be "superior to decisions made in the heat of the moment by football referees or cricket umpires".[16] In the end, however, he tells us that the English system recognises the reality that "the civil process is an exercise in practical justice and not a quest for absolute verity. Thus, the standard of proof in civil matters is a balance of probability, a relatively low measure of assurance".[17] I think this sums up the thinking in most of our jurisdictions.

3.5 Human discomfort in the face of uncertainty no doubt inspired our forbears to search for an imagined "absolute" legal truth though the invocation of Divine wisdom to resolve disputed contentions. Revelation was sought by combat or ordeal.[18] Though the techniques have been discarded, the idea of absolute truth continues to haunt our proceedings. This surfaced most notably in the National Report from Greece. According to doctor Triantafillou-Albanidou and professor Makridou, Greek judges are expected to rule "as if" they are "completely convinced that the relevant facts exist or they do not".[19] The Greek Report leaves us with the fascinating question whether the expected judicial "full conviction" is real or fictitious.[20]

The Greek system is not alone in displaying a nostalgic affection for genuine and absolute legal truth. The oath administered to witnesses in American courts, for example, suggests strongly that the witness must know the truth, for how else could she be expected to swear to it? In modern German practice, by contrast, we find the more realistic approach respecting witnesses. "The general rule", Prof. Gottwald explains, "is that both parties can release the witness from the requirement that he be placed un-

[16] National Report for England and Wales, p. 12.
[17] *Id*., p. 13.
[18] Professor Taruffo addresses these in his Report at pp. 3 and 4.
[19] Report of doctor Triantafillou-Albanidou and professor Makridou at p. 4.
[20] *Ibidem*, p. 18.

der oath, with the consequence that will be taken only in exceptional cases when witnesses give conflicting statements as to decisive points".[21]

3.6 In a further distinction from the scientific method, the search for truth in a courtroom is compromised in all of our systems by rules —such as evidentiary privileges and legal presumptions— that reflect other values. Consider, for example the rules against "hearsay" in the American system and the prohibition against party testimony in most of the civil law world.

3.7 In sum, we cannot equate the civil process with scientific investigation. Yet, we can expect our judges to behave like scientists in evaluating the truth of a proposition by observing relevant phenomena, and testing them against one or more truth-seeking criteria. One can identify three such commonly-used criteria: a) some sort of "consensual" criterion (every witness to the event agrees on a particular account); b) some sort of "intentional" criterion (the witness has no motive to lie and has a motive to be truthful, such as an oath); c) some sort of "coherence" criterion (what's been told makes sense, hangs together, fits the context just right).[22]

2. *Science and the Study of Procedure*

3.8 I now turn to another way to think about the relationship between science and the processes of obtaining information and proof-taking: The scientific investigation of the legal system itself. Here, perhaps, science can play a more direct role. Students of procedure can formulate hypotheses, compare them with successful theoretical models, and ultimately test them against data. Of course, this project is fraught with problems. We need sound theory and good data.

The greatest difficulty is the creation of experimental data. Ideally, theory should be tested against events in the real world. But litigants are inconveniently reluctant to serve as juridical guinea pigs. They do not want their claim or defense to be processed as part of some experiment. Consequently, some process theoreticians have created mock trials and tested different

[21] Peter Gottwald, *The German Culture and Science of Gathering Information and Proof Taking*, p. 17.

[22] See Jerome Bruner and Oscar Chase, Narrative, Inference and Law in Cultural Context (forthcoming).

approaches with mock litigants, such as students or other paid subjects.[23] These experiments are subject to the plausible criticism that their findings might not be replicated when real civil cases are at issue.

3.9 The most frequently encountered solution to the described dilemma might be called the "let's try it and see if it works" approach. If a theoretical model suggests that the process can be improved by some change, and if the legislature can be persuaded to effect the change, the results under the new regime can be compared to the old. Thus, every reform can be considered an opportunity for scientific investigation.

3.10 Such opportunities abound. Since few nations have been wholly satisfied (to say the least![24]) with their civil justice systems, the last decade has seen a remarkable degree of reform. Consider the nations reporting here:

- The Russian Report describes the new Code of Civil Procedure, adopted in 2002.
- The Greek Report mentions Law 2915 of 2001, an apparently important reform which requires that each case be disposed of in a single, concentrated hearing.
- The German Report mentions the Civil Procedure Amendment Law of July 2001, which expands the power of the court to order a party or third party to produce documents.
- The Report for England and Wales describes the through going reforms put in place by the English Civil Procedure Rules of 1998, which include an embrace of "managerial judging".

Each of these reforms will, one hopes, be evaluated over time to determine whether they have achieved satisfactory results.

3.11 Any effort to evaluate change implies agreement on what is to be examined. Most reforms have multiple goals that are somewhat comple-

[23] For one famous example, see John Thibaut and Laurens Walker, *Procedural Justice, A Psychological Analysis* (1975).

[24] See Adrian A. S. Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure, in Civil Justice in Crisis*, Adrian A. S. Zuckerman, Ed. (1999) "A sense of crisis in the administration of justice is by no means universal, but it is widespread. Most countries represented in this book are experiencing difficulties in the operation of their system of civil justice". *Id.* at 12.

mentary but somewhat conflictual as well. We procedural scientists are already familiar with the conflict between the claims of accuracy (which necessitates the careful sifting of as many of the relevant facts as can be found) and the desire for efficiency (which necessitates control of expense and avoidance of delay). What, therefore, is success? Once we know what we want we have to figure out how to measure it.

Here is an irony. It is my impression that rather than the goal of the reform determining what it is that we measure, it is the availability of tools of measurement that create the definition of success. Cost and time can be measured. Accuracy cannot. A "successful" reform therefore, might be one that has improved productivity of courts and reduced litigant costs but has done so with an immeasurable loss of validity in fact finding.

3.12 In spite of these concerns, there is plenty of reason to feel good about the prospects for the scientific study of procedure. I will mention a few.

a) On the theoretical front, procedure has increasingly drawn the attention of law and economics scholars.[25] Models they produce by incorporating sophisticated incentive analyses may lead to more accurate predictions of the consequences of reform. In turn, empirical work will help refine the models.
b) Social psychologists have made enormous progress in gaining an understanding of the ingredients of litigant satisfaction under various procedural regimes.[26] The key finding has been that people care deeply about process, separate from outcome. Important ingredients of litigant satisfaction with process have been identified. The degree of process control available to the litigant (especially the opportunity to present one's viewpoint) is a robust indicator of litigant assessment of process fairness. Some of these studies include subjects from more than one nation and culture. Collectively and methodologically they are a resource we should be sure to consult in designing procedures.
c) Careful empirical work is increasingly becoming a powerful tool with which to test hypotheses about procedure and to examine the

[25] See *e. g.*, Robert Bone, *The Economics of Civil Procedure*, Foundation Press, 2003.
[26] See E. Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988); Tom Tyler *et al.*, *Social Justice in a Diverse Society* (Westview Press, 1997), pp. 75-102.

success or failure of new directions. One important example from the U.S., an examination of the use of monetary sanctions to curb abusive litigation practices. It revealed weaknesses in the then extant Rule 11 of the Federal Rules of Civil Procedure that led to significant modifications that were effected in 1993.[27]

d) The growth of comparative study has grown in volume and sophistication because of the efforts of this Association and its members, among others. This provides each jurisdiction with an expanding range of solutions to common problems, as well as a sense of how reforms have fared under diverse conditions.

IV. The Problematics and Promise of Cultural Inquiry

4.1 Why should we be interested in the relationship between culture and the processes of civil litigation? One answer is suggested by the very nature of our Association. More broadly, by the comparative law enterprise as a whole. I take it that as an Association of scholars of procedure in comparative context we have at least two concerns, not to say commitments: We seek an understanding of our subject at the deepest possible level, and we share a desire to use our understanding for social betterment.

Scholars of law have long explored but never resolved the extent of the relationship between legal regimes and cultural values. Proceduralists have made important contributions to this dialogue.[28] The current era of global-

[27] See American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank, ed., 1989). The Advisory Committee Note to 1993 Amendment to Rule 11 credits this and other empirical studies as the inspiration for the amendment.

[28] See, e.g., Mauro Cappelletti, "Social and Political Aspects of Civil Procedure. Reforms and Trends in Western and Eastern Europe", 69 *Mich. L. Rev*. 847, 885 y 886 (quotes the eminent 19 Century Austrian proceduralist Franz Klein observing the connection of culture and procedure). See also Richard L. Abel, *A Comparative Theory of Dispute Institutions in Society, Law and Society Review*, Winter 1973 217; ; Mirjan R. Damaška, *The Faces of Justice and State Authority* (1986); Mirjan R. Damaška, *Rational and Irrational Proof Revisited*, 5 Cardozo J. Int'l and Comp. L. 25 (1997); William L.F. Felstiner, "Influences of Social Organization on Dispute Processing", 9 *Law and Society Review* 63 (1974); Laura Nader and Harry F. Todd, Jr., Eds., *The Disputing Process. Law in Ten Societies* (1978); Katherine S. Newman, *Law and Economic Organization* (1983); Simon Roberts, *Order and Dispute* (1979). Michele Taruffo, "Transcultural Dimensions of Civil Justice", XXIII *Comparative law Review* 1 (2000).

ization pushes the issue to the forefront because of the increased opportunities to observe the way that different legal regimes respond to each other, and because it has inspired new calls for harmonization.

The harmonization projects, such as the ALI/Unidroit effort to prescribe transnational procedures[29] must, in my view, take culture into account. Cultural commonalities will provide opportunities for relatively easy congruencies of process, whereas significant differences in widely shared values will present obstacles that —simply as a practical matter— should be respected.

4.2 It follows that I face the very difficult problem of identifying the unit about which we wish to characterize as a separate culture. With respect to geographically isolated small-scale societies such as pre-colonial indigenous groups, this presents only modest difficulties. Far more troublesome is the ascription of culture to modern peoples whose principal common identity is citizenship in a nation state of many millions of people, some instances of which are more homogeneous than others. At this point I mean only to surface the issue and invite discussion. In another forum I have discussed the case of "American exceptionalism" and have argued that both interpretive and empirical forms of inquiry support the claim that the U.S., that most heterogeneous of states, has a particular culture, and that it is deeply connected to its official disputing practices.[30] It may be that others do not find the case made. Or one may find it convincing but of limited importance because the U.S., due to its long isolation between the great oceans, is not a good representative of the situation in other modern states. I find the latter hard to believe, but I very much welcome the views of the participants in this Congress on the matter.

4.3 To be sure, the risk of focusing on officially constituted procedural institutions and practices of modern states is that, as the anti-mirror theorists hold, they are the products of the political, professional or economic elites of their societies and for that reason are a poor vehicle for the study

[29] Transnational Rules of Civil Procedure, Preliminary Draft No. 4 (The American Law Institute, Philadelphia, 2003). See also Geoffrey C. Hazard, Jr., and Michele Taruffo, "Transnational Rules of Civil Procedure", 30 *Cornell Int'l L.J.* 493 (1997); Gerhard Walter and Fridolin M.R. Walther, *International Litigation: Past Experiences and Future Perspectives*, Bern, Stampfli Verlag AG, 2000).

[30] Oscar Chase, "American 'Exceptionalism' and Comparative Procedure", 50 *American J. Comp. Law* 277 (2002). Empirical support for the claim that Americans share a set of values is provided there.

of the relation between culture and process. In my view, any analysis that totally separates professional elites from the culture in which they are embedded is unrealistic. Even Pierre Bourdieu, who argues that it is in part the ritualised monopolisation of tools of language and practice that gives the domain, or "field," of law and its practitioners the power and privilege that they enjoy, argues as well for the interconnectedness of law (a particular form of dispute practice) and "the social order itself".[31]

There are two ways in which professional dispute-process elites will interconnect with the "social order" in which they operate: In most cases, they will themselves be products of that culture, and will in general share its metaphysics and values. These will inevitably affect their view of what is right and good in choosing among competing methods of identifying true facts and just norms. Second, even if elite organisers of dispute-ways do not themselves actually believe in the validity of broadly held norms and beliefs, there is an incentive to create procedures that resonate effectively with those subject to them, as those are more likely to win acceptance.[32] This requires a cultural connection.

I do not claim that the disputing-culture link is of the same degree in every society. It will be most robust in cultures which do not strongly differentiate between dispute practices and every day life, such as in small-scale, technologically simple societies. In technologically complex, modern societies, disputing practices are more likely to mirror the broader culture to the degree that the state is a stable democracy. In that case, the ruling elite is likely to emerge from the general public, and therefore to share its values, and, moreover, will be dependent on general satisfaction with the dispute practices it constructs. It is not surprising, contrariwise, that the institutions imposed by colonial governments may differ sharply from the folk practices previously employed. Post-colonial elites may, for reasons of their own, maintain imported dispute institutions. Here again, the failure of those institutions to mirror still-pervasive cultural values does not present a strong challenge to my overall thesis of connectedness. Given

[31] See generally Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (Richard Terdiman, translation), 38 *Hastings L. Journal* 805-853, at 851 (1987).

[32] On the difficulty of changing legal systems in the face of cultural norms, see K. Rokumoto, "Law and Culture in Transition", *American J. Comp. Law*, vol. 49, 545, 559 (2001).

enough time, the imposed order and the local culture may reach an accommodation that involves some mutual interpenetration.[33]

4.4 We who would like to tease out the culture-disputing relationship must reckon with the further problem of defining dimensions along which the influence will be revealed. If such contentions are ever to be tested by methodologies in addition to interpretivism,[34] the variables must be scalable. This requires the creation of a "culture" axis and a "procedure" axis. I am not prepared to propose a defensible model at this point, but I offer some thoughts that may point the way for future work.

4.5 Since it is sensible to begin with concepts and dimensions that have previously informed empirical investigation, one might start with the work of Geert Hofstede to construct the culture dimension. His book, Culture's Consequences, is an extensive empirical investigation of the cultural values of over one-hundred nations. On the basis of his data, his study of other sociological evidence, and his examination of local organizational behavior, Hofstede finds that national cultures can be illuminated through four dimensions "along which dominant value systems ... can be ordered and which affect human thinking, organizations, and institutions in predictable ways".[35] His dimensions are Power Distance, Uncertainty Avoidance, Masculinity, and Individualism.[36]

The next task would be to choose a feature of civil litigation that varies from nation to nation. For this, one could usefully consult Mirjan Damaška's book, The Faces of Justice and State Authority.[37] Damaška, as most present at this Congress will recall, identified several important features of modern procedure the form of which, he argued, would be importantly influenced by the goals of the procedural system and the overall character of the government of the nation in which they were located. These include

[33] See, *e. g.*, Mark Galanter, "The Aborted Restoration of 'Indigenous' Law in India", *Comparative Studies in Society and History*, vol 14, 53-70, 1972.

[34] The interpretive approach uses the related tools of thick description and "cultural contextualization of incident" to gain understanding of the meaning of social practices. That is, we must observe the relevant practices closely and must place them within the culture in which they operate. The task of contextualization is dependent on comparison and contrast; we see what is particular to a society by placing it next to those that differ. See Clifford Geertz, "Fact and Law", in *Comparative Perspective in Local Knowledge* (Basic Books 1983), at 181.

[35] Hofstede, Culture's Consequences (1980), p. 11.

[36] Hofstede, p. 11.

[37] *Supra*, note 26.

such features as the degree of party control over obtaining information and over proof-taking.

Putting one of the Damaškan procedural categories along one of the axes, and one of Hofstede's score for a state on the other, one could determine whether the form of particular procedural features can be predicted by any of Hofstede's dimensions. A robust correlation with any would be interesting and somewhat persuasive of the culture-procedure connection.

I do not underestimate the difficulties of such an enterprise —on both sides of the scale. Hofstede's data are subject to all kinds of attack (though some of his conclusions are supported by other studies of more recent vintage). And Damaška's categories are arguably insufficiently precise to allow country-to-country comparisons. Neither of these objections are insurmountable.

4.6 My optimism is in no small part due to the riches available in the National Reports for this an other sessions of this Congress. The Russian Report, for example, suggests the feasibility of very interesting work along these lines. Professors Treushnikov and Maleshin use the development of the Russian Code of Civil Procedure (2002) to point out the connection between culture and process in their country. The cultural dimension they use is individualism/collectivism (also one of Hofstede's dimensions of culture). They note that the nations of the world vary in the degree to which one of these values is dominant. They further argue that this predilection will influence a particular feature of civil process, *i. e.*, the degree to which the court or the parties controls the process. Russia, a society in political and cultural transition from collectivism to individualism, has changed its procedural rules to shift much of the control from the judge to the parties. As, they argue, Russian society is still somewhat collectivist in orientation compared to some other countries, it was necessary to find a "'golden mean' between the activity of the court and the initiative of the parties in the process of proof-taking".[38]

It is far from my place to judge whether the Russian reforms have succeeded. My point here is that their work supports the claim that cultural studies can helpfully inform efforts to improve and legitimate civil practice.

4.7 There is one aspect of culture that I believe has been too long neglected in the study of comparative procedure. I refer to ritual. The con-

[38] Russian Report at p. 6.

cept of ritual is rather slippery, but there are some generally accepted core elements. In *Ritual, Politics and Power*, David Kertzer argues that ritual remains important to the maintenance of political power in modern states. He defines ritual as "symbolic behavior that is socially standardized and repetitive … It follows highly structured standardized sequences and is often enacted at certain places and times that are themselves endowed with special symbolic meaning".[39]

In the U.S., court rooms are among the most ritual-laden places in our society. There are special rules of speech, of dress, of place and of architecture. I suspect that is true of many other countries as well. My hunch is that these rituals are maintained in part because they add legitimacy to the products of the courts. I wonder, however, if this is so. One way to explore this question would be to compare the degree court proceedings are ritualized in different places. This is an inquiry I hope to take up in the future. I will welcome your advice and your views about the role of ritual in your system.

V. Conclusion

Convergence is a popular term in the current scholarship of comparative law. I close this Report by noting the somewhat surprising degree to which this Session has allowed us to see a convergence between "science" and "culture" in the realm of comparative procedure. Neither alone can answer the great questions we confront. We must use both. The ways that culture and procedure are related can and should be subjected to testing according to the scientific method. Alternatively, the conclusions of scientific investigation must be analyzed culturally before adoption into our processes.

[39] David I. Kertzer, *Ritual, Politics and Power*, 1988, p. 9.