

PART XII

SPECIAL SUBJECT MATTERS

CHAPTER 1

INTRODUCTORY CHAPTER

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1 SPECIAL SUBJECTS

1.1 Special Procedures

- 1 In the field of civil procedure, a few *subject matters* are commonly described as *special*. The following topics, among others, usually receive this qualification: family law, succession law, insolvency law, consumer protection law, environmental law, labour law, and some commercial laws. There is a strong common thread between these special subject matters: they all pursue specific needs, values, and policy objectives that can prove to be difficult to meet effectively through civil procedure.
- 2 For instance, special subject matters sometimes involve rights that are considered ‘intermediate’, meaning they are neither completely private nor public rights, but rather protect ‘diffuse or fragmented interests, such as the interests of ecologists or consumers’.² While most nations recognize intermediate rights, their enforcement is usually difficult, if not impossible.³ This is especially true in systems that follow the classic *private litigation model* rigorously because they tend to be ill-equipped to deal with diffuse interests.
- 3 Fortunately, procedural systems can improve the application of intermediate rights, and thus ameliorate access to justice, by easing the interest requirements for litigation. This can be done either directly, by enlarging the definition of required interest, or indirectly, by allowing claims to be aggregated⁴, notably though the use of special procedural vehicles such as the class action or having public authorities enforcing the rights of the victims⁵. In that line of thought, Robert Cover maintains that this legislative choice, which provides for the different treatment of special subject matters, is justified:

Purposeful manipulation of the scope of participation to achieve substantive ends is permissible and appropriate. But there is additional force to the argument to expand remote participatory rights where the litigation plight of a potential litigant is especially vulnerable. That plight and our reaction to it may be (but need not necessarily be) related to our substantive preferences and values.⁶

- 4 Providing for the relaxed definition of the required interest to be *solely* applicable to specific subject matters, and not to all proceedings generally, is a great example of what we generally label as *special procedure*. Fundamentally, special procedures are defined by

² J A Jolowicz, *On Civil Procedure* (Cambridge University Press, 2000) 98 and 107.

³ *Ibid* 100-108.

⁴ J Zekoll, ‘Comparative Civil Procedure’ in M Reimann and R Zimmermann (ed), *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press, 2019) 1334.

⁵ R Stürner, ‘Procédure civile et culture juridique’ (2004) 56(4) *Revue internationale de droit comparé* 797, 817.

⁶ R M Cover, ‘For James Wm. Moore: Some Reflections on a Reading of the Rules’ (1975) 84 *Yale Law Review* 718, 731. Also see J Resnik, ‘For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication’ (2003) 58 *U. Miami L. Rev.* 173.

their substance-specificity, meaning that they discriminate between subject matters. They are usually politically driven⁷, which implicates that they carry their own policy objectives.

- 5 Special procedures present themselves in many other forms. For instance, the ability to contractualize on procedure is sometimes restricted in litigations that involve special subject matters⁸ like family law⁹. In such circumstances, if the parties are otherwise generally allowed to freely contractualize on procedural issues, the targeted subject matters are treated differently, which means that they are subject to special procedures. As for the subject matters that are generally targeted, the contractualization of procedure is usually prohibited for those that affect the rights of third parties or raise important policy concerns.¹⁰
- 6 While substance-specific procedures have recently gained in popularity, they have been employed to different extents for a long time. In the Occident, family law proceedings offer the most obvious example. Traditionally, under Greek law, the resolution of family matters, either matrimonial or involving the relationship between parents and children, was deemed to require special procedural arrangements, including restrictions on the admissibility of party testimonies, and the decreased evidentiary value of confessions. This deviation might be explained by the reluctance of the substantive law to accept divorce by consensus.¹¹ Similarly, many other jurisdictions, including England, Spain, Romania, and Switzerland, have historically provided for special procedures to govern family matters.¹²
- 7 Often, special procedures are seen as a great tool to improve access to justice. They are crucial because for substantive laws to be properly enforced, the civil justice system must first reach the targeted individuals and attract their claims.¹³ In the context of special subject matters, to serve this objective, procedures must be capable of handling complex and ongoing relationships, and they must be 'characterized by low cost, informality, and speed, by active decision-makers, and by the utilization of both legal and technical expertise'.¹⁴ However, as will be discussed in the next section, special procedures are not

⁷ W B Rubenstein, 'The Concept of Equality in Civil Procedure' (2002) 23(5) *Cardozo Law Review* 1865, 1890. Also see D S Reda, 'What Does It Mean to Say That Procedure Is Political?' (2017) 85 *Fordham L. Rev.* 2203.

⁸ R Feldbrin, 'Procedural Categories' (2021) 52 *Loyola University Chicago Law Journal* 707, 763.

⁹ R R Verkerk, *Fact-Finding in Litigation: A Comparative Perspective* (Intersentia 2010) 51.

¹⁰ R Avraham, W H J Hubbart and I Lipschits, 'Procedural Flexibility in Three Dimensions' (2018) *Coase-Sandor Working Paper Series in Law and Economics* 843, 11-19.

¹¹ K D Kerameus, 'Procedural Unification: The Need and the Limitations' in I R Scott (ed), *International Perspectives on Civil Justice* (Sweet & Maxwell 1990) 51.

¹² P Ferland, 'Le rôle du Juge dans les Procès Civils de la Province de Québec' (Association Québécoise pour l'Étude Comparative du Droit, 6e Congrès de Droit International de Droit Comparé tenu à Hambourg (Allemagne), 1962) 203-225.

¹³ M Cappelletti and B Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181, 240.

¹⁴ *Ibid* 241.

the only option to satisfy the specific needs of special subjects: their implementation requires careful consideration.

1.2 Trans-Substantivity and Substance-Specificity

- 8 The establishment, interpretation and enforcement of procedural laws often requires striking a balance between competing theoretical principles. This is particularly the case when it comes to determining which procedural approach would best meet the underlying policy objectives of special subject matters.
- 9 Intuitively, we might consider that ‘various policy objectives might justify different procedures for different types of cases’.¹⁵ Still, this proposition requires careful examination; while the implementation of *substance-specific* procedures could offer unparalleled means of contextualizing the applicable rules, it may also infringe on certain procedural guarantees and fundamental principles. Alternatively, where procedural rules are rather *trans-substantial*, meaning they apply to all cases indiscriminately, the principles of simplicity and impartiality are safeguarded, but specific subject-matter concerns are more difficult to address. As Feldbrin explains, these two principles are in direct conflict:

The interaction of two competing principles have long pulled procedure in opposite directions. One principle, transsubstantivity, pushes the design of rules toward a generic and content-indifferent form. The other principle, substance-specificity, points toward the need to tailor procedural rules to a specific type of litigation.¹⁶

- 10 Of course, each principle has advantages and disadvantages that must be weighed. According to Feldbrin, *substance-specific* rules, which are driven by concerns of fairness and outcome accuracy, ‘could better take into account nuances and complexities, serving the needs of particular categories of litigation’.¹⁷ More importantly, they could represent, in some instances, the only effective solution. Indeed, certain substance-related issues, namely the dissuasion of conducts and the protection of vulnerable individuals, might only be addressed individually through the purposeful shaping of the applicable procedure.¹⁸
- 11 Meanwhile, the *trans-substantivity* principle, according to which procedural rules must be ‘equally or similarly relevant to different sorts of disputes regardless of subject matter, the parties involved, the relief requested, or the magnitude of the stakes’¹⁹, reduces complexity. As a result, efficiency is enhanced: among other improvements, this approach allows judges and lawyers to concentrate on a single set of procedures, and it reduces

¹⁵ R Feldbrin (n 8) 716.

¹⁶ Ibid 707.

¹⁷ Ibid 716-717.

¹⁸ R M Cover (n 6) 718, 728; R Feldbrin (n 8) 715-716.

¹⁹ R Feldbrin (n 8) 714; D Marcus, ‘The Past, the Present, and Future of Trans-Substantivity in Federal Civil Procedure’ (2010) 59 DePaul Law Review 371, 372.

barriers of entry to different areas of practice.²⁰ Furthermore, having a single set of procedures apply indiscriminately enhances the uniformity of proceedings and offers guarantees of neutrality and impartiality.²¹ In essence, this approach pursues formal equality: where procedure follows trans-substantivity, individuals are treated as objects of equal concern and are somewhat protected from political influences.²²

- 12 Balancing out the costs and benefits of trans-substantivity and substance-specificity is not an 'all or nothing' exercise. It is rather a matter of degree, dealt with on a case-by-case basis, as procedural systems can embody both simultaneously. Accordingly, there is a large spectrum of conceivable procedural rules regarding specificity and patterns of application.²³
- 13 Moreover, strictly trans-substantive procedures would be unthinkable. Every civil procedure system discriminates between substantive categories as they all exclude criminal matters. Also, Main notes that because civil procedure determines how much substance is achieved, it can never be perfectly trans-procedural.²⁴ That is, a single set of rules applied to different subject matters necessarily provide different results. Further, Main argues that 'substantive law is neither *aprocedural* nor *trans-procedural*, but rather is constructed with a specific procedural apparatus in mind to vindicate the rights created or the responsibilities assigned by that substantive law'.²⁵
- 14 Historically, the struggle between these competing procedural principles has been closely tied to the common law tradition.²⁶ This is because in common law jurisdictions, before their merger, two separate legal systems, law and equity, operated simultaneously while having opposite objectives. On the one hand, *equity procedures* were essentially trans-substantive. They were flexible, used a single form of process, and applied regardless of the subject matter. On the other hand, the *writ system* was almost a perfect transposition of the theoretical model of substance-specificity: it required litigants to reduce their case to a single *issue* by framing the disputes. As Feldbrin explains, 'each writ gave rise to a *particular* and *inflexible* procedure to be followed, with a specific time limit for bringing the action, the required mode of proof, the manner of trial, and the type of sanctions that would attend the eventual judgment'.²⁷ The co-existence of these systems created tensions.

²⁰ R Feldbrin (n 8) 714; D Marcus, 'Trans-Substantivity and the Processes of American Law' (2013) Brigham Young University Law Review 1191, 1220-1221.

²¹ R Feldbrin (n 8) 714.

²² D Marcus (n 20) 1220.

²³ Ibid 1204-1207.

²⁴ T O Main, 'The Procedural Foundation of Substantive Law' (2010) 87 Washington University Law Review 801, 822-829. For another critic of transsubstantivity, see S Subrin, 'The Limitations of Transsubstantive Procedure: An Essay on Adjusting the 'One Size Fits All' Assumption' (2010) 87(2) Denver U. L. Rev 377.

²⁵ Ibid 801, 822.

²⁶ R Feldbrin (n 8) 717-718.

²⁷ R Feldbrin (n 8) 718-723.

- 15 Therefore, around the late nineteenth century, many common law jurisdictions, including the United States and Canada, moved to *unified rules of civil procedures*, notably by merging law and equity.²⁸ Thompson emphasizes that these changes reflect the fact that, at that time, the ‘trans-substantive’ principle suddenly had the upper hand:

Underlying these rules or codes were certain assumptions. Pleading was to be ‘fact pleading’, not constrained by legal forms of action. Amendments were to be liberally granted, to permit the parties and the court to reach the merits at trial. Joinder of parties and causes was eased. Discovery was permitted and expanded. Remedial flexibility came with the merger of law and equity. *Basic to these rules was the “trans-substantive premise” that one set of rules in a single court could flexibly accommodate a wide range of substantive claims.* The reformers were caught up in Bentham’s ‘scientific’ approach to law. *Procedure was to be uncomplicated by substantive law and instead, a neutral and transparent medium for the resolution of factual and legal disputes.*²⁹ [Emphasis added]

- 16 Since then, the pendulum has begun to swing back the other way. In the United-States, the principles of trans-substantivity and substance-specificity were the subject of many academic discussions, especially among procedural reformists involved in the merger of law and equity courts.³⁰ At that time, American authors were deeply concerned by the complexity of substance-specific procedures, likely because of their nation’s previous experience with the writ system. More recently, their discourse has become more nuanced. Marcus points to the evolution of society as the source of this doctrinal evolution: ‘trans-substantivity and the simplicity it engenders have a certain appeal, but while perhaps appropriate in 1938, they may not suit the complexity of the twenty-first century legal world’.³¹ He further explains that while some subject matters are sufficiently complex to require specialized lawyers, they might also benefit from specially tailored

²⁸ D Thompson, ‘The Evolution of Modern Canadian Family Law Procedure: The End of The Adversary System? Or Just the End of the Trial?’ (2003) 41(2) Fam Ct Rev 155, 156. See R G Bone, ‘Improving Rule 1: A Master Rule for the Federal Rules’ (2010) 87 Denv. U. L. Rev. 287 (who criticizes three related assumptions that no longer fit modern litigation and are counterproductive to effective procedural design: ‘The first assumption is that procedure can and should be tailored to the unique needs of individual cases. The second assumption is that procedural tailoring is best achieved with general, transsubstantive rules that rely heavily on trial judge discretion to construct “just, speedy, and inexpensive” procedures for each case. The third assumption is that the three values embodied in the phrase “just, speedy, and inexpensive” can be applied without tradeoffs or conflicts and without sacrificing substantive justice for speedier resolution or lower costs’).

²⁹ D Thompson (n 28) 156. Also see A Frost, ‘Overvaluing Uniformity’ (2008) Virginia Law Review 1567; P D Carrington, ‘Politics and Civil Procedure Rulemaking: Reflections on Experience’ (2010) 60 Duke Law Journal 597-667 and G C Hazard, ‘Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure’ (1989) 137 U. Pa. L. Rev. 2237.

³⁰ R Feldbrin (n 8) 711, 724-751 (2021).

³¹ D Marcus (n 19) 372.

procedures.³² Although the principle had been discussed for some time, Robert Cover coined the term ‘trans-substantivity’ in 1975.³³

17 Admittedly, civil procedure in the United States still shows, after many reforms, a persistent preference for the trans-substantivity principle.³⁴ However, in the 1970s, legislators in the United States have begun enacting specialized rules for certain subject matters.³⁵ While these substance-specific rules still represent a very small fraction of all applicable rules³⁶, they challenge the supremacy of trans-substantivity in the United States.

18 Interestingly, the traditional dichotomy between substance and procedure, according to which the latter is distinguished as being purely technical and deprived of *substantive* objectives, serves to legitimize the trans-substantivity principle on a theoretical level. As Marcus explains, *conceptually*, for procedural rules to apply similarly regardless of the characteristics of the case, they must be completely independent from substantive law:

Trans-substantivity by definition requires some analytical separation between substance and procedure. Procedural rules can only apply across doctrinal categories if these categories exist in some manner or another. *Also, procedural rules must stand apart from these doctrinal categories in order for the same rules to function regardless of substantive setting. The substance-procedure dichotomy could fairly be described as trans-substantivity's jurisprudential prerequisite.*³⁷ [Emphasis added]

19 Following this line of thought, if civil procedure is to be purely trans-substantive, it must be completely value neutral and have, as a sole purpose, the effective implementation of substantive law.³⁸ Evidently, the emergence of substance-specific rules, which have substantive goals and are not value-neutral, challenges the traditional conception of the substance-procedure dichotomy.³⁹

20 The question remains of how these principles should be implemented. Evidently, tailored procedures should not be enacted for every type of case; derogations from fundamental guarantees of civil procedure, such as the impartiality of the adjudicator, and the right to be heard, require careful consideration.⁴⁰ Nonetheless, Marcus stresses that

if lawmakers cannot depart from the trans-substantive norm to address [substance-specific dysfunctions], they must either let these dysfunctions fester, or they must

³² Ibid 372.

³³ R M Cover (n 6) 718.

³⁴ R Feldbrin (n 8) 745-754.

³⁵ D Marcus (n 19) 373, 415. Also see R G Bone (n 28) 287.

³⁶ D Marcus (n 19) 427-429.

³⁷ Ibid 380.

³⁸ Ibid 381, 415.

³⁹ Ibid 403, 415.

⁴⁰ M Cappelletti and B Garth (n 13) 290-291.

remedy them with an over-inclusive trans-substantive response that apply unnecessarily to processes involving other antecedent regimes.⁴¹

In that same vein, he believes there is no ‘generalized justification for trans-substantivity’: the equal treatment of procedures, which is not a sacred principle, sometimes makes little sense.⁴² In summary, while departures from trans-substantivity are welcome, he believes that their legitimacy must be evaluated individually.⁴³

- 21 Accordingly, legislatures contemplating special procedures should undertake a contextualized assessment of the costs and benefits of the proposed rules based on empirical studies.⁴⁴ Bone offers some insights regarding this exercise. He submits that the ‘error costs’ of existing procedural rules (ie, the extent of their in-adaptability), which depend on the underlying substantive values of the subject matter, are decisive in evaluating the trade-offs of special procedures.⁴⁵ Therefore, the more important the substantive interests at stake, the more appropriate special procedures are. Similarly, Cover asserts that ‘it is likewise permissible and possibly desirable to consult our substantive preferences when trading off reliability against availability of evidence’.⁴⁶
- 22 In any event, the results of such analysis should be revisited from time to time. As Feldbrin suggests, procedural categories are not static and should therefore be constantly reevaluated in light of the tension between trans-substantivity and substance-specificity.⁴⁷

1.3 Flexibility and Judicial Discretion

- 23 There are two conceivable methods to address substance-specific concerns in procedure. Firstly, the procedural rules can be specifically tailored to the subject matter’s issues. Under this approach, which has been discussed previously, the substance-specificity of the rules contextualizes the procedure. This exercise is done *ex ante*, through legislative choice. Secondly, flexible procedure could, through the proper exercise of judicial discretion, have their enforcement adapted to substance-specific circumstances.⁴⁸ In such instances, the contextualization is done *ex post* by the adjudicatory. It should be noted that flexibility and judicial discretion can be found in both trans-substantive and substance-specific procedures. At first glance, this second method appears compatible with the trans-substantivity principle: it would allow for a single set of procedures to be *applied* to every subject matter. Yet, the result is not strictly trans-substantive: the way

⁴¹ D Marcus (n 20) 1221.

⁴² Ibid 1222.

⁴³ Ibid 1234; R G Bone, ‘Securing the Normative Foundations of Litigation Reform’ (2006) 86 Boston University Law Review 1155, 1160.

⁴⁴ D Marcus (n 20) 1221.

⁴⁵ R G Bone (n 43) 1160.

⁴⁶ R M Cover (n 6) 731.

⁴⁷ R Feldbrin (n 8) 754-760.

⁴⁸ R Feldbrin (n 8) 762.

the single set of procedure is applied (ie, the exercise of the discretion) will necessarily differ among subject matters. The following reflection from Marcus illustrates this issue:

Where process law is articulated in trans-substantive terms but lends itself to regularized patterns of substance specific application, courts might apply the trans-substantive rule in a substance-specific way because it believes that the costs of trans-substantivity for the antecedent regime at issue outweigh the principle's benefits; however, legitimacy, competency and coordination problems may distort this determination.⁴⁹

- 24 The principal difference between these two methods relates to whom holds the power to contextualize the procedural rules. Certainly, where the legislator makes such determination by establishing substance-specific procedures, it offers more predictability and uniformity regarding the procedural treatment of similar cases. The exercise of discretion is, of course, more variable and uncertain because it increases judicial activism.⁵⁰ Furthermore, it is also in direct conflict with the 'rule of law', which raises legitimacy issues. As Chase explains, these two concepts are antithetical: 'discretion is particularistic; law's rule requires overarching command that bind all judges deciding like cases'.⁵¹
- 25 On a similar point, Marcus mentions that substance-specific procedures should only be enacted through the political process, since a court-supervised process can only legitimately, competently and effectively design trans-substantive rules.⁵² However, he adds that a court 'can most likely overcome its institutional limitations and properly craft a substance-specific rule when the court does so to enable the legal process to achieve the policy objectives in the antecedent regime more accurately'.⁵³ This precision justifies the use of judicial discretion for special subject matters regulated by trans-substantive rules.
- 26 While both flexible and tailored procedures could deal with the needs of special subject matters, the most appropriate model remains disputed among American authors. Weber proposes a compromise between these two models.⁵⁴ He believes the most efficient model would be comprised of a single set of flexible procedural rules applicable to most cases, which could adapt to any level of complexity, whether it is caused by the subject matter or the size of the case, paired with special rules tailored to adjudicate small cases.⁵⁵ Weber specifies that some cases that fall below the threshold of small case rules should

⁴⁹ D Marcus (n 20) 1247-1248.

⁵⁰ M Cappelletti and B Garth (n 13) 247.

⁵¹ O G Chase, 'Law, Culture and Ritual' (2005) New York University Press, 74.

⁵² D Marcus (n 19) 416; D Marcus (n 20) 1222.

⁵³ D Marcus (n 20) 1237.

⁵⁴ M C Weber, 'The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases' (1994) 14 *Review of Litigation* 113.

⁵⁵ *Ibid.*

nonetheless be subject to the general rules if they represent claims for vindication going beyond the amount sought for recovery, such as injunctive requests.⁵⁶ As an illustration, Weber refers to the US Federal Rules of Civil Procedure (USFRCP) which utilize the same set of procedures for all types and sizes of civil cases, and embody ideals of flexibility and judicial discretion, arguing that they have been well designed for adjudicating complex cases.⁵⁷ Based on this assumption, he suggests that reforms aimed at increasing efficiency should only depart from trans-substantivity and insensitivity to size to establish special rules for small cases. He believes these changes would be the reform of choice to increase speed and reduce costs in civil justice: special rules would decrease the tactical advantages of complexity and delay, which are predominant in small and mid-size cases, and consequently change the settlement posture of the parties.⁵⁸ In addition, he argues his model would not seriously impair the quality of the adjudication: while employing a single set of uniform rules makes practice simple and ensures all categories of litigants are treated fairly, procedure under specialized small case rules would increase predictability without threatening neutrality in a significant manner since the 'discrimination' between cases is not based on subject matter.⁵⁹

27 Inversely, Marcus argues that judicial discretion cannot efficiently adjust trans-substantive rules to substance-specific concerns. He explains that, in reality, this operation requires a lot of work because 'the judge has to announce an unambiguously substance-specific exception, rather than cloak the particularized application in the flexible generalities of a trans-substantive standard'.⁶⁰ Other authors suggest that, in practice, adjudicators rarely exercise their discretion to depart from their traditionally adversarial posture.⁶¹ Interestingly, some research supports the latter assertion.⁶² This reluctance of adjudicators might be explained, at least partly, by culture.⁶³

28 In modern days, there appears to be a decrease in the popularity of judicial discretion and flexible procedure to address substance-specific problems. For instance, Thompson notes that family law proceedings in Canada, which used to benefit from very liberal and flexible procedural rules, is reverting to a stricter approach.⁶⁴ He identifies a few factors to explain this phenomenon: (i) the increasing caseload, (ii) the increasing complexity of the substantive law, (iii) the decrease in legal aid funding, (iv) the stable or decreasing number of family judge, (v) the unification of family courts.⁶⁵ Priori Posada, on the other hand,

⁵⁶ Ibid 133.

⁵⁷ Ibid 113-114.

⁵⁸ Ibid 130.

⁵⁹ Ibid 135-136.

⁶⁰ D Marcus (n 20) 1249.

⁶¹ M Cappelletti and B Garth (n 13) 240, 243; J C Reitz, 'Why We Probably Cannot Adopt the German Advantage in Civil Procedure' (1990) 75 Iowa L. Rev. 987, 992.

⁶² S C McGuire and R A Macdonald, 'Judicial Scripts in the Dramaturgy of the Small Claims Court' (1996) 11 Canadian Journal of Law and Society 63.

⁶³ O G Chase, 'Legal Processes and National Culture' (1997) 5 Cardozo Journal of International and Comparative Law 1, 21-22.

⁶⁴ D Thompson (n 28) 172.

⁶⁵ Ibid 165.

argues for making procedural norms more flexible and recognizing the judges' power to adapt procedures to address inequalities in civil proceedings, particularly when involving Indigenous peoples and people with disabilities.⁶⁶

1.4 Adversarial and Inquisitorial Systems

- 29 Special subjects often involve disputes between *unequal* litigants. In such instances, the strict *laissez-faire* approach of providing the parties with the same procedural rights, no matter their personal differences, might not be appropriate.⁶⁷ According to Damaska, this merely guarantees 'abstract' equality: 'because the parties are actually different, providing them with equal procedural weapons does not ensure their equal ability to pursue litigative interests effectively'.⁶⁸ In this situation, the weaker individual only has a theoretical possibility of enforcing his rights through litigation.⁶⁹ Effective social reforms, especially in adversarial systems, necessarily include procedural changes made to diminish the influence of the economically stronger party's advantages.⁷⁰ Socialist doctrine stresses the inaptitude of adversarial systems to remedy such inequalities between litigants.⁷¹ Thankfully, two corrective measures are conceivable, each of which has inquisitorial or adversarial characteristics. In fact, both could serve, in their own way, to equalize the parties, to enhance the fairness and the accuracy of the adjudication.
- 30 Thus, the *inquisitorial* approach would naturally involve increasing the active role of the judge.⁷² Damaska explains the role of the judge in this scenario: 'he is expected to intervene where the parties are not evenly matched (although supplied with equal procedural weapons) and to assist the weaker side'.⁷³ This approach has obvious drawbacks that must be highlighted. First and foremost, it might go against the impartiality and neutrality required of the adjudicator. In that same vein, Damaska affirms that a judge 'can no longer easily decide who wins a debate in which he himself is entangled'.⁷⁴ At the very least, an active judge is likely to be *perceived* as biased, which could delegitimize the litigation outcome.⁷⁵ Secondly, the active role of an adjudicator might decrease predictability. According to Sward, where

⁶⁶ G F Priori Posada, 'The flexibility of procedural rules as a way of ensuring access to justice in Latin America' (2023) 13(1) *International Journal of Procedural Law* 137, 156-158.

⁶⁷ M R Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986) 107.

⁶⁸ *Ibid* 106.

⁶⁹ R Stürner (n 5) 816.

⁷⁰ M Cappelletti, 'Social and Political Aspects of Civil Procedure: Reforms and Trends in Western and Eastern Europe' (1971) 69(5) *Michigan Law Review* 847.

⁷¹ R R Verkerk (n 9) 308.

⁷² M Cappelletti and B Garth (n 13) 247.

⁷³ M R Damaska (n 67) 107.

⁷⁴ M R Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986) 107.

⁷⁵ *Ibid*.

[t]he decisionmaker is confined to reasoning from admissible evidence presented by the parties in open court, the parties, who control the evidence, can predict the outcome somewhat better than if they must wait to see what inquiries the decisionmaker pursues.⁷⁶

If this statement proves to be accurate, then, necessarily, special procedures that increase the powers of the judge would make the results of litigation less predictable. Still, this outcome is not commonly accepted: some authors believe inquisitorial systems offer similarly predictable outcomes because procedural and substantive rules frame the judge's decisions, and the parties participate in the investigations.⁷⁷ Finally, the active role of the judge, which may take the form of an obligation to apply the law, or at least part of it, *ex officio*, might go against certain guiding principles of procedure, such as the right of the parties to delimit the scope of the litigation regarding the facts and arguments.⁷⁸

- 31 Alternatively, the *adversarial* approach involves reducing the inequality gap between the parties by providing resources to the weaker party.⁷⁹ Most of the time, this is done through state financing, which can take many forms, such as the payment of counsels, expert opinions requested by the court⁸⁰, pre-litigation technical investigations following a complaint⁸¹, etc. Damaska interestingly explains that this approach might impoverish the arsenal of adversarial techniques:

Unless the state is able and willing to spend enormous resources to subsidize litigation, *it must impose limits on the expenses incurred by the parties it chooses to assist*. But in many instances these limits will leave unacceptable mismatches in place: the wealthier litigant can price his opponent out of the justice system. *Hence a state that takes seriously the transcendence of formal equality is also driven to impose expenditure restraints on the private financing of lawsuits. Costly procedural techniques will have to be outlawed*. Unable to guarantee a litigational Cadillac (as it were) to all citizens, the state must contemplate banning their manufacture altogether in favor of the more modest procedural vehicle available to all. The full-fledged party-dominated mode of proceedings is thus restricted, placed in the state's straitjacket. At this point, an even more dramatic departure from the contest form could become attractive: *if the inequality of the parties is so troublesome, why not reduce its significance by transferring the performance of most of the procedural*

⁷⁶ E E Sward, 'Values, Ideology, and the Evolution of the Adversary System' (1989) 64 Indiana Law Journal 301, 313.

⁷⁷ Ibid 314.

⁷⁸ C Chainais, B Hess, A Saletti and J-F Van Drooghenbroeck, *L'office du juge – Études de droit comparé* (Éditions Bruylant 2018) 113-114.

⁷⁹ M R Damaska (n 74) 107.

⁸⁰ M Cappelletti and B Garth (n 13) 259.

⁸¹ Ibid 270.

*action from the litigants to a nonpartisan agency that can also decide on the acceptable level of cost?*⁸² [Emphasis added]

- 32 Still, the litigation of special subject matters can be ‘subsidised’ by many sources other than the state, such as the financial assistance offered by private organizations, special insurance, contingent litigator’s fees, etc.⁸³
- 33 Before moving on to another subject, a few case studies are in order. With regards to small claims, special procedures offer, in theory, the only economically feasible solution.⁸⁴ Indeed, if such claims were handled by regular courts, and governed by regular procedures, massive state subsidies would be required to ensure accessible and effective remedies, a solution that is very unlikely to be implemented.⁸⁵ Thus, in this context, the adaptability of the adversarial system would be insufficient. Similarly, in family law matters, the needs for flexibility, specifically to solve disputes in their psycho-social and juridical aspects, might justify some procedural departures from the rigidity of the adversarial system.⁸⁶ These hypotheses are tested by the authors of this Part of CPLJ.
- 34 One might in fact wonder whether certain special subjects are more appropriately determined collectively than individually. In adversarial systems, adjudication is traditionally conceived as a contest between two individuals with opposing interests.⁸⁷ Such an approach raises issues for litigation concerning public issues that involve the diffuse interests of many people, because its outcome shapes the future interaction of unrepresented individuals.⁸⁸ To remedy this problem, procedural systems could increase judicial oversight: if the adjudicator represents the public interests of the absentees, the outcome of the litigation can be conceived as being determined collectively. Although this change would threaten adversary principles, Chayes maintains that the increased involvement of judges is necessary to achieve justice in litigation that concerns important public policy issues involving large groups of people.⁸⁹
- 35 In that same line of thought, some authors assert that, in a democratic society, the public interest is always concerned by civil litigation, at least when it comes to issues surrounding the administration of justice.⁹⁰ Moreover, they specify that the influence of the public

⁸² M R Damaska (n 74) 108.

⁸³ R Stürner (n 5) 817.

⁸⁴ M Cappelletti and B Garth (n 13) 243.

⁸⁵ Ibid 243.

⁸⁶ C L’Heureux-Dube, ‘The Quebec Experience: Codification of Family Law and a Proposal for the Creation of a Family Court System’ (1984) 14 Louisiana Law Review 1575, 1620-1621.

⁸⁷ A Chayes, ‘The Role of the Judge in Public Law Litigation’ (1976) 89 Harvard Law Review 1281, 1282.

⁸⁸ Ibid 1281.

⁸⁹ Ibid 1313-1316.

⁹⁰ C Chainais, B Hess, A Saletti and J-F Van Drooghenbroeck (n78) 156.

interest on procedure depends on the ‘nature’ of the litigation. Thus, the role of the judge becomes increasingly important where the public interest is at stake.⁹¹

- 36 On a final note, discussions on the dilemma between adversarial and inquisitorial systems must encompass reflections on the traditional systems of civil law and common law. In *The Faces of Justice and State Authority*, Damaska proposes to distinguish civil and common law procedures based on their compatibility with different functions of government.⁹² Common law procedure is linked to the ‘reactive state’ model, which is characterized by passivity. This model considers litigation to be a private contest between sovereign parties, which have the right to manage their own affairs, therefore the state’s involvement is limited to regulating the dispute resolution and to providing *neutral* adjudicators.⁹³ Meanwhile, because legislators from civil law backgrounds are seen as more involved in dispute resolution, civil law proceedings are associated with the model of the ‘activist state’. Intuitively, this second model relative to the functions of government is better suited to special procedures which carry their own objectives. As Zekoll explains, ‘[w]hile reactive systems strive for “fair” results in the individual case, the goal in activist systems is to generate the “right” decision in line with policies embodied in legal norms’.⁹⁴ Thus, following Damaska’s proposed models, civil law jurisdictions would appear to be more inclined to adopt special procedures. Still, Zekoll highlights two issues in Damaska’s proposition which might temper this conclusion: (i) the existence of a division between civil law and common law ‘systems’ is questionable; and (ii) the enactment of substantive policies is not independent from the adjudicatory systems, because the latter serves the implemented policy objectives by providing the appropriate forum for their enforcement.⁹⁵

2 HARMONIZATION

- 37 In comparative law, there is a growing consensus that the classical two arch-models of the common law and civil law are losing their relevance and accuracy.⁹⁶ In the context of civil procedure, this fading-out effect is especially true for the classical doctrine that classifies common law as *adversarial* and considers civil law to be *inquisitorial*. This phenomenon of the disappearance of the particularities of common law and civil law is referred to as the ‘convergence’ of systems. Its extent sparks academic debate: while some believe that globalization will annihilate the procedural differences between systems, others make more moderate predictions.⁹⁷

⁹¹ Ibid.

⁹² M R Damaska (n 74). See also: J Zekoll (n 4) 1310.

⁹³ M R Damaska (74) 104-106.

⁹⁴ J Zekoll (n 4) 1310.

⁹⁵ Ibid 1331.

⁹⁶ G I Seidman, ‘The New Comparative Civil Procedure’ in C B Picker and G I Seidman (ed), *The Dynamism of Civil Procedure - Global Trends and Developments* (Springer International Publishing Switzerland 2016) 19-20.

⁹⁷ R R Verkerk (n 9) 141.

- 38 Seidman identifies the three ways by which comparatists explain this convergence: (i) doubts have been raised as to the validity of the original arch-models; (ii) local reforms have been inspired by foreign solutions after vast comparative legal studies; and (iii) the rise of international and supranational organizations have led to conscious efforts being made to harmonize national laws.⁹⁸ Essentially, this convergence is the result of many direct and indirect transpositions of procedures. Regarding special procedures, this process raises interesting questions.
- 39 Some believe there is something fundamental about procedure which makes it more difficult for nations to adopt foreign concepts in that field or learn from other procedural systems. More specifically, they point to the broad interconnectivity of procedure: since procedure reflects the culture of the collectivity and is 'tied to a legal system's fundamental organizing principles and norms, [it is] resistant to change and difficult to understand out of context'.⁹⁹ In other words, it is argued that because the judicial trial is an institution of the state, procedural law should follow and reflect state ideology and politics, as well as the social organization that characterizes a given society. Following this line of thought, substantive law would be easier to transpose elsewhere. Therefore, if cultures truly are more attached to their procedural customs than their substantive norms, the transposition of special procedures should be easier because they are essentially substantive in nature (ie, they carry substantial objectives). However, these conclusions are not necessarily adequate. Indeed, some authors doubt the existence of a fundamental difference between substantive norms and the procedural practices that serve to enforce them.¹⁰⁰
- 40 Furthermore, the extent of the relationship between culture and procedure, as well as its importance, remain controversial.¹⁰¹ For those individuals that do not consider culture as a factor in the equation, procedure can be seen as strictly technical, meaning its only purpose is to enforce the law effectively. This leads certain authors to believe that transposing procedural rules is easier.¹⁰² Inversely, Chase believes that 'variations in disputing practices even *among* modern states are traceable to underlying cultural differences'¹⁰³, and that any transposition of procedure requires a serious 'cultural

⁹⁸ G I Seidman (96) 20.

⁹⁹ Ibid 6. Citing: S Dodson, 'The Challenge of Comparative Civil Procedure: Civil Litigation' in O G Chase, H Hershkoff, L Silberman, Y Taniguchi, V Varano and A Zuckerman, 'Comparative Context' (2008) 60 Atlanta Law Review 133, 140; O G Chase, 'American "Exceptionalism" and Comparative Procedure' (2002) 50 American Journal of Comparative Law 277, 278; J D Jackson, 'Playing the Culture Card in Resisting Cross-Jurisdictional Transplants: A Comment on Legal Processes and National Culture' (1997) 5 Cardozo Journal of International and Comparative Law 51.

¹⁰⁰ G I Seidman (96) 7; P Gottwald, 'Comparative Civil Procedure' (2005) 22 Ritsumeikan Law Review 23, 23-26.

¹⁰¹ O G Chase, 'Law, Culture and Ritual' (2005) New York University Press, 47. We have argued in favour of a relationship between culture and class actions in a previous publication: see C Piché, 'The Cultural Analysis of Class Action Law' (2009) 2 Journal of Civil Law Studies 101.

¹⁰² L Cadiet, *Culture et droit processuel* (Association Henri Capitant Des Amis de la Culture Juridique Française, Journées Louisianaises, Thème no 3, 2008) 18.

¹⁰³ O G Chase (n 101) 47.

inquiry’¹⁰⁴. To support his claim, he refers to the peculiarities of American culture. For instance, conferring an active role to adjudicators, in his view, is incompatible with the American culture because it is too strongly embedded in values of individualism, egalitarianism, and *laissez-faire*.¹⁰⁵

- 41 Chase further identifies three challenges posed by culture that might complicate the transposing of procedures.¹⁰⁶ First, he argues that transposed rules are difficult to implement effectively: their acceptance depends on their compatibility with the local culture.¹⁰⁷ Second, he believes that those rules threaten the legitimacy of the system, at least in the mind of the public.¹⁰⁸ Third, his view is that the transposition of procedures creates social risks as it might influence local culture.¹⁰⁹
- 42 The functions of the procedural rules to be transposed play a significant role in the feasibility of harmonization.¹¹⁰ Kerameus observes that ‘the extent to which procedural unification does differ from unification of law in general depends upon the function that is assigned to procedure with regards to substance’.¹¹¹ So long as technical tools are deprived of inherent values, unification should in his view be possible.¹¹² On the contrary, the unification of procedural rules that have been designed to fulfil the needs of substantive norms would necessitate a consensus about the underlying substantive norms. Put another way, unifying only procedural rules becomes increasingly difficult the stronger the functional link is with substantive norms.¹¹³ Where the rules have a purpose other than the proper administration of justice, unification becomes more difficult.¹¹⁴
- 43 On that point, Zekoll provides helpful guidance: if procedure and substantive law share the same underlying policy objectives, such as the protection of consumers or workers, ‘the procedural rules serving these interests will be resistant to change until and unless the underlying substantive norm is subject to change as well’.¹¹⁵ This means that the harmonization of special procedures requires a consensus around the substantive norms

¹⁰⁴ Ibid 48.

¹⁰⁵ Ibid 65.

¹⁰⁶ O G Chase, ‘Legal Processes and National Culture’ (1997) 5 *Cardozo Journal of International and Comparative Law* 1, 18-24.

¹⁰⁷ For a sociological analysis, see: B M Blegvad, C M Campbell and C J Schuyt, *European Yearbook in Law and Sociology* (Martinus Nijhoff 1977) 45 ff.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ K D Kerameus, ‘L’harmonisation procédurale dans le monde contemporain’ in L Vogel (ed), *La procédure entre tradition et modernité* (Éditions Panthéon-Assas 2010) 13.

¹¹¹ K D Kerameus, ‘Procedural Unification: The Need and the Limitations’ in I R Scott, *International Perspectives on Civil Justice* (Sweet & Maxwell 1990) 50.

¹¹² Ibid 51.

¹¹³ Ibid 51.

¹¹⁴ K D Kerameus (n 110) 14.

¹¹⁵ J Zekoll (n 4) 1328.

underlying the concerned subject matters. Perhaps, this explains why procedure related to commercial matters is easier to transpose.¹¹⁶

- 44 Finally, we must keep in mind that the enforcement in multiple jurisdictions of the same procedural rule can easily differ. As Verkerk puts it, '[o]nce a rule is transplanted, it might begin a life of its own, adapting itself to the new environment and circumstances'. Interestingly, the authors of this Part of CPLJ test all these propositions about harmonization in procedure.

3 SPECIALIZATION

- 45 In procedural systems, specialization may be achieved vertically or horizontally. Traditionally, in civil procedure, the expression 'specialization' refers to courts, sections or judges that are specialized by subject matter, meaning they have jurisdiction, usually exclusive but sometimes partial, over an area of the law.¹¹⁷ This phenomenon is usually referred to as *horizontal* specialization. Alternatively, specialization of procedural systems may also be achieved *vertically* through the attribution of jurisdiction to courts that instead depends upon the value or the complexity of the claims. Furthermore, a distinction should be drawn between specialized courts and specialized judges. Most of the time, the judge's expertise will match the court's specialization. However, when judges are first appointed, they are not necessarily specialists in their court's specialization area.¹¹⁸ In the author's jurisdiction, the Canadian province of Quebec, judges of the Superior court are generalists deciding over cases heard within the Court's general jurisdiction.
- 46 With the emergence of ever more complex facts, technical concepts, and evidence¹¹⁹, accompanied by the development of new legal fields, the case for specialization of courts and judges becomes increasingly attractive. In a modern society preoccupied with improving efficiency of the procedural system, the opportunity of streamlining litigations through specialization is promising: '[w]hile some cases undoubtedly will require extensive activity, in a specialized forum lawyers are likely to direct more of this activity toward the vital aspects of the case rather than to matters likely to be self-evident to the experienced, specialized judges'.¹²⁰ Moreover, creating specialized courts with exclusive jurisdiction over particular areas of the law might enhance uniformity of decisions in those areas, thereby contributing to greater predictability and confidence in the courts.¹²¹

¹¹⁶ Ibid 1315-1318.

¹¹⁷ J W Stempel, 'Two Cheers for Specialization' (1995) 61 Brooklyn Law Review 67, 69.

¹¹⁸ Ibid 69-70.

¹¹⁹ See C Piché, 'Le future de la preuve: perspective canadienne en temps de pandémie' (2020) 10(1) International Journal of Procedural Law 187, 216.

¹²⁰ J W Stempel (n 117) 87.

¹²¹ E E Sward, 'Values, Ideology, and the Evolution of the Adversary System' (1989) 64 Indiana Law Journal 301, 339.

- 47 Notwithstanding this, Cappelletti and Garth doubt that regular courts can effectively adjudicate important public policy cases involving diffuse interests and, at the same time, simple and common matters:

It must be recognized, however, that some of the characteristics of regular court systems that make them suitable for public law litigation on behalf of diffuse interests in the aggregate often make them unsuitable for enforcing ordinary people's rights at the individual level. Highly structured adversary procedures utilizing highly trained lawyers and expensive expert witnesses may serve vital functions in public law litigation, but they place severe limits on the accessibility of our courts for small claims made by ordinary people. The evident need is to preserve the courts while creating other, more accessible, forums.¹²²

- 48 Often, the specialization of procedural systems leads to bureaucratic processes. Indeed, to increase accessibility, many nations entrust adjudicatory functions to nonjudicial entities such as administrative agencies, compulsory arbitrators, special tribunals, state arbitrators, etc.¹²³ These gains in efficiency come at a price: since specialists and not the 'people' or their representatives make the decisions in bureaucracies, such systems can end up being contrary to democratic values.¹²⁴
- 49 Interestingly, the structure of a nation's bureaucratic system may be influenced by its culture and history. For instance, Cappelletti noticed that, for a few decades after World War II, nations that had experienced state abuse during the military conflict were inclined to 'rigorously and constitutionally [forbid] entrusting adjudicatory powers to nonjudicial bodies unless full judicial review of their decisions – *de novo* review of both fact and law [was] available'.¹²⁵ These nations preferred to rely on specialized and simplified procedures applicable before normal courts, as well as on non-bureaucratic specialized courts or divisions, to ensure efficiency and flexibility.¹²⁶ Inversely, in countries where due process was deeply imbedded, Cappelletti suggests that there might not have been similar distrust of the executive, which allowed nonjudicial bodies to issue non-reviewable decisions in all legitimacy.¹²⁷ However, these cultural and historical differences are less significant in recent times, the trend being towards convergence of systems.¹²⁸
- 50 In another vein, specialized courts are sometimes perceived as contrary to the adversarial principle. According to Sward, since the judges in specialized courts are or become experts in their fields, the parties might have less control over the outcome of the adjudication.¹²⁹

¹²² M Cappelletti and B Garth (13) 210, 239.

¹²³ M Cappelletti, 'Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and Social Trends' (1973) 25 Stanford Law Review 5, 675.

¹²⁴ R R Verkerk (n 9) 317.

¹²⁵ M Cappelletti (n 123) 675, 681.

¹²⁶ Ibid 686-687.

¹²⁷ M Cappelletti (n 123) 681.

¹²⁸ Ibid 683.

¹²⁹ E E Sward (n 121) 338.

Surely, the specialization of courts contributes to more rational proceedings, as the expertise of the judges will help evaluate the technical arguments of the parties.¹³⁰ However, this level of expertise implies that the parties might lose some control over the proceedings: the adjudicator would be harder to influence, and more likely to be active by exploring matters the parties have tried to avoid¹³¹. Additionally, specialized courts could lead to more biased judges: their prior expertise, knowledge and inclinations will influence their view of the case.¹³² However, as Sward emphasizes, this bias also characterizes generalist courts.¹³³

- 51 Specialization involves ostensible advantages, but also disadvantages. In favour of specialization, Stempel identifies in his article entitled *Two Cheers for Specialization*:

improved precision and predictability of adjudication; more accurate adjudication; more coherent articulation of legal standards; greater expertise of the bench; economies of scale that flow from division of labor, particularly including speed, reduced costs and greater efficiency through streamlining of repetitive tasks and waster motions.¹³⁴

- 52 Stempel nonetheless further recognizes that specialized courts might attract 'lower quality jurists' that might become isolated and unable to reap the benefits of 'percolation' and 'cross-fertilization' typical in generalist courts.¹³⁵ Specialized courts might also become vulnerable to interest-group manipulation, lack independence because they are more easily monitored by the legislature and the executive, and lack the widespread public acceptance and perception of fairness that generalist courts traditionally have.¹³⁶ Finally, Stempel notes that specialized courts may lack geographic diversity, and be less responsive to changes in the caseload mix of the court system.¹³⁷ Since the purpose of this paper is not to evaluate these claims, an exercise that would require conducting empirical research, we will limit ourselves to noting that their validity has been disputed.¹³⁸

- 53 For instance, it remains controversial whether the wider adoption of specialized adjudication would improve or diminish the quality of judges and their decisions. According to Posner, specialized courts usually deal with repetitive cases and therefore cannot attract the best adjudicators.¹³⁹ Still, the validity of this theory is contested: (i)

¹³⁰ Ibid 339.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ J W Stempel, 'Two Cheers for Specialization' (1995) 61 Brooklyn Law Review 67, 88.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid 91-111.

¹³⁹ Ibid 79-80. Citing: R A Posner, 'Will the Federal Courts of Appeals Survive Until 1984?: An Essay on Delegation and Specialization of the Judicial Function' (1983) 56 Southern California Law Review 761, 779-80.

monotony rarely motivates judges to resign, as they might prefer to work exclusively on their subject matter of choice; and (ii) the caseload of generalist courts is similarly unbalanced.¹⁴⁰ Another argument raised suggests the potential diminution in the attraction of talent: the stature and prestige of specialist courts and adjudicators might be stigmatized to such an extent that the best candidates would prefer to work elsewhere.¹⁴¹

- 54 On a related note, the literature offers some useful insights on the best ways to utilize specialization. Stempel stresses the dangers of ‘wholesale specialization’, instead arguing that the usefulness of specialization should be evaluated on an individual basis, because specific guidelines or a one-size-fits-all formula might be inappropriate.¹⁴² Of course, specialized forums should not be created for every subject matter; otherwise, the multiplication of jurisdictional boundaries could create confusion, and specialized judges could become isolated and develop narrow perspectives.¹⁴³ On this point, Stempel suggests that horizontal specialization should target subject matters that are easy to isolate from others, and that a generalist judge would probably not encounter often enough to develop an expertise.¹⁴⁴ He further proposes that reforms should be limited at specializing the trial court level, because this change offers the most significant gains in speed, efficiency, predictability, and uniformity.¹⁴⁵
- 55 In addition, it has been submitted that to effectively adapt the judicial system to subject-matters, there needs to be actual specialization, rather than mere separation.¹⁴⁶ This suggestion came from authors that identified problems with childcare proceedings in Ireland and concluded that adjudicating these matters through the general courts system did not fulfil the needs of the subject matter.¹⁴⁷
- 56 To conclude, we must highlight that specialization can help improve the implementation of policy objectives that underline substantive law. For example, some decades ago in Quebec, it was deemed necessary to reorganize the judicial system for the purpose of effectively implementing a reform of substantive family law.¹⁴⁸ The committee in charge of evaluating the administration of family justice concluded that the procedures in place were ‘partial, inappropriate, and even contradictory due to the division of jurisdiction, the rigidity of the adversary system, the lack of coordination, and inadequate collaboration

¹⁴⁰ J W Stempel (n 117) 80-81.

¹⁴¹ Ibid 82-87.

¹⁴² Ibid 111-112 (referring to R C Dreyfuss, ‘The Federal Circuit: A Case Study in Specialized Courts’ (1989) 64 New York Law Review 1)

¹⁴³ M Cappelletti and B Garth (n 13) 290-291.

¹⁴⁴ J W Stempel (n 117) 112-114.

¹⁴⁵ Ibid.

¹⁴⁶ C O’Mahony, K Burns, A Parkes and C Shore, ‘Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland’ (2016) 30 International Journal of Law, Policy and The Family 131, 151.

¹⁴⁷ Ibid 150.

¹⁴⁸ C L’Heureux-Dube, ‘The Quebec Experience: Codification of Family Law and a Proposal for the Creation of a Family Court System’ (1984) 14 Louisiana Law Review 1575, 1608.

between psychosocial and legal family services'.¹⁴⁹ To remedy these issues, the committee identified objectives specific to family matters that should define the organization and role of the courts, such as (i) humanizing and personalizing the legal process in family matter; (ii) creating an atmosphere favourable to calm and dignified settlement of family conflicts; (iii) appraising the conflict in all its aspects and identifying the underlying problems; and (iv) preventing permanent breaks, whenever possible, and promoting conciliation.¹⁵⁰ According to the same committee, the establishment of a specialized court, presided by specialized judges, and characterized by flexibility, would best serve these objectives. Under this approach, family courts would also have both legal and social functions, a change deemed necessary to achieve outcomes in the best interests of the family.¹⁵¹

4 OTHER CONSIDERATIONS

- 57 Traditionally, the specialization of procedures and courts has been considered necessary to address substantive law that is relatively new and rapidly evolving.¹⁵² Do fundamental principles and guarantees of civil procedure hold a lesser value when confronted with developing substantive law problems? In the following lines, we address their malleability in the context of special subject matters.
- 58 In civil procedure systems, the concept of equality takes different forms¹⁵³, two of which are directly opposed when it comes to special subject-matter proceedings: *equipage equality* and *rule equality*. On the one hand, *equipage equality* provides that litigants should be equally capable of producing their proofs and arguments to achieve the most accurate outcome¹⁵⁴. Evidently, the lack of resources of litigants is less problematic where judges have an active role in the proceedings since they are involved in the factual development as well as the legal analysis.
- 59 The equipage equality approach, often attributed to inquisitorial systems, is usually preferred to adjudicate special procedures. However, it raises concerns when the adversarial approach is selected; to achieve its underlying objective of adequate resolution, the parties must be sufficiently equipped to meet their respective burdens, they must be given equal opportunities to present their case, and the adjudicator must be neutral.¹⁵⁵ For example, where a seemingly neutral procedural rule has a harsher impact on the ill-equipped party, the unequal treatment might lead to an inadequate conclusion of the litigation.¹⁵⁶ To remedy such equipage disparities, many procedural practices can

¹⁴⁹ Ibid 1609.

¹⁵⁰ Ibid 1609.

¹⁵¹ Ibid 1609-1610.

¹⁵² M Cappelletti and B Garth (n 13) 241.

¹⁵³ W B Rubenstein (n 7) 1867-1868.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid 1873-1874.

¹⁵⁶ Ibid 1875.

be adopted such as: ‘government provision of attorneys, *pro bono* programs, fee rules, attorney advertising, notice pleading, liberal discovery and party joinder rules’.¹⁵⁷

60 On the other hand, the concept of *rule equality* requires that civil procedure be relatively efficient and relatively fair: to achieve these objectives the procedural rules must be, notably, ‘trans-substantive’ in nature.¹⁵⁸ Accordingly, a single set of procedural rules should be applicable to all cases, no matter the subject matter, because trans-substantive rules: (1) are more efficient; (2) make procedure more transparent and adjudication on the merits more likely; (3) appear fairer considering all cases are treated identically.¹⁵⁹ This facet of rule equality serves legitimacy and efficiency purposes.¹⁶⁰

61 Special procedures only apply to certain subject-matters, which challenges the concept of rule equality, especially by making the civil dispute resolution ‘unfair’ in some sense; for instance, a litigant could perceive that his exceptional case, which was targeted, is treated unequally. Thus, even where specialized procedures improve considerably a civil justice system, they are often perceived as unfair because they differ from the general procedures.¹⁶¹

62 Since equality, from a procedural fairness standpoint, is protected by trans-substantive rules, Rubenstein argues that lawmakers developing specialized rules owe an explanation for the exceptional treatment of the subject matters.¹⁶² As for efficiency concerns, the benefits of special procedures need to be weighed against their logical drawbacks, such as the increased adjudicatory resources required to identify the appropriate procedural rules in every case and ensure their correct application.¹⁶³ Furthermore, *outcome equality*, which entails that like cases should reach similar litigative outcomes¹⁶⁴, is also commonly invoked to justify special procedures.

63 A review by Chase of empirical research conducted in the field of ‘social psychology of procedure’ suggests that an individual’s perception of procedural *fairness* is influenced by culture.¹⁶⁵ Even more interestingly, it also found that the perceived fairness of a trial is independent of the outcome of the litigation. In that line of thought, after conducting his own review of the literature, Verkerk identifies three factors that seem to be the most relevant to influence this perception: (1) the possibility to voice your opinion; (2) the

¹⁵⁷ Ibid 1881.

¹⁵⁸ Ibid 1884.

¹⁵⁹ Ibid 1885.

¹⁶⁰ Ibid 1886.

¹⁶¹ R C Dreyfuss, ‘The Federal Circuit: A Case Study in Specialized Courts’ (1989) 64 New York Law Review 1, 14.

¹⁶² W B Rubenstein (n 7) 1907-1908.

¹⁶³ Ibid 1885-1889.

¹⁶⁴ Ibid 1893.

¹⁶⁵ O G Chase (n 101) 70-71.

impartiality of the decision maker; and (3) being treated with dignity, honesty, and trust.¹⁶⁶

- 64 Interestingly, procedural reforms aimed at improving ‘access to justice’ have focused on designing specialized courts and procedures to render effective the substantive rights of weaker individuals.¹⁶⁷
- 65 The Max Planck Institute Luxembourg for Procedural Law conducted for the European Union (as represented by the European Commission) an evaluation study of the enforcement, throughout EU Member States, of procedural protections of consumers under EU consumer law.¹⁶⁸ The report found that while the core concept of ‘consumer’ is clearly defined at the EU level, it has been transposed in different ways across EU Member States, leading to divergent levels of consumer protection.¹⁶⁹ The report suggests that the provided definition should allow for a distinction between different types of consumers.¹⁷⁰ In that sense, procedural rights of consumers would be tailored to their levels of vulnerability. To this effect, the report identifies three categories of consumers: (1) the *confident consumer*, who trusts and uses the system provided he is well informed about possible choices, (2) the *responsible consumer*, who is willing to take legal actions when necessary, and (3) the *vulnerable consumer*, who is unable to benefit from the usual protective framework for reasons of illness, age or over-indebtedness.¹⁷¹ Notably, it suggests increasing the substantive and procedural rights of vulnerable consumers to remedy their limited access to justice.¹⁷²
- 66 For certain substantive rights, access to justice concerns call for radical changes in the hierarchy of procedural values, notably those regarding the role of the adjudicator.¹⁷³ While the notion of ‘procedural justice’ was traditionally limited to the correct application of procedural rules, the new paramount objective appears to be ‘finding procedures that are conducive to the pursuit and protection of the rights of ordinary people’.¹⁷⁴

¹⁶⁶ R R Verkerk (n 9) 285

¹⁶⁷ M Cappelletti and B Garth (n 13) 238-241.

¹⁶⁸ An Evaluation Study of National Procedural Laws and Practices in Terms of Their Impact on the Free Circulation of Judgments and on the Equivalence and Effectiveness of the Procedural Protection of Consumers under EU Consumer Law (JUST/2014/RCON/PR/CIVI/0082), 2017.

¹⁶⁹ S Law, Consumer Actions before National Courts in: An Evaluation Study of National Procedural Laws and Practices in Terms of Their Impact on the Free Circulation of Judgments and on the Equivalence and Effectiveness of the Procedural Protection of Consumers under EU Consumer Law (JUST/2014/RCON/PR/CIVI/0082), 2017, 63–66.

¹⁷⁰ Ibid 74-77.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ M Cappelletti and B Garth (n 13) 240-241.

¹⁷⁴ Ibid.

5 INTRODUCTION OF THE CHAPTERS

- 67 Some legal proceedings have a long tradition of specific procedural rules. These include family proceedings, succession proceedings, commercial proceedings, and labour law proceedings. In addition, across many jurisdictions, civil procedure and fundamental civil justice principles and guarantees have become increasingly divergent and/or flexible in the context of special subject proceedings, often to meet the public policy objectives of the underlying substantive law. Examples of these are consumer proceedings, environmental proceedings, competition law proceedings, intellectual property law proceedings, and data protection proceedings.
- 68 In this Part of CPLJ, it was not possible to cover all special subject matters, which necessitated a selective focus. Therefore, an attempt was made to achieve a balanced approach by covering both established special subject areas (such as labour litigation) and emerging ones (such as consumer protection litigation, competition litigation and environmental litigation).
- 69 The following chapters will discuss the specialization in litigations dealing with special subject matters. In this way, they provide an insight into the types of cases that are properly handled through specialized proceedings and sometimes even adjudicated by specialized judges. They will explain, for each subject matter, how private justice and often also public justice serve the ends of the underlying substantive law, whether vulnerable individuals or groups are thereafter better protected or served, and whether specialized procedures and processes for these special subjects are efficient and fair. In other words, each chapter goes beyond providing an illustration of a particular area of the law's proceedings, and attempts to answer the following question: how is civil procedure rendered specialized/flexible to accommodate specific areas of the substantive law? Additionally, the segment analyses the reasons for the development of specific procedural schemes, processes and rules for special subject matters in civil disputes, and explains what those schemes, processes and rules are.

ABBREVIATIONS AND ACRONYMS

ECLI	European Case Law Identifier
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
etc	et cetera
EU	European Union
ff	following
fn	footnote (external, ie, in other chapters or in citations)
ibid	<i>ibidem</i> (in the same place)
ie	<i>id est</i> (that is)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
pt	part
US / USA	United States of America
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes

LEGISLATION

International/Supranational

Law S, Consumer Actions before National Courts in: An Evaluation Study of National Procedural Laws and Practices in Terms of Their Impact on the Free Circulation of Judgments and on the Equivalence and Effectiveness of the Procedural Protection of Consumers under EU Consumer Law (JUST/2014/RCON/PR/CIVI/0082), 2017.

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