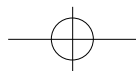
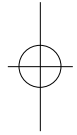
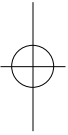
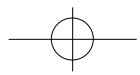
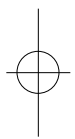
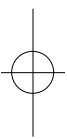
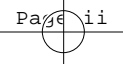


Introducing Discovery into Civil Law





Introducing Discovery into Civil Law

Kuo-Chang Huang

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Contents

Foreword	ix
Acknowledgments	xxiii
Introduction	xxv
List of Abbreviations	xxxiii
Chapter I Two Principles of Civil Adjudication	3
A. Adversary System under the Common Law Civil Procedure	4
1. The Meaning of Adversary System	4
2. Adversarial Presentation of Evidence and Argument	7
3. Neutral Adjudicator—From Passive to Active	11
4. Lawyers' Role and Ethical Rules	15
B. Party Presentation under Continental Civil Procedure	21
1. The Meaning of Party Presentation	21
2. Three Doctrines and Their Implications	23
3. Duty to Tell the Truth	27
4. Duty of Clarification	29
C. Summary—A Comparative Observation	34
Chapter II Fact-Finding without Discovery	37
A. Incomplete Database for Fact-Finding	39
1. Misalignment of Authority, Burden, and Incentives	40
a. Judicial Primacy versus Party Presentation	40
b. The Participants' Incentives	42
2. Right to Move for Judicial Investigation	44
a. Requirements of Materiality and Substantiation	44
b. Judicial Discretion	46
3. Ideology and Policy	47
B. High Standard of Proof	51
1. Judicial Finding of Fact—Personal Conviction	53
2. Undesirable Consequences—Unfairness and Inefficiency	56
a. The Model	56
b. Consequences of Different Standards of Proof	57
3. Finding Truth by Incomplete Information?	63

vi CONTENTS

C. From Piecemeal Hearings to Concentrated Proceedings	66
1. Piecemeal Oral-Argument Sessions & Their Conceptual Unity	66
2. Interrelation between Discovery & Structure of Litigation Process	70
3. Movement toward a Single Concentrated Trial	74
D. Low Settlement Rate	81
1. Traditional Economic Model of Conditions of Settlement	84
2. Informational Effects of Discovery on Settlement	88
a. Voluntary Exchange of Information & Its Impediments	90
b. Compulsory Discovery and Its Effect on Voluntary Exchange	95
E. Toward a More Efficient Procedure: A Cost/Benefit Analysis	99
Chapter III The Continental Alternatives to Discovery — The Japanese Example	109
A. Using Perpetuation of Evidence for Discovery	110
1. The Device of Perpetuation of Evidence	111
a. Purpose	111
b. Requirements	112
c. Court Order	115
2. The Use of This Device for Discovery	116
a. Use in Medical Malpractice Cases	117
b. Criticism of Use for Discovery	118
c. Support for Use for Discovery	120
3. Comment: From Perpetuation to Discovery	123
B. Relaxed Restrictions on Fishing for Evidence	126
1. Prohibition of Fishing for Evidence	127
a. Concept and Rationale	127
b. Motion for an Order of Production of Document	129
2. Relaxation of the Requirement of Substantiation	131
3. Comment: Obtaining Information through Judicial Proof-Taking	134
C. Reduced Burden of Proof	137
1. Japanese Standard of Proof	138
2. Prima Facie Presumption	143
3. Duty of Elucidation by the Opposing Party	149
4. Comment: Reducing the Burden of Proof or Moving toward Discovery?	154
Chapter IV Introduction of Discovery — The Japanese Experience	157
A. Background	159
1. Arguments for Discovery	161

a. Fairness and Truth-Seeking	162
b. Strengthening of Preparation: Moving toward a Concentrated Proceeding	164
c. Party-Controlled Witness Examination	166
2. Arguments against Discovery	168
a. Continental Character	168
b. Workload of Judge and Lawyer	170
c. Business Secrets, Litigation Costs & Discovery Abuse	172
3. A Compromise Scheme	173
B. Orders to Produce Documents	175
1. Scope of Discoverable Documents	176
a. Limited Grounds for Production under the Pre-1996 Code	176
b. Expansion through Judicial Interpretation	180
c. Establishment of General Duty of Production	186
2. Moving for Orders of Production	189
a. Motion for Specifying Documents	190
b. In-Camera Proceeding	193
3. Effects of Nonproduction	196
a. Previous Problem and Subsequent Development	196
b. Increased Sanction under the New Code	199
C. Interparty Interrogatories	202
1. Scope and Requirements	205
2. Effect of Noncompliance	210
Chapter V The Proposed Scheme (1) —	
Scope of Discovery	219
A. In General	222
B. From Whom Discovery Can Be Sought	223
C. General Scope — Party-Controlled Discovery	228
1. The United States System	228
2. The English System	231
3. The Proposed Scheme	235
D. Proportionality — Judicially Defined Discovery	238
1. The United States System	239
2. The English System	244
3. The Proposed Scheme	249
E. Immunity from Discovery	254
1. The Development of Work Product Doctrine and Its Policy	262
2. The Scope and Requirements of Work Product Protection	271
3. The Extent of Protection (1): Condition to Defeat Work Product Protection	279

viii CONTENTS

4. The Extent of Protection (2): Temporal Scope of Work Product Protection	291
Chapter VI The Proposed Scheme (2) — Devices of Discovery	299
A. Pre-Action Discovery	301
1. Pre-Action Discovery in England	302
a. Background and Purpose	302
b. Three Requirements	303
c. Allocation of Costs	306
2. Pre-Action Discovery in the United States	308
a. Limited to Perpetuation of Evidence in Federal Courts	308
b. Aiding in Bringing an Action in State Courts	310
3. The Proposed Scheme — To Aid in Both Framing Complaint and Avoiding Litigation	311
B. Automatic Disclosure	318
1. Opposite Directions of Movement in the United States and England	319
2. Automatic Disclosure under the Proposed Scheme	327
a. Why Adopt It	327
b. Scope of Automatic Disclosure	330
c. Procedure of Automatic Disclosure	334
C. Documentary Discovery	337
1. Request for Inspection or Production	338
2. Document within the “Control” of the Disclosing Party	340
3. Organization of Documents versus Dump Truck Strategy	345
D. Interrogatories	349
1. Feature and Purpose of Interrogatories	349
2. Scope of Interrogatories	353
a. Persons Subject to Interrogatories	353
b. Probing Opponent’s Case	356
3. Procedure for Interrogatories	362
4. Objections to Interrogatories	364
5. Answers to Interrogatories	367
a. Interrogated Party’s Duty	367
b. Effects of Answers	373
 Chapter VII Proposed Rules of Disclosure and Discovery	 381
Bibliography	389
Index	403

Foreword

Why Comparative Civil Procedure?

by Kevin M. Clermont*

I feel so honored and pleased to write a foreword to the first book by my former student Kuo-Chang Huang. You have in your hands an excellent book, but its very title raises a serious threshold question: what is the point of comparative civil procedure scholarship? Not much, one could argue, using as evidence the fact that not much of it is done.¹ I shall here try to rebut that view, using as my prime evidence his book.

* * *

The paucity of comparative civil procedure scholarship may result simply from how hard it is to do. Sound comparative scholarship is a delicate enterprise that demands great learning and skill. A comparativist should be sufficiently immersed in the different cultures under study to understand the context in which legal rules operate and the attitudes an insider might take toward the rules.²

* Flanagan Professor of Law, Cornell University.

1. See David J. Gerber, *Comparing Procedural Systems: Toward an Analytical Framework*, in *Law and Justice in a Multistate World* 665, 665 (James A.R. Nafziger & Simeon C. Symeonides eds., 2002); John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 *Am. J. Comp. L.* 545, 548–49 (1995). *But see, e.g.*, Special Section on International Civil Procedure, *Abuse of Procedural Rights*, 7 *Tul. J. Int'l & Comp. L.* 71 (1999); Symposium, *Civil Procedure Reform in Comparative Context*, 45 *Am. J. Comp. L.* 649 (1997).

2. See George A. Bermann, *The Discipline of Comparative Law in the United States*, in *L'avenir du droit comparé* 305, 314–15 (Société de Législation Comparée 2000):

Although comparative law scholarship is necessarily a good deal more than foreign law scholarship, it nevertheless effectively presupposes foreign law scholarship—and the latter, however low it may rank in the hierarchy of scholarship, is

Nevertheless, scholars often undertake other hard tasks. So, perhaps the paucity results also from a perceived lack of returns. Certainly, not much attention is paid to comparative civil procedure scholarship in academia or the real world.³ What can it, after all, accomplish?

In answering this question, it proves helpful that comparativists are peculiarly given to questioning their work's own worth.⁴ "Are we committed to a mode of academic scholarship that only other comparative lawyers, similarly deluded, value and the rest of legal academia rightly considers trivial or irrelevant?"⁵ They are even worried about their worrying: "Comparative law, [some] say, has been too self-conscious, too hung up on reflecting upon its own sense or nonsense all along."⁶ All this self-doubt has repeatedly prompted comparativists expressly to list the various purposes of comparative law scholarship. They slice the pie in various ways.⁷ Even on similarly sliced lists, their suggested purposes range from the mundane (training students for and aiding practitioners in international practice⁸) to the sublime (being "ambassadors of our own legal culture, to show it in its proper light . . . to reach the foreign ear"⁹). In fact, comparativists list so many purposes that their lists can become self-defeatingly long. In any event, because the subject undeniably has several diverse purposes, comparative law has diverse methods—and fuzzy borders.

Most aptly, Professor J.A. Jolowicz draws from the disparate lists three primary purposes for comparative civil procedure scholarship: borrowing to im-

exceedingly difficult to do and to do well. This is particularly the case if, as both traditional and non-traditional comparative law scholars seem to agree, the sources of law are not limited to formal written sources, much less to what might be described as a legal system's authoritative "rules."

3. See Langbein, *supra* note 1, at 545–47, 549–51.

4. See, e.g., Peter de Cruz, *Comparative Law in a Changing World* 18–26 (2d ed. 1999); Bernhard Grossfeld, *The Strength and Weakness of Comparative Law* 1–6 (Tony Weir trans., 1990); Bermann, *supra* note 2, at 308–12. See generally Symposium, *New Directions in Comparative Law*, 46 *Am. J. Comp. L.* 597 (1998).

5. John Henry Merryman, *The Loneliness of the Comparative Lawyer and Other Essays in Foreign and Comparative Law* 11–12 (1999).

6. Ugo Mattei & Mathias Reimann, *Introduction to Symposium*, *supra* note 4, at 597.

7. Compare, e.g., de Cruz, *supra* note 4, at 18–26, with, e.g., Bermann, *supra* note 2, at 306–08.

8. See Bermann, *supra* note 2, at 306, 311.

9. Grossfeld, *supra* note 4, at 112–14; see also Basil S. Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis* 45 (1997) ("to increase mutual understanding; to destroy artificial barriers; to promote reconsideration of sacred doctrines; to encourage the bringing together of lawyers with common interests").

prove local law, harmonizing law across systems, and uncovering the “mind-sets” of procedural systems.¹⁰ Let me, after slight reformulation, examine these basic three.

Transplants

The comparativist could look abroad for superior procedural devices in order to transplant them into the local system.¹¹ This transplanting could be done through voluntarily borrowing by the system or through involuntary imposition on the system.

The fact is, however, that actual transplanting of procedure, as opposed to the mere seeking of inspiration abroad for locally generated reform, is not common.¹² Transplants that impinge on the system’s organizing principles or constitutional norms are obviously impractical.¹³ But even less intrusive transplants of foreign devices are problematic.¹⁴ The reason is that procedure is a

10. John A. Jolowicz, *On the Comparison of Procedures*, in *Law and Justice in a Multistate World*, *supra* note 1, at 721; *see id.* at 734 (defining “mindset” as “the inarticulate premises on which the known rules of procedure rest — their underlying assumptions and, perhaps, principles”).

11. *See* Alan Watson, *Legal Transplants: An Approach to Comparative Law* 21–30, 95–101, 107–18 (2d ed. 1993). *But see* Pierre Legrand, *The Impossibility of “Legal Transplants,”* 4 *Maastricht J. Eur. & Comp. L.* 111 (1997).

12. *See* Bermann, *supra* note 2, at 307; Jolowicz, *supra* note 10, at 724–25.

13. *See* Stephen Goldstein, *The Proposed ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure: The Utility of Such a Harmonization Project*, 6 *Uniform L. Rev.* (n.s.) 789, 791, 793–94 (2001).

14. *See* Benjamin Kaplan, *Civil Procedure — Reflections on the Comparison of Systems*, 9 *Buffalo L. Rev.* 409, 422 (1960):

Possibilities of lifting pieces from a foreign system and incorporating them in the domestic must be approached with a sense of the interdependencies, the syndromes, so to speak, within the system *a quo* and the system *ad quem*. This is not to say that it is no use trying to import mechanisms for domestic use unless the foreign system is brought over entire. For some procedural devices can stand up pretty well in isolation from the rest of the system. I put as possible examples the special ‘dunning’ and documentary processes successfully employed in many cases in Germany. . . . Consider the feasibility of introducing here the German practice of having witnesses give their testimony in narrative, followed by interrogation by the court; this to be followed in turn by interrogation in our conventional way by counsel for both sides. This may seem a simple change that could be commended on various imaginable grounds, but I would ask you to reflect on whether it could be effectively or safely engrafted on our present system without other profound changes.

See also Konstanze Plett, *Civil Justice and Its Reform in West Germany and the United States*,

xii FOREWORD

field especially marked by the interrelatedness of its parts and its inseparability from local institutional structure.¹⁵ Also, although it is a technical subject, procedure is surprisingly culture-bound, reflecting the fundamental values, sensibilities, and beliefs of the society.¹⁶

All this is not to say that transplants are impossible.¹⁷ Indeed, the author of this book and I have elsewhere suggested a procedural transplant.¹⁸ But any such transplant must be limited in scope and sensitive to context.

Take discovery as an example, appropriately enough as I am writing a foreword to a fine book on the subject. Comparative study of discovery unsurprisingly reveals practices to be quite variable.¹⁹ So, perhaps better approaches and devices exist in other countries, ripe for transplanting. However, discovery schemes are highly interdependent with the rest of the procedural system (think of how discovery in the federal system interplays with notice pleading and with downplayed trial) and with the professional setting (think of how linked discovery is to the lawyers' and judges' ethos). Moreover, discovery peculiarities tend to be more culture-bound than most of procedure (think of the emotions that discovery evokes on both sides of the Atlantic). Therefore, in ordinary times, discovery does not provide promising terrain for nurturing transplants, or at least transplants other than the most delimited procedures drawn from the most similar systems.

13 Just. Sys. J. 186 (1989); John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 Iowa L. Rev. 987 (1990).

15. See Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 Am. J. Comp. L. 839 (1997); Langbein, *supra* note 1, at 551–53.

16. See Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 Am. J. Comp. L. 277 (2002).

17. See Jolowicz, *supra* note 10, at 722–24 (discussing, inter alia, Greek and Japanese procedure); Andreas F. Lowenfeld, *Introduction: The Elements of Procedure: Are They Separately Portable?*, 45 Am. J. Comp. L. 649 (1997).

18. Kevin M. Clermont & Kuo-Chang Huang, *Converting the Draft Hague Treaty into Domestic Jurisdictional Law*, in *A Global Law of Jurisdiction and Judgments: Lessons from The Hague 191, 226–28* (John J. Barceló III & Kevin M. Clermont eds., 2002) (arguing for U.S. adoption of European *lis pendens* doctrine); see also, e.g., Stephan Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. Pitt. L. Rev. 547 (1984) (arguing for U.S. adoption of Germanic restriction on attorneys' pretrial contacts with witnesses).

19. See *Pre-Trial and Pre-Hearing Procedures Worldwide* (Charles Platto ed., 1990).

Harmonizations

The comparativist could seek to harmonize across procedural systems, whether for the possible efficiency of similarity where national systems interact, for actual improvements in procedure, or for complete effectuation of harmonized substantive law. This development could come by agreement between systems or by imposition from above.²⁰

Yet harmonization is no easier than transplanting, and so it is little done.²¹ Indeed, harmonization's usual need for agreement among multiple countries joins all the other impediments to transplants.²² On the one hand, the need for agreement may require a compromise away from the best procedure, something in the middle not always being an optimum. Such compromises would reduce the benefits of harmonization. On the other hand, some aspects of procedure may not be susceptible to compromise, as where a system either has a device or does not, and this more binary choice would affect the countries' willingness to agree. Countries, and vested interests within them, turn out to be remarkably devoted to their procedural traditions.

Harmonization is nonetheless sometimes worth pursuing.²³ I have previously endorsed a limited harmonization in the especially promising area of judicial cooperation across borders, specifically on territorial jurisdiction.²⁴ More ambitious reform is more often doubtful, particularly as the reformer moves into the heartland of civil procedure. The difficulties best appear through two examples.

First, the most prominent example of attempted harmonization currently is the ALI/UNIDROIT project on transnational procedure.²⁵ Its aim was to

20. See Konstantinos D. Kerameus, *Procedural Unification: The Need and the Limitations*, in *International Perspectives on Civil Justice* 47 (I.R. Scott ed., 1990).

21. See Bermann, *supra* note 2, at 307; Jolowicz, *supra* note 10, at 725–26.

22. See *supra* text accompanying notes 13–16; cf. James Gordley, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 *Am. J. Comp. L.* 555 (1995) (arguing for harmonizing legal science rather than laws).

23. See Jolowicz, *supra* note 10, at 725–27 (discussing, inter alia, the Model Code of Civil Procedure for Iberoamerica).

24. Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 *Cornell L. Rev.* 89 (1999); see also, e.g., Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 *Ind.L.J.* 635 (2000) (advocating harmonization via a federal statute to govern the recognition and enforcement of foreign judgments in the United States).

25. ALI/UNIDROIT Principles and Rules of Transnational Procedure (Discussion Draft No. 3, 2002).

xiv FOREWORD

produce a complete set of court rules that a nation could adopt for handling transnational disputes outside arbitration. Proceeding on a view that the civil and common law traditions share fundamental similarities but display methodological differences, the reporters set out to capture the best of both traditions by picking and choosing elements from each. In my opinion, reasons to be wary arise when the aim is so ambitious and especially when the method entails cutting-and-pasting: initially, and arguably wrongly, the project assumes that there is a best set of procedures applicable to more than certain kinds of litigation in one particular society; moreover, and inevitably, a complete set of new rules impinges on some true basics of the various nations' procedural systems, while cutting-and-pasting ignores some of the interdependencies of procedure; and finally, such an unavoidably value-laden and subjective endeavor becomes an ill-advised one in the virtually total absence of empirical evidence. Although the project has proceeded under the brilliant direction of talented reporters, their experience to date has seemed to prove the difficulties of harmonization. The drafting process has been controversial since its inception in the mid-1990s, with criticisms coming from all directions, and the project has consequently seen a change in scope. It now covers only commercial transactions, while deferring more to national laws as to them. As to the project's future, this responsiveness of the reporters shows promise. On the one hand, the rules still seem a suboptimal *mélange* that few countries will willingly embrace. If any did, the new rules would sit uncomfortably atop the different national procedural system for ordinary cases. On the other hand, the project now will state general principles in addition to the rules. A set of principles would be more feasible in terms of achieving agreement, because principles need not be so complete and are less binding and more abstract—and yet they could be effective in eventually inducing changes in national rules.²⁶

Although some contend that the ALI/UNIDROIT project leans too much toward common-law approaches,²⁷ it rejects American-style discovery on the valid assumption that such procedures would be unacceptable elsewhere in the world. It states instead this principle: "Upon timely request of a party, the court should order disclosure of relevant, nonprivileged, and reasonably identified evidence in the possession or control of another party or nonparty. It is not a basis of objection to such disclosure that the material may be adverse to

26. See Goldstein, *supra* note 13, at 795–801; Jolowicz, *supra* note 10, at 730–31, 733–34.

27. See Goldstein, *supra* note 13, at 796; Jolowicz, *supra* note 10, at 731.

the party or person making the disclosure.”²⁸ In its rules, however, the project does not provide for routine disclosure of adverse information, only allowing a party to request the court to order production of nonconfidential and nonprivileged documents that are specifically identified and directly relevant to an issue on which the discoverer has the burden of proof.²⁹ Its grudging approach, then, is basically this: “A party generally must show its own cards, so to speak, rather than getting them from an opponent.”³⁰

Second, the European Union has provided another example that shows the difficulties of procedural harmonization.³¹ Its most thoroughgoing effort to date involved a working group of twelve experts from 1987 to 1993. They started by expressing an aim to create a European code of civil procedure, but finished by producing a report that tentatively proposed rules on a small number of discrete topics.³² Although never implemented, the draft rules were well reasoned and accordingly instructive. The rules are limited in scope, and leave much to national law. Their harmonization focuses on the most pressing points of procedural friction between systems—points, additionally, that involve nonsystemic and independent aspects of procedure.³³

Regarding discovery, again because it is of especial interest here, the European draft rules would have introduced to the Continent a form of the then-prevailing English law on disclosure and discovery of documents.³⁴ They would have required a party to list all relevant documents in its possession, custody, or power. They would also have provided for a litigant’s obtaining nonprivileged documents from parties and nonparties, unless such discovery would cause undue harm.

28. ALI/UNIDROIT, *supra* note 25, principle 13.5.

29. *See id.* rule 21 (providing also that the court can order production of identity of potential witnesses and copy of expert reports). Oddly, rule 22 allows the court to order deposition of witnesses, although the reach of the provision remains unclear. Comment R-22A all too briefly explains this undelineated discovery provision thus: “Under these Rules a deposition may be used in limited circumstances for exchange of evidence before trial.”

30. *Id.* at 12.

31. *See* Goldstein, *supra* note 13, at 791–92; Jolowicz, *supra* note 10, at 727–29.

32. *Approximation of Judiciary Law in the European Union* (Marcel Storme ed., 1994).

33. *See* Goldstein, *supra* note 13, at 792; compare Konstantinos D. Kerameus, *Political Integration and Procedural Convergence in the European Union*, 45 Am. J. Comp. L. 919, 924–29 (1997) (justifying limited approach), with Friedrich K. Juenger, *Some Comments on European Procedural Harmonization*, 45 Am. J. Comp. L. 931 (1997) (criticizing limited approach).

34. *See* *Approximation*, *supra* note 32, at 128–35, 172–73, 195–98 (treating article 4).

Insights

The procedural comparativist can, more simply, seek illumination by the cross-border study of theory, doctrine, or practice.³⁵ The aim is better to understand one's own law: "The purpose of comparative study is to help understand what is distinctive (and problematic) about domestic law."³⁶ This straightforward task is still daunting, as it involves mastering the domestic law, examining the foreign law, making comparisons, and then drawing conclusions.³⁷ Let me offer a somewhat random comment on each of those four steps.

First, one should start as a master of one's own law. Comparative law is no refuge for the dilettante. Although comparative study can help in thinking about one's own legal system,³⁸ that thinking builds most effectively on a solid understanding. If it does, comparative thinking might suggest changes in the domestic rules—changes that might come close to actual transplants,³⁹ and changes that might be significant steps toward deliberate harmonizations.⁴⁰ Indeed, these changes might induce alterations in mindsets, which could eventually produce true convergence.⁴¹

Second, as to examining the foreign law, one must do so carefully while being attentive to culture.⁴² But one does not always need systematic knowl-

35. See John C. Reitz, *How to Do Comparative Law*, 46 Am. J. Comp. L. 617 (1998).

36. Langbein, *supra* note 1, at 545.

37. See Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 Tul. Eur. & Civ. L.F. 49, 60 (1996):

The truly comparative study of law requires at least four steps. At the outset, the student must acquire a solid knowledge of his own law. Then he needs to learn enough about a foreign legal system or law to understand its rules and underlying principles. Step three is to juxtapose domestic and foreign law and clearly state the similarities and differences. Finally, from the observations made, the student must draw conclusions as to what they mean, *i.e.*, derive insights of one sort or another.

38. *E.g.*, Benjamin Kaplan & Kevin M. Clermont, *Ordinary Proceedings in First Instance: England and the United States*, 16 Int'l Ency. Comp. L. ch. 6 (1984).

39. See Markesinis, *supra* note 9, at 43:

Law can learn from medicine: pure transplants rarely work. The grafting of the new organ on a different body must be done carefully, the rejection mechanism must be suppressed. In law, I think, this means, at times, reshaping the foreign idea in a way that can come into your system with a minimum of resistance and dislocation.

40. *E.g.*, Clermont, *supra* note 24; Clermont & Huang, *supra* note 18.

41. See Merryman, *supra* note 5, at 26–32; Jolowicz, *supra* note 10, at 736–37, 739–40.

42. See *supra* note 2 and a accompanying text.

edge of the foreign system. “Even unsystematic knowledge can be very useful in a practical way for, say, law reform.”⁴³ Moreover, “it is quite legitimate for comparatists to base their comparisons on literature produced by foreign law specialists, at least to a substantial degree.”⁴⁴ To do comparative study, as opposed to scholarship on foreign law itself, one need be neither a linguist nor an anthropologist.

Third, to the extent the comparativist is not an insider, he or she should approach the law of a different system with modesty and respect.⁴⁵ Sometimes comparative studies sound as if they are suggesting changes in the foreign law, rather than the domestic law. For example, my wife and I wrote an article that rather rudely wondered how civilians could be so wrong as to their standard of proof.⁴⁶ But we wished thereby merely to highlight a subject that needs attention and to provoke response from comparative scholars, especially from the civilian side. Our principal conclusion was that what our own law does is the right thing—a kind of conclusion that is possible without falling into what some Europhiles pejoratively call the “Cult of the Common Law.”⁴⁷

Fourth, in drawing lessons for the home system, the comparativist should remain correspondingly cautious concerning the force of those comparative lessons. Any argument regarding domestic law should rest most heavily on inside support, rather than on support from the outside. The comparativist should be especially wary of resting strong conclusions on easy generalities.⁴⁸

43. Watson, *supra* note 11, at 17; *see id.*:

A person whose function it is to consider possible improvements in the law of bankruptcy in Scotland may well set out to discover the legal approach in England, France, Sweden, South Africa, New Zealand, and so on. He may have no knowledge of these systems to begin with, and at the end he may know little about them except for an outline of their bankruptcy laws. He may, indeed, have little idea of how well or how badly these laws operate. But his concern is with the improvement of bankruptcy law in Scotland. What he is looking for in his investigation of foreign systems is an idea which can be transformed into part of the law of Scotland and will there work well.

44. *See* Reitz, *supra* note 35, at 633.

45. *See id.* at 634–35.

46. Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 Am. J. Comp. L. 243 (2002); *see also, e.g.*, John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 Stan. L. Rev. 859 (1975).

47. Langbein, *supra* note 1, at 554.

48. *See* Basil Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 Mod.L.Rev. 1, 7–10 (1990); *see also, e.g.*, Ronald J. Allen, Stefan Köck, Kurt Riechenberg & D. Toby Rosen, *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 Nw. U.L. Rev. 705 (1988) (rejecting per-

xviii FOREWORD

For example, scholars are forever making use of sweeping statements comparing civil and common law, but it ultimately turns out that the civil-law and common-law systems are neither that different nor that similar.⁴⁹ Moreover, comparative assertions seem especially susceptible to overpowering counter-assertions, a trick achieved by slight change in frame of reference.⁵⁰ Of course, some generalities prove useful practically, such as the “general principles of law” used in international law.⁵¹ On the more theoretical level, generalities give critical perspectives on domestic law, as in uncovering the unstated premises of one’s own law and revealing its relativity and contingency.⁵² Yet it bears noting that specifics, studied in some context, can be instructive also. Arguing that comparative lawyers should downplay the search for generalities and embrace the study of cases, Professor Markesinis promised, “Looking at foreign law can bring a deeper understanding of problems they face—perhaps even unexpected ideas for solving them—but that will happen only when they sharpen their focus by narrowing it.”⁵³

suasively Langbein’s well-known generalization), *related references collected in* Jolowicz, *supra* note 10, at 722.

49. See Goldstein, *supra* note 13, at 789–90, 799–800.

50. After sitting through a series of lectures on comparing civil and common law last summer, I observed, “All generalizations on the differences or similarities between civil and common law are overstatements.” Then I added, “including this one.” The addition struck me as quite clever. So I started collecting similar paradoxes, such as: “All things in moderation—including moderation.” A related type includes: “There are no universal truths” (apparently except this one). The commonality was a sweeping statement that necessarily implied its own contradiction. The generalized format might be two sentences, with the second explicitly stated or not: (1) The sentence that follows is true. (2) The sentence that precedes is false.

My sensation of cleverness started to fade as I realized that my quip fell comfortably within a well-known family of paradoxes termed self-referential or circular. The prime exemplar is the liar paradox (*e.g.*, “This sentence is false”). Some members of this family are deeply significant, such as Bertrand Russell’s Paradox (which showed that the set of all sets not members of themselves is both a member of itself and not a member of itself, and which thereby threw all mathematical proofs into doubt). See *generally* Stanford Encyclopedia of Philosophy, available at <<http://plato.stanford.edu/entries/curry-paradox/>>; <<http://plato.stanford.edu/entries/russell-paradox/>>. Although consequently one cannot be sure of much, I suspect that my own paradoxical observation on comparative law is insignificant.

51. See de Cruz, *supra* note 4, at 24–25.

52. See Bermann, *supra* note 2, at 306–07; George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 Am. J. Comp. L. 683 (1998).

53. Markesinis, *supra* note 48, at 21.

In sum, the illuminative task can appear a daunting one. But effort and thought can accomplish the task, with the considerable rewards of across-the-board insights into domestic law. Because any willing scholar can pursue this task, every legal scholar should do so, as an adjunct to his or her primary focus. Indeed, the universality of this purpose of simply seeking insight raises the question of what is distinctive about the endeavor. Maybe studying comparative law, so viewed, is no different from being broadly read. This view might explain why Professor Bermann refers to the upper end of this third purpose of comparative law as the pursuit of “the culturally edifying,” while suggesting that a main purpose of comparative law is to reach the point at which all of law study is comparative.⁵⁴ The broad power of this purpose of simply seeking insight from elsewhere, coupled with the rarity of transplants and harmonizations, might then spell the end of comparative law as an autonomous subject.⁵⁵ But we can leave that debate to professional comparativists. Enough has been said to permit me to subscribe sincerely to this proclamation: “Comparative procedure is, therefore, a profoundly interesting and instructive discipline.”⁵⁶

* * *

A wonderful example of the illuminative purpose of comparative civil procedure is this “profoundly interesting and instructive” book on discovery by Kuo-Chang Huang. He is a brilliant young scholar from Taiwan, with law practice there and extensive graduate studies in the United States and Japan behind him. He was the kind of student who comes along once in a teacher’s career. From the first question he posed to me more than four years ago at the University of Paris, after class and in then-halting English, he has astounded me with his subtlety of mind—and challenged and motivated me too. His combination of intelligence and diligence was simply unmatched.

I predict with full confidence that Kuo-Chang Huang will be a bright star of academic civil procedure. He began to undertake serious research as a beginning graduate student. He decided to study the U.S. system of pretrial disclosure, a relatively new scheme supplementary to the discovery scheme that is so characteristic of U.S. civil procedure. Moreover, he decided to study empirically whether disclosure’s claims of success had been realized. So he taught

54. See Bermann, *supra* note 2, at 306, 314.

55. See James Gordley, *Is Comparative Law a Distinct Discipline?*, 46 Am. J. Comp. L. 607 (1998); Reimann, *supra* note 37.

56. Langbein, *supra* note 1, at 545.

himself statistics, and proceeded to write the best study of disclosure yet done in this country.⁵⁷ He next, for a forthcoming book, co-authored an essay with

57. Kuo-Chang Huang, *Mandatory Disclosure: A Controversial Device with No Effects*, 21 Pace L. Rev. 203 (2000). As an aside, let me set his article in context, much as was done in Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 Cornell L. Rev. 119, 132–34 (2002):

One of the most controversial pretrial reforms in the United States has been mandatory disclosure. The federal rulemakers introduced this new mechanism in 1993. Parties now must disclose certain core information, elaborating on the pleaded facts without awaiting a discovery request.

The rulemakers' introduction of disclosure aimed at achieving some savings in delay and expense, and also at moderating litigants' adversarial behavior in the pretrial process. They credited as their inspiration the anecdotal advocacy of disclosure in two law review articles by Professor Wayne Brazil and by Judge William Schwarzer. However, critics claimed that disclosure, in its routine operation and by the consequent disputes, would actually increase delays and expenses. Also, critics argued that disclosure would counterproductively clash with the prevailing adversary system and with the federal rules' notice pleading scheme. After the rulemakers' introduction of disclosure, the unabating controversy prompted them finally to commission empirical studies, by both the Federal Judicial Center and the RAND Institute for Civil Justice.

The FJC reported a survey of 2000 attorneys involved in 1000 general civil cases terminated in 1996 that were likely to have some discovery activities, a survey with a 59% response rate. Most of the responding attorneys felt that initial disclosure under Federal Rule of Civil Procedure 26(a)(1) had no effect on delay or fairness, but among those who detected effects more attorneys believed the effects to be positive rather than negative. Also, the survey found that respondents rarely reported fears of increased satellite litigation. Finally, by statistical analysis of its small sample of cases, the FJC found that the use of disclosure tended to shorten actual disposition time.

The RAND report used its preexisting data to compare a small group of district courts with local rules requiring some type of disclosure during 1992–1993 to another small group with no such rules. The data included the attorneys' subjective measures of satisfaction and sense of fairness, as well as objective measures of attorneys' hours worked and case disposition time. RAND found no significant effect of disclosure on fairness sensed, hours worked, or disposition time. But mandatory disclosure did markedly lower attorney satisfaction.

In 2000, based on these two imperfect studies, the rulemakers amended Rule 26(a)(1). They cut back the duty of disclosure.

Kuo-Chang Huang recognized the shortcomings of the two previous studies and performed his own very clever study of disclosure using data from the Administrative Office of the United States Courts. Among other statistical analyses, he "vertically" compared disposition time in the years before a district court required initial disclosure with disposition time after adoption of disclosure. He also "horizontally" compared district courts that required initial disclosure with district courts that had opted out of disclosure. By multiple regression, he showed that adoption of disclosure tended slightly but significantly to slow down disposition. He concluded that, because it has almost no other practical effects, this

me on reforming territorial jurisdiction in light of contrasts between the civil law and common law.⁵⁸

In the present book, he turns to the broad subject of discovery in civil actions, viewed comparatively. As the above-described attempts at harmonization suggest,⁵⁹ discovery is ripe for such study. In this particular realm of procedure, the civilians' mindset—still hostile to disclosure as well as discovery on the grounds of party privacy and autonomy—starkly differs from the common-law mindset. However, some movement in the civil law has recently occurred, and the future should see more.⁶⁰

Any such change will come by reform from within, and furthermore it will not be by actual transplant. Understanding this, Kuo-Chang Huang looks to the common law for illumination, but he considers civil-law reform as an insider. Given the values of procedure and the realities of practice, he concludes that the civil law should develop some forms of discovery. He then carefully constructs a sensitively native proposal for introducing both disclosure and discovery into the civil law. In sum, his is a productive posture that I do not really need further to describe, as he perfectly well describes it himself, in the Introduction:

Two points should be made perfectly clear at the outset. First, my proposal of introducing discovery is made for the sole purpose of curing the problems arising from the continental system's lack of discovery. It is not an attempt to harmonize the two systems' conflict on

controversial device has no justification in the context of the U.S. federal system. Thus, the rulemakers would have been better advised just to eliminate initial disclosure.

58. Clermont & Huang, *supra* note 18. The book is on the proposed, but perhaps doomed, Hague convention on jurisdiction and foreign judgments. The essay suggests a way of converting the Hague negotiations into national jurisdictional law. Those negotiations have given the United States the opportunity to rethink jurisdiction and make improvements on the interstate level. A federal statute could extend the substance of the negotiated provisions to state courts not only in international cases but also in all interstate cases, whether or not there is a convention. Earlier work foresaw such jurisdictional salvation and argued for its desirability and constitutionality, but just sketched its content. Calls for reform are relatively easy to utter. Actually drafting the reform—fully formulating the law of territorial jurisdiction—is a much harder task. This essay presents a draft of a proposed statute, so adding feasibility to the arguments made to the legislators. In general, the proposed statute aims to pare general jurisdiction down to its proper scope and codify specific jurisdiction into restrained and clear mandatory rules, while pushing constitutional limits into the background where they belong.

59. See *supra* text accompanying notes 25–34.

60. See Jolowicz, *supra* note 10, at 735–36, 740.

xxii FOREWORD

this issue or to build a set of universally applicable discovery rules. The most important lesson I find in the study of comparative civil procedure is that procedural law should be socially constructed and defined, with an eye on the need and culture of a particular society. Second, I would like to emphasize that while I propose to introduce discovery into the continental system, I do not propose to transplant the whole common law discovery scheme. It would be silly to suggest such a complete transplant. Besides the aspect of social environments, procedural arrangements are so highly interrelated that any reform proposal that only focuses on a certain part and ignores its interrelation with other parts is doomed to fail. Accordingly, the discovery scheme I propose is designed not only to accommodate certain important policy choices made by the continental system but also to fit into the structure of the continental system. In sum, the proposal is built from inside the continental system, not imposed on it from the outside.

His proposal is thus addressed to civilians, but his background exposition of common-law and civil-law approaches—and especially of the Japanese experience—makes “culturally edifying” reading for common lawyers. It is an extraordinary piece of work, and I commend it to all you readers who even slightly incline positively on the question of “*Why Comparative Civil Procedure?*”

Acknowledgments

This book is my revised J.S.D. (Doctor of the Science of Law) dissertation. It is the product of three years' research, as Rudolf B. Schlesinger Fellow at Cornell Law School from 1999 to 2000, as a foreign research student in the University of Tokyo from 2000 to 2001, and as a visiting scholar at Cornell Law School from 2001 to 2002.

My greatest debt is owed to Kevin M. Clermont, Professor of Law at Cornell University, who relentlessly mentored my study of civil procedure for the past four years. Without his demanding attitude and bright mind, I could not have worked so hard and fallen so in love with Civil Procedure during my LL.M. year. Without his delicate scholarship, I could not have enjoyed the beauty of this subject and realized how profound its research could be. Without his support and encouragement, I would have lacked self-confidence to develop my academic career and overcome many difficult times. He is the most important reason for me to stay at Cornell Law School to pursue my J.S.D. and the most important contributor to my finishing this book eventually.

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xxiv ACKNOWLEDGMENTS

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Introduction

The procedural differences between the common law and continental systems have been thoroughly examined, vigorously explored, and carefully analyzed by the modern study of comparative civil procedure. The abundance of literature on this subject nicely reflects and fully supports this observation. Virtually all comparative proceduralists agree that the differences between the two systems can be attributed to their different political, social, economic, and cultural settings. This is hardly a surprising finding. In fact, it is as obvious a conclusion as the nature of procedural law will permit. Bringing the observation down to a more specific level, the different mechanisms of fact-finding between two civil adjudication systems are normally observed from and explained by three important perspectives: the different organization of adjudicative institutions, the different structure of litigation processes, and the different allocations of controls among participants.

The common law civil procedure is characterized by (1) the presence of a lay jury in charge of fact-finding, (2) a continuous trial, and (3) a party-controlled-and-propelled proceeding. In contrast, in the continental system a professional judge is not only in charge of legal questions but also responsible for finding the disputed facts. In addition, he controls the pace of the whole litigation process, which consists of piecemeal hearings. The continental judge also monopolizes the investigative power to conduct judicial proof-taking by installment in these piecemeal hearings. It should be cautioned that although these generalities serve to provide a broad landscape of the differences between the two systems, they nevertheless are simplistic and sometimes even misleading. Despite these different features, the ultimate goal of both systems is essentially identical: to achieve the just, efficient, and speedy resolution of disputes. Perhaps the most interesting phenomenon is that neither system is satisfied with its own performance in achieving this ultimate goal, and both systems are trying to seek inspiration from each other to reform their procedural arrangements.

The common law system blames lawyers' overly adversarial litigation behavior for its high cost and long delay. The notion of active judicial management and supervision is sweeping both the United States and England and has

xxvi INTRODUCTION

dominated as the theme of their reform movements for the past twenty years. The focus of judicial attention is shifting from trial to the pretrial stage. As active judicial intervention drives up the importance and frequency of pretrial conferences and motions, the common law civil procedure is in effect moving toward a more episodic style of proceeding.

On the continental side, the system attributes its long delay in case disposition to its piecemeal hearings. The discontinuous nature of proceeding leaves too much room for parties to engage in dilatory strategy and allows them too much leeway in making sloppy preparations. The blatant consequence is inefficiency. As a result, despite several failures and frustrations, the continental system is still striving to move toward a concentrated proceeding.

The opposite directions of these reform movements are clearly bringing the two systems into convergence. This development leads many proceduralists to speculate on the prospect of establishing a set of universally applicable procedural rules. Indeed, two experts—Geoffrey C. Hazard, Jr. and Michele Taruffo—from opposite sides of the Atlantic Ocean have even gone so far as to propose “Transnational Rules of Civil Procedure” under a joint project of the American Law Institute and UNIDROIT, the international law-reform organization headquartered in Rome.

Despite this convergent trend, the attitudes of the two systems toward civil discovery remain far apart. In the common law system, parties are equipped with discovery rights to gather information and evidence in preparing their cases. Discovery enables them to compel disclosure of information from their opponents and even third parties. In the continental system, no such rights are recognized. The civil judges exclusively enjoy investigative power. Only the judges can compel production of evidentiary sources. This contrast leads to serious international conflicts within the context of extraterritorial discovery attempted by U.S. lawyers. Deeming discovery essential to the purpose of civil adjudication, U.S. lawyers never hesitate to reach out for evidentiary sources in foreign countries and to demand their production. Such conduct is also justified and sanctioned by U.S. courts. On the other hand, most continental countries view such discovery attempts as intolerable invasions of sovereignty. They make their antagonism perfectly clear by enacting “blocking statutes,” explicitly prohibiting U.S. discovery activities within their territories.

This intense conflict leads many U.S. scholars to search for the answer of why the continental system so disdains U.S. discovery. Almost all commentators find the answer to be rooted in different procedural arrangements and concepts of procedural justice between the two systems. Their exploration not only furthers the study of comparative civil procedure but also increases U.S.

scholars' understanding of the continental civil procedure. Their works on this subject show deep understanding of the continental system's attitude toward discovery, and they also sort out all conceivable reasons to explain the continental system's rejection of discovery. Some U.S. commentators even marvel at the efficiency of the continental fact-finding mechanism. The inspiration from the continental system, coupled with the popular outcry against discovery abuse in the United States, leads some U.S. scholars to campaign for "German advantages." This campaign further triggers fierce and extensive disputes over the relative advantages and disadvantages of the two systems. It also raises the debate on the desirability and feasibility of transplanting a particular procedural device from one system to the other.

A fundamental question, however, is whether the continental system's lack of discovery is really justifiable to begin with? This book addresses that question, and I submit that it is necessary and desirable for the continental system to introduce certain forms of discovery. The availability of discovery profoundly impacts virtually all aspects of procedural justice: accuracy of adjudication, fairness between opposing parties, and efficiency of dispute resolution. Through the discussion in the subsequent chapters, I will establish that the continental system suffers undesirable consequences from its decision not to grant parties discovery rights and that this decision is not justifiable. I argue that introducing discovery will not only increase the accuracy of the courts' fact-finding and restore the fairness between parties but also promote efficiency.

Two points should be made perfectly clear at the outset. First, my proposal of introducing discovery is made for the sole purpose of curing the problems arising from the continental system's lack of discovery. It is not an attempt to harmonize the two systems' conflict on this issue or to build a set of universally applicable discovery rules. The most important lesson I find in the study of comparative civil procedure is that procedural law should be socially constructed and defined, with an eye on the need and culture of a particular society. Second, I would like to emphasize that while I propose to introduce discovery into the continental system, I do not propose to transplant the whole common law discovery scheme. It would be silly to suggest such a complete transplant. Besides the aspect of social environments, procedural arrangements are so highly interrelated that any reform proposal that only focuses on a certain part and ignores its interrelation with other parts is doomed to fail. Accordingly, the discovery scheme I propose is designed not only to accommodate certain important policy choices made by the continental system but also to fit into the structure of the continental system. In sum, the proposal is built from inside the continental system, not imposed on it from the outside.

xxviii INTRODUCTION

Chapter I, as a foundation for subsequent arguments, examines the two fundamental principles of civil adjudication in the two systems: adversary system under the common law civil procedure and party presentation under the continental civil procedure. This examination reveals that both systems are adversarial in nature, relying upon parties to submit facts and evidence in finding the disputed fact. It also reveals that the two principles are both premised upon a false assumption that parties have equal ability to gather relevant information in support of their cases. While the common law system undertook discovery reform to cure the problem arising from this false assumption, the same reform movement did not occur on the continental side. As a result, if there exist any inherent inequalities of access to evidentiary materials, they remain uncured in the continental system. Contrary to most commentators' observations, I argue that neither civilian parties' duty to tell the truth nor the professional judge's duty of clarification can remedy the continental civil procedure's deficiency in this regard.

Chapter II analyzes the consequences of the continental system's lack of discovery, the reasons for civilians' antipathy to discovery, whether these reasons are justifiable, and how introducing discovery could promote accuracy, fairness, and efficiency within continental civil procedure.

In the first section of Chapter II, I argue that it is unjust and unfair for the continental system to place the duty of submitting evidentiary materials on parties but refuse to provide them with a means of discovering necessary information or evidence. By allowing the court to monopolize the investigative power, the continental system unnecessarily puts the parties' need for information and the judicial system's desire for saving time and resources in direct conflict. The result of such an unjustifiable and inefficient arrangement is an incomplete database for fact-finding. This result not only leads to the reduced accuracy of fact-finding but also unfairly disadvantages the party with the burden of proof. Most commentators believe that the continental system designs its civil adjudication as a means of dispute resolution rather than a mechanism of seeking the truth. They use this dispute-resolution ideology to defend the continental system's indifference to incomplete evidentiary materials and its tolerance of the reduced accuracy of adjudication. I challenge the validity of this explanation.

In the second section of Chapter II, I discuss why the continental system adopts a high standard of proof, its implications, and its relation to the unavailability of discovery. Through this discussion, I show that the continental system does not truly adhere to the dispute-resolution ideology. On the issue of standard of proof, it invokes the goal of finding the truth to rationalize its high standard of proof. Moreover, by declaring that the court will find a fact

only if it has been convinced of the fact's existence with virtual certainty, the continental system uses a high standard of proof to legitimate its fact-finding. But the real consequence of adopting a high standard of proof is not finding the truth, but unfairly disadvantaging the party with the burden of proof. I argue that it is unjust for the continental system to require the party with the burden of proof to bear such a heavy burden of persuasion but deny him the access to necessary evidence. I conclude that the continental system's demand of proving the truth without discovery rights serves the state's interest at the expense of the party with the burden of proof.

The third section of Chapter II explores the relationship between discovery and different structures of the litigation process. I argue that the traditional episodic style of proceeding under the continental civil procedure is not an adequate justification for its rejection of discovery. Moreover, as the continental system gradually moves toward a concentrated proceeding, the need to introduce discovery increases significantly. The availability of discovery has important bearing not only on whether the continental system can successfully pursue efficiency by concentrating its civil proceedings but also on whether this efficiency can be achieved without unduly sacrificing the value of accuracy.

In the fourth section of Chapter II, I discuss the question whether the discrepancy of trial rates between the common law system and the continental system can be attributed to the availability of discovery. Many more cases are fully contested in the continental system than in the common law system, which suggests that cases are more easily settled in the latter. This discrepancy is especially significant when it is taken into account that continental judges are more energetic in pushing settlement than their common law colleagues. While various factors may be responsible for this discrepancy, I submit that it has something to do with the continental system's lack of discovery. By using law and economics analysis, I explain why it is easier to fully contest cases in the continental system, and I show how discovery both increases the frequency of settlement and improves the quality of settlement. Most important, I establish that the availability of a set of discovery rules will greatly facilitate the voluntary exchange of information. The real beauty of providing discovery is to render formal discovery activities unnecessary and to make parties voluntarily and efficiently disclose information.

To sum up all considerations discussed, the fifth section of Chapter II lays down an economic framework to analyze whether provision of discovery will minimize the error costs and direct costs and therefore make continental civil procedure a more efficient procedure.

xxx INTRODUCTION

Chapter III builds on the conclusion that the severe consequences of lack of discovery are too great for the continental system to ignore. The continental system is bound to adopt certain strategies to meet parties' need for a means of gathering evidence and to ameliorate their difficulty in satisfying the heavy burden of proof. I use Japan as an example to examine the continental system's alternatives to discovery. The reason for choosing Japan as an illustration is three-fold. First, Japan is a leading jurisdiction in the world and the sophistication of its civil procedure is very high. Second, Japanese civil procedure is heavily influenced by both German and U.S. civil procedure, and it is very receptive to the two fundamentally different ways of thinking. This fact gives the two systems' conflicting attitudes and policies toward discovery equal opportunity to compete with each other within Japan. As a result, the theories and practices developed in Japan present rich materials to reflect and accommodate competing policies on this subject. Third, and most significantly, as a member of the civil law family, Japan moved to introduce common law discovery in its new Code of Civil Procedure of 1996. This introduction is pioneering. The experience from Japan thus provides invaluable data for research on this subject.

Before the enactment of its new Code of Civil Procedure of 1996, and under the heavy influence of German theories, Japan adopted three major strategies to resolve its problem of lack of discovery: (1) using the device of perpetuation of evidence for discovery, (2) relaxing its restrictions on fishing for evidence through judicial proof-taking, and (3) reducing the burden of proof when the party with that burden has no access to the necessary information or evidence. Three sections in Chapter III are devoted to discussing how Japanese civil procedure uses these three strategies to ameliorate the adverse consequences arising from its lack of discovery.

In examining these three strategies, I analyze what new undesirable results occurred as a result of invoking these strategies, and explain why these strategies are inadequate substitutes for discovery. Perhaps what Japan gained most from the above experience is to reconsider whether the continental system's total rejection of discovery really makes sense at all. After learning that the strategies it adopted were not adequate alternatives to discovery, Japan came to realize that a more promising approach to resolve its lack of discovery was to directly provide parties with more means of discovering evidence.

Chapter IV discusses how Japan introduced the concept of discovery into its new Code of Civil Procedure of 1996. The first section reviews the legislative background of the new Code. Focus falls on the debates among Japanese proceduralists over the pros and cons of introducing the common law discovery. As a result of these debates, a compromise scheme was reached to

adopt a mild reform in Japan's new Code. Two important devices were established by the new Code to expand parties' means of gathering evidence: the order of production of documents and the interparty interrogatories. The former device makes the production of documents a general duty and provides a special mechanism for parties to search for documents. The latter device makes it possible for parties to directly interrogate their opponents. The second section and the third section of Chapter IV examine these two devices in detail. In examining these devices, I argue that although it is certainly desirable for Japan to create its own discovery scheme to suit its society and judicial environment, certain compromises made in its new Code do not achieve any conceivable benefits and may prevent its whole new discovery scheme from working at all.

Chapters V, VI, and VII describe my proposed discovery scheme for the continental system. After arguing that it is necessary and desirable for the continental system to introduce certain forms of discovery and after criticizing the discovery scheme adopted by Japan, I feel compelled to propose a better scheme. To be sure, calling for reform is relatively simple but providing a specific reform proposal is a much more difficult task. In developing my proposed scheme, I heavily rely on the U.S. and English discovery systems and use them as comparative models. Despite the fact that the United States and England share the same common law heritage, discovery in the two countries is significantly different. The comparative analysis of the two discovery systems exposes various policy considerations and provides invaluable insight on how discovery relates to and interacts with other parts of procedural arrangements. Through this comparative analysis, I shape a proposed scheme, which aims at accommodating most policy choices made by the continental system and which is suited to the other features of the continental civil procedure.

Chapter V proposes the scope of the discovery scheme as follows:

(1) generally discovery can be sought only from parties to litigation and cannot be sought from a third party; (2) the scope of discovery is divided into party-controlled discovery and judicially-defined discovery, to achieve efficiency and to realize the principle of proportionality; and (3) the subject of privilege is not changed by the proposed scheme in order to preserve the substantive policy choices made by the continental system, but the work product doctrine is introduced in order to strike a sound balance between the adversarial character of civil adjudication and the ideal of discovery.

Chapter VI examines the desirability of introducing each individual discovery device. Four devices are recommended in my proposed scheme: (1) pre-action discovery, (2) automatic disclosure, (3) documentary discovery,

xxxii INTRODUCTION

and (4) interrogatories. In order to maintain the continental system's decision to place the duty of examining witnesses on the judges, deposition is generally not available under the proposed scheme. To compensate for this inadequacy, the range of people subject to interrogatories is somewhat expanded.

Finally, Chapter VII provides a proposed rule of disclosure and discovery to depict my reform proposal for the continental system to consider.

I realize that I take an unpopular and minority position in this book. I also anticipate that continental judges and lawyers will have few interests in pushing a reform calling for introduction of discovery. Nevertheless, I hope that my argument will, as I intend it to, provide a new version and broader perspective for the current debate on the desirability of discovery and stimulate debate at a different level. I believe that after the consequences of a fact-finding mechanism without discovery are fully explored by proceduralists and truly understood by the society, the time will come that the interests of the continental judges and lawyers will no longer be able to resist the demand of reform.

List of Abbreviations

FRCP	Federal Rules of Civil Procedure
CPLR	New York Civil Practice Law and Rules
ZPO	German Code of Civil Procedure [<i>Zivilprozeßordnung</i>]
JCCP 1890	Japanese Code of Civil Procedure of 1890 [<i>Minji Soshô Hô</i>]
JCCP 1926	Japanese Code of Civil Procedure of 1925
JCCP 1948	Japanese Code of Civil Procedure of 1948
JCCP 1996	Japanese Code of Civil Procedure of 1996
JRCP 1956	Japanese Rules of Civil Procedure of 1956 [<i>Minji Soshô Kisoku</i>]
JRCP 1998	Japanese Rules of Civil Procedure of 1998
CPR	English Civil Procedure Rules
PRO	English Civil Procedure Rules Practice Direction— Protocols
R.S.C.	English Rules of the Supreme Court

