Chapter 2
Fundamental Principles of Civil Procedure: Order Out of Chaos

Neil Andrews

Abstract There is a wide array of fundamental and important principles of civil justice. The main suggestion has been that the leading principles of civil justice might usefully be arranged under these four corner-stones of civil justice: Access to Legal Advice and Dispute-Resolution Systems; Equality and Fairness between the Parties; A Focused and Speedy Process; and Adjudicators of Integrity. Jurists and scholars of procedure will acknowledge the need to identify fundamental norms, but outside the hallowed halls of international colloquia or the court system, general principle is not widely respected. It is regarded with suspicion, especially by politicians and officials who might feel threatened and fettered by such generalities. The European Convention on Human Rights was a post-second world war response to the horrific collapse of all civilised values. Therefore, custodians of true civil justice should not become complacent. As our democratic systems become more and more hollow, procedural rights can provide some concrete protection for ordinary people. Another value of emphasising general principles is that they are an antidote to the numbing and bewildering complexity, detail, and technicality which characterise many national procedural rule books. Finally, international scholarly discussion thrives on fundamental principle. As we continue to debate the central procedural principles, students of civil justice will be standing on the shoulders of those celebrated jurists who have already contributed to this unending task by examining matters of first principle.

N. Andrews (✉)
University of Cambridge, Cambridge, UK
e-mail: nha1000@cam.ac.uk

X. E. Kramer and C. H. van Rhee (eds.), *Civil Litigation in a Globalising World*,
DOI: 10.1007/978-90-6704-817-0_2,

Contents

2.1 Introduction

The tendency of many national procedural systems is towards a proliferation of rules, sub-rules, and sub-sub-rules. This can produce over-detailed and unsystematic procedural regulation. This is clearly true in England, barely ten years after an injection of fundamental procedural aims and principles within the CPR system (1998). We are truly in search of order out of chaos: major principle rather than minutiae.

This tendency can be counter-balanced, even in due course corrected, by reference to generally recognised principles of civil procedure. Without a firm grasp of central and fundamental principles, we are in danger of becoming lost.

Another advantage of attention to general principle is that it can help legal systems move closer together, by reference to 'best practice.' There is so much national baggage, so much domestic clutter. Local detail can have a paralysing effect.

In Europe, harmonisation can be perceived at two levels: adjustment of national systems to ensure compliance with the procedural guarantees contained in, or implied by, Article 6(1) of the European Convention on Human Rights; secondly, regulations introduced to ensure pan-European Union adoption of rather more specific procedural institutions or practices.

Because of the welter of fundamental principles of civil justice that now jostle for recognition, and as the science of procedural law becomes ever more sophisticated, we need pointers, and groupings. My main suggestion will be that the leading principles of civil justice might usefully be arranged under four headings, which I have called the four corner-stones of civil justice. These are:

(1) Regulating access to court and to justice;
(2) Ensuring the fairness of the process;
(3) Maintaining a speedy and effective process;
(4) Achieving just and effective outcomes.

2.2 UNIDROIT/American Law Institute's Principles of Transnational Civil Procedure

The ALI (American Law Institute) and UNIDROIT's (International Institute for the Unification of Private Law) joint project, 'Principles and Rules of Transnational Civil Procedure' (2004),[1] aims to combine common law and civil law approaches to civil litigation. The general aim of composing a 'soft law' fusion of common law and civilian procedure was preceded ten years before, in 1994, by Marcel Storme's innovative project in Europe, a visionary search for shared civil procedural principles, combining civil and common law learning and experience.[2]

The ALI/UNIDROIT Principles offer a balanced distillation of best practice, especially in the sphere of transnational commercial litigation. They are not restricted to the largely uncontroversial 'high terrain' of constitutional guarantees of due process. Instead the project was skilfully pitched at the difficult mid-point between uncontroversial procedural axiom and the fine texture of national codes. The Principles are accompanied by Rules. The Rules are more detailed, fleshing out the more general Principles. And so the Rules offer greater guidance to national lawmakers who wish to use the Principles as a framework for revision of their procedural rules. As Geoffrey Hazard Jr. explained, the Rules are 'merely one among many possible ways of implementing the Principles.'[3]

The Principles and Rules were drafted by a team, appointed by the ALI and UNIDROIT. This team met for a total of 20 days in Rome during the years 2000–2003 (the present author was privileged to be a member). The General Reporters in Rome were Professors Hazard and Stürner, and in Washington DC, Professors Hazard and Taruffo. Within the Working Group, the nationalities represented were Argentina, Brazil, France, Germany, Italy, Japan, and Switzerland, and (from the other side of the common law/civil law fence) the USA and England.[4]

---

[1] The official text is ALI/UNIDROIT 2006, 157 et seq containing a full bibliography of works associated with this project; for large collection of papers (2001–4) 6 Uniform Law Review, a special issue under the title 'Harmonising Transnational Civil Procedure: the ALI/UNIDROIT Principles and Rules'; Andenas and Andrews 2006 (essays and comments by many senior British judges and leading practitioners and commentators on the draft UNIDROIT/ALI project); see also Fouchard 2001; Hazard et al. 2001; Stürner 2000; Stürner 2005, 201–254.

[2] Storme 1994 (Professor Marcel Storme is the long-serving President of the International Association of Procedural Law; he retired from that office in 2007; his successors are Professor Federico Carpi, Bologna, and Professor Peter Gottwald, Regensburg).

[3] ALI/UNIDROIT 2006, 99.

[4] The members of the drafting group were: Neil Andrews, University of Cambridge, UK; Professor Frédérique Ferrand, Lyon, France; Professor Pierre Lalive, formerly University of Geneva, in practice as an international commercial arbitrator, Switzerland; Professor Masanori Kawano, Nagoya University, Japan; Mme Justice Aida Kemelmajer de Carlucci, Supreme Court, Mendoza, Argentina; Professor Geoffrey Hazard Jr, USA; Professor Ronald Nhlapo, formerly of the Law Commission, South Africa; Professor Dr iur Rolf Stürner, University of Freiburg, Germany, and Judge at the Court of Appeals of the German State Baden-Württemberg, Karlsruhe; the assistant to these discussions was Antonio Gidi (USA and Brazil).

The 'Common Law' was clearly out-numbered seven to two by the 'Civil Law' representatives. It is also fair to say that the Civil Law members of the group were strong in resisting certain Common Law ideas. Everywhere the restraining hand of the Civil Law is visible and robust Common Law tendencies (American and English) are curbed.

It was apparent throughout the drafting group's discussions in Rome 2000–2003 that there were radical differences between the USA and English systems, and between the various civil law jurisdictions represented around the table. These differences make nonsense of both the glib phrase 'Anglo-American procedure' and the crude expression 'civilian procedure.' A refrain at these intense drafting sessions was, 'we do not have that institution in our own jurisdiction, but we would be interested in considering it'; or, 'the tradition in my jurisdiction is to regard that practice as wholly inconsistent with one of our fundamental starting-points; however, perhaps we have exaggerated the value of that starting-point.' Rolf Stürner, appointed to be the General Reporter of the UNIDROIT side of this collaborative project, has chronicled the working group's elaboration of these principles.[5]

As the author has suggested elsewhere[6] the Principles operate at three levels of importance: fundamental procedural guarantees,[7] other leading principles[8] and 'framework or incidental principles.'[9]

The author suggested that the ALI/UNIDROIT Principles range from (1) quasi-constitutional declarations of fundamental procedural guarantees to (2) major guidelines concerning the style and course of procedure to (3) points of important detail.[10]

---

[5] Stürner 2005, 201–254.

[6] Andrews 2006.

[7] Andrews 2006, 23, listing: judicial independence, judicial competence, judicial impartiality, procedural equality, right to assistance of counsel, professional independence of counsel, attorney-client privilege ('legal professional privilege'), due notice or the right to be heard, prompt and accelerated justice, the privilege against self-incrimination, publicity, and reasoned decisions.

[8] Andrews 2006, 23–24, listing: parties' duty to co-operate; party initiation of proceedings; party's definition of scope of proceedings; parties' right to amend pleadings; parties' right to discontinue or settle proceedings; judicial management of proceedings; sanctions against default and non-compliance; need for proportionality in use of sanctions; parties' duty to act fairly and to promote efficient and speedy proceedings; parties' duty to avoid false pleading and abuse of process; rights of access to information; right to oral stage of procedure; final hearing before ultimate adjudicators; judicial responsibility for correct application of the law; judicial initiative in evidential matters; judicial encouragement of settlement; basic costs shifting rule; finality of decisions; appeal mechanisms; effective enforcement; recognition by foreign courts; international judicial co-operation.

[9] Andrews 2006, 25, listing: the purpose and scope of the project; jurisdiction over parties; protection of parties lacking capacity; security for costs; venue rules; expedited forms of communication; pleadings; implied admissions; joinder rules; non-party submissions; allocation of burden and nature of standard of proof; making of judicial 'suggestions'; experts.

[10] Andrews 2006, 23.

Fundamental procedural guarantees:

- judicial competence; judicial independence; judicial impartiality; procedural equality; due notice or the right to be heard; publicity; reasoned decisions;
- prompt and accelerated justice;
- professional independence of counsel; right to assistance of counsel; attorney-client privilege ('legal professional privilege');
- privilege against self-incrimination.

Leading principles concerning the style and course of procedure:

- jurisdiction over parties; venue rules; party initiation of proceedings;
- party's definition of scope of proceedings; joinder rules; allocation of burden and nature of standard of proof; pleadings; parties' duty to avoid false pleading and abuse of process;
- rights of access to information; judicial initiative in evidential matters; experts;
- judicial management of proceedings; sanctions against default and non-compliance; need for proportionality in use of sanctions;
- parties' duty to act fairly and to promote efficient and speedy proceedings; parties' duty to co-operate;
- parties' right to discontinue or settle proceedings; judicial encouragement of settlement;
- right to oral stage of procedure; final hearing before ultimate adjudicators; judicial responsibility for correct application of the law;
- basic costs shifting rule; finality of decisions; appeal mechanisms;
- effective enforcement; recognition by foreign courts; international judicial co-operation.

Points of important detail:

- protection of parties lacking capacity; security for costs; expedited forms of communication; non-party submissions; making of judicial 'suggestions.'

As mentioned, the ALI/UNIDROIT project was not the first attempt at bridging the division between Civilian and Common Law procedures. Marcel Storme (and his team, including Tony Jolowicz) had led the way.[11] But, thus far, the ALI/UNIDROIT project is the most detailed identification of points of common ground.

The ALI/UNIDROIT Principles unfold as follows:

(1) Pre-Action Stage: the ALI/UNIDROIT materials say little about this stage other than possible provision of 'provisional and protective measures,' notably orders preserving assets against dissipation, in cases of 'urgent necessity' (Principle 8.2; Rule 17.2); neither the Principles nor the Rules adopt the English scheme of pre-action protocols[12];

[11] Storme 1994.

[12] Andrews 2007a, 201–242; Andrews 2008b, paras 2.26 et seq.

(2) Court's Composition: the requirements of independence, impartiality, 'substantial legal knowledge and experience,' equality of treatment, due notice, and publicity, are listed at Principles 1, 3, 5 and 20 and Rules 3.1, 7, 10 and 24; these requirements apply whenever the court is engaged in the conduct of the case, including an oral hearing, or creating a relevant court file or giving judgment; the question of venue is addressed at Principle 3.4 and Rule 3.3; the right to engage an independent lawyer is enshrined at Principle 4;
(3) Structure of the Proceedings: a three-fold division has been adopted: the 'pleading phase,' the 'interim phase,' and the 'final phase,' see Principle 9;
(4) Commencement and Service: commencement is effected by a party, not by the court, Principle 10.1; jurisdiction is determined in according with Principle 2 and Rule 4; service of originating notices is governed by Principle 5 and Rule 7 and 11; the question of joinder and intervention, as well as amicus curiae briefs, are governed by Principles 12 and 14 and Rules 5 and 6;
(5) Pleadings: statements of claim and defences are regulated by Principle 11.3, and by Rules 11, 12 and 13; amendments to pleadings by Principle 10.4 and Rule 14; default judgment for failure to defend is covered by Rule 15; Rules 15.1 and 19 concern early dismissal of defective pleadings or hopeless cases; the scope of the proceedings is determined by the parties' pleadings, as acknowledged by Principle 10.3;
(6) Case Management by Court: Principles 7.2, 9.3, 11.2, 14, and 17 are relevant; Rule 18 provides detail on this important aspect of modern commercial practice; encouragement of 'ADR' is noted at Principle 24.2 and Rule 18.5; separation of claims is covered by Principle 12.5 and Rule 5.6;
(7) Sanctions against Parties, Lawyers, or Non-parties: this difficult topic attracts attention in Principle 17 (and Principles 5.1, 15, and 21.2) and Rule 35.2;
(8) Preparation of Evidence, including Access to Information: on the court's powers to receive evidence, or even in some situations positively to order its production, see Principles 9.3, 9.4, 16, 18, 19, 22 and Rules 20, 21 to 23, 25, 27, 28;
(9) Expert Opinion: this can be by party-appointed expert or, where appropriate, court-appointed 'neutral expert or panel': Principle 22.4, and Rule 26;
(10) 'Early Court Determinations,' 'Dismissal and Default Judgments,' and 'Provisional and Protective Measures': these very important matters are covered by Principles 2.3, 5.8, 8, 9.3.3, 9.3.5, 15, and by Rules 15, 17, 19, 36.2;
(11) Final Hearing: the 'hearing' or receipt of evidence at the final phase is governed by Principle 19 and Rules 29 to 31; the court's responsibility to apply the law is stated at Principle 22.1; the giving of reasoned judgments at Principle 23 and Rule 31.2; for the requirements of judicial independence, impartiality, the court's possession of 'substantial legal knowledge and

experience,' public access, and independent legal representation, see (2) above;
(12) Res Judicata: this matter is considered at Principle 28;
(13) Costs Decisions: these are regulated by Principle 25 and Rule 32 (on security for costs see also Principle 3.3 and Rule 32.9; and on costs in support of settlement offers, Rule 16);
(14) Possible Appeal: Principle 27 governs; for greater detail, see Rules 33 and 34;
(15) Enforcement: this is regulated by Principle 26 and Principle 29, and Rule 35;
(16) Cross-Border Recognition of Judgments and Judicial Co-operation: on this see Principles 30 and 31 and Rule 36.

The drafters of the Principles acknowledged that there is scope for radical differences of approach on aspects of practice. Such agnosticism pervades discussion of the following topics: sanctions for procedural default, receipt of expert evidence, examination of witnesses, and the system of appeal (see above at (7)–(9), and (14), for references). Should the drafting party have been more decisive on these points and less agnostic? The better view is that these were intellectually honest decisions. They reveal the radical split between different traditions based on principled contrasting approaches. This is more likely to be helpful to future advisors than a confusing statement of an illusory compromise or a mistaken statement of 'universal common ground.' In short, *vive la différence*: provided the procedural difference between one nation's system (or family of nations) and another's is real and fundamental, and no international preference or accepted compromise can be discerned.

The ALI/UNIDROIT text was widely admired by the English commentators, who found this work to be suggestive, original, and flexible. Professor Adrian Zuckerman encapsulated that English consensus as follows[13]:

> Plurality of procedure encourages experimentation and promotes evolutionary progress. Jurisdictional competition could … lead to improvement in dispute resolution. It might, therefore, be better to direct the efforts in this area not so much towards an unified procedural system for transnational cases but towards establishment of general normative standards that allow for considerable variations. Community of general standards would facilitate easier mutual recognition of judgments and … enable different jurisdictions to find their own way of providing adjudication that is effective and attractive …

Although the ALI/UNIDROIT project is relatively young (completed in 2004, published in 2006), it seems likely that it will assist greatly in the intellectual mapping of civil justice and that it will influence policy-makers. If the project is re-opened at some point, fundamental change of the existing Principles is unlikely.

[13] Zuckerman 2002, 322.

Change is more likely to take the form of addenda rather than delenda or corrigenda. Thus some new or emerging topics might be considered at a revision council:

- pre-action co-ordination of exchanges between the potential litigants[14];
- multi-party litigation (this is a 'hot' and controversial topic within the USA, Europe,[15] including England,[16] Canada, Australia, and Brazil); and greater attention might be given to:
- the interplay of mediation and litigation[17];
- costs and funding (in England, the expense of litigation is the greatest impediment to effective civil justice);
- evidential privileges and immunities (notably, attorney-client privilege, protection of negotiation and mediation discussions, and the privilege against self-incrimination)[18]; and
- transnational 'provisional and protective relief'[19] (notably, asset preservation).

On the question whether it is desirable to maintain competition between jurisdictions to maintain competition or national experiment in the fashioning and refinement of civil procedure, the consensus emerging at the discussion of the (then) draft ALI/UNIDROIT Principles and Rules held at the British Institute for International and Comparative Law in May 2002 by leading English judges and commentators was this[20]: 'international uniformity on all points of procedural detail is an unattractive goal, but agreement on fundamental values and doctrines is desirable' (the author has developed this idea elsewhere).[21] In London the ALI/UNIDROIT project was greeted as stimulating and suggestive, and as a fruitful example of 'soft law.' Beyond that, however, there should be scope for national differences in that most delicate of legal activities: administering litigation in a fair and flexible fashion, remaining true to fundamental principles of fairness, but against the background of national traditions.

---

[14] Andrews 2007a, 201–242.

[15] Hodges 2008.

[16] Andrews 2008a, 92–97.

[17] Andrews 2008b; Andrews 2005, 1–34; Andrews 2007d, 1–9; Andrews 2007c, 1–43.

[18] In England this is a fast-moving and delicate topic, Andrews 2008a, b, paras 6.26–6.40; leading works include: Andrews 2003a, chs 25, 27–30; Tapper 2007, chs IX, X; Hollander 2006, chs 11–20; Matthews and Malek 2007; Howard et al. 2005, chs 23–26; Passmore 2006; Thanki 2006, Zuckerman 2006, chs 15–18; see also, Auburn 2000.

[19] Andrews 2003b; published also in Andrews 2002, 48–56.

[20] Andenas 2003.

[21] Andrews 2008b, paras 13.24 et seq; Andrews 2007e, 829–851.

2.3 What Really Counted Before the CPR (1998)? Principles Within the Old English Civil Procedure System

Having been given an opportunity in the mid 1980s to teach civil procedure in Cambridge, I wrote Principles of Civil Procedure (1994).[22] The eleven principles selected in that text were[23]:

- due notice;
- pre-trial disclosure;
- protection against spurious claims and defences;
- justice is not to be evaded;
- accelerated justice;
- oral proceedings;
- publicity;
- promoting settlement;
- finality;
- the adversarial principle;
- the principle of privity.

Some of these had been highlighted by Sir Jack Jacob in his The Fabric of English Civil Justice (1987).[24] In Principles of Civil Procedure (1994) I said that these eleven principles 'lie within the realm of practical politics.' I then mentioned the following three 'noble aims,' and expressed doubt whether they might ever 'be fully attained'[25]:

(1) access to justice;
(2) prevention of undue delay;
(3) management of complex litigation.

2.4 'Woolf Changes' of Principle: CPR (1998)

On 28 March 1994 Lord Mackay LC of Clashfern (Lord Chancellor 1987–1997) appointed Lord Woolf to make recommendations concerning civil procedure, with the following aims[26]: (i) improving access to justice and reducing the cost of litigation (ii) reducing the complexity of the rules (iii) modernising terminology (iv) removing unnecessary distinctions of practice and procedure. Woolf's interim

[22] Andrews 1994.

[23] Andrews 1994, paras 2-003 et seq.

[24] Hamlyn Lectures for the year 1986.

[25] Andrews 1994, 2-013.

[26] Terms of appointment cited in Woolf 1995, introduction.

and final reports appeared in 1995[27] and 1996,[28] and they stimulated a substantial literature.[29] The CPR was enacted in 1998 and took effect on 26 April 1999.

From the perspective of overarching principle, the main features[30] of this exciting fresh start involved recognition of nine leading principles, values, or aims:

- proportionality in the conduct of proceedings;
- procedural equality;
- introducing general judicial case-management responsibilities;
- accelerated access to justice by improved summary procedures;
- increasing focus and reducing cost by curbing excessive documentary disclosure;
- greater resort to the disciplinary use of costs orders;
- curbing appeals by requiring permission;
- stimulating settlement through costs incentives to induce parties to accept settlement offers; and
- judicial encouragement of resort to ADR, notably mediation.

These bare points are fleshed out in the following nine sub-paragraphs.

'The Overriding Objective' in CPR Part 1 gives prominence to the notion of 'proportionality' both in the organisation of levels of procedure—small claims, fast-track, or multi-track proceedings[31]—and in the exercise of the court's extensive case-management powers.[32]

Part 1 also emphasises the requirement of procedural equality.

The principle of party-control was modified.[33] The CPR created a general framework for active involvement of judges in the pre-trial development of moderately or extremely complex litigation. Judges are required to ensure that litigation proceeds with reasonable speed and that the issues are identified and

---

[27] Woolf 1995: it and its successor are available on-line at http://www.dca.gov.uk/civil/reportfr.htm (last consulted in May 2011).

[28] Access to Justice: Final Report (1996).

[29] Zuckerman and Cranston 1995; Cranston 2006; Andrews 2003a, Andrews 2000, 19–38; Flanders 1998, 308; Jolowicz 1996, 198; Zander 1997, 208; Zander 1998; Zuckerman 1997, 31 et seq.

[30] The author's most recent examinations of the CPR system are: Andrews 2008b (also considering the rise of ADR); and Andrews 2010.

[31] Respectively, CPR Parts 27, 28, 29.

[32] CPR 1.4(2); CPR 3.1(2); CPR Parts 26, 28, 29; Andrews 2008b, 3.13 et seq; Andrews 2007b, (see now the new Admiralty and Commercial Courts Guide 2009, Section D, 17–31; and note the anxious discussions engendered by 'rogue' 'super-cases': the Long Trials Working Party Report December 2007; and a pilot scheme during 2008; for the background, Sir Anthony Clarke MR, The Supercase-Problems and Solutions, 2007 Annual KPMG Forensic Lecture, available at http://www.judiciary.gov.uk/docs/speeches/_speech.pdf (last consulted [May 2011]).

[33] On the CPR system from the perspective of the traditional principle of party control, Andrews 2000, 19–38; Andrews 2003a, paras 13.12–13.41; 14.04–14.45; 15.65–15.72.

prioritised. At trial (and during its preparation), judges should control the volume of evidence.

But there are limits to judicial initiative: Parties still select factual witnesses and draw up witness statements[34]; parties still select party-appointed experts (they can also agree upon selection of a single, joint expert, this 'shared' expert being an innovation of the CPR system); judicial permission to use experts is required, but judicial selection of individual experts is avoided, unless the parties reach stalemate in agreeing a single, joint expert[35]; the Court of Appeal has said that excessive intervention by trial judges during the course of evidence is prohibited because it would be wrong for a judge to 'arrogate to himself a quasi-inquisitorial role,' this being something which is 'entirely at odds with the adversarial system.'[36] Summary disposal of cases is promoted by introduction of a more searching test of 'real prospect of success,' in CPR Part 24.[37]

'Standard disclosure' was intended to subject documentary discovery to a more focused notion of relevance. 'Standard disclosure'[38] covers documents on which a party will rely; or which adversely affect his case; or adversely affect the opponent's case; or support the opponent's case.

Procedural discipline would be reinforced by a more discretionary approach to costs decisions.[39] The courts could adjust costs awards and so reflect the fact that a victorious party had raised unnecessary issues. Lord Woolf MR in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* (1999), attempting to temper the perceived rigidity of the 'winner takes all' approach, said:

> too robust an application of the 'follow the event principle' encourages litigants to increase the costs of litigation'; and he suggested 'if you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so.[40]

Finality of judgment would be fortified by the requirement that an appellant would require permission to appeal.[41]

Nearly all appeals require the court to give its permission (formerly known as 'leave'),[42] in response to the appellant's speedy request to the first instance court

---

[34] Andrews 2008b, paras 8.04 et seq.

[35] On these aspects of CPR Part 35, Andrews 2008b; Dwyer, 2008.

[36] *Southwark LBC v Maamefowaa Kofiadu* [2006] EWCA Civ 281, at [148].

[37] CPR 24.2: *Swain v Hillman* [2001] 1 *All ER* 91, 92, CA; Andrews 2008b, paras 5.18 et seq.

[38] CPR 31.6; Andrews 2008b, paras 6.04, 6.22; on the pre-CPR excessive documentary disclosure system, Lord Woolf 1995, paras 1–9 (commenting on the 'Peruvian Guano' test: *Compagnie Financière v Peruvian Guano Co* 11 QBD 1882, 55, 63, CA); Steyn 1992; Cranston 2007, 190, 203.

[39] Andrews 2008b, 9.09 et seq.

[40] [1999] 1 *WLR* 1507, 1522-3, CA.

[41] Andrews 2008b, paras 8.12 et seq.

[42] CPR 52.3(1): except decisions affecting a person's liberty.

(normally within fourteen days[43]; a period which cannot be extended by party agreement).[44] If the lower court refuses permission, a fresh application for permission can be made to the appeal court.

Settlement would be promoted by the capacity of both claimants and defendants to make settlement offers backed by costs sanctions.[45]

In essence: under the English CPR system, Part 36, the claimant's costs risk arises if he does not accept the defendant's settlement offer. In that situation, if the claimant at trial 'fails to obtain a judgment more advantageous than a defendant's Part 36 offer,' then, 'unless [the court] considers it unjust to do so,' the claimant must pay the defendant's costs incurred after the date when the claimant should have accepted the settlement offer. The defendant will only be liable for the claimant's costs incurred before that date.

The defendant's costs risk arises if he does not accept the claimant's settlement offer. If 'judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer,' then, 'unless [the court] considers it unjust to do so,' the defendant will be liable to pay the claimant not just the ordinary measure of costs ('standard' costs) but an aggravated measure (so-called 'indemnity costs'), with the further possibility of a high level of interest on those costs.

The courts were charged with the duty to promote resort to ADR,[46] especially mediation, through use of costs orders,[47] and the staying of proceedings.[48]v

2.5 Article 6(1) European Convention on Human Rights

The (British) Human Rights Act 1998, which took effect in October 2000, rendered the European Convention on Human Rights directly applicable in English courts. Article 6(1) of the Convention states[49]:

> Right to a Fair Trial: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

---

[43] CPR 52.4(2); appeals out of time will only exceptionally be permitted: *Smith v Brough* [2005] *EWCA* 261; [2006] *CP Rep* 17.

[44] CPR 52.6(1) (2).

[45] Andrews 2008b, paras 10.15 et seq.

[46] CPR 1.4(2)(e).

[47] Notably, *Dunnett v Railtrack plc* [2002] 1 *WLR* 2434, CA; *Halsey v Milton Keynes General NHA Trust* [2004] 1 *WLR* 3002, CA; *Nigel Witham Ltd v Smith* [2008] *EWHC* 12 (TCC) at [36] (J Sorabji 27 *CJQ* (2008) 427); on this line of cases, Andrews 2008b, paras 11.40 et seq.

[48] CPR 3.1(2)(f); Andrews, 2008b, para 11.31.

[49] Cmd 8969; Human Rights Act 1998, s 1(3) Sch 1 incorporates the European Convention on Human Rights into UK law; Grocz et al. 2008; Janies et al. 2008; Clayton and Tomlinson 2008.

That important codification of fundamental principle consists of the following elements:

The right to 'a fair hearing': this is a wide concept embracing[50]:

- the right to be present at an adversarial hearing;
- the right to equality of arms;
- the right to fair presentation of the evidence;
- the right to cross examine opponents' witnesses;
- the right to a reasoned judgment[51];
- 'a public hearing': including the right to a public pronouncement of judgment[52];
- 'a hearing within a reasonable time'; and
- 'a hearing before an independent[53] and impartial[54] tribunal established by law.'

Of great interest is that the Strasbourg court divined an implicit fundamental right of 'access to court.' Lord Bingham in *Brown v Stott* (2001) explained[55]: Article 6(1) contains no express right of access to justice, but in *Golder v UK* the European Court of Human Rights said that it was 'inconceivable' that this provision should give detailed procedural guarantees without protecting access to justice.[56] The court in the Golder case conceded that this implied right was not absolute and so admitted limitations.[57]

The Court of Appeal in *English v Emery Reimbold & Strick Ltd* (2002) noted that Article 6(1) requires a court to provide a reasoned judgment[58]: The [ECHR]

---

[50] Clayton and Tomlinson 2008, ch 11.

[51] Andrews 2003a, paras 5.39–5.68.

[52] Andrews 2003a, 4.59-end of chapter; Strasbourg authorities cited, Andrews 2003a, 7.21–7.79.

[53] *Starrs v Ruxton* 2000 *JC* 208, 243; 17 November 1999 *The Times* (High Court of Justiciary) *per* Lord Reed; *Millar v Dickson* [2002] 1 *WLR* 1615, PC; s 3, Constitutional Reform Act 2005 (UK) states: 'The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.' 'The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.' 'The Lord Chancellor must have regard to (a) the need to defend that independence; (b) the need for the judiciary to have the support necessary to enable them to exercise their functions; (c) the need for the public in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.'.

[54] *Porter v Magill* [2002] 2 *AC* 357, HL.

[55] [2003] 1 *AC* 681, 694, PC.

[56] (1975) 1 *EHRR* 524, 536, at [35].

[57] Ibidem, at [38].

[58] [2002] *EWCA* Civ 605; [2002] 1 *WLR* 2409, CA, at [12] (adumbrated by *Flannery v Halifax Estate Agencies Ltd* [2000] 1 *WLR* 377, CA; noted Jolowicz, [2000] *CLJ* 263 (judge must give intelligible reasons for rejecting one side's expert testimony and preferring the other side's; a common law decision which ante-dated commencement of the Human Rights Act on 2 October 2000).

… requires that a judgment should contain reasons that are sufficient to demonstrate that the essential issues that have been raised by the parties have been addressed by the domestic court and how those issues have been resolved. It does not seem … that the Strasbourg jurisprudence goes further and requires a judgment to explain why one contention, or piece of evidence, has been preferred to another.

2.6 Author's Second List of Principles: English Civil Procedure (2003)

Having participated in the ALI/UNIDROIT project, and stimulated by the first years of the brave new CPR world, in English Civil Procedure (2003) I decided to look again at the kaleidoscope of procedural principle because it was obvious that new patterns had emerged. In Chapters 4 to 6 of my 0 no fewer than twenty-four major principles.

- Judicial Independence;
- Judicial Impartiality;
- Publicity or Open Justice;
- The Principle of Due Notice;
- Judicial Duty to Give Reasons;
- Avoidance of Undue Delay;
- Litigants are Not to be Prejudiced by the Court's Culpable Shortcomings;
- Access to Justice;
- Right to Choose a Lawyer;
- Confidential Legal Consultation;
- Procedural Equality;
- Protection against Bad or Spurious Claims and Defences;
- Simplicity of Procedure;
- Judicial Control of the Civil Process;
- Proportionality;
- Disclosure;
- Oral Proceedings;
- Procedural Equity;
- Promoting Settlement;
- Accuracy;
- Fair Play Between Litigants;
- Protection of Non-Parties;
- Effectiveness;
- Finality.

2.7 Order Out of Chaos: The Four Corner-Stones of Civil Justice[59]

I suggest that principles of civil justice can be usefully arranged under four headings, which I call the four corner-stones of civil justice:

(1) Regulating Access to Court and to Justice;
(2) Ensuring the Fairness of the Process;
(3) Maintaining a Speedy and Effective Process;
(4) Achieving Just and Effective Outcomes.

In greater detail, this is how the various leading and fundamental principles of civil justice can be arranged using this four-fold classification.

REGULATING ACCESS TO COURT AND TO JUSTICE

- Access to Justice;
- Right to Choose a Lawyer;
- Confidential Legal Consultation;
- Protection against Spurious Claims and Defences;
- Promoting Settlement and Facilitating Resort to Alternative Forms of Dispute-Resolution, notably Mediation and Arbitration.

ENSURING THE FAIRNESS OF THE PROCESS

- Judicial Independence;
- Judicial Impartiality;
- Publicity or Open Justice;
- Procedural Equality (equal respect for the parties);
- Fair Play between the Parties;
- Judicial Duty to Avoid Surprise: The Principle of Due Notice;
- Equal Access to Information, including Disclosure of Information between Parties.

MAINTAINING A SPEEDY AND EFFICIENT PROCESS

- Judicial Control of the Civil Process to Ensure Focus and Proportionality (tempered, where appropriate, by Procedural Equity; the process is not to be administered in an oppressive manner);
- Avoidance of Undue Delay.

[59] The author's decision to seek to re-order his 2003 long list of 24 principles (Andrews 2003a, ch's 4–6) was prompted by Shimon Shetreet during conversation in Cambridge in March 2010, and at a Colloquium in Clare College, May 21, 2010, in honour of Professor Kurt Lipstein. But Shimon Shetreet and I differ on how best to arrange these principles.

ACHIEVING JUST AND EFFECTIVE OUTCOMES

- Judicial Duty to Give Reasons;
- Accuracy of Decision-making;
- Effectiveness (provision of protective relief and enforcement of judgments);
- Finality.

2.8 Conclusion

There is a wide array of fundamental and important principles of civil justice. The lists can almost overwhelm us. And so we need pointers, and groupings. My main suggestion has been that the leading principles of civil justice might usefully be arranged under four headings, which I have called the four corner-stones of civil justice. These are:

- Regulating Access to Court and to Justice;
- Ensuring the Fairness of the Process;
- Maintaining a Speedy and Effective Process;
- Achieving Just and Effective Outcomes.

Of course, jurists and scholars of procedure will acknowledge readily the need to identify the basic or fundamental norms of their field of study and practice. But outside the hallowed halls of international colloquia or outside the court system, general principle is not widely respected. Indeed it is regarded with suspicion, especially by politicians and officials who might feel threatened and fettered by such generalities. Ever more aggressive, controlling, manipulative, and cynical government systems have taught us not to take anything for granted. And of course the European Convention on Human Rights was a post-second world war response to the horrific collapse of all civilised values.

Therefore, custodians of true civil justice should not become complacent. As our democratic systems become more and more hollow, procedural rights can provide some concrete protection for ordinary people. If judges continue to display high ethical standards governed by this demanding set of procedural principles, other forms of public life might shape up.

Another value of emphasising general principles is that they are an antidote to the numbing and bewildering complexity, detail, and technicality which sadly characterise many national procedural rule books. Certainly this has become a problem in England which, since 1998, has witnessed an oppressive proliferation of pre-action protocols, procedural rules, supplemented by Practice Directions, transmuted by Guides to different branches of the High Court (the 2009 edition of the Commercial Court Guide is 222 pages long). This deluge of micro-detail has rendered the search for overarching and underpinning norms even more important.

Finally, international scholarly discussion thrives on fundamental principle.[60] It is the life-blood. As we continue to debate the membership of the canon of central procedural principles, students of civil justice will be standing on the shoulders of those celebrated jurists who have already contributed to this unending task by examining matters of first principle.[61] For these have become the heroes of procedural scholarship, and I congratulate them on the stimulating work which has already been achieved.

References

ALI/UNIDROIT (2006) Principles and rules of transnational civil procedure. Cambridge University Press, Cambridge

Andenas M et al (eds) (2006) The future of transnational commercial litigation: English responses to the ALI/UNIDROIT draft principles and rules of transnational civil procedure. British Institute of Comparative and International Law, London

Andrews N (1994) Principles of civil procedure. Thomson Professional Publishing, Canada

Andrews N (2000) A new civil procedural code for England: party-control "going, going, gone". Civ Justice Q 19:19–38

Andrews N (2002) Provisional and protective measures: towards an uniform protective order in civil matters. Unif Law Rev 6:931–949

Andrews N (2003a) English civil procedure. Oxford University Press, Oxford

Andrews N (2003b) Towards an European protective order in civil matters. In: Storme M (ed) Procedural laws in Europe: towards harmonisation. Maklu, Antwerp, pp 267–304

Andrews N (2005) Alternative dispute resolution in England. Zeitschrift für Zivilprozess International 10:1–34

[60] In the English language, these include: Jolowicz 2000; Cappelletti and Perillo 1965; Cappelletti 1976; Langbein 1985, 823–866; Damaska 1986; Cappelletti 1989; Storme 1994; AAS Zuckerman 1999; Rechberger and Klicka 2002; Asser et al. 2003, 329–387; Storme 2003; Storme and Hess 2003; Murray and Stürner 2004; Van Rhee 2005; Trocker and Varano 2005; Chase et al. 2007; Pellegrini Grinover and Calmon 2007, 201–242; Van Rhee 2007; Van Rhee and Uzelac 2007; Deguchi and Storme 2008; Van Rhee and Uzelac 2010. And on 'transnational principles,' Storme 1994, and ALI/UNIDROIT 2006; on this project, Kronke 2002; Andenas et al. 2006; Stürner 2005, 201–254; Walker and Chase 2010.

[61] Besides the authors listed in the preceding note, consider the following transnational or comparative works and projects (presented here in chronological order):

(1) Storme 1994; see also Storme 2003; Storme and Hess 2003;
(2) Jolowicz 2000;
(3) The contributors to ALI/UNIDROIT 2006;
(4) Shimon Shetreet, Mount Scopus International Standards of Judicial Independence (a continuing project);
(5) The Nagoya/Freiburg project on 'A New Framework for Transnational Business Litigation,' a project led by Professor Masanori Kawano; the published works in this series (so far) are: Stürner and Kawano 2009; national studies: Andrews 2007b; Ervo 2009; Eslugues-Mota and Barona-Vilar 2009; Kengyel and Harsagi 2010; Andrews 2010; Maniotis and Tsantinis 2010; Schmidt 2010; De Cristofaro and Trocker 2010.

Andrews N (2006) Embracing the noble quest for transnational procedural principles. In: Andenas M et al (eds) The future of transnational commercial litigation: English responses to the ALI-UNIDROIT draft principles and rules of transnational civil procedure. British Institute of International and Comparative Law, London, pp 21–43
Andrews N (2007a) General report. In: Pellegrini GA, Calmon P (eds) Direito processual comparado: XIII World Congress of procedural law. Editora Forense, Rio de Janeiro, pp 201–241
Andrews N (2007b) English civil justice and remedies: progress and challenges: Nagoya lectures. Shinzan Sha Publishers, Tokyo
Andrews N (2007c) I Metodi Alternativi di Risoluzione delle Controversie in Inghliterra. In: Varano V (ed) L'Altra Giustizia. Giuffre Editore, Milano, pp 1–36
Andrews N (2007d) Mediation: a pillar of civil justice in modern English practice. Zeitschrift für Zivilprozess Int 12:1–9
Andrews N (2007e) La Giustizia Civil Inglese e Il Mondo Esterno. Rivista Trimestrale di Diritto e Procedura Civile 61:829–851
Andrews N (2008a) Multi-party litigation in England: current arrangements and proposals for change. Int'l Lis 2:92–97
Andrews N (2008b) The modern civil process. Mohr Siebeck, Tübingen
Andrews N (2010) Contracts and English dispute resolution. Jigakusha Publishing, Tokyo
Asser D et al (eds) (2003) A summary of the interim report on fundamental review of the Dutch law of civil procedure. Zeitschrift für Zivilprozess International 8:329–387
Auburn J (2000) Legal professional privilege: law and theory. Hart, Oxford
Cappelletti M (1976) International encyclopaedia of comparative law, vol XVI. Civil procedure. Mohr Siebeck, Tübingen
Cappelletti M (1989) The judicial process in comparative perspective. Oxford University Press, Oxford
Cappelletti M, Perillo J (1965) Civil procedure in Italy. Martinus Nijhoff, The Hague
Chase O et al (eds) (2007) Civil procedure in comparative context. Thomson/West, St. Paul
Clarke AMR (2007) The supercase-problems and solutions. Annual KPMG forensic lecture. Available at http://www.judiciary.gov.uk/docs/speeches/kpmg_speech.pdf (Accessed May 2011)
Clayton R, Tomlinson H (2008) The law of human rights. Oxford University Press, Oxford
Cranston R (2006) How law works: the machinery and impact of civil justice. Oxford University Press, Oxford
Cranston R (2007) Complex litigation: the commercial court. Civ Justice Q 26:190–203
Damaska M (1986) The faces of justice and state authority: a comparative approach to the legal process. Yale University Press, New Haven
De Cristofaro M, Trocker N (2010) Civil justice in Italy. Jigakusha Publishing, Tokyo
Deguchi M, Storme M (2008) The reception and transmission of civil procedural law in the global society. Maklu, Antwerp
Dwyer D (2008) The judicial assessment of expert evidence. Cambridge University Press, Cambridge
Ervo L (2009) Civil justice in Finland. Jigakusha Publishing, Tokyo
Eslugues-Mota C, Barona-Vilar C (eds) (2009) Civil justice in Spain. Jigakusha Publishing, Tokyo
Flanders S (1998) Case management: failure in America? Success in England and Wales? Civ Justice Q 17:308–319
Fouchard P (2001) Vers un Procès Civil Universel? Les Règles Transnationales de Procédure Civile de L'American Law Institute. Panthéon-Assas, Paris I
Grocz S et al (eds) (2008) Human rights: the 1998 Act and the European convention. Sweet & Maxwell, London
Hazard G Jr et al (eds) (2001) Principles and rules of transnational civil procedure. NY Univ J Int Law Politics 33: 769–785

Hodges C (2008) The reform of class and representative actions in European legal systems. Hart Publishing, Oxford
Hollander C (2006) Documentary evidence. Sweet & Maxwell, London
Howard M et al (eds) (2005) Phipson on evidence, 16th edn. Sweet & Maxwell, London
Janies MW et al (2008) European human rights law: text and materials. Oxford University Press, Oxford
Jolowicz JA (1996) The Woolf report and the adversary system. Civ Justice Q 15:198–209
Jolowicz JA (2000) On civil procedure. Cambridge University Press, Cambridge
Kengyel M, Harsagi V (2010) Civil justice in Hungary. Jigakusha Publishing, Tokyo
Kronke H (ed) (2002) Special issue of the Uniform Law Review, vol VI
Langbein J (1985) The German advantage in civil procedure. Univ Chic Law Rev 52:823–866
Maniotis D, Tsantinis S (2010) Civil justice in Greece. Jigakusha Publishing, Tokyo
Matthews P, Malek H (2007) Disclosure. Sweet & Maxwell, London
Murray PL, Stürner R (2004) German civil justice. Durham, USA
Passmore C (2006) Privilege. XPL, Hertfordshire
Pellegrini GA, Calmon R (eds) (2007) Direito Processual Comparado: XIII World Congress of procedural law, Editora Forense, Rio de Janeiro, pp 201–242
Rechberger W, Klicka T (2002) Procedural law on the threshold of a new millenium XI. World Congress of procedural law. Center for legal competence, Vienna
Schmidt S (2010) Civil justice in France. Jigakusha Publishing, Tokyo
Steyn J (1992) Preface. In: Hodge C, Mathews G (eds) Discovery. Sweet & Maxwell, London
Storme M (1994) Approximation of judiciary law in the European union. Kluwer, Dordrecht
Storme M (ed) (2003) Procedural laws in Europe. Towards harmonization. Maklu, Antwerp
Storme M, Hess B (eds) (2003) Discretionary power of the judge: limits and control. Kluwer, Mechelen
Stürner R (2000) Some European remarks on a new joint project of the American Law Institute and UNIDROIT. Int Lawyer 34:1071–1086
Stürner R (2005) The principles of transnational civil procedure. Rabels Zeitschrift 69:201–254
Stürner R, Kawano M (eds) (2009) Current topics of international litigation. Mohr Siebeck, Tübingen
Tapper C (2007) Cross and tapper on evidence. Oxford University Press, Oxford
Thanki B (2006) The law of privilege. Oxford University Press, Oxford
Trocker N, Varano V (eds) (2005) The reforms of civil procedure in comparative perspective. Editori G. Giappichelli, Torino
Van Rhee CH (ed) (2005) European traditions in civil procedure. Intersentia, Oxford
Van Rhee CH (ed) (2007) The law's delay. Essays on undue delay in civil litigation. Intersentia, Antwerp
Van Rhee CH, Uzelac A (eds) (2007) Public and private justice. Intersentia, Antwerp
Van Rhee CH, Uzelac A (eds) (2010) Enforcement and enforceability. Intersentia, Oxford
Walker J, Chase O (2010) Common law, civil law: the future of categories—categories of the future. Lexis Nexis, Markham
Woolf H (1995) Access to justice: interim report. Available at http://www.dca.gov.uk/civil/reportfr.htm (Accessed May 2011)
Zander M (1997) The Woolf report, forwards or backwards for the new Lord Chancellor? Civ Justice Q 16:208–227
Zander M (1998) The government's plans on civil justice. Mod Law Rev Ltd 61:383–389
Zuckerman AAS (1997) The Woolf report on access to justice. Zeitschrift für Zivilprozess International 2:31–42
Zuckerman AAS (1999) Civil justice in crisis: comparative perspectives of civil procedure. Oxford University Press, Oxford
Zuckerman AAS (2002) Conference on the ALI-UNIDROIT principles and rules of transnational civil procedure. Civ Justice Q 21:322–325

Zuckerman AAS (2006) Zuckerman on civil procedure: principles of practice. Sweet & Maxwell, London
Zuckerman AAS, Cranston R (1995) The reform of civil procedure: essays on 'access to justice'. Oxford University Press, Oxford