CIVIL PROCEDURE TO ENFORCE TRANSNATIONAL RIGHTS?

Paul D. Carrington*

March 3, 2007

All European lawyers are well acquainted with the fact that American civil procedure is different from the Code we celebrate at this conference. A few years ago, the German Minister of Justice proclaimed that America has a "lousy legal system." [1] And anyone acquainted with the differences would acknowledge that the institutions drawn from European civil code traditions are much more efficient than is the American system when it comes to resolving private disputes.

If America were more homogeneous and were served by a democratic parliamentary government responsive to the concerns of all those it governed, few would doubt the United States would be better served by a civil process more similar to that provided by the civil code. But the distinctive features of American law explaining the Minister's assessment were and are indispensable to such democracy as we enjoy in the United States today.

In parliamentary governments serving smaller populations sharing a greater measure of public trust, it may well be best to depend largely, as Europeans generally have, on bureaucracies and prosecutors for the enforcement of laws enacted to protect workers, consumers, individual investors, debtors, patients, and the environment.
It is indeed my impression that the bureaucracies overseen by many European parliaments are reasonably effective at enforcing most public laws.

But in America, the distinction between public and private law is muddled. Of course we have bureaucracies and some are reasonably effective. Business says to excess. But American governments seldom rely fully on their own officials to protect their concerns. We urge private citizens to help government regulate business. Private rights are created for public purposes.

Reasons for this can be found in the history of our nation. Given the similarities between 19th century America and the present state of the world, the novelties of American law might be taken to suggest issues worthy of consideration by any future planners of globalization

who recognize needs to protect interests other than contract or property rights. Maybe the time is coming to devise procedures for private enforcement of transnational law.

The idea of private enforcement of public law emerged in America in the decades after the Civil War that had torn a fragile nation apart. Nominal peace came in 1865. Soon thereafter, the rail lines being laid in every direction united a transcontinental economy serving populations afflicted with many causes for mutual mistrust. The last spike driven to complete the first transcontinental road was designated as the Golden Spike, and it proved to be so. Manufacturing soon became more important than farming. It took only a decade or so after the War before numerous capitalist lions amassed great fortunes, often by exploiting the weaknesses of an urbanizing lower class. The late 19th century was America's Gilded Age. In major respects, the nation was ripe for Marxism. A reason that Marxism never gained solid traction in America is that Americans regarded their courthouses as dispensers of justice. And the political leadership of that time recognized that the regulation of aggressive capitalists inconsiderate of the interests of fellow citizens could often

best be done at convenient courthouses in lawsuits brought by private plaintiffs seeking compensation for harms suffered at the hands of Big Business.

The first major efforts to regulate practices of Big Business in the new national economy were the Interstate Commerce Act of 1887[2] and the Sherman Antitrust Act of 1890.[3] An important feature of the latter law was a provision entitling a plaintiff proving himself to be a victim of unlawful conduct to be compensated three times over. The stated aim of triple compensation was to encourage private enforcement of public law. The Congress of the United States in that enactment implicitly recognized that the national bureaucracy that would be needed to enforce such a law effectively was not available, and would in any case be unable to secure the requisite trust of a public so divided as America was by region, class, and ethnicity.

The United States has since continued to rely heavily, although seldom exclusively, on private law enforcers similar to those encouraged to enforce the antitrust laws. I offer one example from recent times.[4] In 1996, Shintech, a Japanese subsidiary of Shin

Etsu, was recruited by the government of the state of Louisiana to build a factory there. Substantial tax incentives were promised. The company proposed to build a $700 million polyvinyl chloride plant in Convent, Louisiana. The plant would consist of three factories and an incinerator. The governor and the legislature of Louisiana celebrated the coming of a new source of wealth and jobs.

But Convent is located in the center of "Cancer Alley," one of the most polluted communities in America. Its population suffers from a very high rate of cancer and other medical problems associated with bad air. The proposed Shintech plant would each year emit an additional 600,000 pounds of toxic chemicals into the air. As one might expect, the population residing in Cancer Alley consists largely of people who cannot afford to live elsewhere. Unsurprisingly, the population was substantially Afro-American.

The reaction of the people of Convent differed from what one might expect in a similar situation in other nations. One impoverished but aggressive African-American female citizen of Convent organized a lawsuit and went to the courthouse. She and her neighbors sued

Shintech asking a federal court to prevent construction of its plant as a violation of federal law. There were of course both state and federal agencies responsible for protecting the environment. But none was responsive to the plaintiffs until their lawsuit attracted wide public notice.

The government of Louisiana was enraged. They not only opposed the lawsuit but threatened to withdraw public funding for the university law school if its clinical teacher representing the plaintiffs did not dismiss the case. The teacher resigned from the university and continued to represent the plaintiffs, knowing that the federal law required that he be well compensated by the defendants should he win the case.[5] The federal agency began to share their concerns. The outcome was a victory for the plaintiffs. Shintech gave up its plan to build in Convent.

How was it possible for these impoverished citizens to beat not only Business but the state and federal governments? The plaintiffs were able to deploy numerous devices of civil procedure that serve to empower private plaintiffs serving public aims at the same time that

they serve their own. Together, these procedural devices can be seen as a standing invitation to Americans to bring their grievances to the courthouse. To courthouses that are often architectural events dominating the landscape, much as cathedrals often dominate European landscapes.

First of these inviting principles is the American Rule that frees the plaintiffs from any risk of liability for the defendant's legal expenses, even if the plaintiffs suffers an adverse judgment on the merits. [6] There is also law allowing lawyers to serve their clients for fees to be paid only if they succeed, and then only from the proceeds of victory. And there are statutes, such as federal laws protecting the environment that require a losing defendant to pay the plaintiff's attorney even though no such obligation is imposed on a losing plaintiff. This is known as the one-way fee shift.

Second, there is the identity of the decision makers at the democratic courthouse. Most trial judges in America are accountable to voters.[7] And for those who mistrust the judge assigned to their case, there is generally the right to trial by jury, even in civil cases.[8] Juries,

whatever their failings, can almost never be bribed or intimidated. Courthouse decision makers are therefore seldom beholden to a ruling class. Such courts tend sometimes to be more responsive to popular concerns than are legislatures or executive officers.

Third, there is public access to information needed to win private claims enforcing public law. Most information in the hands of government is available to private plaintiffs.[9] And the discovery rules familiar to American courts enable plaintiffs to secure not only the testimony under oath of virtually every adult in the land, but also access to most files in their possession, including their electronic files.[10]

Fourth, there is the possibility of aggregating the claims of victims, not only for the sake of efficiency, but also so that lawyers for a group of lesser claims can hope for sufficient compensation to make it worth their efforts to engage in vigorous advocacy including vigorous discovery to present the strongest possible case against public malefactors.[11] There is also the states' laws of damages that offers

compensation for pain and suffering, and the prospect of punitive damages sufficient to deter repetitive misdeeds.

Partly as a result of these features, there are about a million lawyers in the United States. Less than a tenth of that number are primarily devoted to the representation of individual plaintiffs bringing claims against corporate defendants accused of misdeeds harmful to workers, consumers, investors, or the environment. A roughly equal number advise and represent government agencies who share with them responsibility for the enforcement of laws protecting workers, consumers, small investors, patients, or the environment. A major source of employment of the lawyers found in the vast American law firms is the opportunity to protect Business from private claims that incidentally serve public, regulatory purposes.

Of course, many business executives protest that American civil procedure brings forth many false or frivolous claims. The empirical evidence solidly refutes that claim.[12] Contingent fee lawyers are not often seen to file claims that are doomed to fail. Defense lawyers who charge their clients by the hour, on the other hand, frequently are

found to be presenting weak defenses in which they have invested many compensable hours of professional services. But few American businessmen publicly express a desire to be governed by more congenial European civil procedure if that choice must be accompanied by European-style bureaucracies fully empowered to enforce public law.

There would, as I have said, be less need for so many lawyers and so much dependence on private law enforcement if the United States were a smaller or more homogeneous nation. That observation suggests to me that the efforts to globalize the world economy might possibly profit from a consideration of the American experience. There are at least two major problems presented by global conditions that might be thought to call for an American-style system of private law enforcement on a global scale. Private enforcement is needed with respect to those matters of transnational import because they, like the problems of transcontinental import that confounded the national government of the United States, cannot be plausibly entrusted to either a global or a local national bureaucracy.

The two problems I identify are transnational environmental pollution and the corruption of foreign governments. International laws addressing either of these problems are unlikely to be effectively enforced by any world government I am able to imagine, whether a branch of the United Nations, or of the World Trade Organization, or of an institution not yet created.

Consider the Kyoto Accord now in force as an international agreement regarding carbon emissions. Will its standards be effectively enforced? If so, by whom? Might the lawyer who represented the citizens of Convent, Louisiana, and others of his sort, be summoned to perform the task? Lawrence Summers, later the president of Harvard University, expressed a view shared by many who possess economic power when he urged that the lethal waste created by industrial nations should be shipped to poor nations where the economic consequences of the inevitable biological harms are less costly.[13] The injustice that results from such practices is obvious.

For example, in 2006, Transfigura, a Dutch oil trading firm employed an Ivory Coast contractor to take hundreds of tons of toxic waste from the hold of a ship. The cost of removal of the waste in Amsterdam was said to be perhaps as much as $600,000. To avoid that expense, the African firm was created and hired for $30,000 to dispose of the material. It waste was deposited in numerous locations around Abidjian.[14] At least ten people died as a result, and about 100,000 people sought medical treatment. Transfigura then paid the government of Ivory Coast $200 million to settle all claims.[15] Whether the sum paid is realistic compensation for the harm done and how that money will be used by the government are questions that abide. We are told that a criminal investigation proceeds in the Netherlands and that a class action has been filed in Britain on behalf of thousands of plaintiffs.

This last is an acknowledgment that the American system of private enforcement of public law is a potentially important device in dealing with the problems of transnational environmental pollution. The governments of industrial nations, like those of 19th century American states, have inadequate incentives to protect those outside their

boundaries from injuries caused by their own citizens. And the governments of "developing" nations are too weak and too vulnerable to bribery or intimidation to protect their environments from harms caused by malefactors outside their control.

Indeed, consider the problem of transnational corruption. Corruption is of course a problem in all nations. But it is most serious where it does the most harm, in those weak and failing states in which public officials despair of effective public service. In 1974, the United States made it a crime to bribe an official of a foreign government.[16] Firms have been prosecuted under that law, and some civil claims have arisen against firms causing harm by using bribery to get economic advantages.[17] The Department of State acknowledges that private civil claims are an essential feature of the American law deterring bribery of foreign officials.[18] But of course, in the global marketplace American firms compete with firms from other nations. If an American firm obeys the law and refuses to pay a bribe, and thereby loses a business opportunity to a Belgian firm that pays the bribe requested, the American law may have operated to the disadvantage of its citizens and its national economy. In 1997, recognizing this

problem, the United States initiated an international convention obligating the signing states to enforce criminal laws prohibiting transnational bribery.[19] And now the United Nations has promulgated a similar instrument.[20] And the World Bank is seeking means to prevent the waste of its loans that go into the pockets of bribed officials.[21]

In 2006, controlling transnational corruption is in high fashion in Europe.[22] But can national governments realistically be expected to faithfully prosecute and punish their own citizens and businesses for conduct that is beneficial to their own people, however harmful it may be to the governments of other lands? There will be some prosecutions, but I question whether in the end such treaties are more than benign gestures that acknowledge but do not significantly relieve the problem of transnational corruption.

Might we be able to create a transnational civil procedure that could entertain claims made by private plaintiffs who seek compensation for environmental harms or for economic harms resulting from transnational bribery? Imagine the plaintiffs drawn from the

population of a failed state, say Somalia or Haiti or Bangladesh, whose fragile environment has been sullied by an American firm, or a Belgian one. Or imagine the plaintiff as a firm that failed to receive a government contract because a competitor paid by a bribe to the contract-awarding officials. If a forum were available to hear and enforce their claims, might it not be expected to resemble in some respects the democratic courthouses found across the United States? Would it not be necessary, if effective private enforcement is to be achieved, to provide abundant economic incentives for the private lawyers who would seek to enforce environmental rights? Would it not be equally important to empower private lawyers to thoroughly investigate possible environmental wrongs or bribery of public officials? Might it even be wise to engage in decision-making disinterested persons who have no political or professional ambitions that might be jeopardized by decisions unwelcome to their own governments? Could such a process be devised within the present framework of European institutions so that Somalians or Haitians or Bangladeshi might be effectively enabled to deter environmental wrongs committed by European firms? Or so that firms could be deterred from paying bribes by the knowledge that they are subject to

suits stripping them of any profits gained as a consequence of such corrupt payments? Could we not at least confer on European institutions a duty to enforce judgments rendered in democratic courthouses on such private claims enforcing international laws?

I have no firm answers to these questions. I mean only to suggest the possibility that there may be lessons to learn from the American experience. The United States cannot be said to have found in its experience governing an interstate economy the solutions to the problems of transnational pollution and corruption, but it has perhaps identified the issues to be considered if either of these cosmic problems are ever to be effectively addressed. The reader is invited to join in such a consideration.

NOTES

[*] Professor of Law, Duke University.

[1] Herta Daeubler-Gmelin was German Minister of Justice from 1998 to 2002. Her comment was reported by the Associated Press on September 19, 2002.

[2] Act of February 4, 1887, 24 Stat. 379.

[3] Act of July 2, 1890, 26 Stat. §§209, 210 codified as 15 U.S.C. §§1-15.

[4] For an account of this case, see Robert R. Kuehn, Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic, 4 Wash. U. J. L. & Policy 33 (2000).

[5] 42 U.S.C. §7604. This device of the one-way fee shift was first employed in the laws of many states enacted in the 19th century. John Leubsdorf. Toward A History of the American Rule on Attorney Fee Recovery, 47-1 Law & Contemp. Prob. 9 (1984). For an account of the use of the device in environmental laws, see James T. Blanch et al, Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy (Washington 1996).

[6] E.g. Arcambel v. Wiseman, 3 U.S. 306 (1796); Act of February 26, 1853, 10 Stat. 161; see generally Leubsdorf, note 4.

[7] For a collection of essays depicting the practice of electing judges and the problems that practice presents, see Judicial Independence and Democratic Accountability 61-1 Law and Contemporary Problems (Paul D. Carrington & D. Price Marshall eds., 1999).

[8] On the state of the civil jury, see Randolph M. Jonakaitm The American Jury System (New Haven 2003); Ellen E. Sward, The Decline of the Civil Jury (Durham 2001).

[9] See, e.g. Freedom of Information Act, 5 U.S.C. §§551 et seq.

[10] F.R. Civ.P. 26-37, 45. On the secondary consequences of discovery, see Stephen V. Yeazell, The Misunderstood Consequences of Modern Civil Process, 1994 Wis. L. Rev. 631.

[11] The device of the class actions as an instrument of private enforcement of public law was first proposed by Harry Kalven & Maurice Rosenfield, The Contemporary Function of the Class Action, 8 U. Chi. L. Rev. 684 (1941). It is authorized by F.R.Civ.P. 23. On consideration of the practice in other legal systems, see Debates Over Group Litigation in Comparative Perspecitve: What Can We Learn from Each Other? 11 Duke J. Comp. & Intl. L 157 (2001).

[12] See Marc Galanter, Vanishing Trials: An Examination of Trials and Related Matters in State and Federal Courts, 1 J. Empirical Legal Studies 459 (2004).

[13] His Memorandum of Chief Economist, World Bank December 12, 1991 is celebrated on the internet.

[14] Lydia Polgreen & Marlise Simons, Global Sludge Ends in Tragedy for Ivory Coast, New York Times, October 2, 2006.

[15] Lydia Polgreen & Marlise Simons, Oil Company to Pay $200 Million in Toxic Dumping in Ivory Coast, New York Times, February 15, 2007 at A9.

[16] United States Foreign Corrupt Practices Act. 15 U.S.C. §78-dd.1, first enacted in 1977, 91 Stat. 1494.

[17] E.g. W. S. Kirkpatrick & Co. v. Environmental Tectronics Corp. 493 U.S. 400 (1990).

[18] Department of State Review of Implementation of the Convention (2001), http://www.state.gov/e/eb/rls/rpts/bib/36587.htm.

[19] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, (entered into force Nov. 10, 1998), 112 Stat. 3311.

[20] United Nations Convention Against Corruption (2002).

[21] See http://web.worldbank.org/website,externaltopics.

[22] Carter Dougherty, Germany Battling Rising Tide of Corporate Corruption, New York Times, February 15, 2007 at C1.