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DISCOVERY AND THE ROLE OF THE JUDGE IN CIVIL LAW JURISDICTIONS

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Wide-ranging pretrial discovery is an integral part of contemporary American civil litigation, particularly in cases involving substantial stakes. Pretrial discovery, strictly defined, is entirely unavailable in civil law jurisdictions. Procedures functionally similar to pretrial discovery are available in civil law systems, and American parties to transnational civil litigation sometimes attempt to use those civil law procedures.[1] However, the experience is often frustrating for American lawyers because the civil law judges are not readily receptive to these endeavors. Indeed, the American endeavors in discovery from foreign sources often are deeply disturbing to the bench, bar, and governmental authorities abroad, and engender hostility to these endeavors.[2] This attitude in other countries can be interpreted as anti-foreign sentiment, and specifically antipathy to American-style civil litigation. No doubt attitudes of that sort often exist among civil law judges. However, there are deeper reasons for the reluctance of civil law judges to assist in ventures in which American parties seek pretrial discovery of evidence abroad for use in American legal proceedings. This article undertakes briefly to explore these reasons.

I. AMERICAN AND CIVIL LAW CONCEPTS OF JUDICIAL ROLE COMPARED

The salient procedures for pretrial discovery of evidence under American procedure are those for deposition of witnesses and discovery of documents. The *Federal Rules of Civil Procedure* are the basic model. Under Federal Rules 26 and 30, pretrial discovery depositions may be taken of parties, of party-affiliated persons, such as employees of corporate parties, and of non-party ("third party") witnesses. They

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1 *See* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, REPORTERS' NOTES, note 1, and sources cited there.

2 *See id.* at notes 2–5.

may be taken as of right and without court permission.[3] Refusal of a party to submit to a deposition can be enforced through various sanctions, including the severe sanctions provided in Rule 37 of dismissal of a plaintiff's suit and entry of default against a defendant.[4] Under Rule 45, the power of subpoena can be employed by a party, without leave of court, to compel discovery testimony from a reluctant or hostile third party witness. Under Rule 26(b)(1), the scope of a discovery deposition is bounded only by the requirement that the questions be "reasonably calculated to lead" to admissible evidence. The duration of a deposition is limited only by the time commitment the examining party is willing to make or by a protective order of a court. Protective orders are sought infrequently and typically only after extended and contentious interchanges between counsel.

Under Federal Rule 34, discovery of documents and the degree of specificity in the designation of the documents demanded is subject to no greater restrictions. Discovery of documents can be pursued on demand of a party without court order, and its scope is limited only by the requirement of Rule 26(b)(1) described above. In addition, under the 1993 revision of Federal Rule 26(a)(1), as well as under some state rules, parties must make production of certain categories of documents spontaneously, that is, without either demand by the opposing party or by court order. The depth of a documents discovery demand is effectively limited only by the time commitment the discovering party is willing to make in sifting through the material produced in response, or by a protective order. Orders protecting against documents discovery probably are sought somewhat more frequently than protective orders concerning depositions but are not often or readily granted. Efforts to obtain such protection also are typically preceded by extended and contentious interchanges between counsel.

This system of pretrial discovery is unique to the United States. Other common law countries have nothing like it. In most common law jurisdictions, so I am informed, pretrial depositions are unusual and in some countries are typically employed only in circumstances of the kind specified in Rule 27, such as where the witness will be unavailable for trial.[5] In other common law countries, similar restraint is

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3 *See* FED. R. CIV. P. 26(b).

4 *See* Fed. R. Civ. P. 37(b)(2)(C).

5 *See* Geoffrey Hazard, *From Whom No Secrets Are Hid*, 76 TEX. L. REV. (forthcoming 1998); 1 RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 1; *e.g.*, G. WATSON & M. MCGOWEN, ONTARIO CIVIL PRACTICE 567–600 (1998) (differentiating right of deposition of opposing party from deposition of third party witnesses only upon court approval).

exercised in discovery of documents. Documents are subject to discovery only when "relevant" to the proceeding. Relevance for this purpose is defined by reference to the pleadings in the case, and the rules of pleading require full specification of claims and defenses.[6] In our sister common law jurisdictions, therefore, "fishing expeditions" are not merely prohibited but are practically impossible given the combined effect of the rules of pleading, which require specification of facts, and the principle of relevance, which requires demonstrable relationship between facts pleaded and discovery sought.[7]

However, all the common law systems begin with a concept of the adversary system, which defines the roles of the judge and the parties' advocates. The definitions of these roles in common law systems are traditionally, and at least nominally, similar. That is, the role of the judge is to decide between competing presentations of evidence and law that are tendered by the advocates. The corresponding role of the advocates is to develop and make those presentations. The judge is not responsible for there being an adequate development of the evidence during trial and *a fortiori* is not responsible for there being adequate pretrial discovery of evidence. Nor is the judge responsible for getting at "the truth."[8] The judge simply chooses between the contentions of law and the versions of facts laid before him by the parties.

The premise in civil law jurisdictions is entirely different, at least formally so. Under the civil law procedural systems, the judge is responsible for deciding a case according to the truth of the matter. The judge decides both fact and law because there is no jury or anything like it. It is assumed that the truth of the matter will be revealed by relevant evidence. Under the civil law, it therefore follows that the judge is responsible for eliciting relevant evidence. The parties in civil law litigation are represented by advocates, and the advocates are empowered and obligated to assist their clients in presenting their re-

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6 *See generally* PRE-TRIAL AND PRE-HEARING PROCEDURES WORLDWIDE (Charles Platto ed., 1990).

7 *Cf.* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) (rejecting a contention that there should be a "heightened pleading standard," in other words more stringent requirements of particularity, in claims under 42 U.S.C. § 1983). There have long been calls that such a standard of pleading be adopted generally. *See* Moses Lasky, *Memorandum for the Committee on Rule 8*, 13 F.R.D. 275 (1952).

The American College of Trial Lawyers in 1997 has made a functionally similar proposal, to require that the standard for discovery be "relevance" of the material to be discovered to the issues rather than the standard of "reasonably calculated to lead" to admissible evidence.

8 *Cf.* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

spective sides of the case. However, in principle, the advocates' function is to assist the judge in fulfillment of the judicial responsibility, rather than, as in the common law, the judge being responsible only in terms of the advocates' previously exercised responsibilities of presentation. In the civil law concept, the advocates are supposed to provide comment and suggestions to the judge, with a deference which varies from one civil law jurisdiction to another. But at least in theory they have no power of initiative after they have presented the claims and defenses in the pleadings, except with the assent of the judge.

II. THE ABSENCE OF PRETRIAL IN CIVIL LAW ADJUDICATION

A derivative of this fundamental premise about the roles of judge and advocates is that the civil law system has no "pretrial," let alone pretrial discovery. "Pre" trial implies an adjudication process with at least two stages, pretrial and then trial itself. The need for a two-stage process is evident in an adjudicative system based on jury trial. A jury is an assemblage constituted ad hoc whose members need not be convened until their time on the stage has arrived, and who should go home when their role has been played. The jurors decide facts, not legal questions, and the rendition of their verdict constitutes fulfillment of that function. Efficient use of a jury's time requires that presentation of the evidence be concentrated in a single continuous session. Such a concentrated session is the "trial"; everything prior to trial is "pretrial."[9]

According to modern legal standards, the parties to the litigation should have opportunity to know somewhat beforehand—in a preview, so to speak—the substance of the opposing party's proof. That opportunity includes time to think over that evidence and to arrange to counter it so far as possible. Because a jury trial is to be a concentrated session, opportunity for such a preview must be afforded somewhat before the jury session commences. Hence, pretrial discovery is a logical necessity in a modern system based on jury trial, if the premise is accepted that litigants should have a preview of the evidence that will be presented against them. Most common law countries other than the United States no longer use juries very much. Nevertheless, they adhere to the tradition of concentrated trial procedure. By the same token, they adhere more or less to the need for pretrial discovery.

9 *See* Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409 (1960); *Cf.* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

As Professor Benjamin Kaplan explained long ago,[10] an adjudication in the civil law system proceeds according to an entirely different logic. In that system, the central figure, around whose function the task of the advocates center, is not the jury, but the judge. The central task in a civil law adjudication is for the judge to identify the legal and factual issues involved and to decide them correctly. Also, and of equal practical importance, the judge is a permanent official who can adjourn court sessions to later dates as convenient. The logic of inquiry in that framework is to subdivide a case issue by issue, or by clusters of issues, considering both facts and law as to each issue. Concerning any such issue or cluster of issues, law and facts can be considered together because there is no jury to share in the decisional process. The function of preview for the parties can be accomplished by receiving items of evidence on the basis of the court's making a provisional or tentative appraisal of their significance and conducting further and deeper inquiry only as necessary. The necessity for such further inquiry will be signaled by the party against whom the evidence was received. Evidence received on a tentative basis is taken as truth if there is no negative signal from the opposing party, but, if there is such a signal, the evidence remains open for disputation or discount at a subsequent session of the court. In contrast, the logic of a jury trial is to subdivide the case into issues of law, regardless of the relationship of legal issues to each other, and issues of fact. Then, the issues of fact are further subdivided into a preview (discovery) and a plenary stage of presentation (the trial).

At a more fundamental level, the function of preview (discovery) in a jury trial system is to permit the parties and their advocates to make estimates of the kind, degree, and extent of evidence that will suffice to convince a jury without incurring undue risk of boring or confusing the jury.[11] These estimates by the opposing advocates are derived with regard for counter-maneuvers and counter-estimates in the opposing camp. Pretrial discovery, therefore, is a system whose primary function is to inform the advocates, rather than informing either the judge (who ordinarily knows little or nothing of the proofs until trial commences and who will be essentially a neutral umpire come trial) or the jury (which will receive only a small refined residue of the material processed by counsel in discovery).

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10 *See* Kaplan, *supra* note 9.

11 A vivid demonstration of the need of a party protagonist to winnow evidence down to that which is convincing without being confusing is the contrast in the presentations in the O.J. Simpson case, which involved mind-numbing prolongation, and that in the Timothy McVeigh case, where the prosecution, guided by the debacle in "O.J.," shortened the case by abandoning much potentially admissible evidence.

In contrast, in the civil law system, the critically important function of exploring and sifting evidence is performed by the judge. The judge needs to know the facts necessary to decide the case, but needs to know only that much. The civil law judge's inquiry is not "What evidence should be heard to understand the whole case?" but "What evidence do I require to reach a justifiable decision?" The information needed to decide a case could concern only one or two issues—for example, the terms of a contract without regard to evidence concerning breach, or the nature of defendant's allegedly tortious conduct without regard to evidence concerning injury or damages. Considerations of efficiency would lead the civil law judge to approach complicated litigation in precisely this fashion—that is, issue by issue. The mind of the judge in a civil law jurisdiction, thus, is the medium of forensic exploration as well as the medium of forensic determination.

In this light, we can better understand the negative reaction of civil law systems to the outreach of American discovery. The immediate impact of American discovery in a civil law jurisdiction is experienced by the judges as an invasion of their role and responsibility. As we have seen, under the civil law system, the judge takes initiative in developing the evidence necessary to decide the case. If an American discovery demand is addressed directly to a foreign party, it comes across as an attempt to circumvent the judiciary. The American discovery request also comes across as a peremptory demand that the judge undertake the specified inquiry, regardless of whether the judge would consider the inquiry to be unwarranted or at best premature. The judicial reaction abroad, therefore, is much the same as would be that of a judge in our system if a party made a peremptory demand under claim of right for a decision that the law has placed wholly within the judge's discretion—such as the date on which to set a trial.

In this light, we can also better understand the dilemma posed to the Supreme Court of the United States in the case of *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District*,[12] and why the decision in that case remains anathema in many of the civil law jurisdictions.

III. SOCIÉTÉ AEROSPATIALE

Société Aerospatiale presented the question whether provisions of *The Hague Convention on the Taking of Evidence Abroad in Civil or Commer-*

12 482 U.S. 522 (1987).

cial Matters[13] preempted the discovery rules of the *Federal Rules of Civil Procedure*.[14] The Federal Rules authorize parties to demand production of documents in an opposing party's possession or control, wherever the documents may be located. Accordingly, under the Rules, demand may be made for production of documents located, for example, in Europe in the possession of a company doing business in the United States. The Rules do not require prior judicial approval. If administered in accordance with conventional practice in domestic litigation, the Rules make compliance with such a demand a matter of legal right for the discovering party. The right is backed by various sanctions including dismissal of a plaintiff's claim or default judgment against a defendant. Hence, under the Rules a defendant's resolute noncompliance with a discovering plaintiff's demand for documents would lead to a default judgment.[15]

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters is a treaty to which the United States is a party. Under the Convention, evidence abroad is to be obtained by application to a court in the country where the evidence is located. In the case of witness testimony, application would be made to the court where the witness resides. In the case of documents, it would be made to the court where the custodian of the documents is located.

The procedure specified in the Convention thus conforms to two legal concepts: a concept of international law, and a concept of the domestic law of civil law jurisdictions. The concept of international law is that legal process from one country does not have a direct effect as of right in another country. Rather, enforcement depends upon official action in the country where response is to be made. This concept has long been fully accepted under American law, indeed jealously asserted. It is classically stated in *Pennoyer v. Neff*, where the Court said: "One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . . The other principle of public law . . . is, that no State can exercise direct jurisdiction and authority over persons or property without its territory."[16]

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13 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, The Hague, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.

14 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 473 (1987); Note, *The Role of the Hague Convention for Gathering Evidence Abroad:* Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 24 STAN. J. INT'L L. 309 (1987).

15 *See* Note, *Strict Enforcement of Extraterritorial Discovery*, 38 STAN. L. REV. 841 (1986).

16 95 U.S. (5 Otto) 714, 722 (1877).

From the viewpoint of a civil law jurisdiction, however, equally important is a concept of domestic law in civil law jurisdictions. As described above, the civil law concept is that production of evidence, whether for "discovery," "pretrial," or otherwise, is carried out through the authority and responsibility of the court and not through authorization of the advocates for the parties. The notion that a *party* has a right to *compel* production of evidence violates this fundamental principle of civil law. The violation is comparable to the idea that, in American litigation, a party would have an absolute right to a particular jury instruction regardless of the trial judge's determination that the instruction was superfluous or erroneous.[17] Put differently, recognizing in a party a *right* to require production of evidence, as distinct from a party's right to ask the *court* to require production of evidence, violates a constitutional principle of adjudication in the civil law system.

On the other hand, the concept that a party has such a right—a right not dependent on judicial discretion—has become fundamental, and perhaps nearly constitutional, in the modern American scheme of civil litigation. One can find arguments that denial of pretrial discovery in criminal cases is a denial of due process.[18] Certainly that view would be congenial to jurists who have been on the Supreme Court of the United States, perhaps including some who are on the Court today. On this view, *Société Aerospatiale* presented the gravest kind of legal question in the foreign relations law of the United States: whether the provisions of a treaty, *The Hague Convention*, supersede an American rule of procedure—right to pretrial discovery—of virtually constitutional standing.

On this interpretation, the decision in *Société Aerospatiale* can be understood in sympathetic light from the American viewpoint. Simply stated, the proposition is that a treaty cannot contravene a constitutional right and, if interpretation of a treaty will permit, the treaty should not be held to contravene such a virtual constitutional right. Since interpretation could permit such a construal of *The Hague Convention*, the *Convention* was interpreted by the Supreme Court not to preempt the *Federal Rules*. Rather, the *Convention* was held to be merely an alternative means that could be displaced by the *Federal Rules* when, in a trial judge's determination, fairness so required. Trial judges in the American system of course are guided by American

17 *Cf.* Herron v. Southern Pac. Co., 283 U.S. 91 (1929).

18 *See, e.g.*, H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089 (1991).

concepts of fairness, in which the right to pretrial discovery has become a component. American trial judges, exercising the discretion conferred in *Société Aerospatiale*, unsurprisingly therefore usually conclude that discovery of right under the *Federal Rules* should dominate *The Hague Convention*.[19]

By the same token, however, this application of the *Federal Rules* to foreign parties, specifically discovery demands requiring evidence from an opposing party situated in a civil law country upon demand, doubly offends legal authorities in such a country. It is deeply offensive not merely as a matter of international law, which those of us in this country should understand, but also as a matter of the domestic law of civil law countries—a dimension which we may not have fully understood.

IV. CONSTITUTIONAL FOUNDATION OF THE CIVIL LAW CONCEPT OF THE JUDICIAL ROLE

The concept that the judiciary properly controls the quest for evidence in civil litigation is, as indicated above, fundamental in the civil law system. More importantly, the concept of judicial primacy in the civil law systems is more than a "means or mode" of the administration of justice.[20] On the contrary, it is a fundamental constitutional concept evolved in the political history of major European countries. By the way of comparison, the concept of judicial primacy in compelling production of evidence stands on a par with the concepts embedded in our Constitution concerning jury trials[21] and, for example, the Fifth Amendment privilege against self-incrimination.

The European political history on this issue is too complicated and too important to be encompassed in this discussion. A brief sketch must suffice. There are at least two quite different traditions involved, that in Germany and that in France. However, on this issue the outcomes of the traditions converge.

The judiciary in modern Germany is of course the product of that country's history. The point of useful beginning is eighteenth century Prussia under Frederick the Great and his successors as kings and emperors in Prussia and thereafter in Imperial Germany.[22] In that re-

19 *Compare, e.g.*, Hudson v. Hermann Pfauter GmbH & Co., 117 F.R.D. 33 (N.D.N.Y. 1987) (applying Convention), *with* Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386 (N.J. 1987) (applying Federal Rules).

20 *Cf.* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

21 *Cf.* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).

22 The analysis here is based on the valuable summary in KENNETH FLOYD LEDFORD, FROM GENERAL ESTATE TO SPECIAL INTEREST: GERMAN LAWYERS 1878–1933, ch. 1 (1996).

gime, the judiciary was regarded as an instrument of the constitution, under which the monarchy had nearly absolute authority. Not only the judiciary, but the legal profession as well, were considered instruments for effectuation of that constitution. Judges, therefore, were expected to enforce the law, and lawyers were expected to refrain from frustrating its enforcement. To that end, judges were responsible for obtaining necessary evidence, and lawyers were responsible for avoiding obstruction of the judicial responsibility.

"Fast forward," as they say, to the twentieth century. The modern history of Germany includes the collapse of the Imperial Reich at the end of World War I, then the collapse of the Weimar Republic, then the Nazi catastrophe in which the judiciary and legal profession inevitably acquiesced and in many cases supported Hitler's regime, and then the struggle after World War II to refound the constitution of the regime on a democratic basis. The constitution of Germany thus changed from monarchy prior to World War I, to a dictatorship under Hitler, to a democracy based on the rule of law. The concept of judicial responsibility continues, but since World War II judicial responsibility has been transformed into an institution for effectuation of the new democratic constitution rather than the older authoritarian constitutions. Judicial control of production of evidence is, as we have seen, a key element of that judicial responsibility.

An act of imagination is required to appreciate how German judges could interpret an American demand that they produce evidence in trans-border discovery in civil litigation as an attack on the constitutional foundation of the democratic regime in modern Germany. However, I submit, not too much imagination. No more imagination is required than to understand how the Supreme Court of the United States in *Société Aerospatiale* could interpret a treaty plainly preempting American pretrial discovery as not preempting the fundamental right of pretrial discovery.

The history in France is somewhat different. Here, as in all modern history of France, the key is the French Revolution.[23] The French Revolution destroyed the constitutional foundation of the Old Regime existing prior to 1789 and gravely disturbed the political and social structures on which that regime was based. In its place was proclaimed a regime based on "liberty, equality, and fraternity," as polit-

23 The analysis here is based on a general history of the French Revolution and its significance in later French political consciousness. *See, e.g.*, ROBERT TOMBS, FRANCE 1814–1914 (1996). The classic analysis is ALEXIS DE TOCQUEVILLE, L'ANCIEN REGIME ET LA REVOLUTION (New York, Harper & Brothers 1856). A celebrated modern portrayal of the French Revolution is SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION (1989).

ical rhetoric expressed it. The legal foundation of the new regime was the Civil Code ("Napoleonic Code" in our conventional terms), proclaimed by the newly constituted General Assembly of the Republic of France.

In concept, the Civil Code was a complete statement of the law, concerning all civic relationships. It could be supplemented or displaced only by law-giving of equal legal dignity. Law-giving of equal dignity could emanate only from the democratically constituted legislature in the form of statutes or of implementing regulations promulgated by administrative agencies themselves constituted through the democratic legislative process.[24]

Under the constitutional theory of the French Republic that displaced the Old Regime, the corollary of the principle of legislative supremacy is that of judicial deference. In our legal system, under the law as pronounced in *Marbury v. Madison*,[25] the judiciary is the ultimate guardian of the Constitution. In France, the concept of judicial deference reposes in a quite different context than in our American regime. In France, the judiciary after the French Revolution was not regarded as a proper source of legal policy, nor is it today. Moreover, the judiciary has been regarded with some ambivalence, as possibly presenting something of a threat to the post-revolutionary French Republican regime. The judiciary had been a key element of the Old Regime prior to the Revolution.[26] After the Revolution, the judges and members of the legal profession generally were sometimes suspect as possibly or even probably monarchists, perpetually contemplating that there would be a change of government involving a return to the old. The French Revolution did not kill monarchism. To the contrary, as an historical fact, monarchism continued to threaten the Republican regime, at least until Charles de Gaulle, well after World War II, provided an alternative model of strong executive leadership. But wariness has persisted.

The same general attitude toward the judiciary persists in other European countries, in all of which constitutional history includes monarchism and, in many countries, leftist and rightist authoritarian regimes as well. For judges to go beyond the letter of procedural law would therefore be considered the manifestation of a tendency to-

24 The constitutional justification of administrative authority under American law, where the Constitution makes no mention of such authority, is essentially similar—that is, delegation from the legislature.

25 5 U.S. (1 Cranch) 137 (1803).

26 On the political situation of bar and bench in France at the time of the Revolution, *see generally* DAVID BELL, LAWYERS AND CITIZENS: THE MAKING OF A POLITICAL ELITE IN OLD REGIME FRANCE 185-94 (1994), and sources cited therein.

ward unconstitutional "activism" on the part of the judiciary. The letter of procedural law in the civil law regimes is that the judiciary is responsible for obtaining evidence, a responsibility that could not be delegated. It is a responsibility that certainly could not be delegated to partisan advocates for litigation parties.

Again, something of an act of imagination is required to appreciate how civil law jurists in the French tradition could interpret an American initiative in trans-border discovery in civil litigation as foreshadowing a restoration of the Bourbons. But perhaps not too much imagination.

V. CONCLUSION

In light of these differences in constitutional history in modern democracies, understanding the problems of civil discovery in international litigation requires analysis that penetrates deeper than differences in the "mode or manner" of litigation, and even deeper than concepts of international law. Rather, it requires an understanding of fundamental constitutional concepts that are historically embedded in the social orders of other countries. Because the political history of those countries is different from ours, so also are their contemporary constitutional concepts.