Where is the dividing line? The case of Spanish civil procedure

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It is undeniable that there has always been a clear dividing line between the civil-law and common-law procedural systems. It is also true that this dividing line has become particularly well-defined as Comparative Law has developed as an independent subject, and as the legal-comparison method has developed as a tool for the study and examination of judicial systems.

In very general terms, there is a widespread belief that the characteristics listed below all belong to the civil-procedure systems of the civil-law tradition, and that these characteristics distinguish said systems from common-law systems, and in particular from that of the United-States: (1) the judge has the *ex officio* power to adduce evidence; (2) the court has the freedom to establish what legal framework it considers to be most appropriate; (3) the procedure for examining witnesses is rigid, in which it is the judge who asks the questions; (4) civil procedure is ordered and directed by the judge; (5) there is no discovery; (6) written sources prevail over oral sources.

However, these statements may surprise jurists who are familiar with the Spanish civil procedure system, especially after Law 1/2000 on Civil Procedure (the Civil Procedure Act or LEC) has come into effect, and who find that in current Spanish civil procedure: (1) the judge, as a rule, is unable to adduce evidence *ex officio* (articles 282, 339.5, and 435.1 LEC); (2) likewise, the judge is unable, without incurring in inconsistency, to establish the legal framework he/she considers to be most appropriate for the subject-matter of the case (articles 218.1 II and 456.1 LEC); (3) the judge does not examine the witnesses, but rather a system of cross-examination is used, with questions asked directly by counsel (article 370.1 LEC); (4) the progress of the proceedings is not the exclusive responsibility of the judge, but rather is to a large extent left to the lawyers; (5) even though the effects are a long way from being those of discovery, there are nonetheless methods available for the parties to obtain documents and information in the possession of

other parties and third parties (articles 256 to 263, 293 to 298, and 328 to 332 LEC); (6) the weight of oral sources has finally increased notably with the new Civil Procedure Act.

In other words, a number of the aspects that are traditionally considered to be definitive of civil-law procedure are not found in current Spanish civil procedure, but rather the normative situation in this regard is actually close to that of the United States. Obviously this does not mean that Spain has left the civil law family and has joined the common law, or that our civil procedure is governed by an adversarial system similar to that of the United States. In fact, our system does display other characteristics associated with civil law systems, such as the existence of a professionalized and independently-governed judiciary, a system of sources of Law created by the state and not the judiciary – and therefore without binding precedent – or the absence of a jury in civil proceedings, such that the judge decides on both questions of fact and questions of law.

However, the fact is that when it comes to drawing the dividing lines between the civil-law and common-law procedure systems, the background of those jurists who have hitherto applied the legal-comparison method to the study of civil procedure has had a notable influence, and in close relation to this, so has the legal systems that they have taken as a reference in order to draw up these studies. It is also undeniable that, within the civil-law sector, the greatest emphasis has been placed on the Italian system, the French system, and those of Germanic origin, whilst other systems such as the Spanish have been left on the sidelines (undeniably, Spanish jurists themselves being mainly responsible).

However, what is important is to highlight that, just as the internal differences that exist in the common-law system are growing, within civil-law there have been, for a very long time, sub-groups. Possibly the Spanish civil-procedure systems is as distinct from the French and from the Italian in its day-to-day operation as it is from that of the United States: and this is something that is, to a great extent, due to the historic tradition of Spanish civil justice, which has been largely free from French and Italian influence. Therefore it is clear that the major legal systems can give rise to formats that are distinct amongst themselves, and that they share more and more common ground and grey areas.

This also reveals the freedom and the realism of Spanish legislators in drafting the Civil Procedure Act of 2000, who have considered it preferable not to follow the rigid frameworks of belonging to a ‘legal family’, and to

regulate each institution in the manner that is most convenient in view of the relevant circumstances and needs: this gave rise to the introduction of cross-examination, the general rule on the prohibition of evidence being adduced *ex officio*, the introduction of a rule such as that contained at article 218.1 II LEC, the extension of the powers for obtaining documents, or the reinforcement of the obligations and duties that should reasonably be imposed on the lawyers and the parties when it comes to designing the model for Spanish civil procedure.