PPJ 2014

PUBLIC AND PRIVATE JUSTICE 2014

Procedural Human Rights and Access to Justice in the World of Emergencies and Economic Crisis

COURSE MATERIALS

Dubrovnik, 26 – 31 May, 2014

IUC Inter University Centre Dubrovnik

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Dimensions of evidence in civil procedure
With financial support from the Civil Justice/Criminal Justice Programme of the European Union

PPJ 2014 Course and Conference, IUC Dubrovnik, 26-30 May 2014

PROCEDURAL HUMAN RIGHTS AND ACCESS TO JUSTICE
IN THE WORLD OF EMERGENCIES AND ECONOMIC CRISIS

Conference outline

The 2014 Public and Private Justice Course and Conference at the IUC in Dubrovnik focuses on developments in civil justice in Europe and the world caused by new economic and political challenges that have significantly affected the fundamental concepts of civil proceedings. Seemingly, in many jurisdictions the balance between procedural principles has shifted – not only in the area of criminal justice, but also in the area of civil justice – from broad availability of judicial protection and the full scope of procedural safeguards, to policies that favour budgetary cuts and efficiency.

The intention of the PPJ 2014 is to make a comparative exploration of the various topics that define core procedural rights in contemporary justice systems, and to pinpoint what changes have been occurring in recent times, attempting to find common trends and to draw conclusions as to the possible further course of procedural transformations.

Among the desirable topics, the following are in particular on the agenda:

- What is happening to fundamental procedural guarantees in the area of civil justice? Are procedural human rights in the civil justice sector expanding, or are they shrinking?
- Should fair trial rights be redefined? Is it true that pressures of time, economy and inefficiency, coupled with the challenge of new technologies, justify significant departures from the conventional guarantees of the right to be heard and fully present one's case?
- What is the place of the right to a trial within reasonable time in contemporary judicial systems? Should there be a uniform European or global concept of 'reasonableness'? Are common standards in judicial time management feasible?
- What is the role of private justice in the context of access to justice? Should mediation and ADR enhance access to justice and replace access to courts wherever possible? Should alternative means of dispute resolution be a mandatory overture to civil litigation, which should remain only as 'ultimum remedium'?
- Can society afford unlimited access to civil courts? Are the doors of the courts too wide open, and should they be controlled by costs or cost-related policies? Are increases in court fees a proper policy to enhance efficiency of justice?
- Can citizens afford judicial protection of their civil rights today? Are costs of civil proceedings disproportionate to gains? Should total costs of legal protection be controlled, and how? Should they be foreseeable? Are developments in the market of legal services hampering access to justice?
- What is the extent of the state obligation to guarantee access to justice in the civil sphere? What are the standards for national legal aid systems? Why are legal aid systems not converging? Why is the level of functionality of state-supported systems of legal aid and assistance so different in Europe and the world?

The draft programme of the PPJ 2014 will be published soon at http://alanuzelac.from.hr/text/iuc-course. We warmly welcome you to join us for a discussion of the above matters next May in Dubrovnik!

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Procedural Human Rights and Access to Justice In the World of Emergencies and Economic Crisis

Programme 2014 * Ninth PPJ Course and Conference

in collaboration with EU JUST Project "Dimensions of Evidence in European Civil Procedure"

Sunday, May 25	***Meeting of participants*** *(Stradun, Gradska kavana, 19,30-20,00)* ***Informal joint dinner***
Monday, May 26 **Registration** (9,00 - 9,30) **Opening:** (9,30 – 13,00) [Coffee break 11,00-11,30] **Lunch Break** (13,00 – 15,00) **Afternoon Session:** (15,00 – 18,00)	Opening speeches Laura Ervo (Helsinki): Should Fair Trial Rights Be Redefined? Danie van Loggerenberg (Pretoria, South Africa): What Is Happening to Fundamental Procedural Guarantees in the Area of Civil justice? A View from South Africa Alan Uzelac (Zagreb): Access to Justice in the 21st Century: Are Current Judicial Practices Hopelessly Antiquated? Taking of Evidence, Communication Techniques, Trials General discussion *Book Presentation* (*Nobody's Perfect: Appeals against Judgments in Civil Litigation*); Preparatory information for the EU JUST Book in the project "Dimensions of Evidence in European Civil Procedure" Sebastian Spinei (Sibiu): The Right Principles –What Outcome? Fundamental Procedural Rights and Their Implementation in Romanian Civil Procedure Ivan Milotić (Zagreb): Roman Foundations of Modern Concepts on Access to Justice and Their Relevance for Contemporary Societies Katharina Auernig (Vienna): The Right to Be Heard in Arbitration Proceedings – A Comparative Approach
Tuesday, May 27 **Morning Session:** (9,30 – 13,00) [Coffee break 11,00-11,30] **Lunch Break** (13,00 – 15,00) **Afternoon Session:** (15,00-18,00)	Aleš Galič (Ljubljana): Inconsistency of Case Law and Right to a Fair Trial Richard Marcus (San Francisco): American Misgivings about U.S. Exceptionalism – Court Access as a Zero/Sum Game Magne Strandberg (Bergen): Article 6(2) of European Human Rights Convention as a Basis for a Standard of Evidence in Civil Cases - Remarks on Some Supreme Court Judgments Andrej Aueršperger Matić (Brussels): Access to Justice in the EU: Conceptual Dilemmas and Practical Challenges Jon T. Johnsen (Oslo): Proper Judicial Time-Management as Procedural Human Right Slađana Aras (Zagreb): Are Financial Burdens Preventing Access to Justice in Southeast European Judicial Systems? Anthony Valcke (Brussels), Legal Information, Advice and Assistance in the Western Balkans and Turkey Zvonimir Jelinić (Osijek): Fighting Recession at the Expense of Access to Justice. The Case of Croatian Financial Operations and Pre-Bankruptcy Settlements Act
Wednesday, May 28 **Morning session** (9,00 – 14,00) [Coffee break 11,00-11,30] **Lunch break** (14,00 – 15,00) **Afternoon** **Study Trip**	Stefan Voet (Ghent): Legal Aid in a European Context Fu Yulin (Beijing): Conciliation and Access to Justice: a Chinese Perspective Pablo Bravo Hurtado (Maastricht; Chile): Access to the Supreme Court: A Human Right? General discussion Afternoon: Trip to Cavtat, Dinner on Bosanka Hill (optional)

Thursday, May 29 **Morning Session** (9,30-13,00) **Lunch Break** (13,00 – 15,00) **Afternoon Session:** (15,00-18,00)	Jorg Sladič (Ljubljana), Conditions of Admissibility and Access to Justice - A Slovenian perspective Adela Ognean (Sibiu): Right to a Trial within a Reasonable Time: Problems and Challenges in Romanian Civil Procedure Tanja Domej (Zürich): Access to Justice - Current Issues in Switzerland Natalia Baradanchenkova & Ksenia Sergeeva (Yekaterinburg), Russian Judicial Reform and How It May Affect Procedural Human Rights and Access to Justice General discussion Olaf Halvorsen Rønning (Oslo): Current ECHR Case Law on Procedural Issues Regarding Applications and Decisions on Legal Aid Tomislav Karlović (Zagreb): Prohibition of Retroactivity as Procedural Human Right. Some Remarks from a Historical Perspective Bianca Laarhoven, Stefan Nieuwendijk and Jeffrey van Nuland (Maastricht): Research on "the paradox of access to justice"
Friday, May 30 **Morning Session** (9,30 – 13,00) **Lunch break** (13,00 – 14,00) **Afternoon Session** (14,00 – 15,30) **Wrap-up and departure** (15,30 – 17,00)	*Panel: Legal Clinics and Advice Centers in the service of enhancing access to justice* Participants: Legal Clinics and clinical initiatives from Croatia, UK, Bosnia and Herzegovina, Norway, and the Netherlands - Alan Russell and Andrew Dudley Unger (London): Legal Clinic at London South Bank University - Mona McKiernan, Hana Temsamani, Vilde Ødegaard Hauan (Oslo): The Current Work and Projects of Juss Buss - Mateja Crnković (Zagreb): Access to Administrative Justice in the Light of Analysis of Zagreb Legal Clinic Cases - Students of Zagreb Legal Clinic: How Legal Clinic in Zagreb Developed to One of the Major Legal Aid Providers in Croatia? - Asmira Bećiraj, Ajna Bakrač (Bihać): Developing Legal Clinic in Bihać – Challenges and Achievements

Project DEECP: JUST/2011-2012/JCIV/AG/3434
Dimensions of evidence in civil procedure
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4	Katharina Auernig	University of Vienna, Austria
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52	Anthony Valcke	European Citizen Action Service, Belgium
53	Ljiljana Vodopija Čengić	Notary Public, Croatia
54	Stefaan Voet	Ghent University, Belgium
55	Fu Yulin	Peking University, China

COURSE MATERIALS

LAURA ERVO
Should Fair Trial Rights Be Redefined?

DANIE VAN LOGGERENBERG
What Is Happening to Fundamental Procedural Guarantees in the Area of Civil Justice? A View from South Africa

ALAN UZELAC
Access to Justice in the 21 st Century. Are Current Judicial Practices Hopelessly Antiquated? Taking of Evidence, Communication Techniques, Trials

SEBASTIAN SPINEI
The Right Principles –What Outcome? Fundamental Procedural Rights and Their Implementation in Romanian Civil Procedure

IVAN MILOTIĆ
Roman Foundations of Modern Concepts on Access to Justice and
Their Relevance for Contemporary Societies

KATHARINA AUERNIG
The Right to Be Heard in Arbitration Proceedings – A Comparative Approach

ALEŠ GALIČ
Inconsistency of Case Law and the Right to a Fair Trial

RICHARD MARCUS
Misgivings About American Exceptionalism: Court Access as a Zero/Sum Game

ANDREJ AUERŠPERGER MATIĆ
Access to Justice in the EU: Recent Developments and Conceptual Dilemmas

SLAĐANA ARAS
Are Financial Burdens Preventing Access to Justice in Southeast European Judicial Systems?

ZVONIMIR JELINIĆ
Fighting Recession at the Expense of Access to Justice
The Case of Croatian Financial Operations and Pre-Bankruptcy Settlements Act

STEFAAN VOET
Legal Aid in a European Context

FU YULIN
Mediation in China: Harmonization at Cost of Justice

PABLO BRAVO HURTADO
Access to the Supreme Court: A Human Right?

JORG SLADIČ
Conditions of Admissibility and Access to Justice - A Slovenian Perspective

ADELA OGNEAN
Right to a Trial within a Reasonable Time
Problems and Challenges in Romanian Civil Procedure

TANJA DOMEJ
Access to Justice – Current Issues in Switzerland

NATALIA BARADANCHENKOVA and KSENIA SERGEEVA
Russian Judicial Reform. How It May Affect Procedural Human Rights and Access to Justice

TOMISLAV KARLOVIĆ
Prohibition of Retroactivity as Procedural Human Right
Some Remarks from a Historical Perspective

ALAN RUSSELL and ANDY UNGER
Clinical Legal Education in the UK

MONA MJØEN MCKIERNAN, VILDE ØDEGAARD HAUAN, and HANA TEMSAMANI
Introduction to Juss-Buss Law Students' Free Legal Aid Organization

MATEJA CRNKOVIĆ
Access to Administrative Justice in the Light of Analysis of Zagreb Legal Clinic Cases

ASMIRA BEĆIRAJ and AJNA BAKRAČ
Developing Legal Clinic in Bihać – Challenges and Achievements

Should Fair Trial Rights Be Redefined?

LAURA ERVO

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The current, post-modern court culture is based on *communication and interaction* between the parties and the judge. There has been a big change from the adjudication, the ideals of substantive law and a substantively correct judgment towards the ideal of negotiated law and pragmatically acceptable compromise. In this kind of procedure the judge is seen more as a helper of the parties than the actor who is using his/her public power to make final decisions. Sometimes mediation and this kind of assistance action carried out by the judge have even been seen as a main function of adjudication,[1] which is a significant sign of the totally new paradigm in the procedural world. The development has gone from the judicial power towards court service.[2] At the same time there has been a wide discussion on the ultimate functions of civil litigation.[3] In this progress, the role of parties has been changed from the subservient towards clients.

Proceedings can even be seen as micro politics[4] and the place for *moral discussions and stages for micro politics*. Recently there have been many cases in Finland which have societal meaning even outside the court room and where the discussion and argumentation during the proceedings are more interesting from the general point of view than the result in one single case. Some examples can be mentioned: the cases against tobacco industry, cases concerning the bank crises at the beginning of the 1990s and, for instance, cases concerning bullying. In these situations, with the help of media, the public procedure is a new place for moral discussions and sometimes they even include the elements of political that are societal

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[1] *J.M. von Bargen, Gerichtsinterne Mediation, Mohr Siebeck 2008.*

[2] *K. Ervasti, Käräjäoikeuksien sovintomenettely. Empiirinen tutkimus sovinnon edistämisestä riitaprosessissa. Oikeuspoliittinen tutkimuslaitos*, 2004, p. 433, *V. Haavisto, Sovinnot – ikkuna tuomioistuintyön muutokseen. In Sovittelu ja muut vaihtoehtoiset konfliktinratkaisujärjestelmät. Ed. Soile Pohjonen. WSOY*, 2001, pp. 83 – 119, pp. 98 – 102 and *V.Haavisto, Court Work in Transition. An Activity-Theoretical Study of Changing Work Practices in a Finnish District Court. University of Helsinki*, 2002, pp. 165 – 251, 260 – 262 and 287.

[3] *K.Ervasti, Lainkäytön funktiot. Lakimies*, 2002, pp. 47-72, pp 56 – 62*, T.Leppänen*, Riita-asiain valmistelu todistusaineiston osalta. Suomalainen Lakimiesyhdistys, 1998, pp. 32 - 41, *B. Lindell,* Civilprocessen. Andra upplagan, Iustus, 2003, pp 82 - 101, *P.H.Lindblom, Processens funktioner – en resa i gränslandet. In Progressiv process. Spridda uppsatser om domstolsprocessen och samhällsutveclingen. Iustus,* 2000, pp41 – 85, pp 46 – 58 and *J.Virolainen, Lainkäyttö. Lakimiesliiton Kustannus* 1995, pp. 80 – 89.

[4] Sometimes judges make even political resolutions.

choices.[5] In its best, moral discussion means that the legal discourse in trials becomes more transparent and democratic. To realize this, the legal concepts must be developed[6] in the way that they better meet grass root level and by doing so promote procedures in the places for moral discussions.[7]

There has also been a change from formal justice towards perceived procedural justice, which means that it is not enough that proceedings fulfill the requirements of formal justice but parties and other actors should in addition subjectively think and feel that the procedure was fair.[8] The most important function in the adjudication is that contextual decisions, which the parties are satisfied with, are produced through fair proceedings. The point of view is prospective instead of retrospective and more internal than external. In achieving these aims, communication and interaction between judges and parties are the most important tools.[9] Therefore new kinds of professional skills are needed. To respond correctly to these current demands a judge must know not only jurisprudence and the contents of law but s/he must also have linguistic and social skills.

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[5] *T. Wilhelmsson, (Media)julkinen oikeudenkäynti moraalikeskustelun tilana. Oikeus* 2002/3, pp. 252–264, pp. 252 – 253.

[6] There has been some more discussion on the topic both in Sweden and Finland. In Sweden, the committee wrote in its report that the most important cause of problems in judgments and decisions is probably that court lawyers seldom have the recipient in mind when they write their texts. This may be assumed to be principally due to the traditions in the way in which court lawyers learn how to formulate judgments and decisions. It does not come naturally to them to think about how the text will be perceived and understood by individual parties. The current ideals about how judgments are written need to be changed so as to improve readability and judicial argumentation. In the future, court lawyers must be more aware of plain language efforts when it comes to formulating judgments and decisions. The language policy objective that 'Public Swedish is to be cultivated, simple and comprehensible' also applies to the courts (*Govt. Bill 2005/06:2, Report 2005/06:KrU4*). *SOU 2008:106, Op. cit.*, pp. 31 - 32.
In Finland, Kotus (Institute for the Languages in Finland) has ongoing projects on the topic how to make the language in legislation and in administration more understandable. Please, see http://www.kotus.fi/?l=en&s=3938, visited 24.01.2013.

[7] *T.Wilhelmsson, Op. cit.,* p. 262.

[8] It is important that the court works in an impartial way and it is obvious that they do not try to promote their own interests or the interests of their organization, the party can feel that s/he can influence the course of the procedure or at least s/he feels that s/he has been truly heard and that it even influences the course of procedure, the party is treated well and with dignity and politely and respecting her/his rights. The impartiality of the judge means that s/he attempts to find the equal, non discriminating and truthful decision and the motivation of the judge to act for the common good and to take care of all parties in the proceedings. *J.Tala*, op. Cit., p. 22.

[9] *KErvasti* 2004, p. 168, *V.Haavisto* 2002, Op. Cit in footnote 43, p. 20, *S.Laukkanen, Tuomarin rooli. Suomaleinen Lakimiesyhdistys* 1995, p. 214, *J-P. Takala, Moraalitunteet rikosten sovittelussa. Oikeuspoliittinen tutkimuslaitos* 1998, pp. 3 – 5, *J.Tala*, op. Cit., pp. 21 – 23, *T.Tyler: Why people obey the law? Yale University Press* 1990, p. 94 and *J.Virolainen – P.Martikainen, Pro et contra: tuomion perustelemisen keskeisiä kysymyksiä.* Talentum 2003, p. 5.

For instance, in the Swedish Ministry of Justice study on the people´s trust, there are several factors which are important in trust and confidence in courts. The list is as follows:

- The accessibility of the courts and the court staff for parties and people giving evidence
- The courts' reception of parties and people giving evidence
- Processing times at the courts
- The transparency of the courts' decision-making processes
- The formulation of judgments and decisions
- The way in which activities of the courts are portrayed by the media
- The knowledge of the general public about what goes on in the courts
- The conduct of judges[10]

As we can see, most of these factors which are currently important for trust are based on social and communicative skills.

The conduct of judges is very important also when it comes to citizens' trust in the courts as institutions. If the conduct of judges is inappropriate or takes place in inappropriate contexts, there is, in fact, a danger that citizens' trust in the courts will decline.[11]

Basically, trust-creating efforts in the courts are of course a matter of ensuring that adjudication maintains high even standards. Apart from professional standards, it is, however, also important to ensure that activities in the courts maintain high standards from the point of view of the citizens coming into contact with them. While professional standards, somewhat simplified, can be said to depend on the knowledge and skills of the members of staff, a way in which the citizens perceive standards is determined by the attitude, values and approach of these staff members. This is not just a matter of treating parties and people giving evidence with respect and dignity, but also of the courts and the court staff being accessible, so that those who have questions or opinions are able to get in touch with the courts in a simple manner. Good reception also includes giving parties and

[10] *SOU 2008:106*, Op. Cit., p. 26.
[11] Ibid., p. 27.

people giving evidence access to easily available information about how the court works and what is expected of them in their roles.[12]

The reasons for this development can be just guessed and there are several possibilities: privatization and economic reasons can be one of them. They are political reasons then. Maybe people want to be more individual and get more party autonomy to decide their conflicts as they want to. They are then moral and societal; in the other words, sociological reasons.

All of that will lead to the need to expand *the party-autonomy* and to give more space for the *delegation principle.*[13] It is now the people who want to decide and the judge who should help them. In that type of context the elements of the fair trial will be bursting in its apophyges. We don´t need any more formal and absolute procedural rules to guarantee the fairness, the material truth finding, the materially correct judgments or the legal protection. The new list is totally different and it includes service, social and communicative judges who can mediate, it includes transparency and co-operation instead of allegiance. The whole perspective to the same issues is different and the opposite. The question is no longer how to guarantee the fair trial but how to produce it? The point of view is from passivity to activity and from obeying to doing together. The main actors instead of the state and the judge are the parties and the people.

[12] *SOU 2008:106*, Op.cit., pp. 26 - 27.
[13] Ervo 2009a: 1, Ervo 2011a: 164 and Jokela 2005: 44 and 183 - 184.

What Is Happening to Fundamental Procedural Guarantees in the Area of Civil Justice? A View from South Africa

DANIE VAN LOGGERENBERG

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1. Introduction

A civil action could, in the words of Eduardo Couture,[1] be described as "*civilisation's substitute for vengeance*".

In a civilised country, it is therefore to be expected that:

(a) the right *of all*;

(b) to have access to courts;

(c) by means of civil proceedings;

(d) to have any dispute that can be resolved by the application of law decided;

(e) be guaranteed.

In South Africa, where post-apartheid the Constitution of the Republic of South Africa, 1996, reigns supreme, that right is guaranteed in the Bill of Rights[2] embodied in the Constitution, section 34 whereof provides:

"*Access to courts*

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

As explained in a previous presentation,[3] the word "*procedure*" means "*going forward*" and, viewed as such, *(a)* aims at moving forward the dispute between the parties up to te point of its eventual determination by a court and *(b)* aims at reflecting the evolution of society and its needs.

The question therefore arises, as far as South Africa is concerned, what is happening to fundamental procedural guarantees in the area of civil justice – is it "*going forward*", or

[1] "The nature of the judicial process" (1950) 25 *Tulane Law Review* 1 at 7.

[2] The Bill of Rights also guarantees other fundamental rights. A copy of the Bill of Rights is annexed hereto, marked **"A"**.

not?

In answering this question, it is of material importance to keep in mind that 20 years ago South Africa transcended from a system of parliamentary sovereignty to one of constitutional supremacy and that, as such, the way was paved for a rights-based jurisprudence, in which the rules of civil procedure themselves are from time to time subject to constitutional scrutiny and challenge.

In our new dispensation the state is required to "*respect, protect, promote and fulfil*" the rights in the Bill of Rights[4] which rights, as stated above, include the right of access to courts. In other words, the state is constitutionally required "*to lead by example*".[5]

2. What is happening to fundamental procedural guarantees in South Africa in the area of civil justice?

An analysis of the right of access to courts, as embodied in section 34 of the Constitution, demonstrates that guaranteed by that right are, *inter alia*, the principles of:

(a) equality ("*everyone has the right*"); and

(b) *audi alteram partem* ("*a … hearing before a court*").

In this presentation the focus will be directed at jurisprudence in the area of these two fundamental procedural guarantees.

For purposes of the presentation the focus will, further, be directed at the following:

(a) The limitation of these two guarantees;

(b) These two guarantees in the following areas of civil justice:-

(i) arrest of a person to found or confirm jurisdiction;

(ii) arrest *tanquam suspectus de fuga*;

(iii) class actions.

The aforesaid will be dealt with *seriatim*.

2.1 The limitation of the right to access to courts

In terms of section 36(1) of the Constitution, the rights in the Bill of Rights may be limited only

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[3] "Evolution of the powers of the judge and the powers of the parties regarding taking of evidence" – Dubrovnik 2013.

[4] Section 7(2) of the Constitution.

in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve a purpose.

The right of a superior court[6] to impose procedural barriers to litigation on persons who are found to be vexatious was recognised by the Constitutional Court in *Beinash v Ernst & Young*.[7] In that case it was held that restricting access to vexatious litigants was indispensible to protect and secure the rights of those with meritorious disputes and necessary to protect bona fide litigants, the process of the courts and the administration of justice. The court, *inter alia*, stated:[8]

"*[17] The right of access to courts protected under s 34 is of cardinal importance for the adjudication of justiciable disputes. When regard is had to the nature of the right in terms of s 36(1)(a), there can surely be no dispute that the right of access to court is by nature a right that requires active protection. However, a restriction of access in the case of a vexatious litigant is in fact indispensable to protect and secure the right of access for those with meritorious disputes. Indeed, as the respondents argued, the Court is under a*

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[5] As was held by the highest court of the land, the Constitutional Court, in *Mohammed v President of South Africa (Society for the Abolition of the Death Penalty in South Africa and Another Intervening*) 2001 (3) SA 893 (CC) at para 68.

[6] In terms of section 166 of the Constitution, the courts in South Africa consist of:

(a) The Constitutional Court;
(b) The Supreme Court of Appeal;
(c) The High Court;
(d) The Magistrates' Courts.

In this presentation the Constitutional Court, the Supreme Court of Appeal and the High Court will collectively be referred to as "the superior courts".

[7] 1999 (2) SA 116 (CC) at paras 10 and 17. In this case the High Court made an order in the following terms:

> "No legal proceedings shall be instituted by the first, second and third respondents against any person in any Provincial or Local Division of the High Court of South Africa or any inferior court, without the leave of that court or Judge of the High Court."

This order brought respite to the parties in the case who applied for the order as well as others who had been awash in a sea of litigation launched by the parties against whom the order was made over a period of almost six years. When the High Court heard the matter the parties against whom the order was made had already launched 45 different proceedings of which 27 had been unsuccessful. All of these proceedings were characterised by the High Court as being vexatious.

[8] At 123D-124A.

constitutional duty to protect bona fide litigants, the processes of the Courts and the administration of justice against vexatious proceedings. Section 165(3) of the Constitution requires that '(n)o person or organ of State may interfere with the functioning of the courts'. The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed. This limitation serves an important purpose relevant to s 36(1)(b). It would surely be difficult to anticipate the litigious strategies upon which a determined and inventive litigator might embark. Thus there is a requirement for special authorisation for any proposed litigation.

[18] When one considers, for purposes of s 36(1)(c), the extent of the restriction permitted by the Act, it seems clear that the restriction itself can only occur through an order of Court. The order is then confined to the specific person or persons at whom it is directed; it has no direct effect on the pubic generally. An order restricting a litigant is only made in circumstances where the Court is satisfied that the malfeasant has 'persistently and without reasonable grounds instituted legal proceedings'. If a Judge does not make the order in a judicially permissible manner, then there is always the right to appeal."

In *Cassimjee v Minister of Finance*[9] the Supreme Court of Appeal confirmed the right of a superior court to impose procedural barriers to litigation on persons who abuse court procedures. In this regard the Supreme Court of Appeal, relying on its power to do so in section 173 of the Constitution,[10] stated[11] that the same considerations alluded to in the *Beinash* case would apply to an abuse of court procedures.[12]

2.2 **Arrest of persons to found or confirm jurisdiction**

The rule that arrest of a person could found or confirm jurisdiction was applied in, for

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[9] 2014 (3) SA 198 (SCA) at 200F-201A.

[10] Which provides as follows:

"Inherent power

173. The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[11] At 201A.

[12] Whether this approach by the Supreme Court of Appeal is entirely correct, is not beyond doubt. Under section 36(1) of the Constitution the limitation of the right of access to court is permissible only to the extent that "the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom", taking into account the factors listed in that section. Under section 173 of the Constitution, the power of the superior courts to impose a limitation on the right of access to court in order to

example, Holland as an exception to the rule of Roman law *actor sequitur forum rei*.[13] Fundamentally both rules related to the jurisdiction of a court, i e the power and competence of a court to hear and determine issues between parties.[14] *Actor sequitur forum rei* applied transnationally and subjected the foreign plaintiff to the jurisdiction of the court where the defendant was resident.[15] The rule that arrest (and attachment) founded or confirmed jurisdiction did not apply transnationally. It subjected a foreign national, as defendant, to the jurisdiction of the court of the *incola* plaintiff pursuant to an order of that court, and whilst being within the territory of that court for the time being. The arrest was primarily aimed at founding or confirming jurisdiction and to commence proceedings.[16] Both rules were therefore jurisdictional requirements.[17]

In addition to its primary aim, arrest was aimed at inducing the foreign debtor to pay the plaintiff creditor (or to provide security for such creditor's claim) rather than endure the worry of arrest.[18] In this way law suits could purportedly be cut short and time and costs could purportedly be saved. It is submitted that this aim was secondary to that of founding or confirming jurisdiction on the local court. In this secondary sense, the foreign debtor, by means of the arrest, became related to the judgment of the local court.[19]

From a jurisdictional perspective the principle of arrest extended the jurisdiction, i e the power of adjudicating upon causes and enforcing decrees relating thereto, of a local court to foreigners within its jurisdictional territory for the time being.

The principle of arrest was taken over by the Dutch in the Cape Colony and became part of

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protect their process, must be exercised in "the interests of justice". There seems to be a distinct difference between the two sections and the considerations to be applied by a court in terms of each of them.

[13] See Wessels "History of our Law of Arrest to Found Jurisdiction" 1907 *South African Law Journal* 390.

[14] As to this meaning of jurisdiction, see, *inter alia*, Vromans *Tractaat de Foro Competenti* 1 3 2 fn 1; Voet 2 1 1; *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) at 424; *Ndamase v Functions* 4 All [2004] 5 SA 602 (SCA) at 605H; *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) at 263B.

[15] *Bid Industrial Holdings (Pty) Ltd v Strang* 2008 (3) SA 355 (SCA) at 362E.

[16] See *Tsung Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA) at 180G.

[17] This is recognised in the *Bid* decision *supra* at 362E, 367B and 367E-F.

[18] *Tsung v Industrial Development Corporation of SA Ltd supra* at 180G-181A. In summarizing the position in Holland in *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 306H-307A, Potgieter JA stated that "*the attachment … served to found jurisdiction and thereby enabled the Court to pronounce a not altogether effective judgment*". (Emphasis added).

[19] *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries (Pty) Ltd supra* at 306A-B.

the law of South Africa.[20] It eventually obtained statutory force when it was enacted[21] in section 19(1)(*c*) of the now repealed Supreme Court Act.[22] At the time of its introduction, the relevant provisions of section 19(1)(*c*) read as follows:

"*(c) Subject to the provisions of section 28 … any High Court may –*

(i) issue an order for . . . arrest of a person to confirm jurisdiction . . . also where . . . the . . . person concerned is outside its area of jurisdiction but within the Republic: Provided that the cause of action arose within its area of jurisdiction; and

(ii) where the plaintiff is resident or domiciled within its area of jurisdiction, but the cause of action arose outside its area of jurisdiction and the . . . person concerned is outside its area of jurisdiction, issue an order for . . . arrest of a person to found jurisdiction regardless of where in the Republic the . . . person is situated."

In a long line of cases before and after the rule of jurisdictional arrest was enacted in section 19(1)(*c*) of the Supreme Court Act[23] the purpose thereof was held, in the case of an arrest *ad fundandam jurisdictionem*, to be twofold: first, to found, i e create jurisdiction where no other ground of jurisdiction existed at all, and, secondly, to provide an asset in respect of which execution could be levied in the event of a judgment being granted in favour of the *incola* plaintiff.[24] The purpose of an attachment of property *ad confirmandam jurisdictionem* was also held to be twofold: to strengthen or confirm a jurisdiction which already existed and to provide an asset in respect of which execution could be levied in the event of a judgment being granted in favour of the *incola* plaintiff.[25]

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[20] *Springle v Mercantile Association of Swaziland Ltd* 1904 TS 163 at 167.

[21] By section 6 of the Judicial Matters Second Amendment Act 122 of 1998. For a discussion on how this insertion changed the former position pertaining to the procedure of arrest to found or confirm jurisdiction, see Dendy "Attachment to Found or Confirm Jurisdiction, and Arrest Tanquam Suspectus de Fuga: A Long-Standing Lacuna Filled" 1999 *South African Law Journal* 586.

[22] 59 of 1959. The Supreme Court Act was repealed by the Superior Courts Act 10 of 2013 with effect from 23 August 2013.

[23] 59 of 1959.

[24] See, for example, *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries (Pty) Ltd supra* at 305-8; *Banks v Henshaw* 1962 (3) SA 464 (D) at 466; *Cargo Motor Corporation Ltd v Tofalos Transport Ltd* 1972 (1) SA 186 (W) at 193; *MT Tigr: Owners of the MT Tigr v Transnet Ltd* 1998 (3) SA 861 (SCA) at 870 and *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 166 (SCA) at 181A.

[25] See, for example, *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries (Pty) Ltd supra* at 300; *Murphy v Dallas* 1974 (1) SA 793 (D) at 796; *Telecom Electrical Engineering Services (Pty) Ltd v Berriman* 1982 (1) SA 520 (W) at 523-4; *Agro-Grip (Pty) Ltd v Ayal* 1999 (3) SA 126 (W) at 128I-129A; *Saaiman NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA) at 230D-E.

In *Bid Industrial Holdings (Pty) Ltd v Strang*[26] it was held by the Supreme Court of Appeal that an arrest of a person to found or confirm jurisdiction is unconstitutional and, in this regard, *inter alia*, that:

(a) jurisdictional arrest would cause extensive infringement of the rights to a fair civil trial, equality, human dignity, liberty, etc;[27]

(b) there were less restrictive means to establish jurisdiction than by way of arresting a person;[28]

(c) arrest in itself was powerless to bring about an effective judgment.[29]

Consequently, the Supreme Court of Appeal developed the common law by the abolition of jurisdictional arrest and the adoption, in its stead, where attachment of property of a *peregrinus* was not possible, of the practice according to which a High Court would have jurisdiction if the summons was served on the defendant while he was in South Africa and there was sufficient connection between the suit and the area of jurisdiction of the court concerned so that disposal of the case by that court was appropriate and convenient.[30]

The Superior Courts Act 10 of 2013, which repealed the Supreme Court Act 59 of 1959 with effect from 23 August 2013, contains no provision similar to that of section 19(1)*(c)* of the Supreme Court Act 59 of 1959.

In the premises, an arrest of a person to found or confirm jurisdiction in order for an *incola* of South Africa to pursue civil proceedings in a court in South Africa is no longer possible.[31]

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[26] 2008 (3) SA 355 (SCA). In this case the appellant applied in the High Court for an order for the arrest of the two respondents in order to found or confirm the court's jurisdiction in a proposed action against them for damages in delict. The appellant was a South African company which had its registered office within the area of jurisdiction of the High Court, while the respondents were citizens of Australia, resident and domiciled there. It appeared that the appellant had failed to attach an asset belonging to one of the respondents which had, at one stage, being capable of attachment to found or confirm jurisdiction; and that, despite the appellant's repeated requests, the respondents had refused to submit to the jurisdiction of the High Court. The respondents resisted the application on, *inter alia*, the ground that section 19(1)*(c)* of the (now repealed) Supreme Court Act 59 of 1959, which at the time empowered the arrest, was unconstitutional and because the legislation derived from a common law rule, the common law had to be developed to abolish the rule.

[27] At 366B-C.

[28] At 366H.

[29] At 365D-E.

[30] For a critical discussion of the *Bid* decision, see Bekker and Van Loggerenberg "Freedom from arrest for the foreign debtor: A jurisdictional perspective" 2012 (February) *Journal of Contemporary Roman-Dutch Law* 65.

[31] Strangely enough, the *Bid* decision had no effect on section 30*bis* of the Magistrates' Courts Act 32 of 1944. An anomalous situation, in which the magistrates courts (which are the lowest courts in South Africa) still had jurisdiction to order an arrest to found or confirm jurisdiction, therefore arose. That called for legislative intervention, which took place on 22 January 2014 when section 30*bis* was appropriately amended by the Judicial Matters Amendment Act 4 of 2013 to exclude from it the provisions providing for arrest of persons to found or confirm jurisdiction.

To this end our civil procedure has been moved forward by the courts and the legislature in order to respect, protect, promote and fulfil the two fundamental procedural guarantees under discussion in this presentation.

2.3 **Arrests *tanquam suspectus de fuga***

In South Africa, as elsewhere in the world, it is of prime importance to a creditor to obtain a valid judgment against his debtor, for once he is armed with a judgment, the creditor is able to seek satisfaction of the judgment in most of the civilised countries of the world. Consequently, at common law, a procedure was introduced to arrest a debtor *tanquam suspectus de fuga*. The purpose of such an arrest was the protection of the creditor of such person, by the apprehension and detention of the debtor who was about to flee in order to avoid paying the debt. The object of the arrest was to prevent the debtor's removing from the jurisdiction of the court unless he gave security for the debt so that an effective judgment could be given against him at the trial of the suit should his indebtedness be proved.[32]

In *Malachi v Cape Dance Academy Int (Pty) Ltd* [33] Hlope JP declared arrests *tanquam suspctus*

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[32] See, *inter alia*, *Segal v Diners Club SA (Pty) Ltd* 1974 (1) SA 273 (T) at 275 and *Shell South Africa (Edms) Bpk v Gross h/a Motor Maintenance* 1980 (4) SA 151 (T) at 153.

[33] [2010] 3 All SA 86 (WCC). In this case, the applicant, Ms Tatiana Malachi, a citizen of the Republic of Moldova, was recruited from Moldova and employed by Cape Dance Academy International (Pty) Ltd and House of Rasputin Properties (Pty) Ltd as an exotic dancer.

Upon the applicant's arrival in South Africa a representative of the employers caused her to surrender her passport to him. When she subsequently asked for it, he refused to give it back to her unless she reimbursed her employers the money they had allegedly spent on her pursuant to the terms of the contract of employment.

In terms of the contract of employment the employers were to make and pay for all of the applicant's visa and travel arrangements. They also had to provide her with rented accommodation. The applicant was in turn obliged to reimburse them. A cursory reading of the contract of employment reveals that more is said about her duties and what she was required to pay to her employers than about the benefits that would accrue to her for services rendered. After working for several months, the applicant expressed dissatisfaction to her employers with her conditions of employment.

Eventually she enlisted the assistance of the Consul-General of Russia to secure an air ticket to return to her country of origin. Somehow her employers got to know about her plans. They then applied for an were granted an order by the Cape Town magistrate's court to have the applicant arrested in terms of the impugned provisions. The basis for the application, and for the granting of the arrest order, was that the applicant owed her employers about R100 000 (i e ± €66,666) and that they reasonably suspected that she was about to flee the country permanently in order to escape payment of the debt.

On the same day the applicant was arrested and detained in Pollsmoor Correctional Centre. She was incarcerated for 16 days. Aggrieved by the order for her arrest, she approached the High Court to secure her liberty.

The applicant challenged the constitutional validity of both the provisions of the Magistrates' Courts Act 32 of 1944 and the common-law, insofar as they empower a court to make an order for arrest *tanquam suspectus de fuga*.

de fuga unconstitutional and invalid. He made the following order and referred the matter to the Constitutional Court in terms of section 172(2) of the Constitution:[34]

"*1. The words 'arrest tanquam suspects de fuga' as contained in section 30(1) of the Magistrates' Courts Act 32 of 1944 are declared unconstitutional and invalid and must therefore be deleted.*

2. The whole of Section 30(3) of the Magistrates' Courts Act 32 of 1944 is declared to be inconsistent with the Constitution and invalid.

3. The common law which authorizes arrests tanquam suspectus de fuga is declared to be inconsistent with the Constitution and invalid."

On 24 August 2010 the Constitutional Court confirmed the order of constitutional invalidity made by Hlope JP to the following extent:[35]

"*(i) The words 'arrest tanquam suspectus de fuga' as contained in s 30(1) of the Magistrates' Courts Act 32 of 1944 are declared unconstitutional and invalid.*

(ii) The whole of s 30(3) of the Magistrates' Courts Act 32 of 1944 is declared unconstitutional and invalid."

The Constitutional Court[36] limited the retrospective application of its order to all pending cases, in other words, cases where the review and appeal processes have been finalised are not affected by the order.[37] The Constitutional Court[38] held that the Constitution does not make provision for the confirmation of an order of constitutional invalidity of the common law and, in this regard, stated that:[39]

(a) the impugned provisions of the Magistrates' Courts Act are essentially a codified version of the common law;

(b) Hlope JP had already declared the common-law equivalent of the impugned provisions unconstitutional;

(c) its finding that the impugned provisions are unconstitutional are not at odds with the High Court's finding that the common law is unconstitutional.

The impugned provisions of the Magistrates' Courts Act were removed from it by section 2

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[34] Section 172(2) of the Constitution provides that an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

[35] In *Malachi v Cape Dance Academy International (Pty) Ltd* 2010 (6) SA 1 (CC) at 18I–19B.

[36] At 17F–G.

[37] Consequently, all those potential debtors who were incarcerated on 24 August 2010 had to be released with immediate effect (*Malachi* case at 17F–G).

[38] At 4A–B.

of the Judicial Matters Amendment Act 42 of 2013 with effect from 22 January 2014.

In the premises, an arrest *tanquam suspectus de fuga* is no longer possible in South African civil procedure. To this end our civil procedure has been moved forward by the courts and the legislature in order to respect, protect, promote and fulfil the two fundamental procedural guarantees under discussion in this presentation.

3. **Class actions**

Class actions in respect of claims arising from the Constitution are provided for in section 38 thereof:

"Class actions

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members."

Neither the common law nor legislation made provision for a class action in non-constitutional claims not directly based on the alleged infringement of a fundamental right in the Bill of Rights.

In *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd*[40] the Supreme Court of Appeal developed the common law to allow for the use of a class action in non-constitutional claims.[41]

The reasoning that led the Supreme Court of Appeal to this development was that it would be irrational to allow class actions for constitutional matters and not non-constitutional

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[39] At 16D–E.

[40] 2013 (2) SA 213 (SCA).

[41] The Supreme Court of Appeal acknowledged the source of its power to do so in section 173 of the Constitution, which section is referred to in subparagraph 2.1 above.

claims, because of the similarities involved.[42]

The Supreme Court of Appeal laid down the following requirements for a class action involving non-constitutional rights:

3.1 *Certification*[43]

The party seeking to represent a class must apply to a court for it to certify the action as a class action. Thereafter it may issue summons. The court faced with the application need consider and be satisfied of the presence of the following factors, before certifying the action-

(a) the existence of a class identifiable by objective criteria;

(b) a cause of action raising a triable issue;

(c) that the right to relief depends on the determination of issues of fact, or law, or both, common to all members of the class;

(d) that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;

(e) that where the claim is for damages, there is an appropriate procedure for allocating the damages to the class members;

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[42] The case involved the alleged unlawful conduct of bread producers to fix bread prices in an anti-competitive manner, to the detriment of a vast number of consumers. In developing the common law, the Supreme Court of Appeal, *inter alia*, stated (at 225C-F and 226A-D):

> "The class of people on whose behalf the appellants seek to pursue claims (leaving aside for the present the definition of that class) is both large and in general poor. Any claims they may have against the respondents are not large enough to warrant their being pursued separately, so that it is improbable that any lawyers would be willing to act for them on a contingency-fee basis. If those claims cannot be pursued by way of a class action, they are not capable of being pursued at all. The effect of that is to engage the right of access to courts vested in each of the members of the class by s 34 of the Constitution. The threatened infringement of that right may be challenged by way of a class action and the appropriate remedy is to permit a class action in respect of the underlying claims …
>
> In my judgment it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances, merely because of the claimants' inability to point to the infringement of a right protected under the Bill of Rights. The procedural requirements that will be determined in relation to the one type of case can equally easily be applied in the other. Class actions are a particularly appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal-injury cases or consumer litigation. I accordingly reject the suggestion advanced in some of the academic writing, and in some of the heads of argument, that we should await legislative action before determining the requirements for instituting a class action in our law. The legislature will be free to make its own determination when it turns its attention to this matter and in doing so it may adopt an approach different from ours. In the meantime the courts must prescribe appropriate procedures to enable litigants to pursue claims by this means."

[43] At 226H-227B, 228B-E and 229C-E.

(f) that the proposed representative is suitable to conduct the action and to represent the class;

(g) whether, given the composition of the class and the nature of the proposed action, a class action is the most appropriate means of determining the claims of class members.

3.2 *Class definition*[44]

The applicant for certification must define the class with enough precision for a class member to be identified at all stages of the proceedings.

3.3 *A cause of action that raises a triable issue*[45]

The applicant must show a cause of action with a basis in law and the evidence. That is, the claim must be legally tenable, and there needs to be evidence of a prima facie case.

3.4 *The procedure to be adopted in an application for certification*[46]

The application must be accompanied by draft particulars of claim setting out the cause of action, the class, and the relief sought. The affidavits need to set out the evidence available to support the cause, as well as evidence it is anticipated will become available, and the way it will be procured.

3.5 *Common issues of fact or law*[47]

There must be issues of fact, or law, or fact and law, common to all members of the class, and which are determinable in one action.

3.6 *The representative plaintiff and his lawyers*[48]

The representative plaintiff may be a member of the class or a person acting in its interest. This applies both to class actions based on a constitutional right and to other class actions. The representative's interests cannot conflict with those of the class members; and he must also have the capacity to properly conduct the litigation. The capacity requirement entails the ability to procure evidence, to finance the litigation and to access lawyers. The payment arrangement with the lawyers need also be disclosed, and cannot give rise to a conflict of interest of the lawyers and the class members.

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[44] At 229E-H and 213F-G.
[45] At 232A-E and 233B-236B.
[46] At 236A-F.
[47] At 236F-237D.
[48] At 237D-238D.

On the same day that the Supreme Court of Appeal delivered judgment in the *Children's Resource Centre* case, it delivered judgment in a related matter, *Mukkaddam v Pioneer Food (Pty) Ltd*,[49] involving a bread distributor seeking permission to institute a class action against the bread producers who allegedly made themselves guilty of unlawful, anti-competitive, price-fixing. The reasoning in the *Children's Resource Centre* and *Mukkaddam* cases was materially synchronic. Because the applicant in the *Mukkaddam* case, however, sought to pursue an "*opt-in*" class action in terms of which claimants who join the class as a matter of individual choice, the Supreme Court of Appeal held that the circumstances of the case did not warrant a class action since joinder under rule 10 of the High Court's Uniform Rules of Court allows multiple plaintiffs to join in a single action. The Supreme Court of Appeal recorded that the only advantage in favour of a class action which was advanced on the applicant's behalf was that he would be insulated against personal liability for costs. The court did not consider this to be adequate to move it to authorise the institution of a class action where access to court may equally be achieved by means of a joint action such as that contemplated by Uniform Rule of Court 10.

The *Mukkaddam* case went on appeal to the Constitutional Court *sub nomine Mukaddam v Pioneer Foods (Pty) Ltd*.[50] The Constitutional Court held that:[51]

(a) pursuant to section 173 of the Constitution, which alludes to the "*interests of justice*", the standard which must be applied in adjudicating applications for certification to institute class actions, is the "*interests of justice*";

(b) the requirements laid down by the Supreme Court of Appeal in the *Children's Resource Centre* case must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. They must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise;

(c) none of the abovementioned factors is decisive of the issue;

(d) in the light of section 34, read with section 38 of the Constitution, there can be no justification for elevating requirements for certification to the rigid level of prerequisites

[49] 2013 (2) SA 254 (SCA).
[50] 2013 (5) SA 89 (CC).
[51] At 99D-101C.

for the exercise of the power confirmed, without restrictions. In this regard, section 173 of the Constitution does not limit the exercise of the power nor does it lay down any condition, except that what is done must be in the interests of justice. Compelling reasons would therefore be necessary for introducing inflexible requirements;

(e) courts must embrace class actions as one of the tools available to litigants for placing disputes before them. However, it is appropriate that the courts should retain control over class actions. Permitting a class action in some cases may, as the Supreme Court of Appeal has observed in the *Mukkaddam* case, be oppressive and as a result inconsistent with the interests of justice. It is therefore necessary for courts to be able to keep out of the justice system class actions which hinder, instead of advance, the interests of justice. In this way prior certification will serve as an instrument of justice rather than a barrier to it;

(f) what is said about certification that must be obtained before instituting a class action of a non-constitutional nature, must not be construed to apply to class actions in which the enforcement of rights entrenched in the Bill of Rights is sought against the state. Proceedings against the state assume a public character which necessarily widens the reach of orders issued to cover persons who were not privy to a particular litigation. In these circumstances, it is neither prudent nor necessary to pronounce on whether prior certification must be obtained for class actions instituted in terms of section 38 of the Constitution, without interpreting the section. That aspect therefore lives for another day.

In the premises our civil procedure, in recognising the right of everyone to access to court, has moved forward to provide for *(a)* class actions in non-constitutional claims and *(b)* the procedure to be followed in pursuing such claims. Likewise, the two fundamental procedural guarantees have been respected, protected, promoted and fulfilled.

4. **Conclusion**

It has been demonstrated that the jurisprudence in the area of access to justice and, in particular, the area of the fundamental procedural guarantees of equality and *audi alteram partem*, is well and alive in South Africa.

7. Rights.—(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

8. Application.—(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

9. Equality.—(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4)* No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Footnotes

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See Sch. 6 item 23 (1).

10. Human dignity.—Everyone has inherent dignity and the right to have their dignity respected and protected.

11. Life.—Everyone has the right to life.

12. Freedom and security of the person.—(1) Everyone has the right to freedom and security of the person, which includes the right—

not to be deprived of freedom arbitrarily or without just cause;

not to be detained without trial;

to be free from all forms of violence from either public or private sources;

not to be tortured in any way; and

not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—

to make decisions concerning reproduction;

to security in and control over their body; and

not to be subjected to medical or scientific experiments without their informed consent.

13. Slavery, servitude and forced labour.—No one may be subjected to slavery, servitude or forced labour.

14. Privacy.—Everyone has the right to privacy, which includes the right not to have—

their person or home searched;

their property searched;

their possessions seized; or

the privacy of their communications infringed.

15. Freedom of religion, belief and opinion.—(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that—

those observances follow rules made by the appropriate public authorities;

they are conducted on an equitable basis; and

attendance at them is free and voluntary.

(3) (*a*) This section does not prevent legislation recognising—

(i)
marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii)
systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(*b*) Recognition in terms of paragraph (*a*) must be consistent with this section and the other provisions of the Constitution.

16. Freedom of expression.—(1) Everyone has the right to freedom of expression, which includes—

freedom of the press and other media;

freedom to receive or impart information or ideas;

freedom of artistic creativity; and

academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to—

propaganda for war;

incitement of imminent violence; or

advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

17. Assembly, demonstration, picket and petition.—Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

18. Freedom of association.—Everyone has the right to freedom of association.

19. Political rights.—(1) Every citizen is free to make political choices, which includes the right—

to form a political party;

to participate in the activities of, or recruit members for, a political party; and

to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right—

to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

to stand for public office and, if elected, to hold office.

20. Citizenship.—No citizen may be deprived of citizenship.

21. Freedom of movement and residence.—(1) Everyone has the right to freedom of movement.

(2) Everyone has the right to leave the Republic.

(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.

(4) Every citizen has the right to a passport.

22. Freedom of trade, occupation and profession.—Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

23. Labour relations.—(1) Everyone has the right to fair labour practices.

(2) Every worker has the right—

to form and join a trade union;

to participate in the activities and programmes of a trade union; and

to strike.

(3) Every employer has the right—

to form and join an employers' organisation; and

to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right—

to determine its own administration, programmes and activities;

to organise; and

to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

24. Environment.—Everyone has the right—

to an environment that is not harmful to their health or well-being; and

to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

25. Property.—(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

for a public purpose or in the public interest; and

subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

the current use of the property;

the history of the acquisition and use of the property;

the market value of the property;

the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

the purpose of the expropriation.

(4) For the purposes of this section—

the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6).

26. Housing.—(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27. Health care, food, water and social security.—(1) Everyone has the right to have access to—

health care services, including reproductive health care;

sufficient food and water; and

social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

28. Children.—(1) Every child has the right—

to a name and a nationality from birth;

to family care or parental care, or to appropriate alternative care when removed from the family environment;

to basic nutrition, shelter, basic health care services and social services;

to be protected from maltreatment, neglect, abuse or degradation;

to be protected from exploitative labour practices;

not to be required or permitted to perform work or provide services that—

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.

29. Education.—(1) Everyone has the right—

to a basic education, including adult basic education; and

to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—

equity;

practicability; and

the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

do not discriminate on the basis of race;

are registered with the state; and

maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

30. Language and culture.—Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

31. Cultural, religious and linguistic communities.—(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

to enjoy their culture, practise their religion and use their language; and

to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

32.* Access to information.—(1) Everyone has the right of access to—

any information held by the state; and

any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

Footnotes

*

Sub-s. (1) deemed to read as set out in item 23 (2) (a) of Sch 6 until the legislation envisaged in sub-s. (2) is enacted. See Sch 6 item 23 (1) for enactment provisions and item 23 (3) for lapsing provisions.

33. * Just administrative action.—(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

impose a duty on the state to give effect to the rights in subsections (1) and (2); and

promote an efficient administration.

Footnotes

*

Sub-ss. (1) and (2) deemed to read as set out in item 23 (2) (b) of Sch 6 until the legislation envisaged in sub-s. (3) is enacted. See Sch 6 item 23 (1) for enactment provisions and item 23 (3) for lapsing provisions.

34. Access to courts.—Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

35. Arrested, detained and accused persons.—(1) Everyone who is arrested for allegedly committing an offence has the right—

to remain silent;

to be informed promptly—

(i)
of the right to remain silent; and

(ii)
of the consequences of not remaining silent;

not to be compelled to make any confession or admission that could be used in evidence against that person;

to be brought before a court as soon as reasonably possible, but not later than—

(i)
48 hours after the arrest; or

(ii)

the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;

at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right—

to be informed promptly of the reason for being detained;

to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

to communicate with, and be visited by, that person's—

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right—

to be informed of the charge with sufficient detail to answer it;

to have adequate time and facilities to prepare a defence;

to a public trial before an ordinary court;

to have their trial begin and conclude without unreasonable delay;

to be present when being tried;

to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

to be presumed innocent, to remain silent, and not to testify during the proceedings;

to adduce and challenge evidence;

not to be compelled to give self-incriminating evidence;

to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

36. Limitation of rights.—(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

the nature of the right;

the importance of the purpose of the limitation;

the nature and extent of the limitation;

the relation between the limitation and its purpose; and

less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

37. States of emergency.—(1) A state of emergency may be declared only in terms of an Act of Parliament, and only when—

the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

the declaration is necessary to restore peace and order.

(2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only—

prospectively; and

for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The Assembly may extend a declaration of a state of emergency for no more than three months at a time. The first extension of the state of emergency must be by a resolution adopted with a supporting vote of a majority of the members of the Assembly. Any subsequent extension must be by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. A resolution in terms of this paragraph may be adopted only following a public debate in the Assembly.

(3) Any competent court may decide on the validity of—

a declaration of a state of emergency;

any extension of a declaration of a state of emergency; or

any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that—

the derogation is strictly required by the emergency; and

the legislation—

(i)
is consistent with the Republic's obligations under international law applicable to states of emergency;

(ii)
conforms to subsection (5); and

(iii)

is published in the national *Government Gazette* as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise—

indemnifying the state, or any person, in respect of any unlawful act;

any derogation from this section; or

any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.

Table of Non-Derogable Rights

1 *Section Number*	*2* *Section Title*	*3* *Extent to which the right is protected*
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.
10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsections (1) (*d*) and (*e*) and (2) (*c*).
13	Slavery, servitude and forced labour	With respect to slavery and servitude.
28	Children	With respect to: — subsection (1) (*d*) and (*e*); — the rights in subparagraphs (i) and (ii) of subsection (1) (*g*); and — subsection 1 (*i*) in respect of children of 15 years and younger.
35	Arrested, detained and accused persons	With respect to: — subsections (1) (*a*), (*b*) and (*c*) and (2) (*d*); — the rights in paragraphs (*a*) to (*o*) of subsection (3), excluding paragraph (*d*) — subsection (4); and — subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair.

(6) Whenever anyone is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency, the following conditions must be observed:

An adult family member or friend of the detainee must be contacted as soon as reasonably possible, and informed that the person has been detained.

A notice must be published in the national *Government Gazette* within five days of the person being detained, stating the detainee's name and place of detention and referring to the emergency measure in terms of which that person has been detained.

The detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner.

The detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative.

A court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless it is necessary to continue the detention to restore peace and order.

A detainee who is not released in terms of a review under paragraph (*e*), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention at any time after 10 days have passed since the previous review, and the court must release the detainee unless it is still necessary to continue the detention to restore peace and order.

The detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention.

The state must present written reasons to the court to justify the continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.

(7) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

(8) Subsections (6) and (7) do not apply to persons who are not South African citizens and who are detained in consequence of an international armed conflict. Instead, the state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons.

38. Enforcement of rights.—Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

anyone acting in their own interest;

anyone acting on behalf of another person who cannot act in their own name;

anyone acting as a member of, or in the interest of, a group or class of persons;

anyone acting in the public interest; and

an association acting in the interest of its members.

39. Interpretation of Bill of Rights.—(1) When interpreting the Bill of Rights, a court, tribunal or forum—

must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

must consider international law; and

may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

CHAPTER 3
CO-OPERATIVE GOVERNMENT

Access to Justice in the 21st Century

Are Current Judicial Practices Hopelessly Antiquated?

Taking of Evidence, Communication Techniques, Trials

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PPJ 2014: Procedural Human Rights and Access to Justice
in the World of Emergencies and Economic Crisis

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Access to justice is being discussed from various angles and perspectives. In this contribution, I would like to connect procedural human rights and access to justice debate with the issues that are otherwise not often discussed from this viewpoint – the issue of means of communication and technological methods in the context of the right of users to have open and accessible judiciary. It may be preposterous today to speak about "new technologies" when talking about the means of communication such as mobile phones, computers and the internet. Yet, for many national justice systems, in spite of significant investments in the judicial sector, the way of communicating with the principal users of the judicial services is hopelessly antiquated. Not only that the justice system fails to use advantages of the modern and up-to-date communication techniques, but, on the contrary, it does ignore to a large level the normal and standard developments in contemporary life. This submission will be illustrated on three issues pertinent to civil procedure: service of documents, taking of evidence, and keeping protocols of the oral hearings. In conclusion, it will be argued that nowadays the use of appropriate technologies have to be raised to the level of (procedural) human right – the right to have one's case addressed with means that give fair chance for effective and accurate adjudication. But, the reasons why this procedural human right is in (South) European judiciaries almost invariably violated are multiple, and range from systemic lack of appropriate representation of users' interests and failure to engage in adequate study and research, to the matters connected with organisational inertia and difficulties to adapt to the challenges of economic crisis.

The Right Principles –What Outcome?
Fundamental Procedural Rights and Their Implementation
in Romanian Civil Procedure

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In the early 90's, (even) after more than forty years of totalitarianism, the European Convention on Human Rights was rather disregarded by the Romanian society, maybe because it seemed irrelevant in those times.

Romania ratified the Convention in 1994 and, since that moment, the Convention sort of forced its way, growing into a decisive instrument which influenced our legal system and the collective conscience.

The text of the Convention and the case-law of the Court of Human Rights proved to be effective in a struggle against the reluctance of the State authorities towards substantial reforms.

Confronted with such an instrument, the State and Justice System found themselves under a constant pressure towards changes - in legislation and case-law, in their general perspective on their relation with the citizens.

A New Code of Civil Procedure was adopted in 2013. The need to further align the procedural legislation with the standards of the European Convention on Human Rights was seen as one of the main reasons a new Code was necessary. On the other hand, the Code was intended to put an end to the endless series of modifications brought to the civil procedure, a process marked by hesitation and lack of coherence and consistency.

The fundamental procedural rights are explicitly stated by the new Code as principles of civil procedure.

The question remains whether or not the proclaimed fundamental principles, such as the right to a trial within reasonable time, the right for an effective remedy or the legal certainty, are properly implemented by the Code.

Roman Foundations of Modern Concepts on Access to Justice and Their Relevance for Contemporary Societies

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Historically, arbitration originated in Roman law as a means of supplementing civil justice. Its primary function was to facilitate access to justice in cases when civil justice controlled by the state was factually or legally inaccessible. Moreover, it facilitated access to justice to those private persons and different entities who were not legally recognized and therefore procedurally neglected and negated a possibility to access the state-organized justice because of different reasons. If we consider the that the civil procedure in Roman law was a part of private law, arbitration was surely not an alternative to civil proceedings, but a field of dispute resolution which was of supplementary nature or – in some cases – a necessity, i.e. the only possible mechanism for those who could not access civil proceeding to have their disputes or differences resolved in ordinary proceedings. The sources clearly show that arbitration in Roman law was not an exception, rareness or an elitist means of dispute resolution, but a widespread mechanism which was universally accessible and opened to vast number of private law disputes and differences. The difference and a perpetual tension between civil procedure and arbitration relied primarily on the accessibility of justice.

Slightly remodelled in the Middle and Early modern ages such a concept permanently continued to exist. The modern state perceived dispute resolution process as its exclusive privilege. Still modern procedural systems recognize a variety of institutes and methods to ensure efficient access to justice. Some of these ideas, concepts and institutes were directly inherited or developed on the basis of the ideas pertinent to Roman civil procedure and arbitration. Some concepts, though, were autonomously developed but they are still analogue to the Roman ones.

This paper will analyze Roman foundations of modern concepts which facilitate access to justice and their relevance in contemporary societies. From perspective of arbitration in contemporary societies it will also explore if these concepts were equally implemented and whether they achieve similar goals.

The Right to Be Heard in Arbitration Proceedings – A Comparative Approach

I. Introduction

- Party autonomy as fundamental concept of arbitration
- (Limited number of) mandatory provisions in order to
  - ensure a minimum standard of the arbitration procedure;
  - grant the parties certain fundamental guarantees
- Selected Jurisdictions: Austria, Germany, Switzerland

II. Party's Submissions Disregarded by the Arbitral Tribunal – A Violation of the Right to Be Heard?

- Sub-questions may be:
  - Partial vs Total Deprivation:
    Does it amount to a violation of the right to be heard if **part of the submissions** (e.g. one single request, one motion) is ignored by the arbitral tribunal or only if the party is **entirely deprived from putting forward arguments** in the arbitration proceedings?

  - Obligation to Give Reasons?
    Is the **arbitral tribunal obliged** to deal with the arguments put forward by the parties in the **reasons** of the arbitral award?

  - Burden of Proof:
    Does the **party requesting the setting aside of the award** have to **prove** the (alleged) violation or is the **arbitral tribunal obliged to demonstrate** that the right to be heard has been granted in a sufficient manner?

  - Tribunal's Intention:
    Does it make a difference whether the argument put forward by the party had been **intentionally or unintentionally overlooked** by the arbitral tribunal?

  - Causality vs Formal Approach:
    Does the violation of the right to be heard only lead to a successful challenge of the arbitral award if the **outcome** of the award would have been **different** without it or does **each violation (established by the court) necessarily lead to the setting aside** of the arbitral award?

A. Partial vs Total Deprivation of the Right to Be Heard

Austria:

"*An award can only be challenged, if the party **was not granted its right to be heard at all**. A merely incomplete assessment of facts or insufficient consideration of legally relevant matters cannot lead to the setting aside of the award. The award, therefore, is **not invalid, if the arbitral tribunal ignores or rejects applications to take evidence,** or if it otherwise determined the facts in an incomplete manner. **Such deficiencies cannot be considered equivalent to not granting the right to be heard.**"*

Austrian Supreme Court 6/9/1990, RS0045092 (6 Ob 572/90 et al; recently 9 Ob 27/12d)

Switzerland:
*"[There is] a minimal **duty of the arbitrators to examine and deal with those arguments** raised by the parties that are relevant for the decision. This duty is violated by the arbitral tribunal, if it […] leaves legally relevant allegations, arguments, evidence or offers of evidence out of consideration*."
Swiss Federal Tribunal 4/2/2014, 4A 460/2013 para 3.1.

*"Necessary [prerequisite] is a formal denial of justice in the sense that the party's right to be heard is de facto undermined by an evident mistake [of the arbitral tribunal] and the party is, ultimately, **put in the same position, as if it had not been heard at all on this issue**."*
Swiss Federal Tribunal 4/8/2006, 4P.105/2006 para 7.4.

Germany:
*„[I]gnoring an offer of evidence completely may be considered as a **violation of the duty to grant the right to be heard**. However, the arbitral tribunal is not obliged to accept an offer of evidence, if the argument is not **relevant for the decision**."*
Higher Regional Court Munich 12/4/2011, 34 Sch 28/10 para 3.c.1.

B. Is the Tribunal Obliged to Deal With the Parties' Arguments in the Reasons of the Award?

Germany:
*"A court is not obliged to expressly deal with every argument brought forward by a party in the reasons of its decision, neither is it obliged to reflect on it. This applies even more for arbitral awards, since the **standard required with regard to reasons cannot be compared to the one that applies to court decisions.**"*
Higher Regional Court Berlin 23/7/2003, 23 Sch 13/02, para 2.a.

*"The fact that an argument is **not addressed in the grounds of the decision**, does not allow to conclude that the tribunal has not sufficiently taken the party's allegation into consideration. Generally, **it has to be assumed that the tribunal has taken notice of the party's submission and has also taken it into consideration**. Only if **peculiar circumstances** show the contrary, a violation of the right to be heard can be determined."*
Higher Regional Court Cologne 26/11/2002, 9 Sch 18/02

Switzerland:
*"Pursuant to well established case law, the right to be heard in adversarial proceedings, according to Art 182 para 3 and Art 190 para 2 lit d SPILA, **does not include the right to a reasoned decision** […]. Nevertheless, it implies a minimal **duty of the arbitrators to examine and deal with those arguments** raised by the parties that are relevant for the decision…*

*…If an award is rendered without addressing apparently substantial elements, **it is up to the arbitrators** or the counterparty **to justify […] such omission**, either by demonstrating that the omitted elements were – contrary to the allegations of the claimant – not relevant for the decision or that they had been implicitly rejected by the arbitral tribunal."*
Swiss Federal Tribunal 4/2/2014, 4A 460/2013 para 3.1.

Austria:
"*An award can only be challenged, if the party* ***was not granted its right to be heard at all****. A merely incomplete assessment of facts or insufficient consideration of legally relevant matters cannot lead to the setting aside. The award, therefore, is* ***not invalid, if the arbitral tribunal ignores or rejects applications to take evidence,*** *or if it otherwise determined the facts in an incomplete manner.* ***Such deficiencies cannot be considered equivalent to not granting the right to be heard.****"*
Austrian Supreme Court 6/9/1990, RS0045092 (6 Ob 572/90 et al; recently 9 Ob 27/12d)

III. Legal Provisions on the Right to Be Heard

Austria:

Section 594 para 2 ACCP**:**	The parties shall be treated fairly. Each party shall be afforded the right to be heard.
Section 611 para 2 No 2 ACCP:	The award is to be set aside - if the party invokes that it was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case.

Germany:

Section 1042 para 1 GCCP:	The parties shall be treated equally. Each party shall be afforded the right to be heard.
Section 1059 para 2 No 1 lit b GCCP:	The award can only be set aside - if the party invokes that it was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case.

Switzerland:

Article 182 para 3 SPILA:	Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and their right to be heard in adversarial proceedings.
Article 190 para 2 lit d SPILA:	An award may only be set aside - if the principle of equal treatment of the parties or their right to be heard has not been observed.

IV. Interpretation in the Light of the New York Convention 1958?

- No central authority responsible for interpretation of the provisions of the NYC

V. Arbitration and the European Convention on Human Rights 1950

- Is it Compatible with Article 6 ECHR to Grant Arbitral Tribunals the Power to Decide Upon Civil Rights and Obligations?

- Is the Arbitral Tribunal As Such Bound by Article 6 ECHR?

- Alternatively, is the Arbitral Tribunal Obliged to Observe the Guarantees Provided For in Article 6 ECHR?
    - Limits of Parties' Implied Consent to Waive the Guarantees Enshrined in Article 6 ECHR
    - Limits of Permissibility of such Waiver

Inconsistency of Case Law and the Right to a Fair Trial

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Slovenia belongs to the civil law tradition, in which case law has traditionally not been recognized as a (formal) legal source. According to Article 125 of the Constitution, judges are independent and are, in their decision-making, bound (only) by the Constitution and laws, not by judicial decisions reached in other similar cases. The same follows also from Article 11 of the Courts Act, which explicitly provides that a court is not bound by legal positions of another court. But on the other hand it is an inherent part of the right to equality before the law that in like cases courts must apply the law in a similar manner. In addition a large scale of divergent domestic court practices on the same legal matter, creates a state of legal uncertainty likely to reduce public confidence in the administration of justice.

The reform of the system of the access to the Supreme court, implemented in Slovenia in 2008 (which was discussed in Dubrovnik in 2011), implicitly recognized the case law as an important source of law. Obviously, if the goal of the reform is to promote the role of the Supreme court in creating precedents (as it was explicitly confirmed by the Constitutional Court), this is a very strong signal that the old perception of the irrelevance of the case law is merely a myth. This trend of emphasizing the importance of the case law and its consistency and uniformity has however started even much earlier, on the basis of doctrine established by the Slovenian Constitutional court (which here was under a distinct influence of the German Constitutional court). Through the case law of the Constitutional Court the argument of precedent has won a direct constitutional significance in Slovenia to the extent that the violation of an arbitrary departure from a settled case law can be remedied through a constitutional complaint. The Constitution does not prohibit any departure from case law, but only such that is an *arbitrary* departure.[1] In order that the existence of a violation of the mentioned constitutional right is found, the complainant must demonstrate the following three elements: (1) there must exist a settled case law (thus, in principle, a line of decisions without divergence; The Constitutional Court often emphasizes that one or two different decisions do not already substantiate a

[1] Decision No. Up 297/96 dated 15 June 2000, Decision No. Up 452/02 dated 9.9.2004.

departure from case law. However it is becoming increasingly accepted that even one single decision can already amount to a "settled case law", provided that this decision was reached in order to establish a precedent; (2) that the court's decision in their case departs from a settled case law; and (3) that such departure is arbitrary, which is in the case if the court did not provide sufficient reasons explicitly why the case law must be changed.[2] An arbitrary departure occurs if the court decides differently than other courts in like cases, and does not appropriately reason such departure from case law It is hence expected from the judge to specifically explain the reasons that substantiate the departure: this means that they must know the case law and, explain why they do not agree with such.

There is however no absolute binding character of case law and it is erroneous if the court in civil proceedings pronounces a certain issue to have been already resolved in the case law and that it may not decide differently *at all*.[3] The importance of legal precedent does not resolve the judge from his or her duty always critically to reconsider the settled case law and to strive for a correct interpretation and application of law. Thus, settled case law has a constitutional significance, however, it only concerns one of the arguments to be used in the interpretation of a certain legal norm. Constitutional Court held that the court must not arbitrarily depart from an established case law, which can nevertheless be done if it provides appropriate legal reasons for such departure."[4] Furthermore, the prohibition of the arbitrary departure from case law does not entail that case law cannot be changed. The Constitutional Court has already taken the position that it cannot prevent changes and thereby the development of case law. The requirements of legal certainty do not create a right to consistency of case-law, given that case-law development is not, in itself, contrary to the proper administration of justice.

Given the finding that also a court of appeals may depart from the case law of the Supreme Court (unlike in the system of *stare decisis* in its pure form) the question is raised as to the existence of further appeals by which the party can challenge before the Supreme Court a decision of the court of appeals that departs from the case law of the Supreme Court. It is necessary to provide a systemic solution that in the event that a court of appeals departs from the case law of the Supreme Court, the last word concerning such an issue is reserved again for

[2] Decision No. Up 188/02 dated 11 December 2003.
[3] Such standpoint implicitely follows from e.g. Celje Court of Appeals Judgment No. Cp 1509/99 dated 12 July 2001.
[4] Decision No. Up 404/01 dated 19 February 2004.

the Supreme Court. The appropriate solution is the introduction of the system of leave to file a revision, as it has been implemented with the 2008 reform of CPA, according to which, a departure from a uniform case-law (as well as the fact that there is no uniform case law yet) is one of the major selection criteria for the revision. By such a system, the circle is logically concluded: the court of appeals may decide otherwise than it follows from the case law of the Supreme Court, however, the party then has the possibility to achieve that the "last word" concerning the disputed issue is reserved for the Supreme Court – which can insist on its previous case law, or can also agree with the arguments of the court of appeals requiring that the case law is to be changed. In this context it must be recalled that also the European Court of Human Rights recalls that an effective mechanism has to be in place and implemented promptly by the highest courts responsible for ensuring case-law uniformity, so as to rectify, at the appropriate juncture, any inconsistencies and thus maintain public confidence in the judicial system.[5]

The possibility of the Constitutional court to intervene – in constitutional complaint proceedings - in cases concerning divergent case law forms another potential source of conflict between the Constitutional and the Supreme court. It is crucial to establish reliable criteria in order to ensure that the constitutional court will not transgress into the domain reserved for the ordinary judiciary and the Supreme court as its highest proponent. In this context it is necessary to stress that the Constitutional Court cannot examine which statutory interpretation is correct if two such interpretations are, in view of the established methods of interpretation, possible and in conformity with the Constitution. Article 22 of the Constitution (which, according to the Constitutional Court, is a special expression of the right to equality before the law pursuant to Article 14 of the Constitution[6]) contains constitutional procedural guarantees. It is logical that the alleged violation of a *procedural* guarantee does not entail the Constitutional Court to review the case *on merits*, that is to review whether the civil court has correctly applied the substantive law. Thus, in the case of a constitutional complaint in which the appellant alleges the arbitrary departure from a settled case law the Constitutional Court does not review substantively whether the old case law is correct or lawful, or whether such is a judicial decision that departs from the old case law. There is only a procedural requirement

[5] E.g. Albu and others v. Romania, 34796/09, 10 May 2012.
[6] Decision No. Up 300/98 dated 16 November 2000.

that the court, if it decides to depart from a settled case law, provide special reasons for such (a necessary condition for fulfillment of this demand is that the judge at all knows the existing case law[7]). The mentioned constitutional requirement does not mean that the Constitutional Court becomes the “forth instance” within the ordinary judiciary for the interpretation of ordinary statutory law, deciding on which of the possible interpretations of a law is correct, and for deciding on whether it is admissible to change a case law. Thus, the mentioned aspect of Article 22 of the Constitution represents only a procedural guarantee and concerns only a requirement that reasoning be emphasized and qualified, not the question whether a previous case law is "lawful" or whether such is the judgment that departs from the case law (and can mean a new case law). As the interpretation of ordinary law is the task of ordinary courts (and the review of its correctness is exempted from the jurisdiction of the Constitutional Court), so is also the task of ordinary courts to ensure the development of ordinary statutory law through case law. The Constitutional Court to assume the position of the final instance deciding whether a case law may be changed, or not (with regard to the interpretation of statutes which do not at all interfere with the constitutional level, and concerning the situation in which interpretations of law still remain within the constitutionally admissible limits). Such a decision must finally remain for the courts deciding in "ordinary" proceedings, particularly the Supreme Court, from which it is also expected to be more qualified than the Constitutional Court when it comes to the interpretation of ordinary statutory law – i.e. the law that does not interfere with the constitutional level – also concerning the positions in relation to the question whether such interpretation is to be altered. The Constitutional Court's approach must be restrained. Case law is to be tempered and made firm before ordinary courts (under the baton of the Supreme Court), i.e. where concrete cases and problems that such cases bring are decided.

The positions of the Slovenian Constitutional Court prove that as regards the significance of case law the civil law and the common law model are – just like in many other aspects of civil procedure – converging. However, there still exist important differences between the significance that the Slovenian Constitutional Court, within the civil legal milieu, attributes to case law and the one attributed by the *stare-decisis* doctrine (e.g., concerning the question whether already one precedential decision counts or whether there needs to be demonstrated a settled and uniform case law, and regarding the question whether only a court of the same or

[7] E.g. Decision No. Up 188/02 dated 11 December 2003. Order No. Up 184/98 dated 2 February 1999..

higher level can overturn or change a precedent, or whether every, i.e. also a lower, court can depart from a case law provided that such departure is not arbitrary). In addition, a crucial aspect is also whether a precedent is perceived in a »quasi-normative« manner (trying to extract from it as abstract message and broadly applicable message as possible) or in a »case-analysis« manner (strongly emphasizing the particular facts of the case). Finally, the viewpoint of reporting and accessibility of case law must also be brought to attention. Even the precedent system is found to be functional only in case judicial decisions are being reported. Databases of judicial decisions – non-commercial and commercial; electronic and in volumes of books – which are being established recently in Slovenia are therefore of immediate importance to the matter and ensure the effectiveness of the constitutional requirement of prohibition of an arbitrary departure from case law.

The European Court of Human Rights has only recently (in 2011) established a more comprehensive doctrine concerning interface between (lack of) uniformity of case law and fundamental procedural guarantees. Probably prompted by constantly growing applications invoking the problem of either departure from the uniform case law or lack of uniform case law the ECtHR has established general principles applicable in cases concerning conflicting court decisions. It is decisive whether (1) "profound and long-standing differences" exist in the case-law of the domestic courts, (2) whether the domestic law provides for machinery for overcoming those inconsistencies, (3) whether that machinery has been applied and, (4) if appropriate, to what effect. A key consideration in assessing the above is whether certain stability in legal situations has been ensured, as legal certainty contributed to public confidence in the courts..[8]

The scope of review of the Constitutional court and of the ECtHR differs to a certain degree. But the jurisprudence of both courts demonstrates an inherent link between the public interest in achieving and maintaining uniformity of case law on the one hand and the individual right to a fair trial on the other hand. Also, clear, uniform and predictable interpretation of the law enables the individuals to know where they stand even before any court proceedings are initiated and this can protect their individual interest even better than the courts could.

[8] *Şahin and Şahin v. Turkey, 13279/05,* 20 October 2011.

Misgivings About American Exceptionalism:
Court Access as a Zero/Sum Game

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Everyone knows about American procedural exceptionalism. Indeed, it seems that American exceptionalism extends beyond procedure into other important bodies of law. A strong justification for this exceptionalism is that it affords unparalleled access to justice by guaranteeing that those who seek relief in court have the means and ability to obtain that relief. Indeed, this vision can seem so forceful that Professor Huang, a Korean scholar, wrote a whole book a decade ago urging that civil law systems switch to American ways of handling discovery and burden of proof to enable access to justice. He was forceful in his critique of the civil law process:

To put it bluntly, it is bizarre that while the [continental civil law] system tolerates fact-finding based on an information database that is far more insufficient than that of the common law system, it requires the facts to be established by a standard of proof that is far higher than the common law one.

To date, that broad challenge has not been taken up.

But that does not mean nothing has changed. To the contrary, reform of American federal-court procedure (the original stimulus for much of the current exceptionalism in American procedure) has for several decades been the subject of repeated reform efforts, mainly by formal rule changes but also on occasion in judicial decisions. It is fair to say that this reform has tended to constrain and contain some of the most aggressive aspects of American procedure. European procedure seems, during this time, to have undergone some changes that may make it resemble American procedure a bit more. Both reform trends may be

justified as methods of improving access to justice and protection of rights.

This paper reports on the tenor of relatively recent American reform efforts, which may strike those from the rest of the world as surprising because they urge that access to justice, at least in terms of procedural arrangements, is something of a zero/sum game, a game theory construct in which a gain by one side can be had only if there is a corresponding loss by the other side. That seems a peculiar attitude to take toward procedure, which is designed in general to enable just results. Indeed, that is a central assumption of Professor Huang's book endorsing the adoption of American discovery and related concepts in the rest of the world.

The counter-argument in the US is that excessive 'access to justice' for plaintiffs actually denies justice to defendants, who cannot bear the cost or risk of litigating to judgment. Thus, the basic proposition is that access to justice is a zero/sum game, and that the balance has been set too far in favor of the plaintiff side.

This paper does not seek to offer a conclusion about which side in this American debate is right. But it does try to convey the current American debate in ways that may be informative to scholars in other countries, particularly because it is beginning to be addressed in the US in terms of comparisons to other procedural systems. Those endorsing change are implicitly or explicitly urging the US to become more like the rest of the world, sometimes saying the US exceptionalism is 'unAmerican.' Those opposing change are sometimes saying that the proposed changes are 'unAmerican.'

The term 'unAmerican' has a troubled and troubling history in the US; it was used in the 1950s as a method of attacking some on the left end of the political spectrum, and gave birth to a Congressional committee called the House Committee on UnAmerican Activities that itself attracted much criticism.

For present purposes, the point is that saying something is 'American' or 'unAmerican' directly invites comparative assessments. This paper introduces the topic by comparing the procedural traditions of European civil law systems and the American civil justice system, including some consideration of the underlying theories. It then speculates about ways in which the two systems have in the last 50 years or so converged to some extent. With that background, it introduces recent procedural changes in the US that might seem to reduce access to justice but also to move it somewhat closer to the European approach on a number of

topics.

The reform issues have drawn more and more attention. Our Supreme Court's announcement of somewhat more demanding pleading standards starting in 2007 has produced an avalanche of academic criticism. The most recent round of rule reform proposals attracted about eight times as much commentary during the public comment period as any in the past, and already has been the subject of one hearing in the US Senate Judiciary Committee. This paper uses this experience to explore the arguments against these reforms, mainly stressing reduced access to court, and the arguments for it, mainly stressing the contrary zero/sum view that the present American arrangements essentially deny defendants access to court by giving too much power to plaintiffs and imposing too many risks and costs on defendants.

This paper does not try to resolve this conflict in views, but rather to explore and explain it. Using that approach, it concludes with some reflections on whether the American controversies, which are perhaps growing in intensity, suggest that there will be more convergence in the future.

1.The Received Procedural Traditions

Speaking in the broadest outlines, the received European procedural tradition seems both to have been born in the French Revolution's energetic rejection of judicial discretion and 19th century laissez faire attitudes. Of course, some procedural visions of the 19th century were not so laissez faire (see Franz Klein), but in general the notion was that private litigation was a private matter and not of concern to the body politic. Access to justice, then, depended largely on application to the State, whose public administrators would see that justice was done. Public enforcement by public authorities had broad application, expressed perhaps most aggressively with the Napoleonic notion (contrary to the American proposition that the accused must be considered innocent until proven guilty) that the accused had to prove himself innocent. No doubt this is overdrawn and incomplete, but it provides a starting point.

The Anglo-American starting point seems quite different. In the UK, it may be traced back to Jeremy Bentham, who urged that 'adjective law,' as he termed procedure, must be

refined and employed to assure correct outcomes -- to provide access to justice. By this measure, the common law procedure of the early 19th century fell far short of the mark, and Parliament interceded with the Judicature Acts of the 1870s to replace common law procedure with rules in statutes or promulgated by formal rule committees. In the US, at much the same time a similar movement for codification of procedure took place under the leadership of a remarkable New York lawyer named David Dudley Field, and his 'Field Code' was adopted by many states. The goal of that code was to avoid decisions based on technicalities in favor of decisions in the merits. The method was to empower the parties to prepare and present their cases in court, where such decisions should follow.

In the early 20th century America, this pursuit of decisions on the merits came to feature an attitude like the one urged by Bentham in the 19th century, often calling procedure the 'Handmaid of Justice.' That attitude connects to many features of American procedure, and particularly the specifics of the Federal Rules of Civil Procedure, first adopted in 1938.

One more development deserves mention, however, because it introduces a somewhat different strand of access to justice theory. Beginning in the 1970s, the 'procedural justice' school of analysis gained prominence. This school looked at procedure in terms of whether the participants -- the parties -- found it satisfactory or unsatisfying. Bentham himself identified this consideration as critical by arguing that 'real justice' was not as important as 'apparent justice' -- that the right side seem to win. Approaching the issues this way complicates the question because procedures that satisfy the participants and create the appearance of justice might also frustrate correct resolution of disputes and thus stymie real justice.

In short, the challenge of procedure design is multi-faceted, and one could defend either approach on a variety of grounds, and attack either approach on a variety of grounds.

2.The US Brand of Broad Access

No other system, common law or civil law, offers such broad access to litigation as the US system in its mid-20th century mode. So an initial justification for the U.S. approach might be that it can assure both access and satisfaction with access. A fairly complete catalogue of the distinctive features of the US system is easy to recount:

Low filing fees: Filing fees to initiate litigation are modest in the United States. That does not mean suing is free, but compared to the fees charged in many places (sometimes keyed to the amount claimed in the action) the fees in the U.S. are small. So the cost of filing suit is small, enabling access to court to the point of beginning a case.

Loser does not pay: Although most other countries allow the winner to recover full costs of suit, including attorney fees, from the loser, the US does not. This means that the risks of filing suit are considerably smaller. Filing fees are recoverable, but as noted just above, they tend to be small.

Contingency fees allowed: The U.S. permits lawyers to contract with clients to share in the proceeds of litigation, and most personal injury litigation is funded this way. That means that a seriously injured plaintiff does not have to pay the lawyer unless the claim produces a payment. This is another sense in which access to court is facilitated by American rules.

Emotional distress damages often allowed: Many types of claims permit substantial awards for noneconomic losses such as pain and suffering or loss of consortium. Coupled with the contingency percentage fee system, that means many claims that in other systems would not be "worth" much lawyer effort are worth that effort in the U.S.

Punitive damages often permissible: An increasing variety of claims premised on intentional or outrageous conduct now support requests for punitive damages. Although the Supreme Court has imposed some limitations on the amount of such awards, they can magnify the exposure that results from a suit.

Broad discovery with responding party bearing the cost of responding: The broad discovery available in the U.S. is well known. The conventional rule is that the responding party must bear the costs of preparing responsive material. Some criticize this arrangement as a "subsidy" for claimants. For our purposes, the point is that, along with the contingency fee system and the prospect of emotional distress damages, this means that the financial risks of suing are much smaller for plaintiffs in the U.S.

Preponderance of evidence burden of proof: In much of the world the party with the burden of proof must offer proof that meets a more demanding standard than in the US, where the usual standard is that the party must prove that it is 'more likely true than not true'

that things happened the way this party claims.

Jury trial: The federal constitution and all or almost all state constitutions guarantee trial by jury in civil matters. This is no longer true even in the U.K., from which the U.S. inherited its right to jury trial. But this feature of American civil justice means that 'access to justice' involves, at least in theory, a judgment by community representatives.

Emphasis on demeanor evidence: Many systems emphasize written evidence and mistrust witness testimony. Some have even forbidden testimony altogether. The US continues to stress the value of having juries scrutinize the witness while testifying, particularly during cross-examination.

Limited judicial role in fact-finding or review of it: At least in jury trials, the judge may 'take the case from the jury' only on very limited grounds, and appellate courts have extremely limited roles in reviewing decisions on factual disputes.

Taken together, this combination of features offers a version of 'people's justice,' with potentially low cost access to potentially high verdicts rendered by fellow citizens and not professional jurists. Surely those familiar with other systems regard their methods as suitable for ensuring access to justice, and many in other countries also are familiar with many objections to the US methods that correspond to recent calls for change in the US.

3.50 Years of Convergence?

Despite the dissimilarity in starting points, one can say that there has in the last 50 years been some convergence in present realities, which somewhat sets the scene for the current US debates. On the civil law side, there has supposedly been some movement toward broadening access to potential evidence. Partly to reduce delays in resolution, there has also been some movement in the direction of the 'single continuous trial' that typifies common law adjudication.

On the US end, things have changed a great deal. One of the most significant changes has been the decline in frequency of jury trials, a topic much emphasized in recent debates. To be sure, the rate of jury trials among civil case filings has declined a great deal since around 1950. But it is worth noting that the rate of jury trial was never much more than 15% or 20%

during the lifetimes of any now practicing law. Nonetheless, in a legal system with many liability standards focused on whether a defendant behaved as a 'reasonable person' should behave the absence of decisions by lay juries is significant.

In place of trial, it is said, litigation has come to focus on discovery and summary judgment. Witness examination and evaluation occurs in depositions and does not involve juries. The fruit of those depositions and document discovery then is used to support and oppose motions for summary judgment. If those are successful, they end the case in the trial court but may lead to appeals. If they are not successful, almost all cases that proceed that far then settle.

Summary judgment itself may resemble the resolution offered by paper-bound traditional continental civil law systems. In theory, live testimony could be offered in regard to such motions, but that virtually never happens although deposition testimony, even videotaped testimony, is often offered. The US Supreme Court has even decided a summary-judgment case on the basis of the video of a police pursuit taken by a camera on the pursuit vehicle.

Not only is summary judgment similar to continental methods of deciding cases, but in complex litigation the single continuous trial is often not employed even when there is a trial. Instead, cases are 'bifurcated,' 'trifurcated,' or 'polyfurcated' to isolate and present specific portions of the overall case for decision in sequence. This method may assist juries in focusing on one thing at a time, and saves time if plaintiffs lose on the first issue presented.

More recently, the Supreme Court has limited the stated laxity of American pleading in federal court by instructing that lower courts should not credit complaints that do not make 'plausible' claims. This development has sparked a huge reaction among American legal academics.

4.Resistance to change in the US -- access defeated?

American procedure hit its liberal high point around 1970, when former limitations on federal-court discovery were lifted and the new class action procedures began to be used in earnest. Since then, the changes that have occurred have generally been in a direction that could be said to retreat from the broadest possibilities of open-access procedure.

Actually, the reaction to American procedure's liberality apogee began soon after 1970. In 1976, a major conference occurred sounding themes that have recurred since then -- that claims without foundation were too often made, and that broad discovery imposed unwarranted costs on defendants, sometimes prompting them to settle groundless cases to put an end to the drain of litigation in the wide-open American system.

By the late 1970s, change proposals responsive to these concerns were afoot. Narrowing the scope of discovery was formally suggested in 1978 but then withdrawn. In 1983, rule changes were made to prod federal judges to take more active control of their cases (something Americans thought to be in the German or European model) and judges were told to forbid discovery that was 'disproportionate' to the issues and claims in the suit. In 1993, further prods to judicial control were added, with formal discovery prohibited until the parties had conferred and submitted a discovery plan to the judge, and numerical limits were imposed on some kinds of discovery. In 2000, the scope of discovery was actually narrowed and the proportionality directive was given more prominence.

Most recently, in August 2013 another set of rule amendment proposals were published for comment. To an outsider, they would likely seem relatively modest:

Scope of discovery: The rule on scope was to be changed to say more forcefully yet that discovery must be 'proportional' to be proper, and the idea that anything 'reasonably calculated to lead to the discovery of admissible evidence' was proper discovery would be stricken from the rule.

Numerical limits: The former numerical limits on depositions (10) and interrogatories (25) would be reduced to 5 depositions and 15 interrogatories. In addition, a numerical limitation on requests for admissions would be introduced and deposition length would be shortened from seven hours to six hours.

Cost bearing: The protective order rule would be revised to explicitly recognize that courts confronted by requests for unduly costly discovery could require that the party seeking that discovery pay all or part of the cost of providing it.

Preservation of potential evidence: Particularly due to the growing burdens of preserving electronically stored information that might be used as evidence, rule provisions were

proposed to require that parties seeking sanctions for failure to preserve demonstrate prejudice or prove culpable conduct to justify severe measures.

Since the 1970s, there has been opposition to retreating from the liberal apogee, often raising concerns that changes of this sort were 'shutting the courthouse door.' This time, that reaction was much more prominent. Rule amendment proposals that are controversial sometimes drew as many as 300 public comments in the past, but this time there were 2,343 comments submitted. The Senate Judiciary Committee held a hearing in November, 2013, regarding concerns with access to court that some said resulted from these proposals. More than 120 witnesses testified at the three public hearings held by the rules committee about the proposals, and there was a waiting list of about 30 more people (including some judges) who also wanted to testify but could not be accommodated.

A leading example of critical commentary came from Prof. Arthur Miller, who had been Reporter in the 1980s to the committee that develops procedural changes and who had authored the 'proportionality' provision in the first place. Beyond that, he was the original co-author of the leading treatise on federal procedure in the US and famous in other ways. (Among his many achievements is an Emmy award for his TV program, 'Miller's Law.')

By 2013, Prof. Miller had concluded that the 'proportionality' provision was not warranted, and that the aggregate effect of a variety of developments over the last 30 years was defeating access to the American courts. He was the lead witness during the Senate Judiciary Committee on the proposed amendments, and testified at one of the rules committee's hearings. He recounted various developments that had occurred since the 1970s, including the increased popularity of summary judgment, the growing enforcement of arbitration clauses in contracts, the tightening of pleading standards, and the gradual erosion of the 'right' to discovery.

Many, many others echoed these concerns. Here are some examples from among the public comments:

'Embedding the proportionality concept in [the scope of discovery] would destroy my firm's practice . . . and make it impossible to serve our civil rights clients.' (no. 1609)

'In a world where litigation has grown more complex and discovery is the lifeblood of the plaintiff's case you are destroying the right to a jury trial. These rules will also destroy

the defense bar. Whoever drafted these rules is either totally defense oriented or has not idea what happens in a real lawsuit.' (no. 1684)

'These rules will handicap the ability of everyday people seeking relief from the courts to prove their cases. In this bastion of capitalism, the courtroom is the last place where a single man or woman can oppose a large corporation and stand on equal footing. The reason everyday people can stand on equal footing against the corporations is because they can do the necessary discovery to uncover concealed facts, policies and the cost-cutting but safety-damning measures instituted by these conglomerates.' (no. 2188)

These forceful reactions reflect a real concern, but seem overstated. In 1999, opponents of the change to the rule on scope of discovery predicted dire consequences were the change adopted. But after it was adopted it had virtually no effect. From the perspective of the rest of the world, this tumult may be hard to understand; even with these changes American discovery would still be broader (and more costly) than in any other country.

One explanation for the vehemence of the opposition is that it is difficult to get the attention of legislators or the public without saying a crisis is upon the system; US Senators are not likely to be drawn to disagreements about civil procedure absent a crisis.

Another explanation is that the US has over the last 40 years and more developed a very significant cadre of lawyers for whom the variety of access-furthering measures mentioned above are critical to their entire legal practices. Since the 1960s Congress and many state legislatures have adopted many regulatory provisions that can be enforced by suits for modest amounts ($100 to $1,000) by those who say defendants have violated the regulatory prohibition. Many of those statutes provide that successful plaintiffs can also recover their attorney fees. Even more important, a wide variety of anti-discrimination statutes permit recovery of attorney fees by successful plaintiffs. In all these cases, the claims of the individual plaintiffs are likely to be for modest amounts of money, and the lawyer time needed to build and present the cases likely far outstrips the monetary value. For such lawyers, talk of 'proportionality' raises the prospect that they can't get paid for winning this kind of case because the dollar amounts they can seek are often not large. That is not, of course, what the rule changes address, but it may affect the reaction to them.

The whole idea of proportionality is tricky as well. As recent reform experience in the

UK has shown, there is a tension between the notion that trial preparation is 'necessary' and that it is 'proportional.' In the UK, the recommendation was that recovery of costs for 'necessary' lawyer activity should not be allowed unless it was 'proportional.' Applied in the US, that could seem to blunt the apparent goal of Congress to provide a suitable incentive for lawyers to take these cases. Now that a significant segment of the bar has built practices on this inducement, anything that jeopardizes it is likely to prompt a strong response.

Finally, the vision of citizen juries dispensing justice and bringing corporate titans to their knees has much appeal, particularly in the current era of increased inequality and political polarization. Altogether this is a fairly compelling narrative.

5.The Competing Narrative -- 'Access Prevented'

The proponents of cutting back on many of the distinctive features of American litigation have for decades made a counterargument that they are denied access by those features. A famous article from more than 20 years ago was entitled 'Do the Merits Matter?,' specifically referring to securities fraud class actions. More than 40 years ago, a leading antitrust scholar objected that the class-action rule 'utilizes the threat of unmanageable and expensive litigation to compel settlement . . . it is a form of legalized blackmail.'

This theme arises regularly -- that the difficulty of defeating groundless claims on the pleadings combined with the high cost of responding to discovery, the difficulty of obtaining summary judgment ending the case, and the nightmarish prospect of a 'bet the company' jury trial compel corporate defendants to settle cases without regard to their merits.

Here are some examples from many submitted during the most recent public comment period:

'Within the past decade, we have often observed that clients elect to settle and pay litigated claims that have little or no merit because of the broad scope and attendant expense of discovery. Unfortunately, one of the casualties of ever-escalating discovery expense also appears to be that hallmark of the American civil justice system: the jury trial.' (no. 1754)

'[T]he increasingly onerous burden that the evidence preservation and discovery process has

put on our clients . . . has resulted in defendants settling cases that have no merit, in order to avoid the costs of the discovery process or the risk of sanctions for being unable to produce evidence that has no real bearing on the issues of the case. **Justice is denied every time such a settlement occurs!**' (no. 1301 -- boldface in original)

'To avoid these costs, in-house counsel are routinely compelled to settle cases without regard to their merit. Indeed, creating leverage in the settlement context is not only the result but all too often the strategic goal of parties' free-wheeling discovery requests.' (Association of Corporate Counsel, no. 2014)

'The costs and burdens (e.g., fear of sanctions despite best efforts and extreme use of internal resources and cost of external resources) of discovery and preservation have become an important factor in whether to litigate or settle.' (comment on Prof. William Hubbard's Preservation Costs Survey)

Those who have sounded these warnings have also proposed solutions that look like they borrow features of the civil law systems to remedy perceived flaws in the American system:

Loser pays: Many favor adopting a loser pays rule.

Requester pays: At least, they favor a rule that a party must pay for what it requires the other side to provide in discovery.

Sanctions for groundless claims: Repeatedly Congress has considered whether to make financial sanctions mandatory whenever the court concludes that a party has asserted a groundless claim.

Broadened protective order power: In order to reduce the risk that litigants will use broad discovery for collateral purposes, such as gaining access to trade secrets or otherwise confidential information, it is urged that courts order that such materials be used only for preparing for trial, enforcing those orders with the contempt power.

Immediate disclosure of grounds for suit: Despite generally lax US pleading standards, it is urged that plaintiffs be required to reveal evidentiary support for their claims, particularly of injuries, almost immediately after suit is filed.

The most recent example of urging measures like these is probably the 'patent troll' controversy. A 'patent troll' is an entity that owns patent rights but does not make any product

or provide any service using those patented methods. Instead, its principal business is suing those who do make products or provide services for patent infringement. This can be a very profitable activity. Recently, two American lawyers who were partners at very large law firms with million-dollar draws from the firms left the firms to go into business for themselves acquiring and enforcing patents. They claim to be making much more money from that activity than by litigating patent cases for companies that make products or provide services.

'Patent troll' activity reportedly includes activities that have a strong odor of blackmail. Some patent owners supposedly are very vague about how their patents have been infringed, and send out demand letters to hundreds or thousands of small businesses, threatening to enmesh them in expensive patent infringement litigation unless they pay several thousand dollars per year to 'license' use of the patents involved. In June, 2013, the White House issued a report about the harm this sort of activity is doing to legitimate businesses, and a number of pieces of proposed legislation have been presented to Congress. One bill has passed the House of Representatives. This legislation would require:

Strict pleading standards: Much more precision about the way in which the challenged product or device infringes the plaintiff's patent would have to be provided.

Specifics about plaintiff's patent holdings and related entities must be disclosed: In order to avoid 'shell entities' making repeated infringement claims, plaintiffs would have to provide much more information than usual about their activities and business relationships.

Requester pays for all discovery beyond 'core discovery': Very narrow disclosure is required, after which all additional discovery presumptively must be paid for by the party who requests it.

Litigation limited to claim 'construction' at outset: No further litigation activity could occur until a formal court decision 'construing' the patent claims is completed.

Judicial Conference to draft rules for patent cases: Congress also may direct that the Judicial Conference draft procedure rules to further the objectives above and encourage active judicial management of patent infringement cases.

It should be apparent that those who rely on this counter-narrative about access to justice have an emerging agenda of their own, and that it has features that look more like the

civil law approach than the American approach to litigation.

6.The Comparative Procedure Argument

Lately, those promoting change to respond to what they view as unfairly pro-plaintiff aspects of American procedure have begun to invoke a comparative feature in their presentations.

One example of that effort was a study done for the May 2010 Duke Conference on Civil Litigation, an event put on by the rules committee to evaluate and learn about pressing issues affecting American litigation. This study compared the litigation costs of multinational companies in the US and in other post-industrial countries as a percentage of revenue the companies derived from those countries. The results showed that the American costs were many times higher than the costs in any other country, and sometimes ten times higher.

In December, 2011, the House Judiciary Committee held a hearing on American discovery that focused significantly on whether the breadth of American discovery in particular, and the features of American procedure that make it exceptional in general, were putting American companies at a disadvantage in the global marketplace and costing American jobs.

During the public comment period on the pending set of proposed amendments, repeated assertions invoked the contrast between the US and other countries. Examples:

'Although civil-litigation costs as a share of the economy have fallen from their peak in the mid-1980s . . . the United States remains a serious outlier, with tort costs as a share of the economy 50 percent higher than other Anglo-based legal systems and 150 percent higher than the Eurozone countries.' (no. 2187)

'Unfortunately, our current civil justice system is a major impediment to U.S. competitiveness. According to studies, the U.S. civil justice system is more than twice as expensive as those of our major competitors, such as Japan, France, Canada and the United Kingdom, costing more than $250 billion. These costs divert resources away from productive investments, resulting in lost jobs and lost growth opportunities. A significant driver of the enormous legal costs imposed on manufacturers in the United States is the uniquely liberal American discovery process.' (National Association of Manufacturers, no. 1295)

'The massive burdens imposed by the U.S. discovery system dwarf those of every other industrialized country, and if they continue unabated, multinational PhRMA members and foreign investors will be incentivized to locate and do business elsewhere.' (Pharmaceutical Research and Manufacturers of America (PhRMA), no. 1213)

'A significant percentage of GE's litigation is pending in the court systems of other countries, including roughly 40% of GE's significant cases. GE thus has extensive experience with the court systems of other countries. . . . Although GE has not attempted to make a detailed, data-driven comparative analysis of the cost or burdens of litigation across other countries, GE's experience largely mirrors the conclusions of some of the recent reports and studies conducted by academic institutions and others suggesting that the cost of the U.S. system far outstrips that of systems of equivalent quality elsewhere. . . . [I]n GE's experience, the quality of justice is equivalently high in many other court systems, despite the fact that the costs and burdens of litigating cases here are proportionately much higher.' (General Electric Co., no. 599)

7.Toward More Harmonization to Further Access to Justice?

What is emerging in the U.S., from one point of view, is thus a comparative procedure debate. On one side, the argument is that the US approach is an expression of an inherent American character, tied up with the legacy of the civil jury trial, something that is unique or almost unique to the US. From the perspective of those who favor this view, American procedure uniquely empowers those seeking justice, by opening the courthouse doors for free or a small charge (filing fees, contingency fee agreements, and loose pleading standards along with liberal amendment of pleadings), critical court assistance in obtaining evidence (party and nonparty discovery, with the responding party bearing the cost of complying), and very limited judicial authority to decide which side should win (limited access to summary judgment or similar rulings by the judge).

There is much to be said for this view. It surely accords with the "Handmaid of Justice" image that ushered in the Federal Rules. It surely is true that American litigants manage to

proceed to discovery without already possessing the sorts of evidence that litigants in most other systems must present at the outset, and that they obtain important evidence by using discovery. Indeed some sorts of claims -- employment discrimination, for example -- seem peculiarly dependent on these features of US litigation. From this perspective, moving away from the distinctive American methods would hamstring justice.

The other point of view is diametrically different. It stresses the very large costs that discovery can have, particularly in the Digital Age, and the striking contrast between the amounts of information turned over and the number of items actually used in the lawsuit. It also stresses the difference between the US system and that in use in the rest of the industrialized world on exactly these points. The very features that the proponents of US litigation extol (particularly the absence of a loser pays rule) seem, from this perspective, to load the dice against the American defendant and encourage American companies to relocate to other countries.

In this heated atmosphere, one must be careful in drawing conclusions, and this paper is not presently near to any conclusion about whether further harmonization is likely to occur or would be a good thing. Some observations can be made, however.

One is that serious and persuasive questions have been raised about the themes used to support more aggressive change of US procedure. In 2009, a broad study by the Federal Judicial Center's Research Division showed that, in most cases the lawyers on both sides thought that the amount and cost of discovery was about right and proportional to what was at stake. Discovery cost as blackmail did not seem to be a serious problem. A recent academic study has pursued the point further, challenging the assertions about frequent settlement to eliminate litigation cost.

Another important point is to realize that the costs associated with American litigation need not be regarded entirely as a deadweight loss. More than 20 years ago a presidential commission on competitiveness seemed to assert that for every lawyer in America the country suffered a $1 million loss in GDP annually. But it is not clear that the costs of litigation to defendants are in any sense a dead loss. Much or most of those expenditures end up in the pockets of plaintiffs, frequently injured plaintiffs. Although the US has recently moved closer to universal health care, it has for a very long time been true that injured Americans needed

lawyers and lawsuits to provide what some forms of social insurance provide in other countries.

Beyond that, there is the question of regulation by litigation. There has been, is, and will probably ever be a fairly fierce debate in the US about whether private litigation is a good way to regulate industry and protect consumers, etc. It can be challenged on a number of grounds, such as involving post hoc decisions by lay jurors. Sensible arguments can be made for a more professional, governmentally-run regulatory apparatus. Of course, the US also have such government agencies, but it seems that other industrialized countries rely much more heavily on regulation by government.

Those who support US procedure as ensuring access to justice also often stress that private litigation -- particularly personal injury litigation -- produces safety-enhancing changes in industry. Many who decry the current level and importance of private civil litigation in the US assert that the changes in behavior that result are undesirable, such as keeping useful products off the market.

Those who favor relying on formal governmental regulation rather than post hoc litigation to deal with issues of safety have succeeded occasionally in persuading courts to treat regulatory approval of products or methods as sufficient to defeat private suits seeking to impose liability, under 'preemption' doctrines.

But regulation surely can leave significant gaps. Consider, for example, the enormous recent recall of GM cars with an ignition problem; that led to criticism of the federal agency that is supposed to keep track of the safety of cars. Consider also the recurrent argument that the SEC did not adequately identify and deal with the financial misconduct that contributed to the Great Recession that began in 2008. And that sort of misgiving about leaving safety to government regulators is hardly limited to the US. Consider the soul-searching following the sinking of the Korean ferry, said by some to reflect a national preoccupation with economic growth that led to neglecting safety.

So Americans are likely to be cautious about whether to emulate the procedures of the rest of the world as a way to achieve greater safety and security. And even if that were not an issue, a very different consideration might prompt the US to continue to adhere to the current procedure model even in the face of comparativist criticisms. A huge number of statutes prohibiting such things as discrimination, consumer fraud, spam faxes, etc., utilizes private suits

as an important enforcement tool in the US. Probably such regulation would be done only by governmental entities in other countries, but for a variety of reasons American legislatures favor this alternative. And this effort has created the need for, and led to the creation of, a very large 'private attorney general' bar. These are the lawyers who say radical changes in procedure would put them out of business, and it would surely seem inconsistent to have worked for a generation to bring this sector of the bar into existence and then to try to end it.

More than simply conservatism lies behind the enduring US commitment to its distinctive mode of private litigation, therefore. And one might at least be tempted to think that those who emphasize comparativist reasons for making aggressive changes to the US system could be taking an unduly narrow view in their comparativist attitudes. Much as American manufacturers may argue that, compared to their brethren on the continent, they have high litigation expenses, they probably do not so envy the tax or employment law burdens that their continental brethren must shoulder. Perhaps nullifying aggressive American litigation would not lead to promotion of more aggressive American regulatory and tax policies to fill the gap, but proponents of change might consider widening the lens and contemplating a more comprehensive adoption of the governing styles of the civil law countries.

8.Conclusion

As almost everyone recognizes, American politics have been polarized for some time. American debates about procedure seem to have become polarized also. Perhaps polarization naturally prevents action, or at least aggressive action. It certainly does not seem that aggressive or radical procedural change has been proposed or will be in the offing in the near future. As I put it some time ago, although the adoption of the Federal Rules was a 'big bang' 75 years ago and led to a fairly dramatic realignment of procedure in the US, we are not likely to see another big bang any time soon.

Access to Justice in the EU:
Recent Developments and Conceptual Dilemmas

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With the entry into force of the Treaty of Lisbon, the European Union has acquired greater competence to legislate in the area of civil justice. Article 81(2)(e) TFEU grants an explicit power to the Union to adopt measures aimed at ensuring "effective access to justice". It is however unclear which measures are intended to be adopted under this heading. Practice so far has shown that legislative action of the Union has been primarily focused on providing the legal framework to ensure mutual recognition and communication between different legal systems in Europe (e.g. Brussels Regulations, Rome Regulations), but little action has been taken to tackle the lack of "access to justice" in Europe in the broad sense of the term. Lack of competence and hesitation of Member State governments remain the biggest obstacles.

Nevertheless, a number of recent developments highlight the importance of the issue for the Union and the variety of legal contexts in which the justice/human rights nexus has become a central public policy topic. (1) The publication of the EU Justice Scoreboard demonstrates the interest of the Commission in reviewing the situation of national justice systems. (2) Anticipated accession of the EU to the ECHR will bring even greater pressure to ensure compliance with fair trial guarantees. (3) The Court of Justice has adopted an important ruling on the remedies against delay, essentially following ECHR case law. (4) The alleged lack of adequate legal remedies, including civil justice remedies, has been highlighted in the current debate over investor-state dispute settlement provisions in the EU-Canada and EU-US trade agreements.

The conceptual dilemma present in these developments is the lack of a generally accepted frame of reference as regards the question as to what constitutes "good" or at least "acceptable" justice. This is particularly problematic in the context of human/fundamental rights litigation on the subject of "fair trial" or investment treaty litigation on "denial of

justice", which are premised on the idea that minimal thresholds exist as regards the functioning of state justice systems. While it is true that justice policy typically requires balancing between competing goals (fairness, cost, delay, legal certainty etc.) that can reasonably differ among different countries and legal cultures, a definition of certain common institutional standards of justice (e.g. model procedural rules, minimal budgets, optimal judicial structures etc.) appears to be desirable if transnational legal deliberation of the issue will further increase.

Are Financial Burdens Preventing Access to Justice in Southeast European Judicial Systems?

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Establishing and maintaining effective judicial systems with the fulfilment of the procedural human rights and access to justice are the goals of every modern country.

Since the protection of rights in democratic societies is entrusted to the judiciary institutions, the question of the effective exercise of access to these institutions and the protection of the rights of citizens in proceedings before them is especially important when citizens are faced with excessive procedural costs.

The right of access to court demands that financial burden of civil justice must not form an insurmountable obstacle for exercising of this right. This is even more pronounced in the context of economic crises and the increasingly economic and socially vulnerable groups of citizens.

Regulations on attorney fees and legal aid are therefore important in the relationship between financial burdens of the civil justice and the right of access to court.

Generally, in a lot of European countries, basic principles on attorney fees exist and the remuneration has to be adequate and proportionate to the value and complexity of the case. Often, hourly rates are applied. In some countries, there are also possibilities of lump-sum agreements, conditional fee arrangement ('no win, no fee') or agreements 'paid on result'. In order to preserve the right to access to justice, furthermore, countries are establishing a system of legal aid. But the statutory conditions that the applicant for legal aid must meet to prove his or her financial status could be serious obstacle in achieving timely and effective legal assistance.

In the paper author will analyzed the problem of the relationship between financial burdens of the civil justice in Southeast European Judicial Systems and the right of access to court in those countries. Furthermore, the current law on attorney fees and legal aid of the Southeast European countries will be discussed, with emphasis on Croatia as a young country of the European Union.

Zvonimir Jelinić
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Fighting Recession at the Expense of Access to Justice

The Case of Croatian Financial Operations and Pre-Bankruptcy Settlements Act

Abstract

It is hard to remember when was the last time one legal document raised so much controversy among legal and economic experts, entrepreneurs and wider public as it is the case with the Act on Financial Operations and Pre-Bankruptcy Settlements. As stated by the Croatian Government in the time of its delivery, the primary aim of aforementioned act was to help troubled companies to revitalise their businesses and keep jobs, as well to help creditors to recover their claims in a larger percentage than it would be possible if standard bankruptcy proceedings were applied to troubled companies.
Although number of different questions in relation to the Act and its past and current state of application can be identified, the primary concern of the author will be to check several issues he considers to be in direct relation with the procedural guarantee of access to justice.

This paper will cover three problems; the first one is related to the fact that the first phase of the pre-bankruptcy settlement procedure is of administrative nature (it includes different ways of settling debts - change of repayment terms, waiving part of the debt in question, converting debt to equity and similar plus preparation of the restructuring plan) and under the jurisdiction of the Financial Agency (it is a body of the Ministry of Finance), not the court. So far numerous doubts with respect to impartiality of the pre-settlement Councils as well the ways claims are being reported and their trustworthiness established have been raised in public. It will be necessary to check do current provisions of the Act support such an assumption as well do they in some way relate to access to justice.

Second issue relates to the fact that the Act orders that all enforcement and other civil proceedings for unsecured debts which were pending before the start of the pre-bankruptcy proceedings shall be stopped as well new proceedings cannot not be initiated. It is conceivable that there are many domestic and foreign firms which missed the deadlines and information published on the web to report their claims to the Financial Agency. They are now unable to initiate proceedings and to recover or enforce their already established claims.

Third issue concerns the fact that Commercial Courts, which are approving settlements during the 2nd phase of pre-bankruptcy proceedings, have only limited powers according to the Act to reject settlements with obligations which arise from dispositions by the parties which may be contrary to ius cogens or the rules of public morality.

UNIVERSITEIT GENT

FACULTEIT RECHTSGELEERDHEID

Legal Aid in a European Context

Stefaan Voet

Institute for Procedural Law Ghent University

IUC Dubrovnik

28 May 2014

Article 6 ECHR – Right to a Fair Trial

3. Everyone charged with a criminal offence has the following minimum rights:

to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Article 6 ECHR – Right to a Fair Trial

1.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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Charter of Fundamental Rights of the European Union

Article 47. Right to an effective remedy and to a fair trial

3. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Legal Aid in European Cross-Border Disputes

Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (OJ L 26, 31 January 2003, 41–47)

The Hague Institute for the Internationalisation of Law (HiiL)

Project on Legal Aid in Europe

comparing legal aid systems in 9 countries

available in June 2014

http://www.hiil.org/insight/legal-aid-in-europe

Council of Europe

The European Commission for the Efficiency of Justice

2012 Evaluation of European Judicial Systems

http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp

Figure 2.22 Annual public budget allocated to legal aid per inhabitant in 2010 (Q12)

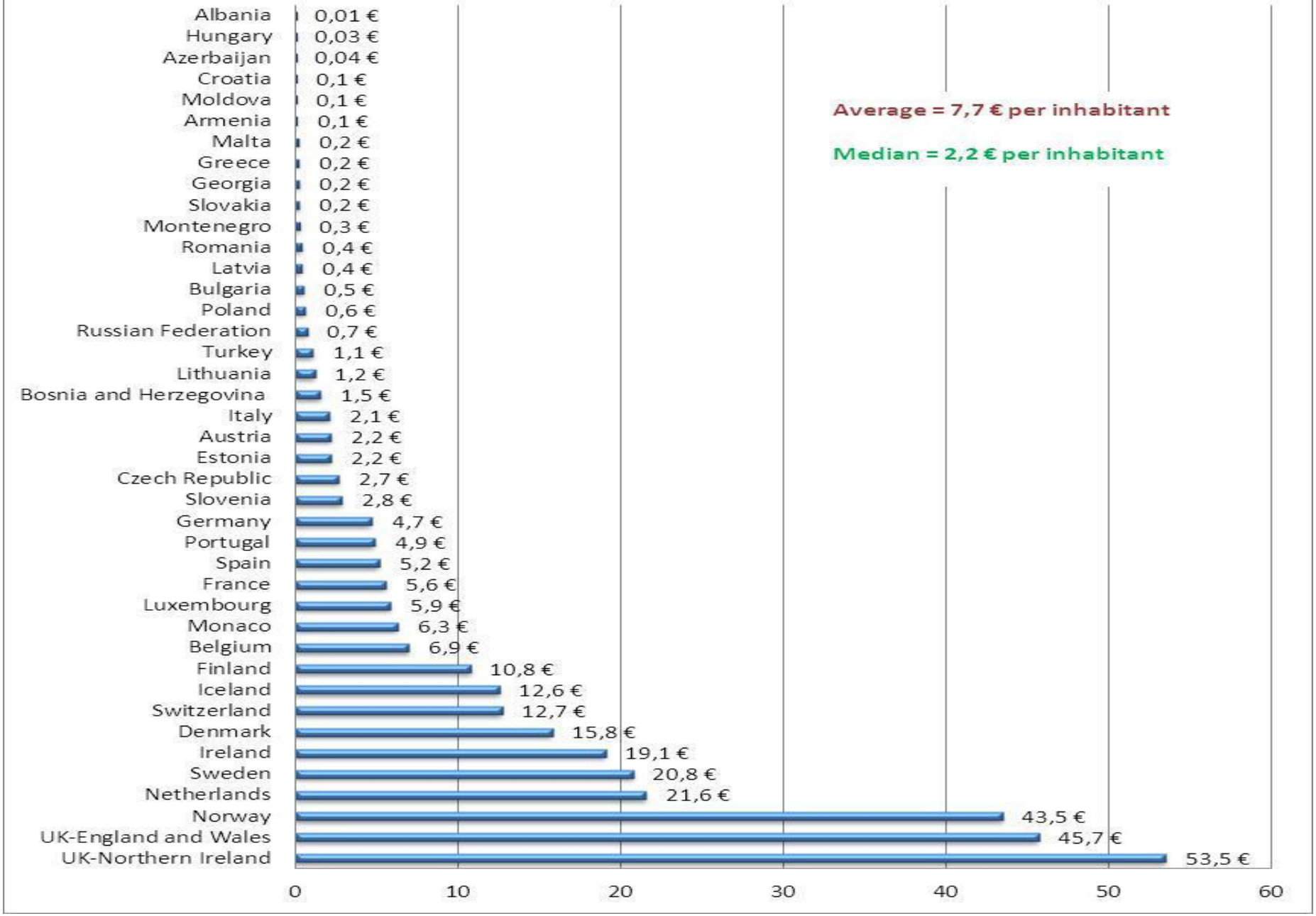


Figure 2.23 Annual public budget allocated to legal aid per inhabitant as part (in %) of the GDP per capita, in 2010 (Q3, Q12)

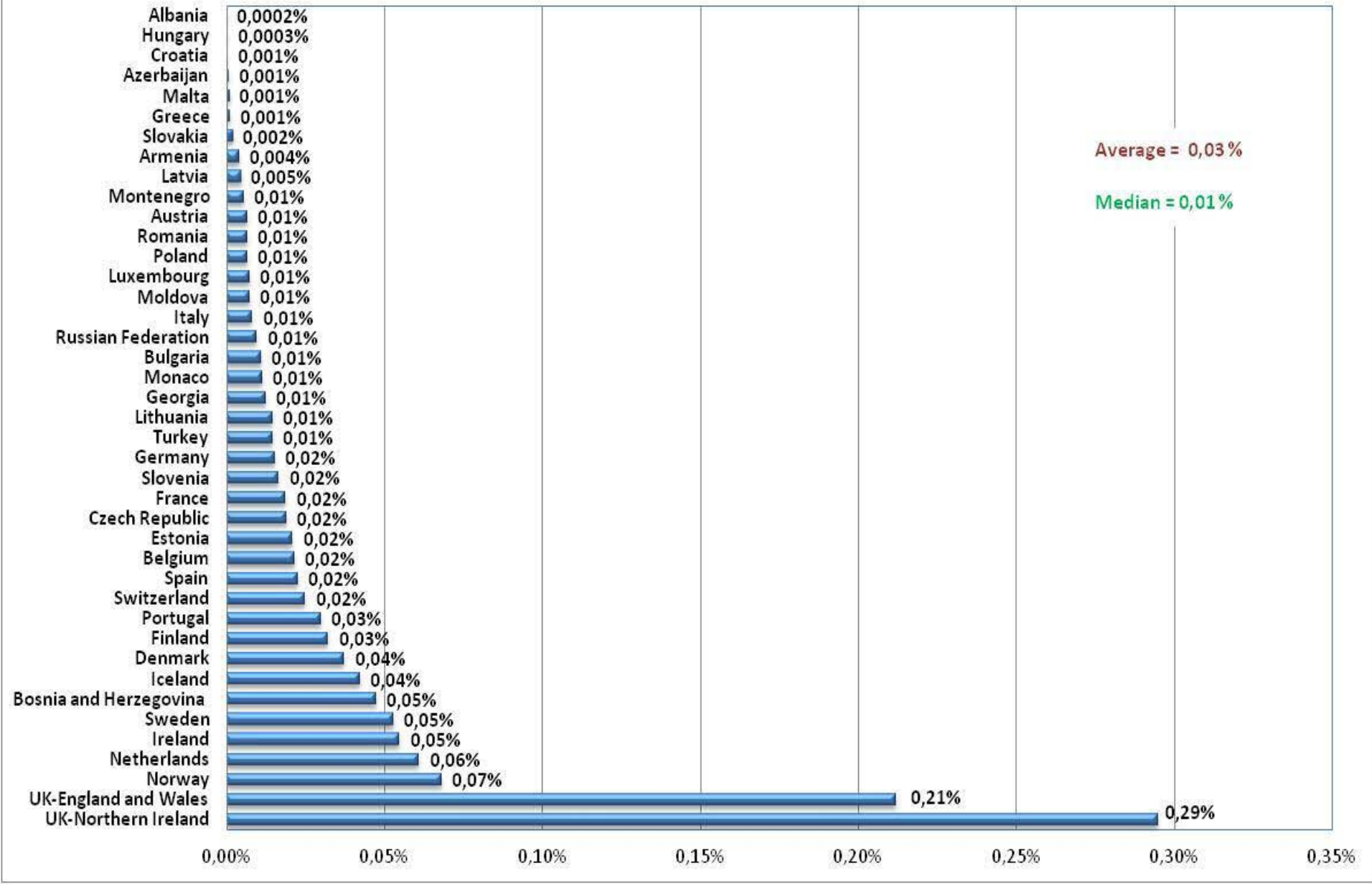


Figure 2.24 Average annual variation of the budget allocated to legal aid between 2008 and 2010 (Q12)

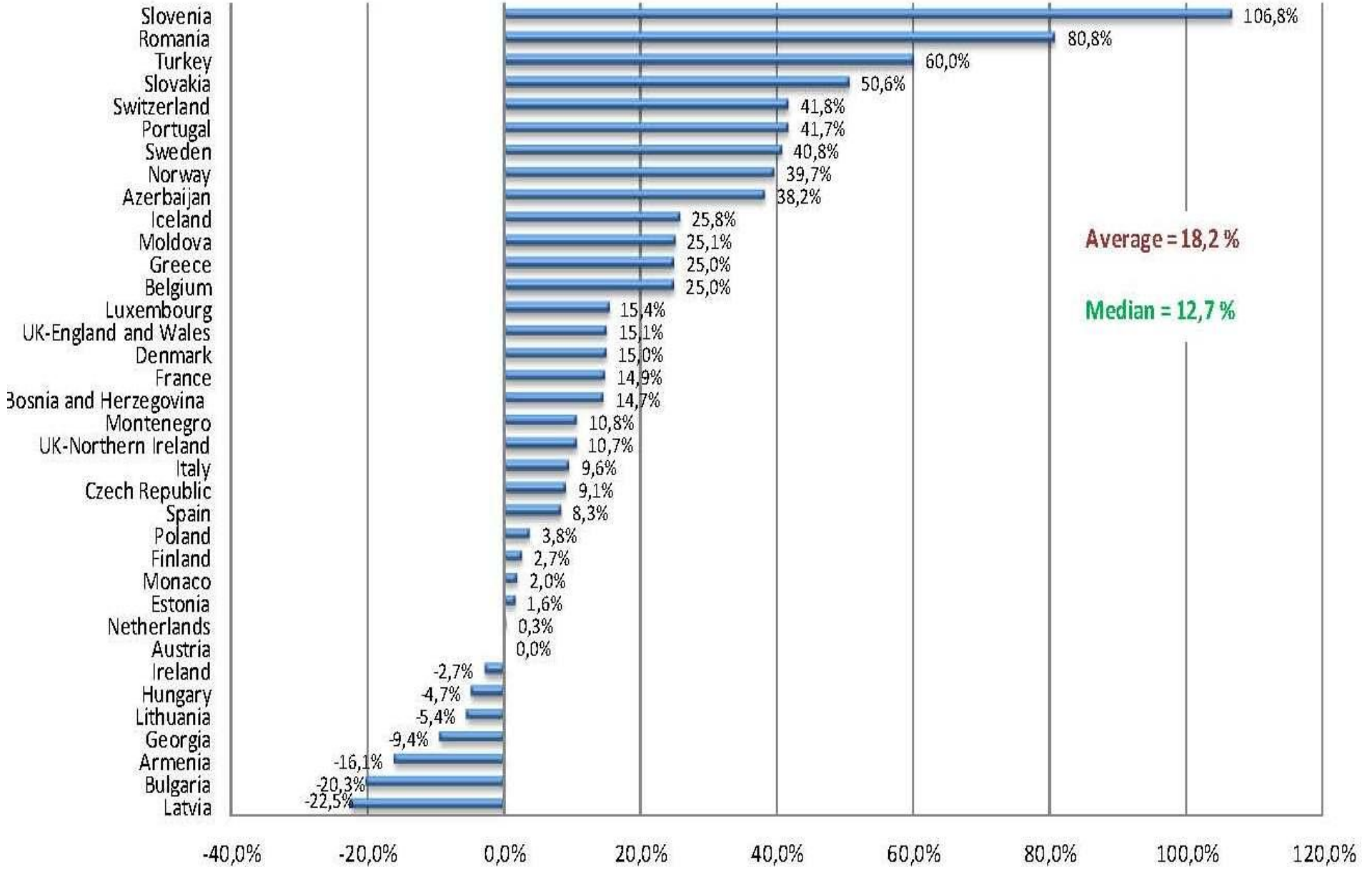


Figure 3.1 Annual public budget allocated to legal aid per inhabitant (in €) and its parts allocated to criminal and non criminal law cases (in %) in 2010 (Q12)

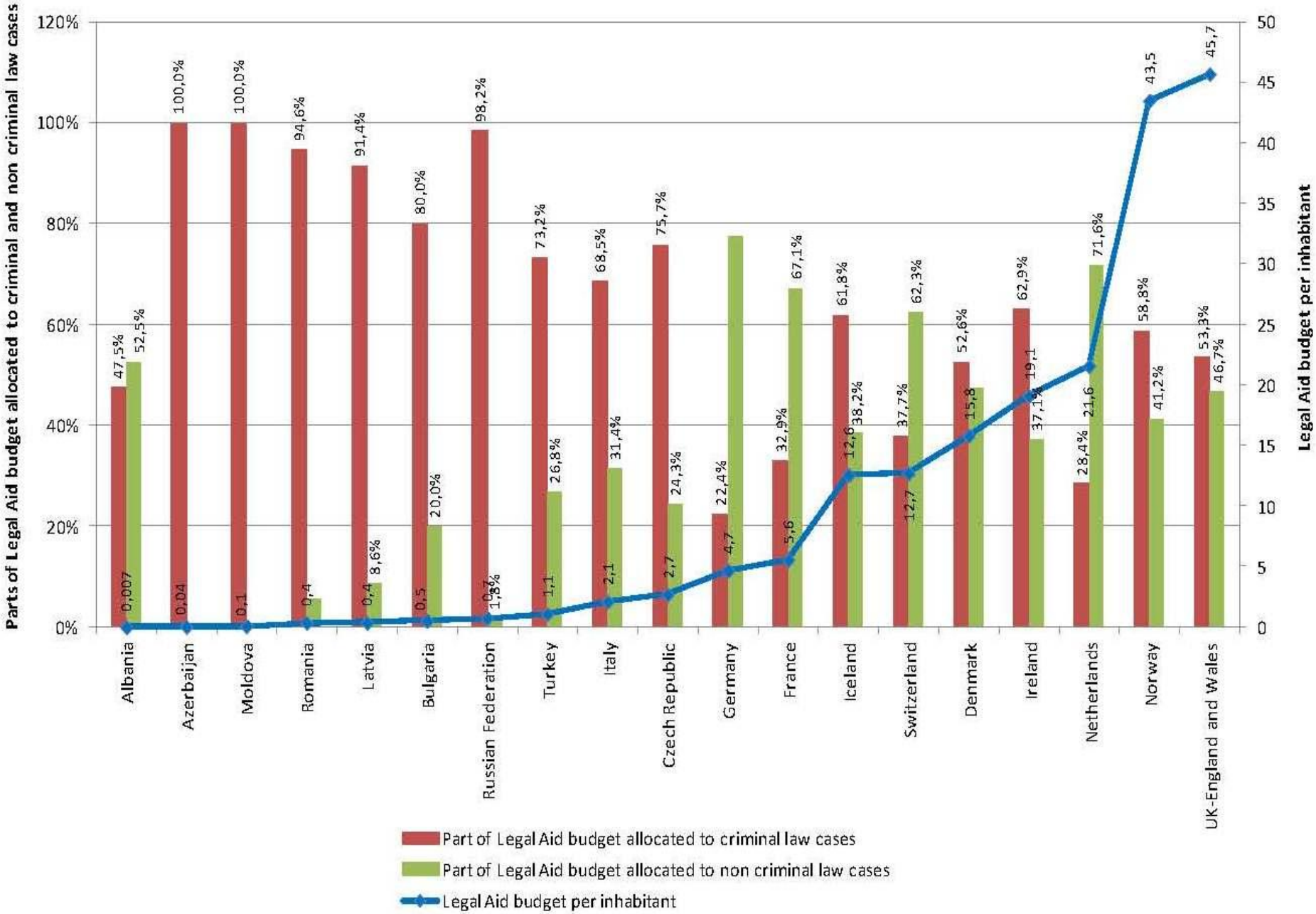


Figure 3.5 Number of cases granted with legal aid per 100 000 inhabitants and average amount allocated in the public budget for the legal aid per case in 2010 (Q12, Q20)

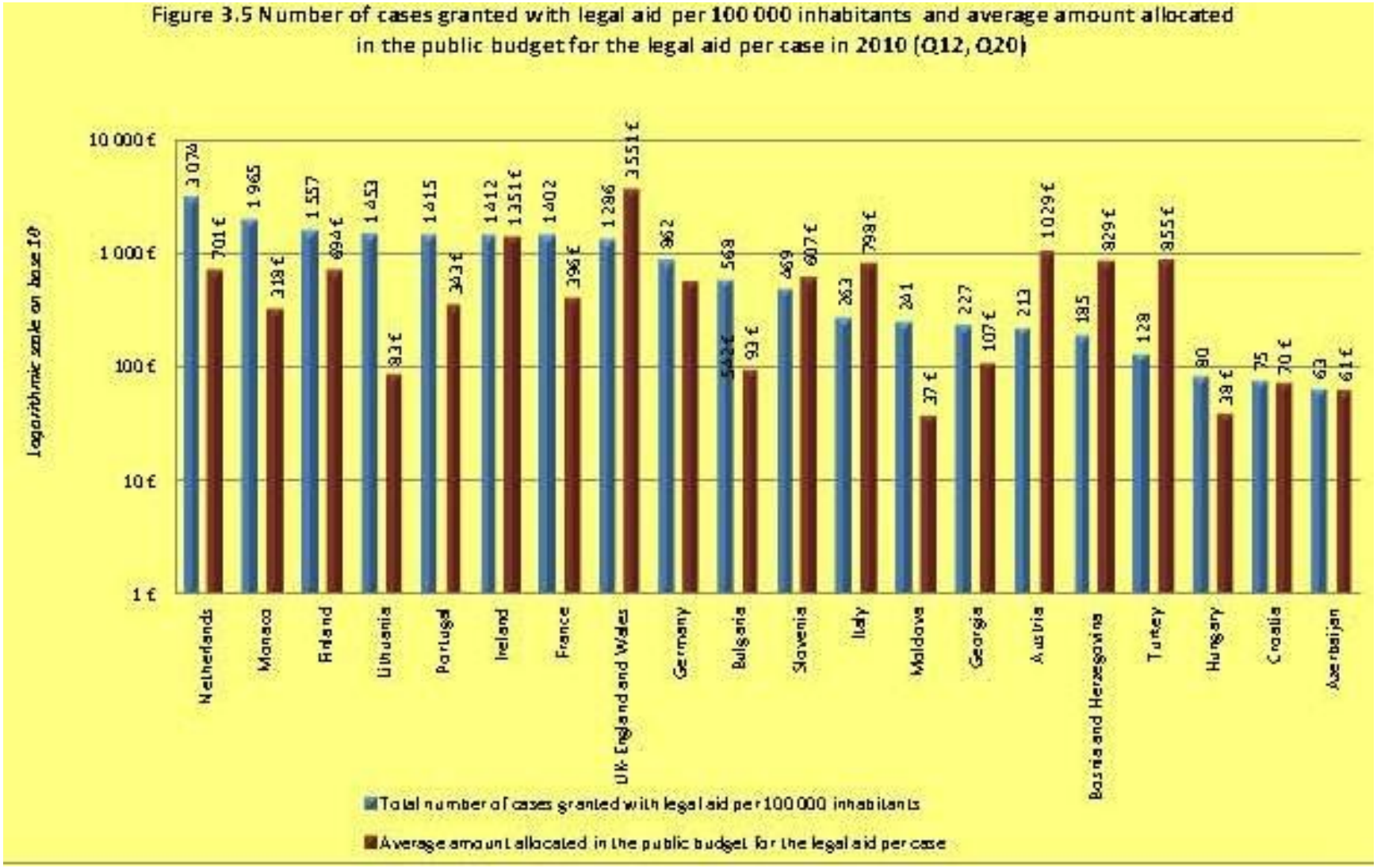
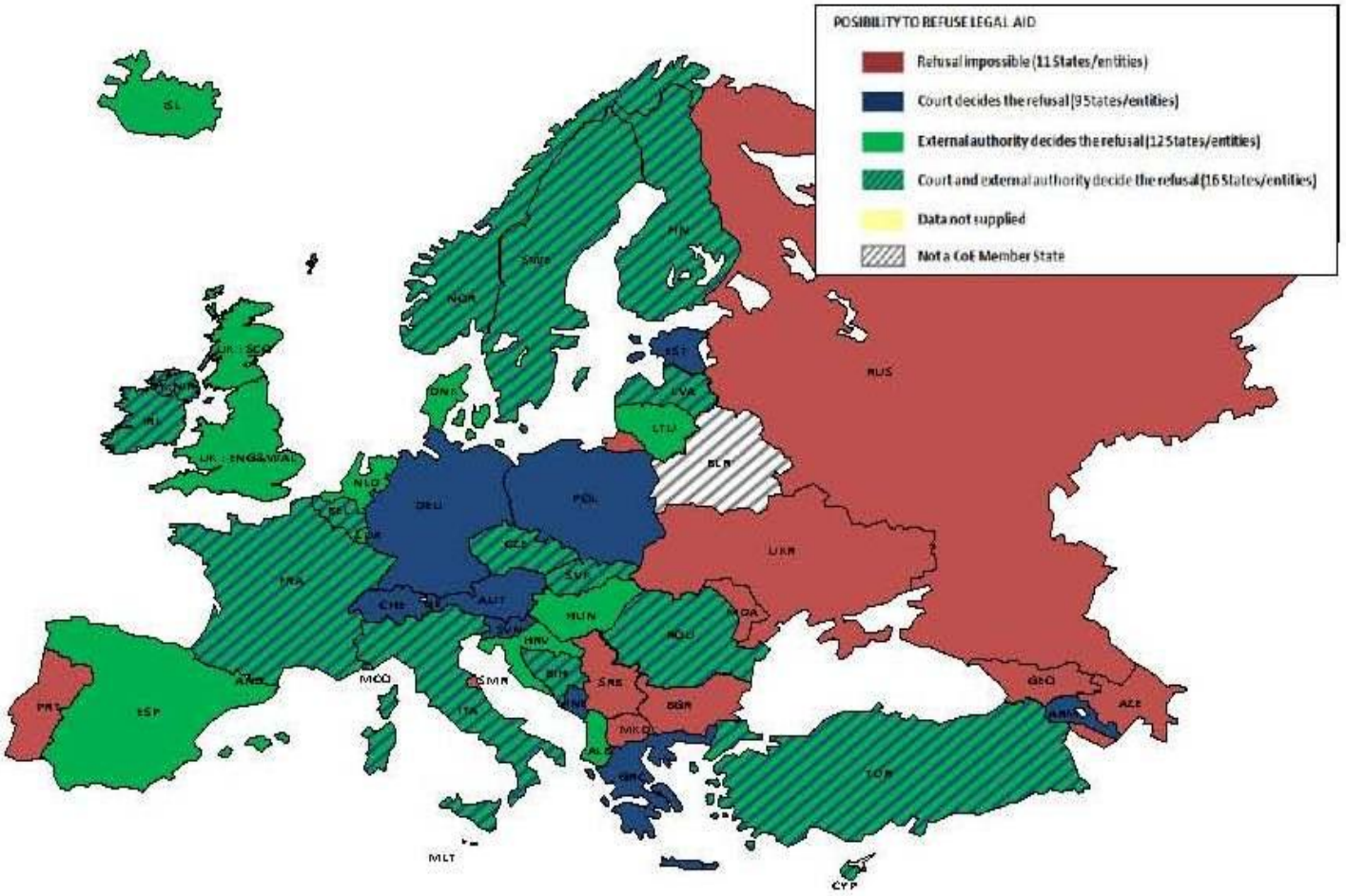


Figure 3.8 Possibility to refuse a request for legal aid for lack of merit in other than criminal cases, and authority responsible for granting or refusing legal aid (Q24, Q25)



Barème de l'aide juridictionnelle
France (2014)

Ressources mensuelles	Contribution de l'État
€ 936	100%
€ 937 et € 979	85%
€ 980 et € 1032	70%
€ 1033 et € 1107	55%
€ 1108 et € 1191	40%
€ 1192 et € 1298	25%
€ 1299 et **€ 1404**	15%

Si vous avez des personnes à charge, ces plafonds sont majorés de:

€ 168 pour les 2 premières personnes à charge, € 106 pour les personnes suivantes.

Legal Aid in Europe: A Turmoil

[Mauro Cappelletti, ABAJ 1974]


15

"The Legal Services Commission of South Australia explained in evidence that the recent law and order campaign in that state, which manifested itself in the form of stricter criminal trespass legislation, has lead to a steady increase in demand for legal aid. Our hypothesis is that as the law and order campaign takes effect and new legislation is brought in for serious criminal trespass, which has elevated the penalties imposed by the courts on people trespassing on peoples property when they are present the number of matters going to the district court has increased significantly, they are being contested hard and, because the emphasis is on longer sentencing, the sentencing submissions are being fought much harder. Our statistics have borne that out … At the rate we are going, we have had to ask the government for $1 million more in the next financial year just to maintain the rate at which we are currently expending funds in the criminal jurisdiction."

(Australian Senate Legal and Constitutional References Committee, Legal Aid and Access to Justice: Fourth Report (June 2004), pp.28-29)

"So, let's get this straight Goldilocks, You sat on Baby Bears chair, it collapsed and you've had pain in your back ever since"

Table 3.10 Private system of legal expense insurance enabling individuals to finance court proceedings (Q26)

Yes (34 States/entities)	No (14 States/entities)
Albania	Armenia
Andorra	Bosnia and Herzegovina
Austria	Bulgaria
Azerbaijan	Ireland
Belgium	Latvia
Croatia	Malta
Cyprus	Moldova
Czech Republic	Montenegro
Denmark	Romania
Estonia	Russian Federation
Finland	San Marino
France	Serbia
Georgia	The FYROMacedonia
Germany	Turkey
Greece	
Hungary	
Iceland	
Italy	
Lithuania	
Luxembourg	
Monaco	
Netherlands	
Norway	
Poland	
Portugal	
Slovakia	
Slovenia	
Spain	
Sweden	
Switzerland	
Ukraine	
UK-England and Wales	
UK-Northern Ireland	
UK-Scotland	


Stu's Views
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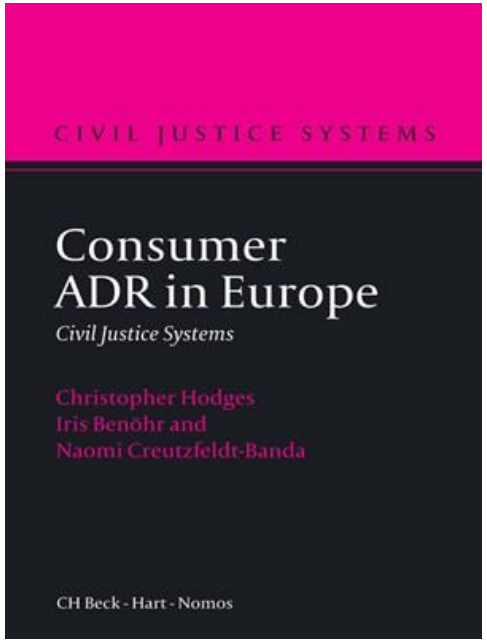
S U
Low self esteem? Take two pro bono cases and call me in a month.


LEGAL AID
SLANE

Immigration Legal Advice Centre

LAC
Legal Advice Centre



Belmed

Rechtwijzer

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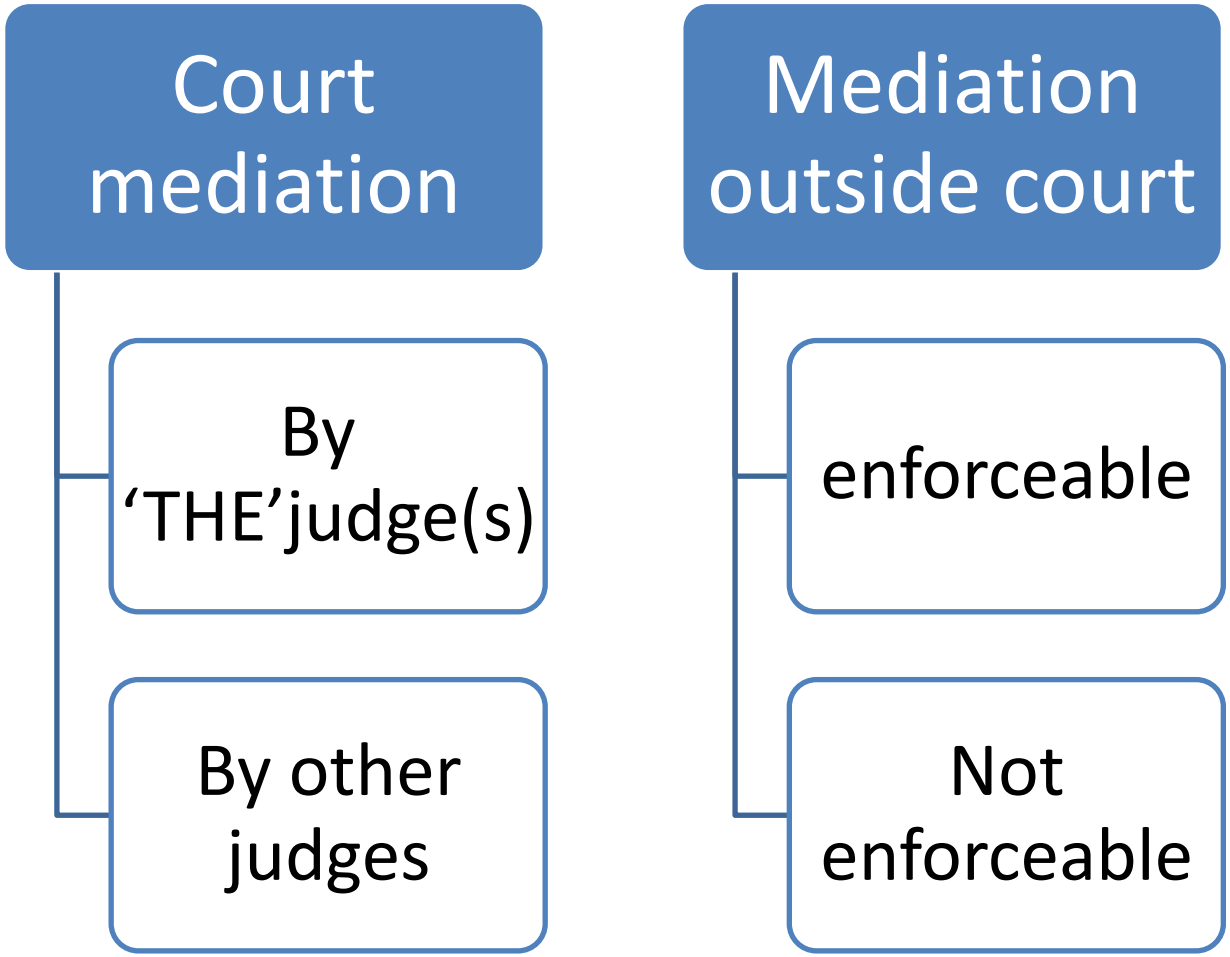
- Mediation in China: Harmonization at Cost of Justice
-
- Yulin Fu
-

Mediation in China



Types and Stages of Court Mediations

1.Earlier/In Advance Mediation (Art. 122)

By docketing judge(s), as or before docketing

2. Pretrial /before hearing mediation

By ‘THE’ judge, or by a judicial assistant

3. Post-trial/post-hearing mediation

By ‘THE’ judge(s), after hearing but before final/conclusion statement of the parties

Mediation by the courts vs./and Settlement by the Parties

- Hosted by the court
- 1.settled and withdraw (not enforceable but acceptable to file a new case if not complished)
- 2.settlement as a consent judgment (enforceable)
- Not hosted by the court
- 1. settled and withdraw
- 2. ask for a consent judgment

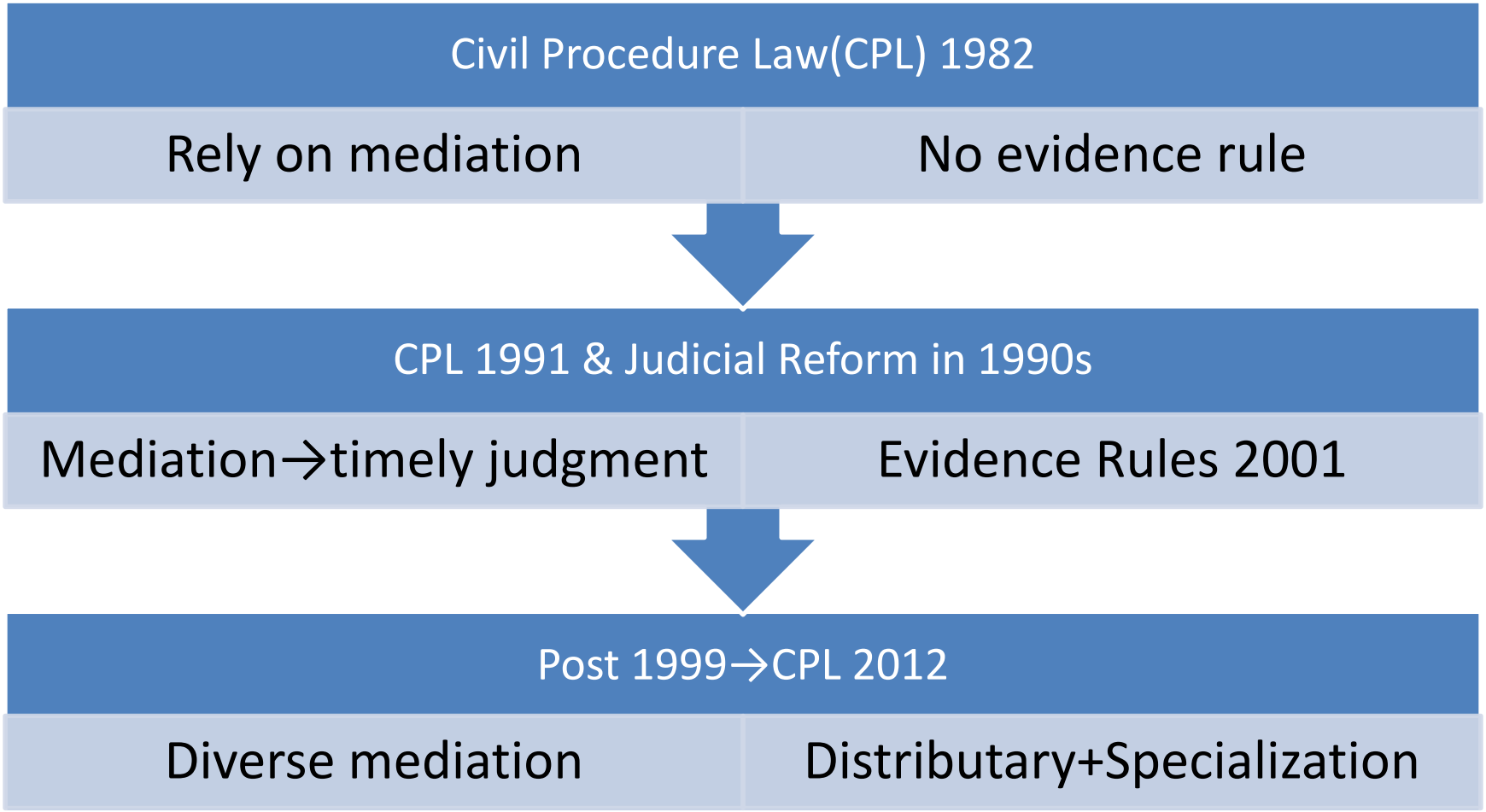
Mediation as A Principle

- Chapter one(Art. 9) When ‘trying’ civil cases, the people’s courts shall conduct mediation under the principles of free will of the parties and legality; and if mediation fails, shall enter a judgment in a timely manner.
- Chapter 8(Art.93-99)Art. 97 When a mediation agreement is reached, the court shall draft a consent judgment, which shall state the claims, facts of the case and results of mediation, with signatures of the judges and court clerk and seal of the court. Once a consent judgment is signed by both sides, it shall become legally binding (and enforceable just like a judgment).

Earlier Mediation

- Article 122 Where mediation is appropriate for the civil dispute involved in an action filed by a party in a court, mediation shall be conducted first, unless the parties refuse mediation.(in advance)
- Article 133 A people's court shall handle accepted cases according to different circumstances:
- (2) Resolving disputes in a timely manner through mediation, if pre-trial mediation is allowed.(before hearing)

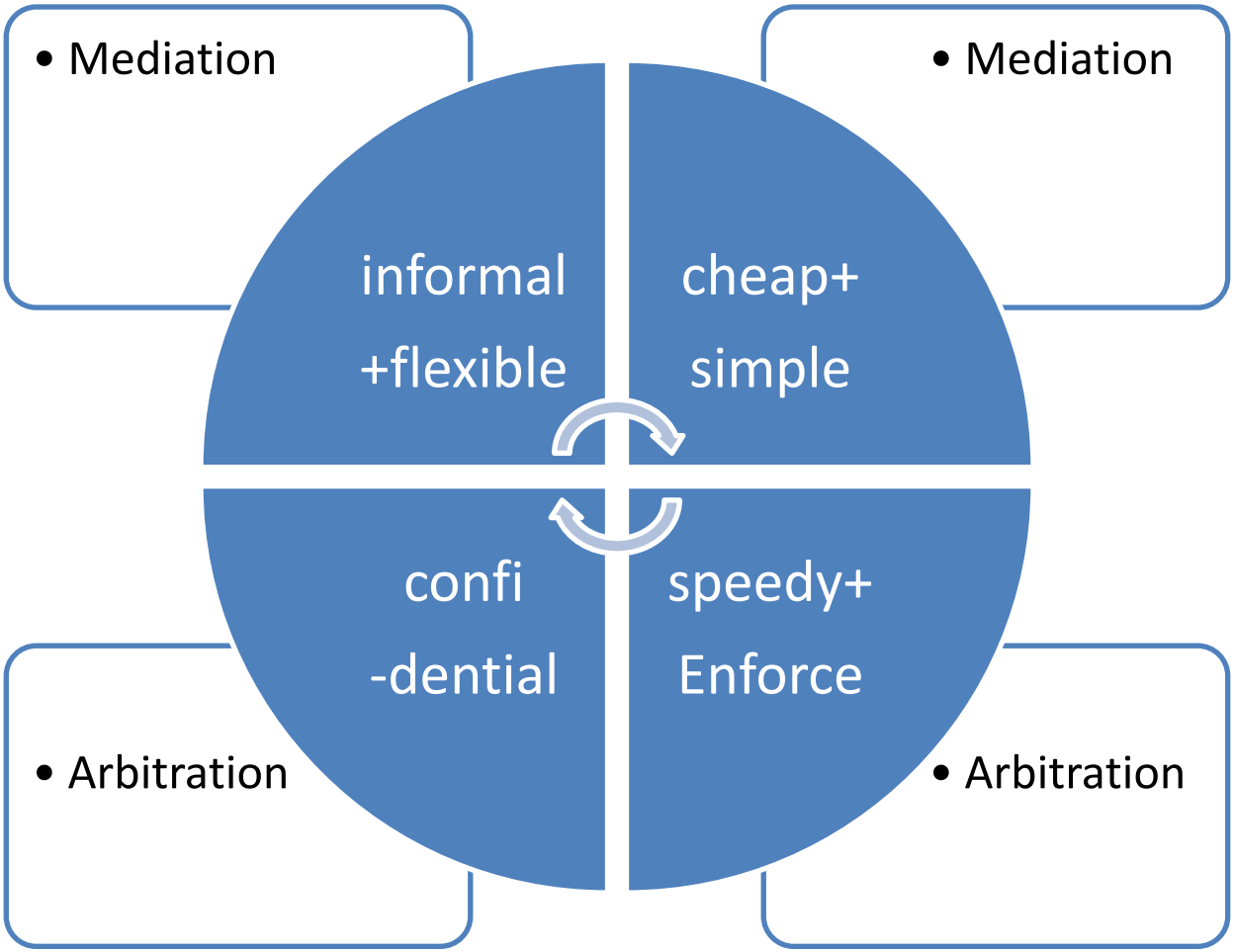
Court Mediation vs. Judgment (judicial professionalization)



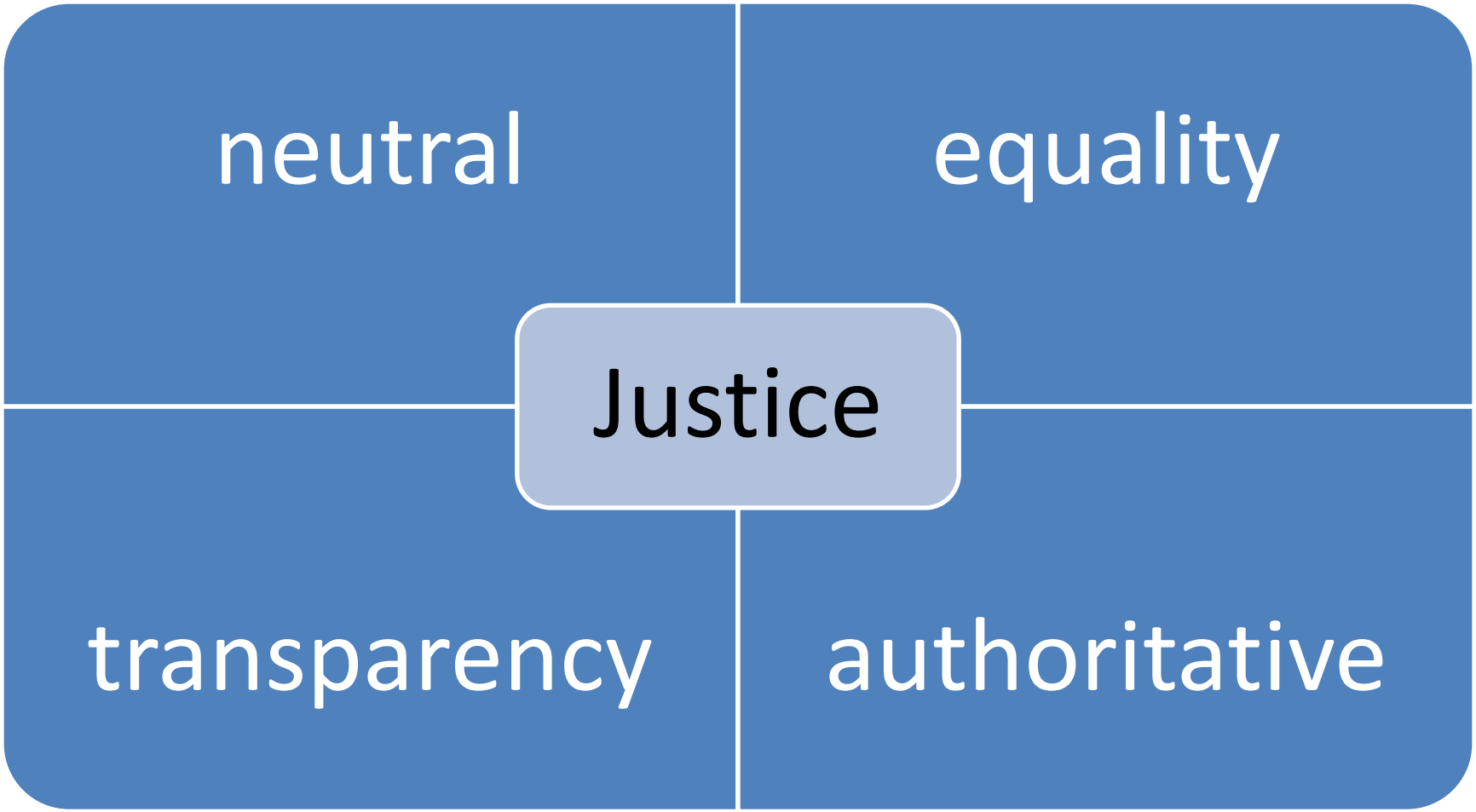
Mediation in Advance vs. Right of the Parties to Sue

- Article 123 A court shall protect the right to sue enjoyed by a party in accordance with law. A court must accept an action instituted(filed) under Article 119 of this Law. A court shall, within 7 days, docket a case which meets the conditions for instituting an action and notify the party; or issue a written ruling within 7 days to refuse to accept an action which fails to meet the conditions, and the plaintiff may appeal against the ruling.
- Contrast: Art. 122 (+ Art. 119 + Art.124)

Court Mediation vs. Development of ADR



Court Mediation vs. Justice



Mediation outside the Courts (largely wanted)

enforceable

- Commercial arbitral mediation/consent awards
- People's med. by judicial confirm.
- Labor mediation + labor arbitral mediation (after 15days)

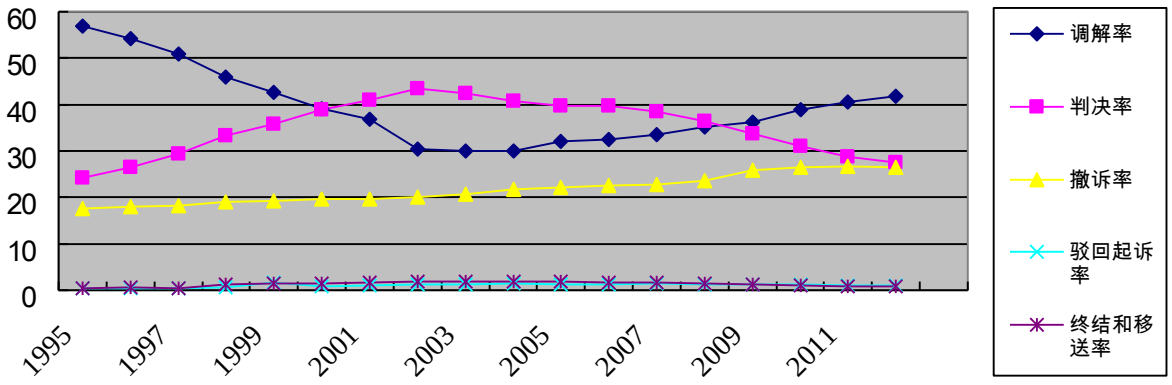
Not enforceable

- By associations (ig. of consumers, trade, industry), clubs, etc.
- By Separate mediation by law firms or other professional mediation centers (mediation center in arb.)

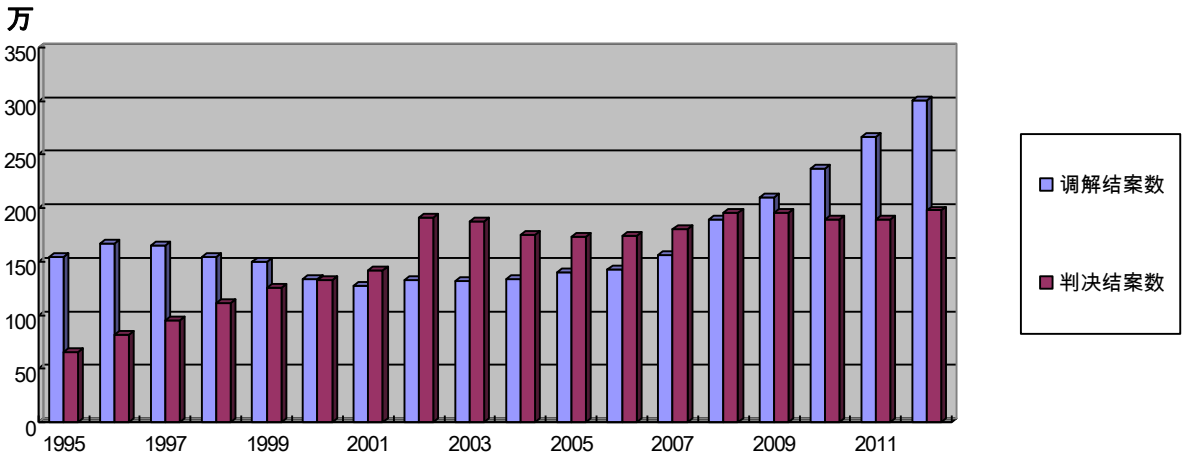
Civil cases of 1st instance disposed in 1995-2012

year	mediation	%	judgment	%	withdrawal	%	dismiss	%	Transfer to other branches	%
1995	1544261	56.89	658784	24.25	476846	17.57	13189	0.48	13584	0.50
1996	1672892	54.24	815741	26.45	553473	17.94	15215	0.49	16511	0.54
1997	1651996	50.95	955530	29.47	592329	18.27	15912	0.49	15928	0.49
1998	1540369	45.84	1115849	33.21	636731	18.95	22388	0.68	44698	1.33
1999	1500269	42.65	1257467	35.75	679443	19.32	26280	1.75	53865	1.53
2000	1336002	39.08	1328510	38.86	669166	19.58	31914	0.93	52889	1.55
2001	1270556	36.74	1417625	41	679720	19.66	35342	1.02	54527	1.58
2002	1331978	30.32	1909284	43.46	877424	19.97	53217	1.21	78164	1.78
2003	1322220	29.94	1876871	42.5	914140	20.7	57998	1.31	84941	1.92
2004	1334792	30.01	1754045	40.76	931732	21.65	61226	1.42	83972	1.95
2005	1399772	32.10	1732301	39.73	965442	22.14	55183	1.27	82437	1.89
2006	1426245	32.54	1744092	39.8	986780	22.52	51473	1.17	70114	1.60
2007	1565554	33.43	1804780	38.54	1065154	22.75	63426	1.35	76958	1.64
2008	1893340	35.18	1960452	36.43	1273767	23.67	64975	1.21	76915	1.43
2009	2099024	36.21	1959772	33.81	1494042	25.77	71052	1.23	76867	1.33
2010	2371683	38.80	1894607	30.99	1619063	26.49	70565	1.15	69241	1.13
2011	2665178	40.64	1890585	28.83	1746125	26.62	68695	1.05	60934	0.93
2012	3004979	41.70	1979079	27.46	1906292	26.45	68333	0.95	61614	0.85

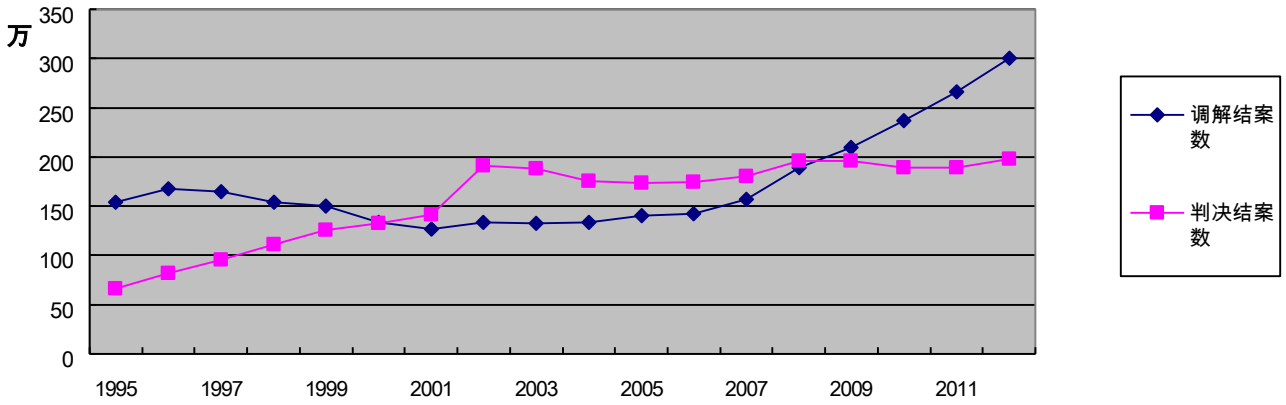
Charter 1 Civil cases of 1st instance disposed in 1995-2012（%）



Charter 2　Mediation vs. Judgments of 1st instance civil cases1995-2012（10,000）



Charter 3　Mediation vs. Judgments of 1st instance civil cases1995-2012（10,000）



Access to the Supreme Court: A Human Right?

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The topic of this paper is the access filters to the recourse before the Supreme Courts in civil matters. The question under discussion will be if the introduction of such filters to the appeal of last resort violates or not any litigant's human right to access before the national highest court. To answer that question, the case-law of the European Court of Human Rights (ECHR) will be studied. Particularly, this paper will analyse in which extent the right of access to justice —as part of the right to a fair trial, recognized by article 6 in the European Convention of Human Rights (Convention)— applies to the appeals procedure before the Supreme Court. Special attention will receive the *Levages Prestation Services vs. France* judgment. In this case, the Court settled that the principle of proportionality and the national "margin of appreciation" have to be considered when evaluating restriction of access to the Supreme Court.

TABLE OF CONTENTS

1. Introduction

2. The problem at stake

3. Right to a fair trial (art. 6) at the Supreme Court level

4. The *Levages Prestation Services v. France* ruling

5. Legitimate goal

6. Foreseeable filter

7. Principle of proportionality

8. National margin of appreciation

9. Conclusion

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Conditions of Admissibility and Access to Justice - a Slovenian Perspective

Dr. Jorg Sladič

1. Introduction

In Roman law Celsus formulated the famous principle *actio nihil aliud est quam ius persequendi iudicio quod sibi debetur.* In European states access to courts is granted to individual claimants.[1] "Access to justice is a fundamental pillar of western legal culture."[2] However, "the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access to courts "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals" *[...]*.[3] In Slovenia the *communis opinio doctorum* holds that the most common limitation of access to justice or courts is to be found in the form of conditions of admissibility of civil actions.

This paper shall start with an examination of the conditions of admissibility from the point of view of human rights in international and constitutional law. The second part of this paper concerns the role and types of conditions of admissibility in Slovenian civil procedure. This chapter shall give an overview on theoretical and judicial application of conditions of admissibility in Slovenia. Then the division and types of the conditions of admissibility shall be presented. Due to the international nature of this conference the conditions of admissibility linked to international law shall also be examined (like the Slovenian application of the principle *par in parem non habet iurisdictionem*).

2. Slovenian constitution, Art. 6 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and conditions of admissibility

According to the Constitutional Court of the Republic of Slovenia:

> "*The right to judicial protection (Art. 23 of the Constitution, Art. 6 Protection of Human Rights and Fundamental Freedoms, hereinafter: "ECHR") does not mean solely a right to proceedings and to a judicial decision, but also a right to the decision on the merits*."[4]

In the same sense the European Court of Human Rights (hereinafter: "ECtHR") adjudicated that:

> "*the Court reiterates that Article 6(1) of the [ECHR] guarantees the right of access to a court for the determination of civil disputes. The Court considers that this right of access to a court includes not only the right to institute proceedings but also the right to obtain a "determination" of the dispute by a court. It would be illusory if a Contracting State's domestic legal system allowed an individual to bring a civil action before a court without*

1 De Boe 2006, p. 97.
2 Opinion of Advocate general Ruiz-Jarabo-Colomer delivered on 5 March 2009, Case C-14/08 Roda Golf & Beach Ressort [2009] ECR I-5439, § 29.
3 ECtHR, cases *Stanev v Bulgaria*, judgement of 17 January 2012, http://hudoc.echr.coe.int, § 230, *Ashingdane v. United Kingdom*, judgement of 28 May 1985, Series A nº 93, § 57.
4 Constitutional Court of Slovenia, decision in case Up-107/99 (cited by Galič 2004, p. 76).

> *ensuring that the case would be determined by a final decision in the judicial proceedings. It would be inconceivable for Article 6 § 1 to describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without guaranteeing the parties that their civil disputes will be finally determined*."[5]

However, conditions of admissibility are closely linked to the institution of proceedings. "In every system of judicial protection questions of admissibility are of such importance that the Court must examine them of its own motion independently of whether they are argued by the parties."[6]

It would appear that the access to courts can legitimately be terminated at the stage of admissibility. According to the ECtHR:

> "*The mere fact that Mr Obermeier's action for a declaration was held to be inadmissible on the ground that he lacked a legal interest does not mean that he was denied access to a court, always provided that his submissions in the revocation proceedings were the subject of a genuine examination*."[7]

From the point of constitutional law and human rights law conditions of admissibility can be imposed on individual claimants only under strict conditions. Perhaps the best summary of the European doctrine on the right to access to courts is to be found in the judgement of the ECtHR in case *Markovic v Italy*:

> "*98. Article 6 § 1 [ECHR] may also be relied on by anyone who considers that an interference with the exercise of one of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 §1. Where there is a serious and genuine dispute as to the lawfulness of such an interference, going either to the very existence or the scope of the asserted civil right, Article 6 §1 entitles the individual to have this question of domestic law determined by a tribunal.*
>
> *99. The right is not absolute, however. It may be subject to legitimate restrictions such as statutory limitation periods, security for costs orders, regulations concerning minors and persons of unsound mind*."[8]

In Slovenia as well as in Croatia a strong German and Austrian influence can be seen both in legal writing as well as in case law on conditions of admissibility.[9] Slovenian law applies a sharp distinction between the admissibility and the merits of a civil action.[10] However, it has been correctly stated that the accession to the Council of Europe and the ratification of the ECHR have changed the traditional approach to the conditions of admissibility.[11] The access to courts is nowadays understood as a right to get a decision on the merits which is guaranteed as a fundamental right under Art. 23 of the Slovenian constitution and Art. 6 ECHR. Any bar to access to

5 ECtHR, case Kutic v. Croatia, judgement of 1 March 2002, http://hudoc.echr.coe.int, § 25.
6 Opinion of Advocate general Roemer delivered on 28 May 1962, case 25/26 Plaumann [1963] ECR 95 (107).
7 ECtHR, case Obermeier v. Austria, judgement of 28 June 1990, http://hudoc.echr.coe.int, § 68.
8 ECtHR, case *Markovic and others v Italy*, judgement of 14 December 2006, http://hudoc.echr.coe.int, § 99.
9 See e.g. Juhart 1963, p. 17 – 20, Zuglia 1957, p. 24 – 27, Fasching 1990, §§ 720- 736,
10 Juhart 1963, p. 17.
11 Georgievski 2006, p. 405 et seq..

courts needs a justification based on the principle of proportionality.[12] Indeed,

> *"in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision."*[13]

> "*The law may impose particular conditions of admissibility conditioning the court's obligation to render a decision on the merits, yet any such condition of admissibility is to be understood as a limitation of the right to judicial protection. Any restriction of the right to judicial protection is not necessarily inadmissible. It is such if it does not comply with the principle of proportionality*."[14]

The fundamental principle of fair trial established by article 6 ECHR does not preclude the imposition of conditions of admissibility for the institution of legal proceedings, if four necessary conditions are complied with:[15]
i. Conditions of admissibility have to be defined by "law" within the meaning of the ECHR. The concept of "law" in the ECHR "*comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability*".[16]
ii. Failure to comply with the conditions of admissibility must be mandatorily due to an act or omission by the party and not by the court or judicial authority.
iii. Conditions of inadmissibility must pursue a legitimate aim.
iv. Conditions of admissibility or any other procedural bar must comply with the principle of proportionality.

It is suggested that access to justice shall be understood as meaning a right to get a decision on the merits of a civil action, i.e. be it either a declaration on the existence or non-existence of a right, legal relation or authenticity of a document (*actio declaratoria*),[17] either a creation, termination or modification of a right, obligation or legal relation (*actio constitutiva*) or a compelling judgement ordering the defendant to perform an obligation *dandi*, *faciendi*, *praestandi* or *ommittendi* (*actio condemnatoria*). In order to get such a judicial decision in Slovenia conditions of admissibility must be complied with. In other words, if one defines access to courts in Slovenia as a right to get a decision on the merits of a case, then the conditions of admissibility form a group of circumstances that may constitute an obstacle to the access to courts.[18] The meaning of a right to judicial remedy is "a guarantee that the court will (in reasonable time) decide on the merits of a case the court is called to decide upon".[19] "The most important practical consequence of defining the access to justice as a right to a decision on the merits is that the legislator is limited in civil procedure when determining conditions of admissibility conditioning the question whether the court will render a decision on the

12 Galič 2011, p. 342.
13 ECtHR, *Delcourt v. Belgium*, judgement of 17 January 1970, Judgments and Decisions 1970, A 8-16.
14 Galič 2004, p. 77.
15 Gilliaux 2012, p. 370.
16 See as far as questions of admissibility are concerned ECtHR, case *Ligue du monde islamique and Organisation islamique mondiale du secours islamique v. France*, judgement of 15 January 2009, http://hudoc.echr.coe.int, §§ 51 – 58.
17 Art. 181 of the Slovenian law on civil procedure (hereinafter the "ZPP"), Official Journal of the Republic of Slovenia Nr. 26/99, 96/02, 2/04, 52/07, 45/08 and 45/08.
18 See Galič 2011, p. 342 and also Spühler, Dolge & Gehri 2010, p. 107.
19 Galič 2011, p. 342 with reference to the Constitutional court, case Up-76/03 and U-I-288/04.

merits."[20]

3. The position of conditions of admissibility in civil procedure: the modern sequitur, ut de exceptionibus dispicamus

When during the 19th century in some civil law countries legal scholars like Bernhard Windscheid and Giuseppe Pisanelli started separating a substantive subjective right from a personal procedural claim (already understood as a subjective right) in a Roman *actio*, the unforeseen consequences were also that the system of mixed procedural and substantive objections and defences (*exceptiones dilatoriae* and *exceptiones peremptoriae*) and of nullities known in *ius commune* procedure *de civilibus* could not remain unchanged.[21] One could even consider that the procedural *exceptiones dilatoriae* of *ius commune* were partially transformed into the conditions of admissibility in modern civil procedure.[22]

The role of the *exceptiones* was described in *Gai institutiones* as follows: "*Conparatae sunt autem exceptiones defendendorum eorum gratia, cum quibus agitur*".[23] During the reception of Roman law the glossators started dividing the *exceptiones dilatoriae*[24] in substantive defences and procedural objections that are obstacles to proceedings (*exceptiones declinatoriae iudicii sive fori*) like the *exceptio procuratoria* (the objection that the plaintiff's representative has no right to act as a representative),[25] *exceptio cognitoria*,[26] *exceptio praeiudicialis* and the *praescriptio fori*.[27] The next step in the development was the introduction of the conditions of admissibility, as all the aforementioned objections concern the admissibility of rulings on the merits. They concern the capacity of persons to act, the court's jurisdiction, the subject – matter of the litigation and the admissibility of procedural acts. In other words they are the constitutive elements of any proceedings.[28]

Conditions of admissibility are formal conditions for admissibility of proceedings on the merits.[29] In Slovenia courts rule on any question regarding the conditions of admissibility by an order, whereas the ruling on the merits takes the form of a judgement (the most notable exception being the *actiones possessoriae*). However, a distinction has to be made between the conditions of admissibility of the whole proceedings and conditions of admissibility of separate procedural acts undertaken by courts, the latter do not concern the conditions of admissibility for instituting proceedings on the merits.[30]

It would be rather a restrictive approach to conditions of admissibility, if they were considered only applicable to civil actions. Such conditions apply not only to civil actions but also to counterclaims (*reconventiones*) and some defences that have the same effect as counterclaims. According to

20 Galič 2011, p. 343.
21 Teixeira de Sousa 2010, p. 13.
22 Nörr 2012, p. 99.
23 Manthe 2010, p. 384. However, it would appear that the interpollated text given by prof. Manthe is not completely correct. See Gai. 4, 16.
24 Gai. 4, 124.
25 Berger 1991, p. 459 and 460
26 Berger 1991, p. 458.
27 Bülow 1868, p. 19 and 20.
28 Bülow 1868, p. 6.
29 Rijavec 2003, p. 99.
30 Rosenberg, Schwab & Gottwald, 2004, p. 619.

Slovenian jurisprudence

> "*Conditions of admissibility of a civil action must be complied with also for lodging the defence of set-off (exceptio compensationis)*."[31]

Conditions of admissibility and conditions of the substantive law in proceedings have the same aim, namely the protection of substantive subjective rights in the framework of proceedings.[32]

In Austrian and Croatian law as well as in Slovenian law the conditions of admissibility may be defined as a group of circumstances that either must exist (positive conditions of admissibility like personal, direct present and legitimate interest in bringing proceedings) or must not exist (negative conditions of admissibility like the *exceptio rei iudicatae*) in order that a court can give a ruling on the merits of a case. Also in Slovenia conditions of admissibility are preliminary conditions for the decision on the merits of a case, therefore it might even be better to consider them as preliminary conditions for adopting a decision on the merits of a case.[33]

However, Slovenian legal writers did not go as far as Croatian writers who state that legal and correct results of administration of justice would be impaired if the circumstances protected by the conditions of admissibility were not taken into consideration.[34] Instead it is stated that the seised court will have to reject (*decline*) the request for judicial protection in the form of a civil action, request or any other writ due to failure of compliance with requirements set by conditions of admissibility.[35]

Some procedural laws based on a different tradition like French, Belgian and Luxembourgish law consider conditions of admissibility (*les fins de non – recevoir*) within the framework of a right of lodging a civil action before courts. Such legal orders consider the conditions of admissibility as a way of procedural defence together with procedural objections (*les exceptions de procédure*) and substantive defences (*défense au fond*).[36] In such legal orders conditions of admissibility for lodging an action are formed of three groups, namely the interest in bringing proceedings, *locus standi* and capacity to take legal proceedings.[37] It is even considered that the conditions of admissibility are procedural defences concerning the access to justice.[38] Conditions of admissibility are considered to have the same definitive effect as substantive defences. However as in cases of procedural objections, no questions of substance are discussed.[39] They are a defence that bars a ruling on the merits of the case if the court has jurisdiction and if the court has been dully seised by the claimant.[40] However, this doctrine is not known in Slovenian law.

The differences are not just doctrinal, they are extremely important also *in praxi*. In France, Belgium and Luxembourg e.g. the objection of limitation (*exceptio praescriptionis, l'exception de*

31 Court of Appeal of Ljubljana, judgement in case II Cp 2243/94.
32 Teixeira de Sousa 2010, p. 43.
33 Rechberger & Simotta 2010, § 501.
34 Triva, Belajec & Dika 1986, p. 24.
35 Rijavec 2003, p. 99.
36 Couchez 2014, §§ 161 – 165.
37 De Boe 2006, p. 97.
38 De Leval 2005, § 32.
39 Ibid.
40 Block 2002, p. 408.

prescription) - even though only examined upon objection by the defendant - is considered as a condition of admissibility, whereas in Slovenia the objection of limitation is a substantive defence not barring the court to take cognisance of the case, it solely bars the court from granting the form of order sought by the claimant.[41] The logical consequence of Slovenian legal thinking being that a substantive judgement rendered after the objection of limitation raised exclusively by the defendant(s) will acquire a substantive *res iudicata effect* (*res iudicata ius facit inter partes*).[42] The other important difference is that the objection of the lack of competence in Slovenia is rather limited. International jurisdiction of Slovenian courts, jurisdictional competence, competence *ratione materiae* are examined of its own motion by the court after lodging the application during the duration of whole proceedings and even *a limine* before the service on the defendant. The international jurisdiction of Slovenian courts and their jurisdictional competence are considered as absolute conditions of admissibility.[43] The jurisdiction and competence are conditions of admissibility for a ruling on the merits. In Slovenia objections of lack of competence that are left to the defendant to be raised pertain solely to the jurisdiction *ratione loci* – if there is not *forum exclusive* – and also to contractual clauses on prorogation of jurisdiction. In all other cases the question of jurisdiction must be examined of its own motion by the court. Any other objection of lack of competence is solely a suggestion put to the Slovenian court to examine the conditions of admissibility. However, in France the lack of competence is a preliminary objection (*l'exception d'incompetence*) that has to be raised before examining any condition of admissibility.[44] It is even said that "*pour pouvoir statuer sur une fin de non – recevoir, il faut tout d'abord qu'il y ait un juge apte à juger*" (in order to rule on a condition of admissibility, the judge must have jurisdiction to issue a ruling).[45] Such a jurisdiction and competence concern a procedural phase which precedes the examination of admissibility.[46] The lack of competence or the lack of jurisdiction do not solely bar a decision on the merits, they also bar a court from ruling on the (in)admissibility of an action.[47] In other words, such a defence is a procedural bar, however not a condition of admissibility. Perhaps the more interesting issue is the fate reserved to the *exceptio plurium litisconsortium* i.e. a procedural situation where a civil action should have been lodged against several co-defendants (like in cases of a *litisconsortium necessarium*) and the claimant either forgot to mention one of them in the written submissions or lodged an action against a single person. In Slovenian law such an objection is considered as a defence on the merits and entails a judgement on the merits of a case (dismissal of an action as unfounded). In other procedural traditions such an error entails the inadmissibility of an action.[48]

According to Slovenian jurisprudence

> "*A statement of reasons in the judgement given by the court of first instance must compulsorily include the court's opinion [...] on conditions of admissibility for adopting a*

41 Ibid. See also Art. 122 French Noveau code de procédure civile: »*Constitue une fin de non-recevoir tout moyen qui tend à faire déclarer l'adversaire irrecevable en sa demande, sans examen au fond, pour défaut de droit d'agir, tel le défaut de qualité, le défaut d'intérêt, la prescription, le délai préfix, la chose jugée*.«

42 See as far as the principle *res iudicata ius facit inter partes* and the objection of limitation is concerned in Court of Appeal of Ljubljana, judgement in case III Cp 1197/2009 and as far as the admissibility of an objection of limitation is concerned Court of Appeal of Koper, judgement in case I Cpg 99/2006.

43 Art. 17 – 22 Slovenian law on civil procedure.

44 See Articles 73 and 74 French Noveau code de procédure civile.

45 Bock 2002, p. 175.

46 Bock 2002, p. 176.

47 Bock 2002, p. 176.

48 Rideau & Picod 2002, p. 206.

> *decision on the merits of the case*."[49] and "*in the statement of reasons of a default judgement the court solely sets out the conditions of admissibility allowing such a judgement.*"[50]

In order to know why there is such an emphasis on the conditions of admissibility, one needs to look at the historical origins of current Slovenian law.

Slovenian law on civil procedure is a derivative of the Austrian ZPO.[51] It follows the traditional German and Austrian doctrine on conditions of admissibility (*Prozessvoraussetzungen*, *procesne predpostavke*) in civil procedure developed since 1868 by the German legal scholar Oskar von Bülow in his work *Die Lehre von Processeinreden und Processvoraussetzungen*.[52] Slovenian legal writers even affirm that the discovery of the term of conditions of admissibility belongs to the most important discoveries in modern science on civil procedure.[53] It might be interesting to examine the influence of infringements of the conditions of admissibility on the ruling on the merits. Are judgements on the merits infringing the conditions of admissibility void (*nična sodba*) or only voidable (*izpodbojna sodba*)? Slovenian legal writers suggest that the infringement of essential procedural requirements of conditions of admissibility can cause either a voidable or a void judicial decision on the merits of a case, as any condition of admissibility bars the cognisance of the merits of the case.[54] Infringement of conditions of admissibility renders the entire proceedings invalid. *A majore ad minus* the judgement on the merits is therefore also invalid.[55] Such an invalid judgement is very rarely void (*absolute nullity*), it is rather voidable (*relative nullity*). This means that after the expiry of time limits for recourses such a judgement infringing requirements of conditions of admissibility still can acquire even a substantive *res iudicata* effect. One of the rare cases of absolutely void judgements in Slovenia is a judgement in a case where one of the parties (be it the claimant or the defendant) is non-existent. Such a judgement cannot acquire a substantive res iudicata effect and does not bind either the court or the still existing party.[56] Such situations in Slovenian law are not that rare, usually they refer to litigation of a legal person that has been wound up and ceased to exist in collective insolvency proceedings. However, it can happen that an action is directed against a deceased person or that a party to the cases dies during the proceedings. In other words, the differences between void and voidable decision on the merits cannot be used for a definition of a condition of admissibility. Therefore alas as in several laws of civil procedure in Europe conditions of admissibility in Slovenian law cannot be exhaustively enumerated.[57]

Also in Slovenian law the conditions of admissibility are the first hurdle that the parties (and *a fortiori* the claimant or the appelant) must take and overcome.[58] According to Slovenian jurisprudence

> "*as there was no compliance with conditions of admissibility of a recourse (the appeal has not been lodged within the time-limits), the Court of Appeal did not examine the legality of*

49 Supreme Court of Slovenia, order in case II Ips 678/2007.
50 Court of Appeal of Ljubljana, judgement in case II Cp 1502/2000.
51 To use the expression of Prof. Uzelac, the Austrian ZPO is the grandfather of the Slovenian ZPP.
52 Juhart 1963, p. 18, Fasching 1990, § 721.
53 Juhart 1963, p. 18.
54 Juhart 1963, p. 19, Sajovic 1941, p. 1.
55 Sajovic 1941, p. 2.
56 Court of Appeal of Ljubljana, judgement in case Cpg 574/93
57 Spühler, Dolge & Gehri 2010, p. 107
58 Ibid.

> *the impugned order of the court of first instance.*"[59]

> "*If there is a lack of conditions of admissibility of a recourse (in this case a lack of legitimatio ad processum), a decision on the merits of the recourse is not admissible. Consequentially the appellate court is not allowed to assess the judgement of the court of first instance.*"[60]

It is true that as a rule the conditions of admissibility shall be assessed as soon as possible and already in the preliminary assessment of the civil action by the court, i.e. the phase of proceedings following the lodging of the action that is closed by the service upon the defendant.[61] However, the modern Slovenian form of civil procedure does not know the *res in iudicium deducta* in proceedings on first and second instance. In other words there are no special "first stage" preliminary proceedings limited to questions of admissibility. Proceedings before ordinary courts and labour courts which apply the law of civil procedure are not composed of preliminary procedure limited to the questions of admissibility and a second stage main procedure concerning the merits. It is stated that elements for assessing the conditions of admissibility are so intrinsically connected with the merits of the case that a ruling on the admissibility can only be given shortly before the ruling on the merits.[62] Under the Austrian influence conditions of admissibility can be examined separately in a preliminary phase of proceedings that is not linked to the merits of the case, however, they can also be assessed together with the questions of the merits.[63]

That is not to say that Slovenian law does not know special procedures where there is a special decision on the admissibility followed in at a later stage by a decision on the merits. Such procedures are typical for the Constitutional Court,[64] and also known in civil procedure before the Supreme Court of the Republic of Slovenia in exatrordinary remedies like the request for leave to lodge a final appeal limited to question of law in cases of important questions of law or of contradictory jurisprudence (*dopuščena revizija* copied after the German model of *die Zulassungsrevision*). The scope of that procedure is nevertheless limited to cases where there is no final appeal (*revizija*) allowed *ispo iure.*[65]

If a claimant lodged a civil action, the court is supposed to adopt a ruling on the merits of this action.[66] However, before deciding on the merits of the civil action, courts must examine if such an action is admissible.[67] Slovenian jurisprudence is quite clear on that point. Under the current jurisprudence

> "c*onditions of admissibility [...] concern the admissibility of civil proceedings (on the merits)*[68]

59 Court of Appeal of Ljubljana, order in cases II Cpg 1117/99 and II Cpg 1118/99.
60 Court of Appeal of Ljubljana, judgement in case Cpg 574/93
61 Articles 272 – 275 Slovenian ZPP, See also Rijavec 2006, p. 545.
62 Triva, Belajec & Dika 1986, p. 25
63 Zuglia 1957, p. 25.
64 Sladič 2012, p. 21.
65 Final appeals as of right (*dovoljena revizija*) are admissible in cases where stakes *ratione valoris* of impugned judgements of courts of appeal are higher than 40.000,00 EUR in civil cases and more than 200.000,00 EUR in commercial cases.
66 Juhart 1963, p. 17.
67 Juhart 1963, p. 17.
68 Court of Appeal of Ljubljana, order in case I Cpg 710/2010 Triva, Belajec & Dika 1986, p. 24.

The difference between the merits and the admissibility can be explained in the following case. The aim of the condition of admissibility of *legitimatio ad processum* (more known to common law lawyers as *locus standi*) is the determination of the person who can act as claimant and of the person who can act as the defendant. Therefore the jurisprudence explained that

> *"In order to rule on the admissibility of a civil action regarding the condition of admissibility of legitimatio ad processum it is not necessary for the claimant to prove that he is the real creditor, i.e, it is not necessary to prove his legitimatio activa and the claimant needs not prove that the defendant is the real debtor, a simple allegation is sufficient.*[69]*"*

In a case where an administrator of the housing tenure divided in condominia cannot *ex lege* represent the (co)owners of a condominium, any question of nullity of a contract for administration of a condominium does not pertain to the *legitimatio activa* of the co-owners (they are indisputably actively legitimated), it pertains to the representation of co-owners of the housing tenures divided in condominia. As the power to represent belongs to the conditions of admissibility the court of first instance erred when it gave a ruling on the merits, as the administrator was not empowered to act on behalf of the co-owners.[70]

Any failure concerning the conditions of admissibility renders the proceedings on the merits inadmissible. Already a single failure of compliance with conditions of admissibility renders the assessment of other conditions unnecessary.

> "*If one condition of admissibility is not complied with, […] the court does not even assess if other conditions conditions of admissibility required by the law are complied with (like filling the action within the legally foreseen time – limits, completeness of the written submissions).*"[71]

4. The division of conditions of admissibility

Conditions of admissibility in Slovenian law are usually categorised into three groups (the *summa divisio*), namely (i.) conditions of admissibility pertaining to the court, (ii.) conditions of admissibility pertaining to the parties and (iii.) conditions of admissibility pertaining to the subject matter of the case.[72]

Some writers also consider that there is a special group of conditions of admissibility linked to the form of an application or procedural (i.e. like incomplete applications i.e. conditions of admissibility regarding the question of the form in proceedings).[73] The (in)existence of that group of conditions of admissibility has not yet encountered an in-depth exam in Slovenian legal writing. Some legal orders consider that question rather as a question of nullity of procedural acts.[74]

69 Court of Appeal of Ljubljana, judgment in case II Cp 3923/2011.
70 Court of Appeal of Ljubljana, judgement in case II Cp 462/2013
71 Court of Appeal of Maribor, order in case I Ip 978/2013
72 Juhart 1963, p. 19, see also for Croatian legal writers Zuglia 1957, p. 25 -26, see in Austria Fasching 1990, §§ 724-726, Rechberger & Simotta 2010, § 502 and in Germany Rosenberg, Schwab & Gottwald, 2004, p. 619-620.
73 Juhart 1963, p. 19, see also for Croatian legal writers Zuglia 1957, p. 26.
74 See e.g. Art. 860 and 861 of the Belgian Code judiciaire/Gerechtelijk Wetboek and Baetens – Spetschinsky 2010, p. 63 – 64.

However the advantage of considering formally incomplete submissions as inadmissible is the lack of any doctrine of nullities of (procedural) acts.[75]

The *second division* of conditions of admissibility is threefold namely in absolute and relative, then in general and special and finally in positive and negative conditions of admissibility.[76]

4.1. Absolute and relative conditions of admissibility

The importance of this division is that absolute conditions of admissibility must be examined before the substance of a case by court *ex officio* in the interests of the sound administration of justice, they are a part of procedural public policy. Seen in comparative perspective the same approach to absolute conditions of admissibility seems to be accepted also at the Court of Justice of the European Union "An unrestricted examination of issues of admissibility also corresponds to the scheme of the provisions on procedure as a whole, since a discussion on the substance presupposes that the Court of First Instance has jurisdiction and that the action is admissible."[77]

Relative conditions of admissibility are assessed solely upon objection by the defendant. It is considered that an agreement on arbitration and the *cautio iudicatum solvi* are relative conditions of admissibility. They are solely procedural obstacles and do not concern the admissibility of an action.[78]

According to jurisprudence the existence of a vested interest in bringing proceedings is an absolute condition of admissibility which pertains to the subject matter of the litigation that has to be examined by the court of its own motion.[79]

4.2. Positive and negative conditions of admissibility

The positive conditions of admissibility must be complied with during the whole proceedings. *A contrario* negative conditions of admissibility must not exist during the whole proceedings.

4.3. General and special conditions of admissibility

General conditions of admissibility comprise the whole proceedings. *A contrario* special conditions concern the admissibility of particular procedural acts performed by the court.

One of the special conditions of admissibility is found quite often in Slovenian procedural law. In case of the defendant's death the court orders a stay of proceedings. The claimant may amend his action against the successors-in-title of the deceased person (so called *subjective amending of action*). However, the consent of the new co-defendant to the (subjective) amending of an application in cases of consequent co-defendants (*litisconsortium a posteriori)*[80] is a special

75 See e.g. Art. 343 Slovenian ZPP.
76 See. Fasching 1990, §§ 720 – 737,
77 Opinion of Advocate general, Kokott, C-229/05 PKK and KNK v. Council [2007] ECR I-439, § 31, Sladič 2008, p. 142 and 143.
78 Juhart 1963, p. 18.
79 Court of Appeal of Maribor, order in case Cp 1363/97.
80 in Slovenian *naknadno sosporništvo* and in German *die nachträgliche Streitgenossenschaft*.

condition of admissibility[81]. In such a situation Slovenian courts do not have the power to order the joining of parties concerned ex officio.

4.4. Conditions of admissibility pertaining to the court

Such conditions of admissibility concern jurisdiction and competence (venue) of the court.[82]

The different conditions of admissibility pertaining to the court's jurisdictions can be divided:
a. no (personal) immunity from jurisdiction of Slovenian courts,
b. international jurisdiction of Slovenian courts,
c. jurisdictional competence under the rules of municipal law.[83]

All of the above mentioned conditions belong to positive, general and absolute conditions of admissibility.

Slovenian legal writers consider that the situation of the competence *ratione materiae* (i.e. jurisdiction of the court to take cognisance of the remedy) and competence *ratione loci* is not that clear. They can be considered as conditions of admissibility. However, a court not having jurisdiction *ratione materiae* or *ratione loci* does not declare a civil action inadmissible, it declares a lack of competence and simply refers the case to the Slovenian court having jurisdiction.[84] In other words there is no bar to proceedings.

4.5. Conditions of admissibility pertaining to the parties

According to legal writers civil proceedings are allowed only under condition of existence of parties.[85] In general such conditions comprise:

a. capacity of bringing proceedings (i.e. legal capacity under substantive law),[86]
b. capacity to sue or be sued of particulars and legal persons (*persona legitima standi in iudicio*),[87]

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81 Court of Appeal of Ljubljana, order in case II Cp 471/2011.
82 The difference between jurisdiction and competence has been explained by Advocate General Ruiz Jarabo Colomer as "*Competence presupposes jurisdiction, which it delimits in order to determine which out of all the courts and tribunals in a territory must settle a particular dispute. Although the two concepts overlap one another to a great extent, they are not incompatible or contradictory."* (opinion of Advocate-General delivered on 8 November 2006, Case C-292/05 *Lechouritou* [2007] ECR I-1519, § 77).
83 So called judicial jurisdiction (*sodna pristojnost*), i.e. the matter is not left to Slovenian administrative authorities or independent authorities *sui generis* like the Court of Auditors or the State's Commission for the Review of Public Procurement.
84 Art. 23 Slovenian ZPP, Juhart 1963, p. 19.
85 Juhart 1963, p. 19. See Art. 80 ZPP.
86 Art. 76 Slovenian ZPP. However, the capacity of bringing proceedings is not limited to particulars and legal persons of domestic law. Any foreign legal person be it of public or of private law hat a *ius standi in iudicio.* According to Art. 76(3) ZPP the capacity of bringing proceedings is recognised to »*such forms of association, who do not have the capacity of bringing proceedings [...] if the court finds with regards to the contentious case that essentially major conditions for acquisitions of a capacity to bring proceedings are complied with*«. Usually the capacity in bringing proceedings is recognised to commercial companies *in statu nascendi,* i.e. for stages before the acquisition of legal personality.
87 Art. 77 Slovenian ZPP.

d. capacity of both parties to perform procedural acts themselves,[88]
e. *legitimatio ad processum* of the party,
f. correct representation of incapable parties (*incapaces*),[89]
g. existence of a mandate to represent a party and capacity to represent a party (*ius postulandi*).[90]

All of the above mentioned conditions belong to positive, general and absolute conditions of admissibility.

An action against a person who dies before the lodging of an action is inadmissible. The capacity of bringing proceedings is a peculiar condition of admissibility, as any problems with it cannot be remedied at all. Physical persons loose such capacity on their death, the continuation of proceedings with successors-in-title is no remedy.[91] This is not to say that Slovenian law does not adhere to the principle *nostris videtur legibus una quodammodo persona heredis et ilius qui hereditatem in eum transmittit* in law of successions. However, that principle is strictly limited to substantive law and cannot be applied in civil procedure. Irregularities linked to the capacity in bringing proceedings are severely dealt with by Slovenian jurisprudence: if a physical person having a quality of the party, did not exist in the moment of lodging of a civil action the lack of condition of admissibility of capacity in bringing proceedings cannot be remedied; nor can the same condition be remedied in a case of a legal person that ceased to exist, such a person cannot lodge a civil action, even representation by attorneys cannot remedy that irregularity.[92]

4.6. Conditions of admissibility pertaining to the subject – matter of the case

In Slovenia the following conditions of admissibility pertain to the subject – matter of the case:
a. *res iudicata* (*exceptio rei iudicatae)*,
b. *res transacta* (*exceptio rei transactae),*
c. *lis pendens*,
d. interest in bringing proceedings (*id quod interest, pravni interes*)
e. waiver of the claim.[93]

All the above mentioned conditions of admissibility are absolute. With the exception of the interest in bringing proceedings they are negative and general.[94] One could even consider that from the point of view of Art. 6(1) ECHR the above enumerated conditions of admissibility pertaining to the subject – matter of the case are the least disputed ones.[95] According to the Slovenian law on civil procedure (Art. 181 ZPP) interest in bringing proceedings is required *expressis verbis* for declaratory actions. It is considered that the examination of the interest in bringing proceedings is not needed for constitutive and condemnatory actions. A request addressed to the Slovenian court to create, modify or terminate a right or an obligation in civil proceedings as well as a request for a condemnation to an obligation *dandi*, *faciendi*, *praestandi* or *ommittendi* contain a *praesumptio*

88 Art. 77 Slovenian ZPP.
89 Articles 78 and 79 Slovenian ZPP
90 Juhart 1963, p. 19.
91 Court of Appeal of Ljubljana, order in case II Cp 1898/2009.
92 Court of Appeal of Maribor, order in case I Cp 1846/2010.
93 Juhart 1963, p. 19.
94 See for negative conditions of admissibility Court of Appeal of Maribor, order in case I Cpg 329/2013.
95 See as far as interest in bringing proceedings and Art. 6(1) ECHR are concerned Sladič 2012, p. 22.

iuris et de iure of such an interest.[96] Interest in bringing proceedings in constitutive actions is so intrinsically linked to the institute of a constitutive action that Slovenian legal writers emphasise that the interest in bringing proceedings exists already if a constitutive action needs to be lodged.[97] However, recent jurisprudence started considering that the proof of the claimant's interest in bringing proceedings might be necessary also in other types of actions (like constitutive actions). According to jurisprudence:

> "*Interest in bringing proceedings is a condition of admissibility that has to exist in every stage of proceedings. When the court of first instance rescinded the contract by which the elderly farmer reserved a part of a cottage after he passed the farm over to his heirs the claimant no longer has an interest for challenging debtor's legal acts (actio Pauliana) performed by the conclusion of the above mentioned contract*."[98]

Interest in bringing proceedings is also required for appeals (*pritožba*) and final appeals (*revizija*) under Article 343(4) Slovenian ZPP. The interest in appeal is considered to have in principle an identical role as the interest in bringing proceedings before the courts of first instance. However, the interest in appeal can be also different, as it is not linked to interest in getting a judgement on the merits from the court of the first instance, it is linked to getting either setting aside or reformation of the impugned ruling or the dismissal of the appeal.[99]

According to jurisprudence:

> "*an appeal is inadmissible, if there is no decision of the first instance aversely affecting the appellant. An interest in appeal exists only if the appellant could get a decision at the appeals level that would be more favourable to him*".[100]

> "*An interest in appeal has to be vested when lodging the appeal, during the entire appellate procedure as well as in the moment when the appellate court rules on the appeal.*"[101]

However, as far as the subject – matter of a dispute is concerned, a court is under obligation to examine and determine the contents and the subject – matter of a civil action. An action cannot be dismissed as inadmissible due to lack of conditions of admissibility if the court does not determine the contents and the subject – matter of the action.[102] However, if the claimant after the additional invitation by the trial court does not complete an incomplete action, the claim in the action cannot be identified, such an action is incomplete and therefore inadmissible.[103]

Stamp duty in current Slovenian law is a bar to proceedings pertaining to the subject - matter of the litigation, however it is not a condition of admissibility. If the stamp duty is not paid, the claimant is deemed to have withdrawn his action. *In praxi* the most important group of procedural bars like stamp duty, time – limits for lodging recourses and other remedies concern the subject – matter of

96 Sladič 2012, p. 20 and 21.
97 Juhart 1963, p. 262.
98 Court of Appeal of Ljubljana, order in case II Cp 2106/2012.
99 Sladič 2012, p. 34.
100 Court of Appeal of Ljubljana, order in case III Cp 55/2001 and order in case III Cp 1396/2000.
101 Court of Appeal of Koper, order in case II Ip 303/2013.
102 Labour and Social Court of Appeal of the Republic of Slovenia, order in case Psp 43/2013.
103 Court of Appeal of Ljubljana, judgement and order in case I Cpg 746/2010.

the litigation. According to the jurisprudence "*the restriction of a right to appeal by conditioning a preliminary payment of a stamp duty does not necessary represent an inadmissible restriction of the right to judicial protection, there is no constitutional inadmissibility*".[104]

5. Conditions of admissibility and other procedural bars originating in international law in Slovenian jurisprudence

5.1. State immunity

According to the International Court of Justice

> *"the law of immunity is essentially procedural in nature. It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law"*[105]

In other words, the law of immunities is constituted of conditions of admissibility.

5.1.1. Position of Slovenian courts

In Europe legal actions relating to history between 1939 – 1945 are still being brought before civil courts. Cases of victims claiming reparation in the form of actions for compensation from Germany for delicts (torts) committed by the Wehrmacht or other Nazi authorities during the war are still pending before European courts. The most internationally known current case is the case of the Greek village Distomo.[106] It is interesting that Slovenian courts referred *expressis verbis* to the Distomo jurisprudence of Greek courts when answering pleas in law according to which Slovenian courts should decide similar cases on the merits and condemn Germany to reparation for delicts having a nature of crimes against humanity committed by the Nazi occupation authorities.[107]

The county court of first instance in Celje in Lower Styria in Slovenia dismissed as inadmissible an application lodged by a group of claimants (brothers and sisters) against Germany for material and

104 Court of Appeal of Ljubljana, order in case I Cp 4199/2010.

105 Arrest Warrant of 1 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgement, I.C.J. Reports 2002, p. 25, para. 60 and Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), Judgement, I.C.J. Reports 2012, p. 99, § 58.

106 257 Greek citizens had brought an action against Germany which was upheld by the Court of First Instance, Livadia, in a decision of 30 October 1997. That decision was upheld by the Greek Supreme Court by a judgement dated 4 May 2000 (see Opinion of Advocate general Ruiz Jarabo Colomer delivered on 8 November 2006, Case C-292/05 *Lechouritou* [2007] ECR I-1519, Fn. 6). On 10 June 1944, during the German occupation of Greece, German armed forces committed a massacre in the Greek village of Distomo, involving many civilians. In 1995, relatives of the victims of the massacre who claimed compensation for loss of life and property commenced proceedings against Germany. The Greek Court of First Instance (*Protodikeio*) of Livadia rendered a default judgement on 25 September 1997 (and read out in court on 30 October 1997) against Germany and awarded damages to the successors in title of the victims of the massacre. Germany's appeal in cassation of that judgement was dismissed by the *Areios Pagos* on 4 May 2000 (Prefecture of Voiotia v. Federal Republic of Germany, case No. 11/2000 (ILR , Vol. 129, p. 513) (*the Distomo case*)), see Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), Judgement, I.C.J. Reports 2012, p. 99, § 30.

107 See Supreme Court of the Republic of Slovenia, order in case II Ips 55/98. Slovenian courts refused any influence of Greek Distomo jurisprudence. "*It is not possible for Slovenian courts to appreciate the regularity and effects in creation of international law of a judgement given by a foreign court […] (that is of course not a part of customary international law)".*

immaterial prejudice. The claimants were forced as young children in occupied Slovenia to undergo a racial medical examination. Following that examination their parents were killed and the children were taken *manu militari* by Nazi occupation authorities due to their alleged racial superiority and transferred to Germany to be "germanised". The court of Appeal of Celje dismissed the appeal with a statement of reasons according to which Slovenian courts cannot take cognisance of *acta iure imperii* of authorities of Nazi Germany under the rule *par in parem non habet iurisdictionem*. Then there followed a final appeal limited to the points of law (*revizija*) to the Supreme Court raising the plea in law according to which the immunity of jurisdiction of states is no longer recognised in international law and that states should stand before the courts of other states for wrongs committed by their occupation. The Slovenian Supreme Court rejected the plea.

According to the Supreme Court:

> "*The defendant [sc. Germany] has a right of state immunity from jurisdiction of Slovenian courts under the rules of international law in this litigation based on extracontractual liability against a foreign state for acts committed by agents of that state during the occupation of our state between the second world war that according to claimant's narration are deemed crimes against humanity and genocide. This immunity has not been waived either expressly or tacitly.*
>
> *The contentious question in this case has to be examined also from the point of view of the principles of interdiction of denial of justice (Art. 23. of the Constitution, Art. 6. ECHR), as one might consider that there is an infringement of human rights in cases where a legal system recognises a certain right (in this case e.g. the legal basis for extracontractual liability could be in the 1907 Hague Convention [sc. Convention respecting the Laws and Customs of War on Land of 18 October 1907] as claimed in the action) and it does not recognise means to have it enforced (the principle ubi ius, ibi remedium). However, the claimant is not barred from enforcing the claims raised before the Slovenian court in proceedings before a court on the defendant's territory. [...] The claimants are not barred from seising a German court and therefore they have not been deprived of judicial protection*."[108]

The above cited order of the Slovenian Supreme Court in case II Ips 55/98 was challenged before the Constitutional Court. That court rejected the constitutional appeal. According to the Constitutional court

> *"19. According to a general rule a court of the Republic of Slovenia has jurisdiction not only in cases, where the defendant has its permanent domicile on the territory of the Republic of Slovenia, but also if the harmful event occurred in the territory of the Republic of Slovenia or if the harmful consequences occurred in the territory of the Republic of Slovenia (see Art. 55. Law on Private International Law and Procedure). In the case of the appellant such a link with the Republic of Slovenia is shown. As there is a reasonable link between the appellant's case and the Republic of Slovenia, the denial of judicial protection before Slovenian court constitutes a restriction of the right to judicial protection.*
>
> *20. Such a restriction of the right to judicial protection is admissible solely if it complies*

108 See Supreme Court of the Republic of Slovenia, order in case II Ips 55/98.

> *with the principle of proportionality. This means that the restriction must be necessary and indispensable in order to achieve the pursued and constitutionally legitimate aim and in proportion with the importance of that aim. [...]*
>
> *21. Immunity from jurisdiction is a reflection of the principle of equality of states and therefore also of respect of independence and dignity of the other state. The rule* par in parem non habet iurisdictionem *according to which legal persons possessing the same status cannot abandon the decision to the courts of one of them, is derived from that principle. Such an aim is constitutionally legitimate, the exclusion of judicial protection is necessary and indispensable to achieve that aim. Indeed, the aim can only be achieved by the exclusion of jurisdiction of courts in the other state. The exclusion of judicial protection in the Republic of Slovenia is also in proportion with the importance of the pursued aim. The respect of sovereign equality of states is important for preservation of international cooperation and coexistence between the states. On the other hand, the appellant has not been deprived of any judicial protection by the challenged orders, he has been deprived solely of protection before a domestic court. The appellant can under general rules on jurisdiction (*actor sequitur forum rei*) sue the Federal Republic of Germany before her municipal court, where the argument of state immunity from jurisdiction cannot be upheld. […].*"[109]

5.1.2 Position of the Court of Justice of the European Union

In *Lechouritou* case the Advocate - General Ruiz Jarabo-Colomer concluded that

> "*actions for compensation which are brought by natural persons of a Contracting State party to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, seeking redress for loss or damage caused by the armed forces of another Contracting State when it invaded the first State in a military conflict, do not fall within the scope ratione materiae of that Convention even if the acts concerned amount to crimes against humanity*."[110]

Conditions of admissibility are assimilated to procedural bars. According to Advocate - General Ruiz Jarabo-Colomer

> "*State immunity is created as a procedural bar which prevents the courts of one State from giving judgement on the liability of another, since, [...] par in parem non habet imperium ('an equal has no authority over an equal'), at least with regard to acts iure imperii, from which it follows that proceedings are barred*."[111]

5.1.3. Position of the European Court of Human Rights

Principles of international law creating procedural bars for individual claimants were examined in several decisions by the European Court of Human Rights. One can classify three groups of

109 Constitutional Court of the Republic of Slovenia, decision in case Up-13/99, see also Landgericht Bonn, judgement of 11 December 2013 in case 1 O 460/11, § 35, Juristenzeitung 2014, p. 412.

110 Opinion of Advocate-General delivered on 8 November 2006, Case C-292/05 *Lechouritou* [2007] ECR I-1519.

111 Opinion of Advocate-General delivered on 8 November 2006, Case C-292/05 *Lechouritou* [2007] ECR I-1519, § 76.

conditions of admissibility or procedural bars in international law recognised by that Court:[112]
a. state immunity from jurisdiction (cases *Cudak v. Lithuania*,[113] *Sabeh El Leil v. France*[114] and *Oleynikov v. Russia*[115]) concerning general, absolute and negative conditions of admissibility applied in every civil national proceedings,
b. state immunity from enforcement (case *Manoilescu and Dobrescu v Romaina and Russia*[116]) concerning absolute, special and negative condition of admissibility applied only in national enforcement proceedings,
c. immunity from jurisdiction and enforcement of international organisations (case *Waite and Kennedy v. Germany*[117]) concerning general, absolute and negative conditions of admissibility applied in every civil national proceedings.[118]

The principle *par in parem non habet iurisdictionem*[119] as the legal bases for all the above mentioned immunities has been extensively examined by the European Court of Human Rights in the decision on the admissibility in the Distomo case (decision in case *Kalogeropoulou and others v. Greece and Germany*).

According to the ECHR:

> *"[...] sovereign immunity of States is a concept of international law, developed out of the principle par in parem non habet imperium, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States.*
> *[...] The Convention should be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.*
> *It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot generally be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of*

112 ECtHR 2013, p. 14 and 15.
113 ECtHR, case *Cudak v. Lithuania*, judgement of 23 March 2010, http://hudoc.echr.coe.int, § 59 *et seq*..
114 ECtHR, case *Sabeh El Leil v. France*, judgement of 29 June 2011, http://hudoc.echr.coe.int, §§ 51 – 54.
115 ECtHR, case *Oleynikov v. Russia*, judgement of 14 March 2013, http://hudoc.echr.coe.int, §§ 61 – 71.
116 ECtHR, case *Manoilescu and Dobrescu v Romaina and Russia*, decsion of 03 March 2005, http://hudoc.echr.coe.int, § 73.
117 ECtHR, case *Waite and Kennedy v. Germany*, judgement of 18 February 1999, http://hudoc.echr.coe.int, § 63, "the Court points out that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments."
118 The Greek claimants in Distomo case had obtained gain of cause before the Greek Court of Cassation. Subsequently they brought proceedings before the German courts in order to enforce in Germany the Greek judgement as confirmed by the Court of cassation. In its judgement of 26 June 2003, the German Federal Supreme Court (Bundesgerichtshof) held that those Greek judicial decisions could not be recognized within the German legal order because they had been given in breach of Germany's entitlement to State immunity (Greek Citizens v. Federal Republic of Germany, case No. III ZR 245/98, Neue Juristische Wochenschrift, 2003, p. 3488 ; ILR, Vol. 129, p. 556), Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), Judgement, I.C.J. Reports 2012, p. 99, § 35.
119 Sometimes known as *par in parem non habet imperium* or even *par in parem non habet iudicium.*

nations as part of the doctrine of State immunity."[120]

The quasi universal acceptance and imposition of the distinction between *acta iure imperii* and *acta iure gestionis* changed the traditional approach to state immunity. "*To the extent that this distinction is significant for determining whether or not a State is entitled to immunity from the jurisdiction of another State's courts in respect of a particular act, it has to be applied before that jurisdiction can be exercised*."[121] Acts perpetrated by the authorities of the 3rd Reich between 1939 – 1945 outside Germany concern the *ius belli gerendi* and the *ius in bello.* They comprise *per definitionem* the *acta iure imperii.*[122]

However, *acta iure gestionis* i.e. acts accomplished by the state acting in the same quality as a private party like concluding employment contracts are at least in Europe no longer covered by the doctrine of state immunity. According to the European Court of Human Rights:

> "*63. The Court found […] that there was a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes, with the exception, however, of those concerning the recruitment of staff in embassies.*
>
> *64. In this connection, the Court notes that the application of absolute State immunity has, for many years, clearly been eroded. In 1979 the International Law Commission was given the task of codifying and gradually developing international law in the area of jurisdictional immunities of States and their property. It produced a number of drafts that were submitted to States for comment. The Draft Articles it adopted in 1991 included one – Article 11 – on contracts of employment. In 2004 the United Nations General Assembly adopted the Convention on Jurisdictional Immunities of States and their Property.*
>
> *65. The 1991 Draft Articles, on which the 2004 Convention (and Article 11 in particular) was based, created a significant exception in matters of State immunity by, in principle, removing from the application of the immunity rule a State's employment contracts with the staff of its diplomatic missions abroad. However, that exception was itself subject to exceptions whereby, in substance, immunity still applied to diplomatic and consular staff in cases where: the subject of the dispute was the recruitment, renewal of employment or reinstatement of an individual; the employee was a national of the employer State; or, lastly, the employer State and the employee had otherwise agreed in writing.*"[123]

5.1.5. Position of the International Court of Justice

The above mentioned Distomo case also went to the International Court of Justice (hereinafter: the ICJ) in case of jurisdictional immunities of the state (*Germany v. Italy*).[124]

120 ECtHR, case *Kalogeropoulou and Others v. Greece and Germany,* decision on admissibility of 12 December 2002, no. 59021/00, ECHR 2002-X.

121 Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), Judgement, I.C.J. Reports 2012, p. 99, § 60.

122 See e.g. Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), Judgement, I.C.J. Reports 2012, p. 99, § 60. "The acts of the German armed forces and other State organs which were the subject of the proceedings in the Italian courts clearly constituted *acta iure imperii*."

123 ECtHR, case *Cudak v. Lithuania*, judgement of 23 March 2010, http://hudoc.echr.coe.int, §§ 63 – 65.

124 Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), Judgement, I.C.J. Reports 2012, p.

The ICJ confirmed the principle *par in parem non habet iurisdictionem* also from the procedural point of view.[125]

5.1.5.1. The territorial tort exception

According to the ICJ

> "*the notion that State immunity does not extend to civil proceedings in respect of acts committed on the territory of the forum State causing death, personal injury or damage to property originated in cases concerning road traffic accidents and other "insurable risks".*"[126]

However, such an insurable risk that can be applied in case of *acta iure imperii* is still an exception. Following the principle *exceptiones sunt strictissimae restrictionis* the ICJ concluded:

> "*the inclusion of the "territorial tort principle" in Article 11 of the European Convention on State Immunity cannot be treated as support for the argument that a State is not entitled to immunity for torts committed by its armed forces.*"[127]

5.1.5.2. The difference between immunity from jurisdiction and immunity from enforcement

The ICJ stressed that

> "*the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgement has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgement has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgement in question. Similarly, any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory.*
>
> *The rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood stricto sensu as the right of a State not to be the subject of judicial proceedings in the courts of another State) are distinct, and must be applied separately.*"[128]

In Slovenia the customary international law as described in the *Jurisdictional Immunities of the State* case has found its expression in Art. 14 of the Slovenian law on Enforcement of Judicial

99.
125 Ibid., § 58.
126 Ibid., § 64.
127 Ibid., § 68.
128 Ibid., § 113.

Decisions and Interim Protection of Claims.[129] According to Slovenian law:

> "*Enforcement of judicial decisions or interim protection of claims against assets of a foreign state is admissible only with prior consent of the minister in charge of foreign affairs, except when the foreign state expressly consents to such an enforcement.*"

As *in praxi* foreign states do not waive their immunity from enforcement this implies that the final administrative act adopted by the minister is an absolute and positive condition of admissibility of enforcement proceedings. However, as the before mentioned administrative act pertains to foreign affairs, it is possible that some sort of administrative discretion be it in the form of common law *political question doctrine* or civil law *acte de gouvernement* (*justizunabhängige Hoheitsakte*) will be applied, as the minister of foreign affairs will claim that post-judgement measures of constraint against property of a foreign state are *per definitionem* a question of foreign affairs i.e. political in nature and therefore not capable of being argued before courts.[130]

5.1.5.3. The exequatur and state immunity from jurisdiction

In cases of request of *exequatur*

> "*the court is not being asked to give judgement directly against a foreign State invoking jurisdictional immunity, but to enforce a decision already rendered by a court of another State, which is deemed to have itself examined and applied the rules governing the jurisdictional immunity of the respondent State*"[131]

However, this statement as simple as it might be *prima facie* hides mores than it shows. According to the ECtHR "*In exequatur proceedings the domestic courts are not called upon to decide anew on the merits of the foreign court's decision. All they have to do is to examine whether the conditions for granting execution have been met*."[132] The term conditions comprise also conditions of admissibility. If a third state is a judgement – debtor and it did not waive its immunity from enforcement in the state in which enforcement is sought nor waive the immunity from jurisdiction in the state of origin of the judgement, then the *exequatur* cannot be granted in conformity with rules of international law. It would appear that as far as immunity from jurisdiction of a foreign state and its *acta iure imperii* are concerned, the rules of public international law require a *révision au fond* of the conditions of admissibility in the *exequatur* proceedings. Indeed,

> "*the court seised of an application for exequatur of a foreign judgement rendered against a third State has to ask itself whether the respondent State enjoys immunity from jurisdiction — having regard to the nature of the case in which that judgement was given — before the courts of the State in which exequatur proceedings have been instituted. In other words, it*

129 Zakon o izvršbi in zavarovanju, Official Journal of the Republic of Slovenia Nr. 51/98 with several amendments.

130 Decisions adopted by bearers of the executive branch of state authority based on political discretion vested by constitutional or legal powers shall not be deemed administrative acts capable of being challenged before the Administrative Court of the Republic of Slovenia (Art. 2 and 3. of the Administrative Disputes Act, Official Journal of the Republic of Slovenia Nr. 105/2006).

131 Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), Judgement, I.C.J. Reports 2012, p. 99. § 125.

132 ECtHR, case, *Saccoccia v. Austria*, judgement of 18 December 2008, http://hudoc.echr.coe.int, § 63, See also Sladič 2013, p. 354.

> *has to ask itself whether, in the event that it had itself been seised of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State*."[133]

5.2. Dismemberment of a state – what about existing clauses of *prorogatio fori expressa*

In Slovenia a clause on *prorogatio fori expressa* can constitute a relative procedural bar as fas as competency *ratione loci* is concerned, if it is raised by the defendant at the very latest in his defence to the action as the first objection before any arguments and pleas on the merits of the action.[134] However, the court can also act of its own motion, if there is a *forum exclusive*, i.e. a mandatory competence from which the parties cannot derogate.

However, unforeseen circumstances of international importance like a dismemberment of a federal state (i.e. a situation where a federal state ceases to exist)[135] have important and unforeseen consequences on civil procedure. Decisions of courts of territories of the old state that constituted *ipso iure* enforcement titles are as of the moment of the effect of dismemberment decisions of foreign courts. This might imply also the application of *exequatur* proceedings. Anyhow, this is one of the few justified applications of the principle of *clausula rebus sic stantibus (*or of their national counterparts like the German *der Wegfall der Geschäftsgrundlage* or French *la doctrine de l'imprévision*). After 25. June 1991 – i.e. the moment of dismembration of Tito Yugoslavia from Slovenian point of view - Slovenian courts were confronted with legal questions like how to assess contractual clauses on the prorogation of the jurisdiction *ratione loci* within former Yugoslavia. According to jurisprudence:

> "*A contract containing a clause of prorogatio expressa was signed before the dismembration of the former common state under the validity of the Yugoslav law on civil procedure on the territory of the whole common state. […] Such a contractual clause is to be understood solely as a clause on prorogatio expressa on the competence ratione loci in the sense of the former Yugoslav law. However, after the creation of new states such a clause cannot be construed as excluding the jurisdiction of courts of the Republic of Slovenia in civil proceedings for a decision on the merits of a claim based on the cited contract, insofar other conditions of admissibility are complied with*."[136]

5.3. Is there still a *cautio iudicatum solvi* in Slovenian law?

Cautio iudicatum solvi is a relative condition of admissibility. According to Slovenian law

> "*(1) If a foreign national or a person not having any nationality and not having a permanent domicile in the Republic of Slovenia, institutes civil proceedings before courts of the Republic of Slovenia, he shall upon request by the defendant lodge a security for costs of civil proceedings.*
>
> *(2) The defendant shall raise the request from paragraph 1 at the very latest [...] at the first*

133 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgement, I.C.J. Reports 2012, p. 99. § 130.
134 Art. 22(1) Slovenian ZPP.
135 See Stein & von Buttlar 2012, § 313
136 Court of Appeal of Ljubljana, judgement and order in case I Cpg 717/2005.

> *hearing before submitting arguments on the merits of the principal case or as soon as he knows that conditions for requiring the security are complied with.*"[137]

However, *in praxi* that relative condition of admissibility is of lesser importance (electronic databases of jurisprudence show only 15 decisions since 1991). It needs to be said that Slovenia either succeeded as a successor in title of Yugoslavia to various bilateral conventions on legal assistance and concluded several new such bilateral treaties. The Slovenian courts have therefore correctly adjudicated "if the plaintiff's state and the state of the defendant's registered office concluded a convention exempting the plaintiff from paying the security for costs, the court is not bound to verify the existence of factual reciprocity."[138] Slovenia also acceded to the Hague Convention of 1 March 1954 on civil procedure.[139] According to Art. 17(1) of that convention there shall be no *cautio iudicatum solvi* based on requirements of foreign nationality and foreign domicile. Slovenia also acceded to the Hague Convention of 25 October 1980 on International Access to Justice[140] Slovenian courts have therefore correctly concluded that that "*The Hague Convention prohibits the imposition of security for costs based solely on the fact that the claimant is a foreign national*."[141]

As far as nationals of the Member States of the EU are concerned "The Court of Justice of the EU has repeatedly held that a rule of national civil procedure requiring, on an appeal, the payment of security for the costs of the proceedings (*cautio iudicatum solvi*) may not discriminate against persons to whom European Union law gives the right to equal treatment."[142] The right of equal treatment is given to nationals of all Member States. This might also be construed as a gradual disappearance of the *cautio iudicatum solvi* (at least as far as proceedings where nationals of member States of the EU are parties). However, newer jurisprudence is not completely in line with such a disappearance. One might even consider that Slovenian courts are adducing new conditions for security for costs for foreign nationals – also for nationals of Members States of the EU – that are not *prima facie* based on nationality (so called indirect discrimination of foreigners). According to jurisprudence

> "*7. The plea in appeal according to which the defendant is not entitled to security for costs or proceedings is erroneous. The court of first instance correctly ruled when issuing a decision on the defendant's opposition that Art. 16 of the Treaty between the Republic of Slovenia and the Republic of Croatia on legal assistance in civil and criminal matters*[143] *is not a bar for such a right of security for costs. According to the cited provision a security for costs shall not be imposed upon a national of one contracting state if he is a plaintiff or*

137 Art. 90 Slovenian Law on Private International Law and Procedure (Official Journal of the Republic of Slovenia Nr. 56/1999).
138 Court of Appeal of Ljubljana, order in case I Cpg 362/2012.
139 http://www.hcch.net/.
140 http://www.hcch.net/.
141 Court of Appeal of Celje, order in case Cp 753/2003.
142 Opinion of Advocate General Bot delivered on 20 September 2012, Case C-325/11 Alder, http://eur-lex.europa.eu, Court of Justice of the European Union Case C-14/08 Roda Golf & Beach Ressort [2009] ECR I-5439, § 29.Case C-43/95 Data Delecta and Forsberg [1996] ECR I-4661, paragraph 12; Case C-323/95 Hayes [1997] ECR I-1711, paragraph 13; and Case C-122/96 Saldanha and MTS [1997] ECR I-5325, paragraph 19.
143 Official Journal of the Republic of Slovenia – International Treaties Nr. 10/1994. Art. 16 reads as follows: "(1) A security for costs shall not be imposed upon a national of one contracting state if he is a plaintiff or an intervener solely by reason of their nationality or of their lack of permanent domicile in that state. (2) The provision of paragraph one shall also apply to legal persons."

an intervener solely by reason of their nationality or of their lack of permanent domicile in that state. This means that only the plaintiff's nationality and domicile are not sufficient for the imposition of the security for costs. However, the defendant claimed in her opposition a weak financial situation of the claimant. The court of first instance could verify the plaintiff's pecuniary situation and capacities when it ruled on the application for exemption of stamp duty in this case. Because such an application by the plaintiff was granted, the defendant's fear that the payment of her costs of proceedings could eventually be prejudiced, was manifestly founded."[144]

6. Conclusion

The access to courts comprises a right to the decision on the merits of a case. Conditions of admissibility are procedural bars prohibiting courts form taking cognisance of the merits of a case, i.e. they are procedural bars to access to courts. Such an access can be barred solely if strict conditions are complied with. Any condition of admissibility is required to be defined by law, must pursue a legitimate aim and must comply with the principle of proportionality. Failure to comply with the conditions of admissibility must be due to an act or omission by the party and not by the court or judicial authority.

Conditions of admissibility are a consequence of long legal development. Nowadays legal sources of conditions of admissibility can be found in autonomous national *lex fori* as well as in international law. The usual division is in conditions of admissibility pertaining to the court, conditions of admissibility pertaining to the parties and conditions of admissibility pertaining to the subject matter of the case. The second usual division of conditions of admissibility is threefold namely in absolute and relative, then in general and special and finally in positive and negative conditions of admissibility.

The last part of the article discusses the application by Slovenian courts of the conditions of admissibility found in international law like the state immunity from jurisdiction and *cautio iudicatum solvi*.

144 Court of Appeal of Ljubljana, order in case II Cp 607/2012.

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Right to a Trial within a Reasonable Time

Problems and Challenges in Romanian Civil Procedure

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Romania has just introduced in February 2013 a New Code of Civil Procedure after a long period of postponements. It replaced the old Code dating, with some modifications, from 1865. It is portrayed to be a new Code corresponding to present day challenges especially to those relating to reasonable time and efficiency. Although it is applied only for one year some preliminary and cautious observations can be derived. The focus of this presentation will be on trying to assess some of these identified observations as regards first instance proceedings of civil cases in Romania. Besides modifying the structure of the first instance civil proceedings by introducing a new preliminary written phase the Romanian judge also received new powers. It is debatable if this increase in powers is beneficial or not referring to the reasonable time and their ability to conduct litigation. Nevertheless, what can be observed is the fact that the active role of the judge and judicial case management still do not benefit from a comprehensive and clear framework.

Access to Justice – Current Issues in Switzerland

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This paper will deal with instruments that might facilitate access to justice in situations of economic inequality between the parties. It will address the current situation and possible future developments in Switzerland in this regard. In particular, I will discuss whether and how pre-trial taking of evidence, actions for a part of the claim (*Teilklagen*) and mass litigation can promote access to justice for economically weaker parties.

Russian Judicial Reform

How It May Affect Procedural Human Rights and Access to Justice

NATALIA BARADANCHENKOVA and KSENIA SERGEEVA

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The position of the commercial courts in the Russian Federation underwent crucial changes in 2013-2014. Our presentation will follow the developments in Russia's judicial reform and many repercussions that such developments may have on procedural human rights and access to justice.

For the time being, the legal views of the Higher Commercial Court of the Russian Federation and the Supreme Court of the Russian Federation diverge in many issues. For this reason, back in October 2013, the bill outlining constitutional amendments on reorganization of the Higher Commercial Court of the Russian Federation was submitted to the State Duma. The amendments strive to ensure the uniformity of the Russian court system and practice. Once all of them implemented, the Supreme Court shall assume competence over the Higher Commercial Court and will handle civil, criminal, administrative and other matters resolving economic and other cases involving physical persons and legal entities.

Is the abolition of the Higher Commercial Court merely a matter of technical restructuring? Or maybe it represents a higher level of quality of justice? In the presentation, we will attempt to estimate the nature of the judicial reform, its implications and consequences for the Russian law and legal reality. Another matter in question that will be discussed during the presentation is how abolition of the Higher Commercial Court influences the competence of other public authorities.

Although the Supreme Court of the Russian Federation will have exclusive authority to interpret issues related to judicial practice, many issues related to these interpretations still remain unresolved. Yet to be established is how the commercial courts are to use such interpretations. In addition, the future of interpretations issued by the Higher Commercial Court over the last twenty years remains unknown. It is also not clear how to deal with resolution of possible conflicts that could arise when the Supreme Court of the Russian

Federation and the Higher Commercial Court of the Russian Federation contradict one another in legal positions involving similar issues.

More importantly, structural and essential changes in the Russian judicial system necessitate amendments of the Commercial Procedure Code of the Russian Federation as part of a major judicial reform project. Subject to their adoption, the proposed amendments may affect future applications to the European Court of Human Rights arising out of commercial cases.

Another grey area involves the process of judicial supervision of the review of judgments. Pursuant to ECtHR case law, the current supervisory review procedure before the Higher Commercial Court is regarded an effective domestic remedy for commercial disputes, which must be exhausted by the applicant before bringing a case to the ECtHR.

However, the proposed bill amending the Commercial Procedure Code the Russian Federation, *inter alia*, changes the cassation appeal and supervisory review procedures for commercial cases. Accordingly, the presentation touches upon a question how those changes affect efficiency of the means of recourse against judgments in commercial cases.

In the meantime, the Commercial Procedural Code of the Russian Federation will continue to function to the extent it does not contradict the Constitution of the Russian Federation and new constitutional laws and other laws adopted pursuant to the constitutional amendments. While as the commercial courts system over twenty years if its existence developed new interesting practices and worked out advanced institutions, the presentation addresses the matters of mutual and deep concern of the Russian lawyers whether the new single judiciary body shall maintain those initiatives and make use of the experience for the best interests of litigants.

Prohibition of Retroactivity as Procedural Human Right

Some Remarks from a Historical Perspective

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1. Generally on the issue of retroactive application of laws
2. Historical development of intertemporal rules:
    a) Roman law
    b) Medieval law
    c) Great codifications of the 19th Century
    d) Present situation, with reference to EU law;
3. Approaches to retroactivity and forms of retroactivity in substantial and procedural civil law – really or just apparently different?
4. *Tempus regit actum* as a general rule in procedural law
5. Problems concerning the prospective and retroactive application of procedural law:
    a) Jurisdiction / Competence
    b) Rules of procedure / Evidence
    c) Judgement, Appeal and Enforcement
6. Prohibition of retroactivity as a procedural human right – conclusion

London South Bank University | Legal Advice Clinic

Clinical Legal Education in the UK – Running drop-in advice services in a university setting

Alan Russell & Andy Unger

This presentation will describe the set up and first three years operation of London South Bank University's (LSBU) innovative Legal Advice Clinic which provides drop-in face to face legal advice to members of the local community.

The Clinic will be contextualised within the evolving tradition of LSBU as a widening participation, civic university and the recent draconian cuts to civil legal aid implemented by the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012.

London South Bank University Legal Advice Clinic

The service to clients

Opened in September 2011, the Legal Advice Clinic is a **free drop-in face to face legal advice service for the local community** in which 2nd and 3rd year undergraduate law students interview and advise real clients, under the close supervision of university-employed practising solicitors.

Operating out of dedicated and refurbished premises on campus, the Clinic has so far advised **approaching 1000 clients**.

Working in pairs, and under supervision, trained Law Student Volunteers interview drop-in clients and:

- Provide basic information on any legal topic
- Give generalist advice in social welfare law matters including housing, family, employment, welfare benefits and debt
- Signpost and refer to appropriate local advice agencies and legal services
- Or refer to the Clinic's own evening sessions

At the Clinic's evening sessions **Law Student Volunteers shadow volunteer solicitors** from 4 large local law firms who provide specialist legal advice in family, housing & employment.

The LAC is open term-time only. Drop-in opening times are currently:

- Tuesdays 10am-1pm
- Wednesdays 10am-1pm and 3pm-6pm

Evening sessions (accessible only via initial assessment at the day-time drop in) are on:

- Thursdays 6pm-9pm

At each drop in session we aim to see approximately 6 clients; we have 2 advice teams, each comprising 2 Law Student Volunteers and a supervising solicitor. A 5th Law Student Volunteer operates the reception.

The LAC is part of the **Southwark Legal Advice Network** and we work in partnership with local solicitors and advice agencies, including Southwark CAB service, Southwark Law Centre, Blackfriars Advice Centre, Cambridge House Law Centre.

The offer to students

Law Student volunteers are provided with **two days of initial training** by the Clinic's supervising solicitors and local CAB staff. There is an additional one day **refresher training** at the start of Semester 2.

Law Student Volunteers will continue to have continuous **on the job training** and always work in **pairs** and under **supervision** of a practising solicitor

In addition students can access the comprehensive social welfare law training programme offered by LawWorks, e.g. consumer, debt, employment, housing, disability discrimination

Law Student Volunteers get a **Certificate of Clinical Legal Education Placement** on completion of their **minimum 13 week placement**.

Law Student Volunteers can use the Clinic Director as a **work-based reference** on job & training contract applications, which will emphasise the client care, interview skills and practical legal knowledge acquired.

Recruitment

There is a big demand by students for volunteer places. There is an **annual equal opportunities recruitment process** (an application form and an interview) and Law Student Volunteers are selected on merit, according to a person specification which puts the emphasis on reliability and commitment, interpersonal skills and being open-minded and non-judgmental about clients and their problems.

Recruitment opens in April of each year and the selection process is completed by the end of May, with Law Student Volunteers starting their placements in September i.e. the start of the next academic year.

Impact

The Clinic has gained widespread national recognition as a result of its innovative drop-in operating model (other UK university Law Clinics do not offer drop in face to face immediate advice).

- In 2012, the Clinic was praised in the **Million+ think tank's report 'Teaching that Matters'** for involving students in a valuable community service while they gain real-world legal experience, develop transferable skills and enhance their employability prospects.
- In 2012, the Clinic Team won the **LSBU Vice-Chancellor's Enterprising Staff Award**. The £5,000 prize was awarded to the Clinic Team for their demonstration of enterprise in enhancing the student experience and employability, providing a significant benefit for the local community, and demonstrating a wider significance to other higher education institutions nationwide**.**
- In 2013 the Clinic Team published its 70 page **Drop-In Clinic Operating Manual** as a free teaching and learning resource for other higher education institutions who might wish to develop similar projects. The manual was

launched at **our own national conference on Clinical Legal Education** attended by 140 academics, lawyers & students. The manual is available via the Higher Education Academy (HEA) and LawWorks. Utilising our Operating manual, Portsmouth and Staffordshire Universities are currently both planning new drop in legal advice clinics.

- The Clinic has just been **highly commended in the LawWorks and Attorney general's pro Bono Awards 2014 in the 'Best Contribution by a Law School**' Category. This commendation is for the Clinic, the Drop-in Clinic Operating Manual and the Clinic's **satellite Helpdesk at the Lambeth County Court.**

Alan Russell

15 May 2014

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Biographies

***Alan Russell** is a Senior Lecturer in the Law Department. He is a practicing solicitor and Director of the LSBU Legal Advice Clinic, a free face-to-face community legal advice centre staffed by students under the supervision of Law Department solicitors.*

Alan joined LSBU in January 2011 and previously managed the Camden Community Law Centre for 20 years. There he conducted housing and public law litigation with a special focus on homelessness and defending possession proceedings, particularly on behalf of vulnerable and mentally disordered people.

Alan is a seasoned court advocate, with 20 years' experience as duty solicitor covering the housing possession list at various central London county courts.

He is currently on the steering group of the Southwark Legal Advice Network and is a member of the Housing Law Practitioners' Association.

Alan has a particular interest in the public funding of legal services. He has advised both the Law Commission and the Law Society's Access to Justice Committee in relation to the public funding of housing advice and litigation. As part of a small working party he developed and wrote the Legal Services Commission's standards for the delivery of publicly funded outreach legal advice services.

Alan teaches Public Law and Civil Litigation (CILEx exempting) on the LLB (undergraduate) programme and is developing a new Civil Litigation LLM (post graduate programme.

***Andy Unger** is Head of the Law Department at LSBU and a Senior Fellow of the UK Higher Education Academy.*

Andy Unger's main academic and professional interest relates to access to justice and the international practice of human rights. For over 20 years he has worked on human rights and rule of law training and assistance projects. Andy was a founder member of the UK section of the European Law Students Association and from 1989 onward took part in a 'Book Bus' project taking law books and training to young lawyers in former communist countries in Eastern Europe and the former Soviet Union.

He then joined the International Human Rights Committee of the Law Society in 1994 where he worked for six years on issues such as the harassment of lawyers in Kenya and the operation of the International Criminal Tribunal for Rwanda in Arusha, Tanzania. Since then, Andy has worked on human rights training projects in Belarus, Armenia, Azerbaijan and Georgia for the British East-West Centre (a democracy and good government NGO). He is currently president of the South London Law Society and takes part in a twinning project with the Law Association of Zambia, where he is helping on an access to justice project, hoping to support the establishment of new law centres in rural Zambia.

Before coming to LSBU, Andy was a High Street Legal Aid Solicitor, dealing mainly with personal injury, family and some criminal cases.

He teaches on the LLB (undergraduate) and LLM (postgraduate) International Human Rights & Development programmes.

Introduction to Juss-Buss

Law Students' Free Legal Aid Organization

By
Mona Mjøen McKiernan, case worker at Juss-Buss
Vilde Ødegaard Hauan , case worker at Juss-Buss
Hana Temsamani, case worker at Juss-Buss

jussbuss.no

Introduction to Juss-Buss

History

- Founded in 1971
- Run by law students at the University of Oslo
- Social profile

jussbuss.no

Introduction to Juss-Buss

Organizational structure

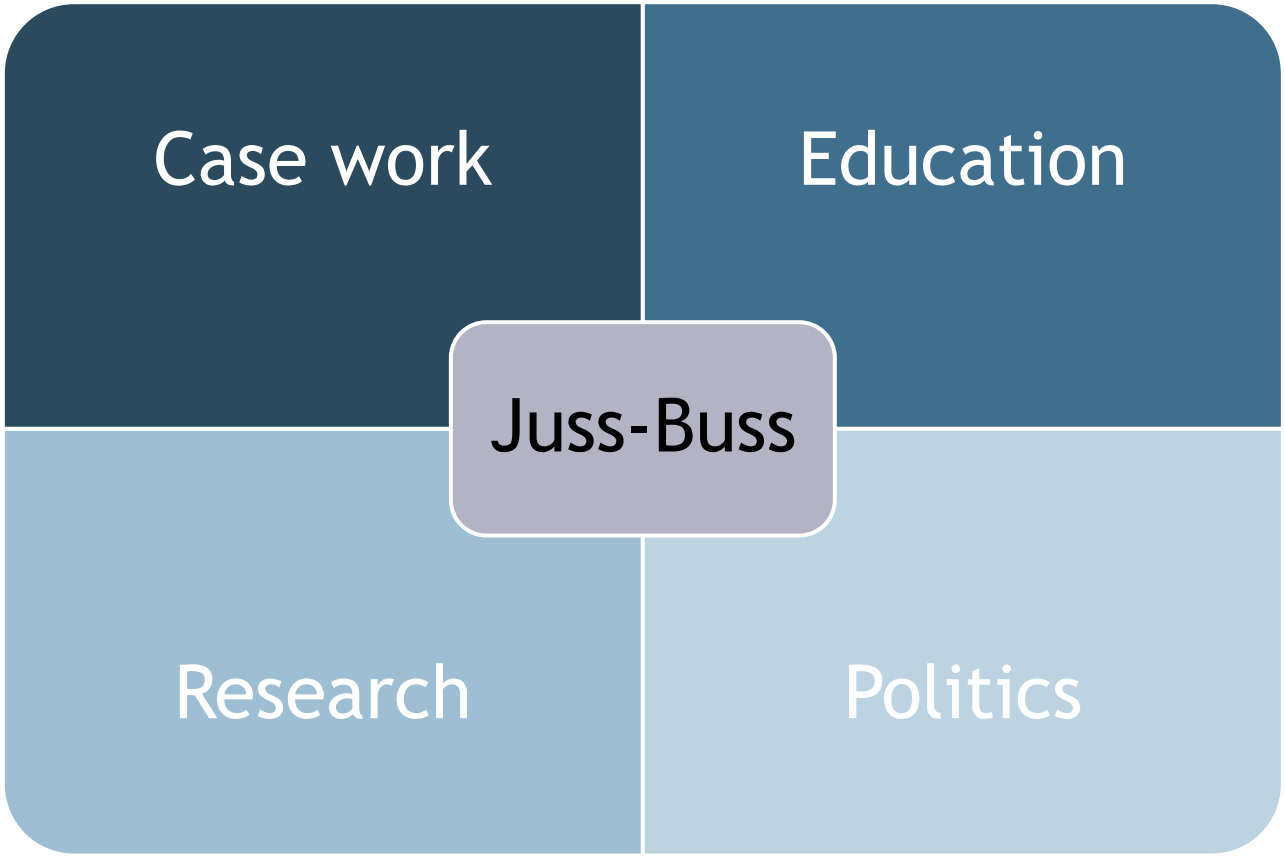
Juss-Buss:

- 30 case workers
  - Three generations of case workers
    - 12 months full time
    - 6 months part time
- Academic leader, managing director and administrative assistant
- All the employees except the academic leader are students
- Four specialized groups

jussbuss.no

Introduction to Juss-Buss

Methods



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Case work

- Who do we want to reach?
  - In general: Areas of law - Adapt to requests
  - In each case: Mapping – Who has the greatest need of help?
- About 5500 cases every year
- Who does not seek help - Uncover need of legal aid

Policy work

Creating legal awareness through information on rights, and seeking to change the legal situation for our client groups

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Purpose of seeking to change the legal situation for our client groups

- Secure legal rights and access to the legal system for all
- Generating awareness in the society
- Making change on general basis

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Seeking to change the legal situation for our client groups

- Dialogue with the government and other politicians
- Public hearings – written or oral
- Media
- Debates and seminars
- Demonstrations

Seeking to change the legal situation for our client groups

Dialogue with the Government and other politicians

Meeting with the Vice Mayor for Social Services and Health Services in Oslo. →

Seeking to change the legal situation for our client groups

Public hearings – written or oral

Juss-Buss commenting on a public hearing on the use of isolation during police custody →

Seeking to change the legal situation for our client groups

Media

The Juss-Buss clip board →

Seeking to change the legal situation for our client groups

Debates and seminars

Debate on the Roma peoples legal situation in Norway →

Seeking to change the legal situation for our client groups

Demonstrations

Juss-Buss' co-workers participating in the 1st of May parade →

Challenges or opportunities?

- Access
  - Being patient
  - Timing
  - Who is likely to be influenced?
- Inexperience
  - Specializing
  - Motivation
- Fronting a different opinion
  - Create public interest
  - Student commitment is essential

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Questions?

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Access to Administrative Justice in the Light of Analysis of Zagreb Legal Clinic Cases

Mateja Crnković, mag. iur.

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Public and Private Justice Course

Dubrovnik, 26-30 May 2014

Access to Administrative Justice

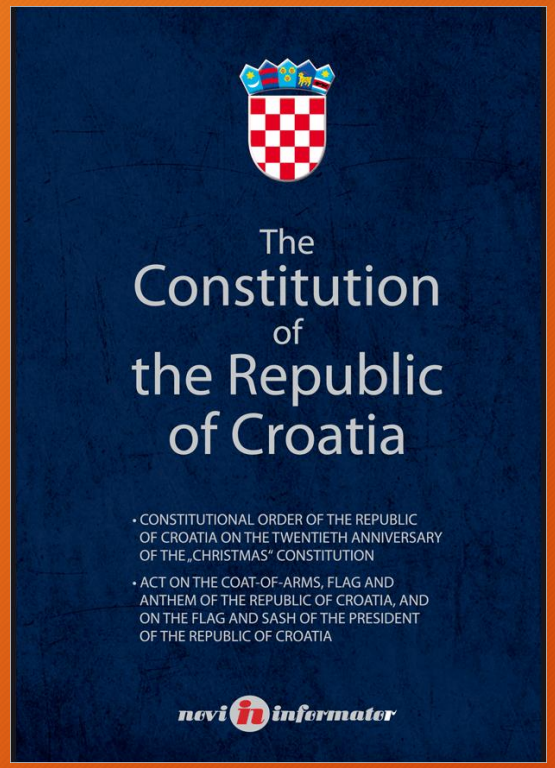
- Art. 6(1) of ECHR:

„In the determination of his civil rights and obligations. . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

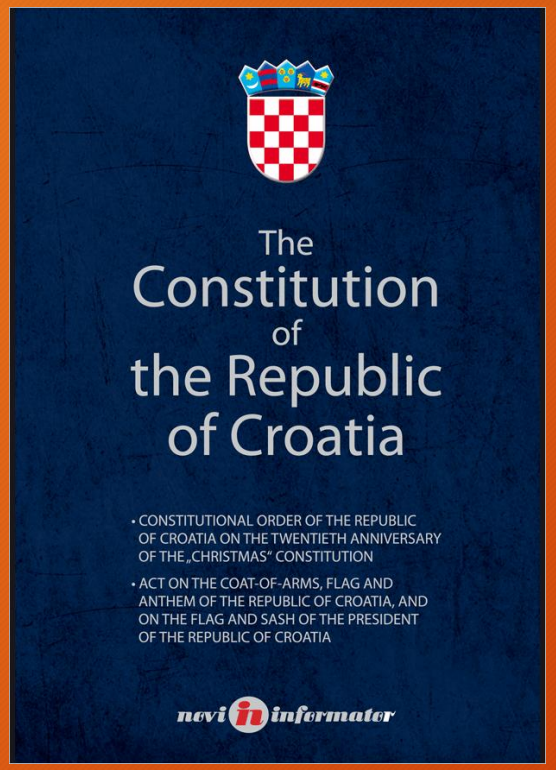
ECtHR: autonomus concept deriving from ECHR

ECtHR doesn't follow traditional division on *ius privatum* and *ius publicum*;
„in ascertaining whether a case ("contestation") concerns the determination of a civil right, only the character of the right at issue is relevant"
KÖNIG v. GERMANY, 1978, § 90

Legal Grounds



Act on Constitutional Court of the Republic of Croatia
Act on General Administrative Procedure
Act on Administrative Disputes
Courts Act (Judiciary Act)
Croatian Legal Aid Act



Art. 29 (1)Everyone shall be entitled have his or her rights and obligations, ... decided upon fairly before a legally established, independent and impartial court within a reasonable period

Art. 6 (1): In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Act on Constitutional Court of the Republic of Croatia

- Art. 63 (1)

Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases when the court of justice did not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated.

Act on General Administrative Procedure

- Art. 1 → definition of administrative bodies → *Government bodies and other state bodies, bodies of local and regional government, legal entities with public authority, which within the scope specified by the law, act and decide on administrative matters (public entities).*
- Art. 7 → protection of ignorant party → *When an civil servant during the procedure learns or finds that a party has a basis for the realization of a right, civil servant will warn on it and will take care of that ignorance is not going to harm the party*
- Art. 10 → principle of efficiency and economy → *Administrative matters are handled as simply as possible, without delay and with as little cost, but to establish the facts and circumstances relevant to the resolution of administrative issue*
- Art. 101 → protection from the silence of administration → *Civil servant shall, in the case of solving the immediate application of a party to bring a solution and deliver it to the party without delay, and no later than 30 days after submission of a complete application.*
Civil servant shall, in the case of keeping the test procedure at the request of a party to bring a solution and deliver it to the party within 60 days of submission of a complete application. If the official concerned fails to bring the solution and deliver it to the party, the party has the right to file an appeal or an administrative lawsuit.

Act on Administrative Disputes

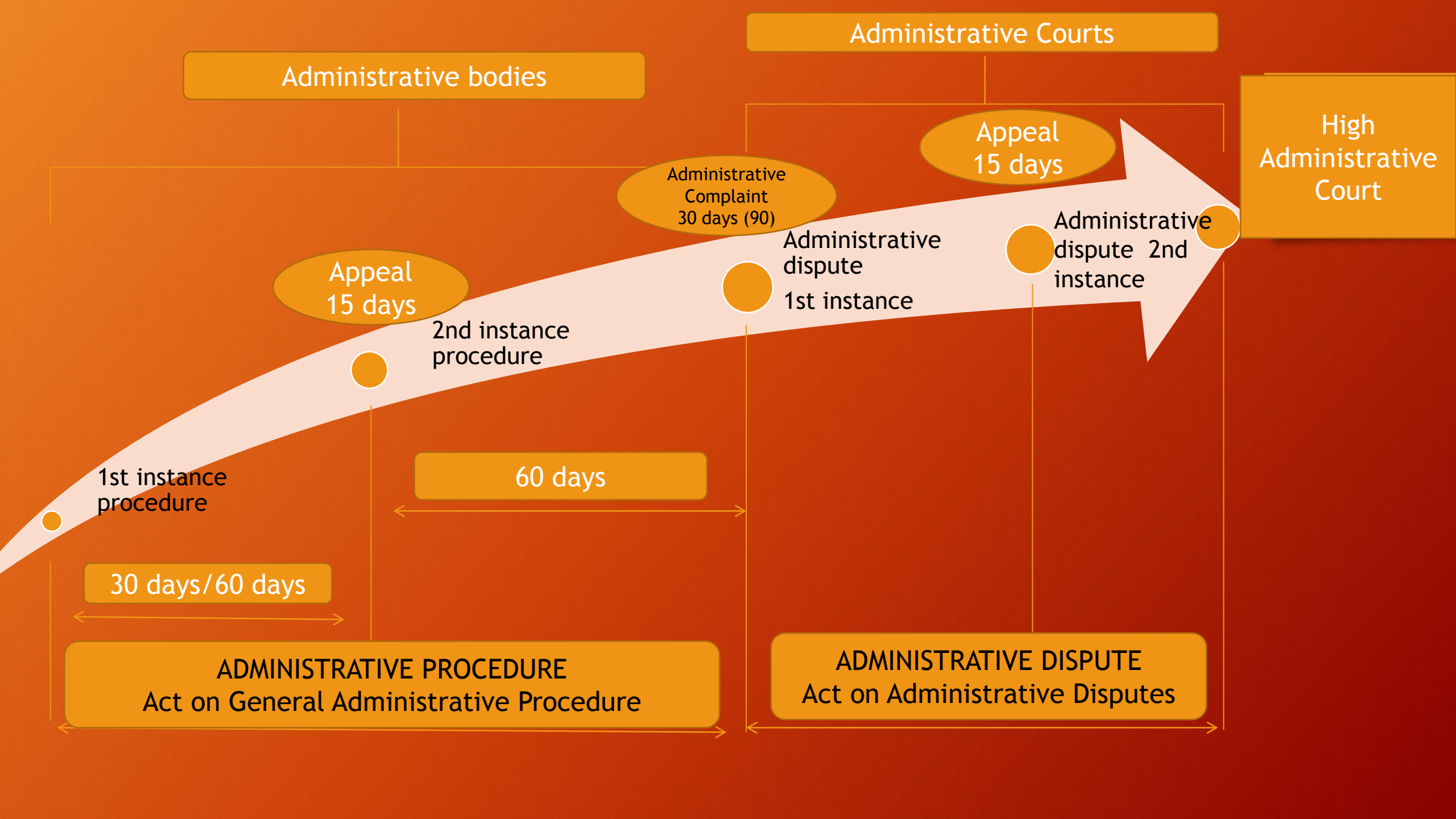
- Art. 12 (2/3) → scope of the proceedings

Assessment of the lawfulness of an act of the body of administrative law by which a right, obligation and legal interest of the party was breached against which it is not possible to file a regular legal remedy

- Art. 8 → principle of efficiency

The Court will conduct an administrative dispute quickly and without delay, avoiding unnecessary actions and costs, will prevent abuse of the rights of the parties and other participants in the dispute and the decision will be taken within a reasonable time.

Administrative Procedure and Administrative Dispute Scheme


Administrative Courts
Administrative bodies
High Administrative Court
Appeal 15 days
Administrative Complaint 30 days (90)
Administrative dispute 1st instance
Administrative dispute 2nd instance
Appeal 15 days
2nd instance procedure
1st instance procedure
60 days
30 days/60 days
ADMINISTRATIVE PROCEDURE
Act on General Administrative Procedure
ADMINISTRATIVE DISPUTE
Act on Administrative Disputes

Croatian Legal Aid Act

- Art. 4 – Legal Clinic in Zagreb
- – provider of the primary, free legal aid

An efficient use of the right to a fair trial presupposes that the decision whether to go to court or not, is an informed one. Most people need expert advice on whether to sue or dispute a claim in court.

Courts Act

- Art. 63 and 64

A party in a judicial proceeding which considers that the competent court did not decide in reasonable time shall initiate proceedings before the same court for the protection of its right to trial in reasonable time

Legal Clinic Cases –
1 January 2012 – 1 April 2014

- 405 cases – 4 categories:

1st Category	Number of cases
A right to the trial within a reasonable time	2
constitutional complaint	6
silence of administration	3
application to the ECtHR	6

2nd Category	Number of cases
procedural rights	25
appeal in administrative procedure	29
administrative complaint	15

3rd Category	Number of cases
Social rights	156
free legal aid	4
work of the administrative bodies	42
civil servants	12

Other categories	- informations	
Citizenship	Foreign qualifications	Rights of students
Residence	Local referendum	Communal fees
Misdemeanors	Legalization of buildings	Asylum

Legal Clinic Cases – 1 January 2012 – 1 April 2014

- 405 cases – 4 categories

Category	Number of cases	%
1. A right to the trial within a reasonable time, constitutional complaint, silence of administration, application to the ECtHR	17	4,19
2. Procedural rights, appeal in administrative procedure and administrative complaint	69	17,3
3. Social rights, free legal aid, work of the administrative bodies, civil servants	196	48,4
4. Other categories	123	30,4

Conclusions

3rd Category	Number of cases
Social rights	156
free legal aid	4
work of the administrative bodies	42
civil servants	12

- relatively good legal grounds
- bad implementation

Reasons:

- Uneducated civil servants
- Politicization
- Uninformed citizens

Conclusions - suggestions

- *Suggestions:*
- Education
- Public discussions
- Brochures
- Modernization of Administration
- Decentralisation

Thank you for your attention!

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Developing Legal Clinic in Bihać Challenges and Achievements

Faculty of Law at the University of Bihac
Dipl. iur Ajna Bakrač
Mr. sc. Asmira Bećiraj

HISTORICAL REVIEW

- Clinic of "Administrative Law" - 2005/2006. was organized by the Faculty of Law in Bihac and ABA / Cell.
- Work at the clinic was divided into two semesters/The Municipal court and the advocacy offices.
- The participants-students of the fourth year.
- Duration-one academic year.

- Legal Clinic of the "Civil Procedure Law" - 2007/2008. was organized by the Faculty of Law in Bihac and ABA/ROLI.
- Working at the clinic was segmental: providing free legal aid/advocacy offices.

PROVIDING FREE LEGAL AID

- Students of the III and IV year with academic mentors (teachers and assistants).
- Office of the Faculty of Law in Bihać- weekdays from 9-12 am.

LEGAL CLINIC OF THE ‘’CIVIL PROCEDURAL LAW"

- Legal Clinic of the "Civil Procedural Law" -2012/13.- ....., organized by the Faculty of Law of the University of Bihac.
- Facilitators: PhD. Suad Hamzabegović; grad. iur Ajna Bakrač; Msc. Asmira Bećiraj.

- Participants- students (of the fourth year) of the Law Faculty in Bihać.
- The institutions that we cooperate with: the Municipal and Cantonal Court in Bihac, law firms and non-governmental organizations.

- In 2013. – We signed a cooperation agreement with the Legal Clinic of the Law Faculty of the University of Zagreb.

LEGAL CLINIC IN BIHAC- AS A GUEST

LEGAL CLINIC IN BIHAC- AS A HOST

ACTIVITIES

- Practical exercises /simulated trials.
- Working in the groups on the fields of:

  matrimonial cases; hereditary and legal issues; media law, the executive law, etc.
- Evaluation of credits within the subjects in the curriculum.

LEGAL CLINIC IN THE FUTURE

- *Adequate space for working and functioning.*
- *To increase the number of active participants-students of the second and the third year.*
- *To Increase the number of institutions as associates.*
- *To work on the projects that are related to the given fields.*

- *To establish the cooperation and agreements with other clinics within BiH and abroad in order to establish mutual cooperation.*

Thank you for your attention!