

PUBLIC AND PRIVATE JUSTICE 2011

Truth and Efficiency in Civil Proceedings

COURSE MATERIALS

May 23 – May 27, 2011
Inter-University Centre
Dubrovnik, Croatia

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- Royal Netherlands Embassy;
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The PPJ course is organised in the co-operation with the European Commission for the Efficiency of Justice (CEPEJ).

Truth and Efficiency in Civil Proceedings

Programme 2011 * Sixth PPJ Course and Conference

<p><u>Sunday, May 22</u></p>	<p>Meeting of participants (Stradun, Gradska kavana, 19,30-20,00) Informal joint dinner</p>
<p><u>Monday, May 23</u> Registration (9,00 - 9,30) Opening Addresses, Morning Session: (9,30 – 13,00) [Coffee break 11,00-11,30] Lunch Break (13,00 – 15,00) Afternoon Session: (15,00 – 18,00)</p>	<p><i>Opening speeches</i> <i>Remco van Rhee (Maastricht):</i> Introduction, announcement of speakers <i>John Langbein (Yale):</i> The Disappearance of the Anglo-American Civil Trial: How It Happened, Is It Convergence with European Civil Justice? <i>Elisabetta Silvestri (Pavia):</i> The antique shop of Italian civil procedure: oath and confession as evidence. General discussion <i>Book Presentation</i> <i>Sebastian Spinei (Sibiu),</i> Rules of Evidence in Romanian Civil Procedure and their Impact on Truth and Efficiency <i>Federico Ferraris (Milano-Bicocca):</i> “Experts’ testimony” in the Italian judicial system: characters, questions and comparative views. <i>Jorg Sladič (Maribor-Luxembourg):</i> Taking and Administering Evidence Beyond the State - Some Reflexions on Procedural Issues Before the Court of Justice of the European Union</p>
<p><u>Tuesday, May 24</u> Registration (9,00 - 9,30) Morning Session: (9,30 – 13,00) [Coffee break 11,00-11,30] Lunch Break (13,00 – 15,00) Afternoon Session: (15,00-18,00)</p>	<p><i>Richard Marcus (Hastings):</i> Extremism in the Pursuit of Truth is our 'Virtue' – The American Infatuation with Broad Discovery <i>Alan Uzelac (Zagreb):</i> ‘Material Truth’ versus Fair Trial within a Reasonable Time: The Fight Continues? <i>Marco Segatti (Pavia):</i> On the notion of optimal level of proof-taking. The content of cost-benefit analysis over accuracy and costs in legal proceedings General discussion <i>John Blackie (Strathclyde):</i> Scottish reform proposals for civil procedure. The end of five hundred years of evolution of a unique modified form of romano-canonical procedure, and system of distribution of business between higher and lower courts <i>Massimiliano Bina (Varese, Como):</i> The views of the Court and the notorious facts: a balance between efficiency and due process of law</p>
<p><u>Wednesday, May 25</u> Morning session (9,30 – 13,00) Afternoon Study Trip: Discovering the Hinterland of Dubrovnik</p>	<p><i>Peter Chan (Hong Kong):</i> The Fact-finding Process and Civil Justice in China. The Role of the Judge in Fact-finding: In Search of the Truth without Undue Delay <i>Jon T. Johnsen (Oslo):</i> Fact-finding about Access to Justice: The ‘Efficiency’ of the Croatian Legal Aid System <i>Slađana Aras & Barbara Preložnjak (Zagreb):</i> Intentional Killing of Efficiency by Overzealousness in the Pursuit for Truth: Fulfilling Conditions for Legal Aid Under New Legal Aid Act <i>Renzo Bloemink, Bas van Dooren, Laura Entjes, Stefan van Gompel, Esther Meulenber, Marlienke Wouters (Maastricht),</i> Immediate Judgment in Civil Proceedings: An Experiment Lunch break (13,00 – 14,00) Cable-car Excursion to Srđ Hill ; Panoramic Walk to Bosanka Plateau (16,00-19,00) A Countryside Dinner in a Cottage on Bosanka Hill (19,00 – 23,30)</p>

<p><u>Thursday, May 26</u></p> <p>Morning Session (10,30-13,00)</p> <p>Lunch Break (13,00 – 15,00)</p> <p>Afternoon Session: (15,00-18,00)</p>	<p><i>Mohamed Paleker (Cape Town):</i> Truth: a Cat-and-Mouse Game in the South African Civil Justice System</p> <p><i>Ognjenka Manojlović (Zagreb):</i> European Procedural Geography in the Light of Truth and Efficiency</p> <p><i>Cristina Parau (Oxford):</i> The political and social context of evidentiary proceedings</p> <p><i>Simona Grossi (Loyola):</i> Fact-finding and jurisdiction. Assessment from the perspective of effectiveness in transnational litigation</p> <p>General discussion</p> <p><i>Vadim Abolonin (Moscow, Kiel):</i> Truth and Efficiency – A Russian Perspective</p> <p><i>Leysan Fatkhullina/Aigul Valeeva/Damir Valeev:</i> Kazan presentation</p> <p><i>Tomislav Karlović (Zagreb):</i> Propter celeritatem dirimendarum litium - presumptions and efficiency in Roman law</p> <p><i>Ivan Milotić (Zagreb):</i> Pursuit for truth and efficiency in Roman arbitration proceedings</p>
<p><u>Friday, May 27</u></p> <p>Morning Session (9,30 – 13,00)</p> <p>Lunch break (13,00 – 15,00)</p> <p>Open Panels (15,00 – 17,30)</p> <p>Wrap-up and departure (17,30 – 18,00)</p>	<p><i>Remme Verkerk (The Hague):</i> More facts, less evidence. The growing importance of fact-gathering and the demise of the traditional presentation of evidence in court</p> <p><i>Rob Jagtenberg (Rotterdam):</i> Truth and mediation</p> <p><i>Peter Gilles (Frankfurt):</i> On Deconstruction of the Truth-Postulate by the Mainstream German Doctrine of Civil Procedure</p> <p><i>Branka Rešetar (Osijek):</i> Interplay between the Efficiency and the Active Role of Judges in Divorce and other Family Proceedings</p> <p><i>Adela Ognean (Maastricht):</i> The Balance of Powers between Judge and Parties in Romania and France</p> <p><i>Panel: Clinical Legal Education – a Way towards Training in Efficient Procedural Style</i></p> <p>Conclusion of the seminar</p>

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ELISABETTA SILVESTRI
UNIVERSITY OF PAVIA, ITALY

The antique shop of Italian civil procedure: oath and confession as evidence

ABSTRACT

In Italy the catalogue of evidence admissible in civil and commercial proceedings includes the party oath and the confession. The parties to a case cannot be heard as witnesses, on the assumption that their testimonies would be biased and devoid of any reliability. But if a party makes a statement under the solemn and formal framework of an oath, or if his statement meets the requirements of a confession, then these very statements are granted the highest possible probative value. In fact, the party oath and the confession are in principle ‘legal proofs’, that is, conclusive and irrebuttable evidence: the court must take them at face value and has no powers as to question the truth of the facts stated by the party.

Historical reasons explain such a paradox, and for a long time Italy was only one of the many continental European legal systems sharing the same attitude towards the parties and the probative weight of the statements they make. Over the years, though, many countries have moved away from the system of legal proofs: they have abolished the party oath as well as the confession, allowing the parties to be heard as witnesses (even though sometimes they still remain witnesses of a special kind). In these countries, the parties’ statements can now be scrutinized by the court, according to the legal standard known as ‘free evaluation of the evidence’.

In sharp contrast with such a trend towards the modernization of the law of evidence, in Italy the rules providing for the party oath and the confession are still in force. The caselaw of Italian courts shows that nowadays neither the party oath nor the confession are used very frequently, even though – at least in principle – the outcome of a case could still depend on either one.

The author contends that the Italian legislator, who lately appears to be under the spell of modern technologies applied to evidence and committed to solving the mysteries of scientific evidence, should be more down-to-earth, and first make up his mind to toss away two relics of the past, the party oath and the confession, both fine as ‘antiques’ but not as reliable means to establish the truth of the facts in dispute.



**The antique shop of
Italian civil procedure:
oath and confession as
evidence**

Elisabetta Silvestri
University of Pavia,
Italy

Trumeau

**Venice,
circa 1750**





Cast-iron ironer, operated with coal

Italy, XIXth century

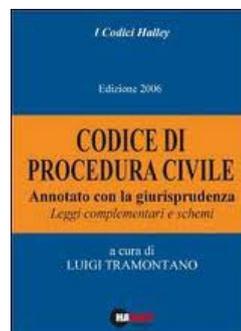
The law of evidence



«substance»



«procedure»



Evidentiary rules: the 'substance'



- admissible evidence
- which evidence must be used to prove certain sets of facts
- burden of proof
- probative weight of particular types of evidence



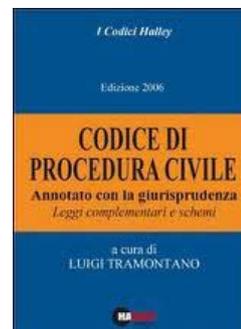
'legal proofs'

Evidentiary rules: the 'procedure'

- presentation of evidence in court
- evaluation of admissible and relevant evidence



principle of
'free evaluation of evidence by
the court'



Which evidence has more weight?



**written
evidence**

**oral
evidence**

Legal proofs

(conclusive and irrebuttable evidence)



- documents (public deeds; private ones meeting certain requirements)
- confession
- party oath

The confession

'The confession is a statement made by a party as to the truth of facts that are adverse to the party himself, and favorable to his opponent.

The confession can be made in court or out of court.'

(article 2730 of the civil code)

The party oath

'Two types of party oath are admissible:

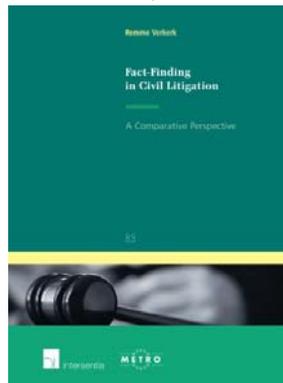
1) the decisory oath, that may be tendered by one party to his opponent so as to have the case decided, totally or in part (*on the basis of the facts stated under oath*);

2) the suppletory oath, that may be tendered by the court to either party, when the facts at issue have not been fully proved, but are not totally devoid of proofs, as well as when the value of the claim cannot be determined otherwise.'

(article 2736 of the civil code)

**What happened in other continental EU countries?
No more party oath and confession**

The Netherlands, Germany,
Austria



Spain



What about France and Italy?



Liberté • Égalité • Fraternité

RÉPUBLIQUE FRANÇAISE



aveu
serment judiciaire
(décisoire, supplétoire,
estimatoire)



1861 > 2011 >>
150° anniversario Unità d'Italia



confessione
giuramento (decisorio,
suppletorio,
d'estimazione)

Conclusion

Confession, party
oath, and legal
proofs in general
are not likely to be
abolished any time
soon



Thank you for
your attention



RULES OF EVIDENCE IN ROMANIAN CIVIL PROCEDURE AND THEIR IMPACT ON TRUTH AND EFFICIENCY

Sebastian Spinei, Associate Professor, PhD
Sibiu Law Faculty

Romania

I. 'Suum quique tribuere'

Ulpianus, Digesta

Justice - Truth

Evidence

II. Crisis

Court system – on the brink of a heart attack

Civil justice - belongs to another century

Difficulties - everywhere the same

- number of cases
- delays
- costs
- resources
- work organization

Answer

Justice reforms

Efficiency

III. Romanian experience

A. The principle of truth

– always professed

C.P.C.: The judge has **the duty** to persist (...) on preventing any error in the finding of truth in the case (...).

Good judgment

– **well-founded** (facts were accurately established, according to the truth)

& **lawful** (law was correctly interpreted and applied)

B.Eficiency

– rather marginal concept

Romania

– example of **creating 'infrastructure for avoiding litigation'** *avant la lettre*

The **1830** 'Regulations' acknowledged the fact that one of the most frequent type of lawsuit of the time was the setting of land property borderlines

The **solution** for reducing number of lawsuits - charging the Administration with the task of establishing the limits of all land property in the country

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Romania

(Somehow) similar circumstance - 1991

– the task of restituting State confiscated land – assigned to **local administrations** (non judicial procedure)

– performed so bad, that a tremendous number of contestations and petitions came eventually before the Courts

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Efficiency – rather marginal concept

But: almost constantly, essential components - mentioned/applied as principles/guiding lines

- Proper rendering/distribution of Justice
 - **Celerity** (*i.e.* swiftness; speed)

Celerity

1. **Laws for the Acceleration of Trials – 1943** most important
(also 1925, 1929)

'A country cannot be built if not based on right judgments – but also swift ones.

Delayed justice means, most of the times, true injustice'

Minister of Justice,
Report to the Head of the State, 1943

1943 'Acceleration' Law - extremely influential

Introduced/strengthened :

- the principle of the **active role** of the judge
- the rule of raising exceptions and **submitting evidence *in limine litis***
- the rule of mentioning the **name** of proposed witnesses in the **introductory claim** or in the defence brief
- evidence can be **admitted only if conclusive**
- Court can **limit number** of witnesses

- new rules on **questioning parties** who live abroad or cannot appear in court due to illness, etc.
- witnesses can be **brought in court by police agents**, following order issued by judge
- if lack of jurisdiction exception admitted, already presented **evidence - 'gained for the case'** (will be used by the competent court)
- the obligation for the court to decide over an **exception before examining the merits** of the case
- the possibility of awarding a **partial** (and enforceable) **decision** upon a partial recognition of the claim, etc.

Romania

All these prescriptions still in effect !

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Romania

Celerity

2. No mention 1948-2000

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3. Ordinance no. 138/2000 important measures for accelerating procedures

Objectives

- ensuring celerity
- sanctioning abusive exercise of procedural rights
- sanctioning tendencies/intentions to cause delay
- reducing costs

Methods

I. reinforcing the structure of the written phase of the process

by (re-) introducing **obligativity of
the defence brief** /statement

- Written preparatory phase**
- claim
 - defence brief
 - counterclaim

Claim, counterclaim

- the demands, grounds (facts, legal dispositions)
- evidence

Defence brief

- the defendant answers the claims and raises his defences, exceptions.
- defence evidence must also be submitted

All written introductory documents – must mention witnesses' names, addresses

Defence brief – role:

- ensuring equality of means between parties
(they know from the beginning of the proceedings each other's claims* and defences)
- the judge informed in earliest stage

*no other additional claims can be filed later during proceedings

- **to be submitted 5 days before first court session**

Sanctions

- if the defendant does not present the defence brief, he will lose the right to submit evidence and raise exceptions (apart from public order ones)

Corrective:

On first day of appearance (FDA), judge will caution/require party not assisted by lawyer to **formulate exceptions & defences** and submit **evidence**.

Upon request, postponement granted for preparing defense and submit defence brief.

Ordinance no. 138/2000 - Methods

II. proposed procedure of administration of evidence by lawyers

- only adopted in July 2005, maintained by the New Code
- optional
- seldom (if ever) used

III. maintains active role of the judge

IV. other dispositions

- modified text that allowed requests for evidence to be filed in later stage of proceedings on grounds of ignorance or lack of instruction of the party
- adding that 'request admissible only if party not assisted or represented by lawyer'

Active Role Principle

'The new laws everywhere are constantly extending the powers of the judge and his right to intervene in the proceedings'.

'His freedom in appreciating and choosing solutions ... and means ... is in a continuous advancement'.

Prof. Eugen Herovanu, 1932

1943 Law for the Acceleration of Trials

Conceived to impact both
on truth & efficiency

CPC:

'the judge is entitled to **require** the parties **explanations** regarding the facts and legal grounds they asserted (...), to **order** the taking of **evidence** he considers necessary and other lawful measures, even if the parties oppose'.

Means of evidence:

- written documents/**writings** ('authentic', 'under private signature';
electronic documents-NCPC)
- **witnesses**
- **verifications** of the judge ('investigation on-site')
- experts' testimony (**expertise**)
- **interrogation**/questioning of the opposing party (may lead to
'confession' (also spontaneous))

Interrogation -

- *la preuve la plus inutile du monde*
(the most useless means of evidence in the world)
- *gaspillage d'activité procesuelle*
(waste of procedural activity)

(Giacomo Oberto, Italy)

Not entirely true

Romania

- oath – eliminated 1950

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Romania

Efficiency-oriented evidentiary rules

1. Prior to litigation:

- system of legal and judicial **presumptions**
(requires no evidence/allows no evidence)
- obligation of constituting **written documents**/legal instruments
ad probationem / ad validitatem
(high degree of veracity, easy to present in court)

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2. Pending litigation

A. Submitting evidence - *in limine litis*

- claim, counterclaim, defence brief
- 'first day of appearance' (FDA) - First meeting/court session

B. Admissibility

- general conditions
 - legality (prescribed by the law)
 - verisimilarity/credibility
 - relevancy
 - conclusiveness

Romania

- particular conditions :

- **witness evidence - non-admissible**

- if aims to prove a legal act/transaction with a value of more than (the equivalent of) 60 EUR

- if aims to prove against the content of a written document

(exceptions allowed)

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Romania

C. Administration

▪ General rules

- administering evidence **before any debates (arguments) on the merits** of the claim

- proof, contrary proof – at same time, as far as possible

- But: the evidence will be taken in the order established by the court

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Romania

- Specific rules

- **writings**

- presented with written introductory documents
- if
 - **opposing party** refuses to answer questioning about him holding writings
 - proved hidden or destroyed writings
 - proved holds writings and refuses to present them,

Court **may consider as proven** the allegations of the party that requested the producing of the writing

- if **other person or institution** holds the writing and does not send it if required,

Court can impose **finances** and order **compensations** for delay

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Romania

Specific rules –

- **witnesses**

- name and address in written introductory documents
- replaceable only in exceptional cases
- court can limit number of witnesses
- witness can brought in court by police agents (based on order issued by judge) **or** proceedings can continue without witness

- **expertise**

- objections to expert conclusions can be raised only at the first hearing after notification to party

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Means of evidence/incidents susceptible to cause delay

- expert's report

'The top ten reasons expert witnesses are trouble' (G. Michael Fenner):

experts make mistakes;

+ cause delay

- investigating authenticity of writings

- hearing witnesses (judge dictates to clerk, rephrases)

- replacing witnesses

(100 days for a replacement)

NCPC

The complaint for delaying the proceedings

- addressed to the same court that judges the delayed case .

- if the complaint admitted, the court will take immediately the necessary measures to eliminate the circumstances that caused the delay .

- the interlocutory judgement that dismisses the complaint can be challenged before the superior court .

Romania

NCPC

Provisions for restraining the possibilities of unjustified prolongation of the process

- Short intervals (day after day basis) granted between hearing dates

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Romania

NCPC

Evidentiary rules unified

- both admissibility and presentation of evidence governed by Civil Procedure Code (currently – CPC, Civil Code, Commercial Code)

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NCPC

Case management

- On the first hearing date, the judge will estimate, after listening to the parties, the *duration of the instruction phase* .
- can be reconsidered during proceedings (art. 233) .
- judge can *impose duties* on participants, and he can perform any action for solving the case . The ordered measures can be notified to parties through phone, fax, etc.

Conclusions

I. NCPC rules - inconsequential when compared with 1943, 2000 reforms :

- a) Past reforms – so ahead of their times, so exemplary, that they are very hard to surpass

Which may actually be true to quite an extent

- b) Romanian legislator will still have some further work to do

Romania

Conclusions

II. *In the past ten years, so much emphasis put in Romania on 'celerity' that issue of quality of judgments seems left behind*

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Romania

Evidentiary Law looks more and more justified not by the quest for truth, but by the concern of the Judicial authorities to *legitimate* their decisions under the *appearance* of rules intending to search for the truth.

Xavier Lagarde

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'Products' of Justice – Decisions

desired results -
accurate, well founded decisions

Symmetry

Efficiency – Truth

Justice

The “experts’ testimony” into the Italian judicial system: characters, questions and comparative views

Federico Ferraris
University of Milan-Bicocca

The problem

- ➡ How can we submit to the court proofs of “complex” facts, which can be properly understood just by means of a specific knowledge?

“Technical testimony”

“Technical testimony” can be placed somewhere in the middle between a witness testimony and a technical advice

⇒ Academics refer to the “technical testimony” to identify a “witness testimony qualified by technical profiles, in which the perception and assessment of the witness cannot find other suitable means of expression outside of a language necessarily specialized”.

Italian case law on “technical testimony”

⇒ Testimonial evidence “shall not consist in an entirely subjective interpretation or in technical or legal evaluations of the fact”.



The only means by which you can introduce special skills into a trial is the technical advice.

Italian case law on “technical testimony”

In some cases, anyhow, the technical advice can become of a s.c. “percipiente” type, that is, it can be used for finding facts, or for the reconstruction of historical facts reported by parties, or even for the quantification of claimed damages.



In all these cases, the court “does not just draw (...) criteria and parameters for assessing the evidence already offered by the parties through other means, but use them in terms of evidence to acquire direct knowledge of a relevant fact, that would be otherwise impossible to ascertain”.



The purpose identified by case law – in terms of advice s.c. “percipiente” – is basically the same as the one scholars attribute to a technical testimony: in fact, both share the importance (and the necessity, of course) of appointing a person provided with a specific expertise, in order to ascertain certain facts that otherwise would e-escape the understanding of the 'average man', as well as to report them at the trial.

Italian case law on “technical testimony”

→ The same decisions seem to provide for a "saving clause", where they say that “although opinions may not be the object of witness evidence (...), where the opinion is of an absolute immediacy, almost inseparable from the perception of the same historical fact, they may contribute to the judge’s idea on the fact”.



“immediate opinion” could be also referred to a technical approach.



solution adopted by art. 194 of the Italian Criminal procedure code.

Italian scholars on “technical testimony”

According to some scholars, even if the civil procedure code states that the witness deposition should be made using a “common” language, sometimes however there are situations where “the witness cannot adequately report the facts in any other way. Only in this case he may use a specialized or technical language”.



the distinction between “ordinary” and “technical” testimony would rely on the nature of the language, necessarily “technical” in order to explain certain phenomena.

Italian scholars on “technical testimony”

According to others, while the “ordinary” witness reports facts to the court in an analytical way, the “technical” witness does something more: he provides the court with not mere observations (and an analytical statement), but with a “synthesis” of what he saw, “synthesis made possible by his particular knowledge”.



the two kinds of testimony differ “with regard not to the object, which is the same, but to the value of the deposition, which in the first case rely to a common experience, in the second to a specific experience”

Italian scholars on “technical testimony”

Others think that some problems could arise when the court is faced with the uneasy task of rightly and properly assessing the outcome of a “technical” deposition. In other words, the risk is that the court may not fully grasp the meaning of the deposition.



In this case, it would not be unreasonable to expect that judges will ask for the assistance of a technical advisor: “this assistance can certainly be used for a correct understanding of witness statements, where the use of technical language by the witness was essential and the court is not able to understand the appropriate meaning of it”.

Differences

Technical Advice/ Technical testimony

- object: “investigation” vs. “facts”;
- nature: discretionary power vs. availability;
- different relationship with the fact to be reported/investigated;
- different liability of advisor/witness.

The “expert witness” in the American system

- Rule 702 of the Federal Rules of Evidence expressly states that “if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case”.

Critical aspects connected with the “expert witness”:

- expert witnesses are only “ideally” impartial observers of external events, but in reality they are “partisan rhetors whose opinion are for sale”;
- another risk is to introduce in trials a kind of knowledge defined, in a particularly colorful way, as “junk science”.

Possible solutions:

- As to the first, the “cross-examination” principle;
- As to the second, the use of “Daubert” parameters.

“De jure condendo” developments

- greater use of Rule 706, which authorizes the court to appoint ex officio expert witnesses;
- progressive development of professional associations that provide appropriate forms of accountability and disciplinary powers against their members when they make partial (if not scientifically false or inconsistent) statements;
- training of judges so as to make them specialized in different areas in which then they will be called to work.

“Experts” in English law

Two are the figures which can bring "professional skills" into a trial: "assessors" and "experts".

- The first is appointed by the court whenever it is necessary to make use of "expert knowledge";
- The second is appointed by parties, but with some relevant limits; moreover, the judge is provided with some important powers, in admitting the deposition as well as in managing the expert's activity.

Characters: independence, impartiality, autonomy, competence.

*Public and Private
Justice:
Dispute Resolution in
Modern Societies*

Taking and Administering Evidence - the Court of Justice of the European Union

**Dr. Jorg Sladič
Law Firm Sladič – Zemljak ,
Slovenia**

PROCEDURAL LAW

- **Procedural law v. civil proceedings,**
- **Cross-fertilization in terms of efficiency?**
- **Search for truth?**

ISSUES

- **Informality of the gathering of information,**
- **Concentration,**
- **Active o pasive role of the judge,**
- **Parties as *domini litis*,**
- **Expedited procedure.**

MAIN INTEREST

- **A new system of the gathering of information that is neither *civil* nor *common law*,**
- **Main features and influences of civil law systems,**
- **Corrections by *common law* (bigger role for the parties),**
- ***Extreme flexibility***

LACK OF NATIONAL AND EUROPEAN RULES

- **There is no legislation at the EU level governing the concept of proof,**
- **Any type of evidence admissible under the procedural law of the Member States in similar proceedings is in principle admissible.**

SPECIAL NATURE OF PROCEDURE

- **Preliminary rulings:** *under article 267 TFEU a national court submits questions to the ECJ about the interpretation or validity of a provision of EU law,*
- **Direct Actions:** *the ECJ must only rule on the application of the parties. It is for them to define the framework of their dispute, and the ECJ must rule on the claims made.*

PRINCIPLE OF UNFETTERED ADDUCTION OF EVIDENCE

- **AG Mengozzi:** case *Mebrom v Commission* (C-373/07 P),
- A particular fact may be proved by any form of evidence (freedom as to the form of evidence adduced) and determination of the probative value of an item of evidence is a matter for the EU judiciary.

PRINCIPLE *ACTORI INCUBIT PROBATIO*

- Linked with the term of the burden of proof,
- Civil law notion of the burden of proof,
- A party may only put forward, in support of its claims, facts which are sufficiently specific and detailed

PRINCIPLE *ACTORI INCUBIT PROBATIO*

- **Reversal of the burden of proof,**
- **Asymmetric situation between the applicant and the defendant,**
- **No easy access to defendant's information.**

PRINCIPLE UNDER WHICH THE PARTIES DELIMIT THE SCOPE OF PROCEEDINGS

- **Parties as *domini litis*,**
- **However, no exclusion of the active role of the judge,**
- **AG *Jarabo-Colomer* in the **VEDIAL** case: EU judicature is also bound by the factual framework and legal grounds established by the parties.**

**PRINCIPLE UNDER WHICH
THE PARTIES DELIMIT THE
SCOPE OF PROCEEDINGS**

- **the parties delimit the legal scope of proceedings (the form of order sought and also the legal background),**
- **the parties delimit the factual scope of proceedings.**

**PRINCIPLE OF OFFICIAL
INQUIRY**

- **Complementary to the *principe dispositif*, Civil law influences,**
- **Measures of inquiry: *The ECJ shall prescribe the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved,***
- **Burdensome and inflexible, rare in practice.**

ACTIVE ROLE OF THE EUROPEAN JUDGE

- **The purpose of measures of organisation of procedure shall be to ensure that cases are prepared for hearing, procedures carried out and disputes resolved under the best possible conditions,**
- **Informal,**
- **Efficient,**
- **Model for national law**

PRINCIPLE OF CONCENTRATION OF ORAL HEARINGS

- **One single oral hearing,**
- **It may last for days (example: Microsoft case: from Monday to Saturday).**

PRINCIPLE OF THE CONCENTRATION OF PLEAS IN LAW AND FACTS

- **Reduction in the number of written submissions. the application, the defence and eventually a reply and a rejoinder. Other submissions are not allowed,**
- **lodging of evidence allowed after the rejoinder only in very exceptional circumstances**

EXPEDITED PROCEEDINGS

- **Very efficient,**
- **A trade off between large legal background and expedient ruling on the merits.**



THANK YOU

EXTREMISM IN THE PURSUIT OF TRUTH IS OUR "VIRTUE" --
THE AMERICAN INFATUATION WITH BROAD DISCOVERY

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I take my title from Barry Goldwater. When he accepted the Republican nomination for President of the United States in 1964, Goldwater said: "I would remind you that extremism in the defense of liberty is no vice! And let me remind you that moderation in the pursuit of justice is no virtue!" A similar attitude pervades the American approach to discovery; for a long time, it seemed that a "leave no stone unturned" attitude prevailed.

At first blush, that attitude seems to fly in the face of efficiency. Certainly it seems that most (or all) of the rest of the world has been repelled by the American embrace of broad discovery. A number of countries have adopted "blocking" statutes to prevent American discovery from occurring on their soil. Most permit nothing of the sort in cases before their courts. And even though American courts will make U.S. discovery available to produce evidence for use in the tribunals of other nations, many nations will not use the fruits of that discovery.

To varying degrees, the prevailing attitudes toward fact-gathering in the rest of the world are variants of "Do it yourself" (i.e., without court assistance) or "Leave it to the judge." Those alternatives may achieve efficiency because those who must do it themselves can only trouble others moderately in their efforts, and because judges who control the process may inherently behave reasonably, or at least not often engage in wasteful wild goose chases.

This paper explores the American romance with broad discovery to evaluate whether it is wasteful. Much as it seems easy to prove that Americans go to excess, the reality is more nuanced. For more than a generation, American discovery rules have emphasized the concept of "proportionality," stressing that the amount of discovery should be proportional to the stakes in the litigation. During that same time, discovery rules have been changed to limit excessive discovery, and some voluntary disclosure has been required without formal discovery at all.

Considerable empirical research shows that overdiscovery is not nearly as large a problem as might be expected from the attention it receives. Extremism in the pursuit of truth -- at least through discovery -- turns out to be a rare thing. Calculated evidence-gathering that corresponds to the needs of the case seems much more common. And discovery does frequently reveal important -- sometimes crucial -- evidence. Particularly in view of the American reliance on private enforcement of public laws through litigation, it can be said that the level of discovery is generally fairly efficient. Of course, one may argue against the entire project of private enforcement, but in efficiency terms there are very respectable points in favor of it.

The alternative arrangements in the rest of the world are not obviously better in producing truthful outcomes, and perhaps not even more efficient. Clearly the U.S. and Europe have -- at a general level -- divergent attitudes toward privacy, at least when it comes to revealing evidence for use in civil litigation. Partly as a consequence, as Prof. Damaska has observed, the European willingness to permit civil litigation to be resolved on a very thin evidentiary basis is baffling. It may be "efficient" in reducing the efforts expended on litigation, but it seems less efficient in terms of ensuring that legal outcomes correspond with the law they supposedly enforce, in other words, in serving

the truth.

The American reality, meanwhile, does not normally correspond to the caricature prevalent in some quarters. The concept of proportionality did not immediately take hold, but seems increasingly important. The advent of E-Discovery has magnified discovery and reportedly also its costs. But there is also reason to suspect that it could be cheaper and much more complete than traditional hard-copy discovery. That outcome would serve interests of truth-finding and efficiency.

Altogether, then, it is at least possible to regard the American adversarial method of fact-gathering as efficient and preferable to others. This is not an argument that it is perfect. To the contrary, efforts to constrain and contain American discovery have preoccupied the American rulemakers since the mid 1970s, and they do not seem likely to leave center stage soon. But despite those reform efforts, the core commitment to broad discovery (compared to the rest of the world) persists.

I. THE PROMISE

Discovery has long held out a promise for American litigants that few others could hope to emulate. Even before the "revolution" in discovery wrought by the Federal Rules of Civil Procedure in 1938, the availability of court-ordered evidence production in the U.S. had ruffled foreign feathers. In the 1870s, American discovery efforts provoked formal German diplomatic protests. But the American discovery of that era was a pale imitation -- if even an imitation -- of the regime introduced by the Federal Rules and gradually expanded for three decades after the rules went into effect.

It's important to recognize that the adoption of the Federal Rules really produced a revolution. As described by Prof.

Subrin:

If one adds up all the types of discovery permitted in individual [American] state courts, one finds some precursors to what later became discovery under the Federal Rules, but . . . no one state allowed the total panoply of devices. Moreover, the Federal Rules, as they became law in 1938, eliminated features of discovery that in some states had curtailed the scope of discovery and the breadth of its use.

The framers of the Federal Rules recognized that their new system broke new ground, and worried that it would be rejected as out of control. But the Supreme Court embraced it, and within a decade proclaimed:

No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.

One might almost say that the Court was announcing that the pursuit of truth -- perhaps even extremism in pursuit of truth -- was the new credo.

The original rules seemed to invite the most aggressive discovery. Indeed, to counter any temptation to resist broad discovery, they insisted that unless the court entered a protective order against discovery (which was difficult to obtain) "the frequency and use of these methods is not limited." Meanwhile, the march of technology made a much larger fund of information obtainable through discovery. The invention and widespread use of the photocopier meant that the volume of documents subject to discovery expanded exponentially. And in

1970, the prior requirement that parties seek court approval for document production requests was removed; instead, the rules permitted any party to demand any "relevant" documents from another party or (by subpoena) from a nonparty without any prior approval by a judge. Judges got involved only if the responding party sought protection from the court, and then the burden was on the party resisting discovery, not the one seeking production.

This expansion of fact-gathering could readily be seen as furthering the interests of truth-finding. Certainly it permitted litigants who had limited information at the time the case began to use discovery to obtain what they lacked without it. That opportunity even expanded the legal grounds for relief in our common law system, according to Prof. Friedenthal:

[O]ver the years developments in many areas such as products liability, employment discrimination, and consumer protection have been the result at least partly of broad-ranging discovery provisions. For examples, lawyers would not have pushed in the courts and in the legislatures for expanded causes of action hinged on proof that defendants knew or should have known of a product's danger, if such proof were normally unavailable. The ability of plaintiffs' attorneys to obtain a corporate defendant's records, to depose corporate employees, and to send searching interrogatories has had a substantial impact in particular areas of law, and is one important factor in the dramatic increase in cases filed.

Indeed, this existence of broad discovery could be regarded as serving truth in the most desirable manner by deterring potential wrongdoers from pursuing courses of conduct forbidden by the law. In the words of Dean Carrington: "Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of

exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered." Often, discovery would reveal the smoking gun that proved liability; striking to the eyes of the uninitiated, American defendants really would produce harmful information.

Courts came to accept that discovery was essential to the truth-seeking goal even when there was no smoking gun. For example, a federal appellate court in a discrimination case explained:

Because employers rarely leave a paper trail -- or "smoking gun" -- attesting to a discriminatory intent, disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer.

As Prof. Hazard put it, the confluence of broad discovery and evolving grounds of legal relief enshrined discovery as a value unto itself: "Broad discovery is thus not a mere procedural rule. Rather, it has become, at least in our era, a procedural institution perhaps of virtually constitutional foundation." Some courts even seemed to embrace the idea of filing a lawsuit mainly or solely to obtain discovery: "[C]ertain civil suits may be instigated for the very purpose of gaining information for the public. . . . Civil Litigation in general often exposes the need for governmental action or correction." One might view broad discovery and truth as intertwined and interdependent.

II. THE CARICATURE

Applause for this vision of broad discovery was never universal even in America, however; one did not have to look

abroad for those who found the vision actually to be a caricature. Beginning in the 1970s, and increasing since, broad discovery has come under attack as subverting rather than seeking truth. There was surely something to this criticism.

Efficiency: As a starting point, it could hardly be said that discovery was always an efficient way of developing information. Carried on in an atmosphere of fairly extreme adversarialism (because the stakes were high), it invited inefficiency. Litigants could not ask the other side to provide the "most important" documents, because that would not be a proper discovery request. Instead, they had to make more objective requests, based partly on guesswork about what might or should exist since they would often not know what did exist. This was *discovery*, after all.

In an atmosphere of trust, efficiency might not suffer too much. Each side might be able to determine informally what materials the other side had and tailor its discovery requests accordingly. Although discovery could be used (among other things) to determine the existence and whereabouts of records and witnesses, this sort of informal exchange was not common. Indeed, it might even be regarded as inconsistent with the American adversarial tradition.

In an atmosphere of extreme mistrust, efficiency is the first victim. Responding parties may parse discovery requests in the most remarkable way to avoid turning over harmful information. Requesting parties therefore shun rifle-shot requests narrowly targeting crucial information because they understandably fear that they will not get what they need unless they make very broad requests that make narrow readings impossible. So discovery requests tend to be extremely expansive. Plaintiff lawyers admit that "We make overbroad requests because we know that we can only get the material we

want by asking for a huge amount of additional material we don't want."

The responding parties then tend to move in the opposite direction from withholding items based on an unduly narrow reading of a discovery request. If there is no way to parse the request to exclude the items the responding party really doesn't want to disclose, the alternative is to honor it literally, or even go beyond it, producing with a vengeance. Thus was born the idea of "dump truck" responses to document discovery. The dump truck would deliver a huge mound of material to the requesting party, which then had to sort through myriad items of little or no importance to find the few items that really mattered. Efficiency went out the window.

A further element of waste was introduced by the right of the responding party to make and defend objections to the document requests. Litigation about those objections could be extremely time-consuming, but sometimes after it was finally resolved with a court order to produce, the outcome was that the producing party then would reveal that actually nothing had been withheld on the basis of that objection. The entire effort resolving the objection was therefore a waste.

This sort of contretemps underscores a long-term reality for American civil litigation: Discovery is often the main battlefield. Merits decisions (judicial decisions about who wins and loses the case on the merits) were rarely possible on the pleadings, and usually could not be made at summary judgment until discovery had been entirely or largely completed. Moreover, merits litigation is extremely risky. For defendants, we are told, going to trial is often too risky. For plaintiffs, the stakes at summary judgment may raise similar risks. Better, perhaps, to fight discovery fights; then even a loss only means that one has to release some additional material, or one does not

obtain some additional material that might be useful (or might not even exist).

Burden: As should be obvious, this activity was costly. For a responding party that was honoring its obligations, the task of finding all the responsive items it has within its "possession, custody, or control" could be monumental. The larger the entity the larger the burden.

The extent of this burden, it should be clear, depends a great deal on the inherent inefficiencies of the adversarial stance of the parties in relation to discovery. The vehemence brought to litigation of discovery disputes has long repelled the American courts. For more than 40 years, the Federal Rules have instructed the judge to impose on the losing party the cost of a discovery motion unless it finds that the losing party's position was "substantially justified." For more than 25 years, the rules have also required the parties to confer before approaching the court with a discovery dispute in an effort to negotiate a resolution without the court's intervention. Courts, as well as parties, can be burdened by discovery.

Indeed, as a renowned magistrate judge observed in the 1980s, the entire judicial system depends on nonjudicial resolution of discovery issues:

The courts, sorely pressed by demands to try cases promptly and to rule thoughtfully on potentially case-dispositive motions, simply do not have the resources to police closely the operation of the discovery process. The whole system of civil adjudication would ground to a virtual halt if the courts were forced to intervene in even a modest percentage of discovery transactions.

A recent case involving sanctions for failure to preserve

electronic information provides a vivid example. The judge, in her long opinion imposing sanctions on plaintiffs, noted in a footnote that she and her law clerks spent over 300 hours working on this one discovery dispute. Admittedly, this was an important discovery dispute, but spending 300 hours of court time to resolve it cannot be regarded as efficient.

The burden on the parties can dwarf the burden on the courts. The recurrent complaint is from what might be called the "producer" side -- usually the defense -- that must gather and produce the material sought through discovery. But there is at least some basis for believing that the burdens are at least as great for those seeking information. It takes a lot of effort to paw through all the material that comes off the dump truck and identify the few genuinely important items.

These burdens compare unfavorably with what seems to be the cost of similar litigation preparation in the rest of the world. A study done in 2010 probed this question by gathering data on the litigation costs of multinational corporations by comparing their revenues from given countries with the litigation cost they incurred defending cases in the courts of those countries. According to this study, the cost of American litigation far outstripped the cost of litigation in any other country, measured as a proportion of the business done by the companies surveyed in the countries in question. For any one concerned about burden (or efficiency) it offers a sobering contrast.

The collateral purpose temptation: Another disagreeable feature of discovery in some cases is what might be called the collateral purpose temptation. Discovery is justified only to the extent it provides information that is relevant to the lawsuit and, hopefully, information that will advance the case toward resolution. But the actual motivation for discovery may go beyond such goals.

As the world increasingly understands, information itself has a value. Governmentally-required information revelation (as occurs due to discovery) may, therefore, be very attractive to those who want to use the information for a variety of purposes besides the one for which government intends it be used. And there certainly have been examples of collateral purposes that seem to influence discovery efforts.

As noted above, some courts have said they are receptive to the prospect of litigation filed primarily to reveal information, not to seek other relief in court. More frequently, particularly in intellectual property litigation, there are serious concerns that material sought through discovery may be used to obtain a competitive advantage in the marketplace. It has even been suggested that discovery of certain intellectual property without suitable protections against misuse would constitute an illegal taking of private property for a "public" purpose (ostensibly of resolving litigation). There have even been instances of parties marketing the fruits of discovery.

Obviously, such marketing efforts bring us no closer to the "truth" that discovery supposedly serves. Indeed, for those seeking the truth in terms of vindication in court, one might even criticize the costs of discovery as a sort of tax on getting to the truth.

Subverting the truth: If the promise of broad discovery is that it will provide the means to determine the truth, the reality, according to some, is that it subverts the truth. In large measure this asserted effect results from the two features just considered. The inefficiency of discovery makes litigation extremely expensive and quite unpredictable. The burden of responding to discovery, particularly for large organizational litigants, may seem to outstrip the actual stakes in the case.

At some point, these pressures may cause some to settle with justice undone, producing the opposite of the truth we are seeking. To the extent that is true, one could conclude that the American way of discovery actually installs a regime in which the truth is frustrated, not furthered. Some defense-side lawyers argue that plaintiff lawyers pursue broad discovery precisely to prevent resolution of cases on their merits; knowing they have weak claims, they want to catch the defendant in a discovery mistake and ask the court to declare them victors on the basis of that mistake -- by imposing the sanction of default or some similar disadvantage -- in cases they could not win on the relevant evidence.

III. THE REALITY

As is often (perhaps always) true, the actual situation lies somewhere between the extremes, such as those set forth above. For some time, as a result, American academics have poured scorn on the hyperbolic attacks on broad discovery that have recurred for the last 40 years.

Hard data on discovery are not easy to obtain, In the 1960s, while considering pervasive revisions of the Federal Rules, the rulesmakers commissioned a comprehensive study of the way the federal discovery provisions had worked for their first quarter century. That period had begun with forecasts that broad discovery would destroy the American adversary system, and also that it would produce a utopia with total sharing of essential information. The study showed that the actual effect had been in between:

By means of discovery and other reforms of recent centuries, the adversary system has been altered by not transformed. Deeply rooted in tradition, in the rules, and in the interests of litigants, the adversarial method of

conducting civil suits has determined how discovery has worked in practice. Basically, it is used by each side to strengthen its own case. . . . Most lawyers use it for the information purposes anticipated by the rules and not for the tactical purposes condemned by the authorities. Most lawyers use discovery successfully, with gains in evidence, names of witnesses, awareness of new issues, and other information useful in settlement negotiations and at trial. Discovery enables each side to learn more about the other's position, but each is still motivated to conceal as much as possible, particularly evidence or witnesses that will have a dramatic effect at trial. Many lawyers continue to be surprised by their adversaries at trial, despite their own use of discovery.

More recent research has produced somewhat similar results. In particular, case-based studies by the American Federal Judicial Center in 1997 and 2009 both showed that in most cases lawyers found that the amount of discovery done before the case was resolved was about right. Among those who thought the amount was not quite right, there was a fairly even split between those who felt that there was too little discovery and those who believed there was too much discovery. The caricature, in other words, was not accurate. Perhaps unexpectedly, there was some indication that discovery is costlier for plaintiffs than for defendants. Also somewhat different from the normal complaints about discovery, it appeared that deposition discovery was costlier than document discovery, even though the strongest criticism was directed at document discovery. In the 2009 survey, it was striking that lawyers who reported that the level of discovery in their individual cases was about right also said that they believed that discovery in most litigation, or in general, was unduly extensive and expensive. This divergence could be seen as the difference between rumor and actual knowledge; the lawyers had actual knowledge of their own cases,

and relied on rumor about the general conditions in litigation.

One feature of the caricature is the claim that discovery costs far outstrip the stakes in litigation. That attitude may be reinforced by the conclusion, reported above, that multinational companies found that American litigation was far costlier (measured as a proportion of revenues from various countries) than litigation in other countries. That finding seems to be contradicted by the finding of the Federal Judicial Center studies that discovery costs are almost always a small and seemingly reasonable proportion of the stakes involved in the litigation. This finding seems to contradict the report that multinationals find their litigation costs so much higher in the U.S.

But this contradiction is probably illusory. The reality is that litigation in the U.S. regularly involves higher stakes than litigation elsewhere. Unlike most of the rest of the world, the U.S. often permits large damage recoveries for pain and suffering or emotional distress. Although some decry that sort of award, the reality is that it increases the heft of litigation. Punitive damages claims also can significantly raise the stakes in a variety of kinds of litigation. Another feature of American litigation is that large organizations often face litigation that involves pro-plaintiff attorney fee-shifting statutes that vary the American Rule requiring each party to pay its own lawyer. Those provisions are commonplace in many environmental and consumer protection statutes. But more generally, the American Rule on attorney fees requires each side to pay its own, so American plaintiffs are not deterred by the prospect of having to pay their opponents' fees. Finally, American plaintiffs almost always have the right to a jury trial, a factor that introduces additional uncertainty. Although judges can cut back large awards, they can only do so in very remarkable circumstances; extremely substantial jury awards often survive judicial review.

Altogether, what these features of American litigation can mean is that some regard litigating all the way to a final decision is too risky because the outcome could be too crushing. In such a setting, particularly with insurance companies to fund substantial settlements with money that does not come out of the settling defendants' pockets, it is not surprising that there are accusations that litigation can have a value that far outstrips the value of the underlying claim, that "the merits don't matter." In that sense, some urge, truth is frustrated. But even if that critique has some justification, it is difficult to conclude that evidence-gathering itself is the driving force. Instead, discovery seems in general to be calibrated to the (admittedly high) stakes involved in American litigation.

And that calibration is no accident. For one thing, given the American Rule that parties must usually pay their own attorney fees, the investment in litigation may tend toward being proportional to the stakes. Beyond that, the rules themselves seek to constrain discovery and make it proportional. Although until the 1980s the Federal Rules invited almost unlimited discovery, that invitation eventually was removed and rules insisting on proportionality were installed in its place. Numerical limitations were also placed on the use of various discovery devices. And a moratorium was placed on initiation of formal discovery to require the parties first to confer about a discovery plan and, hopefully, to exchange some basic information up front. Judges, meanwhile, were prodded to take a more prominent role in regulating discovery, providing some "adult supervision" for this adversary process.

Ideally, these rule changes should fortify the existing and understandable urge toward discovery that fits the case. Ideally, then, the trend should be towards truth and efficiency. Operating in the real world, we must admit that we have not reached that happy medium. And there surely are U.S. cases that

fit the caricature. But on balance the American approach has not rejected the broad discovery path that was chosen 70 years ago.

IV. THE ALTERNATIVE

Since the U.S. is an outlier, and perhaps unique, it is worthwhile to compare alternatives. In terms of truth and efficiency, they might be clearly preferable.

In terms of truth production, there are certainly many complaints that American discovery operates as a bludgeon that deprives parties -- particularly defendants -- of a true outcome. Given the repeated reports that American discovery ordinarily involves expenditures that are actually proportional to the stakes in the litigation, that argument seems less compelling. Of course, one could argue that the stakes themselves defeat some versions of the truth, but the panoply of features of American law that permit large recoveries (e.g., pain and suffering recoveries, punitive damages, and jury trial) ought to be appreciated to be features of the "truth" embraced by American litigation.

This American "truth" seems to differ from the "truths" embraced elsewhere. But the procedures used elsewhere don't, to American eyes, seem to serve even their "truth." Most of the rest of the world, for example, takes a much more exacting attitude toward what a plaintiff must include in a complaint. The proposed Transnational Rules of Civil Procedure illustrate this point and insist that the plaintiff include detailed facts in the complaint and attach or describe the evidence that will be used to support those claims. Although such requirements may serve sometimes to deter groundless claims, they must also deter well-grounded claims of plaintiffs who lack the ability to obtain the evidence needed to prove their cases.

In terms of the "truth" of any legal system, then, there is at least a valid basis for something more like the American willingness to accept rather loose "notice" pleading and permit fairly considerable discovery as a way of exploring the evidentiary foundation of the claims thus stated. Even if the "truth" is the more restrictive version accepted in the rest of the world, this technique would seem to have merit. Claims would at least get through the front door of litigation, although they might be disposed of through the side door of summary judgment or by other pretrial means if the evidentiary support were not forthcoming. In this way, the promise of broad discovery might be realized.

At least in a significant number of American cases, the promise is probably realized. Parties do disclose damaging information through discovery, and their opponents are able to use that information to support claims (or defenses) they could not have proved without it. In at least some cases, the process reveals that claims are not supportable, and many cases settle for small amounts. Some are even abandoned.

But that vision would be deceptive if the process itself defeated the truth, as the caricature suggests it might. Though assertions abound that expensive discovery has prompted litigants, particularly corporate litigants, to capitulate when they have perfectly good defenses, hard proof of those assertions is difficult to produce. That is not surprising. Defendants would not much want to self-identify as patsies who could be pressured into settlement by aggressive discovery tactics. More significantly, however, such third-party research as we have shows that such cases are almost nonexistent, or at least fairly rare.

So one can conclude that the American practice of broad discovery -- at least when measured by the American version of

"truth" -- is fairly successful in a number of instances. The ever-declining trial rate makes us uneasy about what exactly should be regarded as "truth." That decline in trial rate could be attributed to the money and time consumed by broad discovery; perhaps that it is an obstacle to attaining truth. But another goal of discovery is to permit the parties to settle with sufficient knowledge of the evidence, so discovery may provide the parties with an agreed "truth" in light of what they can obtain through discovery.

Trial is not the only possible method of deciding the case based on the evidence. Indeed, summary judgment has become considerably more frequent, particularly in some categories of cases. A prime example is employment discrimination litigation, where defendants frequently succeed in defeating plaintiffs' claims on summary judgment, normally occurring only after substantial discovery. That statistic might be cited to show that American laxity in pleading defeats the truth because it permits these cases to progress to this point. But that sort of argument disregards the multitude of cases in which summary judgment is *denied*. Assuming that plaintiffs lacking discovery would be unable to proceed in such cases, there is a valid argument that the American method is serving the truth by enabling those cases to proceed, and that other approaches that would prevent the cases from being prosecuted are frustrating the truth. And even in those cases in which defendants are granted summary judgment, there could be a "truth" value in the process by which they were exonerated when that is compared to the suspicions of wrongdoing that might fester were pursuit of the truth through discovery not permitted.

Whether party-controlled discovery is necessary to achieve truthful results can be debated. As we have seen, giving the parties control of discovery introduces incentives to misuse it for improper purposes. Prof. Langbein thus proposed, famously,

that evidence gathering could be left to judicial officers instead of the parties; he called it "the German advantage" in civil procedure. But according to Prof. Damaska, we can, at a minimum, be skeptical about that alternative. As he observes, continental civil procedure exhibits "a considerable degree of tolerance -- almost an insouciance, to common law eyes -- for the incompleteness of evidentiary material." Leaving this task to the judge often will not do, because "the protagonist who tends to monopolize fact gathering -- the judge -- is not really very energetic or resolute in his probing. His exercise of his near-monopoly power to develop evidence seems lazy." As Prof. Damaska recognized, the American method was different: "Because processes of proof are propelled by the parties self-interest, there is no lack of incentive to energetic evidentiary action." So there may be reason to fear for the truth if the parties themselves are not empowered to gather the evidence. Indeed, in Prof. Fuller's view, the adversary method is the only way to overcome the tendency of even the most assiduous judicial officer to adopt and pursue an early "hunch," causing her to disregard evidence that the adversary system would require her to consider.

If our coordinate concern is efficiency, we may be inclined to reject party-controlled evidence-gathering because it is not efficient, even if it may be more reliable to get out the full story. Beyond a doubt, it may be prone to wastefulness. Parties seeking evidence are likely to ask for too much. Parties resisting disclosure are likely to fight too hard, and perhaps to contrive to provide too much chaff along with the wheat. Litigants who can see that the evidence proves they will lose have incentives to delay and obfuscate. Costs and delays will mount up.

It could be that judicial control of fact-gathering would be an antidote to these problems. But it could also be that the antidote is only as good as the judges and the system on which

they rely. Actually, at least in terms of litigation duration (sometimes called "delay"), American litigation seems reasonably efficient. Whether that is due to the model or other factors is uncertain. At least some countries that employ a model that seems like the German model (Italy comes to mind) seem to suffer from chronic problems of delay and, one suspects, litigation cost. Those problems have even prompted rulings by the European Court of Justice the delays deny citizens their basic rights to a prompt resolution of their cases.

In sum, when measured in terms of serving the truth and in terms of efficiency, the American method seems to stand up fairly well compared to the apparent alternatives despite its bad reputation.

V. THE FUTURE

Even if the basic American format is likely to continue to prevail for U.S. litigation for the foreseeable future, it could be modified to achieve truth and/or efficiency. As noted, many changes to the American rules have been adopted to prevent and confine perceived discovery overkill. The Supreme Court recently signalled that pleading scrutiny should also be tightened up due, in part, to the cost of discovery, and that development has sparked an intense debate about whether this tightening should be loosened by either legislation or a rule change.

Nonetheless, actual or possible changes under consideration in the U.S. might begin to serve interests of accuracy or efficiency.

Disclosure: In some countries, it is said, parties can be relied upon to disclose evidence without the need for costly and intrusive discovery forays. Certainly that sort of exchange could be more efficient than vigorous disputes about discovery

and huge efforts to find the relevant needle in a haystack of largely irrelevant material. In the U.S., we have for more than a generation recognized that the prosecution in a criminal case has a constitutional obligation to turn over certain exculpatory material. Perhaps a similar directive for civil cases could improve the search for truth and reduce the high discovery costs that arise in many cases.

Twenty years ago, the federal rulesmakers attempted to introduce something of the sort -- an obligation that each side turn over "core information" at the beginning of the case, and before formal discovery began. Some even suggested that this new procedure might make formal discovery unnecessary in most cases. The proposal encountered a firestorm of opposition, and was made voluntary instead of binding, so each district court could decide for itself whether to adhere to the national disclosure rule. Even with that opt-out provision, Justice Scalia of the Supreme Court dissented from adoption of the new disclosure rule on the ground, essentially, that it was un-American:

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients -- on their own initiative and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment -- the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side.

The actual result of this experiment was a patchwork of disclosure regimes in the federal courts across the country. In 2000, the disclosure rule was made nationally binding but changed

to require disclosure only of witnesses and documents that the disclosing party might use to support its claim or defense in the action. In a sense, then, it provided for something that in many countries is a part of pleading -- a statement by the party about what evidence it has to support its case. But if one assumes that vigorous pursuit of the truth calls also for inquiry into information a party possesses that helps its opponent, the revised disclosure provision could hardly supplant formal discovery. Even this somewhat toothless disclosure provision is regularly criticized, often for being ineffective. So for the present the disclosure route does not seem to hold promise in the American federal courts. Some American states -- most notably Arizona -- have more forceful disclosure regimes, but those state-court provisions do not seem likely to sweep the nation.

Electronic information and the CSI effect: American jurors increasingly are said to exhibit the "CSI effect," named after the American television show "Crime Scene Investigation." In the TV show, crime scene investigators use a variety of high-technology devices to solve crimes. Often (perhaps always) they are able to come up with indisputable evidence of guilt, often including surveillance video pictures of the culprit at the scene of the crime. The reality is that surveillance is increasingly an almost constant feature of daily life, or at least daily urban life. Not only are there thousands of digital cameras trained on myriad public spaces, there are also such things as GPS features of cellular phones that permit very accurate tracking of where a person has been.

This material is the stuff of civil litigation as well as TV crime dramas. For more than a decade, electronic discovery has been the Brave New World of American civil litigation. It has grown rapidly into a major business, supposedly generating over \$4 billion in revenue for American E-Discovery providers in 2009.

On one level, this information permits more accurate and "truthful" determinations than could be had without it. Indeed, the Supreme Court has recently held that video footage of a police pursuit established as a matter of law that the police were justified in ramming the car they were pursuing even though the driver claimed he was in control of the car. In other cases, parties have relied on such evidence to argue that their cases should be decided by courts based on digital evidence alone. At least "truth" might be said to get a boost from this prospect.

The variety of proof possibilities is illustrated from a recent article in a trial lawyers' magazine about the "black boxes" in automobiles. For decades, the black boxes in airliners have been important to determining the reasons why they have crashed. Many modern cars have "event data recorders" that record and retain a variety of data. GPS readings may be so precise that the location of vehicles can be analyzed by experts who can use it to reconstruct accidents. Consider the author's description of the use of this sort of data in a case in which a critical question was where a given vehicle (called the "bullet vehicle") was travelling at the time of the crash:

While the plotted GPS data was not refined enough to define the specific distance between the vehicle and the edge line or centerline [of the highway], it was sufficient to show that the bullet vehicle was in the left westbound lane for about 22 seconds and that about 10 seconds before the collision, it moved into the right westbound lane. . . . By defining the lane where the collision occurred, the credibility of both vehicle operators' testimony could be gauged on scientific evidence.

Surely this sort of detail promises greater "truth" than the alternatives formerly available.

Whether reliance on digital data would result in efficiency is another matter. Many decry E-Discovery as hugely expensive and mainly wasteful. But coming up with a substitute is not easy. Increasingly, many or most organizations rely mainly or solely on electronic storage and transmission for their data. Often there are no other records, so E-Discovery must occur. Because this information is so important, potential litigants in America may often feel obliged to retain huge quantities of it, perhaps at great cost. Today, the question whether this preservation situation calls for further rulemaking about E-Discovery is under active review.

But the news is not all bad. To the contrary, new technology may provide valuable solutions to the problems caused by the abundance of electronically stored information. A new technique called TREC may soon be ready, and it holds promise of using digital techniques to extract the pertinent information from huge masses of digital information. Presently the most costly part of the document discovery process is the review of this material for responsiveness by attorneys (at high billing rates), so this technology may provide an inexpensive alternative to that activity. Coupled with a recent rule change that permits parties to avoid the risk of waiver of the attorney-client privilege, this process could actually shorten the document review effort and save large sums of money. Thus might efficiency interests be served.

Whether the interests of truth will be served is arguably less clear. For a long time, American lawyers have looked for "hot documents," the inculpatory materials that support a claimant's case. For centuries, courts have submitted the question whether to treat these hot documents as overcoming myriad witnesses who claim that the defendant never would consider the wrongful conduct plaintiff claims occurred.

The advent of email and text messaging greatly multiplies the chance that the plaintiff will be able to find some documents in the records of a large organization that support her theory of culpability. Whether that really provides a greater confidence that the adjudicated result will serve the truth could be debated, however. Because email and other digital communication seem to include myriad offhand comments, treating a few of those as sufficient to show that the organization acted for a bad motive is dubious. Not only could the search for those stray comments undermine efficiency by costing huge amounts of money, then, it might be seen as undercutting the accuracy interest as well.

But perhaps it would be possible to use digital information in context, improving the search for truth. Assume an employment discrimination case, for example, in which the plaintiff claims she was passed over for promotion because she is a woman. Discovery might unearth a couple of comments suggesting gender bias among her superiors, but if it also revealed a mountain of commentary lacking any such taint, that mountain might be treated as overcoming the probative value of the couple of inappropriate comments. Although the "truth" is often somewhat elusive in such cases, one could argue that such a "total recall" approach would permit a more accurate assessment whether the comments on which the plaintiff relies really support her theory.

"Simplified" procedure: For as long as people have thought about procedure as a distinct topic, there have been complaints about cost and delay. Often, the solution has been said to depend on simplifying unduly complicated procedures.

Actually, there is a fair argument that procedures are often complicated because the problems they seek to solve are themselves complicated. Those who endorse simple answers often turn against simplicity when they don't like the answers, and ask

instead for more thorough methods to resolve problems.

In the U.S., there are recurrent efforts to achieve simplicity, at least in cases that don't have stakes that warrant more complicated procedures. In the California state courts, some low-stakes civil cases may be governed by simplified procedures. More recently, California has also introduced a "fast track" simplified trial option that depends on parties waiving a variety of procedural incidents that would otherwise slow the case down. Around a decade ago, the federal courts considered the possibility of developing some simplified procedure techniques also.

But for the present, simplified procedure seems largely to depend on party agreement, and quite often at least one party will not agree. Indeed, one feature of arbitration that has frustrated some is that even though it is supposed to be simpler and faster than litigation it often gets encrusted by procedures that are just as daunting as formal civil litigation.

VI. CONCLUSION

Focusing on truth and efficiency looks to the right things. But too often it seems to involve tradeoffs -- one can get an improvement in truth-seeking only by enduring an efficiency cost.

The American version may seem to emphasize truth-seeking as the sole consideration, to say that extremism in the pursuit of truth is a virtue, not a vice, and that the costs of that pursuit are insignificant compared to the importance of the goal. But the reality of U.S. litigation is much more nuanced, and the reforms of the last 30 years have certainly pushed efficiency to the fore.

The alternative "efficient" model of the rest of the world

is not uniform, but also does not seem clearly to have struck a better balance between truth and efficiency. To the contrary, it seems too often to give truth short shrift. Perhaps in systems that regard civil litigation as an entirely private matter, that orientation makes sense. In the U.S., "private" civil litigation is an important method of enforcing important public laws. In that atmosphere, extremism in pursuit of truth may further public goals.

At the same time, even the American attitude is sufficiently nuanced to resist overkill in pursuit of truth. The caricature of American litigation is just that -- a caricature. Even if there are actual cases that seem to exemplify the worst aspects of American litigation, they are not the norm. An other systems generate caricatures as well; Dickens' *Jarndyce v. Jarndyce* is just one illustration.

So ultimately each nation is likely to strike its own balance between truth and efficiency. To some extent, that balance will depend heavily on the role civil litigation plays in that society. At the same time, however, national systems can learn important lessons for other nations. Not only is harmonization a desirable goal, but experience is an extremely valuable source of ideas for innovation. Extremism in pursuit of desirable innovations is surely a virtue.

The Fight Continues?

Material Truth

vs.

Fair Trial within Reasonable Time

Alan Uzelac
University of Zagreb

"Materijalna istina" - iskrivljeno ogledalo jedne teorije istine u sudskom postupku
Zbornik PFZ, 42 (4) 419-432 (1992)

431

Summary

Alan Uzelac: "Material Truth" - the Twisted Mirror of a Theory of Truth in Legal Proceedings

1992

Most Croatian lawyers would say that the purpose and aim of legal proceedings is to find a so called "material truth". This is a statement which similarly occurs in most of the (former) socialist countries. On the other side of the (former) Iron Curtain, the notion of "material truth" is known to some Western European lawyers, but is in no way so important: it is merely a technical term for an evidentiary doctrine. Going west, on the other side of the Atlantic, American lawyers would consider the concept of "material truth" as something strange and would probably misunderstand it. Being asked for the objective of legal proceedings, they would probably give several answers, but very few of them would have anything to do with "truth", especially with "material truth".

For Eastern European lawyers the term "material truth" has contradictory meanings; nonetheless, by following differing authors, a complex of distinct traits could be discovered. In the concept, "material truth" could be defined as "correspondence reality, which is to be found exclusively by the Court (i.e. by a maximum level of certainty, unbound by legal rules and actions participants to the legal proceedings, intending to protect common

Survival of the Third Legal Tradition?

Alan Uzelac*

I. INTRODUCTION: SOCIALIST LEGAL TRADITION WITHOUT SOCIALISM

The famous 1969 book by John Henry Merryman¹ starts with a chapter on three legal traditions. In the very first sentence, Merryman claimed that: "[t]here are three highly influential legal traditions in the contemporary world: civil law, common law, and socialist law."² While writing mainly on civil law systems (and demonstrating how they contrast with the common law tradition), he provided only a few remarks on the (then) "young, vigorous legal tradition" of socialist law.³

2011

The starting dilemma

- The guarantee of efficiency???
- Is inquisitorial style of proceedings more effective than adversarial? Does it help us reach more accurate results (“material truth“)?
- **Case 1:** Western European countries aim to speed up trials by strengthening inquisitorial elements.
- **Case 2:** Eastern European countries aim to speed up trials by abolishing inquisitorial powers of courts and judges.

3

Rephrasing the dilemma

- The notions of “active” and “passive” judges as a core of inquisitorial/adversarial proceedings
 - Is this a useful conceptual framework?
 - What is “active” and “passive”? Is the division clear?
 - Inverse correlation: does “active” judge mean “passive” party and vice versa?
- Can both parties and judge be passive?
- “Loyal collaboration” as a goal: how does an *Arbeitsgemeinschaft* fit the scheme?
- Different types of “active” judges:
 - stimulating and moderating the substantive debate between the parties (*materielle Prozessleitung*)
 - case managers – masters of procedural calendar (*formelle Prozessleitung*)
 - truth-finders – agents of public order assigned with discovery of “true facts” (*materielle Wahrheit*)
- ‘Social’ and ‘Socialist’ Civil Procedure
 - What are the main differences between the procedural model of Franz Klein and the procedural model of the socialist civil justice systems?
 - Travelling to the Past: the need for reconstruction of the Socialist concept of ‘material truth’

4

Ideological background of the 'material truth' in a Socialist justice system

- philosophical underpinning:
 - correspondence theory of truth
- political underpinning
 - the truth-finding as the pinnacle in the hierarchy of procedural principles
 - reaching material truth as the overarching goal of civil proceedings...
 - the deformalization of "formal law"
 - material truth as the alibi for "purging the court proceedings of all harmful and unnecessary formalisms"
 - the educational and controlling role in the CP
 - free evaluation of evidence based on 'class instincts', 'socialist consciousness', 'dialectic materialism'
 - formal logic as an obstacle on the way to 'material truth'

5

Two faces of civil justice in the "third" legal tradition

- | | |
|--|---|
| <ul style="list-style-type: none"> ■ Early stages/doctrine (revolutionary justice) <ul style="list-style-type: none"> ▪ replacing law and courts by political bodies; ▪ Soviets: "all power" (including judicial) ▪ typical use of courts: criminal/administrative ▪ no appeal; direct referrals to Supreme Courts; "nadzor"; State Prosecutor as guarantor of public interests ▪ anti-formalism: formal rules (procedure) are "harmful" (discretion; free evaluation of evidence; intimate conviction) | <ul style="list-style-type: none"> ■ Late stages/reality (socialist legality) <ul style="list-style-type: none"> ▪ courts as instruments of stabilization of the "dictatorship of the proletariat" <ul style="list-style-type: none"> ▪ claim for uniformity: "same law for Kaluga and Kazan" ▪ state power should not be abolished, but strengthened. ▪ Soviet justice as "mighty instrument" ▪ formalism; re-affirmation of procedural law; active investigative role of the judges; <ul style="list-style-type: none"> ▪ evolution towards 'excessive formalism' ▪ proliferation of legal remedies (universal right to appeal) ▪ avoiding substantive decisions... |
|--|---|

6

Judicial activism and 'material truth'

- state paternalism as a driving force behind the 'active judge'
- 'adversarial proceedings' as the public display of 'Socialist justice'
 - modest reliance on party initiative
 - need to control whether parties dispose with their rights in public interest, strong grasp on evidence
- political activism vs. procedural activism
 - the transindividual goal of 'material truth' much more important than individual right to a decision within a reasonable time: calendar is not important; neither is value or importance...
- need for coherence with the "democratic centralism"
 - assessment of evidence is free, but subject to hierarchical monitoring and intervention of higher judicial authorities
- result: *de iure* – active role of the judge and the parties; *de facto* – passive and reactive role of both the court and the parties

7

Material Truth & The Three Enemies of Efficiency

Collection of evidence as the ultimate responsibility (burden) of the court

Lack of preclusions in the evidentiary proceedings (trial stage, appeals)

Conversion of appeals into cassation: the poetics of successive remittals

8

The trends

- Abandoning the right of the court to take evidence *ex officio*
 - Is it enough?
 - Obligation to collect evidence proposed by the parties...
 - Obligation to instruct the parties...
- Attempts to introduce deadlines (preclusions) for adducing new facts and evidence
 - Modest success, strong opposition in practice.
- Limiting options for successive remittals
 - the policy of 'second chance'

9

“Lust for decision-making”: the key element of modern Austrian CP

Vielmehr ist die Realisierung [der Grundkonzeption der öZPO] dann gefährdet, wenn sich im Verhandlungssaal Bequemlichkeit breit macht, wenn es dem Richter an Entscheidungsfreude mangelt, aber auch dann, wenn Richter mit Arbeit überbürdet werden.

Jelinek, Einflüsse der österreichischen Zivilprozessrechts, 1991

- the success of the process depends on the status and role of judges (lawyers, experts...)
- regulation of legal professions and systemic design of the organisational structures may determine the level of efficiency (also in the fact-finding process)

10

Conclusions

GENERAL THEORY

- binary opposition of active and passive judges/parties should be refined
- judicial case-management may/should be separated from initiative in fact-finding process
- truth in procedure: a notion that is in the service of fair trial
- notion of 'truth' should be construed from the perspective of users

'THIRD TRADITION'

- paternalistic inquisitorialism continues to rule
- material truth as an obstacle to efficiency
- 'law in action': combining Social(ist) passion for truth with Romano-Canonical proceedings
- lack of progress: the opposition of legal professions

11

On the notion of optimal level of proof-taking

What cost benefit analysis has to say
on the trade-off between accuracy
and costs in legal proceedings

Marco Segatti- Phd Candidate
Università di Pavia

An overview

- Introduction;
- General principles of cost-benefit analysis;
- Accuracy and costs in legal proceedings;
- An example: Judge Posner's model;
- Limits of the behavioral foundations of economic analysis of civil justice;
- Alternative approaches;
- Sketches for some further research

A first glance at the topics

- The need to make reasonable trade-offs between accuracy and costs;
- Is the discipline of Cost-benefit analysis of any help?
- Two limitations:
 - The institutional position of the person doing the trade-off;
 - The ability of legal procedures to adequately represent the interests at stake;
- The source of the limitations: peculiar behavioral assumptions within the standard model of rationality assumed by Economic Analysis of Civil Justice;

Principles of costs-benefit analysis

- Explicit valuation;
- *Consequentialist* framework of evaluation;
- Efficiency as the main normative criteria of evaluation;
- Standard behavioral assumptions: self interest maximization, litigation as a conflict between two strangers;
- The market analogy;

The trade off between accuracy and costs in legal proceedings

- Outcome based theories of adjudication;
- A marginal interpretation of the value of accuracy in adjudication;
- The value of correct outcomes as a tool for creating incentives for behavior outside litigation;
- Some ambiguities:
 - Judgements of facts/judgements of law;
 - A particular interpretation of the content of legal norms (Holmes v. Hart; some empirical suggestions);
 - Predictability of outcomes v. outcome accuracy;
 - An optimal amount of evidence gathering for a non-optimal legal solutions?

A sketch of Judge Posner's model

- Evidence gathering as a problem of search;
- A formal interpretation:
- Take (p) as the probability that, if the evidence is considered by the trier of fact, the case will be decided correctly.
- Take (S) as the amount at stake;
- Assume that benefits B are a positive function of (p) and (S) , and that (p) is a positive function of the amount of evidence (x) . Assume further that the costs (c) are also a positive function of (x) .
- So the Benefits are $B(x) = p(x)S - c(x)$
- The optimal amount of search, satisfies: $p_x S = c_x$
- The problem with mathematical rigor:
 - Rootless theorizing;
 - A problem with the meaning of (p) in the evaluation of evidence: the non uniqueness of bayesian interpretations of probability

Some limits of the behavioral foundations of standard economic analysis of Civil Justice

- A quick look of a prisoner dilemma situation:
- Imagine a dispute between Elisabetta (a famous surgeon) and Federico (a malpractice case)
- $p = 0.6$ $w = 100.000 \text{ kn}$ $c_p = c_d = 20.000 \text{ kn}$
- Federico's expected value of going to trial =
- $0.6 \times 100.000 - 20.000 = 40.000 \text{ kn}$
- Elisabetta's expected loss = $0.6 \times 100.000 + 20.000 = 80.000$
- Settlement range = 40.000 kn: Elisabetta will accept anything less than 80.000; Federico anything more than 40.000;
- Suppose that there are two strategies available for the two players: hard strategy and soft strategy;
- If both use a hard strategy: deadlock 40% of the time with equal split.
- If only one uses a hard strategy: settlement with split of 75% of surplus
- If both use soft strategies: settlement with equal split.

Federico	Elisabetta		
		Hard	Soft
	Hard	52.000 -68.000	70.000 -70.000
	Soft	50.000 -50.000	60.000 -60.000

Federico	Elisabetta		
		Hard	Soft
	Hard	52.000 -68.000	70.000 -70.000
	Soft	50.000 -50.000	60.000 -60.000

Federico	Elisabetta		
		Hard	Soft
	Hard	52.000 -68.000	70.000 -70.000
	Soft	50.000 -50.000	60.000 -60.000

How to get out of a prisoner dilemma

- The importance of social norms: expanding the 'economic' toolbox;
- A 'relational' interpretation of party behavior;
- The importance of lawyers;
- Is the 'maximization of parties' interests' a good criterion for adequate representation?

...searching an alternative perspective

- The Behavioral Law & Economics movement;
- Realism v. predictive workability of the assumptions;
- Are good predictions all we *really* want?
- The ‘peculiar’ image of human motivations ingrained in rational choice theory.

Few things it might be interesting to take note of

- Self- serving bias:
 - What is it?
 - Standard interpretations of failures to settle;
 - Some normative implications:
 - A non bayesian interpretation of divergent expectations;
 - Discovery;
 - The importance of Court-annexed mediation procedures;
 - Is it really all? Sen's (and Marx) notion of 'objective illusion';

- Framing effects: Tversky and Kahneman seminal work:
 - Options with the same expected value, but *described* differently may yield different choices;
- A tentative and broader interpretation: are they really clear instances of irrationality?
 - Menu dependency and its significance;
- The influence of framing in parties' choices:
 - An empirical example

The normative significance of 'decision frames' in legal decision-making

- Sunstein's 'Incompletely theorized agreements';
- 'Decision frames' as a tool of legal reasoning to reach or reject 'Incompletely theorized agreements';
- The influence of 'Framing' on the determination of the factual content of legal disputes;
- The inadequacy of wealth maximization as criterion to decide on 'frames'

A note on what influences the determination of 'frames' in legal disputes

- Damaška's structures of authority and their influence on fact-finding arrangements (ie.: written v. oral evidence);
- The distance of the 'fact-finder' from the 'thickness of reality';
- The institutional position of the fact-finder and the determination of the '*probandum*';

Sketches for some further research

- ...an incentive approach to legal analysis;
- ...a capability approach;
- Outcome/process based theories of evaluation;

(Revised working draft – 15 May 2011)

Efficiency and Truth in Civil Fact-Finding: The Evolving Role of the Judge in Fact-Finding (Mainland China and Hong Kong Compared) and the Threat of Court-Directed Mediation on Fact-Finding in the People’s Courts

By Peter CH Chan, School of Law, City University of Hong Kong

Part A: The Evolving Role of the Judge in Civil Fact-Finding – Mainland China and Hong Kong compared

Overview - Efficiency and fact-finding: two jurisdictions, different approaches

Fairness in adjudication is premised on accurate facts. Constructing a sophisticated and efficient regime for fact-finding is therefore an imperative for civil justice.

China’s attempt to enhance efficiency was mainly effected by devolving the powers and responsibilities of fact-finding from the judge to the parties and strengthening the adversarial principle in its civil procedure.¹ Parties are playing an increasingly crucial role in fact-finding. As a general duty, a party is required to produce evidence in support of the facts on which the party’s allegations are based. However, it would be a misconception to view fact-finding in China as purely a party driven exercise. In fact, the judge retains extensive powers in shaping the landscape of fact-finding.² The extent to which the judge should be allowed to intervene with the fact-finding process is worth close academic scrutiny, particularly given that procedural reforms in China are intended to confer greater autonomy to parties in proceedings.

In Hong Kong, a converse development has been witnessed. The Civil Justice Reform substantially enhanced the court’s powers in case management. The court is now equipped with greater discretionary powers to enforce procedural deadlines. These powers have immense implications on the fact-finding process in Hong Kong, particularly in relation to the improvement of efficiency in fact-finding.

Section I – Mainland China

In the past, the Chinese judge wields monolithic powers in civil litigation. The Ma Xiwu style of adjudication (which emerged in communist controlled areas in China before 1949) required the judge to be extremely active in the fact-finding process. The judge would visit

¹ In this regard, China is not alone given similar experiences of transitional (or former socialist) legal systems. Uzelac describes the strengthening of the adversarial principle as “[an] attempt to empower judges to use the right to decide on the basis of burden of proof rules, instead of allowing endless, unsuccessful attempts to find certainty based on the evidence that is taken *sua sponte*”.

Uzelac 2010, p. 392.

² The judge is empowered to look beyond the pleadings in determining the material facts of the case. The court has the power to investigate and collect evidence on its own account. The judge is also given extensive discretion to determine the burden of proof in cases where the evidentiary rules are silent on the subject.

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(Revised working draft – 15 May 2011)

the community in which the dispute arose, ascertain the actual situations of the persons involved in the dispute and reach a decision in the best interest of the community and in line with government policy. Judicial mediation was the main method for dispute resolution. The Ma Xiwu style had immense impact on the construction of civil justice in modern China.

A groundbreaking development in Chinese civil fact-finding was the promulgation of the Some Provisions of the Supreme People's Court on Evidence in Civil Procedure that came into force on 1 April 2002 (**Civil Evidence Rules**).³ The Civil Evidence Rules consist of 83 articles and remain the most comprehensive legal instrument regulating civil fact-finding to date.⁴ It is important to read the Civil Procedure Law of the PRC (**Code**)⁵ in conjunction with the Civil Evidence Rules in studying Chinese civil fact-finding.

As will be shown, there is clear devolution of fact-finding responsibilities from the judge to the parties since the promulgation of the Code and the Civil Evidence Rules.⁶ The fact-finding function of the judge has (in principle) turned from collecting evidence to reviewing evidence.

However, commentators have warned that the increasing role of the parties must not be interpreted to mean that the inquisitorial nature of civil adjudication has changed once and for all.⁷ The judge still retained extensive and discretionary powers in fact-finding while the principle of party presentation is yet to be entrenched.⁸

³ Note that there are some discrepancies in the English translation of the rules. It is sometimes translated as Specific Provisions on Evidence in Civil Actions of the Supreme People's Court or Several Rules of Evidence Concerning Civil Litigation.

⁴ The Chinese civil procedure code must be read in conjunction with the judicial opinions and interpretations of the Supreme People's Court. The West may not be aware of the fine (yet important) differences between theory, the law and practice in Chinese civil justice. The judicial opinions of the Supreme People's Court are *de facto* "legislative instruments". From the judge's perspective, the opinion has greater normative effective than the civil procedure code or even more important than constitution. Simply analysing the code is seriously inadequate.

⁵ Effective since 9 April 1991; revised version promulgated on 28 October 2007.

⁶ Apart from evidence collection, party participation extends to the exchange of evidence (Articles 32 to 46 of the Civil Evidence Rules), and the cross-examination of evidence and witnesses (Article 66 of the Code; Articles 47-62 of the Civil Evidence Rules).

⁷ For instance, see Zhang and Zwier 2003, p. 455; but it is fair to say that fact-finding under Chinese civil procedure has moved from a strict inquisitorial system to a mixed regime with inquisitorial and adversarial traits.

⁸ Zhong and Yu provided a clear synopsis of the remaining inquisitorial traits of Chinese civil procedure:

"...Chinese judges have more extensive powers than their US counterparts. In common law jurisdictions, judges will only consider the issues raised, the objections mentioned, and the points made in the pleadings. The issues that the parties do not raise are usually waived. Therefore the judge's determination is limited to the pleadings the parties have filed. As the judge 'sits solely to decide' the dispute, she will not make an independent inquiry into the merits of the case, let alone independent investigation. Under the Chinese system, however, a judge's adjudication is not limited to the pleadings and arguments, but focuses on actual investigation and study. The adjudication system and the style of work of Chinese courts are intended to be convenient to, maintain close ties with, and serve the masses. Only after the court has discovered the whole truth of the case and collected sufficient evidence can it make its judgment."

(Revised working draft – 15 May 2011)

Evidence collection: party responsibility system and judicial intervention

Article 64 of the Code provides, “A party shall have the responsibility to provide evidence in support of its own proposition”. Article 2 of the Civil Evidence Rules provides that “The parties concerned shall be responsible for producing evidences to prove the facts on which their own allegations are based or the facts on which the allegations of the other party are refuted”. The Code establishes a party responsibility system under which the parties have the primary role of evidence collection while the judge’s role becomes secondary.⁹ However, the rules entrenched the judge’s residual powers of investigation and evidence collection when certain thresholds are met. The current regime provides for two scenarios under which the court should actively collect evidence: (1) when the parties themselves cannot obtain the evidence for some realistic or objective reasons (they may apply to the court to collect the evidence); and (2) when the people’s court considers it necessary in adjudicating the case.¹⁰ In the first scenario, a common example is where the evidence is archived at a public security authority (or when the evidence relates to land or bank deposits),¹¹ it is impossible (or very difficult) for the parties to collect such evidence on their own accord. Upon application, the court may collect the evidence on the party’s behalf. In the second scenario, “necessity” is elaborated in Article 15 of the Civil Evidence Rules, which tends to give it a restrictive definition, limiting the exercise of the court’s *ex officio* power of investigation to matters relating to state/public interests and non-substantive disputes.¹² However, in practice, necessity has been interpreted widely to encompass any matters that the court in its discretion believes to be necessary for the adjudication of the case. An example is where the case involves complex issues such that the parties are unlikely to be able to provide adequate evidence. Under such circumstances, the court will collect evidence on its own initiative to obtain first-hand knowledge of the relevant facts.¹³

As a general principle of fact-finding, the parties and the court are positioned to work hand in hand to discharge the evidentiary responsibilities in a civil action.¹⁴ A possible reason for retaining the investigatory powers of the judge is the parties’ relative lack of resources (as compared with their Western counterparts). With the exception of large commercial cases, an average party may not have the economic prowess to conduct a comprehensive evidence collection exercise. Another hurdle of implementing a full party-driven evidence collection regime is the administrative red tape in China. Nothing really gets done without good

Zhong and Yu 2004, p. 401.

⁹ Woo & Wang, 2005, p. 932.

¹⁰ Article 3 of the Civil Evidence Rules provides, “[Any] party who cannot independently collect evidence due to objective reasons may request the People’s Court to collect after investigation”, and Article 64 of the Code further provides, “[For] evidence that cannot be obtained by any parties or their litigation representatives because of some realistic reasons or for the evidence that the people’s court considers necessary in adjudicating the case, the people’s court shall investigate and collect such evidence”.

¹¹ NPCSC publication 2007, p. 219.

¹² Article 15 reads, “[1.] The facts that may injure the interest of the state, the public interest of the society or the lawful interest of other people; (2) The procedural matters that have nothing to do with the substantial dispute, such as adding parties concerned, suspending the litigation, ending the litigation, withdrawing, etc on the basis of authority of the courts”.

¹³ NPCSC publication 2007, p. 112.

¹⁴ *Ibid.*, p.112

(Revised working draft – 15 May 2011)

connections. Again, an average party may find it very difficult to collect evidence when the source is a government body, a state-owned enterprise or entities backed individuals who wield extensive political power. The judge's intervention in the evidence collection exercise does sometimes alleviate these difficulties.

In addition to its investigatory powers, the court retains extensive authority in a number of other areas relating to evidence collection and preservation.¹⁵

Despite the retention of judicial powers to intervene, the attempt to move to a party responsibility system in evidence collection is already a significant step forward in ensuring greater judicial impartiality (a success at least as a “legislative” design).¹⁶ The past practice of collecting evidence *sua sponte* by judges bears the danger of a judge forming premature views on the merits of the case (e.g. favouring one side) during the process of evidence collection thereby stripping the court's impartiality. A note of caution, however, is that the ease with which judges may intervene with evidence collection today (even in the absence of application from the parties) suggests that such danger is still very much present under the current fact-finding regime. An inappropriate exercise of judicial activism will result in unwarranted encroachment on what is supposed to be a party responsibility system of evidence collection.

The way in which the court exercises its powers of investigations also deserves attention. Under the current evidence collection regime, judges are still allowed to contact the parties (and witnesses) individually without a formal hearing or without the participation of the opposing party. This practice contradicts the principle of open trial, potentially taints the reliability of evidence (as witness testimony may be influenced by the exchange between the judge and witness) and assaults judicial impartiality. Another concern is the power of the Chinese judge to take both real and documentary evidence *ex officio*. This is contrasted with the German or Austrian judge who is only able to take real evidence *ex officio*. Documentary evidence is only admissible if at least one of the parties has referred to the document in question.¹⁷ The extent to which the court uses investigative power also varies with jurisdiction. For example, in France, the preparatory judge (*le juge de la mise en état*) in practice seldom uses the statutory powers to investigate. In practice, the parties in French litigation before a generic court fix the issues and prove their case with minimal intervention

¹⁵ To name a few examples of these powers (set out in the Code):

- (a) Article 65 states that the court has the authority to obtain evidence from any relevant units or individuals, and such units and individuals may not refuse to provide evidence. The court shall then verify and determine the validity of documentary evidence provided by the relevant unit.
- (b) Article 69 states that the court shall authenticate audio and visual materials and decide whether they can be admitted as a basis for finding the facts after examining them and comparing them with other evidence of the same case.
- (c) Article 71 states that the court has the authority to examine the statements of the parties in connection with other evidence of the case to decide whether such statements can be taken as a basis for finding the facts. The refusal of a party to make a statement shall not prevent the people's court from finding the facts of a case based on other evidence.
- (d) Article 74 states that the court may preserve evidence on its own initiative where there is a likelihood that the evidence may be destroyed or become too difficult to obtain later on.

¹⁶ Woo & Wang 2005, p. 932.

¹⁷ Oberhammer and Domej 2005, p. 304.

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from the court.¹⁸ A judicial investigation conducted arbitrarily disrupts the reliability of evidence gathered and places extra-evidentiary influences on judgments.¹⁹

Empirical research shows that judges still exercise their investigatory powers to “varying degrees, depending on judicial temperament, philosophy and ability”.²⁰ Another factor that determined the degree of judicial evidence collection is the caseload of the court. A court struggling with a heavy caseload usually has no time to actively investigate, thus allowing greater party autonomy in evidence collection.²¹

Civil burdens of proof – a big step forward?

Burden of proof is closely intertwined with the devolution of evidence collection powers from the judge to the parties. These elements form the building blocks of the party responsibility system in fact-finding. The foundational provision for burden of proof is Article 2 of the Civil Evidence Rules:

“The parties concerned shall be responsible for producing evidences to prove the facts on which their own allegations are based or the facts on which the allegations of the other party are refuted.

Where any party cannot produce evidence or the evidences produced cannot support the facts on which the allegations are based, the party concerned that bears the burden of proof shall undertake unfavorable consequences.”

Articles 4, 5 and 6 of the Civil Evidence Rules allocate the specific burdens of proof in tortious, contractual and other forms of disputes. Where specific burdens of proof are not explicitly provided and it is not possible to define who shall be responsible for producing of evidence according to the Civil Evidence Rules or other judicial interpretations, the court may determine the burden of proof in accordance with the principle of fairness and the principle of honesty and credit and taking such elements as the ability to produce evidence into consideration.²²

¹⁸ Clermont and Sherwin [], p. 248.

¹⁹ Zhong and Yu noted:

“Formal procedure is often perfunctorily applied. Because the judge conducts an extensive investigation and collects evidence before he hears the case, he has an understanding of the likely result of the litigation before adjudication commences. In some instances, the judge will make a decision about the outcome of a case before hearing any argument, making the trial essentially a ‘show trial.’ Further, in the course of investigation, the judge inevitably has frequent, often ex parte, contacts with both litigants. All of these extra-evidentiary influences on judgments are problematic. Frequent contacts between the judge and litigants facilitate judicial corruption because they are not subject to any procedural requirements.”

Zhong and Yu 2004, p. 436.

²⁰ Woo & Wang 2005, pp. 933.

²¹ Woo & Wang 2005, pp. 933.

²² Article 7 of the Civil Evidence Rules.

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There are obvious gaps in the current rules governing burden of proof. First, the standard of proof has not been expressly delineated. Second, there is no provision governing the shifting of burden of proof in specific situations. Third, greater procedural guidance is warranted when the court exercises its wide discretion in determining the burden of proof when encountered with the situation under Article 7 of the Civil Evidence Rules. Fourth, commentators have criticised the overly onerous (disadvantageous) consequences when a party fails to provide adequate evidence, which usually results in the party losing the case. Jiang observed that China should develop her own evidence production regime based on the synergy of parties and the judge efforts in evidence collection (inferring that subparagraph 2 of Article 2 of the Civil Evidence Rule should be repealed).²³

The first two problems have been partially addressed in the Uniform Provisions of Evidence of the People's Court: Proposal for Judicial Interpretations (Articles 133 to 142).²⁴

In practice, the question is whether the courts truly subscribe to the burdens of proof requirements as a fundamental premise for decision-making. Empirical study shows that judges general view burdens of proof as relevant in the decision-making process. Burdens of proof tend to be decisive in close decisions.²⁵

The paradox of party responsibility in the absence of the principle of party presentation

Paradoxically, the devolution of the responsibility to the parties to collect evidence (and proving one's case) and the introduction of adversarial mechanisms in fact-finding proceeded without implementing the principle of party presentation (*verhandlungsmaxime*).²⁶ The follow-up question must be whether the reform to enhance party participation in fact-finding was intended only to achieve efficiency rather than promoting overall justice through true party empowerment.

Examples that demonstrate the operation of this paradoxical fact-finding philosophy are numerous. First, statements made by parties are a specific class of evidence.²⁷ While performing a similar function as pleadings, the status of party statements is nothing close to that that of common law pleadings. Article 71 of the Code provides that the court shall examine the statements of the parties in connection with other evidence of the case to decide whether such statements can be taken as a basis for finding the facts. The refusal of a party to make a statement shall not prevent the court from finding the facts of the case based on other evidence. In other words, party statements may not be admitted as the basis for fact-finding if the judge decides it is inappropriate (having also considered other evidence). Even if the statements are admitted, it may only form part of the basis for fact-finding and the court is at liberty to depart from the contents of the statements. In case a party refuses to make a statement, the court can do away with the party statement requirement altogether and rely on

²³ Jiang 2010, pp. 154-155.

²⁴ Zhang B.S. 2008, pp. 94-100.

²⁵ Woo & Wang 2005, pp. 933-934.

²⁶ Lenhoff observed (when discussing the principle of party presentation), “[Since] it is for the parties to initiate the proceedings, it is left to them to present the facts in support of their demands and defences.” Lenhoff 1954, p. 313.

²⁷ Article 63 of the Code.

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other evidence as the basis for fact-finding. Zhong and Yu observed, “[Under] the Chinese system, however, a judge’s adjudication is not limited to the pleadings and arguments, but focuses on actual investigation and study.”²⁸ Second, while parties are entitled to engage in debate in a court session,²⁹ the debate only serves as a fraction of the fact-finding procedure. As with party statements, the court has no obligation to render judgment on the basis of party debates. This is known as the non-binding principle of debate. Third, judicial evidence collection may go well beyond the factual remits set out by the parties under circumstances explained above.

Without entrenching the principle of party presentation, the remit of fact-finding becomes nebulous. Despite positive developments in the Civil Evidence Rules³⁰ in the direction of abandoning the doctrine of factuality (i.e. judicial approach of pursuing material truth),³¹ the backdoor for active judicial investigation invites the reincarnation of the approach. If determined to be necessary for adjudication, the judge may go beyond the evidence presented by the parties and engage in his own train of evidential investigation or enquiry *ex officio*, causing delay and other problems. Without the entrenchment of the principle of party presentation, party participation in fact-finding is prone to be reduced (in the extreme case) to a mere nominal procedure under which parties spend considerable time delineating the facts, producing evidence and debating the facts only to find that their participation had very limited influence over the court’s ultimate fact-finding determination. Paradoxically, as a result of the absence of the principle of party presentation, the increased adversarial elements in Chinese civil procedure (which was introduced partly to achieve procedural efficacy) have the potential of causing greater delay due to the requirements of party participation. On a substantive level, the lack of entrenchment is contrary to the objective of party empowerment, which is supposed to be one of the themes in the Chinese civil justice reform.

²⁸ Zhong and Yu 2004, p. 401.

²⁹ Under Articles 12 and 50 of the Code, parties are entitled to engage in debate. Articles 127 and 128 provide for the procedures of court debate:

Article 127. Court debates shall be conducted in the following order:

- (1) presentation of oral statements by the plaintiff and his agents ad litem;
- (2) response by the defendant and his agents ad litem;
- (3) presentation of oral statements or defence by the third party and its agents ad litem;
- (4) debate between the two sides.

At the end of the court debate, the presiding judge shall ask each side to present his final arguments, with the plaintiff going first, then the defendant, and then the third party.

Article 128. At the end of the court debate, a judgment shall be made according to law. Where conciliation is possible prior to the rendering of a judgment, conciliation effort may be conducted; if conciliation proves to be unsuccessful, a judgment shall be made without delay.

³⁰ Article 63 of the Civil Evidence Rules.

³¹ Zhang and Zwier 2003, p. 451.

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There are two main reasons for the continued rejection of the principle of party presentation in Chinese civil procedure. First, the Chinese legal historical experience in civil litigation was about the empowerment of the judges and not the parties. Magisterial civil adjudication in imperial China confers unrestrained fact-finding powers on the magistrate. While parties were allowed to be involved in presenting evidence, the magistrate was the ultimate arbiter in determining the factual scope of the case. The Ma Xiwu style of adjudication was also premised on the notion of an all-powerful investigatory judge. Second, the obsession for material truth in traditional Chinese jurisprudence postulates an adjudicatory philosophy that is the antithesis of the principle of party presentation.³² Under this jurisprudential view, which is entrenched in Code³³, party-presented facts can only form the legal truth of a case. The partisan predispositions of the litigants almost certainly cannot ensure that a fact-finding process completely based on party presentation can ever reveal the material truth. This view necessitates the court to go one step further to ascertain the material truth. The Maoist instrumentalist approach to legal procedure (which focuses on material truth) still has lingering effect on the contemporary civil justice system. Indeed, the obsession with material truth has been identified as a characteristic feature of former socialist or transitional civil justice systems.³⁴ While Article 63 of the Civil Evidence Rules is said to have repealed the doctrine of factuality (which is premised on the search for objective truthness),³⁵ the traditional preference for material truth in Chinese jurisprudence and the residual (*ex officio*) power of judicial evidence collection suggest that the doctrine of factuality still exert considerable influence over contemporary civil adjudication.

The extent of judicial interpretation (Aufklärung) in fact-finding

Article 3 of the Civil Evidence Rules provides, “The People’s court shall inform the parties concerned of the requirements for producing evidences and of the corresponding legal liabilities so that the parties concerned may produce evidence actively, completely, correctly and honestly within the reasonable time period”. It is clearly inadequate if the court only provides general directions on the evidentiary requirements. Zhang observed that any direction from the court must be made after carefully considering the party’s allegations made.³⁶ The directions should preferably be concrete and specific. In practice, the lack of direction has caused parties to omit evidence resulting in the failure to establish the facts on which their allegations were based. Unclear guidance would also result in delay in evidence production. However, it is unrealistic (and objectionable from a procedural efficacy perspective) to require the judge to micromanage the parties’ evidence production exercise. A balance needs to be struck when the judge exercises this discretion.

Another example is Article 35 of the Civil Evidence Rules. Under the rule, “[If], in the process of litigation, the nature of the legal relations alleged by the parties concerned or the validity of the civil acts are inconsistent with the findings of fact made by the people’s court on the basis of the facts of the case, the provisions of Article 34 of the present Provisions

³² For academic support of the doctrine of material truth, see Jiang 2010, p. 155. For criticism of the judicial preference for material truth, see Zhang & Zwier 2003, pp. 431-432; also see Zhong & Yu 2004, pp. 433-436.

³³ Under Article 64 of the Code, “[The] people’s court shall, in accordance with the procedure prescribed by law, collect and examine evidence comprehensively and objectively”.

³⁴ Uzelac 2010, p. 390.

³⁵ Zhang and Zwier 2003, p. 451.

³⁶ Zhang 2006, p. 142.

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shall not be applicable, and the people’s court shall inform the parties concerned that the allegations [of the] litigation may change”. For instance, if the contract that forms the basis of the plaintiff’s claim for the repayment of a loan was determined to be invalid by the court, the court will notify the plaintiff and the plaintiff would need to decide whether to amend his claim (e.g. from a contractual claim to a proprietary claim). Inconsistency between an allegation and the facts would only lead the litigation to a dead end causing undue delay. The rule allows some leeway for the plaintiff to modify his claim and saves time and cost.

Evidence exchange and management with efficiency in mind

The first case management example is the regulation of production of new evidence. Under Article 125 of the Code, parties may present new evidence during a court session. This rule has been criticised for allowing parties to produce evidence at any stage of the proceedings causing undue delay.³⁷ However, if one looks at Article 125 in conjunction with Articles 40 to 45 of the Civil Evidence Rules, the parties’ right to present new evidence is not unrestricted.³⁸ In the case of *Guo Chun Xuan v Liu Zong Lai*³⁹, the plaintiff applied to produce supplemental evidence to the Zhengzhou City Intermediate Court. The court rejected the application on the basis that the supplemental evidence was not “new evidence” as it is already in “objective existence” (and in the custody of the plaintiff) during the first instance proceedings. The “objective existence test”⁴⁰ is contrasted with the qualitative test in Hong Kong for adducing new evidence on appeal pursuant to the principles in *Ladd v Marshall*.⁴¹ Under Hong Kong test, no further evidence (apart from evidence as to matters which have occurred after the trial or hearing) shall be admitted unless there are special grounds (such special grounds are set out in *Ladd v Marshall*).⁴²

A second example is the introduction of time limits for producing evidence. As a general principle, parties are required to produce evidence actively, completely, correctly and honestly within the reasonable time period.⁴³ On this basis, the judiciary is determined to

³⁷ Zhang and Zwier noted “[It] is very common that a party refuses to produce or exchange evidence before the trial, but presents the evidence to the court during the trial by surprise, or even on appeal. Even where a party has presented no evidence during the trial, he could present to the appellate court ‘new’ evidence in his favour”.

Zhang and Zwier 2003, pp. 430-431; also see Uzelac 2010, p. 392.

³⁸ The definition of “new evidence” is clearly defined. For instance, in relation to first instance hearing, Article 41 of the Civil Evidence Rule states that, “[The] new evidences of the first instance hearing include: the evidences newly found by the parties concerned after the expiration of the time period for producing evidences in the first instance court hearing; the evidences which the parties concerned cannot provide during the time period for producing evidences due to objective reasons and still cannot provide during the extended time period approved by the People’s court”.

³⁹ [(2008) *zheng min san chu zi* (No. 99).]

⁴⁰ Article X of the Notice of the Supreme People’s Court on Applying the Provisions on Time Limit for Producing Evidence of the Some Provisions on Evidence in Civil Procedures.

⁴¹ (1890) 15 App Cas 223, 225, quoted in Wilkinson, Cheung & Booth 2009, p. 953.

⁴² Wilkinson, Cheung & Booth 2009, p. 953.

⁴³ Article 3 of the Civil Evidence Rules.

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establish the normative effect of time limits and promote procedural efficiency by providing an onerous “sanction” for non-observance of time limits. Failure to submit evidence within the time period shall be deemed as giving up the right to produce evidence.⁴⁴ The position on time limits has been further clarified since the promulgation of the Notice of the Supreme People’s Court on Applying the Provisions on Time Limit for Producing Evidence of the Some Provisions on Evidence in Civil Procedures,⁴⁵ which provides for detailed regulations on time limits for different types of procedures (e.g. summary procedure and jurisdictional challenge).

A third example is the exchange of evidence. Article 39 of the Civil Evidence Rules provides that the court oversees the process of exchange of evidence. The judge records (on the case files) the evidence to which the parties have no objection. In other words, the evidence not subject to objection is deemed to be affirmed. In other words, such evidence would be taken as the basis for affirming the facts of the case without being subject to cross-examination.⁴⁶ Where there are any objections, the objecting party must provide reasons. Having satisfied with the reasons, the judge will record such evidence in accordance with the classified facts that need to be provided. By managing the exchange of evidence, it is intended that the major issues of the case are determined in advance of trial. There is a statutory limit to the exchange of evidence, i.e. unless the case is very important or complicated, there can be no more than two rounds of exchange of evidence.⁴⁷

Cross-examination and limitations in the use of oral evidence

[to be developed]

How the judge evaluates and determines evidence

[to be developed]

Section II – Hong Kong

There has been a significant shift of case management powers from the parties to the judge in Hong Kong with the implementation of the Civil Justice Reform (CJR) since April 2009. The exercise of these powers by judges has significant implications for fact-finding.

Underlying objectives and the surge of judicial power in fact-finding

[efficiency and proportionality in fact-finding is built into the underlying objectives][to be developed]

⁴⁴ Article 34 of the Civil Evidence Rules.

⁴⁵ Promulgated by the Supreme People’s Court on 11 December 2008.

⁴⁶ Article 47(2) of the Civil Evidence Rules.

⁴⁷ Article 40 of the Civil Evidence Rules.

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The CJR not only conferred extensive procedural case management powers to the judge but also substantive case management powers (e.g. O.1A, r.4(2)(c): “[deciding] promptly which issues need full investigation and trial and accordingly disposing summarily of the others” and O.1B, r.1(2)(j): “[exclude] an issue from consideration”).

Statement of Truth and Restrictions on Amendment of Pleadings

The reform introduced the requirement that all pleadings (together with the further and better particulars of the pleadings) must be verified by a statement of truth.⁴⁸ The effect of the statement of truth is that the pleader believes that the facts stated in the pleadings are true.⁴⁹ The statement of truth may be signed by the pleader or his legal representative.⁵⁰ In practice, the lawyer must confirm that all material and relevant facts have been pleaded before signing the statement of truth. The court may by order strike out a pleading that is not verified by a statement of truth.⁵¹ Proceedings for contempt of court may be brought against a person if he makes a false statement in a document verified by a statement of truth without an honest belief in its truth.

The verification requirement serves two important functions that are conducive to efficient fact-finding. First, if a party is required to certify his belief in the accuracy and truth of the matters put forward in the pleadings, it is less likely to include assertions that are speculative.⁵² Second, the requirement limits the pleader’s ability to allege inconsistent alternative sets of facts (unless there are reasonable grounds).⁵³

In addition to the verification requirement, new restrictions have been implemented after the CJR on amending pleadings. While a party may still amend his pleadings once without leave before the close of pleadings,⁵⁴ any further amendments must obtain leave from the court.⁵⁵ The court must not order a pleading to be amended unless it is of the opinion that the amendment is necessary either for disposing fairly of the cause or matter or for saving costs.⁵⁶ It has been observed:

“[the] courts have, therefore, been less prepared to permit substantial amendments for which last-minute applications are made than in the past. Leave is especially likely to be

⁴⁸ RHC O. 41A, r. 2.

⁴⁹ RHC O. 41A, r.4.

⁵⁰ RHC O. 41A, r. 3.

⁵¹ RHC O. 41A, r.6(1).

⁵² Final Report 2004, p. 111 (para. 221).

⁵³ White Book 2011, 18/20A/2.

⁵⁴ RHC O. 20, r. 3(1). The opposite party may apply without 14 days after being served with the amended pleadings, apply to the court to disallow the amendment: RHC O. 20, r. 4(1).

⁵⁵ RHC O. 20, r. 5, which must be read subject to O. 20, r. 8. Under O. 20, r. 8(1), for the purpose of determining the real question in controversy between the parties, or of correcting ant defect or error in any proceedings, the court may at any stage (either of its own motion or on the application of parties) order a pleading to be amended.

⁵⁶ Under O. 20, r. 8(1A).

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refused where an adjournment would be necessitated involving the change of a milestone date or where, if the amendment were allowed, the trial would have to be adjourned to allow the other party time to prepare a revised case.”⁵⁷

From a practical point of view, the verification requirement coupled with the new restrictions on amendments encouraged the pleader to advance his whole case with minimal amendments and be as forthcoming and honest as possible in its pleadings. The CJR conferred greater powers to the judge with regards to pleadings. It allows the court to identify the issues at an early stage of the proceedings and take proactive steps to ensure this initial step of fact-finding is carried out expediently and appropriately. The serious consequence of making false statements without honest belief promotes the truthfulness of the cases pleaded, which contribute to the search for truth in civil litigation.

Efficiency in discovery

The Chief Justice’s Working Party on Civil Justice Reform (**Working Party**) commented that “[there] was a broad consensus that the excesses of discovery ought to be tacked by appropriate case management by the courts.”⁵⁸ Following this view, a major change was implemented in the regime for discovery by conferring extensive powers to the judge in limiting discovery. For the purposes of case management and furthering the underlying objectives, the judge may make an order to limit the discovery of documents.⁵⁹ Such orders can be made of the court’s own motion without application by any party. While the default position is that the parties should decide their discovery regime appropriate for the action, if they do not do so, or if the court considers a different regime to be more appropriate, the court may exercise its power to limit discovery. This new rule also allows the judge to order the manner of discovery and the time for inspection.⁶⁰ The new rule ensures judicial intervention when faced with the excesses of discovery. It is submitted that the court should be guided by the underlying objectives in exercising its powers under this new rule.⁶¹ To date, there has not been a case in which the court exercised its powers under this new rule. It is questionable whether the rule will be frequently invoked as any judicial decision to limit discovery may become a point for appeal. For instance, if the rule is invoked to exclude marginally relevant documents that does not justify the delay and costs involved in their discovery, the party requesting the document may challenge the court’s decision arguing that its case management

⁵⁷ Wilkinson, Cheung & Booth 2009, p. 302.

⁵⁸ Final Report 2004, p. 259 (para. 500).

In fact, the Working Party considered whether to limit the scope of automatic discovery set out in *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 to only those documents directly relevant (Final Report 2004, p. 242 (Proposal 25)). However, the working group reached a conclusion that the *Peruvian Guano* principles should be retained as the primary measure of discovery, taken as the starting point for such case management.

⁵⁹ RHC O. 24, r.15A.

⁶⁰ White Book 2011, 24/15A/1.

⁶¹ An example of the exercise of the power is to direct, where appropriate, that discovery should take place in stages or in relation to particular issues first; or that it should be limited to particular classes of documents; or that documents need not be listed individually but by bundle or by file in certain categories: see Final Report 2004, p. 245 (para. 475).

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powers must not override the party's rights to discovery under the *Peruvian Guano* principles, which entitles a party to "train of inquiry" documents.

Whether it is discovery by parties without order,⁶² or when discovery is ordered by the court,⁶³ the court may (upon application) order for the determination of issues or questions before discovery.⁶⁴ This rule can effectively limit the scope of discovery when the court directs that particular issues have to be determined in advance of discovery. This would ensure the discovery to be more focused and avoid undue delay caused by the ambiguities with what the issues are. In practice, however, this rule is rarely invoked.⁶⁵ This is because lawyers are usually able to identify the issues unless the case is very complicated. But after the CJR, the situation is likely to be different given the judicial mandate of case management and the sanctions parties may face for undue delay.

An effective fact-finding tool (which was also available under the old rules) is the party's right to inspect documents referred to in pleadings and affidavits.⁶⁶ The party requesting inspection must satisfy the court that inspection is necessary either to dispose fairly of the matter or to save costs.⁶⁷ The documents must be specifically referred to (or directly alluded to) in the pleadings or affidavits. Mere inference is insufficient.⁶⁸ The virtue of this tool is that it allows parties to better prepare for their case at an earlier stage. For instance, a defendant may request to inspect documents referred to in the statement of claim to assist the preparation of the defence. This tool was underutilized before the CJR because it was easier to amend pleadings then. After the CJR, given the restrictions on amendment of pleadings, parties are much more likely to rely on it.

Reforms in pre-action discovery

[to be developed]

Witness statements and expert reports

[to be developed]

Appeals from certain decisions of masters to a judge in chambers (O. 58, r. 1)

[to be developed]

Listing Questionnaire (PD 5.2)

[to be developed]

⁶² RHC O.24, r. 2.

⁶³ RHC O.24, r. 3.

⁶⁴ RHC O. 24, r. 4.

⁶⁵ White Book 2011, 24/4/1.

⁶⁶ RHC O.24, r.10.

⁶⁷ RHC O.24, r.13.

⁶⁸ White Book 2011, 24/10/1.

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(B) Is court-directed mediation (especially judicial conciliation) a roadblock to fairness in civil fact-finding in the people's courts?

Judicial fear of decision-making and the policy preference for court-directed mediation

The work of a Chinese judge is partly assessed on the basis of his or her ability to avoid mistakes and minimise appeals. Adjudication (which involves the rendering of a decision) is “risky” for a judge given the possibility of appeal. The fear of making an improper fact-finding determination is one of the reasons for judicial procrastination and undue delay in a number of transitional (or ex-socialist) jurisdictions.⁶⁹ With regards to fact-finding, as issues of facts remain the main ground for appeal in China,⁷⁰ judges who are uncertain with their factual determinations are exposed to the imminent risk of appeal. Court-directed mediation becomes a very attractive alternative (whether it is in the form of pre-trial mediation, or judicial conciliation, usually taken place during trial). By resorting to court-directed mediation, the judge is absolved from the responsibility to render a definitive fact-finding determination.⁷¹

With the implementation of the overriding administrative policy of achieving social harmony since 2002, court-directed mediation has been identified to be the preferred tool for civil dispute resolution (as opposed to adjudication). However, scholars have questioned whether there is any necessary link between the policy objective of maintaining social harmony and the promotion of court-directed mediation as the preferred form of civil dispute resolution. In many courts today, settling a dispute by court-directed mediation has become an end *per se* rather than an alternative means to resolving disputes. This phenomenon is worrying as it encroaches upon the litigants’ right to be heard. This section critically examines the flaws of court-directed mediation in China (with particular focus on judicial conciliation) and the ramifications of the institutional preference for court-directed mediation on civil fact-finding.

The Chinese concept of mediation

The Chinese concept of “mediation” may seem elusive from a European perspective. The fundamental principles of party autonomy and the neutrality of the mediator in European mediation may not fit well with the actual practice of mediation in China. Traditionally, Chinese mediation was coloured by didactic (and ideological) undertones and was frequently used to advance adjudicatory objectives. These historical traits have found their reincarnation in contemporary China where mediation was promoted as a dispute resolution tool to advance governmental policies (e.g. the achievement of social harmony) and to effect judicial reconstruction (e.g. the rising importance of judicial conciliation in civil litigation). Further, certain terms require clear definitions to avoid ambiguity. For instance, the term “judicial mediation” (commonly used nowadays in academic literature and legal practice alike) may be more appropriately called “judicial conciliation” given the judge acts as the conciliator in the settlement process. Many of the components of court-directed mediation in China are idiosyncratically Chinese, which arose out of a very different legal culture from Europe.

⁶⁹ Uzelac 2010, pp. 392-393.

⁷⁰ Zhang & Walton 2010, p. 110.

⁷¹ Legal elites tried to promote judicial professionalism (particularly during the 1990s) by advocating the separation of mediation and adjudication (*tiao shen fen li*). However, they are losing the battle recently as the prevailing policy promoted the further integration of mediation with adjudication.

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Court-directed mediation: a critical appraisal

Court-directed mediation (especially judicial conciliation) is an integral part of contemporary Chinese civil procedure.⁷² It performs both adjudicatory and political functions. While the free will of the parties is emphasized in the Code, the court often dominates the mediation process and steers the settlement negotiation along its adjudicative agenda. Given these features, mediation in Chinese courts often distinguishes itself sharply from court-annexed mediation practiced generally in other jurisdictions.

Adjudication overshadowed by mediation has the tendency to undermine due process. Scholars are concerned that an overemphasis of court-directed mediation would result in an exponential extension of the court's mediation functions at the expense of its adjudicatory functions, and as a result affecting due process in civil litigation. Court-directed mediation lacked the basic safeguards of adjudication (the Code is thin on the procedural details of mediation).

Conflict of interest arises inevitably when the judge acts as both the mediator and the adjudicator (in the case of judicial conciliation). The question of mediation confidentiality was a subject widely discussed in international academia. China is underdeveloped in maintaining mediation confidentiality.

The question of party autonomy must be addressed not simply from the perspective of whether party consent to mediate had been obtained. Party autonomy is a principle of ADR that should permeate the whole mediation process ranging from the definition of issues to the methods employed for reaching settlement. The traditional role of the magistrate in judicial mediation may have found its reincarnation in modern day Chinese judicial conciliation. Observers of the system may notice that judicial conciliation in the people's court is coloured by didactic undertones and bureaucratic patrimony. Furthermore, it is questionable whether the governing philosophy to promote social harmony should translate into the policy of preferring court-directed mediation over adjudication. Zhang Weiping is a strong critic of court-directed mediation (in particular judicial conciliation) stating that it has no direct relevance to promoting social harmony.⁷³

It is further argued that the fundamental problem with court-directed mediation is that it is more of a case management mechanism than a genuine tool for promoting private justice that ADR is supposed to offer. The lack of modern and effective methods of case management drives court to resort to quick fixes at the expense of procedural formalism.

⁷² Court-directed mediation generally involves two procedures: judicial conciliation and pre-trial mediation. Under judicial conciliation, the judge acts as the mediator under the notion of "integration of mediation and adjudication" (*tiao shen he yi*). The process is usually invoked after trial has commenced. Given evidence is usually available at the time of trial, a settlement is more likely to be reached.

Pre-trial mediation is conducted by a judge or judicial officer different from the trial judge. This process usually yields limited results because the parties cannot benefit from common law-type discovery (so there is usually inadequate evidence available to make a settlement determination).

⁷³ Zhang W.P. 2007, p. [].

(Revised working draft – 15 May 2011)

Aside dispute resolution, the civil court performs important public functions, namely the enforcement of rights and the declaration of norms.⁷⁴ Court-directed forms of mediation (including judicial conciliation) are designed to settle disputes only and not to enforce rights and declare norms. Overemphasising mediation risks the civil court losing its public functions.

An overemphasis on court-directed mediation may result in the court not accumulating enough experience in adjudicating cases. This in turn may affect the reform of China's civil procedure and the construction of adjudicatory formalism. This may ultimately result in the retreat of the formalist legality that China was keen to develop in the 1990s. The superimposition of the judicial will on a "mediated" settlement would very likely lead to a higher rate of enforcement. Statistics show that enforcement rates have arisen in recent years as a result of the re-emphasis on court-directed mediation.⁷⁵ As a result, the time and cost of dispute resolution may be even higher than court adjudication.

The onslaught of judicial conciliation on fact-finding

The institutional preference for judicial conciliation detrimentally affects the fairness of civil fact-finding. There are at least three problem areas that deserve attention.

The judicial preference creates an "atmosphere" among the judges that the primary goal in a civil action is dispute resolution rather than the enforcement of rights. The need to fairly enforce the rights of the parties necessitates a thorough fact-finding process that will assist the judge in ascertaining the truth (whether legal or objective truth). The overemphasis on judicial conciliation will inevitably result in the lax of the fact-finding process given the focus has been shifted from the enforcement of rights to pure dispute resolution. The lax in fact-finding deteriorates the public function of the court, which involves the delivery of justice to parties, both in the form of rights enforcement and also in the form of ascertaining the truth. Fact-finding is a core and indispensable component of public justice. The overemphasis on judicial conciliation compromises the very core value of public justice.

⁷⁴ Professor Zuckerman's view that a civil justice system is not only a regime for dispute resolution but also performs an important public function of law (and rights) enforcement strikes at the heart of the problem China is facing today. He said:

"The civil court provides a law enforcement service. The role of the civil court is not merely to mediate disputes but to give effect to our rights and enforce them. A pedestrian injured by a speeding car, for example, does not go to court asking the judge to resolve her dispute with the speeding driver. Rather, the pedestrian demands what is due to her under the law. It would, therefore, be a mistake to regard the adjudication of civil disputes as merely a dispute resolution process. If dispute resolution were all that litigants sought, alternative dispute resolution (ADR) would indeed offer an adequate substitute to expensive court proceedings. But this is not the case...While there are undoubted differences between the civil and the criminal processes, the fundamental purpose is the same: to support law and order by enforcing and protecting rights. Civil right holders are free to choose whether to assert their rights. But if they choose to demand court enforcement of their rights, they are entitled to expect adequate court assistance. To sum up, like its criminal counterpart, the civil court provides a public service that is crucial to the maintenance of a society governed by the rule of law: a law enforcement service".

Zuckerman 2009, p. 53.

⁷⁵ Pan 2010, p. []. Non-compliance rate of mediated settlement stood as high as 50-80 per cent.

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Apart from being an integral part of adjudication, the fact-finding procedure also assists parties in assessing their positions in settlement negotiations (**ADR function of fact-finding**). For instance, when parties reach a stage at which they have obtained enough facts that reflect their relative positions, they would be more likely to engage in settlement negotiations. This is only possible when two elements are present: (a) party consent for mediation (or other forms of informal settlement process) is strictly observed; and (b) that the parties are always entitled to the right to continue with adjudication free from the risk of biased treatment by the court (should ADR fails). As judicial conciliation is now effectively the preferred norm for the disposal of disputes in the people's courts, party consent is at risk of being endangered. As a result, the parties may be induced, coerced or pressured into judicial conciliation without the benefit of sufficient facts on which to base their settlement process. This obscures the ADR function of fact-finding. Further, the lack of protection of parties that the ensuing adjudication (should judicial mediation fails) would be free from bias also means that the parties will be more concerned with what the court thinks is the right time for conciliation rather than assessing the facts revealed at the particular stage of the proceedings in deciding whether to engage in ADR. This further obscures the ADR function of fact-finding.

When judicial conciliation fails, and adjudication follows, there is always the risk of the judge unduly utilizing the facts ascertained in the conciliation process for adjudicative purposes (because the trial judge also acts as the conciliator). This situation also suggests an apparent bias on the part of the judge in the formal fact-finding process (in adjudication) in that he or she is likely to be swayed or affected by the facts revealed in the conciliation process. On a different level, the court may “blame” the parties for failing to resolve the dispute by the judicially preferred conciliation process. This also gives rise to an apparent (or real) bias on the part of the judge that would likely prevent the judge from objectively carrying out the ensuing fact-finding procedures and assessing the available evidence. This in turn affects the quality of justice.

[overemphasis on court mediation also reduces the norm-declaring functions of the civil court through fact-finding determinations – to be developed]

Hong Kong's mediation regime: a reference for Mainland China?

It is an underlying objective of the RHC to facilitate the settlement of disputes (RHC O.1A, r.1(e)). It is also a duty of the court to encourage parties to use ADR (RHC O.1A, r.4(2)(e)) and to help the parties settle their disputes (RHC O.1A, r.4(2)(f)). *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 provides the test for establishing the successful party's unreasonableness in refusing to agree to ADR. In deciding whether the successful party had acted unreasonably, the court must bear in mind the benefits of ADR and have regard to all circumstances of the case (e.g. the nature of the dispute).⁷⁶ [to be developed]

(C) **Conclusion** [to be developed]

⁷⁶ Wilkinson, Cheung & Booth 2009, p. [].

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1

EFFICIENCY AND TRUTH IN CIVIL FACT-FINDING:

The Evolving Role of the Judge in Fact-Finding (Mainland China and Hong Kong Compared) and the Threat of Court-Directed Mediation on Fact-Finding in the People's Courts

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2

Part A: The Evolving Role of the Judge in Civil Fact-Finding – China & Hong Kong

- 2 jurisdictions – different approaches in enhancing efficiency
- China – devolution of fact-finding power and responsibilities to parties
 - attempts to entrench the adversarial principle
 - Judge retains extensive powers
 - common development in transitional (or ex-socialist) jurisdictions
- Hong Kong – Civil Justice Reform
 - increased case management powers of the judge
 - implications on fact-finding

3

China

4

The legislative scheme

- Origins – the *Ma Xiwu* philosophy lives on?
- Legislative Milestones:
 - Civil Procedure Law of the PRC (**Code**) – promulgated in 1991 (revised in 2007)
 - Some Provisions of the Supreme People's Court on Evidence in Civil Procedure (1 April 2002) (**Civil Evidence Rules**) – the nature of judicial interpretations
 - Both instruments must be read together
- Devolution of responsibilities to parties
- Judge's role evolved – e.g. from collecting evidence to reviewing evidence (but note judge's extensive discretionary powers)
- Commentators – still inquisitorial? Mixed regime with inquisitorial and adversarial traits

5

Collection of evidence – party responsibility system and judicial intervention (1)

- Party responsibility system in evidence collection
 - Article 64 of the Code provides, “A party shall have the responsibility to provide evidence in support of its own proposition”.
 - Article 2 of the Civil Evidence Rules provides that “The parties concerned shall be responsible for producing evidence to prove the facts on which their own allegations are based or the facts on which the allegations of the other party are refuted”.
- Two scenarios for judicial intervention:
 - (1) when the parties themselves cannot obtain the evidence for some realistic or objective reasons (they may apply to the court to collect the evidence); and
 - (2) when the people’s court considers it necessary in adjudicating the case. (see Art 64 of the Code and Art 3 of the Civil Evidence Rules)

6

Collection of evidence – party responsibility system and judicial intervention (2)

- Scenario 1: Cannot obtain the evidence for “realistic reasons” – e.g. archived with public security authorities – parties may apply to court to obtain the evidence.
- Scenario 2: “necessity” theoretically limited to facts relating to state/public interests and non-substantive disputes.
 - In practice, necessity has been interpreted widely to encompass any matters that the court in its discretion believes to be necessary for the adjudication of the case.
 - E.g. the case involves complex issues such that the parties are unlikely to be able to provide adequate evidence.
 - Reform? The reform proposal retains this power. Author suggests its removal or curtailment/restriction by practice direction.

7

Collection of evidence – party responsibility system and judicial intervention (3)

- Justification for judicial intervention (practical constraints):
 - Financial weakness of the parties (except litigants of large commercial disputes) – legal aid?
 - Legal profession's ability to meet the fact-finding challenge
 - “political” weakness of litigants (and lawyers)
- Historical tendency of judicial over-activism: diminished (or loss of) impartiality (e.g. forming premature views on the merits of the case in the evidence collection process).
 - Judges still allowed to contact the parties (and witnesses) individually without a formal hearing or without the participation of the opposing party.
- Empirical study: judicial investigatory powers exercised to varying degrees (judicial temperament and caseload)

8

Civil burdens of proof (1)

- Article 2 of the Civil Evidence Rules:
 - **First Limb:** The parties concerned shall be responsible for producing evidence to prove the facts on which their own allegations are based
 - **Second limb:** Where any party cannot produce evidence or the evidence produced cannot support the facts on which the allegations are based, the party concerned that bears the burden of proof shall undertake unfavourable consequences.
- Articles 4, 5 and 6 of the rules allocate the specific burdens of proof in various types of disputes.
- Where specific burdens of proof are not explicitly provided (and cannot be defined under the rules), the court may determine the burden of proof (Art 7).

Civil burdens of proof (2)

- Problems:
 - Standard of proof not expressly provided
 - No provision dealing with the shift of burden
 - Greater guidance needed on the court's exercise of discretion under Art 7.
 - overly onerous (disadvantageous) consequences when a party fails to provide adequate evidence, which usually results in the party losing the case (commentators call for the abolition of the **Second Limb** of the burden of proof test).
- The first two problems addressed in the Uniform Provisions of Evidence of the People's Court: Proposal for Judicial Interpretations (Articles 133 to 142).
- Empirical studies - judges general view burdens of proof as relevant in the decision-making process. Burdens of proof tend to be decisive in close decisions.

Party responsibility system without party presentation principle

- Lack of entrenchment of party presentation principle
 - statement of fact by a party still had no effect on the determining the scope of factual identification by judge - Court may or may not admit party statements as the basis of fact-finding (Art 71 Code)
 - Non-binding principle of debate
 - Judicial investigation may go beyond the remit of parties' factual assertions.
- Problems (given judicial intervention can be arbitrary - China's legal culture).
 - Unclear factual remit
 - Undue delay (extreme case – treating party participation as a nominal process)
 - Reincarnation of principle of factuality (search for material truth)
 - Contrary to the objective of party empowerment

Material truth or legal truth?

- Reasons for the continued rejection of the principle of party presentation:
 - Legal history: magisterial adjudication/ Ma Xiwu – judicial hegemony + search for material truth (very limited party participation)
 - Chinese jurisprudence: preference for material truth over legal truth (e.g. Maoist legal instrumentalism to contemporary jurisprudential view that China needs to develop her own adjudicatory philosophy)
- Article 63 of the rules is said to have repealed the doctrine of factuality;
 - Article 63 The People's court shall take the facts that can be proved by evidence as the basis of judgment according to law.
 - But in reality, the doctrine is still relevant

Evidence exchange and management with efficiency in mind

- Production of new evidence:
 - *Guo Chun Xuan v Liu Zong Lai*
 - The appellate court rejected the plaintiff's application to adduce supplemental evidence on the basis that it was not "new evidence" as it is already in "objective existence" (and in the custody of the plaintiff) during the first instance proceedings.
- Time limits for producing evidence:
 - Failure to submit evidence within the time period shall be deemed as giving up the right to produce evidence
- Exchange of evidence (2 rounds max):
 - Evidence not objected to would be taken as the basis for affirming the facts of the case without being subject to cross-examination
 - Intended that the major issues of fact are determined in advance of trial

HONG KONG

CJR: Active case management powers

- The CJR – case management powers – strengthening of the court's role in fact-finding
- Underlying objectives (O. 1A, r. 1):
 - Reasonable proportion and procedural economy
 - Increase cost-effectiveness in procedure
 - Ensure case is dealt with expeditiously
- Active case management (O. 1A, r. 4):
 - Identifying issues at an early stage
 - deciding promptly which issues need full investigation and trial
- General powers of case management (O. 1B, r. 2):
 - Court may by order exclude an issue from consideration

15

Statement of Truth and Restrictions on Amendment of Pleadings (1)

- All pleadings must be verified by a statement of truth
 - pleader believes that the facts stated in the pleadings are true
 - lawyer must confirm all material and relevant facts pleaded
 - strike out a pleading that is not verified
- Advantages of verification requirement
 - if a party is required to certify his belief in the accuracy and truth of the matters put forward in the pleadings, it is less likely to include assertions that are speculative
 - the requirement limits the pleader's ability to allege inconsistent alternative sets of facts (unless there are reasonable grounds)
- Court must not grant leave for pleadings to be amended unless the amendment is necessary either for disposing fairly of the cause or for saving costs.

16

Statement of Truth and Restrictions on Amendment of Pleadings (2)

- Effect:
 - identify the issues at an early stage of the proceedings and take proactive steps to ensure this initial step of fact-finding is carried out expediently and appropriately.
 - The serious consequence of making false statements without honest belief promotes the truthfulness of the cases pleaded, which contribute to the search for truth in civil litigation.

17

Efficiency in discovery (1)

- New rule: The judge may make an order to **limit** the discovery of documents (by application or of the court's own motion) – yet to be applied in practice
- Default position – parties decide discovery regime
 - if they do not do so, or if the court considers a different regime to be more appropriate, the court may exercise its power to limit discovery.
 - This new rule also allows the judge to order the manner of discovery and the time for inspection.
- The new rule ensures judicial intervention when faced with the excesses of discovery.
- The court should be guided by the underlying objectives in exercising its powers under this new rule.

18

Efficiency in discovery (2)

- Another tool (Old rule): parties may inspect documents referred to in the opponent's pleadings and affidavits
- allows parties to better prepare for their case at an earlier stage. For instance, a defendant may request to inspect documents referred to in the statement of claim to assist the preparation of the defence.
- This tool was underutilized before the CJR because it was easier to amend pleadings then. After the CJR, given the restrictions on amendment of pleadings, parties are much more likely to rely on it.

Part B: Court-directed mediation: Roadblock to fact-finding in the people's courts

Judicial fear of decision-making

- The work of a Chinese judge is partly assessed on the basis of his or her ability to avoid mistakes and minimise appeals.
- Adjudication (which involves the rendering of a decision) is “risky” for a judge given the possibility of appeal.
- With regards to fact-finding, as issues of facts remain the main ground for appeal in China, judges who are uncertain with their factual determinations are exposed to the imminent risk of appeal.
- Court-directed mediation becomes a very attractive alternative.

21

Policy preference for mediation

- Administrative policy of achieving social harmony since 2002, court-directed mediation has been identified as the preferred tool for civil dispute resolution
- Scholars (notably, Zhang Weiping) have questioned whether there is any necessary link between social harmony and mediation
- In many courts today, settling a dispute by court-directed mediation has become an end *per se* rather than an alternative means to resolving disputes.

22

Legal history – the Chinese concept of mediation

- Didactic functions and ideological undertones
- frequently used to advance adjudicatory objectives.

23

Court-directed mediation: a critical appraisal

- Due process undermined: Court-directed mediation lacked the basic safeguards of adjudication (the Code is thin on the procedural details of mediation).
- Conflict of interest arises inevitably when the judge acts as both the mediator and the adjudicator (in the case of judicial conciliation).
- Case management tool
- Overemphasising mediation risks the civil court losing its public functions.
- Lack of adjudicatory experience – retreat of formalism

24

The onslaught of judicial conciliation on fact-finding

- A lax attitude towards fact-finding:
 - given the primary goal is dispute resolution rather than the enforcement of rights, there is less need for discipline and precision in fact-finding.
- Losing the ADR function of fact-finding:
 - the fact-finding procedure also assists parties in assessing their positions in settlement negotiations.
 - This is only possible when two elements are present: (a) party consent for mediation is strictly observed; and (b) that the parties are always entitled to the right to continue with adjudication free from the risk of biased treatment by the court (if ADR fails).
 - losing the deliberative process (where parties assess the facts and evidence) in a settlement-centred culture

The onslaught of judicial conciliation on fact-finding

- Confidentiality issues and apparent bias:
 - When judicial conciliation fails, and adjudication follows, there is always the risk of the judge unduly utilizing the facts ascertained in the conciliation process for adjudicative purposes (because the trial judge also acts as the conciliator).
 - This situation also suggests an apparent bias on the part of the judge in the formal fact-finding process (in adjudication) in that he or she is likely to be swayed or affected by the facts revealed in the conciliation process.
 - On a different level, the court may “blame” the parties for failing to resolve the dispute by the judicially preferred conciliation process.
- Reduces the norm-declaring functions of the civil court through fact adjudication

THANK YOU

Project commissioned by the
Centre for Human Rights, Zagreb

Evaluation of the Croatian Legal Aid Act and its implementation

International expertise by

Jon T. Johnsen, Georg Stawa and Alan Uzelac

Zagreb/Oslo/Vienna
October-December 2010

This document only reflects the authors' opinions that are not necessarily those of any of the organizations, including, but not limited to the organizations to which the authors are affiliated, as well as the organizations that have commissioned or sponsored the production of this document.

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2. INTRODUCTION. EVALUATION ISSUES

2.1. *Mandate, members and work*

The report presents our analysis of the Croatian Legal Aid Act (CLAA) and its implementation in the 2009-2010 period. Our mandate comes from the “Application for ‘fund for local cooperation’, a Croatian Human Rights Centre project financed by the Embassy of Finland in Zagreb since June 15, 2010. The objectives and approach of the analysis are described as follows:

4. 4. Objective(s) of the project.

The main objective is to initiate and develop an expert analysis of the implementation of the existing Free Legal Aid Act which will lead to concrete recommendations for improvements of the free legal aid system. The final objective is to establish an effective free legal aid system.

5. Description of the approach: how the project intends to create changes, what methods would be utilised, how different social groups and interests would be taken into consideration.

Currently, there are extremely few meetings and discussions between the different stakeholders in the field of free legal aid that could lead us to proposals for improvements in the free legal aid system. On the one side, the Ministry of Justice is defensive about the criticism coming from the NGO's, certain experts in the field of free legal aid as well as individual citizens, while on the other hand the NGO's and experts lack relevant empirical data in order to be able to make a serious assessment of the implementation of the Free Legal Aid Act since February 1, 2009. Finally, the Croatian Law Chamber has filed a complaint against the Free Legal Aid Act to the Constitutional Court. The current situation fosters increasing criticism and antagonism, rather than encouraging open discussions about the existing problems and ways to solve them.

This expertise we are proposing would change the dynamic of the discussion and in fact, set the grounds for changes that would make the system function in a more effective manner for those for whom it was created – citizens that are in need for free legal aid in order to ensure the greater principle of access to justice and rule of law. The expertise would gather relevant empirical data, comparative analysis of examples of best practices and, within the Croatian context, suggest certain concrete proposals for improvement. The expertise would be comprehensive in the sense that it would take into account the interests of the different interest groups (NGO's, lawyers, government officials, etc.), but above all the needs of individual citizens. (P 2-3)

The Human Rights Centre appointed as members of the expert group:

- Professor Dr. Jon T. Johnsen, Faculty of Law, University of Oslo, Norway;
- LStA Mag. Georg Stawa, Leiter der Abteilung Pr 8 Projekte, Strategie und Innovation, Bundesministerium für Justiz, Austria;
- Professor Dr. Alan Uzelac, Pravni fakultet, Sveučilište u Zagrebu, Croatia.

The expert group met in Zagreb on October 11, 2010 and heard evidence from:

- Mr. Tin Gazivoda (former director of the Human Rights Centre), Topic: the background of the whole policy process, legislative proposals and the implementation of the law, past activities in the field;
- Ms. Ljiljana Božičević Krstanović (Center for Peace, Osijek, head of the Coalition of legal aid providers). Topic: the experiences of NGOs as providers of legal aid, the activities of the Coalition, policy issues;

- Ms Dragana Milunić (Civil Rights Project Sisak). Topic: experiences of the organization that had a long record of legal aid activities and has been the most active as a legal aid provider that tried to work within the frame of the CLAA;
- Mr. Mladen Klasić (attorney-at-law, Vice-President of the Croatian Bar Association). Topic: the activities of the Croatian Bar Association in the field of legal aid, experiences of lawyers with the CLAA and its implementation;
- Ms. Ljubica Matijević Vrsaljko (attorney-at-law, former Ombudsperson for children). Topic: experiences of a lawyer who has actively been involved in legal aid provision, also in cooperation with civil society organizations.
- Ms. Jagoda Novak (acting Director of the HRC and the Head of its Research and Information Department). Topic: past research of the legal aid caseload of the various providers, their sources of funding and development in the past years.

On October 12, members Johnsen and Uzelac received further evidence from:

- Mr. Wilfried Buchhorn (representative of the UNHCR in Zagreb). Topic: experiences of one of the most active and generous international donors in the field of legal aid.

The expert group also wished to hear the opinion of the Ministry of Justice, but the Ministry was not able to arrange a meeting with any of the responsible officials at this date due to other pressing obligations.

On 24 November 2010 the group issued a first draft of its evaluation. The Human Rights Centre sent it to the Croatian Ministry of Justice, the Bar Association and the civil society organizations involved in legal aid.

The expert group met in Zagreb again on December 3, 2010 and presented its second draft with its preliminary recommendations for improvements at a public meeting. All stakeholders were invited and the media also participated. The presentation was followed by a debate. The Human Rights Centre also invited all stakeholders to send written comments to the draft report.

On December 15, the Croatian Ministry of Justice officially invited the international expert members Johnsen and Stawa to an extensive discussion of the draft report. The participants from the Ministry were:

- Mr. Dražen Bošnjaković, Minister of Justice;
- Mr. Kristijan Turkalj, Director of the European Union and International Cooperation Directorate;
- Ms. Jasna Butorac, Head of Free Legal Aid Department;
- Mr. Miljenko Petrak, Cabinet Secretary.

The meeting included a visit to the General Administration Office of the City of Zagreb (department for legal aid applications) and the participation at the meeting of the Commission for Legal Aid (the advisory body of the Ministry of Justice). The members of the Commission present at that meeting were:

- Mr. Kristijan Turkalj, Director of the European Union and International Cooperation Directorate, Vice – President;

- Ms. Tamara Novak Petrović, Senior Advisor, Ministry of Finance;
- Mr. Marijan Hanžeković, Croatian Bar Association;
- Ms. Marina Kasunić Periš, Head of Industrial Democracy Sector, The Union of Autonomous Trade Unions of Croatia.¹

Also present at the meeting on December 15 were:

- Mr. Vanja Bilić, new Director of Civil, Commercial and Administrative Law Directorate in the Ministry of Justice;
- Mr. Damir Kontrec, State Secretary in the Ministry of Justice.

The Ministry also sent the Human Rights Centre an extensive written comment to the draft evaluation.² The Centre has also received written comments from the Civil Rights Project (PGP) Sisak.³

2.2. The expert group's interpretation of its mandate

The mandate from the Human Rights Centre leaves the expert group with significant space for further definition and specification. We build our evaluation on the following considerations:

Legal aid schemes are complex systems. Evaluations therefore tend to become extensive since many elements need to be considered both separately and how they interplay with the other elements of the scheme. At the outset we aimed at a short, principled document. However both the inputs from the stakeholders and the complexity of the task have made an extensive report necessary.

Important momentum in the development of legal aid is gained from Croatia's accession process into the European Union and our commissioners want to use our evaluation *inter alia* as a part of this process. This premise means that we should deliver our report fast. It does not leave much space for empirical studies of the Croatian legal aid system as a part of the evaluation. We must build on the existing information, also when it appears incomplete and ambiguous. We therefore will focus our evaluations on some major features of the Croatian legal aid system, and avoid going into detail.

An evaluation has to build on a set of standards. We will start by outlining them. We will then focus on six major elements of the scheme contained in the Croatian Free Legal Aid Act (CLAA). Those elements are:

¹ The meeting was attended by four out of eight members (the president from MoJ, the representatives appointed on behalf of civil society organizations, by the legal clinics and the Ministry of administration were absent). The expert group was assisted by Ms. Ognjenka Manojlovic during the meeting.

² Draft analysis of the Croatian Free Legal Aid Act and its implementation – response submission, December 13, 2010 (MOJ Response submission December 13, 2010).

³ Comments dated 17 December 2010.

1 The understanding of legal problems and effects of legal aid schemes underlining Croatian legal aid. Is the knowledge basis underlying CLAA in accordance with international legal aid research and the practical experiences from the advanced legal aid schemes in other countries?

2 The scope of legal problems covered.⁴ Is the coverage wide enough? Does the range of problems included in CLAA produce a sufficient protection? Are the priorities sensible? Are the types of problems covered by the CLAA the most important ones or are there other, equally important problems that fall outside the schemes?

3 The part of the population covered.⁵ Does the scheme cover the part of the population that are unable to carry ordinary legal service costs or for other reasons ought to be exempted from such costs or do groups fall outside coverage although they cannot afford to pay for legal services themselves? Opposite; are groups included although they might carry all or parts of the costs themselves?

4 The range of services offered. Does the scheme provide for the types of legal services (counselling, drafting and representation) that are necessary for a professional sound handling of the problems covered or are there limitations?

5 Delivery. Does the scheme put up a delivery system that secures that everyone who applies and qualifies also receives sufficient service?

6 Funding. Is the funding sufficient? Is the money provided well spent? Do alternative sources of funding exist that might be better utilized?

We will also present proposals for improving the scheme contained in the Act.

Defenders in criminal cases are not covered by CLAA. Croatia has a separate scheme for defenders in criminal cases contained in the Code of Criminal Procedure. We were neither asked, nor will we include defenders in criminal cases in our evaluation.

Croatia also has legal aid schemes for legal aid in some other types of cases outside the CLAA. A separate scheme for legal aid in asylum cases exists in the relevant legislation, and the Civil Procedure Code also contains some provisions concerning legal aid. The Attorneys Act provides for legal aid on *pro bono* basis awarded by the Croatian Bar Association. A wide range of schemes set up by Civil Society Organizations and sponsored from various sources (mainly outside the national state budget) also exist.

Our mandate concerns CLAA. Our information about the other schemes is limited. Still we will mention them when it seems appropriate for the understanding of CLAA and its operation.

⁴ Problem criteria, *criteria ratione materiae*, objective criteria.

⁵ Person criteria, *criteria ratione personae*, subjective criteria.

3. EVALUATION STANDARDS

3.1. Selection

There are different standards that might be used in evaluations of legal aid systems. In Croatia as elsewhere political parties have ideas about how to shape legal aid schemes, stakeholders have expectations, the users and their organizations also have opinions about how the schemes should function and so might other civil society organizations. The standards of government become however a major formative factor in deciding how to reform the system. In many societies, legal aid has a long history which means that traditional expectations about what the existing system should deliver also have an impact.

We will, however, not use any of the internal Croatian standards as the yardstick for our evaluation. We are composed as an international team and understand our mandate as providing Croatia with an international evaluation of its legal aid schemes.

We will use two main sets of criteria. The first set relates to the *minimum standards contained in international human rights*. Croatia has acceded to the European Convention on Human Rights⁶ (ECHR) as well as the UN Convention on Civil and Political Rights⁷ (CCPR). Both conventions have provisions on fair trial that also bear on legal aid. Those conventions contain minimum obligations that legal aid schemes in Croatia' as well as in other member states must fulfil.

The second set of criteria comes from *studies of legal aid schemes* mainly in the western, industrialized world and expresses what we think are „best practices“ concerning crucial elements in legal aid schemes. Given the Croatian situation, several of those goals appear aspirational in character and cannot be achieved in a short time perspective. In our statistical comparisons we therefore also use European means and averages as a rough yardstick on how far Croatia's development has come.

3.2. *The minimum human rights' requirements in ECHR article 6 and the legal aid doctrine of the ECtHR*

Over the years the ECtHR has delivered several decisions on legal aid as part of its principles on access to justice. We cannot go into detail on the content of its doctrine or give an extensive account of it, but will summarize some main principles now and develop on them when necessary for the different evaluations we make in the report.

Access to legal aid is a part of the entitlement to a fair trial in ECHR article 6(1). Article 6/3c on minimum rights in criminal cases stipulates that legal aid should be provided „when the interests of justice so require.“ A similar standard is applied according to article 6(1) to other types of cases. *Airy v Ireland*⁸ from 1979 contains the main principles. The decision sets a precedent which obliges governments to provide legal aid where needed taking into account the following criteria:

⁶ Ratified on 17 October 1997, in force since 5 November 1997. See Off. Gaz. 18/97 of 28 October 1997.

⁷ The Republic of Croatia was admitted as a Member of the United Nations by General Assembly resolution A/RES/46/238 of 22 May 1992.

⁸ Application No. 6289/73.

- the importance of the case to the individual (applicant);
- the complexity of the case;
- the individual's capacity to represent himself;
- the costs and the individual's capacity to carry them.

The Airy-principles have been confirmed in several judgements. ECtHR applies the criteria to the concrete circumstances of the complaint. Access to courts is meant to be *effective* for all citizens, independent of their economic situation. A violation will be established if costs appear as an actual barrier to access to court.

Since the findings of the ECtHR relate to individual complaints and usually are made long after the alleged violation has taken place, its case law contains challenges for national law makers. Legislation as such are not found in violation of the Convention although the Court has said that member states have an obligation to organize their legal systems in a way that prevents repeated violations of article 6.⁹ It is mainly left to the states to find out how to best establish sufficient access according to their present system and legal tradition.

When evaluating we therefore build on rough estimates of *the risk* that violations will occur, but we do not intend to forecast the number of violations that will actually be established by the ECtHR in the coming years. The procedures for bringing cases before the Court are time consuming and cumbersome, and depends to a great extend on legal aid lawyers' competence on the case law and procedures of the Court and their willingness to risk putting in a significant amount of unpaid work. The number of non-detected violations probably greatly outnumbers the number of established violations. Although the principles laid down in *Airy* appear discretionary and flexible,¹⁰ they have important consequences for the shaping of legal aid schemes. As mentioned, we will develop on their meaning as we go through each of the major elements of our evaluation.

3.3. *Best practices*

While the human rights standards constitute binding obligations on all states that have acceded to the human rights conventions, our „best practices” are suggestions that Croatia might decide to adopt or not according to its own autonomy. As explained, these practices are gathered from different legal aid schemes that are among the best developed in the world.

In its letter of December 13, 2010 the Ministry of Justice states that

... it can be noted that the legal aid system in the Republic of Croatia follows the trends of some European countries and is taken as close example of „best practices”. It is simply unrealistic to expect that the Republic of Croatia, considering its economic and social structure, is able to mirror Great Britain, Norway or Finland. While drafting the Act in the Republic of Croatia, we focused on models that are closer to us in terms of an economic and political environment, like the Hungarian, Slovenian, Slovakian and the Lithuanian model.¹¹

We agree that costly „best practices” cannot be expected to be implemented at the same scale in Croatia as in the most affluent states in Europe, although statistics from the European Commission on the Efficiency of Justice show that Croatia's combined spending on courts

⁹ See as an example *Hadjidjanis v. Greece*, Application No. 72030/01.

¹⁰ See *Ashingdane v. UK*, esp. para 54 and 57 (Application No 8225/78).

¹¹ MOJ Response Submission December 13, 2010, p. 5.

and legal aid are not very different from the average spending in Scandinavia and the UK.¹² The difference is rather that, in comparison to legal aid, Croatia prioritizes court spending far more than the more affluent states.

It should be kept in mind, however, that also the European states that spend the most on legal aid still experience a huge shortage of money and that cost-efficient ways for delivering the service therefore have high priority. Even if less affluent states have less money to spend on legal aid, they might learn from several of the delivery methods applied in the best developed schemes.

Several of these „best practices” also are supported by the soft-law of human rights. The Council of Europe, for example, has issued several documents over the years that encourage governments to develop legal aid. Some significant resolutions and recommendations are listed in appendix I.

Our „best practices” suggestions build on the idea of legal literacy, active citizens and equal protection of their rights. People should be encouraged to utilize actively their legal positions. Legal alienation is counterproductive to modern government. Courts should be an effective vehicle for correcting injustice and developing the law for all parts of society.

As with human rights, we will forward our „best practices” as part of our evaluation of the major elements of Croatian legal aid. Space does not allow for an extensive elaboration of the content, implementation or reasons behind the different „best practices” that we point to. Mainly we must limit ourselves to outlining their main features.

Recommendation:

It is important for Croatia to produce a development strategy for legal aid that comprehends both long time and short time goals. We also think that several of the „best practice“ principles might be realized wholly or partially in a short time perspective and that they will mean significant improvements of the present schemes.

¹²

In 2008 Croatia spent 51 Euros per inhabitant on courts and legal aid, Denmark 56, UK-Scotland 58, Finland and Sweden 59, UK-England and Wales 69, Norway 66, UK-Northern Ireland 92. Croatia did not give separate budget figures for the courts and legal aid. European Judicial systems. Edition 2010 (data 2008) Efficiency and quality of justice. Figure 2.21 p 38. Downloadable from http://www.coe.int/t/dghl/co-operation/cepej/evaluation/default_en.asp.

4. RESEARCH BASED LEGAL AID POLICY

4.1. *Why is research important?*

Modern legal aid policy is increasingly becoming research based. Politicians want to know how widespread legal problems are. Research also has mapped *the characteristics of the problems* that people experience, such as:

- the legal and factual matters they contain,
- the welfare meaning of the problems to the problem holders and their network,
- how legal problems are produced,
- what sort of legal service is necessary for proper professional handling of the problem,
- different ways of handling legal problems,
- how legal service system functions and why is it unable to cover all the different sorts of problems that exist in industrialized societies.

Research also has mapped the social distribution of legal problems – if there are differences in the volume, type and welfare meaning of the legal problems experiences by:

- the poor and the rich,
- men and women,
- the old and the young,
- the well and the poorly educated,
- singles and married,
- immigrants and nationals.

Empirical research conducted over the last 30-40 years has important implications for the design of legal aid policy. In particular it reminds us that ordinary citizens in modern western societies experience a large number and a wide variety of legal problems, only a small proportion of which involve litigation. In fact the research demonstrates again and again that while many people report experiencing common and frustrating legal problems in a number of areas of life, they rarely go to court. The Scandinavian findings are analysed in the works of Johnsen.¹³ The recent research conducted by Hazel Genn in England and Genn and Paterson in Scotland reflects similar conclusions.¹⁴ The research also suggests that different disadvantaged groups, including the poor, illiterate and disabled, face particular difficulties in responding to legal problems regardless of whether they involve litigation or not.

Unmet legal service need is an important entity in legal aid policy. It expresses the amount of legal problems that people are unable of solving neither by themselves nor with assistance from the legal service system. A targeted legal aid policy ought to know the volume of the unmet need, its legal composition, its welfare meaning, how it is spread among the different segments of society and what share it constitutes of the total number of legal problems that a society produces.

¹³ See especially Johnsen, Jon T 1987 *Retten til juridisk bistand* Tano Oslo.

¹⁴ The England and Wales research is reported in Genn, Hazel 1999 *Paths to Justice. What people do and think about going to law* Hart Publishing Oxford. The Scottish research is reported in Genn & Paterson 2001. *Paths to Justice Scotland* Hart Publishing. Researchers in a number of other societies including the Netherlands and Canada have undertaken similar research.

The best legal aid schemes in the world today are grounded upon advanced research on such issues, and research is actively used in planning, developing and managing the schemes. Common law countries like England and Australia explicitly state in their legal aid legislation that legal aid schemes should be „needs-oriented”. A developed understanding of people’s legal problems and need for professional service now guides the formation of legal aid policy in those countries.

England and Wales use goal-oriented management of their legal aid scheme. The overall target of their schemes is to provide the best possible coverage of people’s legal service needs from the resources available. Major research tasks are:

- mapping and analysis of the existing legal service needs and changes in the needs,
- priority setting – analysing criteria for selection of the types of legal problems and parts of the population that should be subject to coverage from the schemes,
- evaluation of the delivery systems; whether they help people as presumed in the targets set and how cost efficient different ways of delivery are,
- how the delivery systems might be best organized and further developed and what sort of provider agreements or contracts works best.

England and Wales have established a special research centre – The Legal Service Research Centre (LSRC) – that carries out the research necessary for setting the targets and controlling their fulfilment. They have, for example, developed methods for mapping local legal service needs that the legal aid providers and managers can use for targeting their services within their districts.

4.2. Findings

We have not registered any information that any national research of legal needs has been initiated or used in the development of the Croatian Legal Aid Act of 2008. Neither have we seen that the international body of research and experience has been drawn upon.

Some comparative studies of the legal aid systems in Europe produced by the Ministry of Justice as early as 2004 are only brief compilations from various sources rather than the result of serious research. Useful comments and recommendations were also received from CARDS 2004 National Action Plan for Croatia, but also do not have a character of systematic collection of knowledge, especially in the field of the legal service needs. Especially, it seems that prior to the enactment of the new law no systematic research took place regarding the costs of legal aid and financial impact of new rules.¹⁵

We think that the main findings of international legal aid research also apply to Croatia and that huge amounts of legal problems exist that people cannot cope with properly without legal assistance. Such problems are especially pressing for poor people and deprived groups.

¹⁵

It seems that there were several suggestions to conduct such research during the process of enactment of the CLAA, but they were apparently rejected. We have received the text of the Review of the Final Draft of the Act on Exercising the Right to Legal Aid from 2007, sent to the Ministry by the group of civil society organisations (“the legal aid coalition”), which states under III that “...the bill was drawn up without any prior gathering of the relevant information, and without any realistic assessment of the overall future costs of the new system”.(p. 1). When that draft bill was withdrawn from the Parliament, the same group of legal aid organizations produced the document entitled “Common Principles for the Regulation of Free and Subsidised Legal Aid in the RC”, where it was again stated that a precise assessment of the current situation has to be produced (p. 5, at b.7).

4.3. Evaluation

We think that legal aid schemes should be developed from the best knowledge available. It is paramount that states with limited resources available for legal aid spend the money they have in a considerate and cost effective way that secures that the most pressing legal service needs are met before the less important ones. Research also is important to setting such priorities properly. To our evaluation the lack of research based priorities in Croatian legal aid also have significant impact on the cost effectiveness of the resources actually spent. We will substantiate this assertion in the next parts of our report.

Recommendation

Measures ought to be taken both to develop research on the functioning of the Croatian legal aid schemes and to get access to the international body of research. The legal aid authorities ought to become aware of important findings and use them in their policy making.

(See further recommendations on research below).

5. COVERAGE OF LEGAL PROBLEMS

5.1. Findings

One ramification for access to legal aid in Croatia is the problem criteria listed in CLAA. According to article 5(1) legal aid will be granted in cases before courts, administrative bodies or other legal entities vested with public authority if they adjudicate „the beneficiary’s existential issues.” Pursuant to art. 5(2) such existential issues are „especially:”

- Status matters;
- Rights from the social welfare system;
- Rights from pension and invalidity insurance;
- Other forms of support;
- Employment rights;
- Protection of children and young adults;
- Protection of victims of criminal offences;
- Trafficking in human beings;
- Domestic violence;
- Matters concerning immovable property „up to the size of adequate living accommodation” which is interpreted as 35 m² in article 3 with an additional 10 m² per additional person;
- Matters concerning means for work vital for supporting the beneficiary and his/hers household;
- Monetary claims up to a certain amount (Twenty times the lowest monthly bases for calculation of obligatory insurance contribution per household member, i.e. 54.000 kn or the equivalent of 7.300 Euros);
- When prescribed by international agreements to which Croatia is a party.

In the letter of December 13, 2010 to the Human Rights Centre, the Ministry of Justice says that

„... the legal formulation is quite broad, enabling the approval of legal aid for almost all types of proceedings, while proceedings listed in Article 5, paragraph 2 of the Act are only provided as examples, in a manner intended to emphasise the most important proceedings that in most cases have an existential importance for the party.”¹⁶

In our meeting on December 15, 2001, the Croatian Ministry of Justice repeated that the issues listed are only *examples* of existential issues. The list is not meant to be complete, and other matters – for example consumer cases or compensation matters – may also qualify if they fulfil the „existential issue” criterion.

To our understanding the use of the word „especially” signals a strong priority to the types of cases listed in the text. Furthermore, the Ministry’s report MOJ 2010 contains an extensive categorization of all the orders granted by the legal aid offices in the period from February 2009 to February 2010 (see p 32-47). Almost all of the 3 178 orders recorded falls within the categories listed in CLAA article 5(2). 175 orders are listed as „Other legal matters” (p 46-

¹⁶ MOJ Response Submission December 13, 2010, p.2

47).¹⁷ The report does not give information about the categorization of the 995 refusals and to what extent they relate to other problem categories than the ones listed in CLAA art 5(2).

Pursuant to article 5(3), in court proceedings the court may also approve legal aid to parties „who do not meet the conditions prescribed in this act for reasons of fairness.”

5.2. *Human rights*

How do these limitations conform to the human rights standards contained in the Airy principles?

5.2.1. *CLAA article 5*

To our evaluation, the interpretation of article 5(2) forwarded to the evaluation group by the Ministry does not conform to the interpretation used by the SAOs. They look at the categories listed there as almost exhaustive.

Croatia is not alone in limiting the categories of problems that qualify for legal aid. Several jurisdictions limit the scope of their schemes either by excluding certain types of legal problems, or by restraining them to selected categories.

Norway for example uses a similar technique as Croatia. The Norwegian Legal Aid Act (NLAA) makes a major distinction between litigation aid and aid for other legal problems.¹⁸ The list contains eleven major categories for legal assistance outside the courts and fifteen for legal representation before the courts and some other judicial bodies (NLAA §§ 11, 12, 17). These priorities focus upon cases that relate to:

- dissolution of marriages or unmarried cohabitation, emphasizing division of property and forced marriages;
- female circumcision;
- public child custody;
- compensation for loss of provider and bodily injuries
- applications for public compensation to victims of violent crime and compensation claims against the perpetrator
- termination of housing contracts and evictions from accommodation
- discharge and dismissals from work contracts
- complaints about social security decisions
- involuntary expulsion from the country;
- involuntary health treatment – for example for drug abuse, mental illness, and infectious diseases;
- conscious objectors to military service;
- loss of legal competence.

The provisions leave limited space for discretion. Other categories of problems are excluded from legal aid unless the circumstances appear extraordinary.

¹⁷ See appendix IV for MOJ's categorization and statistics and chapter 8.2.3 for further discussions of the Ministry's categories

¹⁸ *Lov om fri rettshjelp* 13 juni 1980 nr 35.

When comparing to the categories used in CLAA some are similar, while others differ significantly. The Croatian Ministry argues that their selection of problems covers “the most important proceedings that in most cases have an existential importance for the party.”¹⁹ The Norwegian Ministry has argued similarly for their priorities. The comparison shows that incompleteness and arbitrariness in coverage is a significant risk of a legislative technique that points to selected categories of legal problems as almost exhaustive for coverage.

According to international research lots of problems exist in the categories that are not covered by the SAO’s interpretation of CLAA article 5. Many of them are often of great importance to people, e.g. division of marital property of some size²⁰, removal of parental custody in child care proceedings²¹, many housing and tenants’ problems²², access to medical treatment²³, taxes²⁴, immigration and asylum²⁵, consumer issues²⁶, compensation for injuries for example from car or work accidents²⁷, property damage, inheritance of some size, neighbour disputes, resettlement issues due to the war, rights of Roma people²⁸ etc.

On the contrary, Finland does not prioritize according to legal characteristics of the cases. They use general, discretionary criteria for identifying the problems that qualify for civil legal aid under the general schemes. The wording in the Finnish Legal Aid Act (FLAA) appears simple.²⁹ The main rule is that all legal problems qualify when legal aid is necessary, unless certain specified exceptions apply (FLAA 1 §).

Neither do the Airy criteria distinguish between different types of legal claims. The main criterion is the problem’s importance to the individual, not the legal category. The ECtHR decision in *Steel and Morris v the United Kingdom* from 2005³⁰ develops on the principles of Airy:

Steel – a part-time bar worker – and Morris – a postal worker – had extensively criticized McDonald’s for their hamburger production and was sued for slander. The proceedings became one of the largest in English history with 313 court days at the first instance and 23 for the appeal hearings, involving 40,000 pages of documentary evidence and 130 oral witnesses, several of them expert

¹⁹ MOJ Response submission December 13, 2010 at p. 2.

²⁰ Such cases would not be covered by the art 5(2) CLAA if the value of the property is above 7.300 € or the case relates to an apartment or a house which has over 35 m2.

²¹ These cases might be covered by the general phrase of „status matters“, but it is not clear. For the sake of removal of any doubt, it would be better to use a more specific wording.

²² Such cases would again not be covered under art. 5(2) if they relate to property over the size of „adequate living accommodation“ i.e. 35 m2 for the applicant with an additional 10 m2 per member of her/his household.

²³ It is interesting to note that art. 5(2) CLAA expressly refers to „rights from pension and invalidity insurance“, but leaves out the rights from the medical insurance and/or medical care schemes.

²⁴ It seems that the CLAA does not treat any tax-related matter as an „existential issue“.

²⁵ Immigration and asylum matters, in spite of being typical legal aid matters, are not covered by the CLAA, but by the special legislation (see *infra*).

²⁶ Same as in the preceding footnote.

²⁷ These categories as such do not exist in art. 5(2) CLAA. Their determination as „existential“ would depend on whether they are covered by the other categories (e.g. by the amount of monetary claim or by the relation to the rights from labour or invalidity insurance).

²⁸ It seems that the legal aid for Roma is treated outside of the overall budget for legal aid. In the replies to CEPEJ Evaluation Scheme 2010, a separate legal aid budget for Roma minority in the amount of 78.378 EUR is mentioned. See http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2010/2010_Croatia.pdf, p. 4.

²⁹ *Rättshjälpslag* 5.4.2002/257.

³⁰ Application No. 64186/01.

witnesses giving evidence on a range of scientific questions. Legal arguments took some 100 days in court. The judgments alone filled more than 1, 100 pages (§ 65).

Although the applicants fulfilled the means test, defamation proceedings were outside the legal aid scheme in England. They were mainly left to represent themselves, while McDonald's used a team of experienced lawyers, and were estimated to have spent more than £ 10 million in legal expenses (§ 58, 68. ECtHR found that in a matter of such complexity, neither the sporadic help from volunteer lawyers nor the extensive assistance from the judge, could form 'any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel ...' and concluded that the denial of legal aid was a violation of ECHR Article 6 (1) (§ 72).

The UK argued in vain that

...states did not have unlimited resources to fund legal aid systems, and imposing restrictions on eligibility for legal aid in certain types of low priority civil cases were therefore legitimate, if such restrictions were not arbitrary" (§ 53).

According to ECtHR defamation issues had to be considered from the Airy criteria too. The applicants acted as defendants to protect their right to freedom of expression. The damage claim, which amounted to £ 100,000 at the outset, would have ruined both applicants and was potentially very serious. The UK therefore had violated their entitlement to access to justice and legal aid.

The Airy criteria do not oblige states to provide free access to justice, but presupposes that all cases are considered according to the individual circumstances before legal aid is denied. The Court's case law therefore contains examples on denial of legal aid in defamation cases that did not amount to a violation of article 6 because the applicant was considered capable of conducting the case himself (*Mc Vicar vs UK*)³¹ or when the case is not „as serious" to the applicant in question (*Munro v UK*)³² or no reasonable prospects of success exist (*Thaw v UK*).³³

Generally, access to the courts – including legal aid - might be subject to regulations by the states. *Antonicelli v Poland*³⁴ from 2009 summarizes the limitations for such regulations:

33. The Court further emphasises the importance of the right of access to a court, having regard to the prominent place held in a democratic society by the right to a fair trial (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 12-13, § 24). A restrictive interpretation of that right would not be consonant with the object and purpose of this provision (see *De Cubber v. Belgium*, judgment of 26 October 1984, Series A no. 86, § 30). However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State (see *Edificaciones March Gallego S.A. v. Spain*, judgment of 19 February 1998, 1998-I, § 34 and *Garcia Manibardo v. Spain*, no. 38695/97, § 36). In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Ashingdane v the United Kingdom*, judgment of 28 May 1985, Series A no. 93, p. 24, § 57; *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 44, ECHR 2001 – VIII, *mutatis mutandis*).

³¹ Application No 46311/99.

³² Application No 10594/83.

³³ Application No 27435/95.

³⁴ Application 2815/05.

What legal aid schemes cannot do is to exempt selected categories of problems from legal aid independent of their importance to the individual. Therefore the interpretation of CLAA article 5(2) practiced by the SAOs does not conform to the Airy criteria, because research shows that all legal categories might harbour problems that are serious to the individual. It might perhaps be argued that family problems more frequently amount to serious or existential problems than consumer problems, but *some* consumer problems still will be just as serious as family problems and might also be of an existential character according to CLAA art 5 (1). The Airy principles as construed in *Steel and Morris* do not allow states to exempt them from coverage because consumer problems *on average* are less serious than other categories of legal problems.

We agree that the interpretation presented to the evaluation committee by the Ministry of Justice that emphasises the listed categories as *examples* is clearly better suited to satisfy the Airy criteria than an interpretation that understands them as priorities with almost no exceptions as applied by the SAOs. Obviously further measures are needed to make the ministry's intentions with the provision a reality. A change of the text in CLAA that clarifies that problems that falls outside the list also are covered according to the Airy criteria seems necessary. Until then the Ministry's interpretation should be made clear to the SAOs, the providers and the users.

We also think that the „existential issues” criterion is too strict. The Airy criteria do not demand that a problem amounts to an existential issue before it qualifies for legal aid. It is sufficient that the problem is of importance to the individual. Manifestly ill founded claims might be exempted from access to court and states might also screen off cases with limited prospects if such a merits test is carried out in an objective way by qualified decision makers. But governments must secure access to courts and a fair trial for claims of importance to the individual and with reasonable prospects of success also when they need support from legal aid.

However, the provisions on legal aid for reasons of fairness in article 5(3) and 42(2) allow courts to grant legal aid independent of the problem criteria in article 5 if:

- the proceedings are complex
- the party does not have the ability to represent himself/herself
- the financial status of the party is such that hiring an attorney would endanger the livelihood of the party and members of his/her household.

The principles cited are similar to the Airy criteria except that the Airy judgment also emphasises the importance of the case to the individual which in theory makes the Croatian fairness principles more liberal. However, since the principles are discretionary, the effect in practice depends on whether Croatia uses the discretion as supposed in the case law of ECtHR.

We estimate that the Croatian practice is significantly stricter. Article 5(3) describes legal aid grants on „the reason of fairness” as *exceptions* from the ordinary criteria and the wording of article 5 makes it optional for the courts if they want to use their discretion. The Airy criteria are supposed to be the *minimum* principles for providing legal service in national legal aid schemes that should be granted to everyone.

It seems that an exceptional character of this instrument is further confirmed by the fact that the report issued by the Ministry of Justice on the implementation of the right to legal aid in 2009 contained no data whatsoever on the scope and volume of application of Art 5(3).

To our evaluation, the „fairness” provision obviously cannot compensate for insufficiencies in CLAA article 5 compared to the Airy criteria.

5.2.2. Other civil schemes

Findings. From CLAA art 13(3) we read that the Labour Act and the Civil Procedure Act also contain provisions on legal aid. Those schemes should also be taken into consideration when we evaluate the total coverage of Croatian civil legal aid. In addition the Ministry points to various schemes in acts other than CLAA and states that „... in order to assess a system it is necessary to consider all of its aspects through a constructive analysis...”³⁵ We agree that those schemes ought to be taken into consideration when comparing to the Airy criteria.

The relevant legal aid schemes in the sector of non-criminal cases³⁶ are:

- the provisions in the Code of Civil Procedure that authorise the court to waive the court fees, and eventually also award free representation to certain parties;
- the provisions in the Act on the Legal Profession which empower the Croatian Bar Association to appoint *pro bono* lawyers in certain cases;
- the provisions in the Law on Asylum which relate to legal aid for the asylum applicants;
- the provisions on representation in labour cases;
- the provisions in the Consumer Protection Act, relating to the legal aid in consumer cases.

Further provisions limited to the waiver of fees in the court and administrative proceedings exist in the acts that regulate fees in such proceedings.

Before outlining some main features of these schemes, we would like to note that the objections of the Ministry to our draft evaluation related to the need to consider the schemes outside the CLAA might be a kind of *venire contra factum proprium* argument. In fact, the Ministry of Justice as the main responsible body for legal aid has not included any data on the use of the other schemes in its annual report entitled “Realisation of the Right to Legal Aid and the Expenditure of Funds in 2009” submitted to the Croatian Parliament (*Sabor*). For the same reason, the experts could not obtain a detailed insight into the functioning of these schemes, and the following outline had to be derived from the other, non-official sources and the impressions from the interviews with the stakeholders.

Further on, the expert group was also informed that the Ministry itself had rejected on several occasions the idea of integration of the schemes existing under other acts in the system of the CLAA.³⁷ The objections to the legislative draft of 2007 *inter alia* related to the fact that “it does not establish a unified and integrated system, thereby impeding harmonisation of individual elements and monitoring of the costs and effects of the new system”. In its 2007 Review, the Coalition of Legal Aid Organizations argued that point in more detail:

The main objective of the Act, which is also a response to the tasks of a state in the process of association with the EU, is to form an integral and functioning system to enable citizens to exercise

³⁵ MOJ Response submission December 13, 2010 pp 1, 5-6

³⁶ As noted in the introduction, this evaluation does not relate to criminal legal aid, which is entirely outside of the CLAA and would deserve a separate study.

³⁷ Already in November 2004 the proposal to integrate other schemes into the new act was submitted in writing to the Ministry by one of the members of this expert group, Prof. Uzelac (who was at that time one of the members of the Working Group on legal aid appointed by the Ministry).

their rights effectively. This objective is also contained in the very name of the bill, which refers to the realisation of the right to legal aid. It is the state's duty to help those who are unable to exercise their rights without obtaining adequate legal assistance, which they cannot afford due to their indigence. The assessment of the *status quo* found in the exposition of the bill states that "the Republic of Croatia does not have an integral system for providing legal aid".

However, at the very beginning of the bill this position is abandoned, and it is noted that the present forms of providing legal aid are regulated in separate laws which remain in effect (Art. 1/2). Accordingly, the provisions on free legal aid in civil and criminal proceedings and certain forms of providing legal aid in other specific areas will not be altered by the provisions of this bill.

Such a solution is negative, and is not even fully adhered to by the bill itself. It is negative for various reasons. First, the earlier provisions were not harmonised, and various difficulties arose in their implementation. For example, the provisions of the Civil Litigation Act (CLA) on the appointment of *pro bono* attorneys did not specify whether the appointed attorneys were entitled to receive remuneration, and, if so, from which source such remuneration would be paid. The provisions of the Act on the Legal Profession defines the circle of beneficiaries and the criteria for appointment of *pro bono* attorneys in a rather narrow and insufficient way (as stated in the exposition of the bill itself). There are also defects concerning the appointment of *pro bono* attorneys in criminal proceedings, particularly with regard to planning costs and models for calculating and paying remuneration for such attorneys. The new bill, whose main objective is to establish a system of free legal aid in the broader sense of the term, has failed to address these open issues and harmonise the existing regulations. (...)

Most importantly, previous regulations on exemption from the costs of proceedings and on free and subsidised legal aid regulated matters regarding jurisdiction and the sources of support for legal assistance differently. By keeping these provisions, a situation is effectively maintained in which the jurisdiction and responsibility of the state and society for adequate protection of the rights prescribed by the legal order are divided among several bodies and organisations, and are thus quite diffuse. There is no possibility for unified monitoring, supervision, or assuming responsibility when any difficulties arise.³⁸

In the Common Principles of February 2008, the Coalition stated that, among the "main goals and principles" for the regulation of free and subsidised legal aid, an *integrated system* should be developed:

The area of free and subsidised legal aid should be regulated in such a way that all existing forms of providing legal aid and facilitating access to justice are harmoniously integrated into a comprehensive legal aid system. This includes the provision of legal aid via the state sector (based on the provisions of the Civil Litigation Act and the Criminal Procedure Act, as well as separate acts in which individual topics are regulated, such as the Asylum Act, the Administrative Procedure Act, and the Notary Public Act). It also includes the forms of legal aid provided by professional organisations and associations (e.g. the free legal aid offered by members of the Croatian Bar Association, pursuant to the Legal Profession Act, and by non-governmental organisations and associations in realising their own goals, with the use of their own funds or funds obtained from donors), as well as all other forms of legal aid (e.g. from legal clinics). The main goal is to create an integrated system of free legal aid, if possible also on the normative level, where, for ease of reference, all provisions on free and subsidised legal aid should be incorporated in a single legal text to the maximum possible extent.³⁹

In the public statement to the members of the drafting group regarding various proposals regarding the text of the draft CLAA of February 26, 2008, the Ministry rejected the proposal to integrate the system, explaining that it would „delay enacting of the law for some time“.⁴⁰

³⁸ Review of the Final Draft of the Act on Exercising the Right to Legal Aid, http://www.human-rights.hr/attachments/457_Review_of_the_final_draft_of_the_act_on_exercising_right_to_legal_aid.doc, p. 1 (citation).

³⁹ Common Principles for the Regulation of Free and Subsidised Legal Aid in the Republic of Croatia, http://www.human-rights.hr/attachments/457_polazne_osnove_eng.doc, p. 1 (citation).

⁴⁰ Declaration regarding the changes in the draft text of the CLAA and the suggestions by the members of the drafting group, e-mail communication by J. Butorac of February 26, 2008, p. 2.

The members of the expert group support the idea of integrating the system, but emphasize that this is above all the duty of the responsible state bodies, which should commission appropriate research, collect all relevant information and ensure that both the normative framework and its implementation in the practice function in a balanced and harmonious way.

Without the good basis in the officially collected data, this report can only briefly summarize the legal aid schemes that have been left outside the Legal Aid Act.

Legal aid under the Code of Civil Procedure. The provisions of the CCP contain the historically oldest form of legal aid, derived from the “law of the poor” (*Armenrecht*) regulation of the Austrian ZPO of 1895. Under arts. 172-177 CCP, the party in the litigation proceedings that cannot pay the costs of the proceedings without endangering his or her maintenance (or the maintenance of the members of the party’s family) can request full or partial waiver of the payment of costs. The waiver is granted by the court (i.e. the acting judge or the panel of judges), in a summary proceedings.⁴¹ The partial waiver covers only the court fees, while the full waiver also includes payment of deposits of costs of witnesses, experts and similar expenses. These costs will be finally borne by the court if the party whose costs were waived loses the proceedings. Otherwise, such costs are being recovered by the opposite party.

In the case of full waiver of costs, the court may, upon application of the party, appoint the legal representative (a lawyer or another appropriate person), if this is considered necessary for the protection of the rights of the party (art. 174 CCP). If a member of the bar is being appointed, the decision on appointment is being delivered by the president of the court. The appointed lawyer cannot refuse the representation, except where there are legitimate reasons for such refusal (if this is argued, the court has to decide on justification of these reasons). If the appointed representative wins the case, his fees are going to be recovered from the losing party. Otherwise, it appears that legal aid would be given *pro bono*.

Another confusing element regarding this scheme lies in the fact that it has been practically duplicated in the provisions of the CLAA on legal aid based on “fairness” (arts. 42-44). Except from the fact that CLAA raises the level of formal requirements (number of documents that have to be submitted of evidence of financial status), there are no essential differences in the regulation, which raises the question which scheme would be applicable in civil proceedings (or whether they would be both applicable, according to the choice of the applicant).

Legal aid under the Law on Legal Profession. Since 1994, the Law on Legal Profession contains a provision on pro bono representation. The rules are limited to one article - art. 21, which provides the following:

Article 21. The Association shall organize free legal aid for the victims of the homeland war and other deprived persons in legal issues that such persons realize as a matter of rights connected with their position, as well as in some other cases provided for by the enactments of the Association.

Some rules on the professional obligation to provide legal aid are contained in the Attorney’s Code of Ethics, Chapter III:

35. Free legal aid to deprived persons and victims of the war for the homeland is the honourable duty of every attorney and it must be carried out as conscientiously and diligently as for any other clients.

⁴¹

The proof of poor financial status is limited to the submission of a certificate by the competent tax authority.

36. An attorney shall accept representation of deprived persons and victims of the war for the homeland in civil and criminal cases when assigned by an authorized body of the Association.

37. An attorney shall have the obligation to render free legal aid to deprived persons and victims of the war for the homeland in legal matters in which these persons are enforcing their rights related to their positions when the Association entrusts such legal assistance to him or her in accordance with its enactments.

38. In the case of success in voluntary representation of deprived persons and victims of the war for the homeland, an attorney may ask for a fee for his or her legal services to the extent to which such a representation will not lose its social and humane character. An attorney shall, in any case, be allowed to accept a fee that amounts to what the represented client has recovered from the adverse party on account of the attorney's representation.

39. An attorney who, as counsel to a deprived person or a victim of the war for the homeland, acquires from such a person or from a third party, in connection with such representation and on whatever ground, a reward before the termination of representation, has thus committed a severe violation of the attorney's duty and of the reputation of the legal profession.

Although the Statute of the Bar Association (Art. 70(1)(3)) provided the authority of the Management Board “to enact regulations on appointing attorneys to the victims of the war for the homeland and socially deprived persons”, such regulation was never enacted. Instead, the web-pages of the Association⁴² specify the documents and requirements for appointment of *pro bono* attorney. The required documents are the written request with the indication of the matter, certificate of the competent tax authority, certificate on the monthly income of the applicant, certificate of citizenship (only Croatian citizens may apply) and, in family cases, various documents regarding children. The applications may be submitted by mail, to the central address of the CBA in Zagreb, or once a week in person (Wednesdays from 10h to 14h). It is expressly stated that only representation may be awarded, and that no legal advice can be asked or granted. As to the level of economic means and other eligibility tests, they are not expressly stated and seemingly depend on internal practices.

Legal aid under the Law on Asylum. Under the 2007 Law on Asylum, among other rights, the asylum seekers have the right to legal aid. Such legal aid encompasses assistance in drafting statements of the asylum claim, and the representation in the administrative proceedings.⁴³ The right to provide legal aid to asylum seekers is defined much broader than in the CLAA: any lawyer engaged by the associations with whom the Ministry of Interior has concluded a contract on legal aid provision is eligible to provide legal aid. Also, the financial means test for asylum seekers is defined in a more flexible way: any asylum seeker who does not possess sufficient funds or property of value is eligible for legal aid (art. 34). Legal aid to asylum seekers is paid by the Ministry of Interior. Legal aid under Law on Asylum is provided and paid according to the Regulation of the Minister of Interior enacted in 2007. Under this regulation, the lawyers acting in asylum cases have the right to 50% of their regular fee, and the fees for providing legal advice are regulated by the agreements concluded between the Ministry of Interior and legal aid providers.

Legal aid provided by the trade unions in labour cases. The forms of legal aid provided in labour cases by the trade unions differ only marginally from the general rules. Unlike in other court cases, where representatives may in principle be only qualified attorneys, in labour cases the workers who are members of the trade unions may also be represented by the

⁴² <http://www.hok-cba.hr/Default.aspx?sec=169>.

⁴³ See Law on Asylum, art. 29. From the MOJ response submission p 5 it seems that the scheme is limited to appeals against the decision of the Ministry of Interior, and does not comprehend any primary legal aid in preparing the application to the Ministry.

employees of the trade unions (art. 434a CCP). The trade unions also participate in providing primary legal aid to their members, which is one of the reasons that they are specifically authorized to be among the legal aid provider under the CLAA.

Legal aid under the Consumer Protection Act. This Act authorizes the associations for consumer protection to inform the consumers about their rights, assist the consumers in their dealings with the businesses, and establish advisory offices (*savjetovališta*) for protection of consumers. Although legal aid is not specifically listed among the activities of the advisory offices, it seems that the advice on the protection of consumers' rights would include the forms of primary legal aid. Under the CPA, such advisory offices may be co-financed from the state budget, and have the right to apply for office space to the units of local administration and self-government (see arts. 126 to 128 CPA).

Evaluation. The above presentation of the various parallel legal aid schemes permits us to draw some conclusions:

- *The need to integrate and co-ordinate the system.* It is not user-friendly that an act which, by its title, should cover all or most forms of legal aid leaves a number of provisions on legal aid in other pieces of legislation.⁴⁴ Even if some provisions or schemes are for any reasons left in other pieces of legislation, the schemes contained in the various acts have to be harmonized, co-ordinated and studied from an integral perspective, also for the reasons of optimizing the impact of the schemes for satisfaction of legal needs of the users.
- *The need to learn from the experiences of the parallel schemes.* Some of the schemes described above have elements structurally very different from the approach of the CLAA. They are mainly based on the straightforward definition of legal problems covered, and the direct provision of legal aid by the organisation that is approached by the user, without the need to undergo a long and cumbersome process of legal problems (and means) testing at the separate administrative bodies which are used solely for filtering purposes.
- *The need to restructure the provisions on coverage, aligning them with the Airey criteria.* Also when we take into consideration all the additional schemes that we know of, the legal aid coverage in Croatia shows significant deficits compared to the Airey criteria. The different, overlapping and complex rules on coverage of legal problems contribute to confusion and entail a high risk that specific cases which would, under Airey criteria, undoubtedly require legal aid, will remain uncovered.

5.3. Best policy

Modern legal aid should be liberal when it comes to short legal advice and cover all types of legal problems in society. International research show that legal literacy is limited and that ordinary and poor people face huge amounts of simple legal problems that they are unable to handle effectively by themselves but can be solved quickly by a competent adviser. Such services should be informal, efficient and accessible.

⁴⁴ It seems from the meeting with the Ministry that, after the initial period of denial, the need for a less fragmented system is finally recognized. Yet, it would be wrong to undertake such integration by eliminating the strong points in the present parallel schemes, and impose the weak and inefficient structures and bureaucratic approaches present in the CLAA and its implementation to the areas of specific needs.

It seems that the importance of an efficient legal advice system for everyday legal problems is not well understood in Croatian legal aid policy. We therefore recommend a survey about the need for primary legal aid to learn about the needs.

Also more complicated legal problems should be covered by legal aid outside courts. For most problems, the court is not the best solution. Some will be better handled through negotiations or alternative dispute resolution (ADR). Administrative procedures might be a better alternative for others – or the only one. For many problems the use of such procedures is obligatory before going to court.

The need for such services is also recognized in CLAA through the provisions on primary legal aid. The limitations on the problems covered are the same as for secondary legal aid, which means that important categories of problems are without coverage. CLAA article 2 also has implications for primary legal aid since it limits the purpose of the law to „facilitating access” to courts and other adjudicative bodies. Problems that do not concern adjudication seem in principle outside the scope of the law. Combined with the system of financing which generally does not stimulate provision of legal advice (see *infra* at 8.4, 9.1 and 9.3) this focusing on problems which occur in the context of adjudication can further explain why so few orders are issued for legal aid provision from the CSOs.

Today, the bulk of the legal counselling services for free are provided by the Civil Society Associations and mainly financed outside the Legal Aid Act. The huge caseload of the CSOs regarding problems that fall outside the CLAA as it is practiced today is a strong indicator that the coverage is deeply insufficient compared to the actual needs. Those insufficiencies will be manifested if the services from the CSO’s disappear.

To our evaluation, a policy must be developed to secure primary legal aid for all serious problems outside the courts with criteria similar to Airy. As long as the CSOs carry on with their services, CLAA might be used in a supplementary role and mainly provide legal aid for problems that are not covered by the services of the CSO’s. However, if the external funding disappears, a choice should be made on whether integrate the CSO’s services better into the CLAA or build up a separate service independent of them. We will comment further on this issue in chapter 8.

Recommendations

Primary legal aid ought to cover all types of legal problems. A survey should be carried out to map the need for primary legal aid.

For secondary legal aid CLAA ought to define a number of problem types of high welfare importance that are covered without further qualifications unless they are manifestly ill founded. All other categories of problems also ought to qualify after a fair merits test if access to the courts is of importance to the applicant and the prospects are fair. The „existential issues” criterion should be removed from 5(1) CLAA.

We suggest that CLAA should be formulated in a way that covers all categories of court cases that are not sufficiently covered by other schemes. The wording in the Finnish legal aid act combined with this limitation is one model. Another is to use the three criteria in CLAA article 42(2) on legal aid for reasons of fairness as the main criteria for legal aid and remove the limitation to exceptional cases.

The civil schemes outside CLAA ought to be better integrated and co-ordinated with the system established by CLAA. All provisions on coverage ought to be restructured and aligned with the Airey criteria. The user-friendly features of the schemes outside the CLAA like a straightforward definition of legal problems covered, the direct provision of legal aid by the organisation that is approached by the user, and simple procedures for merits and means testing (or lack of such procedures) ought to be considered also for other categories of problems covered under CLAA.

6. PART OF POPULATION COVERED

6.1. Findings

6.1.1. Economic limits

Section III of CLAA contains provisions on the qualifications that the applicants must satisfy. Article 7 says that coverage includes Croatian citizens and certain categories of foreigners, namely:

- People with temporary or permanent residence in Croatia;
- Asylum seekers and asylum grantees;
- Foreigners under subsidiary protection;
- Children of foreigners not accompanied by their parents and lacking a legal guardian [given that they are unable to carry the costs of legal assistance without risk to their livelihood (7(1))].

Asylum seekers are included as far as they are not covered by provisions in other acts (7(2)). Other foreigners mentioned in 7(1) are only covered if they also would fulfil the conditions for legal aid in their home country for the case in question, and also the conditions that are applicable to Croatian citizens.

Article 8 specifies what the „unable to carry the costs” standard shall mean. The criteria are complex. Those who qualify without any further conditions are:

- Welfare recipients and recipients from „other forms of assistance”;
- War veterans with the right to maintenance from the Act on the Rights of Croatian Homeland War Veterans or from the Act on Protection of Military and Civilian War Invalids and their family members.

Other persons qualify when the following five conditions are cumulatively met by the applicants and the members of her/his household:

- Their assets in monetary form are less than 54.000 kn (twenty times the lowest monthly bases for calculation of obligatory insurance contribution per household member; about 7.300 Euros in 2010);
- Their assets in non monetary form are less than 54.000 kn (twenty times the lowest monthly bases for calculation of obligatory insurance contribution per household member; about 7.300 Euros in 2010);
- They do not own a house or a flat that exceeds „the seize of adequate living accommodation” which is interpreted as 35 m² in article 3 with an additional 10 m² per additional person;
- They do not own a car with a value above 48.600 kn (eighteen times the lowest monthly bases for calculation of obligatory insurance contribution per household member; about 6.500 Euros in 2010);
- Their total monthly income and revenue per household member are less than 2.700 kn (the lowest monthly bases for calculation of obligatory insurance contribution per household member; about 365 Euros in 2010).

Children qualify without any economic limit in proceedings before competent judicial bodies when the case is about the right to maintenance from their parents and other persons who are obliged to support them (Article 8 (2)).

The Ministry of Justice has sent an opinion on the interpretation of CLAA to the state administration offices on 22 April 2010. In that opinion, the Ministry expressed the view that both Article 5 and Article 8 have to be construed in the light of Article 2, which contains the definition of legal aid. The ministry suggests a somewhat more flexible interpretation of the economic criteria, especially when applying article 8 (1)c cf. article 3 nr 18 on adequate housing. The upper limits might be exceeded if the property is in poor condition or impossible to sell and the overall situation of the applicant conforms to the general purpose and meaning of the act.

However, the principles for granting legal aid for reasons of fairness in article 42(2) also allow courts to grant legal aid independent of the person criteria in article 8. As explained in chapter 5.2.1 the „fairness” principles in CLAA appear as exceptions, while the Airy-criteria are minimum principles. We therefore think that the Croatian practice is significantly stricter than supposed in the case law of the ECtHR also when it comes to exemptions from the economic limits in CLAA.

Supplementary rules on how to consider the applicant’s economy are found in article 24 - 29, esp. article 25 and 26. To some extent they seem both to repeat and to modify the rules found in article 8. We will evaluate these rules in the Means and merits testing section in chapter 8.2, see especially 8.2.1.

6.1.2. Contributions

Several European legal aid schemes use contribution systems. People of some means are covered by legal aid but have to carry parts of the costs themselves. Different types of contributions are used:

Basic contributions must be paid in advance and the scheme usually covers expenses that exceed the basic contribution. Percentage contributions mean that the applicant has to pay a share of the total costs. They can be progressive in the sense that people with more means pay a higher share of the costs than applicants with lesser means. A third type is maximum contributions. They set upper limits for percentage contributions. All costs that exceed the maximum contribution are carried by the government.

Contributions mean that the economic criteria become more complex, since separate economic limits must be used for contributions. The poorest part of the population does not pay contributions or only the basic contributions, while the most affluent of those who qualify might pay almost all ordinary costs themselves. For them, legal aid mainly functions as a protection when legal costs become exorbitant as demonstrated in the *Steel and Morris* case. Since a contribution system lowers the average costs per legal aid case, it makes it possible to include a larger part of the population in the scheme than when all grantees receive the service for free without increasing costs.

CLAA article 2 says that legal aid is a way of facilitating access to judicial bodies „where the costs are paid in their entirety or in part by the Republic of Croatia.” The act contains a contribution system in article 31. Only percentage contributions are used. No contributions apply to applicants who are granted legal aid because they live on social welfare or other forms of assistance or qualify from the right to maintenance according to the act on war veterans. Other grantees must pay contributions if their monthly household income per

member exceeds 50 percent of the minimum base for calculating and paying contributions for obligatory insurance. Contributions range from ten to fifty percent of the total costs. CLAA also has rules on repayment if the grantee has submitted incorrect information on his household's economy or has his economic situation substantially improved.

6.2. Evaluation

6.2.1. Human rights criteria.

Means test. Human rights also bear on means testing. According to the *Airy* principles trial costs must be adjusted to the economic capacity of the individual. Legal service costs must not make legal assistance unavailable when it is deemed necessary in the interests of justice. Both economic limits and contributions must be in accordance with this principle.

Steel and Morris develops on the principles of *Airy* with respect to trial costs. For people of means the human rights consequence is that they might claim access to legal aid if trial costs become exorbitant. Human rights do not lay down a right to *free* trials, but costs must be adjusted to the economic capacity of the individual. This principle obviously bears upon the framing of both economic limits and contributions. Legal aid cannot be limited only to the poor. If costs become exorbitant, as in *Steel and Morris*, middle income and possibly high-income people might also be in need for public support.

The means testing laid down in CLAA article 8 cf. article 2 seems strict and will not satisfy the demand for flexibility embedded in the *Airy* principles. Neither will the more flexible interpretation suggested in the Ministry's letter of April 22, 2010 be sufficient, although the intention is certainly going to the right direction. Issued as an opinion it cannot be expected to substantially change the interpretations that can be gleaned from the text of the act itself. The exemptions from the means test embedded in the „fairness” criteria are not wide enough to compensate for the limitations in access to legal aid in CLAA article 8 cf. article 2.

We have not received any statistics that show how extensive was the coverage of the CLAA i.e. how widespread is poverty in Croatia and what percentage of poor people is covered from the existing limits. In our view, it would be one of the major tasks of the bodies responsible for legal aid to collect and monitor these indicators. In our independent assessment we could arrive to only few potential indicators that also raise some concerns about the sufficiency of the coverage.

Under the latest CEPEJ data, Croatia had in 2008 a per capita GDP of 10.583 EUR, and average gross annual salary of 12.533 EUR. The average monthly net salary in 2009 was about 5.300 kn (about 730 EUR). There are also varying assessment of the level of poverty of the overall population. According to several sociological studies (Šućur⁴⁵, Bejaković⁴⁶) and the World Bank data, the absolute poverty in Croatia is relatively low. But, various sources estimate that the relative poverty is still considerable. In 2009, it was reported that 856.429 citizens live below the relative level of poverty, or about 17,4 percent of population (Novi list, 19/09/2009). In 2007, the level of households that lived at the edge of poverty was about 20%

⁴⁵ Šućur Z., *Siromaštvo: teorije, koncepti i pokazatelji*, Zagreb: Pravni fakultet, 2001.

⁴⁶ Bejaković, P., *Poverty, Inequality and Social Exclusion in the EU and Croatia*, in: Ott, K. (ed.), *Croatian Accession to the European Union: Institutional Challenges*, Zagreb: IJF, 2005, pp.. 79-103 (also available at <http://www.ijf.hr/eng/EU2/Bejakovic.pdf>).

or 285.133 households. At that time, the poverty threshold was 1.744 kn net monthly income for a single-person household or 3.663 kn for a 4 person family.

If we compare these indicators with the criteria for means testing set in Art. 8, it is evident that they do not match. Although the monthly income as an indicator may be comparable, there are three further criteria that have to be met, which include the ownership of various assets, including the ownership of a flat or a house. This would e.g. exclude from potential coverage all persons who live at the edge of poverty in their own houses, which is often the case, especially in rural areas with elderly, single-person households. Further limitation is the need that all members of the household – even if there is no maintenance obligation between them and the applicant – pass the income and property test, which further weakens the chances of the applicants to obtain legal aid and makes them dependant on other members of his or her household (even if they qualify under the CLAA, they have to submit their declarations and consents to inspection of their property). Under all these conditions, it seems that a significant part of the people who live at the edge of poverty would not qualify under the criteria of Art. 8 CLAA.

In addition, it seems that the costs of legal services in Croatia may be rather significant even for the people who do not belong to the group of „poor” or „very poor”. According to the available information, the costs of proceedings in Croatia include court taxes, the costs of representation and other expenses (especially the expenses of court experts). If a monetary claim is raised concerning the property of about 500.000 kn value (about 70.000 EUR - which corresponds to the price of a smaller apartment), only the costs of legal representation in a proceedings of two instances may amount to about 10% of the value (50.000 kn or 7.000 EUR), which is – together with court taxes and some other expenses – over ten average monthly salaries. In large cases, the maximum amount payable to a lawyer for a single action in court proceedings (one written submission or one hearing in a court) may under the Tariff for lawyers amount to 123.000 kn (about 17.000 EUR). Such costs may become a prohibitive factor also to persons who belong to wealthier classes. Today they do not qualify since the means test in CLAA art 8 has a set upper limit, independent of the foreseeable costs to bring the case to the court. The only possibility will be an approval of legal aid from the courts for reasons of fairness according to article 5 (3). As explained above, we do not think that the present practices of the courts include such cases.

Contributions. A legal aid system that demands middle-income people to carry ordinary legal service costs themselves, might not conflict with human rights if it protects against exorbitant costs that exceed their economic capacity. For the upper part of the income ladder, contributions might be steep. However, legal aid schemes that only cover costs up to a certain limit, or use percentage contributions without any ceiling, might conflict with article 6 if costs become high.

As to the system of contributions in CLAA Art. 31, we find it striking that the report on implementation of the law in 2009 does not contain any information about the scope and use of this instrument. In some aspects, the provision on contributions also seems to be ambiguous (e.g. it is not clear what the contribution is, to whom it applies and what the rights and obligations of the applicants and the providers are). So far, we may only raise the assumption that a number of cases in which legal aid is given the share paid by government are very limited. The low payment for legal aid work may, however, reduce the impact of contributions.

From 2011 the present payment rates for the providers will increase with fifty percent, see chapter 8.3. As a consequence, contributions also will increase similarly unless they are

adjusted. As far as we know, no evaluation of whether such a steep rise the contributions is compatible with the capacity to pay among the groups that are subject to contributions has been carried out. For costs of some significance the increase probably means an insurmountable barrier to access to court for the groups affected.

6.2.2. *Best policy.*

Modern legal aid schemes are supposed to be generous in defining their target population. Most of the population qualifies – although contributions apply for people above the poverty line and might be steep for the better off. For the affluent the schemes mainly function as a protection against exorbitant costs. When contributions are used, they are tailored both to the costs of the case and to the grantees economy. The point is to secure that no one shall be left with costs that are unreasonable compared to their economic capacity and to avoid that fear of such costs becomes a barrier for access to justice. Some European states also provide short legal advice free for everyone and some also cover legal costs independent of economy in administrative cases about governmental intervention into people's integrity – like involuntary psychiatric treatment. Legal costs for public intervention into immovable property – like expropriation – are commonly covered.

Recommendations

The means test ought to be reviewed and significantly extended in light of the Airy criteria. Maximum contributions ought to be part of the contribution system and the contributions must be kept in accordance with the individual's capacity to pay also when the government's costs changes – for example due to adjustments in the payment to the providers. Coverage must include all types of trial costs that amount to a barrier to access to justice – including lawyer fees and court taxes, costs for expert evidence, translation costs and other major evidence costs and also costs to the counterpart. The contribution system might be extended similarly.

7. SERVICE

7.1. Findings

Primary and secondary legal aid. CLAA article 4 distinguishes between primary legal aid (4(2)) and secondary legal aid (4(3)). Primary legal aid comprehends information, counselling, drafting and representation outside the courts, while secondary legal aid includes legal assistance and representation in court cases – also in settlements before a court. Representation before the European Court of Human Right and other international bodies is covered, but classified as primary, not secondary, legal aid.

A grant for primary legal aid comprehends all forms of service listed in article 4(2) see article 30(1). Grants for secondary aid also include all sorts of service listed in article 4(3) but shall be issued „for specific types of proceedings and instances”. New applications are necessary if grantees want to pursue their case before other instances than specified in the grant.

For primary legal aid article 4(2) must be read in the light of article 2 that significantly limits its scope. Article 2 delimits legal aid to „facilitating access“ to courts and other adjudicative bodies, see also article 5(1) that limits legal aid to „proceedings.“ If these provisions are interpreted narrowly, people will only be entitled to legal aid when they are considering to forward claims before adjudicating bodies. Information and advice on legal planning, drafting of legal documents and applications and help to negotiate with counterparts *without* bringing in adjudicative bodies is outside CLAA.

Research from other countries show that legal alienation is widespread and that legal assistance to sort out and solve legal problems before they reach the adjudicative stage is important, see chapter 4.1. CLAA does not seem to address this challenge.

Coverage of costs. Access to court involves several kinds of costs. They might include:

- Provider costs or the costs of the assistance of a legal expert
- Court costs – usually a fee to the court for handling the case
- Costs for experts and other costs connected to the production of evidence
- Costs for interpretation
- Costs to the counterpart if the case is lost
- The party’s own costs.

CLAA article 6(1) says that legal aid relates to „complete or partial provision of payment of the costs of legal assistance,” while CLAA article 4(4) says that „approval of any form of legal aid includes exemption from payment of taxes and the costs of the proceedings.” The wording covers both costs for the lawyer and the court costs.

An issue where our findings are uncertain concerns the payment of the fees for experts in the proceedings. Under art. 4(4) legal aid includes „exemption from payment of the costs of proceedings”, which may include the payment of court experts. However, in this respect we have not found any indications in the Report on legal aid provided in 2009. From some lawyers and also from associations we have received information that such costs are not covered by the legal aid scheme. The same can be said regarding the interpretation costs; they are undoubtedly a part of the total costs of proceedings. In the “old” scheme of the Code of Civil Procedure, such costs would be borne by the court, if the user of legal aid loses the case. However, we have not seen any confirmation either of the fact that these costs are paid

when required, or that payment of experts or the interpreters is included in the legal aid budget.

In many jurisdictions – including Finland, Norway and Austria -- a party must carry the costs of the counterpart if the case is lost. Under Croatian law, the winning party also can request to have its costs awarded in the judgment. We have not found any specific rules which would limit or exclude the application of this rule in respect to the legal aid beneficiaries. Therefore, it seems that, if legal aid beneficiary loses the case, s/he would face the chances of being ordered to pay the whole legal costs of the counterpart. According to human rights standards, costs to the counterpart should be considered as a part of the total cost barrier. Even when the poor party's own costs are covered fully, a risk of paying the counterparts costs might still be prohibitive for poor people, cf. *Steel & Morris*.

Also the party's own costs might sometimes be prohibitive to court participation. Travel and accommodation costs are most common. Handicapped grantees might be in need of special health services if participating in a trial, etc. As far as we can see, there are no provisions especially for the party's own costs in CLAA.

It might be asked if legal aid for the reasons of fairness also covers costs that are outside ordinary legal aid. As we read CLAA article 42(2) it allows for legal aid independent of the problem criteria in article 5(1) and (2) and of the person criteria of article 8. It does not allow for coverage of other types of costs than the ones listed in the act.

7.2. Evaluation

Human rights. According to human rights the types of service offered by legal aid cannot be limited to an extent that makes access to justice ineffective. However, the „access to justice“-approach to legal aid in human rights focuses on *access to courts and similar judicial bodies*. The human rights obligations for governments to provide legal aid is therefore mainly limited to what is necessary for proper use of them.

However, 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. Especially among poor people, many are not capable even to decide properly whether to seek a lawyer's assistance about a legal dispute. A legal aid system that limits itself strictly to court assistance might be criticized for not helping its citizens sufficiently in finding out whether they need the protection provided by Article 6.

In *Golder v UK*,⁴⁷ the majority of the ECtHR found that the entitlement to a fair trial also comprehended a right to make an *informed* decision as to whether to sue or not. If a person lacks sufficient means for necessary counselling, legal aid might become a prerequisite for effective access to court. Since the main aim of Article 6 is to protect access to court for claims *with* merits and not the unfounded ones, governments' obligation to provide access to pre-trial legal counselling might be shaped accordingly. However, making legal aid available only for the court alternative might pressure people on legal aid into the court track also when they would have been better off with ADR.

In principle, the range of legal services provided for in CLAA satisfies the human rights obligations. However, for problems that falls outside the ones listed in article 5(2) – that is the bulk of the problems – and legal aid will mainly be granted for „reasons of fairness“ according to article 5(3), no pre-trial advice on whether to go to court seems available through

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legal aid. Article 42(3) says that an application may be submitted „when court proceedings are instituted or during the court proceedings”. The first steps – counselling on whether to go to court or not, instigating the proceedings or denying a claim before a court – must be carried out by the applicants *before* they know whether legal aid for „reasons of fairness” will be granted. If the application is turned down, poor people might be exposed to expenses they cannot cover even if they refrain from further litigation. Even the cost risk involved with the steps necessary for forwarding an application might well be prohibitive since the granting of legal aid for the reasons of fairness is meant to be exceptional, see CLAA article 5(3).

According to article 6 ECHR access to the courts must be effective for everyone. *All* costs that are considered necessary from the Airy criteria must be kept to a level that is compatible with the individual’s capacity to pay.

It is uncertain whether the costs of expert evidence are effectively covered by CLAA either. Inability to effectively engage experts because of their high costs is also relevant from human rights perspective, since it may potentially cause a violation of the right to access to a court (see *mutatis mutandis* the ECtHR decisions in cases *Bakan*, *Tolstoy-Miloslavsky*, *Kreuz* and *Stankov*). The Airy criteria mean that *all cost* barriers connected to the proceedings that hinder access should be lowered to a level in proportion with the applicant’s capacity to pay.

Interpretation is another important category of trial costs that should unambiguously be covered under legal aid scheme. Pursuant to article 6(3)e ECHR defendants in criminal cases are entitled to free interpretation „if he cannot understand or speak the language used in court.” Also in other cases interpretation must be provided if necessary for efficient use of the procedural rights embedded in the principle of fair trial in article 6(1).

Even though we have been told by the Ministry that costs of experts and interpreters could be paid from the legal aid funds, we have also heard that this is not functioning in the practice. We consider that these are elements that are too important for the effectiveness of the system to be left to discretionary assessments; firm proof of effectiveness and comprehensive statistical data is needed to confirm the functionality of the system.

According to the Airy criteria also costs to the counterpart and the party’s own costs must be coverable when necessary for access to court. Such costs are clearly outside the scope of CLAA.

Although article 4 CLAA includes representation before human rights bodies, article 13 ECHR also entitles everyone to „an effective remedy” before a *national* authority for alleged violations of ECHR. If legal aid is necessary for effective use of such remedy it must be included in the scheme. In Croatia, such remedy is primarily available in the form of the constitutional complaint, which is decided by the Constitutional Court. The language of art. 4(3) leaves space for doubt whether any secondary legal aid may be afforded for representation before the Constitutional Court, which is not regarded to be the body of the state judicial power, and insofar may be left outside the scope of formula “representation before courts”. Yet, as the Tariff for Legal Aid includes proceedings before the Constitutional Court, it seems that it was construed that such proceedings are covered, however only in the context of secondary legal aid (meaning that civil society organisations and other providers who are not lawyers cannot be credited from the CLAA scheme for their assistance in this respect).

Best practice. If we turn to the best practice perspective, the range of services provided ought to be broader than in CLAA. Service *outside* courts ought to contain:

- information and education services,
- counselling,
- advice,
- drafting,
- negotiations,
- applications,
- complaints,
- mediation
- other ADR methods,
- representation before administrative and judicial bodies outside the court proceedings,
- test cases,
- law reform issues.

Legal aid *before* the courts ought to include all necessary legal representation and minor assistance in courts including:

- expert testimony
- interpretation
- test cases
- action for precedents of importance to the target groups of legal aid
- class and group actions on behalf of the target groups
- human rights actions.

We think it important that the information and educational services on legal matters are developed and strengthened because it promotes legal literacy and improves people's capacity to handle simple legal problems on their own. Such strategies also promote more rational and efficient use of the legal aid schemes.

Pursuant to article 9(3) CLAA, providers „cannot charge for offering general legal information.” Obviously it is limited how much general legal information legal aid providers can produce and disseminate for free. Whether legal information and education is made part of CLAA is not the main issue. It is important, however, that the data that can be extracted from the legal aid cases on common legal problems and the obstacles and strategies that can be used to remedy them are systematized and used to improve legal information services and to develop self help systems for simple matters. Associations might be well suited to perform such tasks.

We also recommend the introduction of collective measures as test cases, class and group actions and human rights actions on behalf of the target groups of legal aid also because such strategies are more cost efficient than funding a large number of individual cases with similar content over legal aid.

For similar reasons Croatia ought to consider the inclusion of some law reform strategies into legal aid. They should focus on remedying and simplifying provisions that legal aid cases show hamper efficient and just application of the law to the target groups.

Recommendations

Primary legal aid should include pretrial advice on cases that qualify under the „reasons of fairness” criterion. CLAA ought to cover costs for expert evidence and other production of evidence, interpretation costs, costs to the counterpart and the applicant’s own costs when deemed necessary for proper access to justice. Information and education in legal matters ought to be improved. The information that can be gathered from legal aid cases should be better used. A selection of collective strategies ought also to be considered for inclusion into CLAA.

8. DELIVERY

8.1. *Who provides legal aid?*

CLAA establishes a delivery system for legal aid in articles 9-14. Three categories of providers are pointed out – attorneys, authorized associations and institutions of higher education through law clinics, article 9(1), 14(1). Attorneys may offer both primary and secondary legal aid while associations and legal clinics are limited to primary legal aid, art. 10(1), 11(1). It is not further defined in CLAA what is meant by an attorney. Under Croatian law, all licensed attorneys (i.e. the members of the Croatian Bar Association) are allowed to provide legal aid according to CLAA. No additional qualifications are demanded.

The legal aid providers are in principle obliged to provide legal aid if so requested by the applicant. However, in the case of attorneys, they may refuse to provide legal aid in cases prescribed by the Attorneys Act (Art. 10(2)). The Attorneys Act includes a reference to the Code of Ethics, which states that provision of legal services may be refused „for important reasons” (p. 43 of the Code). The Code gives examples of these reasons: bad prospects for success; notorious inclination to frivolous litigation; excessive amount of other work; lack of special experience required for the case; immorality of the grounds for which legal service is sought; incapacity of the party to pay the expenses. For associations, no exceptions to the duty to provide the legal aid to the beneficiary are foreseen (Art 11(2)).

The right of the legal aid providers to refuse legal aid seems to be quite imbalanced. While there are many options which allow attorneys to refuse provision of legal aid (even in cases where such refusal would be definitively inappropriate), the other legal aid providers such as associations have an absolute duty to cater all the applicants to whom an order was awarded – also when their request is entirely outside of the special field of expertise of the association.

Croatia had around 4 000 attorneys in 2010 and almost half of them (1900) practice in Zagreb. We have not received any information about how many of them that handled commissions under CLAA during the first year, but we can estimate that on average the lawyers handled around 0,5 cases per lawyer⁴⁸. It seems safe to infer that at least half of the profession did not provide any legal aid. The real figure probably is significantly higher.

Associations who want to provide legal aid must register at the Ministry of Justice. The counsellors used by the associations must hold a law degree, have passed the bar exam, possess at least two years of professional work experience and be insured against liability. They are obliged to provide primary legal aid, article 13(1).

According to the statistics from the Ministry of Justice⁴⁹ 30 associations and one legal clinic had applied for registration and 22 associations and one clinic had been approved as legal aid providers for 2009.⁵⁰ The average number of orders handled per association can be estimated to 26.⁵¹ Figures from the yearly reports of the associations for 2009 show that ten –

⁴⁸ MOJ 2010 p 6: 2 416 orders were issued, p 16: 75,8 percent of the legal aid was provided by attorneys.

⁴⁹ Republic of Croatia Ministry of Justice „Report on the realization of the right to legal aid and the expenditure of funds in 2009” Zagreb March 2010 (*MOJ 2010*).

⁵⁰ MOJ 2010 p 16-18.

⁵¹ See footnote 4.

or almost of half of the associations – had not handled/finished any orders according under CLAA in 2009. Only three associations handled/finished more than ten orders.⁵²

Universities and other institutions in higher education that offer courses in law might establish legal clinics staffed by law students for providing primary legal aid restricted to:

- legal information,
- legal advice,
- drafting of documents, art 14(1).

They cannot provide representation in administrative matters, ADR or before international bodies. They also must register at the Ministry of Justice. At present Croatia has one clinic registered that sees clients (Split). One is under establishment (Zagreb).

Evaluation. We support the underlying idea of organizing the providers better and see to that they possess sufficient competence for the advice they give. We think that legal problems and legal alienation is widespread in Croatia as elsewhere and that the *capacity* of the legal aid system is highly insufficient also among the jurisdictions that have the highest numbers of legal aid cases per inhabitant, see chapter 4.

It is therefore important that qualification criteria and other quality measures do not exclude possible providers that possess sufficient competence to provide reliable and cheap advice in specific areas of law -- for example consumer matters, health and welfare benefits, immigration issues, resettlement procedures, minority protection and anti-discrimination issues, ecology, matters regarding family violence and other family relations, typical problems of the witnesses and victims of crime etc. Especially in the UK a variety of first line services staffed with non lawyers exist that handle both legal and non legal problems and refer the more complicated ones to the legal specialists.

Associations usually focus their activities on certain issues according to their purpose and goals and deliver services to their members and the public within their field of work. In several European countries they also deliver legal services, but usually limit them to legal issues that are within their field of work. Unions focus on issues in labour law, automobile associations on car and traffic problems, taxpayer organizations on tax issues, consumer organizations on consumer issues, organizations for battered women on family law (divorce, custody for children, division of marital property etc.), criminal prosecution and compensation, etc. We think it less fruitful to oblige the associations to provide service in all categories of cases covered by CLAA. They should be allowed to specialize in accordance with the working field of their organization if they so wish.

Recommendation

We suggest that advisers with a law degree (mag. iur.), but without the bar or any other supplementary exam be allowed to deliver primary legal aid. Persons who have no law degree, but possess other proper training should also be allowed to deliver primary legal aid in matters that are within their competence. Associations should be allowed to specialize according to their field of work.

⁵²

See MOJ 2010 p 21-22.

8.2. Coverage in practice

8.2.1. European comparisons.

What sorts of coverage do the CLAA providers produce in practice? We will use newly published statistics from Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) as a rough indicator of the quality of the Croatian legal aid schemes compared to schemes in other countries.⁵³ Croatia has not provided figures on most of the features asked for, but table 3.3 contains crucial data on the number of grants.⁵⁴ Croatia reports 32,7 legal aid cases per 100 000 inhabitant „other than criminal cases” in 2008; which we understand to be the types of problems that are now covered by the CLAA. Croatia has not provided information on the number of criminal cases with legal aid.⁵⁵

Croatia ranks as number 16 of the 21 states that have provided figures especially on legal aid outside criminal cases. At the bottom we find Montenegro (1,0) case per 100 000) and FYROM Macedonia (1,7 cases per 100 000). Also Slovakia (13,7) and Georgia (17,3) provide legal aid in significantly fewer cases per 100 000 inhabitant than Croatia. Bosnia & Herzegovina is on the same level as Croatia (33,3), while Italy provided legal aid in 81,8 cases per 100 000 or two and a half time as many as Croatia, Estonia 203,4 cases per 100 000 inhabitant or six times as many and Hungary 407,7 or twelve times as many. In Northern and Western Europe Finland provided legal aid in 896,9 cases per 100 000 inhabitant or twenty-seven times as many as Croatia and UK Scotland 2 226,2 or sixty-eight times as many. Turkey is at the top with 4021,7 legal aid cases per 100 000 inhabitant. The median is 169,6 cases per 100 000 inhabitant or five times the Croatian provision and the average 757,3.⁵⁶

Croatia had a per capita GDP in 2008 of 10.683 euro. It ranked no. 28 of the 47 member states⁵⁷ that have provided data for the „European judicial systems” – edition 2010 (data 2008). The lowest was Moldova with 1.151 euro - or only one tenth of the figure for Croatia and the highest Luxembourg with 80 600 euro or 8 times as much as Croatia.⁵⁸ Except Slovakia, the states that provide less legal aid than Croatia -- like Moldova – also are significantly poorer. Hungary and Estonia both have a GDP on the level of Croatia but provide significantly more legal aid.

Data on CLAA that went into force in 2009 are mainly gathered from MOJ. In Croatia we face the following amount of cases regarding applications for legal aid and their dispositions

⁵³ European judicial systems Edition 2010 (data 2008) *Efficiency and quality of justice*. European Commission for the Efficiency of Justice (CEPEJ). Council of Europe Publishing Strasbourg. Oct 2010. (CEPEJ 2010) Downloadable from http://www.coe.int/t/dghl/cooperation/cepej/default_EN.asp.

⁵⁴ CEPEJ 2010 table 3.3 p 52-53.

⁵⁵ Croatia has commented Q24 of the CEPEJ questionnaire from which the figure is drawn:

„According to data delivered by Croatian Bar association (hereinafter: CBA) out of the total number of 1951 applications, 1449 were granted in civil cases.

The provision of Art. 21 of the Law on Legal Profession and Advocates does not foresee free legal aid in criminal cases. These matters are regulated by the Criminal Procedure Act; therefore, according to the provisions of this Act the court shall appoint the defence counsel ex officio. As mentioned in Q 13., the Ministry does not have such data at its disposal.” See http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2010/2010_Croatia.pdf for details.

⁵⁶ CEPEJ 2010 table 3.3 p 52-53.

⁵⁷ UK England and Wales, UK Scotland and UK Northern Ireland are listed separately in the statistics.

⁵⁸ CEPEJ 2010 table 1.1 p 12.

(figures available for 2009 have been reduced to 12 months on average, figures for 2010 have been extrapolated using data of October 21st 2010 to make them comparable):

Months	Year	Amount					IN PROCESS OF APPROVAL
		SUBMITTED APPLICATIONS	ACCEPTED	REFUSED	REJECTED	SUSPENDED	
"13 months"	2009	4.647	3.190	971	160	140	186
01.01.-31.12.	2009	4.283	2.940	895	147	129	171
01.01.-21.10.	2010	7.052	5.033	1.359	252	245	163
01.01.-31.12.	2010	8.755	6.248	1.687	313	304	202

In the year 2010 in relation to 100.000 Croatian inhabitants 197,43 applications have been submitted, 140,91 of which were „accepted”, meant granted with legal aid. The figure is significantly higher than the 32,7 grants reported to CEPEJ for 2008 and the number of orders granted more than doubled from 2009 to 2010. In relation to the median value of 170 cases per 100.000 inhabitants in Europe in the year 2008 this is 83 % of that volume. According the median of 170 „accepted” applications the total number of „accepted” cases expected for Croatia would be of 7.500 a year instead of 6.248 cases registered in 2010.

It means that the CLAA has become significantly more effective. If the growth continues Croatia should soon reach the European median of 170 legal cases per 100 000 inhabitants.

It should be kept in mind as well that an order for secondary legal aid is limited to „specific types of proceedings and instances” (CLAA art 30(2)), which means that a court case might demand more than one order. Four fifths of the orders issued in the period were for secondary legal aid.⁵⁹

It is not possible to read from the Ministry’s report how many people actually received legal aid over the scheme during its first year of operation. Only a fraction of the orders seems to have been finished during the period since the expenses for the 2.416 orders were calculated to 1.319.000 Kuna while the Ministry paid only 37.000 Kuna or less than 3 percent of the calculated expenses during the reported period. Even if the share of orders completed is higher than the share of the costs, it seems safe to conclude that very few of the orders issued have been finished during the first year’s operation of CLAA.

We will not try to figure out the reasons behind. Statistics over several years probably are necessary to establish if all or most of the orders issued during the first year actually are used by the grantees. We only want to mention that the number of finished cases per year has to improve dramatically if Croatia shall maintain the same level of coverage as provided by the scheme in 2008 before CLAA went into force.

8.2.2. *Geographic distribution.*

The mean or average number is just one aspect of legal aid coverage. Another is how the coverage is distributed within Croatia. The Ministry's report provides some data about the

⁵⁹ MOJ 2010, p. 16.

distribution of the orders provided on the different legal aid offices (SLO) that can be used for assessing the geographic distribution.⁶⁰ The results are shown in the next table:

Table: Geographic distribution of legal aid orders March 2009-March 2010⁶¹

County office	Pop	Area km ²	Orders	Orders per 100.000 inhabitants	Population per km ²
<i>Bjelovar</i>	133084	2638	41	31	50
<i>Sl. Brod</i>	176765	2027	85	48	87
<i>Dubrovnik</i>	122870	1782	24	20	69
<i>Pazin</i>				24	73
<i>Karlovac</i>	141787	3622	104	73	39
<i>Pozega</i>	85831	1821	37	43	47
<i>Rijeka</i>	305505	3590	157	51	85
<i>Sisak</i>	185387	4448	272	147	42
<i>Zadar</i>	162045	3643	109	67	44
<i>Koprivnica</i>	124467	1734	64	51	72
<i>Krapina</i>	142434	1230	62	44	116
<i>Gospić</i>	53677	5350	37	69	10
<i>Čakovec</i>	118426	730	86	73	162
<i>Osijek</i>	330505	4149	189	57	80
<i>Šibenik</i>	112891	2994	67	59	38
<i>Varaždin</i>	184769	1260	155	84	147
<i>Virovitica</i>	93389	2021	78	84	46
<i>Split</i>	463676	4524	101	22	102
<i>Vukovar</i>	204768	2448	305	149	84
<i>Zagreb</i>	309696	3078	86	28	101
<i>Zagreb city</i>	779145	640	305	39	1217
Total	4.437.430	56.542	2.413	54	78

⁶⁰ MOJ 2010, p 7-11.

⁶¹ Data on population and area of the Croatian counties are gathered from http://hr.wikipedia.org/wiki/Hrvatske_%C5%BEupanije (Popis županija).

The county with the poorest coverage (Dubrovnik) shows 20 orders per 100.000 inhabitants against 149 per 100.000 for the best covered county (Vukovar). The average for the 3 counties with the poorest coverage is 25 orders per 100.000 against 127 for the 3 counties with the best coverage or 5 times as high. Coverage therefore appears very uneven. Although there are significant differences in the poverty rate between the counties that impact on the need for legal aid, they cannot explain such huge differences. It is unlikely that the people who qualify for legal aid in Vukovar have 6 times as many problems as the people who qualify in Dubrovnik. However, the 6 counties that suffered most from the war⁶² have 93 orders on average which is almost twice as many as the national average of 54.

Neither does the degree of urbanization seem to correlate with the coverage. Dubrovnik has 69 inhabitants per km² – a bit under the average of 78 while Vukovar has 84. The 3 counties with the poorest coverage have 87 inhabitants per km², while the 3 counties with the best coverage have 70 inhabitants per km². Gospić with only 10 inhabitants per km² has 69 orders per 100 000 inhabitant, while Zagreb with 1 217 inhabitants per km² has only 39.

Lawyers delivered three quarters of the legal aid. It seems that the lawyers are a highly urbanized profession in Croatia as well as elsewhere. The lawyer density in Zagreb is very high. According to the Bar Association approximately half of them work in the Zagreb area while less than one quarter of the population lives there. Despite a number of orders well below the national average, the lawyers in Zagreb City only provided 30 percent of the legal aid delivered there. The rest was provided by the associations.⁶³ Only Osijek had a similar distribution. In all other counties the attorneys provided all or almost all of the aid.

Since the associations are limited to providing primary legal aid, it is reasonable to believe that the distribution of the two types of legal aid also is very different in Zagreb and Osijek compared to the rest of the counties.

The main factors behind probably are lack of information to the users and deficits in the organization of the delivery system. As far as we know, the legal aid authorities have not attempted at identifying standards for what a proper coverage should be or to find out if sufficient capacity is available among the lawyers and associations working in the different counties.

We also will draw attention to the distribution of cases between the lawyers and the associations. An estimate of the overall delivery of legal aid in Croatia just before CLAA went into force showed that the associations provided approximately 70.000 cases a year against approximately 7.000 by the attorneys. It seems beyond doubt that the associations are the main providers of legal aid in Croatia. Most of their cases do not concern litigation. According to the statistics from the Ministry of Justice 80 percent of the orders were issued for secondary legal aid and only 20 percent for primary legal aid and 76 percent of all the orders went to lawyers against 24 percent to associations.⁶⁴

During the drafting process, it was agreed that primary legal aid should be an important element of the system, and that it will be funded in the approximately the same amount as the secondary legal aid. The underlying idea is that legal advice is important also as

⁶² Vukovarsko-srijemska, Šibensko-kninska, Osječko-baranjska, Zadarska, Ličko-senjska, Sisačko-moslavačka,

⁶³ MOJ 2010, p. 16.

⁶⁴ MOJ 2010 p. 16.

an element of preventing litigation, and that it may be more effective than *ex post facto* remedies.

There are several reasons for developing an extensive legal advice system. Several of the jurisdictions with the highest number of legal aid cases per 100 000 inhabitant have established extensive legal advice systems both run by the public sector and by civil society organizations and the recognition of advice services as an important part of legal aid is also increasing. Among the reasons are:

- Many (potential) legal conflicts will be avoided and solved at an early stage with far less resources through the courts.
- Modern citizenship builds on legal literacy, while legal alienation, lack of legal knowledge and self confidence in legal matters are widespread. People need advice about how to utilize the increasing specter of rights they are provided with from modern government, as in working life, as wage-earners and self-employed, and as property owners, consumers, recipients of health and welfare benefits, etc. as well as in their family life.
- For many, effective access to court presupposes user-friendly advice at an early stage of the conflict. If not, many will give in even if they are protected by the law, simply because they are unaware of their rights or think it impossible to have them protected for example because they think lawyers are far too expensive or do not know about the availability of legal aid.

However, for the funding for the NGOs and clinics was right from the beginning reserved less money, and this trend is continuing.⁶⁵ There are fears that in the future the law will effectively be reduced to (some) forms of secondary legal aid, and that funding from the legal aid scheme will be given only for the services of lawyers.

8.2.3. Types of problems

When we look at the types of problems covered during the first year of the scheme we find that they concern a rather limited selection of the categories listed in CLAA. The approved applications concerned:⁶⁶

- Family matters (50 %)
- Ownership of housing and means for work (13 %)
- Enforcement (12 %)
- Domestic violence (5%)
- Other matters (5%)
- Less than 5 %:
 - ✓ Labour law disputes
 - ✓ Administrative proceedings related to pension insurance
 - ✓ Social welfare rights
- Less than 1 %:
 - ✓ Victims of crime
 - ✓ Legal status

⁶⁵ See MOJ 2010. The less funding for primary legal aid was awarded by the Legal Aid Commission in spite of the CLAA provisions which could be interpreted as encouraging equal distribution – see art. 53(2).

⁶⁶ Source MOJ 2010 p 13-14. The most detailed categorization of the cases handled under CLAA is listed countywise on p 32-46, with the total for Croatia on p 46-47 – see Appendix IV.

- ✓ Proceedings before the Administrative Court
- ✓ Extraordinary remedies
- ✓ Proceedings before the European Court of Human Rights
- ✓ Immigrant issues

The list of problems covered in CLAA article 5(2) contains 13 categories of problems. The statistics of the legal aid actually delivered use somewhat different categories than in article 5(2) although most of them seem similar.

„Family legal proceedings” are the uncontested largest category that probably consumes most of the legal aid budget. „Ownership of housing and means for work” is the second largest category. „Enforcement” is the third largest category. Together, the three categories – family proceedings, housing matters/means for work and enforcement – made up three fourth of the orders. They cover four of the thirteen categories listed in art. 5 (2).

The rest seems insignificant in practice. Labour law disputes amount to 3 per 100.000 inhabitant, pensions, welfare and health together to 5 per 100 000 inhabitant and victims of crime to 0,7 cases per 100 000 inhabitant. Given the welfare importance of the types of problems listed in the narrowly shaped criteria of CLAA and how widespread they must be in Croatia, it seems safe to infer that the scheme at present only covers a tiny fraction of the people and problems that qualify.

8.2.4. Other schemes

In Chapter 5.2.2. we listed several civil legal aid schemes legislated outside CLAA. Statistical information on those schemes are incomplete or lacking.

As to the legal aid provided under the Code of Civil Procedure, in spite of the fact that essentially the same rules were in effect for over 80 years, there is little or no systematic data about the scope of its usage in practice or the expenses finally paid by the state on that account. All we have are incidental attempts to find some information on the account of individual projects, e.g. reporting for the Council of Europe.⁶⁷ It seems that the overlapping of this system of legal aid with the other legal aid schemes (e.g. with *pro bono* attorneys awarded by the CBA) led to significant practical decrease in the use of this scheme. While the decisions on waiver of court fees are regularly being granted, the courts now tend to deflect the applications for *pro bono* lawyers appointed by the courts, pointing the applicants to the other schemes in order to save the court the time and money.

The Ministry of Justice informs that „from the beginning of implementation of the Ordinance on Free Legal Aid in Asylum Proceedings, until 31 July 2010, legal aid was provided in 101

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In its replies to the CEPEJ Evaluation Scheme in 2008, the national correspondent tried to collect some relevant data and stated in the comments to Question 24 (p. 9) the following: “Courts – mandatory representation of parties was ordered in approximately 1,324 cases. Of these, 420 were civil cases. In 3,148 cases the parties were exempted from payment of court costs. Also, in 1, 879 criminal cases there were court appointed defense attorneys. These forms of legal aid are financed from the regular funds provided for the operation of courts. They are not recorded or monitored separately at the moment. Conclusion: there are many cases granted with legal aid but we can give only the framework numbers.” See the answers at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2008/croatie_en.pdf.

cases, based on appeals against the Ministry of Interior's decision to deny the request for asylum.“ The Ministry does not tell when the implementation began.⁶⁸

As to the numbers of application and the number of appointed attorneys, although no systematic and comprehensive analysis exist, some data can be found in various sources. In the 1990s, the numbers of appointed attorneys were from 70 to about 600.⁶⁹ Seemingly, these figures were somewhat reduced in the beginning of the 2000s, rising again in the second part of the decade. The Croatian replies to the CEPEJ evaluation scheme give some figures for this form of legal aid. They are specified as 410 appointments in 2004; 530 in 2006 (out of 1130 applications);⁷⁰ and 1449 (out of 1951 applications) in 2008.

In the interviews conducted by the members of the expert group with the representatives of the Bar Association, it was emphasized that the Croatian Bar Association wishes to continue providing *pro bono* representation. It was also stated that the number of applications, in spite of enactment of the CLAA, has not been reduced, on the contrary, that the number of appointed lawyers continues to be high. It was argued that one of the reasons for such state of affairs is the lacking efficiency of the CLAA scheme. Also, some lawyers stated that, with the present level of compensation for legal aid provided by lawyers under the CLAA scheme, most lawyers rather prefer to work *pro bono* than within the “paid” scheme of the CLAA, which requires disproportionate level of engagement of time just to handle the paperwork necessary to qualify for financial compensation.

We have received no data on the number of cases where trade unions are involved in the provision of legal aid to their members. Equally, there is no reliable data on the functioning of the scheme under the Consumer Protection Act. As consumer protection is still under development in Croatia, we can draw little or no conclusions regarding the effectiveness of these schemes. The participation of the trade unions in the legal aid provided to workers in legal aid cases is significant, but is essentially not different from the similar assistance provided to individual members by other associations and organizations.

In this context, the civil society organizations remain the most important and comprehensive legal aid providers. They handled more than 70.000 cases in 2008, and are with no doubt the most accessible providers of legal aid in Croatia. A survey conducted by the Human Rights Centre in 2010 among the fraction of the organizations (12 “traditional” legal

⁶⁸ MOJ Response submission December 13, 2010 p 5

⁶⁹ See Uzelac, „Pristup pravosuđu. Analiza stanja u RH i pravci mogućeg razvoja“, 2000. According to the data supplied by the CBA for the purpose of a project commissioned by the Croatian Law Centre in 2000, the development of the number of applications was the following:

Year	Appointed lawyers
1993.	70
1994.	95
1995.	204
1996.	247
1997.	398
1998.	471
1999.	497
2000.	605

⁷⁰ It is also stated that in 2007, from January to September, there were 1311 appointments out of 1693 applications.

aid providers) revealed that those organizations handled in that year about 22.300 legal aid cases outside the system of the CLAA.⁷¹

8.2.5. Evaluations

Human rights. Human rights demand access to the courts to be *effective*. States are free to organize their legal aid schemes as long as they provide effective access. To our evaluation the Croatian legal aid act does not fulfil this criterion since it is supposed to cover all sorts of cases except for the ones covered by the specialized schemes (see chapter 5). Both the problem and the person criteria are too narrowly shaped to secure everyone proper access to the courts.

Obviously the scheme has not been very effective in providing legal aid within the criteria set in CLAA and the other schemes either, during its first year of operation. However, it should be kept in mind that the new procedure might need time to produce new cases. Controlling and gathering statistics concerning Legal Aid is essential to prove the effect of the implemented measures and to support improvements in the CLAA and the organisation of legal aid system. At this stage – regarding 2008 and 2009 – statistics within the MoJ seem not to deliver the relevant figures yet. Beyond number of cases with granted Legal Aid and the overall budget, the (average) amount of Legal Aid granted (per case) would be a vital indicator for the effectiveness of granting Legal Aid. EU's Progress Report for 2010 summarises the development of Croatia's legal aid delivery as follows:

„...In the area of legal aid, implementing legislation has been amended to simplify procedures and to increase the fees for lawyers to take on legal aid cases.

However, planning for implementation of the new system of administrative justice is at an early stage. Procedures for legal aid remain complicated and the overall level of aid provided is low. In practice, access to justice for vulnerable persons with insufficient means remains difficult. The provisions of the law on legal aid are still interpreted narrowly and are not enforced uniformly among the twenty county offices responsible for implementation. The number of applications for legal aid has been considerably lower than expected.

Between February 2009 and April 2010, a total of 5,152 requests were received, of which 3,536 were approved. NGOs continue to be the main providers of free legal advice and have ten times as many cases than those covered under the national system. However, they are experiencing a decline in funding.⁷²

Our findings are in line with the report of the EU experts.

⁷¹ This is more than data for 2007 and 2008, but less than 29.359 cases in 2006. The sources of financing of these organizations were UNHCR, embassies of Finland, the Netherlands and Norway, EU Delegation, Ministry of Health, Ministry of Justice (outside the CLAA) and the Foundation for the Development of Civil Society (in total: about 5-6 million kn).

⁷² European Commission. SEC(2010) 1326. Commission staff working document Croatia 2010 Progress Report accompanying the Communication from the Commission to the European parliament and the Council Enlargement Strategy and Main Challenges 2010-2011 EN {COM(2010) 660} Brussels, 09 November 2010 p 51-52. See http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/hr_rapport_2010_en.pdf.

Recommendations

A strategy of supporting legal aid delivery provided by the civil society organizations is important. They have developed delivery systems for many important categories of problems capable of providing legal advice on a mass basis. Today the lawyers in Croatia lack the organizational tools and generally do not prefer to be involved in the provision of primary legal aid. They probably also lack the capacity necessary to develop a similar service, and if they could, it would be significantly more expensive.

CLAA should provide for a payment system that produces incentives for the civil society organizations to maintaining and expanding their existing provision and supplement it with legal advice services from lawyers for problems not covered by the NGOs.

CLAA financing ought to increase as the foreign aid for legal aid decreases.

8.3. Means and merits testing

8.3.1. The application process for receiving legal aid

Findings. The application process for receiving legal aid is complex. In principle, each procedure for approval of legal aid has to be instituted by submitting an application to a legal aid office of the county administration. Exceptionally, the procedure for approval of primary legal aid may be instituted by direct submission of an application to authorized associations, unions or legal clinics (Art. 15). The application has to be filed on a form, prescribed by the Minister of Justice. The form contains various details about the applicant, as well as about the legal matter for which legal aid is requested. Inter alia, the applicants have to state the type and level of the proceedings for which legal aid is asked (e.g. administrative proceedings in the second instance). The form of legal aid (primary or secondary legal aid) has to be chosen, as well as its sub-type (e.g. „legal advice”, „drafting documents in legal proceedings”). Only one form of legal aid may be indicated in the application form.

Further on, the applicant has to provide a full disclosure of the financial status of himself/herself and the members of his/her household. For each member, a number of details have to be reported, including the relationship, personal identification numbers (OIB), data on the average monthly income realized during past 12 months; data on average monthly amount of the taxable income; names and addresses of the employers; data on immoveable property owned by the each member of the household including their addresses, usable space in square metres and market value; data on vehicles or vessels owned by them (including types, brands, models, years of production, registration plates and current market value of the vehicles or vessels). Data about the amount of savings or cash in banks should be disclosed as well, including the particulars such as the numbers of bank accounts and the SWIFT codes of the bank. Other assets of the applicant and his household members, such as the ownership on securities or shares, have to be disclosed in detail as well.

Under Art. 16 CLAA, the completed application form has to contain a number of attachments:

- a written statement by the applicant and all members of his/her household on their assets;
- a written statement by the applicant and the members of his/her household giving permission to inspect all data on their assets and revenue;
- various certificates on the status of the applicant issued by a competent body (e.g. beneficiaries of social welfare; asylum seekers, foreigners under subsidiary protection, victims of trafficking).

If the application is submitted directly to the authorized associations, unions or clinics, it also has to have attached a certificate from the tax administration on the amount of revenue of the applicant and members of his/her household on their assets – Art. 16(4).

The application forms have to be submitted personally or by registered mail to the State Administration Office (or its branch) competent according to the (permanent or temporary) residence of the applicant. After submission of the application form and the required attachments, the office (SAO) will have to verify the facts given in the statement. Although it is not necessary to check every declaration of the applicant, the SAO is obliged to verify at least ten percent of the requests.

The legal aid offices should regularly decide on the application within 15 days from the submission of the application – Art. 23(1). If application is rejected, the applicants may lodge an appeal within 8 days with the MoJ, and – if unsuccessful – further institute an administrative dispute with the Administrative Court.

If application is granted, an order (*uputnica*) certifying fulfilment of the conditions for legal aid is issued. This order is related to the type of legal aid requested (advice/representation; specific proceedings and the instance of proceedings). However, the issued order as such does not determine the legal aid provider: the beneficiary of legal aid should „freely” decide on the choice of provider of legal aid, „bearing in mind the authority of the provider to offer specific forms of legal aid” (Art. 30(3)). This means that the applicant has to find herself/himself the appropriate attorney or other legal aid provider, without any reference by the SAO or the other body.

Evaluation. The described system of processing legal aid applications is quite complicated, and to a large degree bureaucratized (which was a remark that the expert group heard from various sides). It is setting a number of both procedural and substantive obstacles, which can have a negative impact, both because a significant number of applications that would deserve to be accepted may be discarded, and because it discourages prospective applicants.

Another problem may be the dependence of the applicants on the good will of the members of their households. Eventually, the refusal of the member of the household to provide information on his assets or sign a consent form agreeing with inspection of her or his property can have the meaning of veto on the applicants claim for legal aid.

The obligation of the applicants to supply information about all members of their households is also not in line with the general approach and definition of legal aid in the CLAA, which relates to the financial situation of the users among which there exist a maintenance obligation.⁷³ A means test under which an applicant would not be eligible to receive legal aid if (s)he lives in the same household with a relatively wealthy relative, who, on the other side, does not have any legal obligation to support the applicant and pay his or her expenses, seems to be too strict and unfair.

The need for the applicant to opt for a specific type of legal aid already at the beginning of the process may be unfair and biased towards specific forms of legal aid. Legal aid applicants typically require legal aid before they know all the procedural options and before they are in position to recognize concretely their need for a specific legal aid provider. They are also more likely to choose under such conditions providers of secondary legal aid, because they are authorized to provide a broader scope of services – although for the specific cases providers from the non-governmental sector may have been more suitable.

Poor and underprivileged users therefore need help with their applications. CLAA seems to presuppose that filling in the application, producing the necessary documentation and forwarding it to the right SAO is the task of the applicant only. CLAA does not provide for any help to potential users in this respect. The application procedures obviously are too complicated for many who qualify under CLAA and (will) unfairly screen off many that would have succeeded in ascertaining their rights had they been capable of putting in a proper application.

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See art. 2, which defines legal aid applicants as those who „would not be able to exercise their rights [of access to justice] without risk to their livelihood and the maintenance of the members of their household“.

It appears from our evaluation of the problem criteria in chapter 5 and the person criteria in chapter 6, that both are complex. For poor and underprivileged people it seems very difficult to find out on their own whether they qualify or not. We think the complex criteria combined with the complicated application procedures a main reason behind the limited use of the scheme. The strict rules in CLAA on misuse supported by rather draconic sanctions also will scare away poor people that actually qualify.

Necessary assistance might be provided by SAOs and other public information agencies.

During our visit to the City Office for General Administration in Zagreb we learned that the employees spent considerable time on explaining, helping and advising applicants on how to fill in their application forms and supply necessary accompanying documents. The SAOs also gather significant amounts of information digitally for their applicants through a special agreement on access to the network of the Ministry of Interior, Ministry of Finance and Ministry of Justice which significantly reduced the burden both for the applicants and the SAOs. We think that the strategies applied by the Zagreb office to reduce the requirements on the applicants are important. If similar practices and systems are lacking at other SAOs, they should be introduced.

Still the time use on the necessary preparation of the legal aid applications and decision making seemed astonishingly high. Obviously significant resources might be freed for other use – for example advising applicants on their problems and solving the simple ones – if the application procedures are simplified (see *infra* at 8.3.4).

We also learned the associations lack access to the information system used by the SAOs for gathering information necessary to the legal aid applications. We suggest that this deficit should be remedied, for example that the approved associations receive similar information from the SAOs for their applicants (eventually subject to their consent).

CLAA also ought to cover necessary work with legal aid applications as a separate category of problems. Then the providers can help potential users with putting in proper applications as part of their remunerated work. The Ministry of Justice might consider simplifying the application procedures. We agree that an effective means test must be nuanced. It might be asked, however, whether the necessary information can be provided from the instances that possess it directly to the SAOs, relieving the applicants from demanding bureaucratic tasks that many of them do not master.

Comparison to the Austrian form. It is worth to take a look at the „ZOBPP-1” Form prescribed by the Croatian Ministry of Justice⁷⁴ and to compare it with „ZPForm 1”, the Austrian pendant, as the effectiveness of the relevant instruments is mainly determined by the application form as the crucial entry-point. Main features of the two forms are summarized in the following table:⁷⁵

⁷⁴ We refer here to the entirely revised form, prescribed in January 2010, after the finding that the original application form was overly lengthy and difficult for users. See the text of the new regulation in NN 12/2010. The original form was enacted only a year before, see NN 13/2009.

⁷⁵ For the full comparison see appendix III.

	"ZOBPP-1"	"ZPForm 1"
Lenght	4 pages	4 pages
Readability	Size of caracters: 11pt	Size of caracters: only headlines 11pt, Comments and notes smaller
Structure	numbered lines in boxes per chapter	numbered lines in boxes per chapter
Overall number of fields to be read/max. possible fill-out-boxes	129	87

Concerning length, readability, structure and number of to be filled out boxes, there is no big difference between the two forms. „ZOBPP-1” is more readable and better structured than the Austrian „ZPForm 1”. Though the „ZOBPP-1” requires more input, it is easier to understand and to fill out, as its standardized boxes provide easier choice and help than its Austrian counterpart.

To sum it up: The „ZOBPP-1” is a useful instrument for the administration of legal aid. It supports social distribution as well as planning, developing and managing the scheme. The form is now better readable and structured than the Austrian „ZPForm 1”. Its functionality is to some extent improved, especially regarding collection of data which enable analysis of the objectives and effect of legal aid. The instrument is indispensable in setting up the control systems of expenditures and the actual usage of public budget for legal aid.

The fact that the authorities managed to considerably change and improve the application form in a short time, based on the criticisms of the users, also displays good practice of timely response, which is also to be hoped in respect to many other issues outlined in this evaluation.

Recommendation

A system for assisting users with the application process ought to be established. SAOs and other information agencies might provide the necessary support. Legal aid should also cover necessary assistance with legal aid application from the providers. Simplification of the procedures should be considered and also a transfer to the SAOs of most of the data collection necessary for the form.

The need to submit written consents and declarations from all members of the household has to be reconsidered. The applicants’ right to legal aid cannot be conditioned by the good will of the members of their household.

In particular, the circle of those whose financial status has to be taken into consideration when performing the means test has to be narrowed. It should not take into account all members of the applicant’s household, but only those who have a legal obligation to support the applicant and take care about his maintenance.

8.3.2. *Orders (vouchers) as a precondition for receiving primary legal aid*

Findings. There is practically very little difference between the application processes for primary and secondary legal aid. Irrespective whether the applicants seek representation in a complex court case in two instances (which, according to the estimates, may last for several months and years), or whether they need simple free legal advice in their matter, they have in principle to undergo the same complex application process (see *supra* 8.3.1.). One application may contain only a request for one type of legal aid, i.e. for one advice in one legal matter. If the same applicant seeks another advice in the same or related matter, the whole application process should be repeated, which involves submission of another set of forms, attachments and written declarations.

One of the rare departures from the usual flow of the application process consists in the possibility to apply directly to the associations and legal clinics (see art. 16). However, even in such a case, the applicants have to fill in all the forms and submit all the documents as if they would when applying to the SAOs. The associations and legal clinics may not check the applications themselves, but they need to transfer them to the SAOs, who have to decide on their own whether an order would be issued or not. In principle, any aid or advice provided by the associations and clinics before the issuance of the order is provided on their own risk. Strictly under the law, even if the applicant has addressed an association or a clinic directly, these providers of primary legal aid should wait until the order has been issued, and limit their involvement only to assistance in the application process (which is not counted as legal aid).

There is another further barrier for direct applications. Under art. 16(4), additional documents need to be supplied if the application is submitted directly to the legal aid providers (certificates from tax authorities for him and member of his/her household), which could be another discouraging element regarding direct applications for both users and the providers.

After presenting their draft recommendations, the experts received comments from an association actively engaged in providing legal aid which stated that the whole system of orders (vouchers, *uputnice*) is inefficient and should be abandoned. If for any reason such a system should be maintained, orders should be limited to representation in the whole sets of proceedings (one complete court or administrative proceedings).⁷⁶

These comments are in line with the principal objections raised by practically all providers of primary legal aid encountered by the experts. They were criticizing the fact that the system of applications for orders (*uputnice*) is applicable even to the simplest forms of legal assistance (legal advice, drafting of simple documents). A lengthy administrative process in such cases is overkill: it is not proportionate to the nature of the need and the scope of the assistance provided. It is also not in line with the customary methods of financing organisations that provide legal aid out of court, especially if a significant part of communication with the beneficiaries is being done by telecommunication means (telephone, mail). The application of the system of orders (*uputnice*) on primary legal aid may be one of the main causes why registered associations and unions had such a large proportion of legal aid cases outside of the CLAA scheme.

Best practices. In its response submission of December 13, the Ministry of Justice argued that

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Comments received by PGP (CRP), dated 17 December 2010.

...it can be noted that the legal aid system established in the Republic of Croatia follows the trends of some European countries and is taken as a close example of "best practices". [...] While drafting the Act in the Republic of Croatia, we focused on models that are closer to us in terms of an economic and political environment, like the Hungarian, Slovenian, Slovakian and the Lithuanian model.⁷⁷

We will not discuss here whether Hungarian, Slovenian and the Lithuanian models can rightly be described as European "best practices".⁷⁸ If we only consider their results – the number of legal aid cases covered and the amount in the state budget allocated per case – we can also note that all three countries show huge differences among themselves (see the charts *infra* under 9.2.). Therefore, it may be questionable to which extent one can speak about one uniform model of legal aid with reference to these three countries.⁷⁹

The only common denominator of legal aid systems of these countries (which is most likely referred to in the received comments) is in the fact that all those countries use a complex application process which results in the issuing of a specific act – an order or a voucher – which entitles the holder to receive legal aid. However, even if we take only this detail, the similarities between these "models" and the Croatian system will soon end.

While we do not dispose of comprehensive information about the cited legal aid systems in these countries, it can still be noted that in all of them the "voucher" application system is confined to secondary legal aid only.⁸⁰ The content of vouchers (orders) is also different (e.g. in Slovenia, the vouchers need to contain a reference to individual legal aid lawyer). The differences in financial value of the vouchers are also quite considerable (the average value in Slovenia is measured in hundreds of Euros). Finally, the bodies authorized to issue vouchers in these countries are typically either courts or special legal aid offices established at the courts, and not the general offices of state administration.

Therefore, it can be concluded that Croatian system cannot be taken as a replica of any established national or international legal aid model. It is quite unique, especially insofar that it stretches the complex filtering mechanism through vouchers to include also the simple and inexpensive forms of legal assistance, such as legal advice and other forms of primary legal aid. This may also be one of its unique weaknesses.

Evaluation. As stated *supra*, the processing of the applications requires considerable efforts and the astonishingly high engagement of time by the SAOs. The engagement of time and efforts on the side of the user is expected to be comparably high. Especially in the context of primary legal aid, this seems to be quite disproportionate to the required outcome and thus discouraging for the applicants. As demonstrated by the figures, very few applicants do in fact use the lengthy and demanding application proceedings for obtaining simple legal advice. This is certainly not in line with the best practices in legal aid and the ambitions of the law to

⁷⁷ Response submission, MoJ, at 5.

⁷⁸ None of these countries are listed in the Council of Europe Legal Aid Best Practices (see CJ-EJ(2002)2).

⁷⁹ The internal document of the Croatian Ministry of Justice produced in 2004 under title "Comparative Analysis of the Systems of Legal Aid in some European Countries with Special Reference to the Current State of Legal Aid in Croatia", does not distinguish these countries as one model either. In fact, it does not even discuss Hungary, but speaks of separate national systems existent in Austria, Czech Republic, France, Lithuania, Germany, Macedonia, Norway, Slovenia, Scotland and Great Britain. This study is the only known study in which some "models" and "best practices" were officially discussed in Croatia.

⁸⁰ This is certainly the case in Slovenia, which is geographically and historically closest to Croatia. Slovenia also guarantees the right to a free initial legal advice with no means or merits testing at all. According to the MoJ's own comparative analysis undertaken in 2004, Lithuanian system is even more different, and combines services of private attorneys (based on vouchers) with the system of direct provision of legal aid by the offices of public attorneys. See the Analysis, p 8-9.

create a comprehensive “standard” system of legal aid. The need to request a voucher for every legal advice is also unprecedented in comparative practices. Thus, we can safely conclude that the application process based on the issuance of orders (legal aid vouchers) in the administrative proceedings is entirely inappropriate in the context of primary legal aid.

We also question the value of the voucher system itself. A main motivation for using vouchers usually is that they provide legal aid clients with a freedom to choose a provider that best suits their needs and interests -- similar to market clients. A voucher system was thoroughly tested in "The Delivery Systems Study" as part of a large study of different delivery models carried out in 1977-80 in the US by the Legal Services Corporation.⁸¹ The study included 38 test projects that were compared to a representative selection of 12 neighbourhood law centres drawn from 98 legal aid schemes all over the US.⁸²

The study planned to test two models for voucher systems. In the first type the vouchers were given to the applicants themselves and contained a set sum that the applicant could use to buy service from a provider of his or hers own choice – similar to the Croatian vouchers. In the second type a set sum should be given to established organizations of poor people. It was left to the organizations to decide what sort of cases they would fund and how much to spend in each case. They also should choose the providers for their members.⁸³

Only the first model became operational. No organization was willing to test the second one.⁸⁴ It functioned for one year only and was then abandoned because the essential feature – the free choice of lawyer -- did not work in practice. The applicants had little previous experience with the local lawyers, limited knowledge of them and had no preferences. Instead of forcing them to make uninformed choices, the project produced a list of local lawyers stating their background, experience and competence.⁸⁵ The study concluded that a voucher system had no special advantages over other delivery models because the free choice of lawyer had little meaning to poor people.⁸⁶

Recommendation

The submission of the applications directly to the legal aid providers should be encouraged, and the requirement of submission of additional documents in such cases should be abolished. The associations should be empowered to undertake themselves the means and merits tests regarding the applicants, and make their autonomous decision on the eligibility for legal aid. Processing of legal aid applications by the associations and legal clinics should be credited as a part of their legal aid work.

⁸¹ Legal Services Corporation (1980) The Delivery Systems Study. A policy Report to the Congress and the President of the United States.

⁸² Lc p 27-33.

⁸³ Lc p 23-26.

⁸⁴ Lc p 47.

⁸⁵ Lc p 67-68.

⁸⁶ Lc III.

The need to obtain an order (voucher) for every legal advice, or for singular actions in court or administrative proceedings, is disproportionate to the efforts and the result, and should be abandoned. Complex application procedures are inappropriate for obtaining primary legal aid.

As an uninformed choice of lawyers has no advantage for the poor people, who have no previous experience with the local lawyers, limited knowledge of them and no special preferences, the system of orders (vouchers) that do not designate an appropriate legal aid provider should be reconsidered. Users should be assisted in making appropriate selection of legal aid provider.

8.3.3. Case flow

Talking about efficiency and effectiveness of legal systems is ever to have a look on the case flow, spotting on caseload (as the relation of remaining to incoming cases), clearance rate (expressed as a percentage, is obtained when the number of resolved cases is divided by the number of incoming cases and the result is multiplied by 100) and disposition time (case-turnover-ratio per year) as recommended by the CEPEJ in the following chart:⁸⁷

		Amount			Caseload	Clearance Rate	Calculated Time of Disposition
Months	Year	Filed	Decided	Pending at the end	Rate	Rate	Days
"13 months"	2009	4.647	4.461	186	4%	96,00%	15,22
01.01.-31.12.	2009	4.283	4.112	171	4%	96,00%	15,22
01.01.-21.10.	2010	7.052	6.889	163	2%	97,69%	8,64
01.01.-31.12.	2010	8.755	8.553	202	2%	97,69%	8,64

According to these common parameters and benchmarks it is seen that the process of handling the cases is functioning excellent, at a low level of caseload the clearance rate is nearly 98% and increased in 2010 though the amount of filed cases doubled within one year.

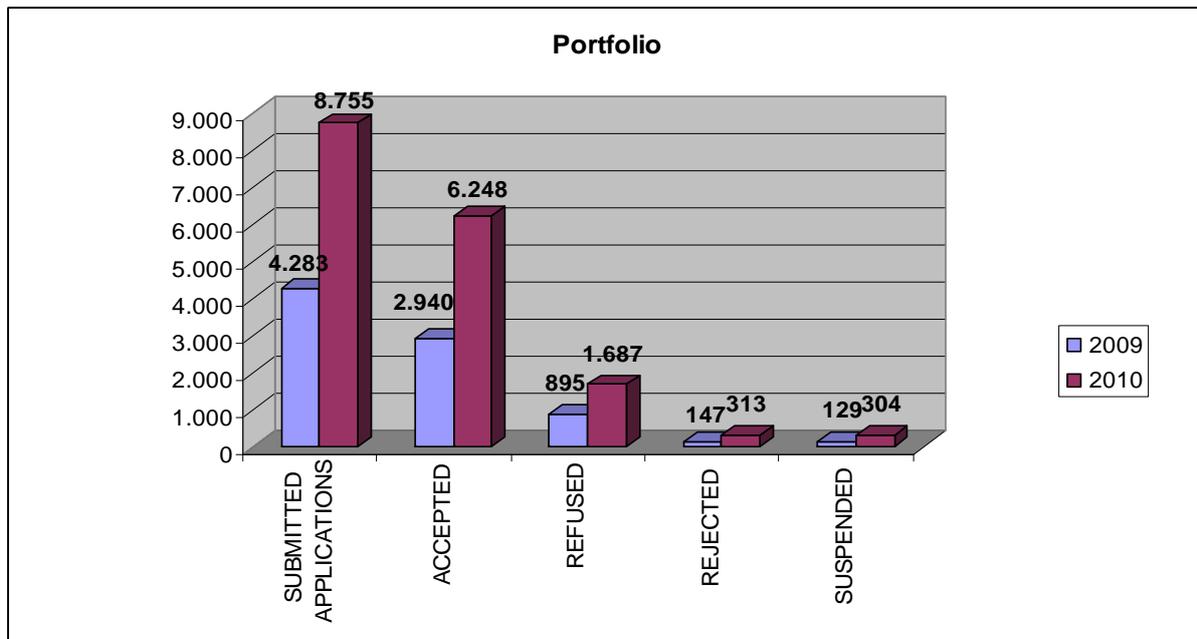
In the same period the disposition time decreased from 15 to almost nine days. The figures seem to show some typically features of the introduction phase of a new instrument with improvements of delivering more cases in a shorter time in the second year. It might be considered that the system is still not fully charged and ready for additional increase of cases.

More detailed data on the length of proceedings show, however, that some offices have surpassed this time limit (e.g. in Ličko-Senjska County the duration was continually in average 20 days, and in some months several counties declared average durations in the 20 to 30 days range; in December 2009, in Bjelovarsko-Bilogorska County, duration of the proceedings was 73 days.). The law provides for the possibility to issue an order instantly in urgent cases (Art. 23(2)), but the Report does not contain any information which would indicate that this option was used by the SAO.⁸⁸ In the first half of 2010 the longest monthly average duration was 25 days and the shortest three days.

⁸⁷ Source: Croatian Ministry of Justice.

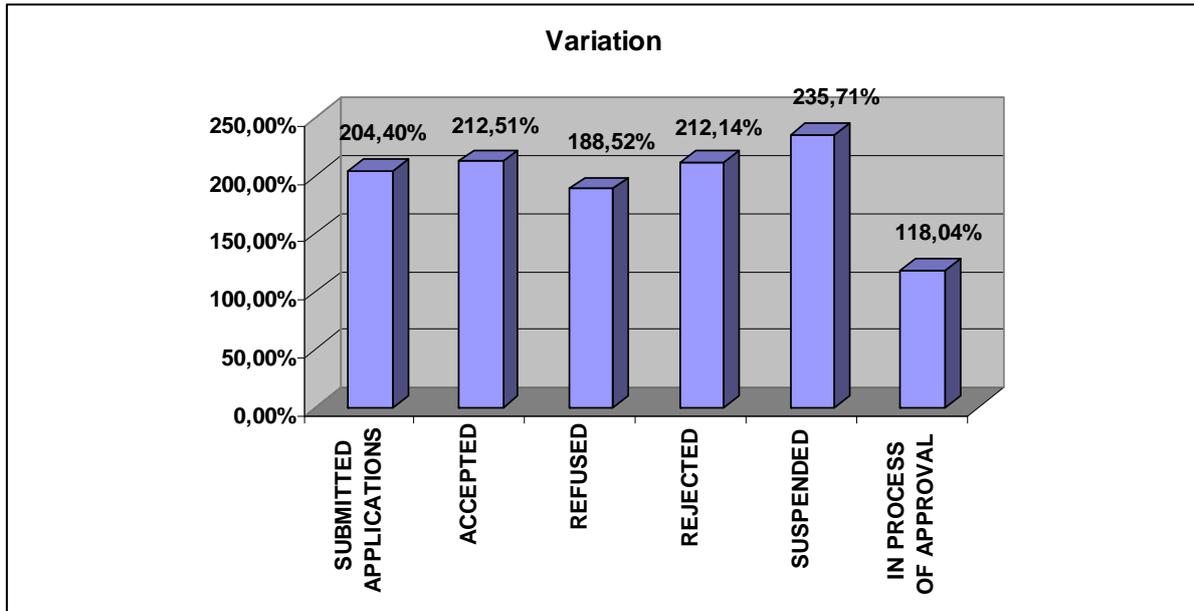
⁸⁸ Source: Croatian Ministry of Justice: Length of proceedings in 2009; Length of proceedings in 2010.

A closer look at the tables reveals that only three offices had any monthly variations in their average monthly case handling time in both 2009 and 2010. Three offices with an invariable monthly case handling time in 2009 increased their case handling time at the turn of 2009 to a higher invariable level in 2010.⁸⁹ 11 offices reported the legal maximum of 15 days for every month recorded in 2009 and 13 in 2010. It seems a bit astonishing that the bulk of the offices do not show any variation in monthly case handling time during one and a half year.



⁸⁹

Brodsko-Posavska 7 days average all of the months in 2009, 15 days all of the first six months of 2010, Virovitičko-Podravska average of 18 in 2009, 25 in 2010, Vukovarsko-Srijemska average of 13 in 2009, 15 in 2010.



Talking about effectiveness, it is remarkable that in 2010 the amount of submitted applications increased about 204%, whereas the accepted applications increased for 213%. The development of those figures in the coming periods will be more than interesting.

COUNTRY	YEAR	SUBMITTED APPLICATIONS	ACCEPTED	RATE OF ACCEPTANCE
Austria	2008	19.171	15.318	79,90%
	2009	22.354	17.825	79,74%
Croatia	2009	4.283	2.940	68,65%
	2010	8.755	6.248	71,37%

Accordingly a slight decrease in the share of not accepted applications has taken place. The share is almost thirty percent, around 10% lower than i.e. in

Austria. This shows that uncertainty about the conditions for receiving legal exists and that at many of the applicants are too optimistic about the extent of the coverage.

8.3.4. Ban on advertising

CLAA article 9(4) forbids providers to use „any form of advertising” of their legal aid offer. We do not know the reasons behind. The provision might have been caused by an uncritical parallelism with ban on advertising applicable to professional lawyers in their commercial dealings, which is rather strictly imposed and applied by the Croatian Bar Association. Both research and experiences from other countries show that users are poorly informed about the existence of legal aid schemes and the qualification criteria and the practicalities on how to go about to apply for legal aid and find a provider. When knowledge of legal aid is lacking, their considerations of whether to use legal services will be made from their knowledge of the market prices and to poor people they usually appear prohibitive.

The very low and uneven use of CLAA during its first year of operation shows that those findings are applicable on Croatia.⁹⁰ It is paramount to efficient use of CLAA that information campaigns are launched and that the SLOs, other information services and other instances that get in touch with potential users also inform them about legal aid.

In this respect the ban on advertising seems counter-productive. It is, of course, important that advertising is objective and the information correct. Proper advertising – for example on

⁹⁰ See 8.4 below.

TV and internet – obviously will be of great help to the users especially if they receive information locally about where to go. Advertising also is a very important sign to the deprived users that the providers value them as customers and have an interest in serving them. Many poor people are afraid of approaching lawyers and think they are not interested in their legal problems. When it comes to the associations, the risk of misleading advertising seems limited since they are non profit organisations.

8.3.5. *Functioning of SAOs*

The 21 State Administration Offices (SAO) all over Croatia provide access and help to get access to legal aid by two employees each (occasionally shared with other public services).

The Zagreb City SAO visited by the experts offers this service exclusively by seven employees (three lawyers and four administrative clerks) working on average 11.760 hours total a year. From March 2009 to March 2010 this office issued 305 orders. Even having in mind the still increasing numbers of issued orders and the fact, that according to an acceptance-rate of app. 71% in 2010 app. 429 applications were to be processed, the available amount of working-hours per case shows room for additional tasks.

Therefore it might be recommendable to offer not only orders for access to legal aid but primary legal aid itself by these offices (in particular because they are also staffed by lawyers!). This would disburden NGOs in the area, improve efficiency on primary legal aid dramatically, and raise the quality of service from the client's perspective („one-stop-shop”) at the same expenses (the same staff).

Recommendations

The ban on advertising ought to be lifted and proper advertising encouraged. Some measures that secure that advertising is objective, reliable and helpful to the users might be introduced. In addition, advertising raises public awareness on the legal aid system and will increase and improve its general acceptance.

SAOs should not only offer orders for access to legal aid but primary legal aid itself in a framework of a „one-stop-shop” concept.

8.4. *Payment*

It would be from the outmost interest to analyse the appropriateness of fees and the fee structure in respect to secondary legal aid (lawyers) and in respect to primary legal aid (advice and assistance given by associations/unions/clinics). Both sectors complained in interviews about the inadequacy of fees and/or allocated budget related to their work. As stated by the Croatia 2010 Progress Report by the European Commission of October 2010 {COM(2010) 660}, measures have been taken to increase the fees for lawyers to take on legal aid cases.

In both cases of primary and secondary legal aid, reliable facts for a detailed evaluation are not available. Those available for 2009 (which was the starting phase of the system) are not consistent. Due to the introduction of the new application form and the available control regarding the issuing of the orders, data should become available to enable a comparison of at least the appropriateness of fees and their structure in the years 2010 onwards.

It seems that one of the intentions of the reform of legal aid was to support professional legal aid provided by professional lawyers. If this support is given at the expenses of the legal aid provided by non-governmental sector, a by-product may be that the stream of legal aid cases (and some streams of funding) would be deflected from (some of) the NGOs towards the bar. This could further have negative impact on the activities of NGOs, which used to be addressed by the users seeking all kinds of advice. Although only a fraction of the financing of the NGOs used to arrive from the funds given specifically for legal aid cases, from the perspective of the NGOs this may create the impression that they are not supported adequately anymore. What will really happen, i.e. whether legal aid (and especially legal advice) delivered by the NGOs would significantly decrease, and the legal aid provided by the lawyers would simultaneously increase, cannot be established without relevant and reliable data which will arrive in the course of next months and years. Yet, this is a political question, too.

Payment is a very important instrument in the provision of legal aid. For lawyers who are a market oriented profession, the level of remuneration for legal aid has an impact on their capacity for legal aid work. If the level is low compared to what they earn from the clients on the market, the economic incentive will be to allocate as much as possible of their available capacity to such clients. Only capacity that is left over after the “market” clients have been served will be allocated to legal aid. If the legal aid payment does not cover more than office costs, the lawyers might prefer to spend the time off instead. If legal aid commissions pay comparably well, the incentive will be the opposite.

NGOs do not work for profit and their providers usually are on a salary. Their incentive is to help people, not to earn a living from what their clients pay. However, they also do have office and personnel costs that must be covered. If payment received from legal aid does not cover such costs, the service must be reduced or abandoned or paid from other sources. According to CLAA article 11(3)c all associations must hire providers with the state professional or bar examination and at least two years of work experience and also provide for professional liability insurance. This demand means that personnel costs will be relatively high and also difficult to adapt to fluctuations in funding. Office costs and other costs will add. A payment system that does not produce reasonable guarantees that such investments are going to be covered, discourages civil society organizations from providing legal aid.

From the Bar Association we learned that legal aid payment was far below the average payment from clients for similar services on the market. They estimated this relation to be as low as 15-20 percent or even less, which probably does not even cover office costs. With such limited payment it seems unlikely that any lawyer would take on legal aid cases from economic considerations – only from altruistic motives or from the sense of obligation. Although attorneys are not allowed to refuse legal aid clients that have been granted orders, there are exceptions. If the volume of legal aid work becomes significant and threatens the profitability of the practice it is hard to believe that the obligation to accept further legal aid commissions will work in practice.

For associations the main challenge seems to be the very low volume of orders (and even lower amount of order-related funding) they receive. According to our information only a few percent of their incurred costs for all of the free legal services they were running could be covered from the orders received during the first year of CLAA’s operation. We have learned that the associations that had the highest number of orders during the first year now will withdraw from providing primary legal aid under CLAA. If the present payment system

continues probably most of the existing legal aid services from the associations will be dismantled when their alternative funding ends.

From 2011 the present rates will increase with 50 percent. It is a step in the right direction but compared to the large discrepancy to the market fees for lawyers, it does not help much. For the associations the main challenge is the very low volume of orders. Even if each order pays better, the total income still seems far too limited for establishing and maintaining a service based on full time providers.

Payment is due only after the service has been delivered. With a long case handling time especially for court cases, lawyers who want to take on a significant volume of legal aid cases will also need credit for prepayment of fees and costs which adds to the expenses. Associations are faced with a similar challenge.

The voucher system means that a standard price is paid both in primary and secondary legal aid case independent of how much work is actually involved. From other jurisdictions we know that payment per case, court hearing or other category of work operation might encourage substandard work, because the faster finished, the larger the profit. Such payment systems also are vulnerable to so-called „cherry picking”. The lawyer accepts cases that are profitable according to the payment rates and turns away the unprofitable ones. Increasingly these challenges are met by introducing different kinds of quality control systems.

Recommendations

The Bar Association suggested to us that legal aid fees should be raised to 50-60 percent of the average market fees. Legal aid would then be economically interesting to a reasonable number of Bar members. We think it a sensible proposal. Experiences from other jurisdictions tell that such a fee level makes the legal profession accept a significant amount of legal aid work.

The Ministry of Justice, in collaboration with the associations, should arrange a study of the costs connected to running advice service with a volume that is economically rational, on how it could be set up, what sorts of cases it should handle and how it should be advertised to achieve a desired volume. The study should also develop a payment system that relieves the associations from exposing themselves to significant economic risks in running legal aid services.

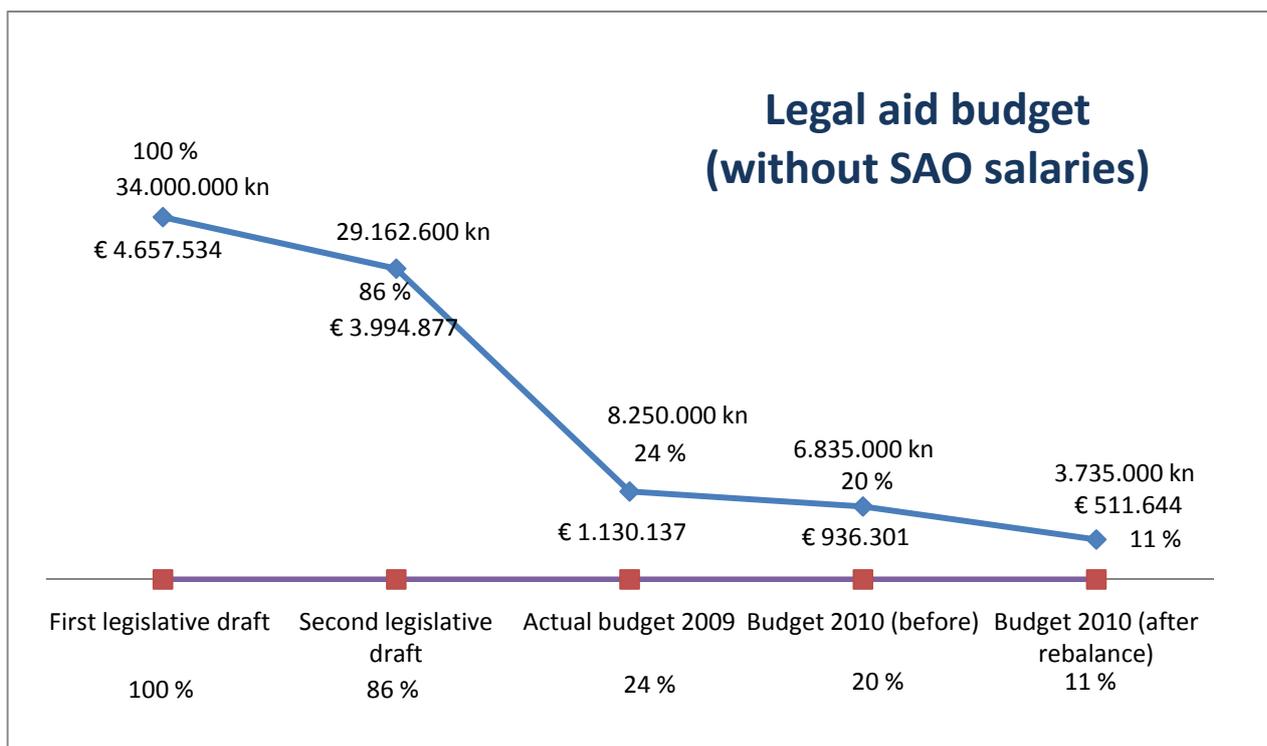
9. FINANCIAL MEANS

9.1. Total investment in legal aid (in comparison to other countries)

For 2009 the budget for the beneficiaries of free legal aid was 8.250.000 kn (per 1.1.2009 equal to 1.125.239 €). 4.500.000 kn were allocated to the State Administration Offices and the City of Zagreb for the secondary legal aid provided by lawyers. 2.010.000 kn were allocated to the Associations and Legal Clinic authorized to provide primary free legal aid after the completed tender procedure for financing the free legal aid.⁹¹

6.835.000 kn (per 1.1.2010 equal to 936.885 €) have been allocated in the year 2010 in the state budget for the provision of the free legal aid, 330.000 kn to the Associations and Legal Clinics authorized to provide primary free legal aid after a tender procedure for financing the free legal aid.⁹²

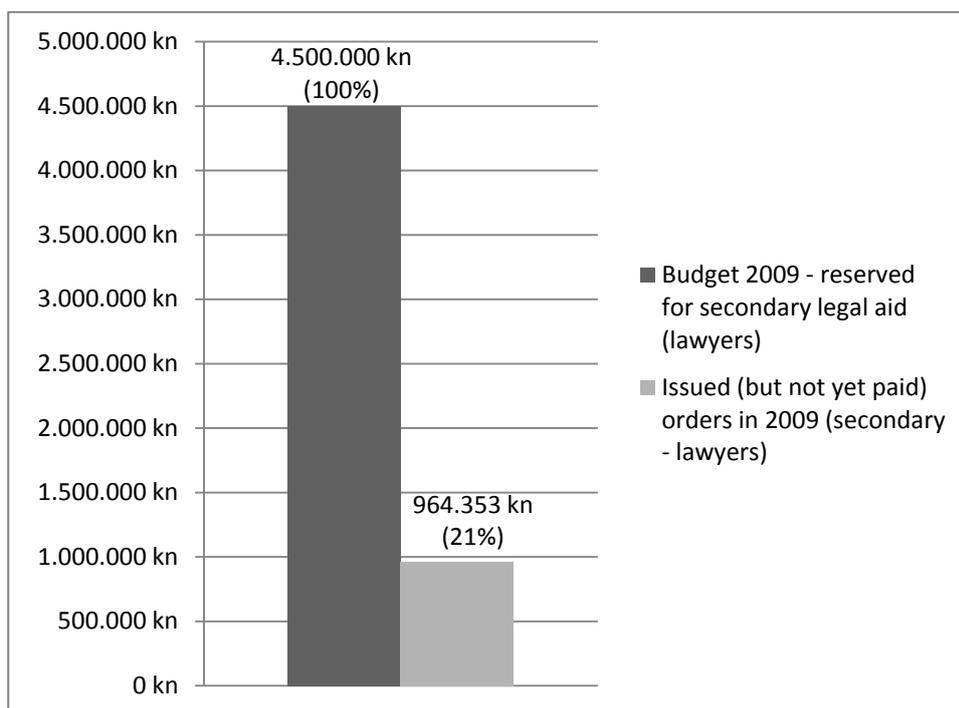
The rebalanced budget for 2010, however, is significantly lower. The following figure shows the budgetary developments since the first CLAA draft:



As shown, the budgeting process has resulted in a substantial decrease in the money supposedly available for legal aid. Also the 2010 budget has been cut by almost a half. However, it still seems sufficient to cover the orders actually issued.

⁹¹ MoJ: Fact Sheet – Free Legal Aid.

⁹² MoJ: Fact Sheet – Free Legal Aid.



The figure below shows that the orders for secondary legal aid issued in 2009 had a value of 964 000 kn. Even with a predicted doubling of the orders in 2010 and a fifty percent raise in the payment, a budget of 3.735.000 kn seems sufficient.

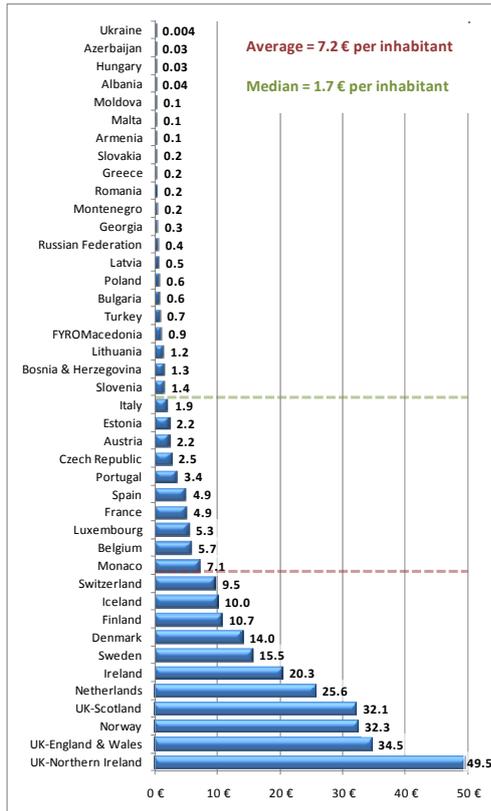
However, the figures also reveal that the ambitions of the reform to cover a large number of cases have been drastically reduced. If the present budget allows for 6 000 orders a year, the budget from the first legislative draft would have allowed for roughly 60.000 orders and probably more, since a larger share could have been used for primary legal aid which is priced far lower than secondary legal aid.

Until 31st of August 2010 citizens of poor economic status were exempt from paying the costs of the court fees and litigation costs by the courts for a total of 2.600.000 kn.⁹³

To compare that with other countries we will rely on the Report „European Judicial Systems Edition 2010 (data 2008) Efficiency and quality of justice” by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe. Even if Croatia did not provide specific budgetary data regarding 2008 we may use other countries as an indicator.

7,2 € per inhabitant is spent on average by the public authorities to promote access to justice through the legal aid system. However, one can also consider the median value in Europe which is 1,7 € per inhabitant:

⁹³ MoJ: Fact Sheet – Free Legal Aid.



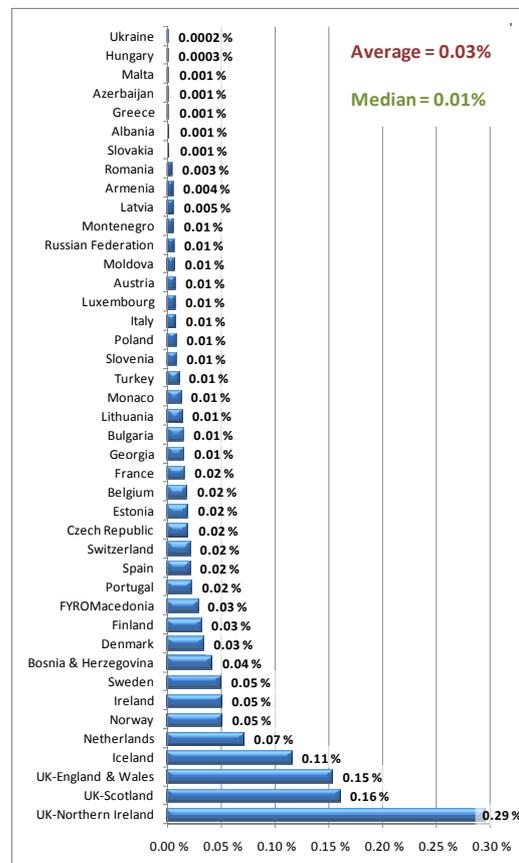
Regarding the median public budget allocated to legal aid per inhabitant in 2008 Croatia is providing 0,31€ per inhabitant (FYROMacedonia (0,9€), Bosnia & Herzegovina (1,3€) or Slovenia (1,4€) and Austria (2,2€)). In 2010 that benchmark dropped to 0,21€ per inhabitant, which is 12,35% of the European median of the year 2008. If we use the revised budget, Croatia is down to 0,11 € or 6,5% of the median (or 1,5% of the European average).

	Total budget on legal aid in Euro	Inhabitants	Total budget on legal aid per inhabitant
2008	1.364.359	4.434.508	0,31
2009	1.125.239	4.429.000	0,25
2010	936.885	4.429.000	0,21

Introducing the reference to the GDP is useful to measure the impact of the budgetary amount allocated to legal aid, in relation to the states' prosperity, to help people who do not have sufficient means find access to justice: Regarding

the annual public budget allocated to legal aid as part (in %) of the GDP per capita, Croatia (GDP and inhabitants of 2010 related to 2009 due to lack of more accurate data) is comparable to countries like Romania (0,003%) in 2008 and still significantly budgeting more money for legal aid (0,002%) than Albania, Greece, Malta (0,0001%) or Hungary (0,0003%), but five times below the European median of 0,01% .

	Total budget on legal aid in Euro	Inhabitants	GDP per capita in Euro	Total budget on legal aid as % of GDP per capita
2008	1.364.359	4.434.508	10.683	0,003%
2009	1.125.239	4.429.000	10.245	0,002%
2010	936.885	4.429.000	10.245	0,002%



If we use the revised budget for 2010 Croatia only provides around one tenth of the European median.

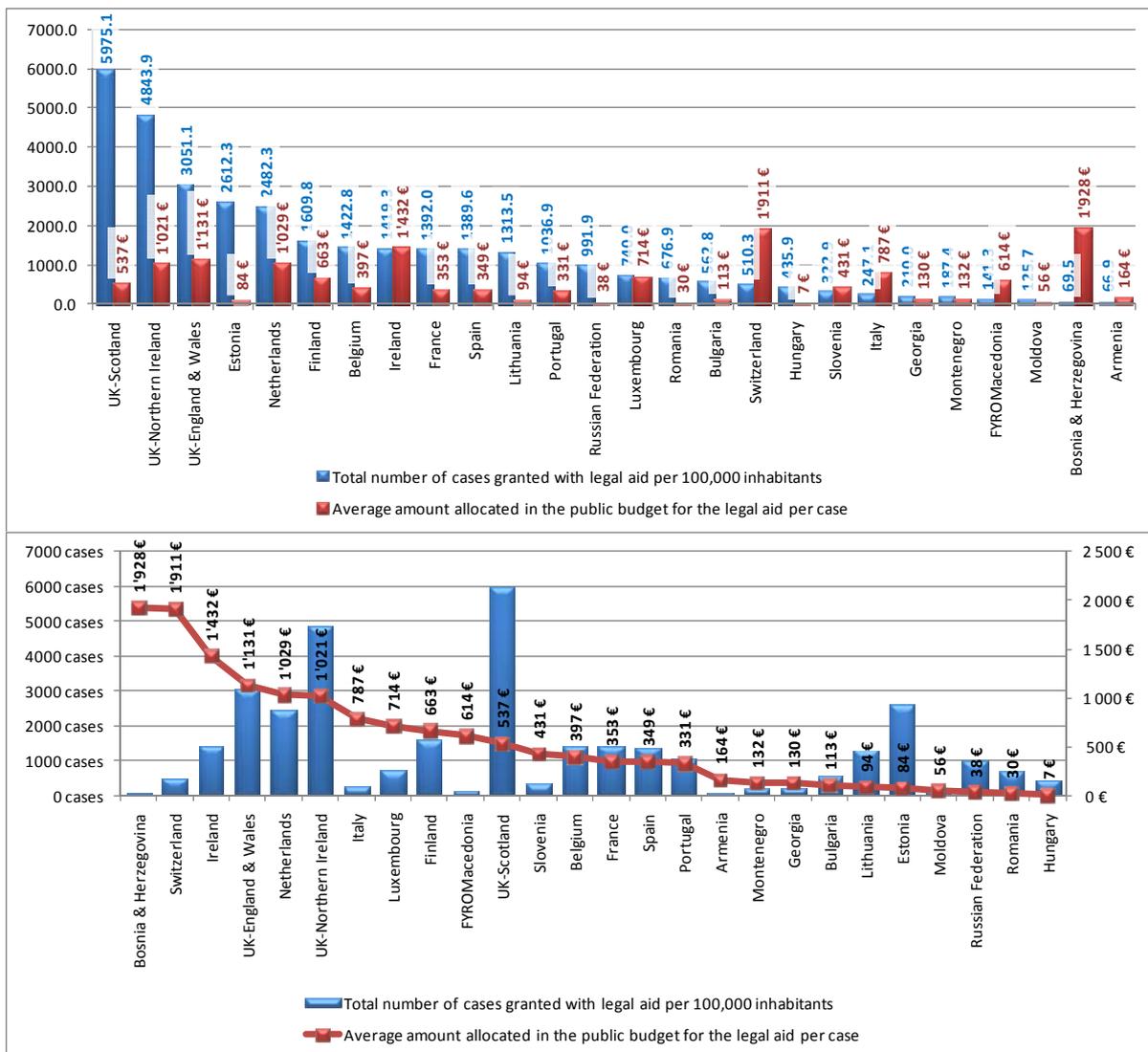
From the perspective of the amount of money budgeted for legal aid it can be stated that Croatia is budgeting relatively less money than

most of the European countries. The relevant question to ask next is, if the budgeted money is really applied to legal aid cases in the frame of the new CLAA.

9.2. Actual expenditures and trends

Due to the fact we are missing hard facts on how much money was really applied on what amount and what kind of cases in 2009 and 2010 so far, it will be a workaround to have a closer look on the number of granted cases per inhabitants as well as the amount of money available in relation to the number of granted cases.

On average, in the 26 states or entities concerned in that chapter of the Judicial Evaluation Report given by CEPEJ, a case eligible for legal aid receives a grant of 536 €. The median value is 353 € per case.



However, significant discrepancies between several groups of states or entities can be noted from this information. Thus, it is possible to identify three groups of states or entities:

- those which allocate a significant amount to legal aid (more than 1.000 €): Bosnia and Herzegovina, Ireland, UK-England and Wales, the Netherlands, UK-Northern Ireland,

- those which allocate between 300 € and 800 € per case: Italy, Luxembourg, Finland, „the former Yugoslav Republic of Macedonia“, UK-Scotland, Slovenia, Belgium, France, Spain, Portugal and
- those which allocate less than 300 € per case Armenia, Montenegro, Georgia, Bulgaria, Lithuania, Estonia, Moldova, Russian Federation, Romania, Hungary.

The amount allocated per case must be related to the level of wealth in the state when analysing this issue more in depth.

In Croatia – having lack of consistent time-series of data regarding the money really spent on cases – we have to use the theoretical available budget per granted case:

Year	Total budget on legal aid	Cases granted	Available amount per case
2009	1.125.239€	2.940	382,73€
2010	936.885€	6.248	149,95€

Obviously the available amount per granted case dropped from 382,73 € (above the European median value of 353 € per case) to 149,95 € due to cut of budget and driven by the increase of granted cases. The level of available money per case in 2010 is similar to

Armenia and despite the drop significantly higher than the amount spent per case in Montenegro, Georgia, Bulgaria, Lithuania, Estonia, Moldova, Russian Federation, Romania or Hungary. It is important to mention, that several of these states have only recently started to develop a legal aid system and might be considered as good bench markers.

However, the real expenditure seems to become far lower. It appears from the figure on secondary legal aid above that the budget orders actually issued in 2009 amounted to far less than the sums set aside in the budget. We have learned that MoJ has calculated the expenses for the 2.416 orders issued from March 1, 2009 until March 31.2010 to 1.319.000 kn which mean a cost per case of 546 kn or 78 euro (see *supra*, 8.2.1.). With a predicted number of orders for 2010 of 6.248, the rebalanced budget of 511.644 euro means cost of 81 euro per case.

Assuming that with continuous increase of effectiveness of CLAA in the near future and an expectation of 170 „accepted” applications per 100.000 inhabitants, the total number of „accepted” cases for Croatia would be 7.500 a year instead of 6.248 cases registered in 2010. Keeping the financial input of app. 150 € per case, an overall budget for legal aid of 1.125.000 € (today equal to 8.319.583 kn) would be necessary to be applied. This amount is almost exactly the budget drawn for the year 2009 and about 1,4 Mio kn or around 20% higher than the budget draft for 2010. An average of 80 euro will need a budget of 600 000 euro or 4.320.000 kn.

9.3. Investment of other donors

Several of the civil society organizations that gave evidence to us, said that the introduction of CLAA had lead to a significant drop in international funding of legal aid. The numbers of cases handled over the new act could only compensate for a fraction of the reduction of coverage.

In our opinion that drop of international funding is not driven only by the new act itself, but in general by the withdrawal of international community from activities of supporting civil society Croatia as well, as Croatia is considered to be able to tackle its endurances by

itself nowadays. In case – and some might get the impression – NGOs were able to finance an important part of their activities by money labelled for legal aid in the past by donors, it is not logical this should remain the case. This is at least a strong commitment to public authorities to increase efficiency and effectiveness of public spending for legal aid (at least in economic crises), but also the volume of such spending.

According to the MoJ Report, in 2009 all registered associations and clinics were initially awarded 2.010.000 kn (about 270.000 Euro). However, due to the low number of orders that could be collected by the associations, it was requested that they return most of the money awarded. In such a way, 1.519.300 kn was returned. For 2010, the amount initially awarded to all the registered associations and clinics was only 330.000 kn (about 45.000 Euro), which is a drop of 85% in comparison to 2009.

A survey of the traditional legal aid providers among 12 associations conducted in 2010 by the Human Rights Centre revealed that they were able to include only 119 or 0,5% of their 22.300 cases in the scheme of CLAA (data for 2009). The total amount they received in that year from the CLAA scheme was about 135.000 kn (about 18.000 Euro, out of which only about 2.000 Euro from received orders). On the other hand, their activities in that period were supported by 5-6 million Kuna (700.000-800.000 Euro) from other donors, mainly the international organisations and foreign governments. However, during our study visit some of the largest donors, such as UNHCR, announced that they will be pulling out of country within the next year or two. One of the reasons for decreasing foreign funding is the very existence of the CLAA, as this is perceived as a sign that the state authorities will take over the funding previously provided by the international sources. As only about 2% of the funding was matched by the state money received from the CLAA scheme, even slight reductions of the funding from international sources could seriously diminish financial capacity of non-governmental sector to provide their legal aid services. On the other hand there is no proof on what percentage of cases the former legal aid procedure was providing legal aid in accordance to the CLAA.

Best practice. In a best practice perspective delivery should be need and user driven. The service needs as people experience them should be the main governing principle in organizing and managing legal aid schemes. Priorities should be made from a developed understanding of the volume, characteristics and welfare meaning of their legal problems. The legal aid system should be a learning organization.

Primary legal aid schemes should also include plans for cooperation with civil society organizations. They should build on the idea of the legal literacy and use a mass education approach. The individual advice and representation system ought to contain a well organized system for channelling and distributing problems according to their professional complexity. Secondary legal aid should build on equality in access and service and contain mechanisms against overuse. Primary and secondary legal aid should form a coherent system and strike a fair balance between legal aid before and outside the courts.

Quality management is important. Management should prioritize „as much aid as possible” for the resources available. A wide range of mechanisms for quality assurance ought to be used – including development of trial and counselling skills among the providers aimed at poor people. Emphasis should be on dedicated providers and development of their expertise in legal aid. Overloading of the providers should be avoided.

Recommendations

Funding for legal aid should be sufficient and varied. It should be sufficient for all needs covered under the scheme. Funding for first line legal aid (i.e. primary legal aid) should come from multiple sources, both in the public and private sector, from international stakeholders and also from client contributions. Funding for legal aid in court cases should be primarily government-based, but other contributions, such as those from pro bono work of the members of the Bar, are welcome as well.

Controlling on public spending must be strict to ensure sustainable funding, but should not overburden the process to get access to legal aid itself.

The quality challenges connected to the present payment system ought to be considered.

10. CONCLUSIONS

We have evaluated the Croatian legal aid act from two main sets of standards; the minimum obligations contained in human rights and the best practice standards gathered from the most advanced European schemes. We have not attempted at covering all aspects of the act, but focused on six major elements of the scheme:

- The understanding of legal problems and effects of legal aid scheme,
- The scope of legal problems covered,
- The part of the population covered,
- The range of services offered,
- Delivery,
- Funding.

For each issue we have described the present function of CLAA, evaluated the way the scheme works from our two sets of standards and forwarded recommendations when we find that the standards are not met. When formulating recommendations our emphasis has been on the minimum requirements to legal aid in human rights, because we think it pressing that Croatia fulfils them as fast as possible.

10.1. Recommendations

Our main recommendations are:

1 The understanding of legal problems and effects of legal aid scheme

Croatia ought to undertake research of the functioning of the Croatian legal aid schemes and also secure access to the international body of research. The legal aid authorities ought to become aware of important findings and use them in their policy making. A survey should be carried out to map the need for primary legal aid.

We also recommend that the Ministry of Justice in collaboration with the associations conducts a study of the costs connected to running advice service with a volume that is economically rational, on how it could be set up, what sorts of cases it should handle and how it should be advertised to achieve a desired volume. The study should also develop a payment system that relieves the associations from exposing themselves to significant economic risks in running legal aid services.

2 The scope of legal problems covered

Primary legal aid ought to cover all types of legal problems and include pretrial advice on cases that qualify under the „reasons of fairness” criterion. For secondary legal aid CLAA ought to define a number of problem types of high welfare importance that are covered without further qualifications unless they are manifestly ill founded. All other categories of problems also ought to qualify after a fair merits test if access to the courts is of importance to the applicant and the prospects are fair. The „existential issues” criterion should be removed

from 5(1) CLAA. We suggest that CLAA should be formulated in a way that covers all categories of court cases that are not sufficiently covered by other schemes.

The civil schemes outside CLAA ought to be better integrated and co-ordinated with the system established by CLAA. All provisions on coverage ought to be restructured, and aligned with the Airey criteria. The user-friendly features of the schemes outside the CLAA, like the straightforward definition of legal problems covered, the direct provision of legal aid by the organisation that is approached by the user, and simple procedures for merits and means testing (or lack of such procedures) ought to be considered also for other categories of problems covered under CLAA.

3 The part of the population covered

The means test ought to be reviewed and significantly extended in light of the Airey criteria developed in the case law of the European Court of Human Rights. Maximum contributions ought to be part of the contribution system and the contributions must be kept in accordance with the individual's capacity to pay. Coverage must include all types of trial costs that amount to a barrier to access to justice – including lawyer fees and court taxes, costs for expert evidence and other production of evidence, interpretation costs, costs to the counterpart and the applicant's own costs when deemed necessary for proper access to justice. The contribution system might be extended similarly.

4 The range of services offered

Information and education in legal matters ought to be improved and make better use of the information that can be gathered from legal aid cases. Also a selection of collective strategies ought to be considered for inclusion into CLAA.

5 Delivery

We suggest that advisers with a degree in law, but without the bar exam and also with other proper training irrespective of their degree in law are allowed to deliver primary legal aid in matters that are within their competence. Associations should be allowed to specialize according to their field of work.

A system for assisting users with the application process ought to be established. SAOs and other information agencies might provide the necessary support. Legal aid should also cover necessary assistance with legal aid application from the providers. Simplification of the procedures should be considered and also a transfer to the SAOs of most of the data collection necessary for the form.

The need to submit written consents and declarations from all members of the household has to be reconsidered. The applicants' right to legal aid cannot be conditioned by the good will of the members of their household.

In particular, the circle of those whose financial status has to be taken into consideration when performing the means test has to be narrowed. It should not take into account all members of the applicant's household, but only those who have a legal obligation to support the applicant and take care about his maintenance.

The submission of the applications directly to the legal aid providers should be encouraged, and the requirement of submission of additional documents in such cases should be abolished. The associations should be empowered to undertake themselves the means and

merits tests regarding the applicants, and make their autonomous decision on the eligibility for legal aid. Processing of legal aid applications by the associations and legal clinics should be credited as a part of their legal aid work.

The need to obtain an order (voucher) for every legal advice, or for singular actions in court or administrative proceedings, is disproportionate to the efforts and the result, and should be abandoned. Complex application procedures are inappropriate for obtaining primary legal aid.

As an uninformed choice of lawyers has no advantage for the poor people, who have no previous experience with the local lawyers, limited knowledge of them and no special preferences, the system of orders (vouchers) that do not designate an appropriate legal aid provider should be reconsidered. Users should be assisted in making appropriate selection of legal aid provider.

The ban on advertising ought to be lifted and proper advertising encouraged. Some measures that secure that advertising is objective, reliable and helpful to the users might be introduced. In addition, advertising raises public awareness on the legal aid system and will increase and improve its general visibility and accessibility.

SAOs should not only offer orders for access to legal aid but primary legal aid itself in a framework of a „one-stop-shop” concept.

The legal aid fees should be raised to 50-60 percent of the average market fees. Then legal aid would be economically interesting to a reasonable number of bar members.

The Ministry of Justice, in collaboration with the associations, should arrange a study of the costs connected to running advice service with a volume that is economically rational, on how it could be set up, what sorts of cases it should handle and how it should be advertised to achieve a desired volume. The study should also develop a payment system that relieves the associations from exposing themselves to significant economic risks in running legal aid services.

6 Funding

Funding for legal aid should be sufficient and varied. It should be sufficient for all needs covered under the scheme. Funding for primary legal aid should come from multiple sources, both in the public and private sector, from international contributors and also from client contributions. Funding for legal aid in court cases should be primarily government-based, but other contributions, such as those from *pro bono* work of the members of the Bar, are welcome as well.

Controlling on public spending must be strict to ensure sustainable funding, but should not amount to a barrier that makes people give in when they qualify and are in need of legal aid. The quality challenges connected to the present payment system ought to be considered.

10.2. Final observations

Besides these specific proposals, we would like to forward a few general considerations and recommendations. We agree with the EU report that

„...procedures for legal aid remain complicated and the overall level of aid provided is low. In practice, access to justice for vulnerable persons with insufficient means remains difficult. The provisions of the law on legal aid are still interpreted narrowly and are not enforced uniformly among

the twenty county offices responsible for implementation. The number of applications for legal aid has been considerably lower than expected.

..... NGOs continue to be the main providers of free legal advice and have ten times as many cases than those covered under the national system. However, they are experiencing a decline in funding.⁹⁴

The Ministry of Justice has a pivotal role in developing Croatian legal aid. The international members of the evaluation group -- Johnsen and Stawa -- have noticed a significant tension between the Ministry and the civil society organizations both about the quality and functioning of the present legal aid scheme and the future development of legal aid in Croatia. The attitudes and arguments are characterized by suspicion and skepticism, not seldom with limited basis in reliable information.

It is not our task to evaluate or distribute the responsibility for the present situation. It is, however, clearly detrimental to an effective development of legal aid in Croatia and therefore also to the poorer part of the Croatian population who suffers from an insufficient scheme.

Independent of the history we hold it a main responsibility of the Ministry of Justice to improve the communications with the major providers and develop a policy that make all possible providers and stakeholders work together in a concerted effort to improve the system.

Today the Ministry's approach appears too focused on administration and cost control and does not seem to fully realize the extensive unmet need for legal aid that exists among the poorer part of the population. We think it unrealistic to meet these needs by using lawyers in private practice as the sole providers. International research shows that they are not the best providers for all types of legal aid either. High volume of simple advice in specialized areas can often be better and cheaper when provided by advisers with other sorts of training.

We regard it important for Croatia to produce a development strategy for legal aid that comprehends both long time and short time goals. A strategy of supporting legal aid delivery provided by the civil society organizations in Croatia is important. They have developed delivery systems for many important categories of problems and are capable of providing legal advice on a mass basis. Today the lawyers in Croatia lack the organizational tools and probably also the capacity necessary to develop a similar service, and if they could, it would be significantly more expensive. CLAA should provide for a payment system that produces incentives for the civil society organizations to maintaining and expanding their existing provision and supplement it with legal advice services from lawyers for problems not covered by the NGO's. CLAA financing ought to increase as the foreign aid for legal aid decreases.

⁹⁴

European Commission. Sec(2010) 1326. Commission staff working document Croatia 2010 Progress Report accompanying the communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2010-2011 en {COM(2010) 660} Brussels, 09 November 2010 p 51-52. See http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/hr_rapport_2010_en.pdf.

Appendix I: CoE resolutions and recommendations on legal aid

- *Resolution 76 (5)* on legal aid in civil, commercial and administrative matters, recommending that governments grant legal aid to all citizens of member states and to all residents on an equal footing with its own citizens.
- *Resolution 78 (8)* on legal aid and advice saying that economic obstacles to legal proceedings ought to be eliminated, and that an appropriate system of legal aid will contribute to that aim.
- *Recommendation No R (93) 1* on effective access to the law and to justice for the very poor.
- *Recommendation (2000) 21* on the freedom of exercise of the profession of lawyers suggests that states should encourage lawyers to provide legal service to persons in economically weak positions and ensure that effective legal services are available to them, in particular to persons deprived of their liberty.
- *Recommendation (2001) 3* on the delivery of court and other legal services to the citizen through the use of new technologies.

In addition to the recommendations and resolutions, the Council of Europe also collected experience and knowledge on legal aid systems and best practices, producing the following documents⁹⁵:

- *Action Plan on Legal Assistance Systems*, document adopted on 6 March 2002 by the Commission of Experts for the Efficiency of Justice and the CDCJ, Strasbourg (CJ-EJ(2002)5 Addendum III).
- *Legal Aid Best Practices*. Preliminary Draft Guide, document adopted on 5 February 2002 by the Commission of Experts for the Efficiency of Justice of the Council of Europe, Strasbourg (CJ-EJ(2002)2).

⁹⁵

See more at http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/Documents/20-02/1CJEJ5%20e%202002.pdf.

Appendix II: CVs of the experts

Jon T. Johnsen

Background and positions

Jon T. Johnsen was born in 1942. He holds a law degree (cand. jur.) from 1969 and a PhD in law (dr. juris) from 1986, both at the University of Oslo. He has worked as research assistant at the Department of Public and International Law, deputy judge at the city court of Tromsø, research fellow at the University of Tromsø and researcher at the Institute for Sociology of law at the University of Oslo, on a legal aid project commissioned by Norwegian Ministry of Justice. Between 1978 and 1990 he held a position as an assistant and then associate professor at the Institute for Sociology of Law and supervised Juss-Buss – a student legal aid clinic. In 1990 he became professor at the Department of Public Law and has taught criminal procedure and criminal justice, lawyers' law and clinical subjects.

Between 1990 and 1993 he also held a part time professorship at the Institute for Law at Tromsø University teaching sociology of law. He visited University of California, Los Angeles in 1989-90, University of California, Berkeley in 1995-96, The Law Faculty at Copenhagen University in 2002 and 2009 and was invited as IUEU Distinguished Research Fellow at Flinders University, Adelaide, Australia in 2008.

Research

Johnsen's main research fields are sociology of law, legal aid and criminal procedure and interdisciplinary issues. He has participated in international research projects on legal aid and the legal profession. Developing the student legal aid clinics at the Law Faculty in Oslo and later at the University of Tromsø has been important to him. He has drafted public reports for The Ministry of Justice on legal aid and criminal justice.

Other commissions

Johnsen has been head of the Institute of Sociology of Law, vice dean (1992-94) and dean (2004-2007) of the Faculty of Law. He has been member and leader of commissions that reformed the law study in Oslo during the 1990ies. Since 2003 he is an expert member of the European Commission on the Efficiency of Justice under the Council of Europe. He has been involved in the development of legal aid in Norway and internationally through most of his career. He has served as an adviser to the Norwegian Ministry of Justice several times since the 1970ies. Recently he has been hired as an independent expert by the Ministry of Justice with the task to supervise the implementation of a governmental policy report on major reforms in Norwegian legal aid.

Georg Stawa

Education

Born on April 17, 1969. Magister iuris degree obtained from University of Vienna in 1994.

Positions

Head of Department at the Austrian Ministry of Justice, charged with projects, strategy and innovation. Vice-President of CEPEJ, member of CEPEJ GT-EVAL. Deputy of the Austrian member of the JSB of EUROJUST.

Professional experience

Public prosecutor working on the issues of judicial management within the Austrian Ministry of Justice (2006-2010). Judge at the District Court of the 1st District of Vienna, fully assigned to the Ministry of Justice (2001-2006). Judge for the area of the Court of Appeal Vienna (1999-2001).

Key qualifications

- Controlling, Statistics and Court Performance
- Project management
- Specially trained in didactics and personnel evaluation
- General coordination and organization
- Public relations
- Participation in international research projects (Universities of Bologna and Utrecht, Council of Europe) dealing with the evaluation of judicial systems, the allocation of cases to courts and with recruitment, training and evaluation of judges.

Specific experience in international projects

Country	Date from - Date to
Montenegro	Oct 2010 - CEPEJ: Review of "The Analysis of the rationalization of the court Network" of Montenegro;
<i>Abu Dhabi, U.A.E.</i>	March 2010 - CEPEJ: Performance Study of the Judicial Department of the Emirate of Abu Dhabi, united Arab Emirates;
Montenegro	May-November 2009 - UNDP: Capacity Assessment of the Ministry of Justice of Montenegro;
Russian Federation	November 09 – CEPEJ peer review on court-statistics;
Portugal	March 09 – CEPEJ: “Dematerialization and the use of ICT”, proof of effect;
Montenegro	October 08 – EU Twinning “Justice reform”;
Turkey	April and September 08, January and November 09 – CoE: Project on Support to the Court Management System in Turkey, Assessing the current situation in the courts (of Antalya and Corlu), identifying shortcomings and needs and giving inputs on performance indicators and court management;
Croatia	June 06 – June 08 CARDS-Twinning Support to the Reform of the Croatian Court System – Phase 2,

	Component leader;
Montenegro	April 07 - Strategy of the reform of the judicial system;
Croatia	Oct. 06 - Regional Round Table – Strengthening the Human Resources Management and Budget Management in the Judiciary;
Turkey	Sep. 2006 - Seminar “Court Management and Quality of Justice”, organized by the Turkish Justice Academy and the Council of Europe, Ankara;
Croatia	2006 - World Bank: Development of the Court Statistics System and Judicial Performance Monitoring Mechanism, leading expert;
Macedonia	Feb. 2006 - Regional Round Table on “Case assignment, case tracking and filing”;
Montenegro	Nov. 2005 - Regional Round Table on IT and Court Statistics;
Croatia	May and Aug. 2005 - Strategy of the reform of the judicial system;
Croatia	Oct. 2005 - Regional Round Table on corruption;
Macedonia	July and Sep. 2004 - Strategy of the reform of the judicial system;

Alan Uzelac*Education*

Born in Zagreb on June 15, 1963. Graduate studies: Zagreb University (Croatia), Johannes Gutenberg University, Mainz (Germany). Graduated from University of Zagreb - Faculty of Philosophy (B.A. degrees in philosophy and comparative literature) and Faculty of Law (dipl. iur. degree in 1988). Postgraduate studies: Zagreb University, University of Vienna, Austria (Visiting Fellow, 1992, 1995), Harvard Law School, USA (Fulbright Visiting Researcher, 1996). Postgraduate degrees received from Zagreb University - Master of Laws, 1992 and Doctor of Laws, 1999.

Positions

Dr. Uzelac is currently employed as Professor of Procedural Law at the Zagreb University, Faculty of Law, where he teaches Civil Procedure, Arbitration, ADR, Judiciary, Evidence and Protection of Human Rights in Europe. He is an active member of the International Association of Procedural Law, where he was elected to the Council of the Association. In the similar German-speaking organization - Internationale Vereinigung für Verfahrensrecht – he is also as member elected to the scientific board (Rat). He was involved in various activities of the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, where he held different functions (Bureau member from 2003-2006, Member – national delegate 2003-2008; President of the Task Force on Timeframes of Proceedings of the CEPEJ 2005-2006); Member of the SATURN Group de pilotage 2007-2008. Since mid-90s, Dr. Uzelac has also been engaged as national delegate of Croatia in the work of UNCITRAL Working Group for Arbitration and Conciliation where he participated in drafting of the several international instruments in the field of alternative dispute resolution.

As a member of the Committee of Experts for the Efficiency of Justice (CJ-EJ) of the Council of Europe, in 2001 and 2002 Uzelac was a member of the working groups that produced the Action Plan on Legal Assistance Systems (CJ-EJ(2001)4 rev 3), and Legal Aid Best Practices (CJ-EJ(2002)2).

Research and teaching in the field of legal aid

Within the civil procedure as his main area of specialization, Professor Uzelac is in particular interested in the functioning of the civil justice systems as a framework for the protection of the rights of the individuals and businesses. This includes research regarding procedural costs as well as teaching and research regarding the regulation of legal aid and waiver of litigation costs (both being part of the mandatory course in civil procedure). Professor Uzelac has also been teaching an elective course at the final year of master studies in law, the course Organisation of Judiciary, which *inter alia* discusses legal aid systems. At the post-graduate level, he teaches courses on European Court of Human Rights and Protection of Human Rights in Europe, where issues of access to courts and judiciary, as well as other relevant aspects of the right to a fair trial within reasonable time are analysed. Legal aid systems are among the topics presented within two other post-graduate courses developed and taught by Professor Uzelac – the courses in Comparative Law and Comparative Civil Procedure.

Professor Uzelac is one of the organising course directors of the post-graduate course Public and Private Justice at the Inter-University Course in Dubrovnik, which has also featured current topics related to access to judiciary in modern societies.

Together with Professor van Rhee, he edited the book *Access to Justice and Judiciary*, (Intersentia: Oxford-Portland-Antwerpen, 2009), which featured a number of papers in comparative law concerned with the issues of access to justice and legal aid.

He was a mentor of several master papers and one doctoral dissertation on the topics of legal aid in Croatia and Europe. He also delivered in Croatia and abroad a number of speeches and lectures on the topic of access to justice and legal aid.

Since October 2010, Professor Uzelac was appointed by the Law School in Zagreb to lead the Zagreb Legal Clinic, which is the first live-client legal clinic established at the University of Zagreb to provide legal aid to specific groups of clients (e.g. victims of family violence; asylum seekers; various minorities; indigent people etc.).

Other commissions

Dr. Uzelac was engaged in drafting of a number of documents in his home country and in international bodies. In Croatia he was the principal drafter or engaged in the drafting of the following acts: Law on Courts; Law on State Judicial Council; Arbitration Law; Conciliation Law; Anti-Discrimination Law.

He was also member of several working groups formed from 2004 to 2008 by the Ministry of Justice that has worked on several drafts of the Legal Aid Act.

In 2003, he was engaged by the Croatian Law Centre (HPC) on the project which analysed various aspects of access to justice in Croatia, which resulted in the first comprehensive study of that topic.

In 2006 and 2007, he collaborated with the Croatian Human Rights Centre and the Coalition of Legal Aid Providers, and contributed to the analysis of the draft legislative proposals and the common platform related to legal aid, endorsed by these institutions and submitted to the authorities and the public.

In 2009, Professor Uzelac was engaged as international expert (commissioned by the OSCE Mission in Podgorica) to evaluate the state of access to justice in Montenegro and produce a working document presenting a model for legal aid legislation in Montenegro.

Appendix III: List of sources (background documents on legal aid in Croatia)⁹⁶

1. Free Legal Aid Act of the Republic of Croatia (CLAA), Off. Gaz. 2008, (translation provided by the Ministry of Justice, available at <http://www.pravosudje.hr>)
2. Regulation on the Tariff for Determining the Value of the Amount on Compensation for Providing Primary and Secondary Legal Aid for 2009, <http://www.pravosudje.hr>.
3. Ordinance Establishing the Project Valuation Criteria of Associations Authorized for the Provision of Free Legal Aid and Legal Clinics and on the Project Reporting, Ministry of Justice, <http://www.pravosudje.hr>.
4. Application for the Approval of Free Legal Aid, Form ZOBPP-1.
5. Opinion of the Ministry of Justice to the County State Administration Offices regarding the implementation of the CLAA, Zagreb, 22 April 2010.
6. Ministry of Justice, Republic of Croatia, Report on the Realisation of the Right to Legal Aid and the Expenditure of Funds in 2009, Zagreb, March 2010 (translation provided by the HRC, cited as MOJ 2010).
7. Excerpts from the Croatian National Budget for period 2009-2013 (Sabor, Off. Gaz., data relevant for legal aid budget).
8. Ministry of Justice, Monitoring of the Expenditure of the Reserved Funds for Issued Orders by County in the Period from 1/02/2009 to 31/12/2009; from 1/02/2009 to 21/07/2010
9. Ministry of Justice, Monitoring of the Expenditure of the Funds for Issued Orders According to the Form of Legal Aid in the Period from 1/02/2009 to 31/12/2009
10. Draft analysis of the Croatian Free Legal Aid Act and its implementation, expert report of 24 November 2010.
11. Draft analysis of the Croatian Free Legal Aid Act and its implementation – response submission, December 13, 2010 (MOJ Response submission December 13, 2010)
12. Written comments on the Draft Evaluation Report from the Civil Rights Project (PGP) Sisak, e-mail dated 17 December 2010
13. CEPEJ, European Judicial systems. Edition 2010 (data 2008), downloadable from <http://www.coe.int/cepej>; Croatian national reports submitted to the CEPEJ, *ibid*.
14. Review of the Final Draft of the Act on Exercising the Right to Legal Aid, http://www.human-rights.hr/attachments/457_Review_of_the_final_draft_of_the_act_on_exercising_right_to_legal_aid.doc
15. Common Principles for the Regulation of Free and Subsidised Legal Aid in the Republic of Croatia, http://www.human-rights.hr/attachments/457_polazne_osnove_eng.doc

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This list contains only a selection of the most important documents pertinent to legal aid in Croatia; other sources are cited in the footnotes of this document.

16. Novak, Jagoda, A Review of the Process of Public Discussion, Proposal and Adoption of the Bill on Free Legal Aid, with Emphasis on the Participation of Civil Society Organisations 1991-2007, Zagreb, Human Rights Centre, 2007
17. Human Rights Centre, Survey of the Legal Aid Cases Handled by the Traditional Legal Aid Providers (comparison of the caseload of legal aid cases of 12 associations within and outside of the CLAA scheme in 2008-2010 period), Zagreb, 2010
18. CARDS National Action Plan for Croatia 2004 (3.1.3. Improving Access to Justice by Establishment of the Legal Aid System in Croatia), Suggestion 1.
19. European Commission. SEC(2010) 1326. Commission staff working document Croatia 2010 Progress Report accompanying the Communication from the Commission to the European parliament and the Council Enlargement Strategy and Main Challenges 2010-2011 EN {COM(2010) 660} Brussels, 09 November 2010; http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/hr_report_2010_en.pdf.

Appendix IV: Form to apply for legal aid

	"ZOBPP-1"	"ZPForm 1"
Lenght	4 pages	4 pages
Readability	Size of characters: 11pt	Size of characters: only headlines 11pt, Comments and notes smaller
Structure	numbered lines in boxes per chapter	numbered lines in boxes per chapter
Overall number of fields to be read/max. possible fill-out-boxes	129	87

In the following table the fields and boxes of „ZOBPP-1” are listed and compared if they are also followed in the Austrian „ZPForm 1”. If different functionalities are relevant, comments are given:

"ZOBPP-1"	"ZPForm 1"	Comments
A DETAILS OF THE APPLICANT		
A 1		
NAME	yes	
SURNAME	yes	
FATHER'S/MOTHER'S NAME	no	
Male Female	no	
DATE OF BIRTH	yes	
PLACE OF BIRTH/COUNTRY	yes	
CITIZENSHIP	yes	
TYPE OF IDENTIFICATION DOCUMENT (identity card or passport)	no	Helps to identify multiple applicants, but is not allowed in Austria due to data-protection law.
PLACE OF ISSUING AND ISSUING BODY	no	Helps to identify multiple applicants, but is not allowed in Austria due to data-protection law.
OIB (Personal identification number)	no	Helps to identify multiple applicants, but is not allowed in Austria due to data-protection law.
JMBG (Registration Number of Citizen)	no	Helps to identify multiple applicants, but is not allowed in Austria due to data-protection law.
PLACE OF RESIDENCE	yes	
STREET AND NUMBER	yes	
PLACE/POSTAL CODE	yes	
COUNTY/COUNTRY	yes	
TELEPHONE	no	

<p>A.2. In circumstances when free legal aid is required by a minor or a person deprived of the capacity to exercise rights, the application in his/her name shall be submitted by the legal representative or guardian</p>		
<p>DATA ON THE LEGAL REPRESENTATIVE OR GUARDIAN:</p>		
<p>NAME AND SURNAME</p>	no	<p>The representation has to be documented outside the form in Austria, eventually be executed in a separate file, which is not automatically linked to the application for legal aid. Therefore the additional fields in the Croatia form provide more functionality, increase efficiency and reduce length of procedure.</p>
<p>CITIZENSHIP</p>	no	
<p>TYPE OF IDENTIFICATION DOCUMENT (identity card or passport)</p>	no	
<p>OIB OR JMBG</p>	no	
<p>THE CODE OF THE ACT WITH WHICH THEY ARE SET AS LEGAL REPRESENTATIVES</p>	no	
<p>PLACE OF RESIDENCE</p>	no	
<p>STREET AND NUMBER</p>	no	
<p>PLACE AND POSTAL CODE</p>	no	
<p>COUNTY/COUNTRY</p>	no	
<p>TELEPHONE</p>	no	

B.DATA ON THE LEGAL MATTER FOR WHICH LEGAL AID IS REQUIRED (description)		
B.1. PRIMARY LEGAL AID		
1. ADMINISTRATIVE PROCEEDING		
1.1. In status matters	no	In Austria anyone may seek legal advice free of charge (from a district court or the local lawyers chamber, public chambers, private associations or unions) on points of law and in order to examine the chances of success of entering into litigation. Where legal representation is provided, legal aid also covers the pre-trial advice given by the lawyer. This service is offered in general. Therefore it is not necessary to apply for primary legal aid. On the other hand there are no data available about the amount and kind of given services. There is no cost controlling. It is not clear how much money is spent on primary legal aid by the public and private sector "por bono". Further on it is not able to identify in Austria directly out from facts and figures, in which law is provoking most need of primary legal aid and i.e. might be improved. As Croatia is collecting data in section B.1. of "ZOBPP-1" also about areas where primary legal aid is demanded, it is able to identify needs of improvement by changing law and/or investing money.
1.2. In proceedings related to residence and work of foreigners in the Republic of Croatia	no	
1.3. In proceedings for establishing the health insurance rights	no	
1.4. In proceedings related to the retirement insurance	no	
1.5. In proceedings for establishing the rights from the social welfare system	no	
1.6. Other administrative proceedings	no	
2. LEGAL AID PROVIDED IN PEACEFUL OUT-OF-COURT SETTLEMENT OF DISPUTES	no	
3. IN PROCEEDINGS WHERE THE OBLIGATION OF PROVIDING LEGAL AID DERIVES FROM THE INTERNATIONAL AGREEMENT	no	
4. PROCEEDINGS BEFORE EMPLOYER (only for trade unions and attorneys)	no	
B.2. SECONDARY LEGAL AID		
1.LEGAL PROCEEDING		
2.1.In the proceedings related to the ownership of a house or flat necessary for housing of the applicant; ownership of the means for work of the applicant.	partially	In Austria a party with insufficient financial means may apply for legal aid when entering into litigation or at any time later as long as the civil proceeding is still pending. As far as required the court can give legal aid by (wholly or partially) freeing the indigent party from court fees and the other fees and by providing legal representation free of charge. The Austrian "ZPForm1" is asking the applicant to explain for "which case" he/she is applying of secondary legal aid. A general description may be given if no case is pending. The necessity of these is to enable the court to check if the claim proves to be manifestly unfounded or not brought in good faith. According to that general description no hard facts are available to control into what branches secondary legal aid is given, which legal branch is provoking most need of secondary legal aid and i.e. might be improved.
2.2. In labor law proceedings	partially	
2.3. In family law proceedings, proceedings concerning support and the proceedings which include a decrease in the amount of the support	partially	
2.4.In seizure proceedings when it concerns proceedings for which, pursuant to the provisions of this Act, legal aid shall be approved	partially	
2.5. In proceedings according to extraordinary legal remedies	partially	
2.6. In proceedings before the Constitutional Court of the Republic of Croatia	partially	

2.7. In proceedings before the Administrative Court of the Republic of Croatia	partially	As Croatia is collecting data in section B.2. of "ZOBPP-1" also about areas where secondary legal aid is demanded, it is able to identify where the investments are going to and the needs of improvement by changing law and/or adopting the invest of money.
2.8. Other legal proceedings	partially	
2. MEDIATION PROCEEDINGS	partially	
3. IN PROCEEDINGS WHERE THE OBLIGATION OF PROVIDING LEGAL AID DERIVES FROM THE INTERNATIONAL AGREEMENT	partially	
C. FORM OF LEGAL AID		
1.1. Legal advice	partially	The Austrian "ZPForm1" is asking the applicant to explain for what means of secondary legal aid he/she is applying for. This has to be done in reference to the correct paragraph and litterae of civil procedure code (§ 64 ZPO) without further standardisation or help by the form itself. In opposite to this section C. of "ZOBPP-1" is asking in standardised way for one of six categories. This is not only more user-friendly but also enabling controlling by the relevant categories.
1.2. Legal aid in drafting documents before administrative bodies	partially	
1.3. Legal aid in drafting documents before court	partially	
1.4. Representation in administrative matters	partially	
1.5. Representation before court	partially	
1.6. Other proceedings	partially	
D. APPROVAL OF LEGAL AID FOR SPECIFIC CASES (all the applicants enclose a statement on status , except the applicants specified in point 3)		
1. Recipients of rights from social welfare system and other forms of assistance	no	These categories are neither applicable nore asked in Austria. From the point of view of the croatian law the requested information is necessary to decide about the approval of lagal aid. In addition it allows analysis about the application of legal aid regarding social means.
2. Beneficiaries of the right to maintenance pursuant to the Act on the Rights of Croatian Homeland War Veterans and the Members of their Families and to the Act on Protection of Military and Civilian War Invalids	no	
3. Children, whose parents or other persons are obliged to support them, in procedures before competent bodies	no	
4. Victims of domestic violence	no	
5. Victims of trafficking in human beings	no	
6. Victims of the offence	no	
7. Asylum seekers	no	
8. Those granted asylum	no	
9. Foreigners under subsidiary protection	no	
10. Foreigners under temporary protection	no	

E. DANA ON THE MEMBERS OF THE HOUSEHOLD OF THE APPLICANT			
Name and surname	indirectly	The Austrian "ZPForm1" asks for the family status, if someone lives alone in his premises or to what extent she/he is responsible for family members/minors. It seems not that logical, why the croatian form/the law is relaying on members of the household but not on the question if someone is liable for the livelihood (I.e. the rich uncle might be part of my household but never liable to pay me a penny other than for rent and surplus).	
Date of birth	indirectly		
OIB ili JMBG	indirectly		
Relationship to the applicant	indirectly		
F. THE FINANCIAL STATUS OF THE APPLICANT AND THE MEMBERS OF THE HOUSEHOLD			
F.1.			
Name and surname of the applicant and the members of the household	yes	All requirements within the chapter regarding financial status cover at least those from the Austrian application form. The Austrian "ZPForm 1" goes beyond that asking also for debts and maintenace obligations as these are reducing the property regarding approval of legal aid.	
Incomes and revenues from non-independent/independent work	yes		
Name of the employer	yes		
headquarters/address	yes		
TOTAL AMOUNT:	yes		
Type of immoveable property	yes		
F.2. DATA ON IMMOVEABLE PROPERTY			
Housing accommodation (flat or house)	yes		
Other immoveable property (business space, land, forest and other)	yes		
Owner (name and surname)	yes		
Address (street, number and place)	yes		
Useable space in m ²	yes		
Market value in Croatian kuna	yes		
Total	yes		
F.3. Dana on vehicles/vessels			
Owner (name and surname)	yes		
Type, brand and model, year of production	yes		
Registration plate	yes		
Value in Croatian kuna	yes		
Type of property / receipt (saving, securities, shares in capital, pension and other property)	yes		
Name and surname of the owner/beneficiary	yes		
Amout in Croatian kuna	yes		

F.4. Other property and revenues		
Type of property / receipt (saving, securities, shares in capital, pension and other property)	yes	
Name and surname of the owner/beneficiary	yes	
Amount in Croatian kuna	yes	
Total	yes	
Date	yes	
Signature	yes	

Appendix V: Categories of legal aid cases (MoJ Statistics)⁹⁷

ANNUAL MONITORING OF LEGAL AID ACCORDING TO THE TYPE OF PROCEEDINGS

FOR THE PERIOD FROM 02/02/2009 TO 01/03/2010

TOTAL LEGAL ACTIONS

In the proceedings related to the ownership of a house or flat necessary for housing of the applicant; ownership of the means for work of the applicant; ownership of the means for work of the applicant	423
Legal aid for the victims of an offence	33
Victims of an offence	30
Administrative proceeding is conducted in proceedings related to residence and work of foreigners in the Republic of Croatia	4
Administrative proceeding is conducted in proceedings for establishing the rights from the social welfare system	86
In legal proceedings for family law, except for proceedings which include a decrease in the amount of the support, when the person obliged did not pay their support obligation; in cases concerning the protection of minors and young adults with behaviour disorders and in proceedings which are conducted before courts according to international conventions to which the Republic of Croatia is a signatory, and that concern the protection of rights and the welfare of children	1,561
In labour law proceedings, related to workers and persons who are seeking employment	135
In proceedings before the Constitutional Court	13
Victims of domestic violence	173
Administrative proceeding is conducted in proceedings for establishing the rights from health insurance	31
Administrative proceeding is conducted in status matters	29
Administrative proceeding is conducted in proceedings related to pension insurance	98
In proceedings according to extraordinary legal remedies	10
In proceedings before the European Court of Human Rights	5
In execution proceedings when it concerns proceedings for which, pursuant to the provisions of this Act, legal aid may be approved	368
Other legal matters	175

⁹⁷

Copied from MOJ 2010 p 46-47.

Aras, S., Preložnjak, B., Intentional Killing of Efficiency by Overzealousness in the Pursuit for Truth: The example of Croatian Legal Aid System

Establishing and maintaining effective systems of protection and realization of the subjective rights of citizens is the task of modern legislations.

Since the protection of subjective 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 the economic and socially vulnerable groups of citizens are faced with excessive procedural costs.

In order to preserve citizens' rights to access to justice, as one of the fundamental human rights of which depends on the availability of legal aid to all citizens irrespective of their social and / or economic status, governments are establishing a system of free legal aid as a mechanism for effective realization of the subjective rights of citizens. The normative activity regarding establishing the legal framework of free legal aid in Croatian legislation was first initiated through constitutional guarantee of the right to free legal assistance, achieved through provisions of criminal and civil procedural law. Finally, it was implemented through the Law on Free Legal Aid, based on the influence of legislative achievements in modern European countries.

Entitlement to free legal aid in the Republic of Croatia is primarily dependant on the criterion of property, upon which a potential user of the right to free legal aid can achieve the aid regarding the condition that he could not bear the costs of the proceedings without existentially endangering himself or his family members.

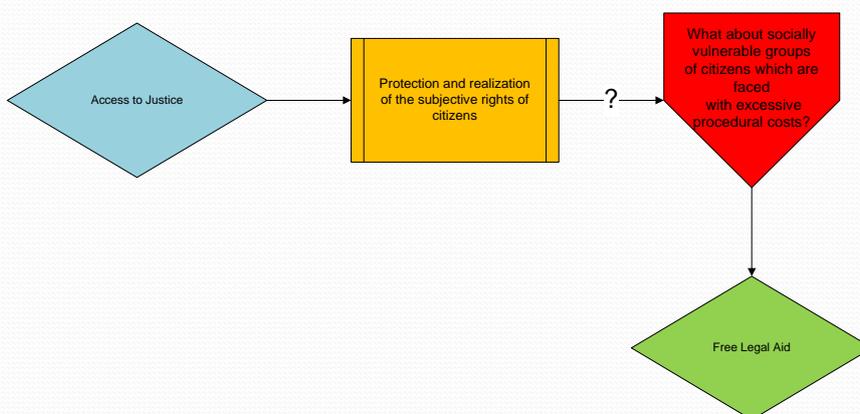
Stipulating the fulfilment of above mentioned property census is tied to the administrative procedure for issuance of order, which in addition to complexity of the prescribed conditions for satisfying the property census is a serious obstacle in achieving timely and effective legal assistance.

In effort to eliminate barriers to achieve timely and effective legal aid, and thus achieve the effective protection of subjective rights in general, the authors evaluate the current setting of the Croatian system, and give some projections *de lege ferenda*.

*Intentional Killing of Efficiency by
Overzealousness in the Pursuit for Truth: The
example of Croatian Legal Aid System*

*Slađana Aras & Barbara Preloznjak
University of Zagreb*

Tasks of modern legislations



International framework

- **Global**
 - ✓ International Covenant on Civil and Political Rights
 - ✓ International Covenant on Economic Social and Cultural Rights
 - ✓ Convention on the Rights of the Child
 - ✓ UN Basic Principles on the Role of Lawyers
- **Regional**
 - ✓ European Convention for the Protection of Human Rights and Fundamental Freedoms

Croatian legal framework

- Croatian Constitution
- Code of Civil Procedure, Law on the Legal Profession, Law on Asylum, Labour Law, Consumer Protection Law
- Croatian Law on Free Legal Aid (CLLA)

Croatian Law on Free Legal Aid

- The purpose of adopting CLLA:
 - ✓ establishing a system which enables the citizens of lesser economic status to engage a legal representative,
 - ✓ acquiring equal right of access to judicial and administrative government institutions in order to secure the universal non-discriminative system of free legal aid,
 - ✓ reducing the number of cases which are initiated because of ignorance of parties regarding the rights, obligations and possibilities of success in each individual legal case.

Croatian Law on Free Legal Aid

- Goals of adopting CLAA:
 - ✓ preparation and more professional representation of parties,
 - ✓ more efficient work of courts and other institutions which decide on rights and obligations of citizens would be enabled,
 - ✓ establishment of clearly defined criteria that allows claiming the right to free legal aid,

Croatian Law on Free Legal Aid

- Goals of adopting CLAA:
 - ✓ enlargement of users of the right of free legal aid to all foreign citizens,
 - ✓ clear and comprehensive provisions regarding the the approval and obtaining the free legal aid,
 - ✓ harmonization EU legislation,
 - ✓ establishing a comprehensive supervision of provided legal aid quality and in order to sanction unprofessional and negligent treatment in providing free legal aid.

Results of applying CLAA in practice

- 1. Legal framework of exercising the right to free legal aid**
 - ✓ does not form an integral and functioning system to enable citizens to exercise their rights effectively
- 2. Limitations of the assumptions for the fulfillment of the content of the right to free legal aid**
 - ✓ entitlement to free legal is primarily dependant on the criterion of property
 - ✓ prescribed conditions for satisfying the property census are tied to the administrative procedure

“Existential issues” criterion

1. cases before courts, administrative bodies or other legal entities vested with public authority if they adjudicate „the beneficiary’s existential issues”
2. “especially”: status matters; rights from the social welfare system; rights from pension and invalidity insurance; other forms of support; employment rights; protection of children and young adults; protection of victims of criminal offences; trafficking in human beings; domestic violence; matters concerning immovable property „up to the size of adequate living accommodation”; matters concerning means for work vital for supporting the beneficiary and his/hers household; monetary claims up to a certain amount; when prescribed by international agreements to which Croatia is a party

Means test

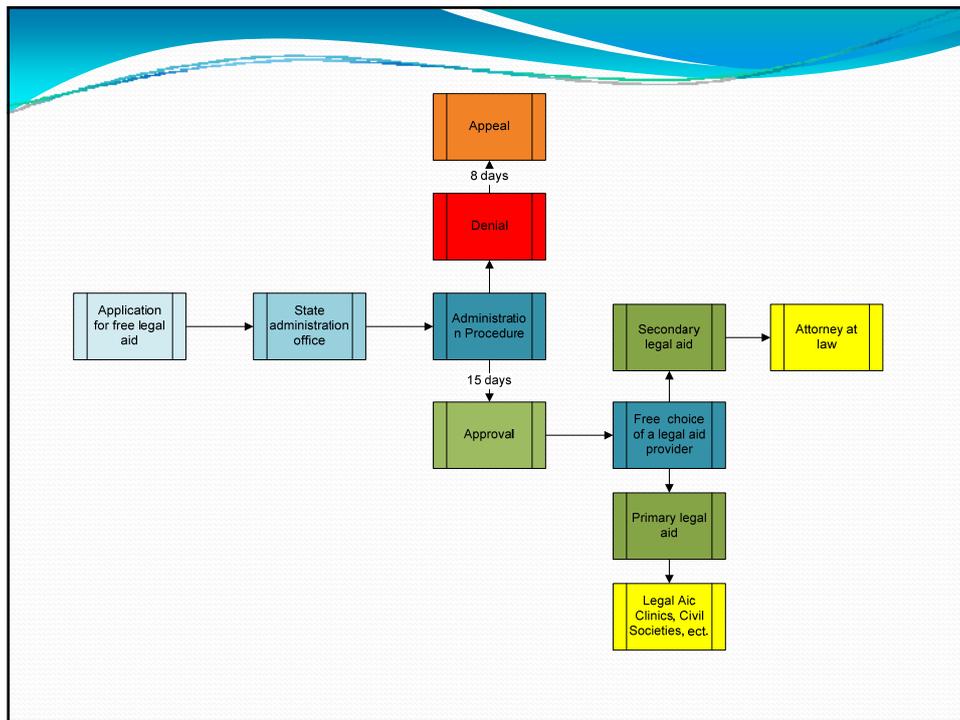
1. monthly income
2. ownership of a flat or a house and other immovable property
3. ownership of a vehicle or a vessel
4. other property or income (savings, shares in the capital, pensions and other assets)

of the applicant and the members of his/her household – even if there is no maintenance obligation between them

Questions

- ✓ what is case with existential issue? Is it division of marital property?
- ✓ what is with people who live at the edge of poverty in their own houses in rural areas of some size?
- ✓ case: after separation daughter leaves with her mother. The daughter wants to claim divorce. Her mother is against divorce and does not give the relevant data for purpose of submitting the request for free legal aid.

- ✓ court may also approve legal aid to parties „who do not meet the conditions prescribed in this act for reasons of fairness“:
 - the proceedings are complex
 - the party does not have the ability to represent himself/herself
 - the financial status of the party is such that hiring an attorney would endanger the livelihood of the party and members of his/her household.
- ✓ **Decision of Croatian Constitutional Court** (U-I-722/2009), 15 of July 2011: art 5/2 CLAA (existential issues); art 8 CLAA (means test)



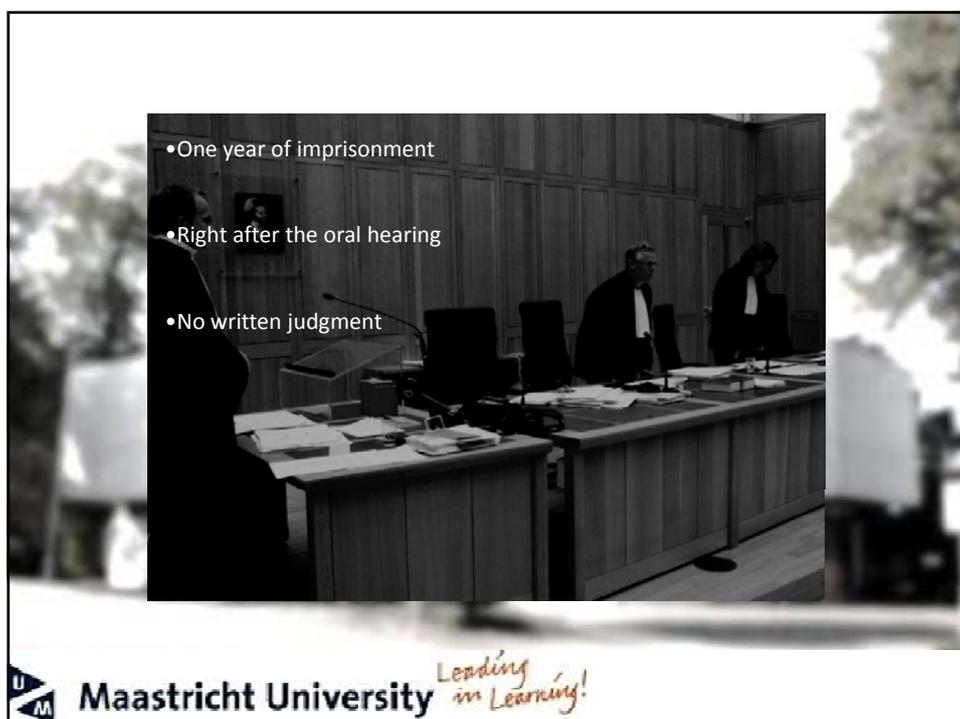
- Are administrative proceedings and documents that have to be submitted of evidence of financial status – listed in CLAA – appropriate for primary legal aid (information, counseling)?
- Thus this system insures more professional representation of parties and finally more efficient work of courts and other institution?

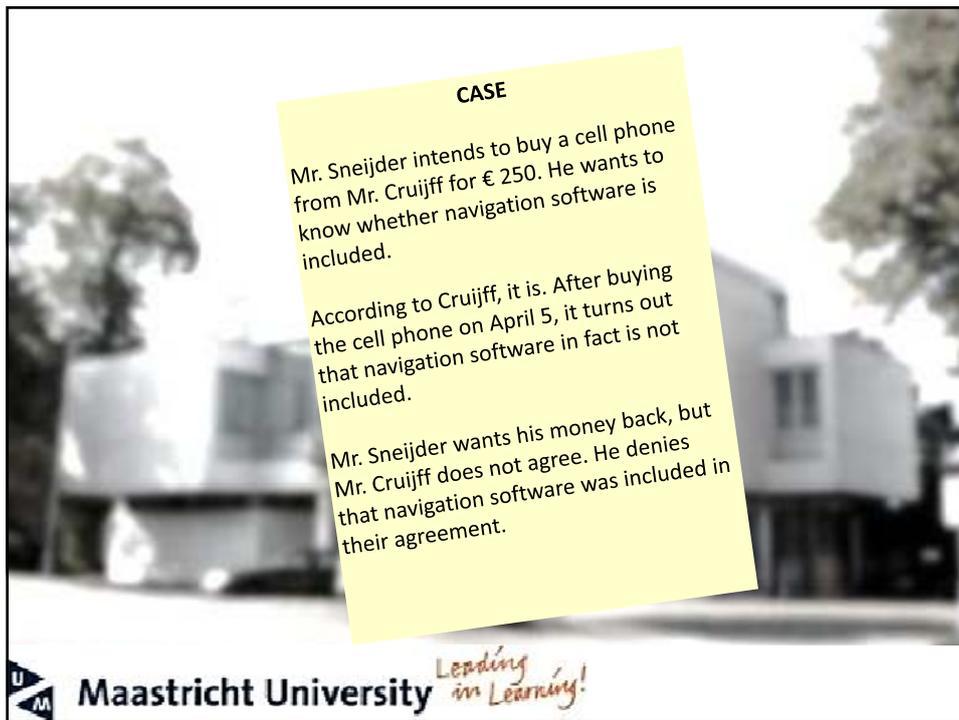
Final remarks

- The implemented system of free legal aid did not enable citizens of lesser economical status to the full extent to:
 - ✓ have the access to legal representative,
 - ✓ acquire legal aid and to have equal access to judicial and administrative government institutions.

Final remarks

- It is necessary to:
 - ✓ implement significant changes to the model and means to possibility of access to free legal aid,
 - ✓ reduce the level of bureaucracy and formalism of the approval process and utilization of free legal aid services.
- In order to:
 - ✓ accomplish the presumptions of *acqui commutaire* implementation,
 - ✓ fulfill the warranties taken over by international law which require the complete equality of citizens in regards to access to justice.





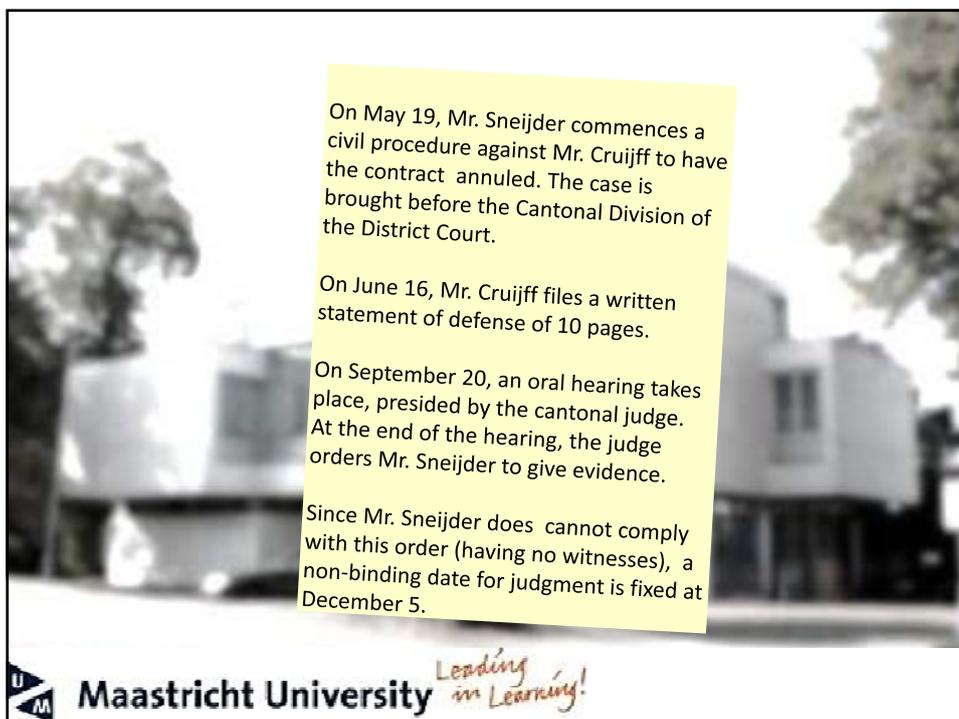
CASE

Mr. Sneijder intends to buy a cell phone from Mr. Cruijff for € 250. He wants to know whether navigation software is included.

According to Cruijff, it is. After buying the cell phone on April 5, it turns out that navigation software in fact is not included.

Mr. Sneijder wants his money back, but Mr. Cruijff does not agree. He denies that navigation software was included in their agreement.

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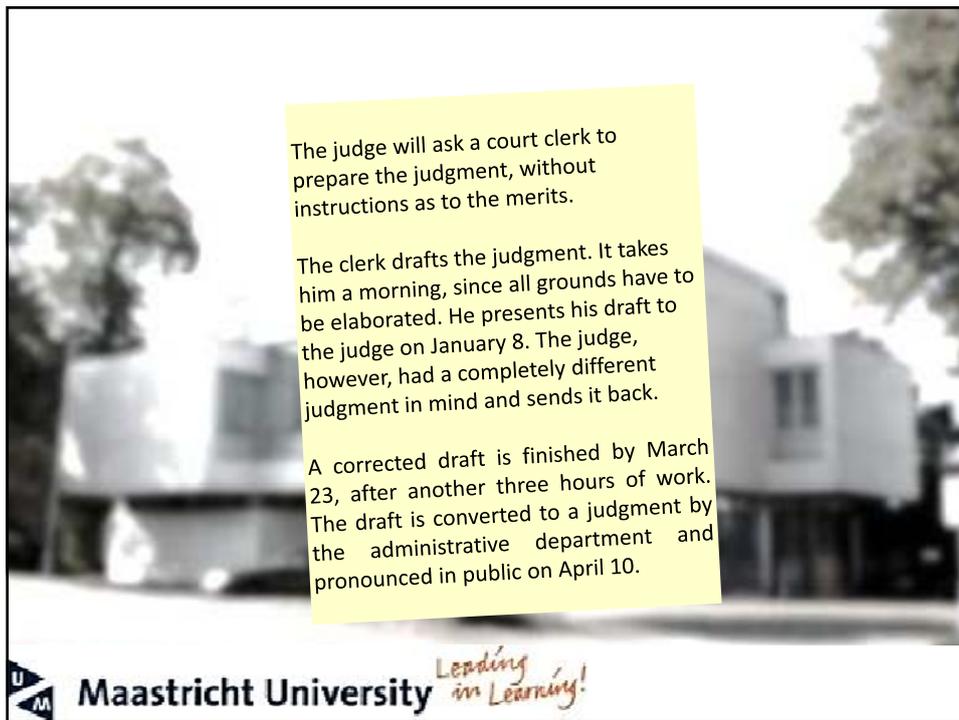
On May 19, Mr. Sneijder commences a civil procedure against Mr. Cruijff to have the contract annulled. The case is brought before the Cantonal Division of the District Court.

On June 16, Mr. Cruijff files a written statement of defense of 10 pages.

On September 20, an oral hearing takes place, presided by the cantonal judge. At the end of the hearing, the judge orders Mr. Sneijder to give evidence.

Since Mr. Sneijder does not comply with this order (having no witnesses), a non-binding date for judgment is fixed at December 5.

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The judge will ask a court clerk to prepare the judgment, without instructions as to the merits.

The clerk drafts the judgment. It takes him a morning, since all grounds have to be elaborated. He presents his draft to the judge on January 8. The judge, however, had a completely different judgment in mind and sends it back.

A corrected draft is finished by March 23, after another three hours of work. The draft is converted to a judgment by the administrative department and pronounced in public on April 10.

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CONTENTS

1. Current practice in civil proceedings
2. Alternative approach: immediate judgments
3. Research
4. Conclusion

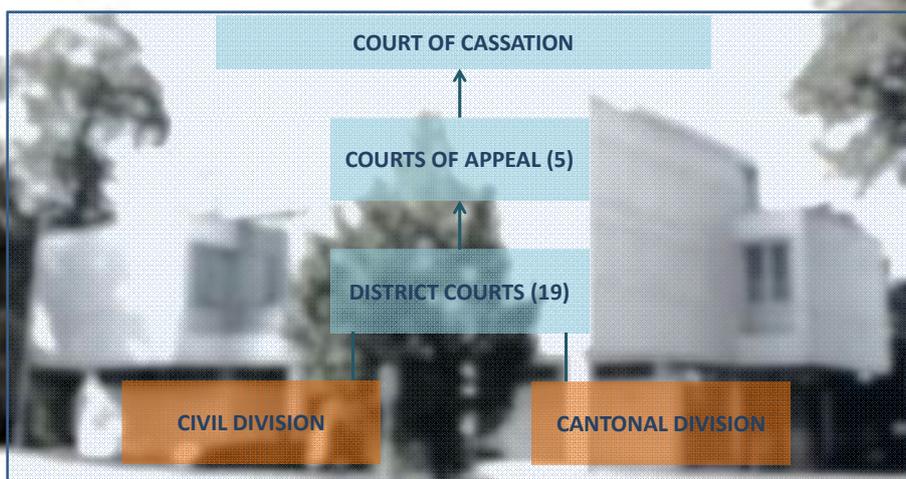
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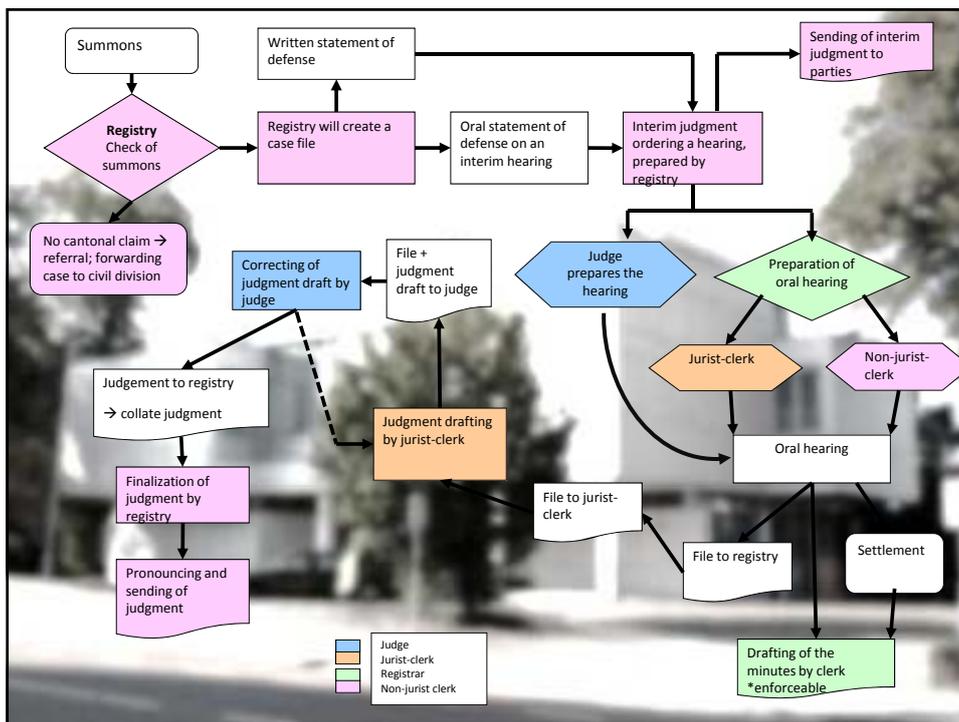
GENERAL CHARACTERISTICS OF DUTCH CIVIL COURTS

Dutch civil courts are

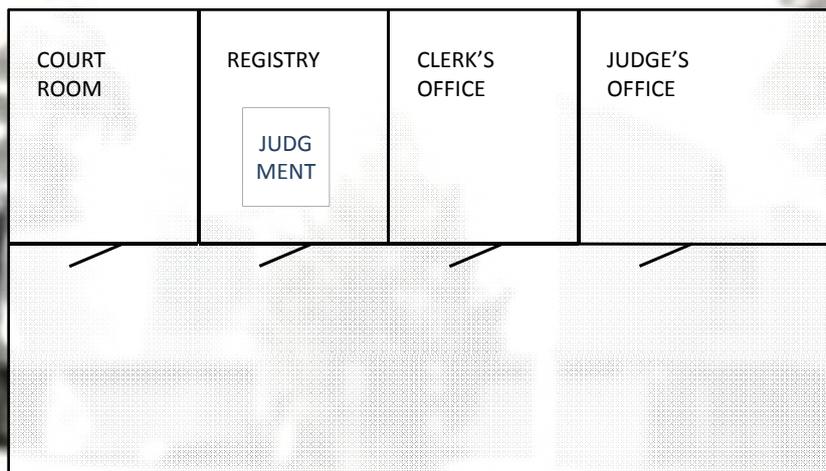
- non-specialized (only exception: lease of farming land)
- adversarial case managers and
- inquisitorial fact finders (with some adversarial aspects)
- using general rules of procedure that are identical for all cases

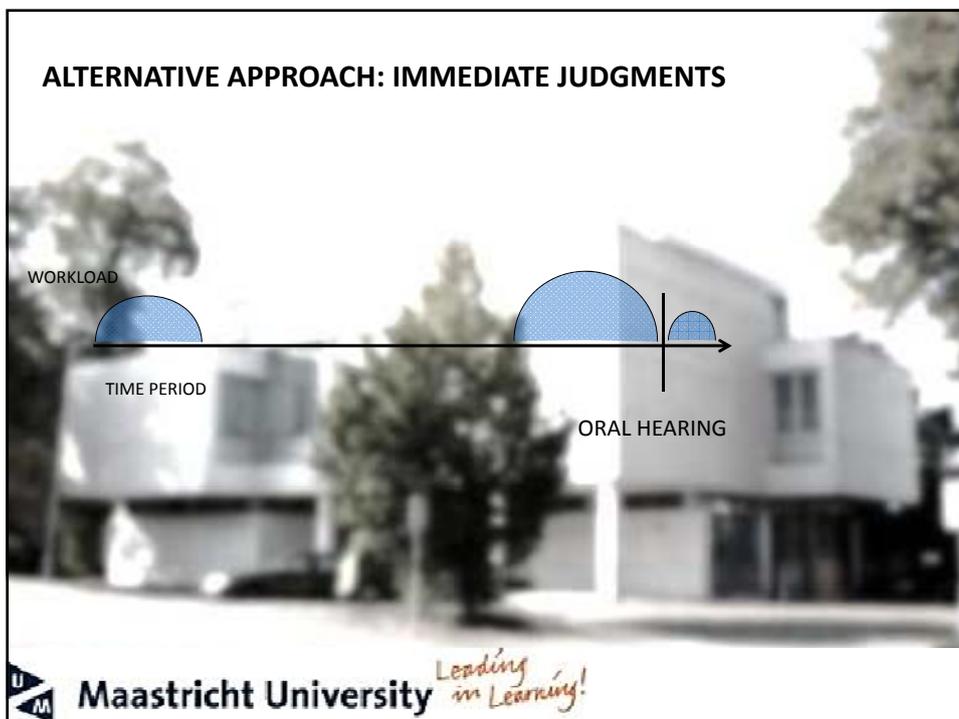
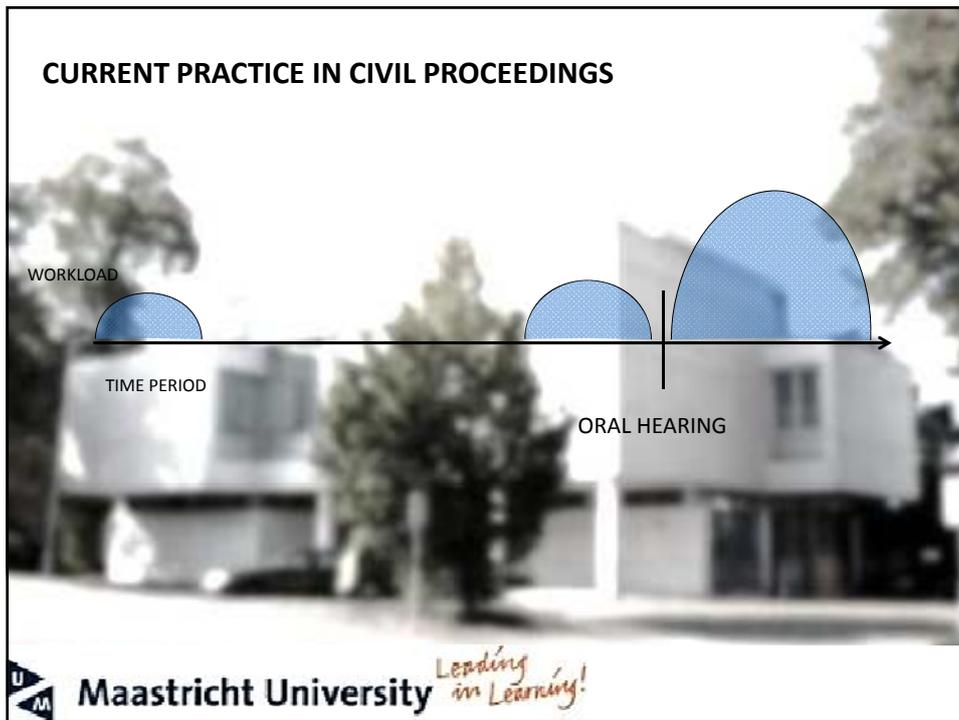
CURRENT PRACTICE IN CIVIL PROCEEDINGS





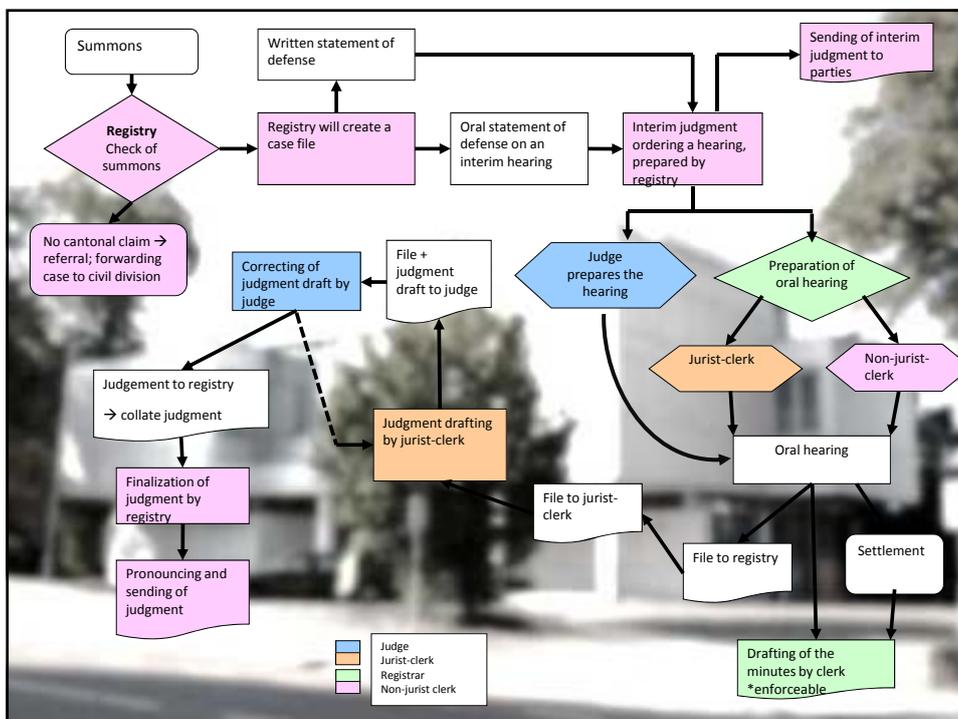
CURRENT PRACTICE IN CIVIL PROCEEDINGS

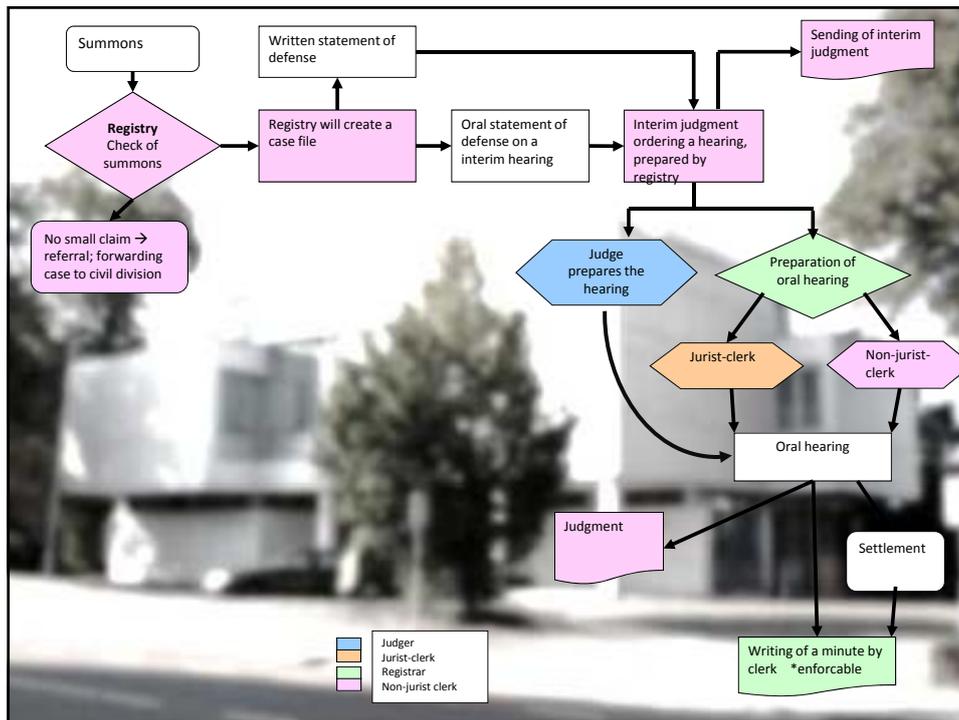




IMMEDIATE JUDGMENTS: WHY IT MAY AND CAN WORK

- The boundaries set by Dutch law leave enough room to shorten the grounds of judgments.
- Cantonal judges are very experienced and capable of formulating grounds on the spot.
- Right after the oral hearing, all facts of the case and statements of the parties are still in the judge's memory
- Oral hearings are there to make cases less complicated, which means that in most cases no difficult decisions have to be made.
- In administrative law, such a possibility is already provided by statute.
- Police court judges are used to taking much more serious decisions without a period of reflection.



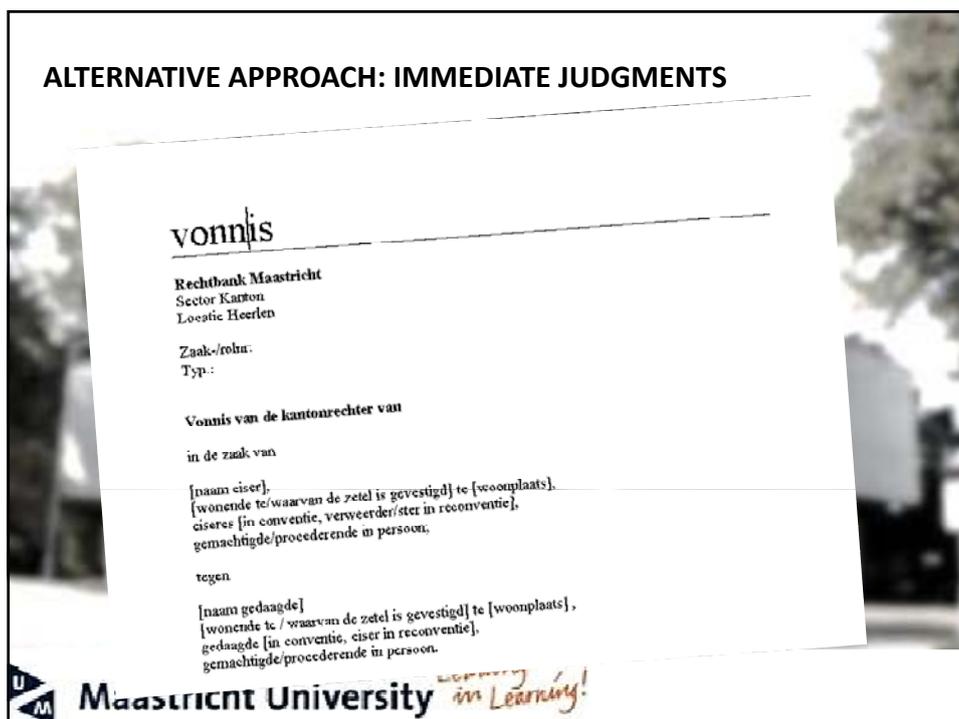


ALTERNATIVE APPROACH: IMMEDIATE JUDGMENTS

The extra advantages:

1. the court can seize the opportunity to explain its decision in a direct meeting with the parties;
2. the court clerk's expertise can be used in an earlier stage of the proceedings;
3. time delays are shortened considerably and justice will be done faster and better.

ALTERNATIVE APPROACH: IMMEDIATE JUDGMENTS



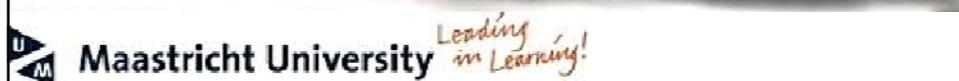
SIMULATION SESSIONS

The new approach will be applied in the District Court of Maastricht, more specifically in the Heerlen location.

A preview of how the approach will work out in practice will be provided by a simulation hearing with a real judge, Theatre Academy students and real legal representatives.

After this simulation, changes can be made to instructions and forms.

The recordings of the simulation session will be part of the proposal.



RESEARCH

Before starting the experiment, the current situation will be subject to research. The research will be quantitative. Several parameters will be measured:

- the amount of time needed for preparing the judgment, differentiated over several actors involved (judges and clerks);
- consumer satisfaction;
- costs (indirectly)

RESEARCH

To assess the amount of time needed, time measurement forms will be used.

		JUDICERING KANTONRECHTER				
		Zaknummer				
Voorbereiding compartie	Lezen dossier					
	Samenvatting					
	Overnemen/judicantende					
Tijds de compartie	Tijd in afwachting voorlopelijk aan de comparitie					
	Zittingduur comparitie					
	Tijd in afwachting na de comparitie					
Voorals	Aanwijzingen aan zittingvoorzitters					
	Wachten omzigt voorals					
	Vroegmoedigheid					
Anders nuttelijk	Collaboreren					

RESEARCH

The consumer satisfaction will also be measured, to start with the current situation. We will use closed question surveys:

Exit-Interview partijen comparities kanton Heerlen

Goedemorgen/goedemiddag, U komt zojuist uit de zitting, ik ben van de Universiteit Maastricht en wij doen een onderzoek naar het oordeel van partijen over het kantongerecht. Mag ik u een paar vragen stellen? Uw antwoorden worden anoniem verwerkt. Als er vragen zijn waarom u geen antwoord wilt geven, dan hoeft dat niet. Het ralu ongeveer drie minuten van uw tijd kosten.

[Bij bevestigende beantwoording]

Eijn dat u mee wilt werken. Zoals gezegd gaan we zorgvuldig om met de gegevens en blijft alles anoniem. U mag vragen oversluis als u wilt. Kan men nu beginnen?

[Bij bevestigende beantwoording]

1. Wat vond u van de zitting waaraan u net hebt deelgenomen? Het is de bedoeling dat u een cijfer van 1 tot 10 geeft.
2. Vond u dat de rechter naar u kstrende? Geef een cijfer van 1 tot 10.
3. Vond u dat de rechter zich inhielde in uw situatie? Geef een cijfer van 1 tot 10.
4. Kon u de rechter goed volgen? Geef een cijfer van 1 tot 10.



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RESEARCH

After the new approach will be implemented, we will measure:

- the amount of time needed for preparing the judgment differentiated all actors involved (judges and clerks);
- the consumer satisfaction and contentment of all professionals involved (the representatives of the parties, judges, clerks);
- costs (indirectly).



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RESEARCH

To measure the contentment of the professionals involved, we will use mixed surveys, with both open and closed questions.

Appendix G – Het interviewen van professionele partijen
Gemachtigde: advocaat, deurwaarder en juristen.

Onderwerp: Gegevens geïnterviewde

Vraag 1. Wat is uw beroep?

Vraag 2. Hoe lang verricht u al juridische hulpverlening?

Vraag 3. Heeft u van tevoren nog andere juridische functies vervuld?

Onderwerp: Tevredenheid over de onmiddellijke uitspraak

Algemeen

Vraag 4. Heeft u ervaring met procedures waarin de rechter mondeling vonnis wijst (zoals in het straf- of bestuursrecht)?

CONCLUDING REMARKS

- Statistical analysis will be used to analyze the results
- Expected benefit in time of 25 %
- Expected benefit in cost reduction of 30 %
- Expected reduction of turnaround time of 2 months
- Significant improvements without trade-off

PUBLIC AND PRIVATE JUSTICE

2011 COURSE AND CONFERENCE, INTER-UNIVERSITY CENTRE, DUBROVNIK

TRUTH AND EFFICIENCY IN CIVIL PROCEEDINGS

23-27 MAY 2011

PAPER ABSTRACT

TRUTH: A CAT-AND-MOUSE GAME IN THE SOUTH AFRICAN CIVIL JUSTICE SYSTEM

Prof Mohamed Paleker, University of Cape Town, South Africa

It is not an exaggeration to say that nine-tenths of civil actions in South African courts are settled on the doorsteps of the court or during trial. This comes at great emotional and financial expense to litigants, who are expected to endure the slings and arrows of litigation for many months and often time, years.¹

The question, of course, is: what hinders early settlement of matters? The absence of court-connected alternative dispute resolution mechanisms is a significant factor.² However, the attitude of the civil justice system to truth-finding is, perhaps, the single most important factor, which ironically has received scant attention.

The South African civil justice system is adversarial in nature. Judicial officers assume the mantle of impartial umpires. Although they ensure that evidential and procedural rules are not infringed, they do not descend into the arena at any stage of litigation. As such, judges do not assist with fact-finding. Litigants are responsible for identifying, presenting and eliciting evidence. Judges simply render decisions on the strength of evidence presented to them.

Practitioners are known to play a tactical game of cat-and-mouse from the inception of a matter until judgment. Too much openness and transparency is regarded as strategic suicide. Simulating a poker game, practitioners are known to hold their evidential cards face down and will only expose the aces up their sleeves close to or during trial. Consequently, for a considerable period of time, parties fumble around in the dark searching for evidential clues. Unfortunately, South African civil procedure permits this process of constant pursuit, near captures, and repeated escapes.

The pleadings process is premised on the idea that only material facts (*facta probanda*) as are necessary to disclosed a cause of action must be pleaded.³ Evidence (*facta probantia*) may be pleaded, but this very seldom happens in the

¹ It is estimated that, on average, it takes three years for a civil matter to be finalised in the High Court and a year and a half in the Magistrates courts.

² Mohamed Paleker "Mediation in South Africa – Here But Not All There" in N Alexander *Global Trends in Mediation* (2006).

³ Marnewick *Litigation Skills for South African Lawyers* (2007) 80-81.

action procedure⁴, for everyone plays the adversarial game according to the same rules. Going against the grain will undoubtedly place one at a tactical disadvantage.

Having regard to the role of the judicial officer, the current rules of procedure afford parties a gamut of evidence extracting mechanisms comparable to many to other legal systems. However, the problem with these is that they come too late in the litigation process and are often not very helpful to identify the truth. Instead, they seem to enable parties to gain information about the types of evidence that will be confronted in court. But, they do not give an indication of what the actual evidence will be or how exactly the evidence will be used.

Discovery procedures are reserved for very late in the litigation process. Although a court can order discovery to take place before the close of pleadings, it will only do so in exceptional cases. The general and most applied rule is that discovery takes place after the close of pleadings i.e. during the pre-trial stage.⁵ The duration of the pleadings stage in the Magistrates' Courts can be as much as six months and, on a conservative estimate, up to a year in the in the High Courts. The time it takes to move from the pleadings stage to the pre-trial stage is dependant on the complexity of a matter and whether the parties – as is often the case - raise technical defences⁶ and/or other interlocutory procedures.⁷ Consequently, for a considerable period of time the litigants are not familiar with the evidential arsenal held by the other side.

Truth-finding woes are exacerbated by the fact that the pre-trial discovery process is a rather restrained affair. Parties generally discover documentary evidence. With the exception of expert witness summaries, the evidence of witnesses will never be known until they appear in the witness box during trial. It is, therefore, not uncommon for a party to be taken by complete surprise during trial as this is generally the first opportunity when he or she comes to hear of the opponent's evidence. This explains the prevalence of sudden and urgent settlement negotiations during the course of trial.

Settlement on the doorsteps of the court, however, is a fate that often awaits many private litigants who are easily exhausted of funds and cannot afford to proceed to trial. For them, the concealed truth will never be known or exposed. This bodes well for large corporations who have the financial resources to call the proverbial 'bluff' and to engage litigants in matters where, if the truth was know at the very beginning, they might not have done so. Under the current civil procedure rules they

⁴ A distinction must be drawn between the application procedure and the action procedure. The action procedure has three stages: (a) pleadings stage; (b) pre-trial stage; and (c) and trial stage. The application procedure has two stages (a) pleadings stage; and (b) hearing stage. In the application procedure *viva voce* evidence is generally not permitted. The material facts as well as the evidence must be presented on the 'papers' i.e. by way of affidavits of which only three are permitted: the founding affidavit (by applicant), the answering affidavit (by respondent) and replying affidavit (by applicant). The application procedure can only be used where this is permitted by statute or the common law and where the parties do not foresee a material dispute of fact, which cannot be resolved on the papers. On account of these limitations, it is the action (trial) procedure which is the more dominant procedure of first instance.

⁵ Magistrates' Court Rule 23 and 24; High Court Rule 35.

⁶ Technical defences are commonly raised by *special pleas* and *exceptions*.

⁷ Interdicts, summary judgment etc are common examples of interlocutory procedures.

are able to entangle private parties in expensive litigation for a considerable period of time knowing full well that sooner or later their opponents must capitulate and forgo the truth because of a lack of resources.

In my paper, I intend to explore what impact 'rugged' adversarialism has had on fact and truth-finding in the South African civil justice system, and whether this system is defensible under the South African Constitution⁸ with its sophisticated Bill of Rights. I will consider the attitude of judges, and the legal profession to truth-finding in civil actions and whether the time has come for stayed perceptions to change. The role of pleadings and the discovery process when it comes to the pursuit of the truth will also be examined. Where necessary, recommendations for reform will be made.

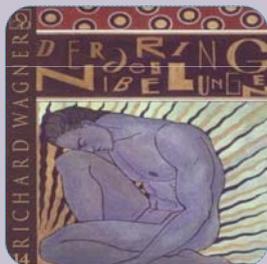
⁸ Constitution of the Republic of South Africa Act 108 of 1996.

European Procedural Geography in the Light of Truth and Efficiency

OGNJENKA MANOJLOVIĆ
UNIVERSITY OF ZAGREB

PUBLIC AND PRIVATE JUSTICE 2011
TRUTH AND EFFICIENCY
IN CIVIL PROCEEDINGS
MAY 26, 2011

Geographical considerations



**THE
GERMANIC**
AUSTRIA
GERMANY



**THE
ROMANESQUE**
FRANCE
GREECE
ITALY
SPAIN

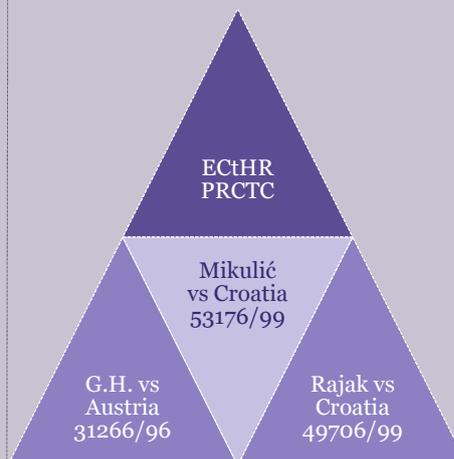


**THE POST-
TRANSITIONAL**
BOSNIA
CROATIA
SERBIA
SLOVENIA
POLAND

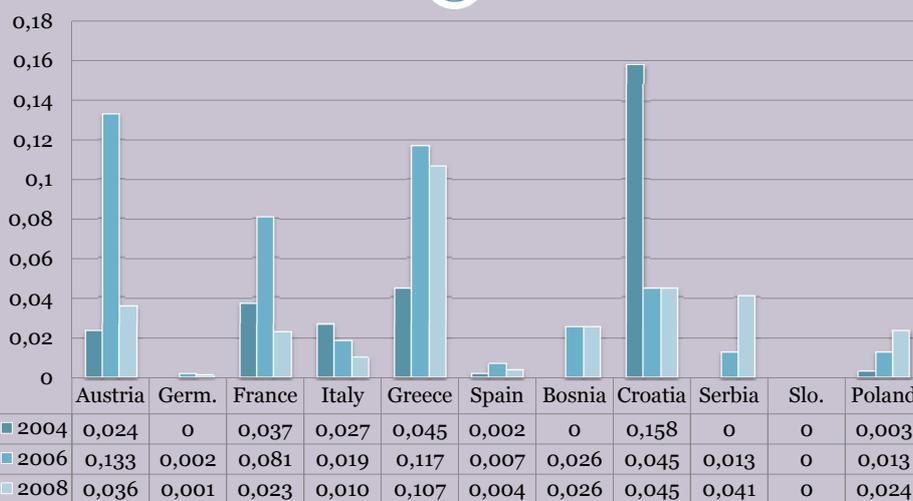
Objectivity: The Subjective

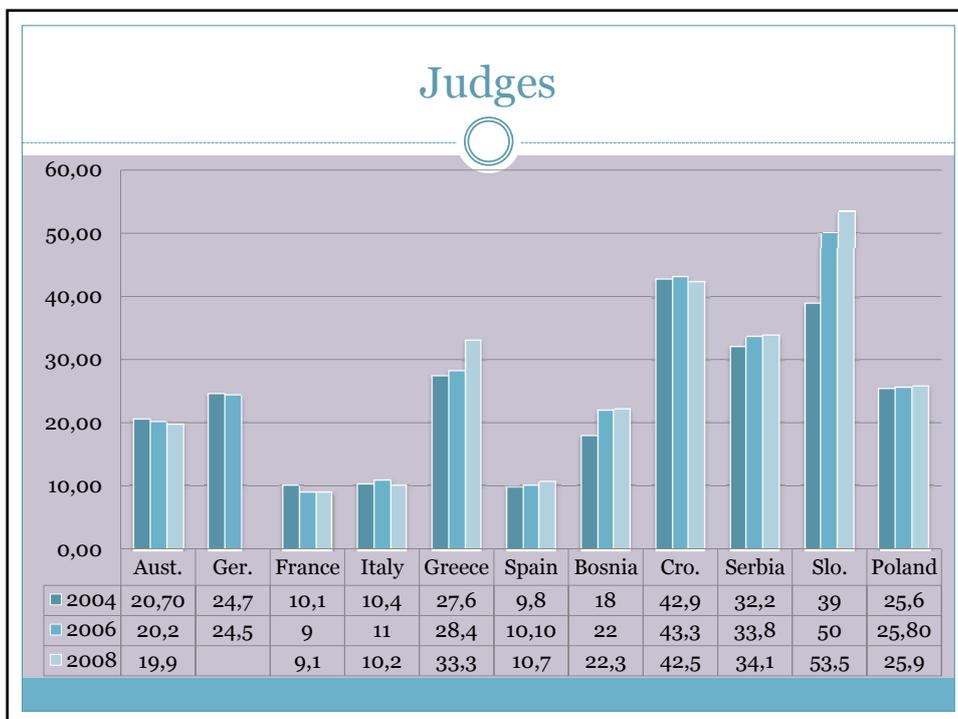
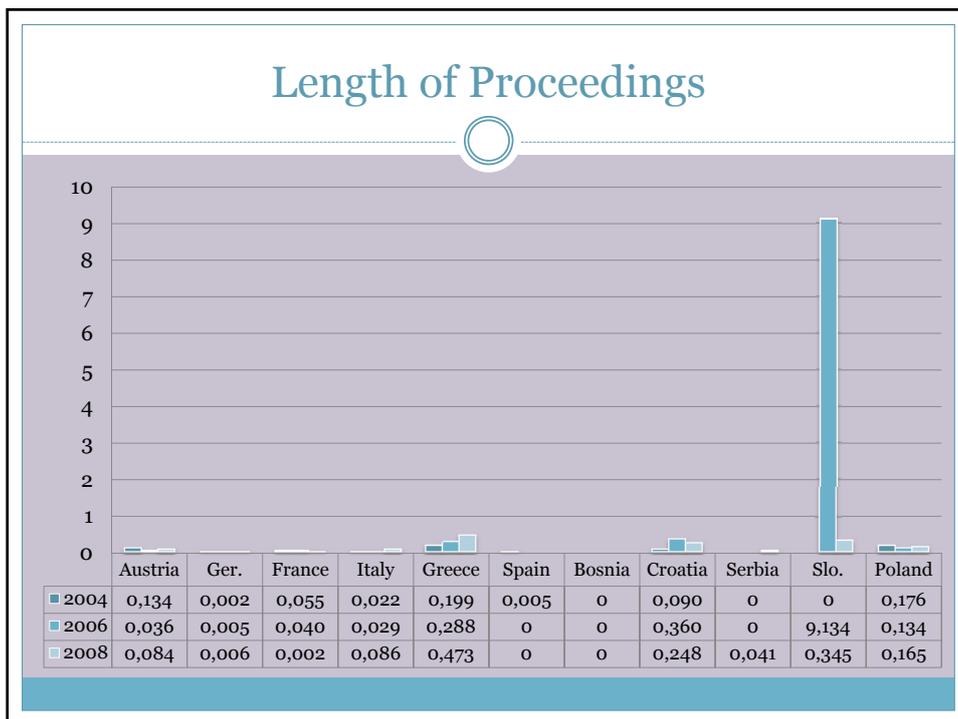
Article 6/1 – Right to a Fair Trial and Length of Proceedings

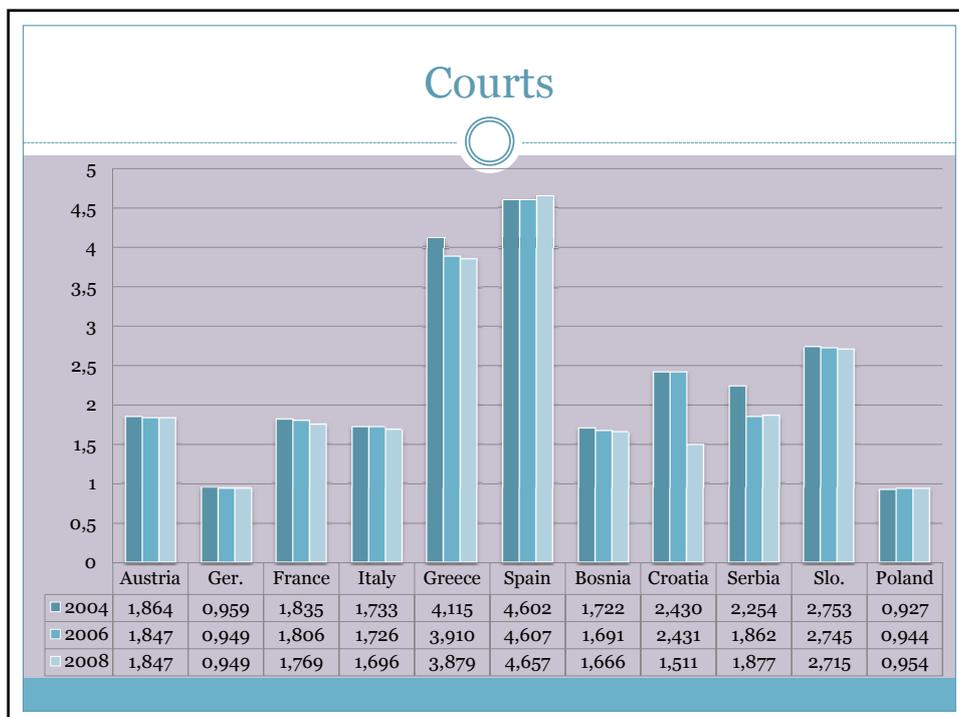
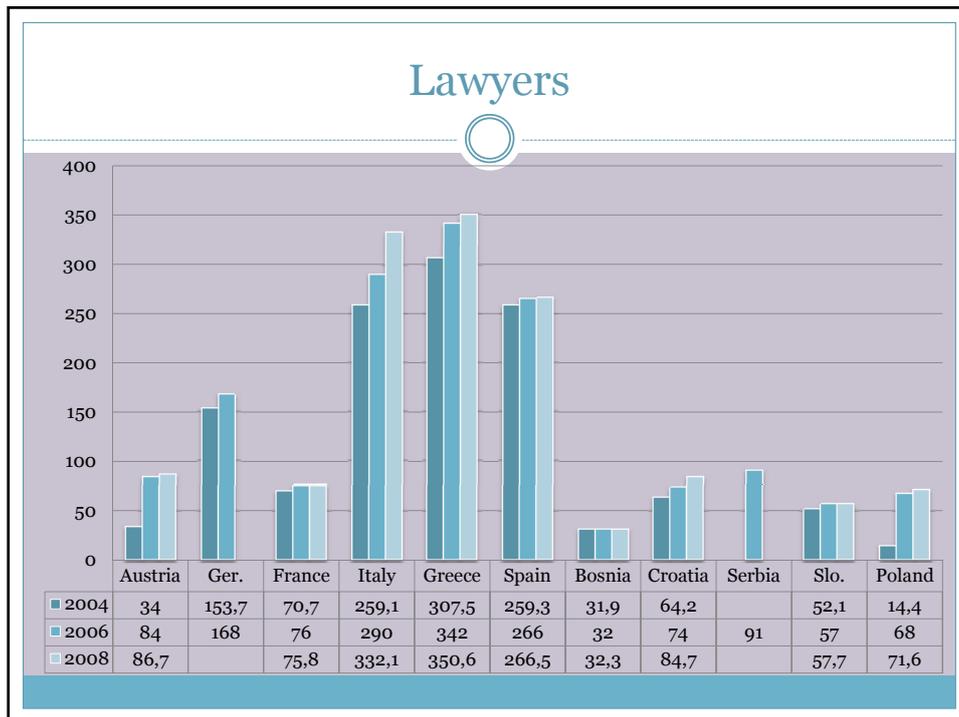
*In the determination of his civil rights and obligations (or of any criminal charge against him), everyone is entitled to a **fair and public hearing** within a **reasonable time** by an **independent and impartial tribunal established by law.***



Right to a Fair Trial







Conclusions Trough Numerology

- **The Germanic Acquiescence of Efficiency**
 - **low number of courts, medium number of lawyers, medium size of the judge pool** (with a declining trend) = 0,036 (2008) RFT/ max. 0,134 LoP
- **The Romanesque Flair for Fair**
 - **very high and steadily growing number of courts, steadily growing high number of lawyers, low to medium large size of the judge pool** = max. 0,117 RFT/ max. 0,473 LoP
- **The Post-transition Predicament and Croatia**
 - **high number of courts, medium size body of lawyers, very high number of judges**

The Little Black Dress Principle

A lower number of **lawyers, courts, and judges**
 with **systematically active roles**,
 lead to discovery of truth in a **timely manner**
 and
 an **efficient judicial system**
 by
objective standards.

THANK YOU
FOR
YOUR ATTENTION!

the
**LITTLE
BLACK
DRESS**



Ognjenka Manojlović
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fact-finding and jurisdiction

assessment from the perspective of effectiveness in
transnational litigation

Simona Grossi, Associate Professor of Law
Loyola Law School Los Angeles

Jurisdiction

EUROPE	UNITED STATES
<ul style="list-style-type: none"> •Article 14/2001 	U.S. Supreme Court's decisions
<ul style="list-style-type: none"> •consent, agreement, waiver of the right to object •locus rei sitae •place of performance (contracts) •place where harm occurred (torts) •place where consumer/the "other party to the contract" resides (product liability) 	
	<i>forum non conveniens</i> <i>"tag" or "transient"</i> <i>jurisdiction</i>

Truth in the modern doctrine of the Russian Civil Procedure

Dr. Vadim Abolonin, LL.M.

German Chancellor Fellow, Alexander von Humboldt Foundation.
Institute of East European Law, University of Kiel (Germany)

Dr. Gleb Abolonin

Institute of Information and Law (Moscow, Russia)

Basic questions

- What kind of truth?
 - Should judge be „active“ or „passive“?
-
-

Formal truth and „passive“ judge

„Formal truth“ belongs to the common law tradition

- „Legal fight“ in front of the judge
 - Mission of the judge : calculation and estimation of evidences
 - Important role of lawyers
-
-

Objective (material) truth and „active“ judge

Concept comes from French and German Law

- Judge shall be eager to know the truth and play an active role
 - Judicial investigation
 - Judge collects the evidences
 - Searching for real state of affairs
-
-

Objective truth?

- Art. 12 of the Russian Code of Civil Procedure

„The court shall govern the process, explain the rights, create the conditions for comprehensive and thorough investigation of evidences, ascertainment of actual circumstances and the correct application of legislation while examining and solving civil cases“

Arguments for objective truth

- Distinction between private and public law
 - Procedural law is a part of the public law
 - Court represents the State
-
-

A civil litigation, when it is not instituted on order to
achieve a judgment based on the ground of objective
truth is senseless

Evgeniy Vaskovsky
(1866-1942)



Jurisdiction as a means of achievement of the truth in civil process of Russia

Prof. Damir Valeev
Kazan (Volga region) Federal University
Russia

Presented by Aigul Valeeva and Leysan Fatkhullina

Plan

- System of courts of Russian Federation,
- Courts of general jurisdiction,
- Courts of arbitrazh,
- Types of proceedings in civil process in courts of general jurisdiction and in courts of arbitrazh.

Legal base of Russian court system

Constitution of Russian Federation
(art. 10, 45, 46)

Federal constitutional law "On
court system of RF"

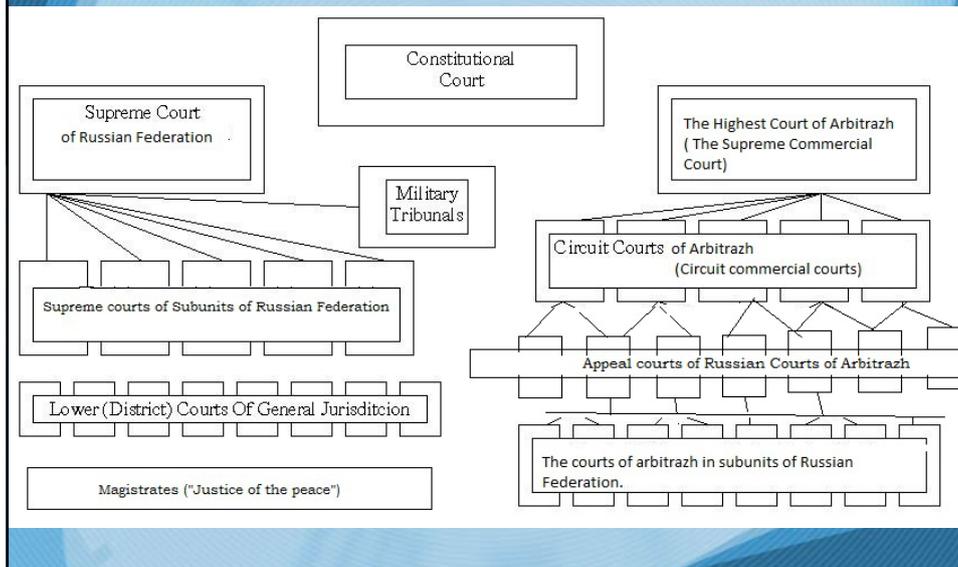
Federal constitutional law "On
arbitrazh' courts of RF"

Civil Process Code

Arbitrazh Process Code

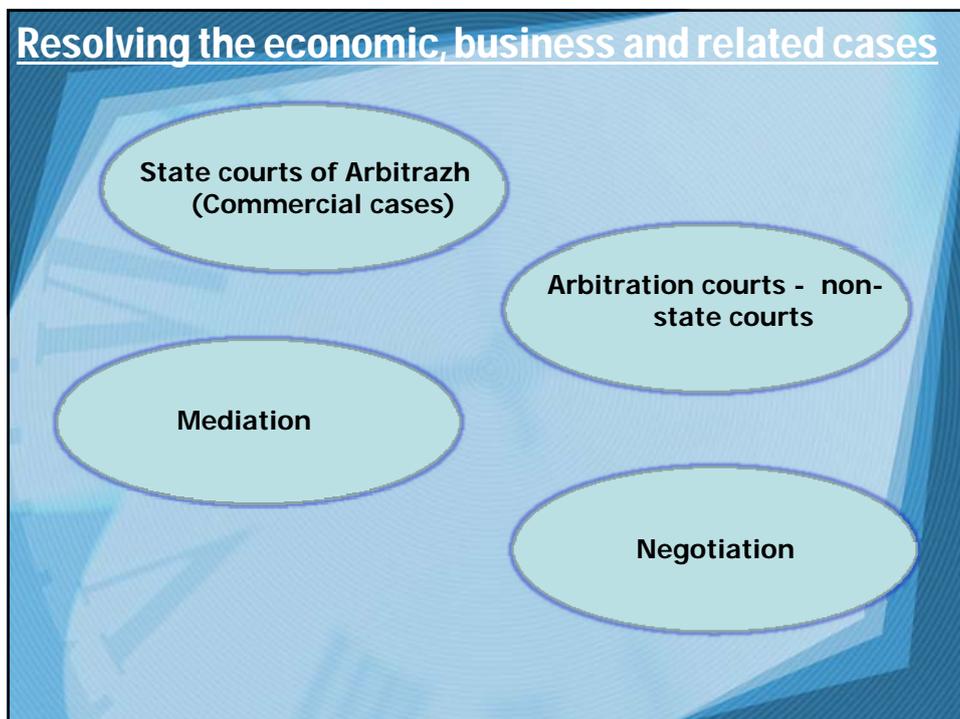
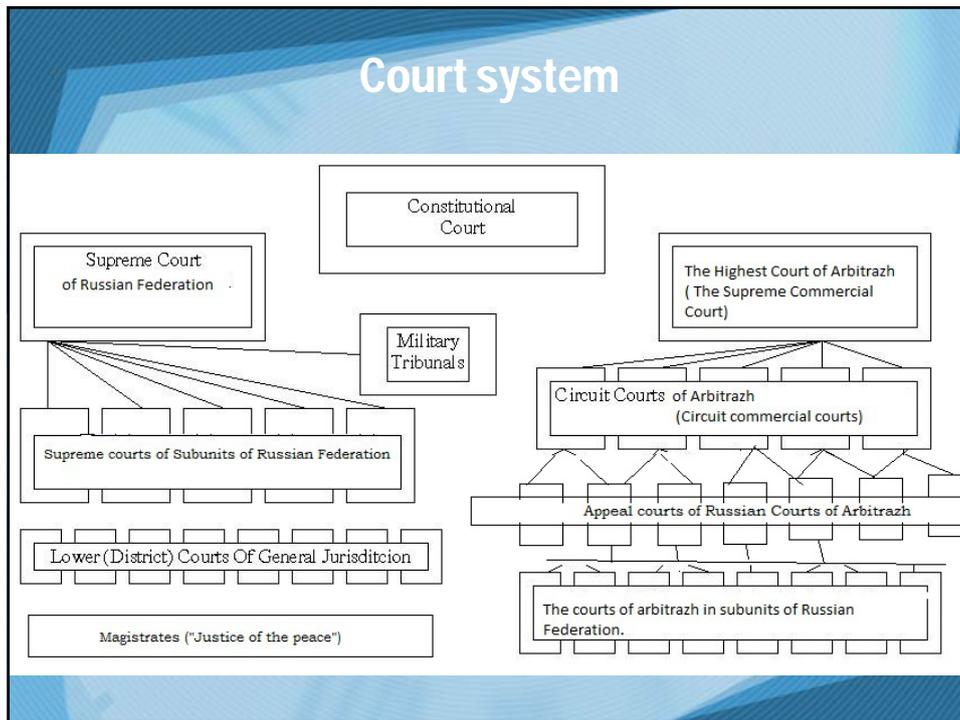


Court system



Courts	The 1 st instance	Appellation	Cassation	Supervision ("nadzor")
RF Supreme courts	X		X	X
Subjects of RF' Supreme Courts	X		X	X
District courts	X	X		
Magistrates court	X			





TYPES OF PROCEEDINGS IN CIVIL PROCESS OF RUSSIA

Claims proceeding

1. Lasts for 2-1 months and 3 in a Court of Arbitrazh
2. Session starts with the announcement of the case.
3. Judge: checks presence of the parties, announces the bench of judges.
4. Disposal of legal proceedings in essence starts with the judges' short report about the claim.
5. Parties are asked whether plaintiff supports his claim, whether defendant admits or not.
6. Explanation of the parties, exploration of evidences.
7. Pleadings.
8. Judge goes to another separate room to make a decision.
9. Announcement of the decision.

In courts of general jurisdiction:	In courts of arbitrazh:
Proceeding on the cases of public character:	Proceeding on cases of administrative and other public character:
<ol style="list-style-type: none">1. On protection of voting rights.2. On challenging of decisions of state organs.3. On acceptance of non-normative acts invalid in the part or hole.	<ol style="list-style-type: none">1. on contest of normative legal acts2. on contest of non-normative legal acts3. On administrative offences.

In courts of general jurisdiction:	In courts of arbitrazh:
Proceedings related to challenging the decision of national arbitration ("treteyskii") courts and enforcement of them.	

IN COURTS OF GENERAL JURISDICTION:

In courts of arbitrazh:

Acceptance and enforcement of decisions of foreign state courts and decisions of foreign arbitration courts.

In courts of general jurisdiction:

In courts of arbitrazh:

Special proceedings:

Special proceedings:

1. Establishment of the facts having legal value.
2. Adoption of the child.
3. The recognition of the citizen is unknown absent or the announcement of the citizen died.
4. Limitation of capacity of the citizen.
5. Recognition of emancipation of the person under 18 y.o. ect.

1. Bankruptcy cases.
2. corporate disputes.
3. on protection of business reputation.
4. disposal of legal proceeding on protection of the rights of a uncertain circle of persons.
5. Establishment of the facts having legal value.
6. The simplified proceedings.

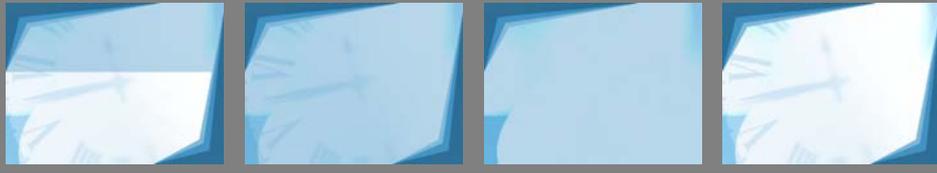
In courts of general jurisdiction:

Court order proceedings

In courts of arbitrazh:

Cases on affairs with participation of foreign persons

Thank you!



Tomislav Karlović

Propter celeritatem dirimendarum litium - presumptions and
efficiency in Roman law

The development of Roman law during the post-classical period was under significant Hellenistic influence which resulted in the wider use of written instruments, especially in the law of obligations. One example of such development represents *stipulatio* as Roman verbal contract and the ever increasing role of written document evidencing its conclusion. The importance of the literary form was becoming steadily greater with the changes in the law of evidence and the use of presumptions attached to the document. At first, these presumptions were used to overcome the deficiencies in the drafting of documents in regard to the verbal form of contract, while their final development represents Justinian's decision that written document creates *praesumptio iuris* that the contract was verbally concluded in presence of both parties and the only allowed counter-evidence was that the parties were not in the same city at the day mentioned in the document. Furthermore, this should be proved only by qualified evidence, "*liquidis ac manifestissimis probationibus*". The motive for this decision was to put an end to the numerous litigations where persons claimed that they were not present and did not conclude the contract. Its result was that *stipulatio* was practically reduced to written form. As a whole, the development leading to and Justinian's constitution indicate the change in the law of evidence in post-classical Roman law and also show how this change, aimed at expediting the disputes before the courts, influenced the substantive law.

More facts, less evidence

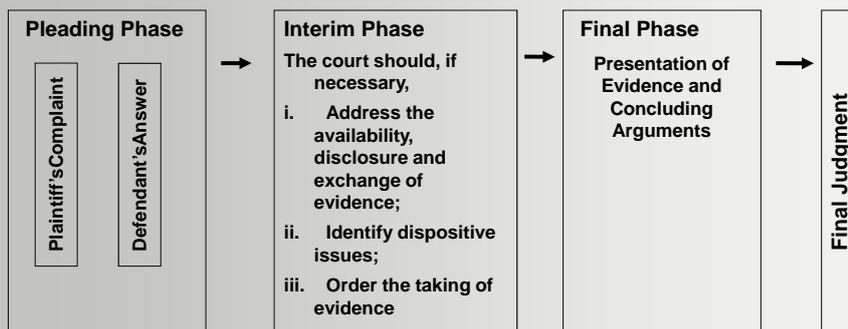
Changes in the Dutch legal system

Remme Verkerk
Dubrovnik, May 2011

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Introduction

Principles of Transnational Civil Procedure

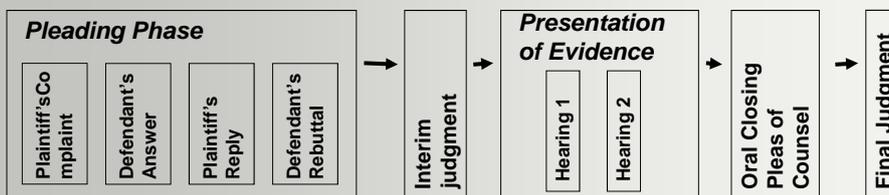


Main theme: the diminishing significance of the third and final stage in the process of litigation.

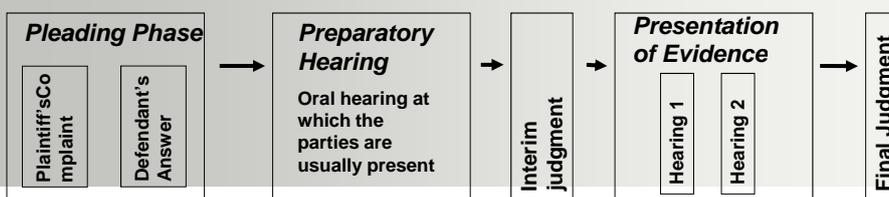
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Structure of Litigation in the Netherlands

Common Course of the Procedure before 2002



Common Course of the Procedure after 2002



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Fewer cases reach the third and final stage

Number of judgments, District Court of Rotterdam Ahsmann 2010

Year	Dispositive judgments	Evidence orders
1997	627	350
1998	790	418
2007	705	175
2008	799	200

Note: limited empirical evidence is available

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AnExplanation

One main explanatory factor: the introduction of a new interim phase in the litigation process

1. The rise of the oral preparatory hearing (personal appearance of the parties).
2. Gradual rise of document discovery.
3. Pre-action examination of witnesses and appointment of experts.

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AnExplanation

Another (possible) explanatory factor: the overhaul of the courts' organizational structure and a new system of financing our courts.

Its effects:

1. More (focus on) efficiency
2. More work pressure is experienced within the judiciary
3. Financial incentives may affect judicial decisions on a case by case basis

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An Explanation

Likely causal relations:

1. Thorough fact-gathering may lead to front-loading. The gravity of the fact-finding process simply shifted from evidentiary hearings towards fact-gathering in the interim-phase.
2. Judges may have incentives to avoid the examination of witnesses. An examination of witnesses increases the work load and is financially unattractive for the court. Judges may be inclined to promote settlement and render summary judgments.
3. Parties may have incentives to avoid evidentiary hearings. Early exchange of information may encourage settlements and there may be cost considerations as well.

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The demise of the traditional presentation of evidence, an appraisal

Striking a balance

1. Efficiency considerations should affect judicial decision-making.
2. Procedural fairness requires that the parties have a right to present their case and, if necessary, to present evidence.
3. The accuracy of the fact-finding process is of great importance for the legitimacy of the legal system, the perceived fairness of the system and the enforcement of substantive law.

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Foodforthought: a viable hypothesis?

1. The traditional system of presenting evidence in court in both civil law systems and common law systems predates Xerox machines, e-mail and cloud computing. (E-)documents are presently widely available and can generally be produced in the early stages of the litigation process at relatively low costs.
2. The shift away from the traditional examination of (witness) evidence towards fact-gathering in the early stages of the litigation process is a consequence of these developments.
3. We should examine the evidence that most improves (i) the litigants perception of fairness and (ii) the accuracy of the fact-finding process at (iii) the lowest costs. Therefore the gradual demise of the third and final stage in the litigation process, an the rise of (e-)document discovery and the personal appearance of the parties is a desirable development.

Annie de Roo

Rob Jagtenberg

Truth and mediation

Outline

This presentation will centre around the tension between - on the one hand - the need in mediation to concentrate on future relations and not to get stuck in each party reconstructing its own truth in the past, and – on the other hand – the experience that genuine reconciliation is only possible if it is based on a full, common appreciation of all relevant underlying facts (which may even include facts that would not be relevant at all in court proceedings). Mirroring civil procedure against mediation might become a thought-provoking exercise, focusing on issues such as ‘whose truth’, and ‘how much truth is needed to move ahead to a truly final (and hence efficient) settlement of the dispute’?

FLIGHT

FIGHT

AVOID

YIELD

SOLVE

CONFRONT

Run Away
Negate

Lump it
Give in

Discuss

Intimidate

Kill

Negotiation

Mediation

Arbitration

Litigation

- **MODERN MEDIATION**
- **BASED ON RESEARCH (HARVARD: FISHER, URY, SANDER)**
- **OFFERED BY PROFESSIONAL EXPERTS**
- **FOCUS ON UNDERLYING INTERESTS INSTEAD OF POSITIONS**
- **REALITY TESTING THROUGH 'BATNA', FINDING WIN-WIN SOLUTIONS**
- **EMPOWERMENT OF DISPUTANTS**
- **IN USA AND INCREASINGLY IN EU: MEDIATION TIED TO LITIGATION**
- **COURTS MAY REFER MANDATORILY OR VOLUNTARILY (NB: BUDGETARY INTEREST GOVERNMENTS!)**

LITIGATION

TRUTH (?)

**NOT AN END IN ITSELF
RECTITUDE OF DECISION**

FACTS

**IN SUPPORT OF LEGAL
POSITIONS TAKEN**

**SELECTION OF FACTS BY
LAWYER CUTTING OFF PP**

MEDIATION

TRUTH ?

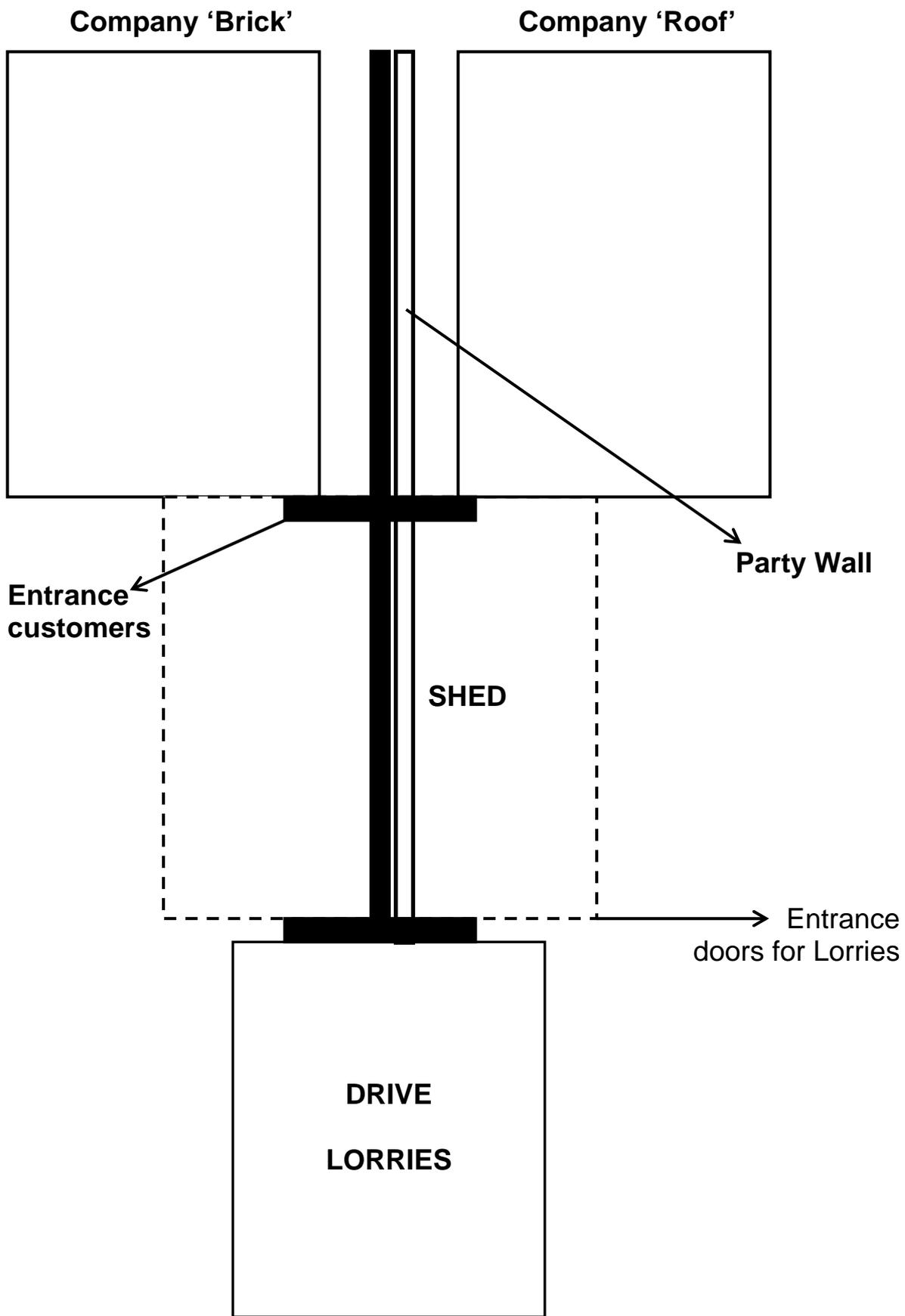
**PRIVATE CUSTOMER
SATISFACTION**

FACTS

**SELECTED BY PP
JOINTLY AS RELEVANT**

**EACH PP MAY TELL
WHOLE STORY**

<- INTERESTS ->



LITIGATION

MEDIATION

EMOTIONS = FACT ?

**?
(PERSONAL INJURY)**

BASICALLY YES

**DO EMOTIONS SUFFICE
FOR A STANDING?**

NO

YES

<- INTERESTS ->

LITIGATION

**DUTY TO PROVIDE EVIDENCE
SANCTIONS?**

**DISCLOSURE
DISCOVERY
WITNESSES (OATH)
JUDIC. INFERENCES
PERJURY? FRAUD?**

**POSSIBILITY TO EXCLUDE
EVIDENCE
SANCTIONS?**

**PRIVILEGE
BY AGREEMENT
ESCROW**

MEDIATION

**AGT TO MEDIATE:
BEST ENDEAVOUR
PLEAD DEFECT OF
CONSENT?**

PP INTER SE CAUCUS

**AGREEMENT TO
MEDIATE (DUTY TO
OBSERVE SECRECY)**

LITIGATION

MEDIATION

IDENTICAL CASE IN CIVIL LAW / COMMON LAW

FILES READ IN ADVANCE
1 HOUR ALLOTTED
FOR HEARING
NO NEED WITNESSES

civil
law

JUDGE: SHALL I
MEDIATE? (+ 1 hr.)

INFO GATHERED DURING
TRIAL; + 7 DAYS TO
HEAR ALL WITNESSES

common
law

CPR (REFERRAL
OPTION) NOT USED

ZUCKERMAN, LIFE!:
RECTITUDE vs. TIME vs. COSTS

LITIGATION

MEDIATION

**THE EFFICIENCY DILEMMA
(NB: PRODUCTIVE EFFICIENCY)**

**THROUGH STRATEGIC BEHAVIOUR, OUTPUT
REQUIREMENTS MAY THWART NECESSARY AND
EQUIBALANCED COLLECTION & ASSESSMENT OF
DATA/FACTS/EVIDENCE**

**JUDGES ATTUNE OUTPUT
TO FIT FIXED SALARY OR
BUDGET**

**MEDIATORS
ATTUNE OUTPUT
TO MAXIMIZE INCOME**

LITIGATION

MEDIATION

TRUTH & RULE OF LAW

- > **COMPULSORY REFERRAL OF**
- > **CASES BY COURTS TO**
- > **MEDIATORS**

OWEN FISS ON LAW AS A PUBLIC GOOD

THE ITALIAN JOB

SOCIETIES IN TRANSITION?

LITIGATION

MEDIATION

NOT FACTS, BUT (LEGAL) FICTION !

**FICTION MOST
FREQUENTLY USED
IN REVENUE LAW**

**FICTION NOT
USED**

**OTHER AREAS OF LAW
SUBSTANTIVE/PROCEDURAL**

**AS A DEVICE TO ENHANCE
EFFICIENCY**

LITIGATION

**PERCEPTION OF DISPUTANTS
WHO CHECKS, CORRECTS?
SEARCHING QUESTIONS?**

PERCEPTION OF JUDGE

**UNCONSCIOUS CASTING
IN FORMAT JUDGMENT ?**

WHO CHECKS, CORRECTS?

MEDIATION

**PERCEPTION
OF MEDIATOR**

**ONE SIDE
OBSTRUCTS
SETTLEMENT
WHO CHECKS,
CORRECTS?**

TWO PROPOSALS

MEDIATION:

**INSERT IN EU MEDIATION DIRECTIVE POSSIBILITY
FOR ONE SHOTTERS
TO OVERRIDE SECRECY IN CASE OF DEFECTIVE CONSENT
APPLICATION TO SPECIALIZED JUDGE**

LITIGATION:

**EXPERIMENT WITH TWO-STAGE PROCEDURE
FACT-FINDING (STAGE 1) & REPORT BACK TO PARTIES
FOR CONFIRMATION
THEN (STAGE 2) JUDICIAL DECISION ON THE LEGAL MERITS**



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**PUBLIC AND PRIVATE JUSTICE:
DISPUTE RESOLUTION IN MODERN SOCIETIES**

**Course 2011 Inter University Center Dubrovnik
General Topic: Truth and Efficiency in Civil Proceedings**

**Specific Topic: On Deconstruction of the Truth-Postulate by the Mainstream
German Doctrine of Civil Procedure**

On Deconstruction of the Truth-Postulate by the Mainstream German Doctrine of Civil Procedure¹

Peter Gilles, Goethe University, Frankfurt am Main, Germany

Not uncommonly, the “purpose of civil procedure”² is described as the enforcement of subjective-individual material-substantive rights. This declaration is quite often combined with a more philosophical or theoretical purpose description of the “realization of justice on the basis of the truth”,³ thereby emphasizing that the intended justice is a material rather than a formal one, whatever this term “material justice” may mean.

To avoid misunderstandings in advance it should be pointed out that the above has nothing to do with “procedural justice”⁴ in the sense of producing justice by procedure which is no part of the question which is anyway not recognized currently by most of the academics specialized in civil procedure but mostly by theorists of law.

Instead, this article focuses on the truth-postulate by the mainstream German doctrine of civil procedure which distinguishes not only between a subjective and an objective truth, but also between a typical, purportedly “formal truth” and a “material truth”. This stream of thought is based on the concept that we have not only one type of truth, but two types of truth, instead of a unique one which is for sure only recognizable and able to be reconstructed through different methods and quantifiers.

Coming back to the key- and catch-word of justice the content of this terminus is difficult to define because of its abstractness and its procedurally inoperable nature, if it can be defined at all. No wonder that therefore the prevailing opinion tries to narrow the question by substituting the terminus of justice by the termini of “legitimacy” or “correctness” of court decisions (see §§ 68, 561 ZPO, and also § 526 ZPO former version), reducing the question as to whether a court decision is fundamentally correct or at least correct in a “formal,” procedural way, dividing the correctness into an “outer procedural” and an “inner procedural” one.⁵

¹ German-English translation by Julia Vinson, J.D., M.L.I.S., (U.S.A.), Doctoral candidate, Goethe-Universität Frankfurt; Elta Nhitte Catalan (Philippines), Candidate for Law Exam, Goethe University Frankfurt Main.

² See especially *Schilken*, *Zivilprozessrecht*, 5. Aufl. 2006. S.6f; *Gaul*, *Zur Frage nach dem Zweck des Zivilprozesses*, *AcP* 168 (1968), S.27, 48; *Pawlowski*, *Die Aufgabe des Zivilprozesses*, S.345, 358.

³ But see *Gilles* *Prozessrechtvergleichung / Comparative Procedural Law*, 1996. S.48.

⁴ See e.g. *Gilles*, *Rechtsmittel im Zivilprozess*, 1972. S 51ff.

⁵ See: *Gilles*, *Der Beitrag der Sozialwissenschaften zur Reform des Prozessrechts*, in: *Gilles* (Hrsg.) *Effektivität des Rechtsschutzes und Verfassungsmäßige Ordnung*, 1983., S.131; *Gilles*, *Juristenausbildung und Zivilverfahrensrecht*, 1983, S.58.

When dealing now with the purpose of civil procedure, which has to be restricted to the normal first instance court procedure, this purpose does not mean only the realization of justice in general, and also not only the realization of material justice in the sense of material legitimacy or correctness, but rather the interpretation and application of the procedural as well as the substantive law in absence of any mistakes or infringements of fact-finding as well as law-finding rules (see §§ 513, 520, 545, 546, 551 ZPO, and also § 562 ZPO).

Also, when we neglect the different duties and responsibilities of the court instances and jurisdictions and their divisions in fact-finding instances and legal control instances, combined with the statement that the realization of justice on the basis of the truth is mainly the duty and responsibility of the fact-finding instances, the actual “realization” of justice on the basis of the truth has to be critically questioned.

With this formulization, it may be construed that the decision-making or decision-finding takes place on the basis of the “true” or “real” circumstances of the case, i.e. on facts which has already occurred and which belong mainly to the past. In other words, this situation is viewed with the perspective of previously occurring conditions and events, actions and behaviours which the court must consider as a “historical” situation which the court has to reconstruct. To reach this goal according to the expressive wording of the regulations the court must weight both the “truth” and the “completeness” of the parties’ assertions. Furthermore, if necessary, the court must also discern this truth and completeness by the taking of evidence to fulfil the court’s obligation to reconstruct a –let’s say- virtual depiction of the facts and circumstances in the sense of mere information about those facts and circumstances in order to discover the truth (see §§ 138, 286, 520 ZPO). Only then the civil procedure will have satisfied its truth-finding purpose. All this is only valid regarding the normality that a fact-finding takes place.

So far, we have to keep in mind that there are quite a lot of possibilities that a fact-finding does not take place for example, when procedural conditions as conditions of admissibility are absent with the consequence of pure procedural decision which does not deal with the factual and material side of the case, but rather with the procedurally admissible conditions. The civil procedure would have missed its purpose.

The same holds true where, according to the law, no inspection of the facts takes place, like in cases of judgments in default (§§ 330, 331 ZPO), judgments based on admission, or judgments based on waiver of the claim (§§ 306, 307 ZPO). All these judg-

ments are not a result of truth-finding reconstruction of the facts; therefore, there is no need for the judge to base his grounds of his decision on facts (§ 313, 313b ZPO).

More important, the law itself demands only a limited establishment of the truth in respect to specific aspects or in respect to the nature of *res ipso* or even in respect to an impossibility of tracing the truth. Sometimes the law even allows incompleteness of the case to be investigated, which means taking into account a possible “untruth.” An example of this legally limited fact finding is the rejection of late factual submissions of the parties (§296 ZPO), as well as rejections of presentations after the conclusion of the oral hearing (§ 296a ZPO).

Much more important in regard of full truth, half-truth or even untruth is the following: according to the law, the court decision concerning whether a factual allegation of one party or of both parties is “true or not true” is principally assigned to the free discretion of the court (§ 286 ZPO). The process of building up the judge’s conviction must be based on the entire content of the negotiations and only additional on the taking of evidence. But in contrast to the official section title of § 286 ZPO and in contrast to the leading opinion, this section does not only deal with questions of free consideration of evidence, but also with the free consideration of the whole contents of negotiations, as well as the interactions of the parties with all their statements and counterstatements, allegations and denials (see § 282 ZPO). Concerning these negotiations containing the presentations of the parties according to the case in a factual as well as a legal relationship (§ 137 ZPO), the parties play a decisive role. In so far they are the main actors of this part of the civil process, while the court itself has only the responsibility to lead and to manage the negotiations and to take care that the case will be discussed exhaustively (§ 136 ZPO). Furthermore, the parties are the main source of information for the court concerning the facts and factual circumstances. Therefore to discover the truth, each of the parties is accordingly obliged to recount the facts and circumstances completely, thoroughly, and truthfully (§ 138 I ZPO) but without any legislative sanctions when the parties will not do so.

Besides this truth postulate is not really taken seriously in theory or in practice due to the following reasons: in clear violation of these legal demands, mentioned in § 138 ZPO, occasionally accompanied by legitimating this with an exceedingly understood parties’ autonomy, as well as exceedingly interpreted principle of submission of facts by the parties, the majority of legal scholars and practitioners contend that each party

must submit only those factual circumstances which are most favorable to each of them. Accordingly, the plaintiff may present an incomplete submission by submitting only those factual circumstances which could legitimate his claim, while omitting those facts which cast his claim in an unfavorable light. Therefore, according to this prevailing opinion, the defendant must only submit facts concerning objection and defense.

The consequence of such a point of view will not be a mathematical result like “1/2 truth of the plaintiff + 1/2 truth of the defendant = 1/1 full truth” but the result will be 1/1 untruth of the plaintiff + 1/1 untruth of the defendant = 1/1 untruth.

But the most severe and problematic aspect allows us to talk about “The deconstruction of the truth postulate by the mainstream of German civil procedure” is the following: the nearly unanimous opinion misinterprets a legal text (§ 138 III ZPO) which declares that facts which are not expressly contested must be deemed and admitted as an unlimited truth. This misunderstanding is somehow the seed of the “formal” truth. Because of this misunderstanding the leading opinion comes to the inaccurate conclusion that the court may not doubt a party’s allegations followed by an inquiry of the doubted facts by the court respectively by taking evidence. Even then when the court has strong and deep doubts, the courts must accept a party’s allegations as truthful. However, such an opinion cannot be extrapolated from the law because the above mentioned section contains only a “fictional admission” and also the consequences of this admission. Concerning the admission, we may refer to § 288 ZPO, which states that the factual allegations of the parties do not require proof if they are admitted. The same is for the evidence of facts (§291 ZPO). The theoretical background of these regulations has to be seen in the idea that in case of admitted facts under normal circumstances, no reason exists to doubt the truth. In other words, there is no need for inquiries or evidence taking. But in cases where the court has doubts, the court may, at its discretion, make inquiries for additional clarification (§§ 139 ff ZPO). If the court would not be allowed to inquire to exclude all possibility of its doubt, the legally provided free conviction regarding the truth of factual allegations (§ 286 ZPO) would be ignored.⁶

In this context, it is also noteworthy that the German evidence procedure law, which stems from the 19th century, contains a principle of “strict evidence” which allows only specifically enumerated means of proof that is “evidence by inspection” (§§

⁶ See *Schmidt*, *Der Zweck des Zivilprozessrecht und seine Ökonomie*, 1973; *Gilles*, *Zum Bedeutungszuwachs und Funktionswandel des Prozessrechts*, S.407.

371ff ZPO), “evidence by witnesses” (§§ 373ff ZPO), “expert evidence” (§§ 402ff ZPO), “documentary evidence” (§§ 415ff ZPO), and the “evidence by examination of parties” (§§ 445ff ZPO).

This enumeration of only five means of proof seems to be overage and outdated. Nowadays this should lead to the comprehension that our procedural law is not well-prepared for discovering truth. This is illustrated by the question of whether photos, videos, and films, audio tapes and recorded declarations belong to which type of regulated means of proofs, and whether they can be used as evidence and how much weight they may be given as evidence. In this context one should not overlook that the court i.e. is largely not willing to apply regulations which they consider as outdated, overly narrow regulations or inappropriate for our time.

Therefore the practice has developed since a long time let’s say compensations of the principle of strict evidence by inventing “informal information acquisition” or “informal factual clarification” like the recently used informal informational evidence by examination of parties or by calling in the files or records of other already terminated or still pending procedures.

Last but not least the discussed truth postulate, as well as the abovementioned justice postulate and the legitimacy postulate, have been weakened by a newer fundamental movement in the whole era of justice systems and court procedures which may name the “economization respectively rationalization”⁷. This movement demands a balance between the postulate of truth, justice or legitimacy with other postulates or basic procedural principles, mainly the principle of efficiency or effectiveness of court proceedings culminating in the goal to produce a best possible judgment in a reasonable amount of time with the least expenditure respectively costs, which can be called the “mission of optimization” of conflicting procedural purposes.

This basic idea of economization of justice systems and court procedures does not longer support the old concept of “fact finding at any cost” as well as the former “principle of exhaustion” respectively utilization of the whole lot of all available means of evidence.

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Interplay btw. Efficiency and the Active Role of Judges in Family Proceedings

Branka Resetar, assist. professor,
Faculty of Law
University of Osijek

Outline

1. Legal sources – Law in book
2. Case (enforcement of contact order and handover of passport) – Law in action
3. Comment on efficiency and role of judge
4. Conclusion

1. Legal sources – Law in book

- A) Principles of family proceedings
 - The principle of urgency
 - Inquisitorial principle
 - Principle of fact finding (“pursuit for truth”)

1. Legal sources – Law in book

- B) Legal rules of enforcement and interim measures
 - Family law Act 2003
 - Enforcement Act 1996

2. Case (enforcement of contact order and handover of passport) – Law in action

- Contact order – contact btw. father and two children , half of winter school holiday
- Application for E and IM (5.12.2007)
- First hearing (14.12.2007)
- Second hearing (17.12.2007.)
- Handover of passport and suspension of the proceeding (18.12.2007.)

3. Comment on efficiency and role of judge

- Proceeding was concentrated – 2 hearings,
- Minimum of procedural formalities – telegram, fast process c. disqualification
- Verbal discussion – absence of written communication
- Fast and cheap inquiry methods of fact finding – phone call to teacher
- Fact-finding – informal methods

Conclusion

- Different rules for family proceedings
- Inquisitorial principle
- Skill of judge

Thanks!

THE ROLE OF THE JUDGE IN FRANCE AND ROMANIA AS REGARDS THE LEGAL RELATION OF THE PARTIES

Ognean Adela Olga
PhD researcher
Maastricht University

1

Contents

1. Judicial case management: definitions
2. Related concepts in France and Romania
3. The role of the judge as regards “the legal relations of the parties”
4. Method to quantify judicial activity
5. Romania and France
6. Further problems

2

Ivo Giesen

Any form or manifestation of the judge's/court's (1) discretionary powers and (2) the way these are used (3) to direct the process (4) in any direction and (5) at any point of its course.

Neil Andrews:

The essence of judicial case management in English law, is that (1) the judicial system as a whole and (2) the courts in individual cases (3) regulate (4) the content and (5) progress of litigation

3

Working definition

Judicial case management is (1) a manifestation of the judge's (or the court's, or the judicial system's) discretionary or mandatory powers (2) in conducting litigation (3) at a level that is more intense than in the traditional systems of civil procedure and that is aimed at

- (a) reducing costs and/or
- (b) increasing the speed of litigation and/or
- (c) establishing the substantive truth and/or
- (d) redefining the legal relation of the parties.

4

Defining “redefining legal relations”

With “redefining legal relations” all aspects of the relation of the parties are meant, including their (implicit) opinion on procedural matters like

- the jurisdiction of the court
- the validity of the introductory document
- the observation of periods of appeal

5

Research focus and program

Research focus:

- to what degree
- courts in different jurisdictions
- in civil cases
- are inquisitorial with respect to the aim of redefining the legal relations of the parties

Methodology:

- inventory of interventions
- system of categorizing powers
- weighing mechanism

6

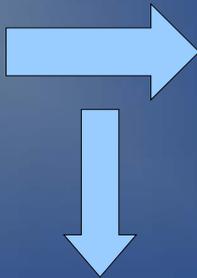
Terminology

- judicial case management has an anglo-american origin
- France – *l'office du juge* = the office of the judge
- Romania – *rolul activ al judecatorului* = the active role of the judge

7

Initial phase of civil proceedings

Submission of
the
statement
of claim and
the statement
of defence



Administration
of
proof

Preliminary issues

8

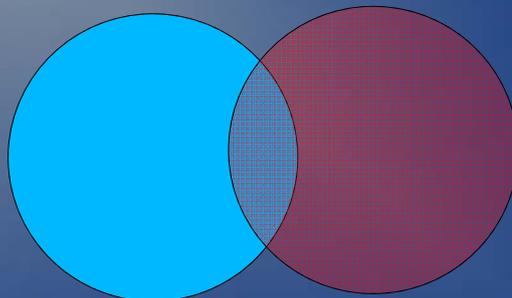
INVENTORY AND CATEGORIES

Jurisdiction X				
No power A	Discretionary power with exceptions B	Discretionary Power C	Mandatory power with exceptions D	Mandatory power E
			X	
Lack of interest				

- Each item will be categorized and graded on a scale of 0-10:
- no power (grade 0)
 - discretionary power with exceptions (grade in $<0,10]$)
 - discretionary power (grade in $<0,10]$)
 - mandatory power with exceptions (grade in $<0,10]$)
 - mandatory power (grade in $<0,10]$)

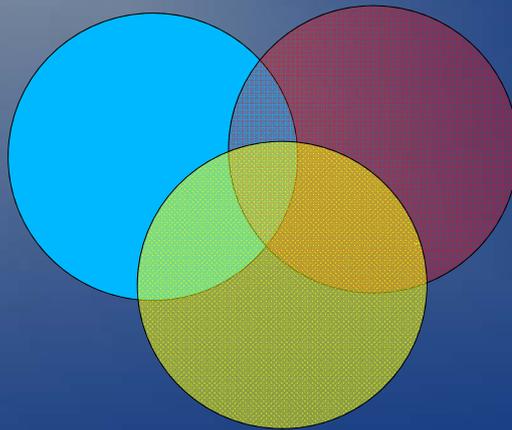
9

DEFINING CATEGORIES



10

DEFINING CATEGORIES



11

	ROMANIA					FRANCE				
Preliminary issues	A	B	C	D	E	A	B	C	D	E
Disqualification					X				X	
Lack of jurisdiction <i>ratione materiae</i>					X				X	
Lack of territorial jurisdiction (venue)				X					X	
Statutes of limitation					X	X				
Nullity of documents for lack of form					X					X
Lis pendens					X				X	
Connexite (joinder of claims/parties)					X			X		
Res judicata					X			X	X	
Lack of interest					X			X	X	
Lack of...					X			X	X	

	ROMANIA					FRANCE				
Preliminary issues	A	B	C	D	E	A	B	C	D	E
Disqualification					7.4				5.6	
Lack of jurisdiction ratione materiae					7.6				5.9	
Lack of territorial jurisdiction (venue)				5.8					7	
Statutes of limitation					7	0				
Nullity of documents for lack of form				7.7						6.6
Lis pendens					5				4.2	
Connexite (joinder of claims/parties)					5			3.5		
Res judicata					9			3		
Lack of interest					9.2				7	
Lack of					6				5.6	

CLINICAL LEGAL EDUCATION

INTRODUCTION

1. Present your Clinic – when and how is it established? What was the reason for its establishment?
2. What is the legal basis for the activities of the Clinic?
3. Describe the internal organisation of the Clinic and its organizational relation to Law School/University.



CLINICAL LEGAL EDUCATION

ROLE IN THE LEGAL AID SYSTEM

1. What is the main objective of your Clinic (training, legal aid, education)?
2. Is the Clinic engaged in the actual provision of legal aid?
3. Systems of filtering of clients: eligibility, how the Clinic decides on it?



Oh, that's awful!! And you have no money left? You really should see a legal aid clinic.

CLINICAL LEGAL EDUCATION

INTEGRATION IN THE CURRICULUM

1. Do students get credits for participating in the legal clinic?
2. Is participating in the clinic considered as an internship or a course?
3. Is the participation of a student assessed or graded in some way?



Graduated legal Helper

CLINICAL LEGAL EDUCATION

LEVEL OF LEGAL SKILLS

1. Are there requirements as regards the exams passed by participating students?
2. Is there an entry exam?
3. Is there a special training before or during the program?



CLINICAL LEGAL EDUCATION

SCOPE OF CLINICAL WORK

1. Does clinical work include client interviews, formal advice, correspondence, writing of procedural documents?
2. Are students allowed to have direct contacts with the opposing party('s counsel), lawyers, courts, public prosecutors?
3. Do students represent clients in court or are they allowed to speak in court on behalf of them?



Three law students determined to get the truth out of their client

CLINICAL LEGAL EDUCATION

SUPERVISING STUDENTS' WORK

1. Is there an experienced lawyer supervising the student's work?
2. Are letters and other documents subject to approval before they can be sent, are interviews prepared in someway?
3. If students assist clients in court, which measures are taken to safeguard the quality of their actions?



Sign on all the doors between legal clinic and court room

CLINICAL LEGAL EDUCATION

PARTNERS

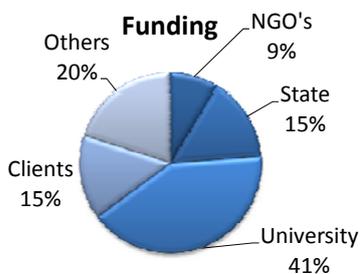
1. With whom does the Clinic cooperate?
2. Networking with other Clinics?
3. Are there sideline activities, initiatives, national or international cooperation?



CLINICAL LEGAL EDUCATION

FUNDING

1. How facilities (building, staff, office supplies) are financed?
2. Do clients pay for the services of the clinic?
3. Are there other case related sources of income?



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Prof. Remco van Rhee, University of Maastricht – Prof. Van Rhee is the Head of the Metajuridica Department of the Maastricht University Law School and Academic Director of the Maastricht University European Law School. He is also member of the board of editors of several publications, among other the Civil Procedure in Europe-series, where he edited an important book "The Law's Delay" based on the papers presented at international conference "The History of Delays in Civil Procedure". Van Rhee is also one of the directors of the research programs "Foundations of European Private Law" and of "Foundations and Principles of Civil Procedure in Europe" of the Ius Commune Research School. He is chairman of the Working Group on the History of Civil Procedure sponsored by the German Gerda Henkel Foundation. Additionally, he is general editor of the Civil Procedure Casebook of the Ius Commune Casebooks for the Common Law of Europe. Extensive more information can be found at <http://www.personeel.unimaas.nl/remco.vanrhee/>.

Prof. Alan Uzelac, University of Zagreb - Professor Uzelac teaches courses on Civil Procedure, Alternative Dispute Resolution, Arbitration and Organization of Judiciary at the Universities of Zagreb and Osijek. Apart from academic duties, Dr. Uzelac is an expert who collaborated in the number of projects for the assistance to law reforms. As national delegate in the European Commission for the Efficiency of Justice of the Council of Europe he is elected to be Member of the Bureau of this organization, where he currently presides over the work of the Task Force on Timeframes of Proceedings. He spent ten years working as the Secretary General of the Arbitration Court at the Croatian Chamber of Commerce where he was also editor of the international law review (Croatian Arbitration Yearbook) and organizer of international conferences. Further biographical data and other relevant information could be found at <http://alanuzelac.from.hr>.

Prof. Burkhard Hess, University of Heidelberg – Director of the Institute of Civil Law, Civil Procedure, International Private and Procedural Law and Comparative Law at the University of Heidelberg, Germany. Author of a number of projects and books in the area of functioning of justice, inter alia – most recently – of the study on Enforcement Agency Practice in Europe. See <http://www.ipr.uni-heidelberg.de/Mitarbeiter/Professoren/Hess/Hess.htm>.

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NOTES FOR SCHOLARSHIPS, TRAVEL AND ACCOMMODATION

If your scholarship covers **travel expenses**, please note that these will be reimbursed during the program. In order to get your travel cost refunded, please give your tickets to the Course organization team members so that they can be copied. Upon return home, you are obliged to send in your ticket in the envelope.

If your scholarship covers **accommodation expenses**, please note that everything will be taken care of directly with the owners of private accommodation or the Hotel.

SOCIAL ACTIVITIES

Sunday, May 22

Meeting of participants (Stradun,
Gradska kavana.)

After the meeting (from 19,30 to 20,00) an informal gathering for a dinner in one of the restaurants in the center of the old City of Dubrovnik (everyone pays his own expenses).

Wednesday, May 25

Cable-car Excursion to Srđ Hill

Panoramic Walk to Bosanka Plateau

A Countryside Dinner in a Cottage on Bosanka Hill

Transportation and the dinner is provided by the courtesy of the PPJ Course.