

PPJ 2017

PUBLIC AND PRIVATE JUSTICE 2017

*Transformation of Civil Justice:
Unity and Diversity*

COURSE MATERIALS

Dubrovnik, 28 May – 2 June, 2017





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Transformation of Civil Justice Unity and Diversity



Twelfth PPJ Course and Conference (2017) Programme

<p><u>Monday, May 29</u></p> <p>Registration (9,00 - 9,30)</p> <p>Morning Session: (9,30 – 13,00)</p> <p>[Coffee break 11,00-11,30]</p> <p>Lunch Break (13,00 – 15,00)</p> <p>Afternoon Session: (15,00 – 18,00)</p>	<p>Opening speeches</p> <p>Alan Uzelac (Zagreb), Civil Justice at Crossroads: Adapt or Die?</p> <p>Sergio Arenhart (Curitiba), Development of Collective Litigation in Brazil</p> <p>Elisabetta Silvestri (Pavia), Human Rights Class Actions and ECHR Pilot Judgment Procedure</p> <p>Matthias Weller (Wiesbaden), Judicial Cooperation of the EU in Civil Matters in Its Relations to Non-EU States - a Blind Spot?</p> <p>Erlis Themeli (Rotterdam), A Survey on Choice of Court Preferences in the EU: Implications for the Competition of Civil Justice Systems</p> <p>Erwin Giesen & Oscar Vranken (Maastricht), Safeguarding the Right to an Impartial Tribunal by Means of Challenging the Court within the EU</p> <p>Jorg Sladič (Maribor), The New Model of Civil Litigation - the European Way</p>
<p><u>Tuesday, May 30</u></p> <p>Morning Session: (9,30 – 13,00)</p> <p>[Coffee break 11,00-11,30]</p> <p>Lunch Break (13,00 – 15,00)</p> <p>Afternoon Session (15,00 – 18,00)</p>	<p>Remco van Rhee (Maastricht), Civil Litigation for 21st Century? Recent Reforms in Dutch Civil Procedure</p> <p>András Osztovits (Budapest), The Changing Role of the Supreme Court in the New Hungarian Code on Civil Procedure</p> <p>Matthias Van Der Haegen (Ghent), Transformation of the Cassation Mechanism: France, the Netherlands and Begium on the Road to <i>Terra Incognita</i>?</p> <p>Aleš Galič (Ljubljana), Trends And Oscilations in The Transformation Of Slovenian Civil Litigation</p> <p>Rashri Baboolal-Frank (Pretoria), Civil Litigation in Tribunals in South Africa: Creating a Singular System</p> <p>Christian A. Delgado Suarez (Lima), Judicial Precedents in New Latin American Civil Procedure</p> <p>Marko Bratković (Zagreb), Roots of the Resistance to the Change in the Supreme Court's Role</p>
<p><u>Wednesday, May 31</u></p> <p>Morning session (9,00 – 12,00)</p> <p>Afternoon (12,00 – 23,30) Study Trip</p>	<p>Margaret Woo (Boston), Manning the Courthouse Gates: Pleadings, Justice and the Nation-State</p> <p>Bartosz Karolczyk (Waszaw), Towards a Major Overhaul of Civil Procedure in Poland</p> <p>Fernando Gascón Inchausti (Madrid), Between Reform and Dejudicialisation: Current Trends in Spanish Civil Litigation</p> <p>Slađana Aras Kramar (Zagreb), Dejudicialization of Consensual Divorce?</p> <p>Excursion to Boka Kotorska – Perast and Kotor</p>

<p><u>Thursday, June 1</u></p> <p>Morning Session (9,30 – 13,00)</p> <p>Lunch Break (13,00 – 15,00)</p> <p>Afternoon Session: (15,00–18,00)</p>	<p>Rob Jagtenberg and Annie de Roo (Rotterdam): The Settlement of Disputes Involving Citizens' Initiative, Particularly in the Domain of Family Law</p> <p>Magne Strandberg (Bergen), Norwegian Civil Procedure under the Influence of EU Law</p> <p>Martina Mantovani (Luxembourg), Trusting Whom? On the Place of Notaries within the European Area of Justice</p> <p>Vesna Rijavec (Maribor), Judicial Cooperation in the EU on the Crossroad</p> <p>Stephanie Law (Luxembourg), The Transformation of Consumers' Procedural Protection in Times of Crisis</p> <p>Adriani Dori (Luxembourg), Benchmarking Member State Courts' Performances as a Catalyst for Domestic Reform?</p>
<p><u>Friday, June 2</u></p> <p>Panel on Legal Aid Systems (9,30 – 11,00)</p> <p>Practice of Legal Aid – Law Clinics (11,30 – 13,00)</p> <p>Lunch break (13,00 – 15,00)</p> <p>Afternoon Session (15,00 – 17,00)</p>	<p><i>PUBLIC AND PRIVATE JUSTICE – ACCESS TO JUSTICE THROUGH LEGAL AID</i></p> <p>1st panel session: <i>EVOLUTION OF LEGAL AID SYSTEMS: ORGANIZATIONAL, FINANCIAL, AND QUALITATIVE ASPECTS</i></p> <p>Jon T. Johnsen (Oslo) - Nordic Legal Aid and 'Access To Justice' in Human Rights. A European Perspective</p> <p>Juraj Brozović (Zagreb) – Legal Aid in Croatia: Between Normative Flexibility and Functional Insufficiency</p> <p>Catherine Evans (London) – Access to Justice Following the Obliteration of Civil Legal Aid</p> <p>2nd panel session: <i>EXCHANGE OF CLINICAL EXPERIENCE AMONG STUDENTS: CHALLENGES AND BEST PRACTICES</i></p> <p><i>Students-clinicians:</i> London South Bank University, Universities of Oslo, Heidelberg, Zagreb and Split</p> <p>General discussion</p>



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Civil Justice at Crossroads: Adapt or Die?

The scholars of civil procedure generally share the view that civil justice does undergo changes, but that, generally, it is a stable and indispensable branch of the state authority. Referring to the well-established human right to a fair trial for any disputes concerning civil rights and obligations, many think that the residual court monopoly on dispute resolution cannot be put in jeopardy. Indeed, public criticism of civil justice is every now and then lively voiced, but isn't that something that also shows the cyclic nature of history, as from Shakespeare's times there were those who wanted to "kill all lawyers" due to the "law's delay"?

The thesis presented in my contribution is, however, that the above reasoning is wrong. The *communis opinio doctorum* about indispensability of civil justice might be only an educated guess, or, worse, a myth. In light of unprecedented developments in the modern world, which have largely been ignored by all but very few national civil justice systems, there are real prospects that civil justice could lag behind the needs of the modern society so much, that it will be surpassed and replaced by other means of social regulation. Indeed, this does not mean that civil courts will be closed overnight, but in a short to medium future the crisis can lead to such a decrease of "real" issues arriving to be processed by the state system of civil justice, that it will become apparent that social costs of a conventional civil justice apparatus are many times bigger than the benefits it provides to the society.

In this presentation, the thesis outlined above will be corroborated with several comparative examples of: 1.) dramatic lagging of court practices and their inability to cope with five distinct challenges (which I am going to identify as the challenges of speed, technology, massification, costs and wisdom); and 2.) ongoing practice of bypassing courts by other dispute resolution devices, which are increasingly cutting the basis for court adjudication from both sides of the dispute resolution spectrum (small and consumer claims on the one side, and complex litigation on the other side). In the light of these examples, alternative scenarios for the future transformations of civil justice systems will be presented, which roughly correspond to the dilemma indicated in the title of the speech.

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Development of Collective Litigation in Brazil

Brazilian collective action has a very peculiar profile. Known for long time – specially by the ancient “popular action” (ação popular) experience, which could be initiated by any citizen, seeking protection for public interests, such as environment and public property – it has developed a singular approach, offering protection to any sort of interests. As a consequence, every kind of collective right may be subject to a collective action. It is common, nowadays, to see the use of collective actions for structural reforms and for questioning public policies. This broad use of collective action demands a new kind of procedure, that enables social participation and allows Government to exercise its eventual political choices.

On the other hand, it is important to see the role played by collective redress in mass litigation. Brazil also accepts something very similar to the North-American “class action”. Nevertheless, one of the main problems faced by Brazilian jurisdiction is the excess of mass litigation. It seems strange, but this situation is due to judicial interpretation of many aspects of this collective action. It seems important, from that point of view, to examine the reasons of this situation and possible solutions to make Brazilian class action more effective.

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Human Rights Class Actions and ECHR Pilot Judgment Procedure

One common imagining of class actions is associated with a few popular novels and films in which aggressive and unscrupulous lawyers sue giant corporations with a view to extorting financial settlements that will be highly profitable for the lawyers themselves but rarely for the members of the class action, the individual men and women who actually suffered injury.

This is the dark side of class actions, one which is widely known by the public. But there is also a bright side, even though less glamorous and hardly appreciated, at least outside the USA: it is the experience of human rights class actions, namely the experience of class actions used as a form of civil redress available to the victims of mass violation of fundamental rights.

The presentation will focus on some particular aspects of human rights class actions, expounding on the controversial concept of universal civil jurisdiction, with some brief remarks on the ECHR pilot judgment procedure and its potential to become a European equivalent of U.S. human rights class actions.

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Judicial Cooperation of the EU in Civil Matters in its Relations to Non-EU States - a Blind Spot?

The EU has become one of the biggest trade blocks in the world. In 2015, the total level of trade in goods (exports and imports) recorded for the EU-28, China and the United States was almost identical, peaking at EUR 3 633 billion in the United States, which was EUR 61 billion higher than for China and EUR 115 billion above the level recorded for the EU-28. And the EU is determined to intensify its external economic integration with third states (DG Trade: “being the leading trade region”). However, increasing volumes of cross-border trade with third states will inevitably bring about an increasing volume of cross-border commercial disputes with trade partners from third states. Yet, there seems to be no strategy of the EU for accompanying economic integration by judicial integration. Of course trust management in judicial cooperation with third states is particularly difficult, of course there is international commercial arbitration as an alternative on the basis of a valid agreement by the parties, of course there are sometimes bilateral and even multilateral treaties on judicial cooperation in civil matters (such as e.g. the Hague Conventions), but in the EU’s external trade policy, in particular in the process of negotiating free trade agreements with third states, these elements do not amount to a coherent strategy for judicial integration. Rather, judicial cooperation appears to be a blind spot. Against this background the presentation will discuss the need and possible steps for improvement.

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A Survey on Choice of Court Preferences in the EU: Implications for the Competition of Civil Justice Systems

At least since 2007, England has been developing promotion campaigns for its courts. Germany, France, and the Netherlands have followed similar steps. Interest groups within these jurisdictions advise their governments to adopt measures to attract foreign litigants. A number of surveys, suggest that English courts and English laws are the most preferred among European jurisdictions. These studies are mostly aimed at businesses while lawyers are only occasionally inquired as respondents. However, lawyers exercise considerable power over their clients. This power allows them to be the true choice makers for both law and court. In view of this, an empirical study aimed at lawyers would provide valuable data on choice makers’ preferences and their considerations. For these reasons, my survey focuses on lawyers’ preferences with regard to choice of court. More specifically, I distributed my survey

to lawyers working for the largest law firms in Europe. Results from this survey indicates that lawyers indeed impose their power on their clients. The most attractive jurisdictions for lawyers are England and Germany, while Italy and Romania are first jurisdictions lawyers try to avoid. The survey suggests also that lawyers consider different elements when choosing a particular court and different elements when describing their ideal court. Results from the survey help at building a better understanding of lawyer's choice preferences, and can help governments to better prepare their competitive endeavors.

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Safeguarding the Right to an Impartial Tribunal by Challenging the Court

Art. 6 (1) ECHR requires a tribunal falling within its scope to be impartial. The treaty does not prescribe any specific set of procedural rules to safeguard this impartiality. It merely serves as a minimum requirement to guarantee a fair trial. This puts an obligation on the state parties to the ECHR to ensure that their national legal systems provide the necessary procedural safeguards to ensure that the requirement of an impartial tribunal is met.

One such safeguard is the power of the parties to a procedure to challenge a judge who in their opinion does not meet the requirement of impartiality. If there is a legitimate reason for one of the parties to suspect a judge from being (subjectively and/or objectively) partial, then that party may seek the disqualification of that judge. Since every state party to the ECHR has the freedom to establish its own civil procedural rules, one can observe some distinctly different elements in the national rules regarding the challenge of judges. These differences can be found e.g. in the grounds on which a judge may be challenged, but also in the time and manner in which will be decided on such a challenge.

Through comparative research, combined with a survey and questionnaires, we are mapping out the different challenging procedures of EU member states and the actual efficiency and effectiveness of these procedures in the real world. Using statistical analysis, we hope to expose statistically significant relationships between challenge regulations, court statistics, challenging frequencies and success rates.

Our main goal is to isolate the factors that influence the efficiency and effectiveness of the national challenging procedures while simultaneously creating a comparative overview of the different challenging procedures. The results will be discussed in a research paper. During the Public and Private Justice conference, we will present our preliminary findings.

New Model of Civil Litigation in Slovenia

In comparative law scholars of US civil litigation started developing a critique of civil lawsuits. They are retrospective, self-contained (the *res iudicata* is confined to parties), party-initiated and party controlled (absence of active managerial judges), entirely linked to existing substantive law. In other words, common law legal scholarship started attacking the traditional civil procedure as not performing its regulatory function. A new model of civil litigation was offered as a remedy. Could this new model also be used in European states?

On a comparative level, the retrospective function of law-suits in private law seems to be a very common law tradition based on Roman law not knowing a general action for injunction (*actio condemnatoria*, *Leistungsklage*) in tort law (*omnis condemnatio pecuniaria est*) that was avoided in continental Europe by actions for injunction for enforcing rights under substantive law. Such a development is probably influenced by extension of public law (see in Europe e.g. compulsory provisions in competition law intending to protect the effective competition like Art. 101 and 102 TFEU) in private lawsuits and is supposedly requiring a transformation of civil procedure in something more than a purely compensatory function.

As far as the US are concerned, it is said that “civil litigation works as a policymaking mechanism.” Europe has acknowledged all the criticism regarding proceedings before administrative and constitutional courts, where litigation indeed works as a policymaking mechanism. It is contended that there is a phenomenon of gradual approaching of functions of lawsuits before ordinary (civil and commercial) and administrative/constitutional courts in Europe. The modern law is rather attacking the traditional division private/public law than manifesting the inability of traditional lawsuits in private law. As far as the retrospective function of a lawsuit in Europe is concerned, actions before administrative and constitutional courts also contain a so called *Normwiederholungsverbot*, i.e., a prohibition of enacting the same legal norm a second time (after it has been repealed once already by the competent court). The French term of *contentieux objectif* is also known. Both terms contain a purely and completely regulatory function. Annulments of administrative acts and laws have an *erga omnes* effect, public law lawsuits are strongly controlled by the judges (*le principe inquisitoire*, *Inquisitionsmaxime*) and completely linked to substantive law (e.g. by special requirements of *locus standi* or interest in bringing proceedings understood as a direct interest due to a norm of law having a direct effect).

On the other hand, regulatory functions in civil litigation in Europe seem to be rather indirect. This is a consequence of a split of judiciary in ordinary (civil and criminal) and specialised (commercial, labour, administrative and constitutional). The indirect regulatory function seems to appear in lawsuits where the insurance companies on the legal basis of subrogated

claims lodge civil lawsuits against tortfeasors. Newer development in Slovenia can be seen e.g. in building matters. Conditions for granting a building permit are a matter of pure public law (so called regulation state). However, where such conditions are either repealed or alleviated, e.g. building and zoning regulations do not set a maximum height any more, then public law doesn't have regulatory function any more. Litigants are left with instruments of private law and private litigation (e.g. like *actio negatoria* or *actio possessoria*).

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Towards a Modern Civil Process: New Developments and Best Practices in the Netherlands

The present paper addresses two important developments in the Netherlands as regards the administration of civil justice: (1) The creation of an International Commercial Court (Netherlands Commercial Court) in Amsterdam and (2) The digitalization of the Dutch civil process.

(1) The Netherlands Commercial (NCC)

There are various reasons for the establishment of the NCC. Apart from the fact that litigation in Dutch may be impracticable for multinationals, it has been observed that major international cases do not reach the ordinary courts anymore due to a movement to arbitration and foreign courts (e.g. the Commercial Court in London) where cases are heard in English. This development is problematic for various reasons, one of them being the fact that as a consequence the Dutch courts are losing their experience in dealing with complex international litigation. This is unfortunate, since the Dutch courts administer justice according to high international standards, costs of litigation are relatively moderate and the business climate in the Netherlands is favourable.

The jurisdiction of the NCC will not be based on a financial threshold but on the commercial character of the case. The rules of procedure will be based on the latest Dutch civil procedure rules as developed in the recent reform project discussed in the second part of my presentation. The procedure will be characterized by an early informal case management conference, an active judge and the use of digital techniques. Proceedings and the judgment will be public but the court may rule that information will be kept secret.

On appeal, cases will be heard by a specialized English language division of the Amsterdam Court of Appeal and cassation appeal will be available at the Dutch Cassation Court. Unfortunately, cassation proceedings cannot be conducted in English, although the cassation court has announced that it will receive and decide cases on the basis of the documents of the lower courts in English.

(2) Digitalization of the Dutch Civil Process

The introduction of E-justice was put high on the agenda by the Dutch Ministry of Justice in its program titled 'Quality & Innovation in the Administration of Justice' initiated in 2012. This program aims at reform in both civil and public law litigation, to be introduced in stages (started in 2017). Improving access to justice and further reducing the complexity of litigation, especially in order to facilitate the introduction of E-Justice, are some of the aims of the

reform. It is considered that the reforms are necessary even though in the Netherlands access to justice is relatively easy, the quality of the administration of justice is generally speaking high, and judgments are given within a reasonable time. Nevertheless, even though the Dutch administration including the administration of justice is of high quality in international comparison and also has a high status internationally, this does not mean that reform is superfluous. In order to remain one of the leading and competitive jurisdictions in the EU, reforms are considered necessary. The legislature underlines the social and economic functions of the administration of justice and therefore the relevance of efficiency and low costs.

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The Changing Role of The Supreme Court in the New Hungarian Code of Civil Procedure

The Hungarian legal society has been waiting for almost a decade for the legislator not to modify the Code of Civil Procedure in force but to find some time to adopt a new Code of Civil Procedure that meets the changed societal and economic expectations for a modern justice system. Their wish was satisfied in 2014 when the codification of the new Hungarian Civil Procedural Act commenced. The main committee for the codification set up working committees comprising Hungarian lawyers, judges, attorneys and university professors. As a consequence of their work, the Hungarian Government accepted a proposal for the new Code of Civil Procedure in 2015. The proposal gave serious consideration to ideas of modernity and respect for new international and foreign solutions. At the end of February 2016 the Code was redrafted and undergone a series of professional debates. In November 2016 the Hungarian Parliament adopted the new Act which will enter into force on 1st January, 2018.

This lecture sets two aims. Firstly, it introduces the conceptional changes of the new Act and reflects on some heavily debated provisions. Secondly, it outlines the new legal remedy system and examines whether the Hungarian Supreme Court (Kúria) can fulfil its constitutional duties against this new legal background.

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**Transformation of the Cassation Mechanism:
France, the Netherlands and Belgium on the Road to *Terra Incognita*?**

The structure of the supreme courts of France, the Netherlands, and Belgium, is modeled on the cassation mechanism. The underlying principle of the cassation mechanism the protection of the primacy of the law, through wide-ranging control of the legality of judgments. Through this control, the supreme court also guards the uniform application of the law and advances legal development. These are aims distinct from protecting the primacy of the law, rather underscoring the important value of judge-made law.

Recent decades witnessed an effort within supreme court procedures to bring this latter, normative function to the fore. This has been exacerbated by the rising number of appeals, which endangers both the timely adjudication of cases and the internal consistency of the case law. Consequently, mechanisms that allow for passive selection or quick dismissal of cases that do or do not correspond to the normative function of the Court, the technique of prejudicial questions, the possibility to answer grievances merely *pro forma*, and a greater willingness to delve into factual issues, now all form an integral part of Western-European cassation mechanisms.

This evolution presents a challenge to the main constituting principles of the cassation mechanism. Although in theory the reforms remained loyal to the core building stones of the cassation system, at least in spirit these supreme courts are slowly abandoning long-held traditions. The question begs where this evolution will halt. As for now, reforms have stopped short of so-called leave to appeal systems such as found to different extents in the German, Scandinavian, and Anglo-Saxon legal tradition. Is a similar system likely to be the future of the Belgian, French, or Dutch Court of Cassation or will they nonetheless remain at their core pure cassation mechanisms?

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**Trends and Oscillations in The Transformation of Slovenian Civil Procedure: The
Amendments of 2017**

The Slovenian Civil Procedure Act was enacted in 1999. Subsequently it has been amended several times, but only two of these amendments amount to a more ambitious attempt of reform. The first such amendment was adopted in 2008. It put more emphasis on a preparatory stage of proceedings and strengthened procedural sanctions (preclusions) for

delay and inactivity. Moreover, the reform reshaped the system of access to the Supreme Court, with the introduction of a leave to appeal system, where the selection (filtering) criteria are oriented towards the promotion of a public purpose of the supreme court: ensuring uniformity of case law and development of law through case law, thus creating precedents which will set important standards for the benefit of future cases.

The second significant reform of Slovenian civil procedure followed in 2017 (adopted in February, with coming into force in September).

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Civil Litigation in Tribunals in South Africa: Creating a Singular System

The purpose of this paper is to examine civil litigation of tribunals and the creation of a singular tribunal system in a South African context. The global establishment of tribunals has a deep history that stems over two thousand years. South African tribunals asserts more than five hundred years of existence. It is significant to demonstrate the beginnings of tribunals to understand the context that tribunals operate within. Furthermore, the historical impact elucidates the evolution of tribunals' changes and results in the transformation of tribunals to present day. The tribunals of this study were established in South Africa in the twentieth and twenty-first century. The separate operation of tribunals is counterproductive in that it creates a duplication of systems instead of a singular system with a unified pool of resources, which ensures standardisation of functions. An amalgamated tribunal system under one singular system is proposed as more suitable for the users and encourages consistency, which eradicates any glitches that hampers the smooth operation of it. A singular system fosters development of skills, efficiency and effectiveness through one mode of operation. The rationalisation of tribunal rules cultivates a harmonised tribunal system. Tribunals of this study are administrative as it exercises a public power and are a tier of the executive, and provides the realisation of policy and legislation through the tribunal decisions. As a result, the civil litigation of a singular tribunal enhances access to justice and administrative justice.

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Judicial Precedents in New Latin American Civil Procedure

This brief speech aims to prove that civil law's supreme courts although the recent evolution of legal interpretation theories still act as if they were idealized just to protect the *legislative*

meaning of the law. We bring some reasons in order to express that the binding effect of precedents stands for the coherence, predictability and certainty of the law. Therefore, with the constant evolution of civil law's interpretation theories it also led to some reform acts on many Latin American civil procedure codes. We shall explore the main reforms on the 2015 Brazilian civil procedure code and the 1993 Peruvian civil procedure one.

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Roots of the Resistance to the Change in the Supreme Court's Role

That is, I wrote that same story four times. None of them were right (...)
W. Faulkner on his novel *The Sound and the Fury*

In recent years in many jurisdictions, especially in Europe and South America, the paradigm shift in the supreme court's role from a private to a public purpose has been recognised. Due to growing backlogs at supreme courts in many jurisdictions, the private purpose of just and correct resolution of every individual case has given place to a public purpose consisting in safeguarding and promoting the public interest of ensuring uniformity of case law, the development of law, and offering guidance to lower courts. In accordance with its public function, the supreme court is supposed to grant permission to file a second appeal only if the case raises a question of law of fundamental significance, as has traditionally been the case with supreme courts in common law jurisdictions and in Scandinavia.

However, such a paradigm shift has been met with considerable criticism by a large part of the legal community, in particular attorneys-at-law, but some academics as well. It has been argued that litigants will become exposed to judicial arbitrariness. This demonstrates that the idea of the paradigm shift from the supreme court pursuing individual interests to pursuing a public purpose has only been embraced (if at all) in a half-hearted manner.

In order to explore the possible roots of such a resistance to the change in the supreme court's role, Faulkner's polyperspective technique of narration used in the novel *The Sound and the Fury* might be of some help. Largely the same story told from the perspective of the individual party, the attorney-at-law, the supreme court and the constitutional court reveals that, for the benefit of the public interest of uniform application of law, some particular interests of all involved have to be suppressed.

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Manning the Courthouse Gates: Pleadings, Jurisdiction, and The Nation-State

While civil procedure reforms are often said to be based on concerns of efficiency and economy, this article argues that civil justice reforms are also part of any nation's project of national identity and state building. A robust civil justice system is a statement of national progress and reforms to the system are less a reflection of a "civil justice crisis," and more a result of political bartering and debates about a nation's identity. This can be seen in European countries' recent efforts to coordinate procedural systems even as they are called to define themselves as member states of the European Union. As this article will document, this is similarly true in China and in the United States, where civil procedure reforms have matched critical stages of state building and national expansion. But interestingly, this article concludes that despite the different polity of the two countries, recent changes in civil procedures may be similarly counter-productive to the *raison d'être* of the procedures sought to be reformed, rather than supportive of their ideals (respectively, democracy in the U.S. and harmonious society in China). The effect of these changes, in the case of the United States can be counter-democratic, and in China, counter-harmonious.

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Towards Major Overhaul of Civil Procedure in Poland

A major reform of civil procedure is in the works at the Ministry of Justice. The draft may be officially published for comments in July, and it may become law effective January 1, 2018. To a foreign lawyer, these three particular areas might be interesting. The introduction of:

Preparatory stage in civil litigation

The existing Code of 1964 does not provide for any preparatory stage. It is arguably one of the main structural flaws of civil procedure. This flaw is a consequence of the ideas that constitute the building blocks of what is known as socialist legal tradition. In this tradition, it was up to the court to single-handedly clarify issues, collect evidence, and - generally - prepare and organize the process, while remaining silent about the potential outcome until the judgment was given.

While significant reforms in the '90s and this decade of the 21st century have resulted in deletion of legal provision which represent the socialist legal tradition, changes planned by

the Ministry of Justice constitute by far the most comprehensive and progressive attempt at modernizing civil procedure without a new code.

Prohibition of procedural abuse

The legislator intends to improve procedure by clearly prohibiting procedural abuse. The courts will likely receive increased authority to disregard submission that are a manifestation of that abuse (i.e. submission that contain abusive language, frivolous suits or repetitive or vexatious appeals). Moreover, sanctions include amplified costs.

Modernization and rationalization of taking of evidence

“Evidence law” in Poland is mainly practical matter. However, the practice of submitting and taking evidence is far from practical since it has been greatly affected by the socialist legal tradition. For example, many attorneys actually have not spoken to the witnesses they intend to hear in court. It is then no surprise they have trouble stating what is the fact they intend to prove by such witness’s testimony. This and many other irrational practices are daily routines of key actors of the Polish justice system. The draft of the bill amending the Code aims at increasing the role of the parties as well as their level of activity required to meet the burden of proof.

Finally, I will talk about digitalization (informatization) of civil justice which is a process already partially implemented in Poland. I am not hesitant to call this a digital (ongoing) revolution. Recently, Polish legislation relating to the informatization of the civil justice system has expanded in an unprecedented manner. In my presentation, I will outline two key areas – where we are with such legislation and what looms on the horizon. I will focus on both data banks (which brilliantly represent the modern approach to access to justice) and e-access to an individual case.

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Between Reform and Dejudicialisation: Current Trends in Spanish Civil Litigation

“Spanish civil justice was strongly reformed with the new 2000 Code of civil procedure, whose main goal was strengthening the quality of first instance proceedings and securing a more efficient performance of enforcement proceedings. The system, however, has experienced additional reforms, which have undermined the central role of the judge in the proceedings; furthermore, the positive trend to foster mediation and other ADR forms has been taken –in times of austerity- as an excuse not to provide the court system with the necessary resources to fulfill its tasks.”

Dejudicialisation of Consensual Divorce?

Civil marriage and the right to divorce were the results of the French Revolution. As marriage came under the jurisdiction of the state, the civil divorce emerged and secular courts were established to authenticate the ground for divorce claimed by the parties. The history of divorce shows inequality of woman and man and the marital offence as a sole just cause for divorce. By time, the simplification of divorce procedure and recognition of non-fault divorce, as well as divorce on bases of joint application of spouses, label the development and transformation of family laws of European countries.

The growing number of divorce procedures, the recognition of non-fault divorce, especially the consensual divorce, and the need to take the best interest of a child in primary consideration have made significant changes into the law of divorce in Europe. First, it can be underlined the growing use of family mediation as a method of resolving the disputes that come together with divorce (disputes regarding parental responsibilities and maintenance of a child, as well as disputes regarding the joint property of spouses and maintenance of ex-spouse). Secondly, there is a new tendency of arbitration in disputes connected with divorce, first of all property and economic disputes, in some European countries. Last but not least, there is a growing tendency of dejudicialisation of the sole divorce by introducing the public notaries and the administrative bodies as a forum for resolving the divorce (and the matters connected with divorce).

As family mediation and arbitration are dispute resolutions methods reserved (at this moment) only for disputes that are connected with divorce (property and economic disputes of spouses, parental responsibilities and maintenance of a child), it can be used the term “dejudicialisation of divorce” in the broader sense. But this last tendency – the divorce of a marriage before the public notary or an administrative body (usually civil registry body) – marks the real “dejudicialisation of divorce”. In the focus of the presentation will be the dejudicialisation of divorce in this latest sense.

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The Settlement of Disputes Involving Citizens' Initiative, Particularly in the Domain of Family Law

Private justice – where parties directly involved in a conflict attempt to engineer a solution themselves – is often associated with ADR-methods such as mediation. In the domain of family law mediation is well-established, but many more private justice varieties can be found here. In this paper, the success of family mediation and collaborative practice across Europe will be touched upon, but the focus will be on 'family group conferences'.

Such conferences, more accurately described as 'social network decision-making', are mostly encountered in the civil courts' practice of supervision orders, issued to protect and to care for children, in cases of abuse, neglect or poor parenting skills generally. Such orders intrude into the private family life, as they may even entail removal of the child from the parent(s). A guiding principle in such cases has become to maintain, where possible, the relationship between a child and the (extended) family. The family group conference has been developed (first in New Zealand) as a device to give 'voice' to the wider family (or community) and to mobilize support from its members to the benefit of the child.

During the past 25 years, the concept of family group conferences has proliferated around the world. In Europe, the concept fits in well with the desire for more direct participation of citizens, the new buzzwords being 'empowerment', 'right to challenge' and 'the Big Society'. However, as with ADR generally, the idealistic motive of 'empowerment' goes hand in hand with the somewhat more cynical motive of 'austerity'. Thus, in varying degrees, family group conferences may be developing into another case management tool for the (publicly funded) courts as well as for the (publicly funded) professionals in the social domain.

In this paper, we will give an impression of how referrals to family group conferences have been organized and regulated in some jurisdictions (notably New Zealand, England & Wales, and the Netherlands). Among the issues to be dealt with are: the dilemma's that crop up in the (judicial) assessment of requests for referrals; the nature of 'a right to direct' one's own family affairs; and the legal status of 'plans' concluded during a family group conference.

The paper concludes with a discussion of the ramifications of the underlying philosophy that families (citizens) need to be safeguarded – where possible - against interventions by State professionals. Is it conceivable, for instance, that the traditional 'right of access to court' will – through the intermediary of 'access to justice' – develop into 'a right to be safeguarded against becoming involved (by one's adversary) into court litigation'? Should there be a paramount right to modes of dispute resolution based on party autonomy?

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Norwegian Civil Procedure under the Influence of EU-Law

Norway is connected to the European market through the EEA-agreement, which is an agreement between EU and the three EFTA-states Norway, Iceland, and Lichtenstein. Because of the EEA-agreement are many parts of EU-law binding for Norway, but prevailing view is that matters of civil procedure is outside the scope of the EEA-agreement. Therefore, many parts of EU civil procedure law, such as the Directives on service and evidence, are not applicable in Norwegian law. However, procedural rules that are based on Directives of substantive law or the general principles of effectiveness and equivalence are regarded as a part of the EEA-agreement. For instance, does the national court's duty to apply EU consumer law ex officio clearly relevant for Norwegian courts because these duties are based on substantive directives that are binding under the EEA-agreement or the principle of effective application of these directives.

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Trusting Whom? On the Place of Notaries within the European Area of Justice

Over the recent years, civil justice reforms, in Europe and beyond, have relied on the devolution of ancillary judicial activities to public notaries as a means to relieve the pressure on the judiciary. In addition to the traditional and historically rooted core areas of notarial practice (succession, family law and immovable property), public notaries are, more and more often, acquiring new competencies in unprecedented domains, such as enforcement proceedings and debt recovery. If we look at the case-law of the European Court of Justice, though, it becomes evident that this latter kind of outsourcing of judicial activities is putting a continuous strain on the internal functioning of the integrated European Area of Justice. At least 6 judgments touching – directly or indirectly – upon the role of notaries within the domestic judicial systems have been rendered over the last 6 years (case C-53/08, C-32/14, C-94/14, C-392/15, C-484/15, C-551/15), three of which have been delivered over the last few months. Against this backdrop, the proposed paper aims at clarifying the ambivalent role played by notaries within the European Judicial Area. If, on the one hand, the data communicated by the Commission (Yearly Report on the training of legal professions; Report on the functioning of the Judicial Network in Civil and Commercial Matters) portrays the notaries as key-actors of the judicial cooperation established at EU-level, the aforementioned case-law, on the other hand, seems to set clear boundaries to the States' possibility to resort to notaries when cross-border cases are concerned. In fact, while recognizing that Member

States remain, in principle, free to shape their domestic judicial reforms as they deem convenient, even by devolving to notaries some specific enforcement-related tasks or the processing of non-disputed monetary claim cases, the Court of Justice reminds that non-compliance with a set of core procedural requirements comes with a price: the ‘authentic documents’ resulting from the outsourced activities should not be granted, in principle, any extraterritorial effect. The argument used by the Court to uphold this conclusion is well-known: the corrosive effect deployed by the principle of mutual trust on the procedural autonomy of Member States.

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The Transformation of Consumers’ Procedural Protection in Times of Crisis

Over the past decade, the CJEU has – via preliminary references from national courts, identifying (possible) obstacles in national rules of civil procedure – rendered a line of judgments in an effort to establish procedural safeguards for the enforcement and protection of EU consumer rights. These references concern increasingly significant consumer regulatory needs including those which pertain to general consumer contracting ((online) consumer sales and services) and those which have come to the fore in the post-2008 crisis context, concerning (largely but not exclusively) consumer credit. The paper firstly provides an overview of key (procedural) problems identified both pre- and post-crisis across the Member States. It then examines the national and CJEU case law and critically analyses the development of one procedural mechanism: the power and subsequent obligation on national judges to examine compliance with EU consumer protection ex officio. The paper assesses the reach, limits and problematic dimensions of this mechanism, in ensuring the effective and equivalent protection of consumer rights and evaluates the shift in judicial cultures to which it gives rise, including for example in Spain, and particularly where the nature of adjudication is typically adversarial.

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Benchmarking Member State Courts’ Performances as a Catalyst for Domestic Reform?

The EU Justice Scoreboard is the Commission’s recent initiative to evaluate Member States’ justice systems with the use of indicators. Although the Scoreboard was initially conceived as a non-binding tool comparing national courts’ performances, a deeper analysis reveals that it goes beyond a simple monitoring and evaluating exercise. With its emphasised economic

focus and its strong policy dimension the Scoreboard has a far-reaching effect on the organization of national justice systems, on national economic policies and possibly on the behaviour of investors in a country. At the same time, the Scoreboard marks a transition from supranational harmonization to softer methods of policy coordination through monitoring and evaluation. It is still too early to assess whether this transition anticipates a paradigm shift in the Commission's policy on EU Justice. However, the Scoreboard displays some commendable improvements in its methodology and in the presentation of the data it provides. This increases the Scoreboard's (to date unexpressed) potential for the future and suggests that it could work as a basis for experimenting new governance tools in the area of EU Justice.

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Nordic Legal Aid and 'Access to Justice' in Human Rights. A European Perspective

The analysis starts with the schemes organised by the legal aid acts in Finland and Norway and discusses the welfare ideas behind. It outlines the main ideas about legal aid in the 'access to justice' ideology of human rights as developed in European Court of Human Rights' case law, and compares it to the welfare ideology of Nordic legal aid. The chapter describes the ideas behind an initiative of the Council of Europe to build a new institution – the European Commission for the Efficiency of Justice (CEPEJ) – that works to improve access to justice in Europe. The final part uses CEPEJ statistics to provide some basic information about the present state of the existing legal aid schemes in Europe. Conclusions are drawn on how the Nordic schemes meet welfare challenges, their performance in a European perspective and whether human rights might become a driver for legal aid reform in Europe.

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Legal Aid in Croatia: Between Normative Flexibility and Functional Insufficiency

Before 2008, effective access to legal aid was possible only in criminal cases through the instrument of obligatory defence counsel. In order to facilitate access to justice in civil cases as well, Croatia enacted its first Legal Aid Act. It laid down the threshold for obtaining legal aid, thus making it dependant on overall income of applicant and his or her household members, their pecuniary and non-pecuniary assets, as well as their real estate. However, the Constitutional Court abolished these statutory provisions due to the lack of flexibility which effectively disabled many citizens to obtain legal aid. Although some of the problems were supposed to be solved by the amendments of Legal Aid Act in 2011, it was not until the new Legal Aid Act was passed in 2013 that the legislator finally decided to sincerely cope with the problems recognized by the Constitutional Court. The result are the simplified threshold rules, along with several important exceptions. In some types of proceedings (e.g. child alimony) legal aid is granted automatically, regardless of the threshold. Additionally, some types of income and assets are excluded during the assessment of overall income either due to the reasons of social justice (e.g. social benefit) or due to the fact that there are objective reasons which prevent applicant from disposing off that property.

Normatively speaking, the criteria for obtaining legal aid in Croatia seem to flexible enough to enable citizens in need to access justice in their civil cases. Do the numbers confirm the

existence of such flexibility? Unfortunately, although the number of legal aid users has indeed increased over the years, still very few citizens manage to obtain legal aid. This can be explained by two sets of reasons. The first one is the lack of proper financing of legal aid system. When compared to other European countries in 2014, Croatia allocated as little as 2.59 € per capita to legal aid, thus placing it way beyond the European average. Additionally, the budget has been split in half since 2014. Partially in connection with that problem, the second reason for functional insufficiency of Croatian legal aid system is citizens' lack of information. They are not sufficiently informed about their rights, which makes their exercising illusive. The lack of support for legal advisors (so-called primary legal aid providers) only intensifies that problem.

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Access to Justice Following the Obliteration of Civil Legal Aid

The presentation will:

Examine the effect of the cuts to the scope of Legal Aid in England and Wales following the Legal Aid, Sentencing and Punishment of Offender Act 2012 (LASPO).

Analyse the extensive body of research on how UK citizens use the civil justice system to solve basic justiciable problems and in particular focus on the pioneering large scale study carried out by Professor Genn in her paper "Paths to Justice" which evidenced the need for targeted early advice and intervention and the positive impact of advice on public health and well-being.

Evaluate the latest reports on improving Access to Justice following LASPO, including the Low Commission report "Tackling the Advice Deficit" which states that "There is a continuum including public legal education, informal and formal information, general advice, specialist advice, legal help and legal representation. Legal aid should be viewed as part of this continuum, rather than as a stand-alone funding mechanism; the more we can do at the beginning of this spectrum, the less we should have to do at the end."

Consider the role of clinical legal education in improving Access to Justice. The London South Bank University (LSBU) Legal Advice Clinic is part of Southwark Legal Advice Network and views its role as working not in isolation but as part of the continuum of legal advice in Southwark and Lambeth.