The Heroes of Judicial Periphery
Court Experts, Court Clerks and other Actors in the Shadow

Seventeenth PPJ Course and Conference (2023)

Programme

Monday, May 29 **Registration:** (9,00-9,30) **Morning Session:** (9,30 – 13,00) **Afternoon Session:** (15,00 – 18,00)	Stefaan Voet (Leuven), Unknown is Unloved: The Heroes of Judicial Periphery Eduardo Oteiza (La Plata & Barcelona), Court experts. The Judicial Decision, Independence and Access to Justice Alan Uzelac (Zagreb), Courts of the Future – a Lonely AI Planet or a Team Universe? Fernando Gascón Inchausti (Madrid), The Role of Judicial Secretaries in Spain Hermes Zaneti (Vitoria), Public Prosecutors, Ombudsmen and Similar Institutions in Latin American Civil Procedure Álvaro Perez Ragone (Lima), Clerks in the First, Second and Supreme Courts in Latin America Mauricio Magalhães Lamha (Rio), Supporting Actors in International Child Abduction Cases before Brazilian Federal Courts
Tuesday, May 30 **Morning Session:** (9,30 – 13,00) **Lunch Break** (13,00 – 15,00) **Afternoon Session** (15,00 – 18,00)	Elisabetta Silvestri (Pavia), The Italian Path to Judicial Clerkship Gina Gioia and Sayedeh S. Salehi (Tuscia), Beyond Wooden Desks: The Impact of Artificial Intelligence on Reshaping the Role of Court Staff Aleš Galič (Ljubljana), Experts for Legal Issues in Slovenian and Comparative Law Tatjana Zoroska Kamilovska (Skopje), Party - appointed vs. Court - appointed Experts: Considerations in the Light of Macedonian Experience Branka Babović Vuksanović (Belgrade), Part of the Solution or Part of the Problem? Party Appointed Experts in Serbian Litigation Proceedings Marko Bratković, Juraj Brozović and Alan Uzelac (Zagreb), Peripheral Actors in Croatia: Problems and Open Issues
Wednesday, May 31 **Morning session** (9,00 – 12,30) **Afternoon Session:** Study trip (12,30-23,00)	Xandra Kramer (Rotterdam), Expert Evidence in Cross-Border and International Context Magne Strandberg (Bergen), Appointment of Experts in Norwegian Civil Proceedings Camilla Bernt (Bergen), The Use of Psychologists to Provide Expert Evidence in Custody and Child Protection Cases *Excursion to Cavtat, Konavle and the Srđ hill*
Thursday, June 1 **Morning Session** (9,30 – 13,00) **Afternoon Session:** (15,00–18,00)	Raf Van Ransbeeck (Bruxelles), The Belgian Court Staff and their Belgian and European Training perspective Michael Stürner (Konstanz), Experts on Foreign Law in German Civil Procedure Nicolas Kyriakides (Nicosia), Law Clerks: A Solution for Delays in Civil Litigation Danie van Loggerenberg (Pretoria), Experts and Other Shadow Actors in South Africa Yulin Fu (Beijing), The Landscape of Chinese Judiciary: Assisting Personnel in PR of China
Friday, June 2 **Morning Session** (9,30 – 14,00)	*Panel: Legal Aid Clinics – Another Kind of Peripheral Heroes (open discussion with the participation of clinical leaders and law clinics from Croatia and Europe)* Biljana Đuričin (Podgorica), Mediation Clinic: My American Experience Przemysław Kubiak (Lodz), How Training Soft Skills in CLE Can Form Better Lawyers and (In)Directly the Better Justice System Zvonimir Jelinić (Osijek), Law Clinics as Peripheral Heroes of Legal Education

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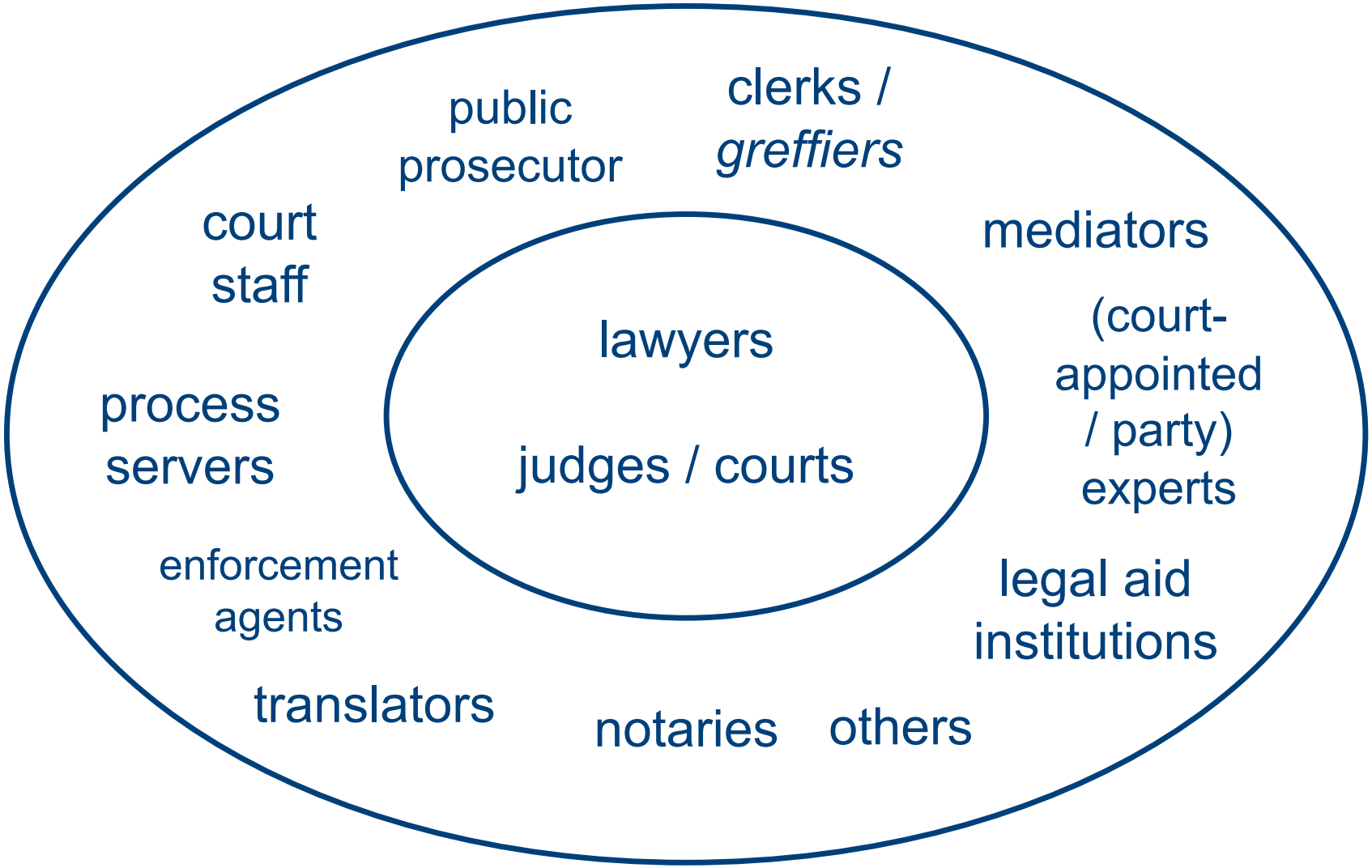
Unknown is Unloved: The Heroes of Judicial Periphery

29 May 2023

Prof. dr. mr. Stefaan Voet

KU Leuven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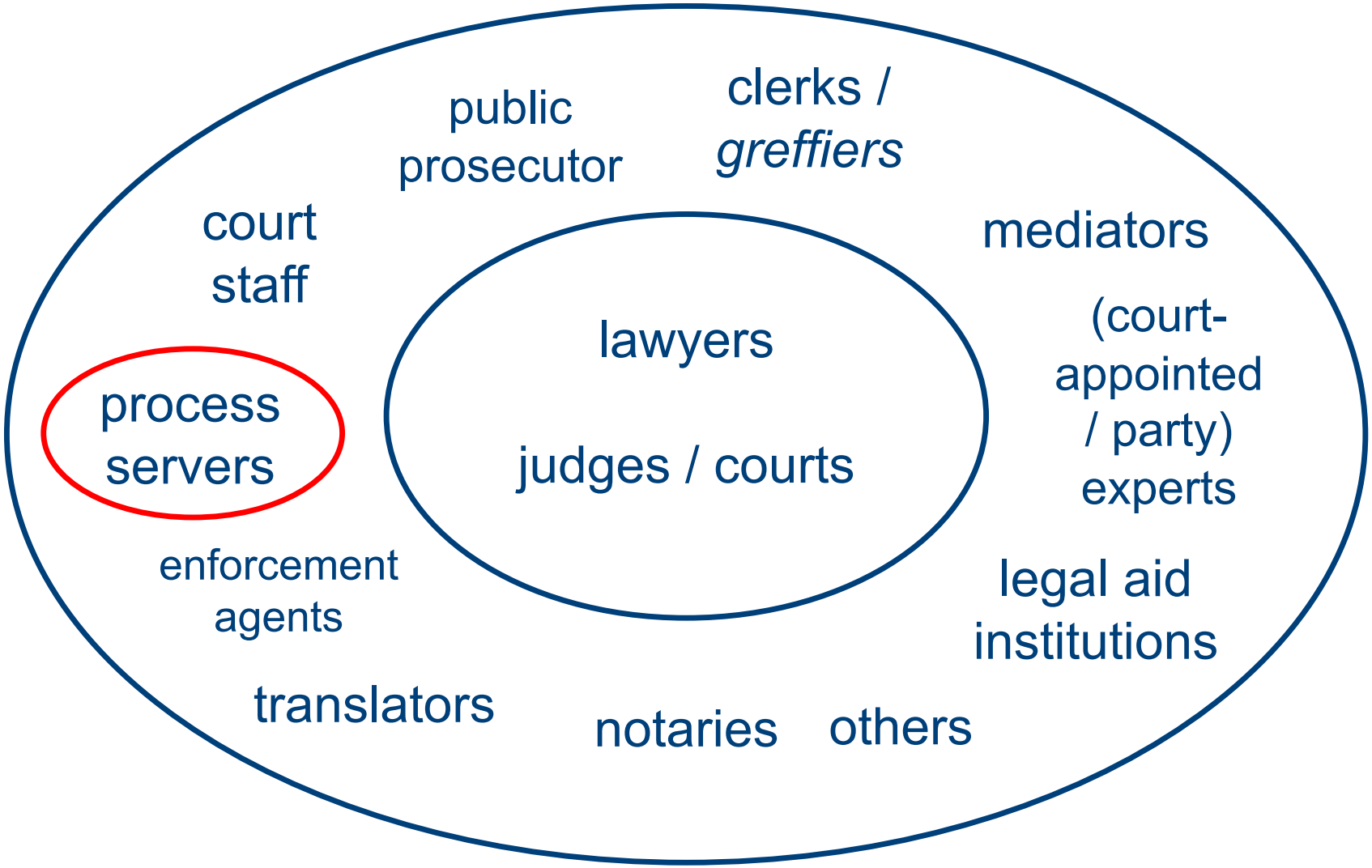
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PART VI Service and Due Notice of Proceedings

Section 2 – Responsibility for and Methods of Service

Rule 71. Responsibility for service

(1) Responsibility for service of documents lies with the **court/parties**.

(2) If responsibility lies with the court, upon application the court may entrust a party with service of documents if appropriate.

(3) Where responsibility lies with the parties the court retains supervisory control which may include the power to set aside service.

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Rule 74. Responsibility for service

(1) Service guaranteeing receipt includes

(a) service by physical delivery attested to by an acknowledgement of receipt signed by the addressee or by a document signed by a **court officer, bailiff, post officer or other competent person who effected the service** stating that the addressee has accepted the document, and the date of the service;

(service by court officers or other person designated under national law; e.g., Austria, Belgium, England, Germany, Greece, France, Luxembourg, Netherlands, Romania, Spain and Switzerland)

(b) – (d): service by electronic means, postal service

Emmanuel DEBRAY
Quentin DEBRAY
Huissiers de justice
Gerechtsdeurwaarders

Barbara MEIRSSCHAUT
Lic. rechten, LL.M
Joachim JANSSENS de VAREBEKE
Master en droit

Candidats Huissier de Justice
Kandidaten Gerechtsdeurwaarder

DEBRAY & ASSOCIATES
HUISSIERS DE JUSTICE
GERECHTSDEURWAARDERS

Val des Seigneurs 15 Horendal
Bruxelles 1160 Brussel

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Tel : 02/772.61.02
Fax : 02/772.92.72
etude@debray.be / kantoor@debray.be
Comptes tiers/Derdenrekeningen:
BE64 1919 5165 6252 BIC CREGBEBB
BE23 0003 2847 8691 BPOTBEB1

Numéro de dossier : 186950 - SDO
Référence à rappeler en cas de paiement : 003/0086/95072
Ref. avocat/requérant : 20200460-02 / LC / SDI

186950_1149.2_174.52.15

Enregistrable

CITATION A COMPARAITRE DEVANT LE TRIBUNAL

DATE DE LA REMISE DE LA CITATION

L'an deux mil vingt, le VINGT NOVEMBRE

IDENTITE DE LA PARTIE DEMANDERESSE & DE SON CONSEIL

À la demande de :

Monsieur , né à Anderlecht le 10/06/1980, numéro national 80.06.10-... , (Jenval), Rue Mahiermont, 62,

Ayant pour conseil : à 1160 AUDERGHEM, Avenue

IDENTITE DE L'HUISSIER DE JUSTICE SIGNIFIANT

Je soussigné(e) Maître Sophiane GYSEN,
Huissier de Justice de résidence à 1400 NIVELLES, Faubourg de Mons, 10.

IDENTITE DE LA PARTIE DEFENDRESSE & mode de signification de l'acte

Ai donné CITATION à :

L'ASSOCIATION DES COPROPRIETAIRES **DE LA RESIDENCE THOMAS**, inscrit(e) à la BCE sous le n°0819.847.760, sise à 1330 RIXENSART, Avenue de Clermont-Tonnerre, 34, représentée par son syndic, la S.R.L ... n° 0898.261.372, ayant son siège à 1410 WATERLOO Chaussée de , étant pour elle au siège de l'association,

Où je me suis présenté et y ai parlé à : ... employé.

selon sa déclaration, qui ne signe pas mon original pour réception de la copie.

étant donné que la copie de mon acte n'a pu être remise à son destinataire, ni à une personne habilitée à recevoir pour lui, elle a été laissée sous enveloppe fermée à l'adresse de ce destinataire à heures en lui signalant *que j'adresserai une lettre conformément à l'article 577 – 8 §3 C.c. à son syndic,* la S.R.L ... BCE n° 0898. ...1.372, ayant son siège à 1410 WATERLOO Chaussée de , pour l'avertir de la possibilité qu'il aura de venir en retirer une copie en mon étude pendant un délai de trois mois à dater de ce jour;

SOMERS Sébastien
Huissier de Justice suppléant
remplacement

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Hoe verloopt de invordering van onbetwiste geldschulden?

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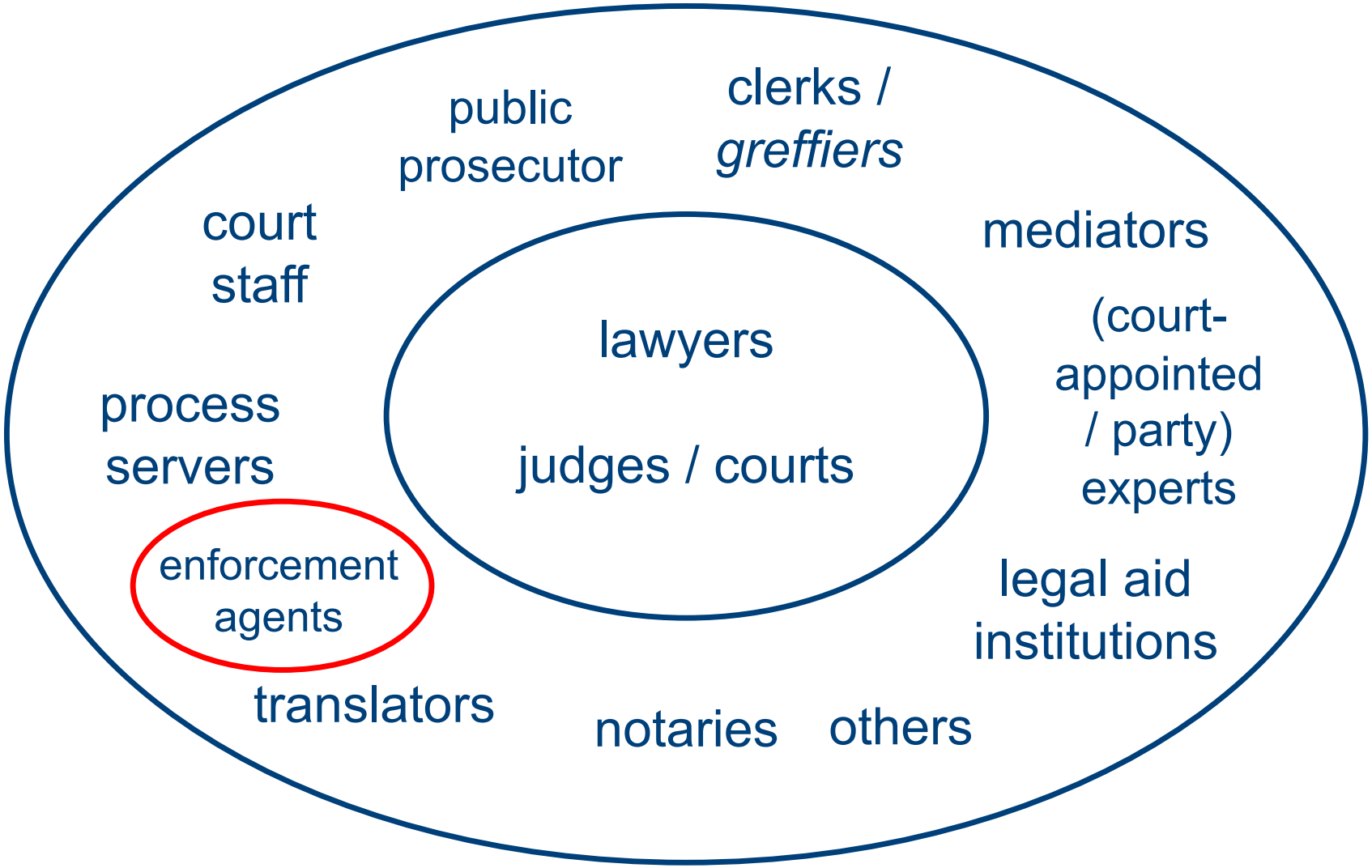
Union internationale des huissiers de justice
International Union of Judicial Officers

The purpose of the UIHJ is to represent its members to international organisations and ensure collaboration with national professional bodies. The UIHJ aims the promotion of international treaties and efficient and effective national procedural and enforcement law; to improve such legislation and to promote ideas, projects and initiatives which help to move forward and elevate the independent structure of judicial officers.

Furthermore, the UIHJ takes part in the organisation of judicial officers, notably via its involvement in the establishment and development of national professional organisations which intend to become members of the UIHJ.

The UIHJ is proactively involved, wherever possible, to strengthen the rule of law, to increase the status of the profession of judicial officer and offer its expertise for judicial reform.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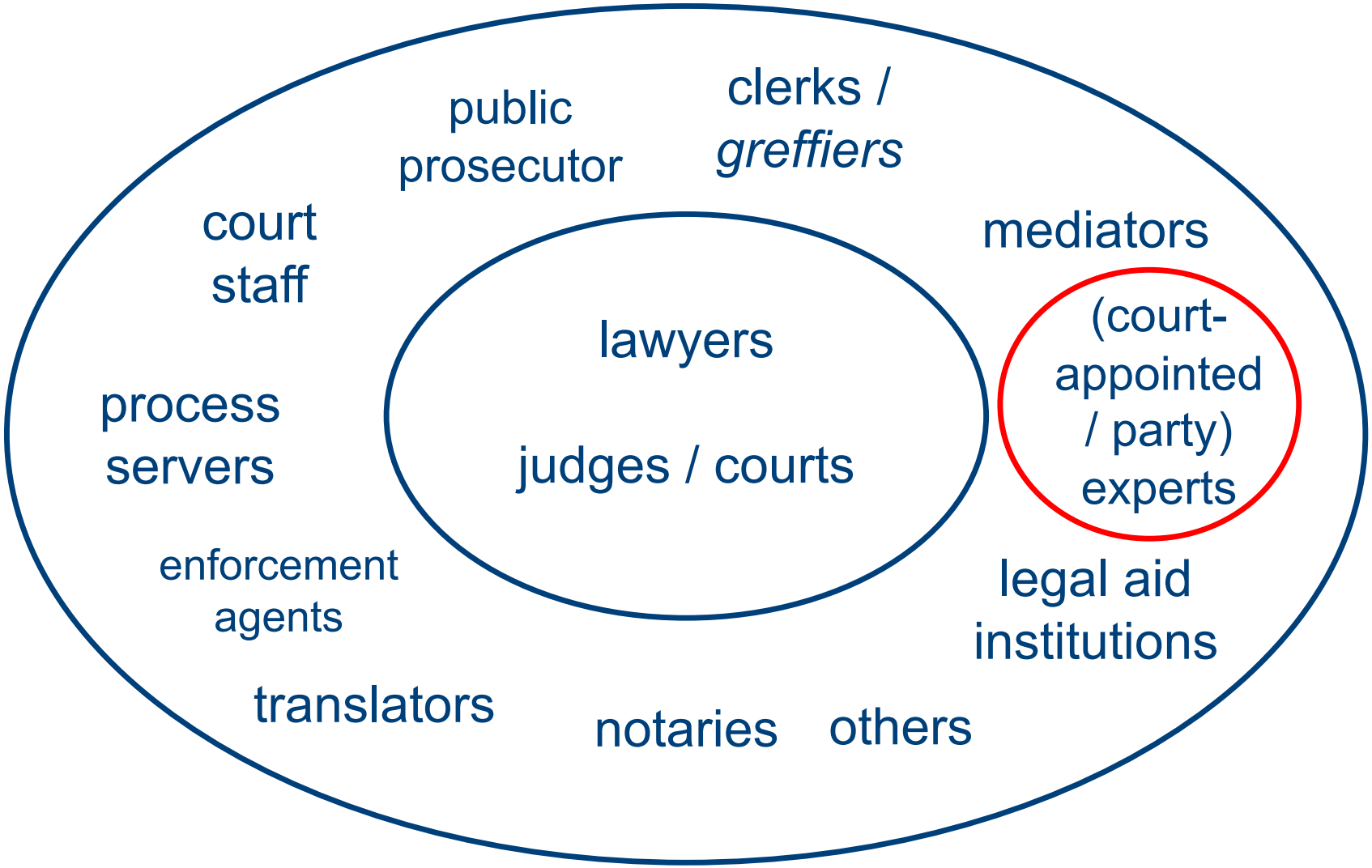
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Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe's Member States

Document adopted by CEPEJ at its 24th Plenary meeting

(Strasbourg, 11 – 12 December 2014)

https://rm.coe.int/168074827a

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- reference framework (civil, criminal, administrative law)
- court-appointed expert: technical experts “place at the disposal of courts their scientific and technical knowledge on matters of fact” (medical, psychological, constructional and economic expert opinions and also those concerning road accidents)
- complement the judge’s deficient technical knowledge or help with the fact-finding; *‘the expert is simply an assistant or consultant of the judge, nothing more”*
- NOT: appraisal/evaluation of facts / interpretation/application of the law → judge
- natural persons (responsibility)
- appointment by the court (selection criteria, selection procedure) – lists of experts!
- independence & impartiality (& integrity)
- interim & final report
- judge is under no obligation to follow the suggestion of the expert opinion
- costs


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PART VII Access to Information and Evidence

Section 3 – Types of Evidence

D. Expert Evidence

Rule 119. **Party-appointed Experts**

Parties may present expert evidence on any relevant issue for which such evidence is appropriate. They may do so through an expert of their choice.

Rule 120. **Court-appointed Experts**

(1) The court may appoint one or more experts to give evidence on **any relevant issue** for which expert evidence is appropriate, including **foreign law**.

(2) Experts can be **individuals** or legal entities. In the case of legal entities at least one individual must assume responsibility for the expert's report.

(3) If the parties agree upon an expert, the court ordinarily should appoint that expert.

(4) Parties may object to the appointment of a court-appointed expert on grounds of bias. Where there is a reasonable apprehension of bias, the court must either, as relevant, refuse to appoint the expert, rescind their appointment or set aside their evidence in its entirety.

Rule 121. **Instructions to Court-appointed Experts**

(1) The **court shall instruct experts** concerning the issues on which they are to provide evidence. It should set **reasonable time limits** within which any such expert should submit their written report or reports.

(2) In an appropriate case, the court may extend or limit the scope of its instructions to an expert. It may also vary any time limit for submission by an expert of their report.

(3) The court must inform the parties of any orders given or varied under this Rule.

(4) Where a party objects to the nature or scope of instructions given by the court to an expert, it may apply to the court to vary those instructions.

Rule 122. **Duties of Experts**

(1) An expert, whether appointed by the court or by a party, owes a duty to the court to present a **full, objective and impartial assessment** of the issue addressed.

(2) No expert may give evidence outside their field of expertise. An expert may also refuse to give evidence for the same reasons a witness may refuse to give evidence.

(3) An expert must not delegate their task to third parties unless authorised to do so by the court.

(4) Where an expert, without a reasonable explanation, fails to render their evidence within time limits set by the court, the court may impose **appropriate sanctions**.

Rule 123. **Expert Access to Information**

(1) Court-appointed experts should be provided with access to all relevant and non-privileged information necessary to enable them to prepare their written report.

(2) In particular, a court-appointed expert may ask a party to provide any information, to provide access to any documents, permit inspection of property or entry upon land for the purposes of inspection, to the extent that such are relevant and material to the proceedings.

(3) In appropriate circumstances, an expert may examine a person or have access to information derived from a physical or mental examination of that person.

Rule 124. **Expert Reports and Oral Evidence**

(1) Expert evidence should ordinarily be given in the form of a **written report**. However, in simple cases, the court may order that expert evidence be given **orally**.

(2) An expert may give **oral testimony** to explain their written report either on the court's request or on the application of any party. Subject to any applicable legal provisions, such oral testimony may be given at a hearing or via any appropriate means of distance communication, such as, but not limited to, video-conferencing.

(3) The court may require an expert to give their evidence, whether that is in the form of a written report or by way of oral testimony, on **oath**.

(4) Where an expert gives oral testimony, parties may only ask the expert questions that are relevant to their report.

(5) If a party-appointed expert fails to appear when duly summoned to attend an oral hearing, and does so without a valid reason, the court may disregard that expert's written report.

Rule 125. **Costs**

(1) The fees and expenses of a court-appointed expert shall form part of the **costs of the proceedings**. The court may order that a party who applies for an expert to be appointed pay their fees in advance.

(2) The fees and expenses of a party-appointed expert shall only be recoverable from the other party if the court so orders.

EUROPEAN EXPERTISE & EXPERT INSTITUTE

Shaping Expertise across European Justice Systems

The EEEI thus stands as a forum for debate on the future of expertise, with the aim of contributing to :

- redefining the expert's role and place in our society
- harmonising professional practices and rules
- participating in the overall harmonisation of European regulations of expertise
- bringing together the key stakeholders – judicial experts, magistrates, lawyers, academics – as well as user federations

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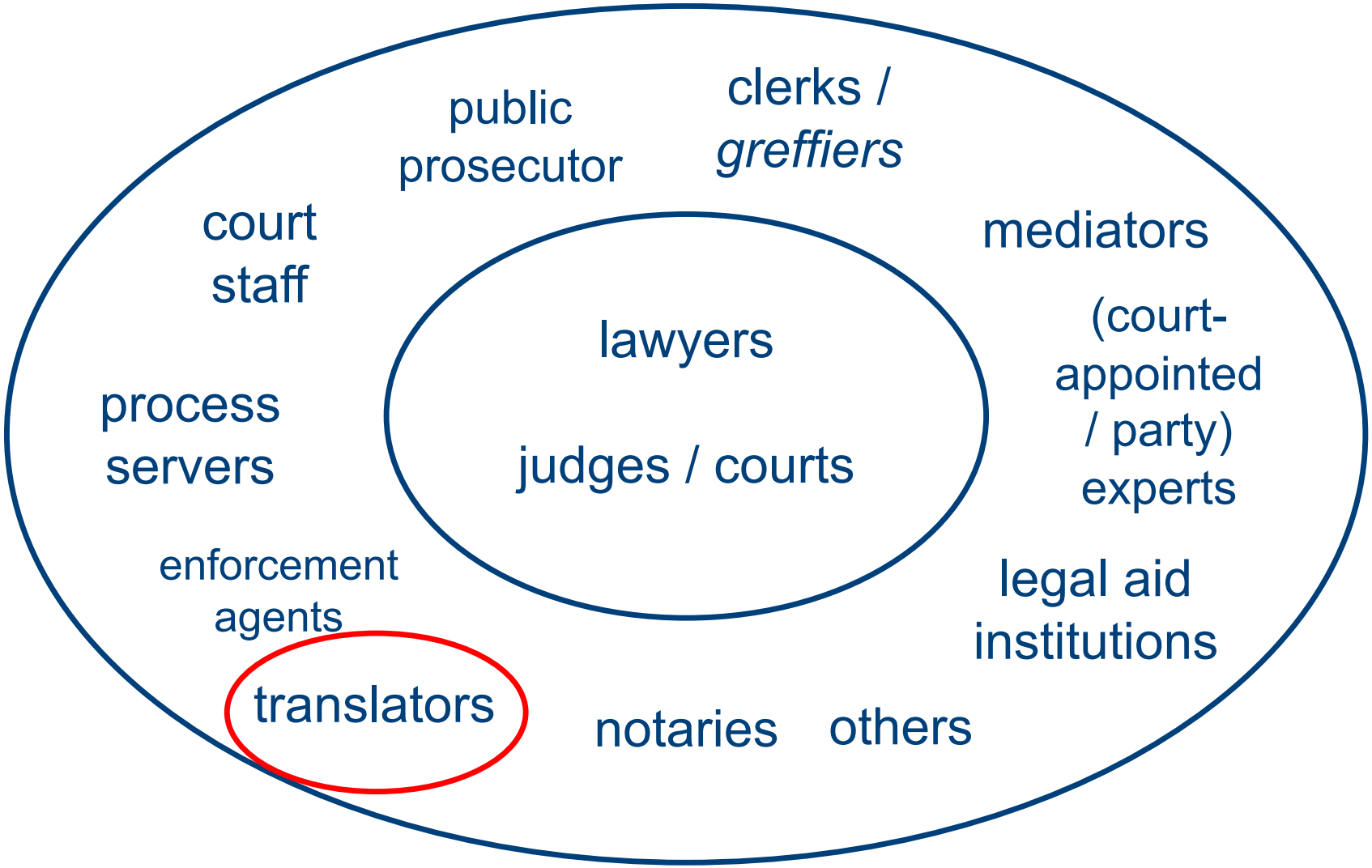
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PART I General Provisions

Section 2 – Principles

G. Language, Interpretation and Translation

Rule 19. **Language of the Court**

Proceedings, including documents and oral communications, must as a general rule be in a language of the court. The court may permit all or part of the proceedings to be conducted in other languages where doing that would not prejudice the parties or the right to a public hearing.

Rule 20. **Interpretation and translation**

(1) Interpretation or translation must be provided by the court to parties who are not sufficiently competent in the language used in the proceedings. The right to interpretation includes the right of parties with hearing or speech impediments to receive appropriate assistance. Such interpretation and translation shall ensure the proceedings are fair by enabling the parties to participate in them effectively.

(2) Where documents are translated, the parties may agree, or the court may order, that such translation be limited to such parts of the documents as necessary to ensure the proceedings are fair and that the parties are able to participate effectively in them.

The **legal translation service**, shared between the two jurisdictions (Court of Justice and General Court), comprises two directorates, between which the language units are apportioned. The directors share responsibility for **23 language units** (Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish).

The Court's translations are established in accordance with mandatory language arrangements and include all the combinations of the official languages of the European Union. The volume of pages to be translated currently exceeds **1 100 000 pages per year**.

The texts to be translated are all highly technical legal texts. To accomplish that task, the service employs only **jurists** who have completed their education in law and who have a thorough knowledge of at least two languages other than their mother tongue.

Translation of Judgments of the European Court of Human Rights into Non-official Languages: The Politics and Practice of European Multilingualism

Forthcoming, Anne Lise Kjær and Joanna Lam (eds.): Language and Legal Interpretation in International Law, Oxford University Press (Oxford Studies in Language and Law)

University of Copenhagen Faculty of Law Research Paper No. 2020-89

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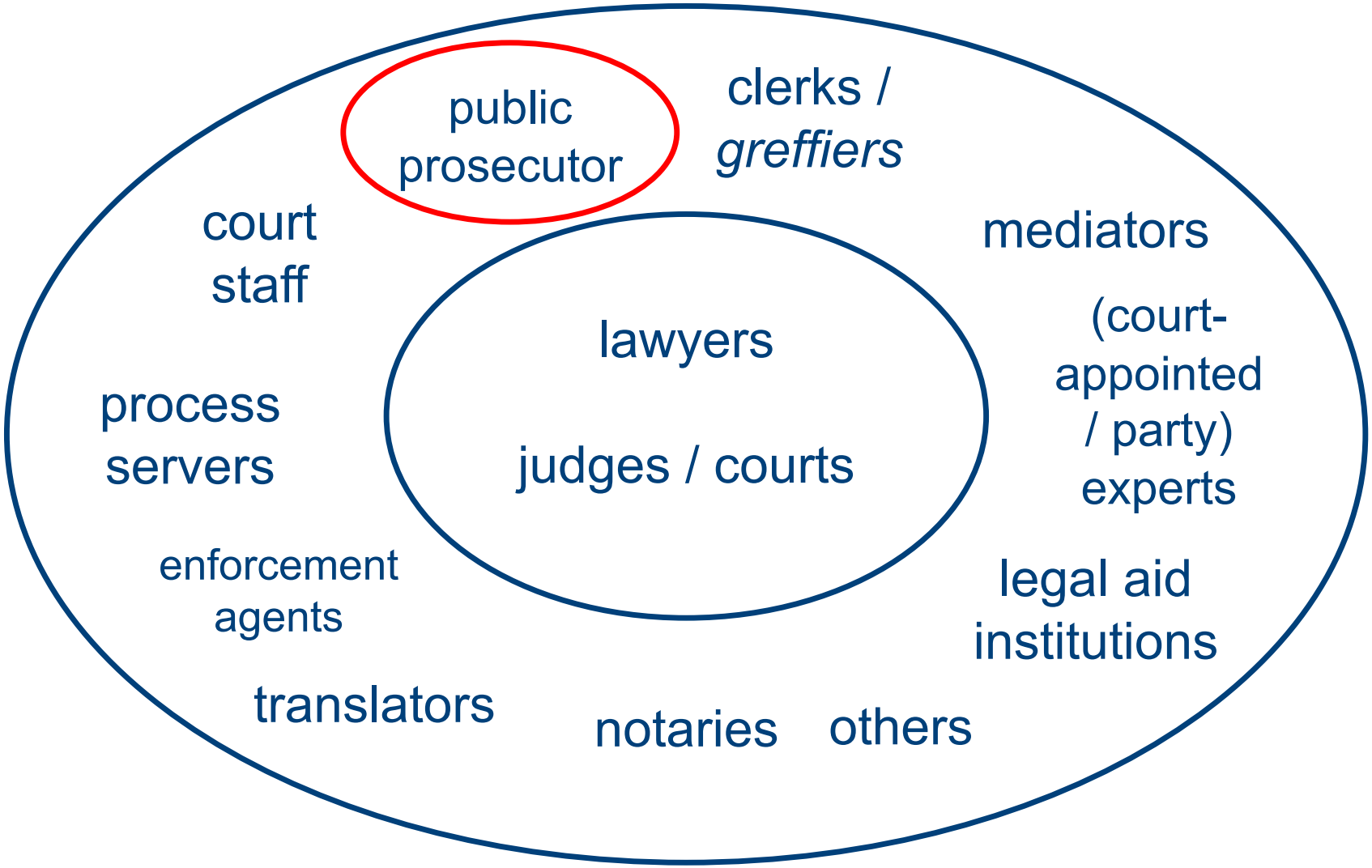
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Article 138*bis*, §1 Belgian Judicial Code

Dans les matières civiles, le ministère public intervient par **voie d'action**, de **réquisition** ou, lorsqu'il le juge convenable, par **voie d'avis**.

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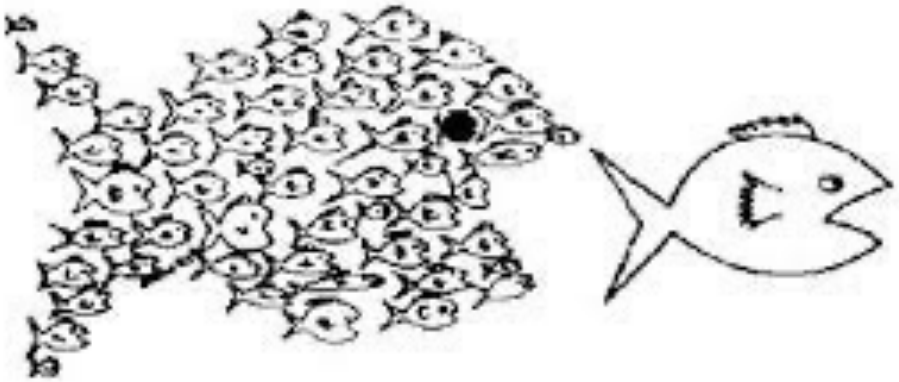
CLASS ACTION



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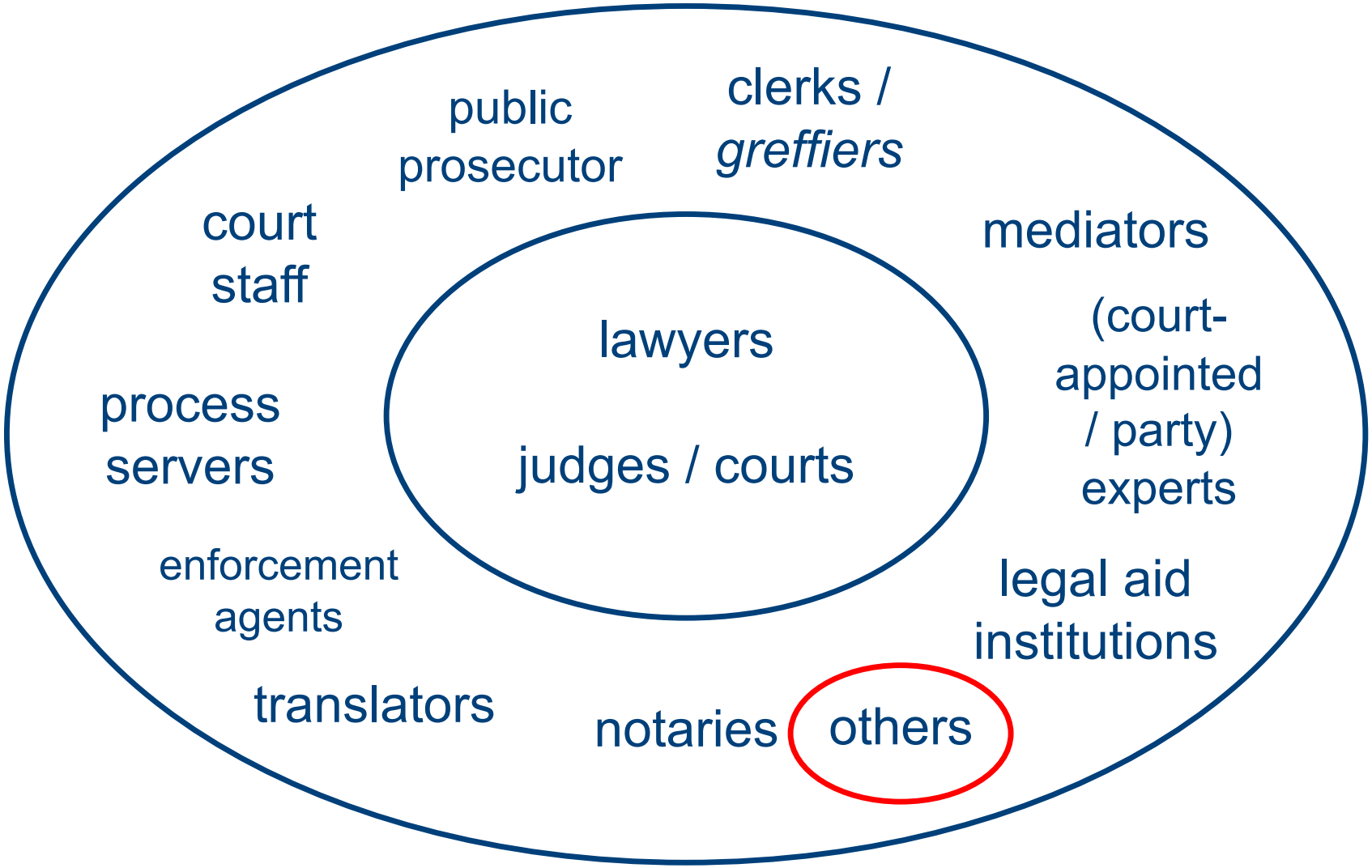
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Rule 53 Federal Rules of Civil Procedure
(a) Appointment.
(1) Scope. Unless a statute provides otherwise, a court may appoint a **master** only to:
(A) perform duties consented to by the parties;
(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:
(i) some exceptional condition; or
(ii) the need to perform an accounting or resolve a difficult computation of damages; or (…)

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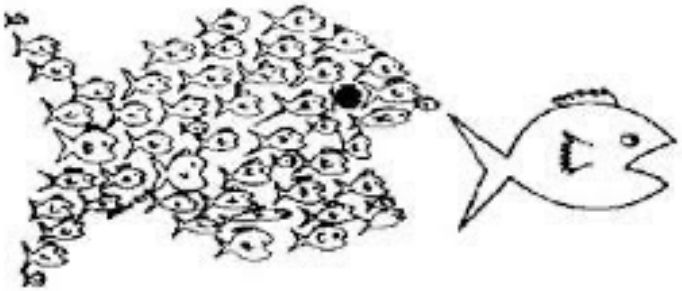

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Chapter 2 – Representative actions
Article 4
Qualified entities

7. (…) Member States may designate **public bodies** as qualified entities for the purpose of bringing representative actions. Member States may provide that public bodies already designated as qualified entities within the meaning of Article 3 of Directive 2009/22/EC are to remain designated as qualified entities for the purposes of this Directive.

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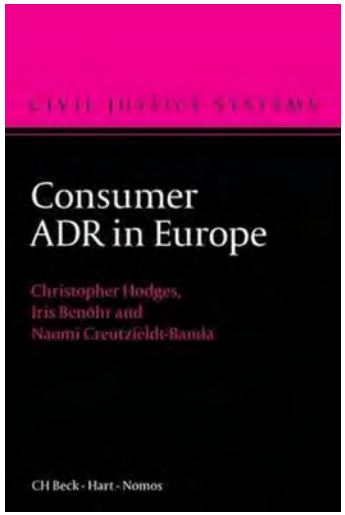
"multilayered framework of regulation, lawmaking and law application"

(Walter Van Gerven)



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EXPERT EVIDENCE AND ACCESS TO JUSTICE. VALUES AT STAKE.

Prof. Eduardo Oteiza

Roadmap

I. Context: uncertainties and certainties. Two central values: equality and neutrality.

II. The limited knowledge of the judge on scientific and technical aspects.

III. Normative strategies.

IV. Party expert vs. Expert assistant to the Judge.

V. Partiality and inequality as a risk to be taken into account.

1. Context: Uncertainties and certainties. Two values at stake: Neutrality and equality.

- UN General Assembly - 2015 - 2030 Agenda - Sustainable Development - Leave No One Behind central, transformative promise.
- Goal 16 – "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels."
- 16.3 – "To promote the rule of law at national and international levels and ensure equal access to justice for all."

- Covenant on Civil and Political Rights (1966)
- Article 14: "All persons shall be equal before the courts and tribunals… everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…"

Human Rights Committee - General Comment No. 32 (2007) "The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law."

The requirement of jurisdiction, independence and impartiality of a court within the meaning of Article 14, paragraph 1, is an absolute right that may not be derogated.

Europe - Access to justice:

- European Convention on Human Rights – **Article 6 - Right to a fair trial.**
- EU Charter of Fundamental Rights - **Article 47** - Right to an **effective remedy and to a fair trial.**

ECHR - Golder v. UK (1975) - An important derivation of the right of access to justice is the principle of equality of arms.

ECHR – Feldbrugge v. The Netherlands (1986) - need to achieve a fair balance between the parties.

IACHR: Advisory Opinion OC-16/99:

…defendant must be able to assert their rights and defend their interests effectively and in conditions of procedural equality with other defendants.

To achieve to its objectives, the due process must recognize and resolve the factors of real inequality affecting those who are brought to justice.

Baldeón García (2006) and Vélez Loor (2010).

Herrera Ulloa (2004): …the right to be tried by an impartial judge or tribunal is a fundamental guarantee of due process.

Usón Ramirez (2009):… impartiality requires that the judge intervening in a particular dispute to examine the facts of the case with no prejudice…

CAPPELLETTI ("Who watches the Watchmen?" 1983):

The ultimate value, essence and nature, so to speak, of the judicial function, is for a decision to be taken by an impartial third party (tertius super partes) after a fair opportunity to present and defend a case.

HOBBES (*De Cive* 1646)

" No man is a fit arbitrator in his own cause " and therefore "no man in any cause ought to be received for arbitrator to whom greater profit, or honour, or pleasure apparently ariseth out of the victory of one party than of the other".

ANDRÉS IBAÑEZ, *Tercero en Discordia. Jurisdicción y juez del estado constitucional – TERZIETÀ -* Jurisdiction and judge of the Constitutional State, 2015) –

Independence is a prior guarantee, a condition of possibility of impartiality.

2.
The problem of expert impartiality.
The limited knowledge of the judge.

C.B. v. Austria – 2013- An expert provides assistance in order to resolve a question or problem that arose… one that the judge is unable to resolve.

Taruffo- the judge as a typical average man, from a cultural point of view.

DAMAŜKA (*Evidence Law Adrift*, 1997)
The facts revealed by modern technical instruments broaden the gap with "reality as perceived by human sensory organs."
These technical instruments are handled by experts with special knowledge.

V.A.R. - Video Assistant Referee.

HAACK (*The Expert Witness: Lessons from the U.S. Experience*, Journal of Philosophical Studies (2015).

It is unlikely that expert witnesses will willingly proffer information that could be detrimental to the party hiring them, even if this information were of use to the judge.

Nor can this be guaranteed from "non-partisan" experts. The only difference is that they were not hired by either of the parties.

3.

Different normative strategies regarding the impartiality of the expert.

Appointment of the expert by the judge: Iberoamerican Model Code, Uruguay, Brasil, Argentina.

Codice di Procedura Civile - Carpi and Taruffo - *consulenza tecnica d'ufficcio - ausiliari del giudice* - Functionally, and sometimes substantially, jurisdictional activity. *Consulenza técnica di parti* - does not constitute a means of proof but merely defensive allegations.

Code de procédure civile - technicien - chosen by the judge to illustrate a point - (Article 233).

They must discharge their responsibility with conscience, objectivité et impartialité (Article 237).

Zivilprozessordnung: the expert as adviser to the judge. Party opinions are not a means of proof in the sense of Articles §§355.

English Civil Procedural Rules - BATTEL OF EXPERTS.

PART 35 - EXPERTS AND ASSESSORS.

35.3 –

(1) It is the duty of experts to help the court on matters within their expertise.

(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

35.4 –

1. No party may call an expert or put in evidence an expert's report without the court's permission.

35.10 - Contents of report

1. …
2. At the end of an expert's report there must be a statement that the expert understands and has complied with their duty to the court.
3. The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

ALI/UNIDROIT - Principles and Rules of Civil Procedure (2004) –

26. Expert Evidence – Special Evidence

26.1 The court MUST appoint a neutral expert… if considers that expert evidence may be helpful.

ELI/UNIDROIT - 2020 - European Rules of Civil Procedure:

Rule 119. Party-appointed Experts - parties may present expert evidence on any relevant issue for which such evidence is appropriate. They may do so through an expert of their choice.

Rule 120. Court-appointed Experts

(1) The COURT MAY APPOINT one or more experts to give evidence on any relevant issue for which expert evidence is appropriate, including foreign law.

Ley de Enjuiciamiento Civil Española – 2000 -

- Burden of providing the expert opinions that they deem necessary or convenient for the defense of their rights. (Articles 265and 336).
- Right to free legal assistance (declaration of poverty) , in which case the expert will be appointed by the court (Article 339, 1).

Similar models: Colombia (2012), El Salvador (2008), Organic Procedural Code of Ecuador (2015), Civil Procedure Code of Honduras (2007) Procedural Code of Costa Rica (2015).

4.
Party expert
vs.
Expert assistant to the Judge.

False antinomy that only bypasses the problem.

Party expert: structural partiality due to the relationship's origin.

Official appointments of experts. Qualitative difficulties.

5.
Partiality and inequality as a risk to be taken into account

Fundamental values.

The right to evidence - Due process in constitutional and conventional terms.

The independence and impartiality of the judge and the expert.

Access to justice under equal conditions.

Cappelletti and Garth: right to effective access to justice

Although perfect equality is a utopia, the questions are: how far can we push the utopian hope for equal justice and what barriers can we overcome.

Courts of the Future

A Lonely AI Planet or a Team Universe?

PROF. DR. ALAN UZELAC

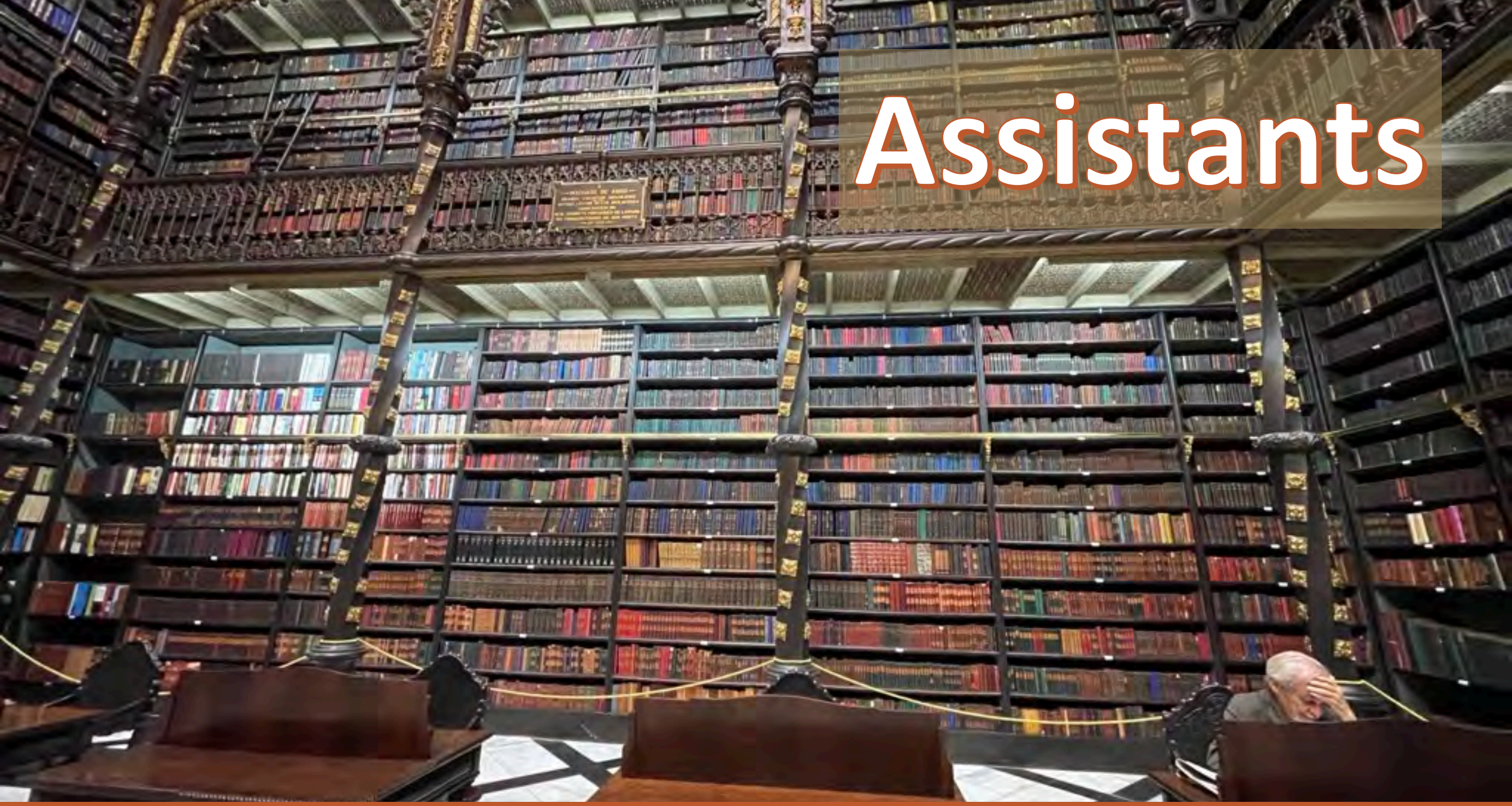
SVEUČILIŠTE U ZAGREBU / UNIVERSITY OF ZAGREB

PPJ 2023

Court: A Team Universe???

Experts

Clerks



Assistants

Administrative and technical staff in court buildings

2.2. Brojno stanje kadrova u pravosudnim tijelima na dan 31. prosinca 2021. godine

Tablica 3. Brojno stanje kadrova u pravosudnim tijelima

Pravosudna tijela	Pravosudni dužnosnici		Savjetnici i stručni suradnici		Vježbenici		Službenici		Namještenici		Ukupno	
	Žena	Ukupno	Žena	Ukupno	Žena	Ukupno	Žena	Ukupno	Žena	Ukupno	Žena	Ukupno
Sudovi	1.204	1.680	509	635	40	62	4.628	5.115	423	680	6.804	8.172
Državna odvjetništva	441	635	157	203	20	26	790	850	85	143	1.493	1.857
Sveukupno	**1.645**	**2.315**	**666**	**838**	**60**	**88**	**5.418**	**5.965**	**508**	**823**	**8.297**	**10.029**

Croatian judiciary – over 10.000 full-salaried professionals
1.700 judges, 600 state attorneys, 6.800 employees
… 4.000 ***typists – court protocol holders***

Statistički pregled o radu sudova za 2021. godinu

Erosion of the ”court” as a place of justice and adjudication

What is „the court”?
From the court as a place
to the court as a service

Do we need physical
courthouses and
courtrooms any more?
Virtual courts, online
courts…

(De)specialization?
(De)compartmentalization?
(De)centralization?

The courts as monuments…

MCKINSEY GLOBAL INSTITUTE

DISCUSSION PAPER
SEPTEMBER 2018

Until 2030 the AI will bring 13.000.000.000.000 $ to global economy

7.000.000.000.000 $ needs to be spent for mitigating the shock to the labor market

„…transition had to start some five years ago…"


DIGITAL
TRANSFORMATION

MASTER OF THE ROLLS

THE RIGHT HON. SIR GEOFFREY VOS

The Future of Civil Dispute Resolution in England and Wales

London – virtually
Monday 10 May 2021

„INTEGRAL HOLISTIC ONLINE DISPUTE RESOLUTION SYSTEM"

10. We already have a number of online systems in England and Wales. I will not bore you with details. In brief outline, we already have 1.3 million small court claims brought online mainly by bulk utility or financial claimants through Money Claims Online. We have had 200,000 Online Civil Money Claims brought by litigants in person. Professionals already take some 690,000 small personal injury claims, pre-court, through the Personal Injury Claims Portal every year. The new Whiplash Claims Portal - launching this month – is likely to attract a further 6 figure number of claims from litigants in person. In addition, Possession Claims Online already deals with some 100,000 such cases per annum. The HMCTS reform project will launch its Damages Claims Online portal later this month.

MASTER OF THE ROLLS

THE RIGHT HON. SIR GEOFFREY VOS

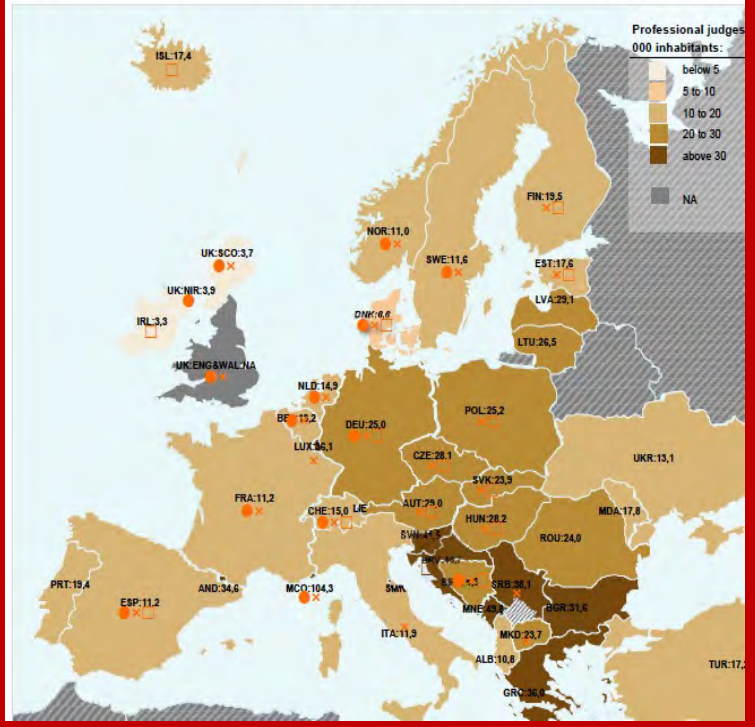
The Future of Civil Dispute Resolution in England and Wales

London – virtually
Monday 10 May 2021

„INTEGRAL HOLISTIC ONLINE DISPUTE RESOLUTION SYSTEM"

39. I want to see an holistic online dispute resolution system that takes account of the needs and expectations of the new generation of consumers, SMEs, industry and financial instructions, here and abroad. We must keep a very firm eye, as I have said, on the types of dispute that will actually arise in the future, for surely they will not be the kind of disputes that arose in the past. They will be digitally based – disputes concerning on-chain transactions, purchases made on Apple and Amazon platforms, and disputes arising from digital rather than paper documentation. We must be ready for the changes that are round the corner. Lawyers and the justice system have a reputation for being slow to accept new ideas. I hope that, during the current digital revolution, the courts of England and Wales will be seen as leading the way by setting a good technological example internationally.

Map 3.2 **Number of professional judges per 100 000 inhabitants in 2020 (Q1, Q46)**



81 % of the court budget are salaries!

	Approved budget (in €)	Implemented budget (in €)
TOTAL - Annual public budget allocated to the functioning of all courts (1+2+3+4+5+6+7)	187 560 717 [ ] NA [ ] NAP	186 909 470 [ ] NA [ ] NAP
1. Annual public budget allocated to (gross) salaries	152 285 443 [ ] NA [ ] NAP	152 285 433 [ ] NA [ ] NAP

TO WHICH EXTENT IS THE TAIL WAGGING THE DOG IN THE EUROPEAN JUSTICE SYSTEMYS?

Figure 2.1 **Judicial system budget per inhabitant, as % of GDP in 2020 (Q1, Q3, Q6, Q12, Q13)**

	States / Entities	Per inhabitant (€)	As % of GDP
A: < 10.000 €	ALB	14,53 €	0,33%
	ARM	10,47 €	0,28%
	AZE	9,59 €	0,28%
	BGR	54,13 €	0,61%
	BIH	37,81 €	0,73%
	GEO	8,69 €	0,23%
	MDA	15,73 €	0,41%
	MKD	19,27 €	0,37%
	MNE	64,02 €	0,80%
	SRB	40,21 €	0,66%
	TUR	16,12 €	0,21%
	UKR	NA	NA
B: 10.000 - 20.000 €	GRC	45,23 €	0,29%
	HRV	64,32 €	0,53%
	HUN	55,29 €	0,40%
	ISL	116,04 €	0,62%
	LTU	47,45 €	0,27%
	LVA	56,49 €	0,37%
	POL	NA	NA
	PRT	NA	NA
	ROU	49,58 €	0,44%
	SVK	71,55 €	0,43%
C: 20.000 - 40.000 €	AND	158,40 €	0,44%
	BEL	87,00 €	0,22%
	CYP	63,51 €	0,27%
	CZE	64,50 €	0,32%
	ESP	87,90 €	0,37%
	EST	53,56 €	0,26%
	FRA	72,53 €	0,21%
	ITA	82,15 €	0,30%
	MLT	62,98 €	0,26%
	SVN	100,03 €	0,45%
	UK:ENG&WAL	NA	NA
	UK:NIR	111,86 €	0,39%
	UK:SCO	85,20 €	0,27%
D: > 40.000 €	AUT	137,99 €	0,32%
	CHE	217,31 €	0,29%
	DEU	140,73 €	0,35%
	DNK	92,35 €	0,17%
	FIN	79,11 €	0,19%
	IRL	NA	NA
	Average	78,09 €	0,35%
	Median	64,50 €	0,30%

2023

Škare Ožbolt: “Maksimum plaće zapisničara je 5000 kuna, sa svim dodacima”

VIJESTI | Autor: N1 Hrvatska | 17. tra 2023 09:21 | 1 komentar

Podijeli :

ŠTRAJK PRED SUDOVIMA

Ovi ljudi rade za plaću koja je manja od minimalca, šef Vrhovnog suda: ‘Odmah im dajte povišice od 30 posto‘

Namještenici u pravosuđu imaju iznimno niska primanja, a među njima je više od devedeset posto žena

Piše: Slavica Lukić Objavljeno: 08. lipanj 2022. 08:38

“Status sudskih službenika i namještenika je općenito podcijenjen, a naročito sudskih zapisničara”, navodi u izvješću Dobronić. “Od njih se traži vrlo mnogo, a daje im se vrlo malo, a upravo oni su u postojećim uvjetima vrlo važni za pravilno funkcioniranje sudova. Sadašnja situacija sa zapisničarima na prvostupanjskim sudovima je kritična. Oni su s jedne strane preopterećeni, a s druge potplaćeni”.

SUDSKE ZAPISNIČARKE: PODCIJENJENE, POTPLAĆENE, PREOPTEREĆENE

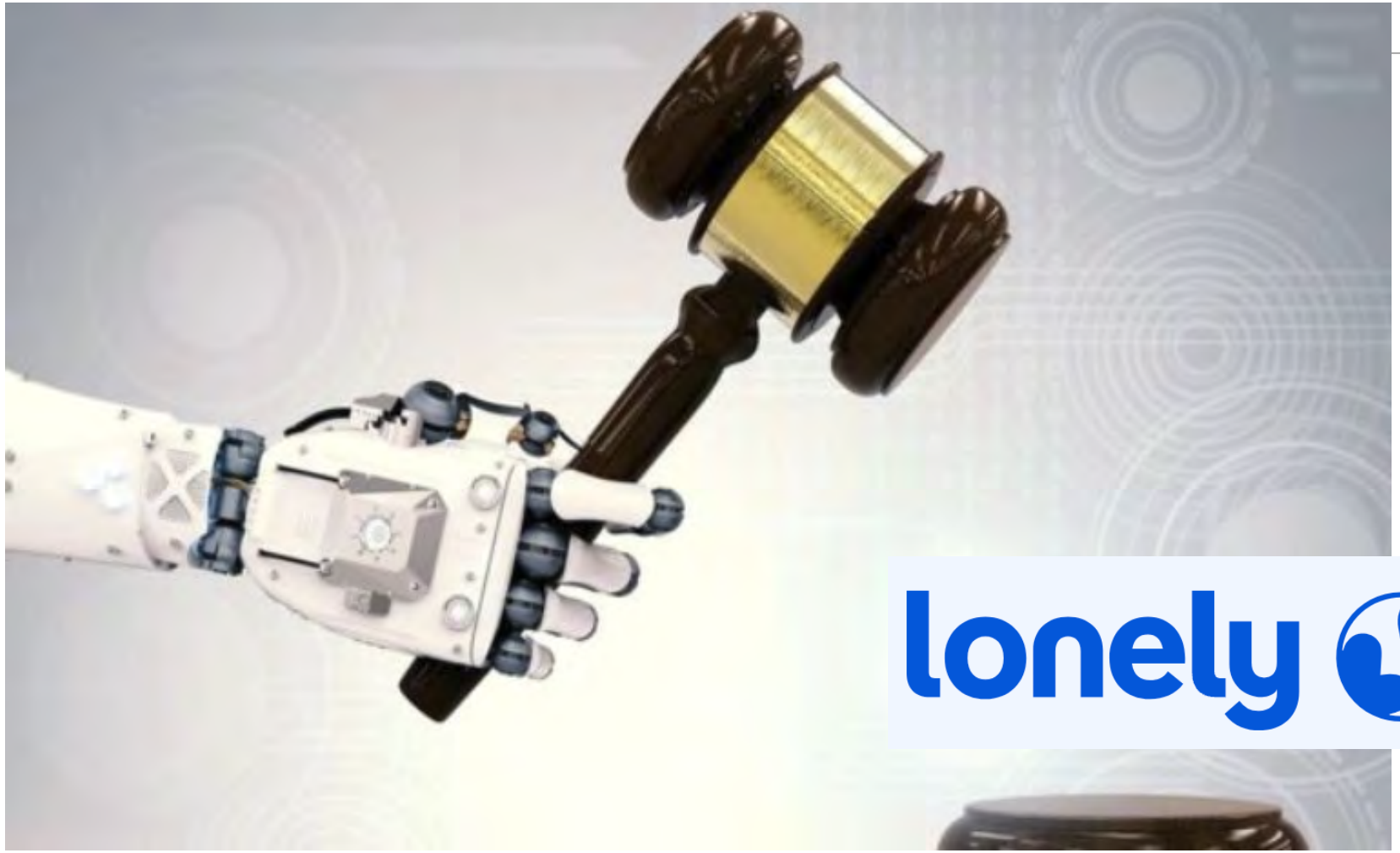
Objavljeno: 14.04.2023

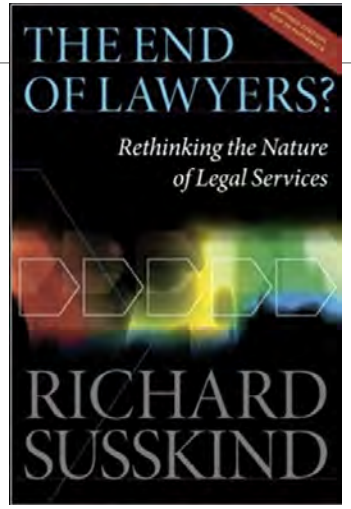
PODCJENJIVANJE RADA I DOPRINOSA SUDSKOM PROCESU

Četvero naših sugovornica zaposleno je na Općinskom građanskom sudu u Zagrebu, a lista njihovih radnih zadataka je poduža. U opis posla tako ulazi pisanje presuda, rješenja, zaključaka i drugih sudskih odluka te dopisa po diktatu suca ili sudskog savjetnika. Iako postoji informatički sustav pravosuđe ne odustaje od fizičkog vođenja dokumenata te je posao zapisničara poduplan. Iz tog razloga podneske koji su dostavljeni za određeni spis svakodnevno uvezuju i to kronološkim redom u informacijski sustav i u fizički spis. Pišu i otpremaju sudske pozive, dopise, odluke te otpremaju spise na viši sud kroz informacijski sustav suda. Uz to, otpremaju spise nadležnim sudovima te donose rješenja vezano uz naplatu sudskih pristojbi.

Naša prva sugovornica na Općinskom građanskom sudu radi 28 godina. Najvećim problemom ovog radnog mjesta smatra veliki obujam posla koji proizlazi iz stalnog nadograđivanja sustava.

Prospects of the use of AI in the courts





lonely planet

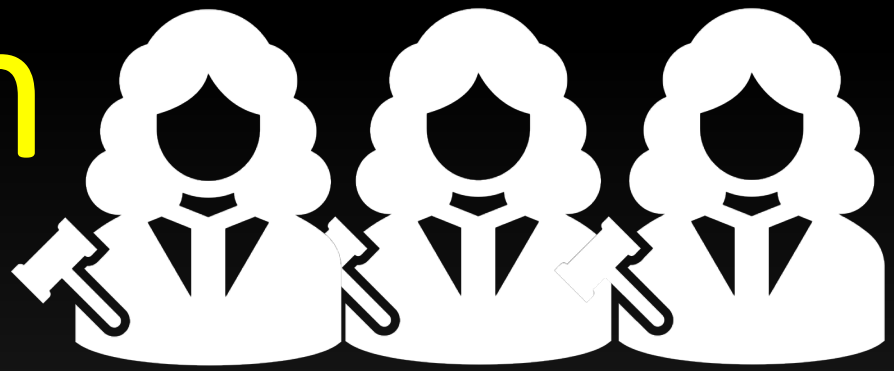

Experts
12
12
11


Clerks

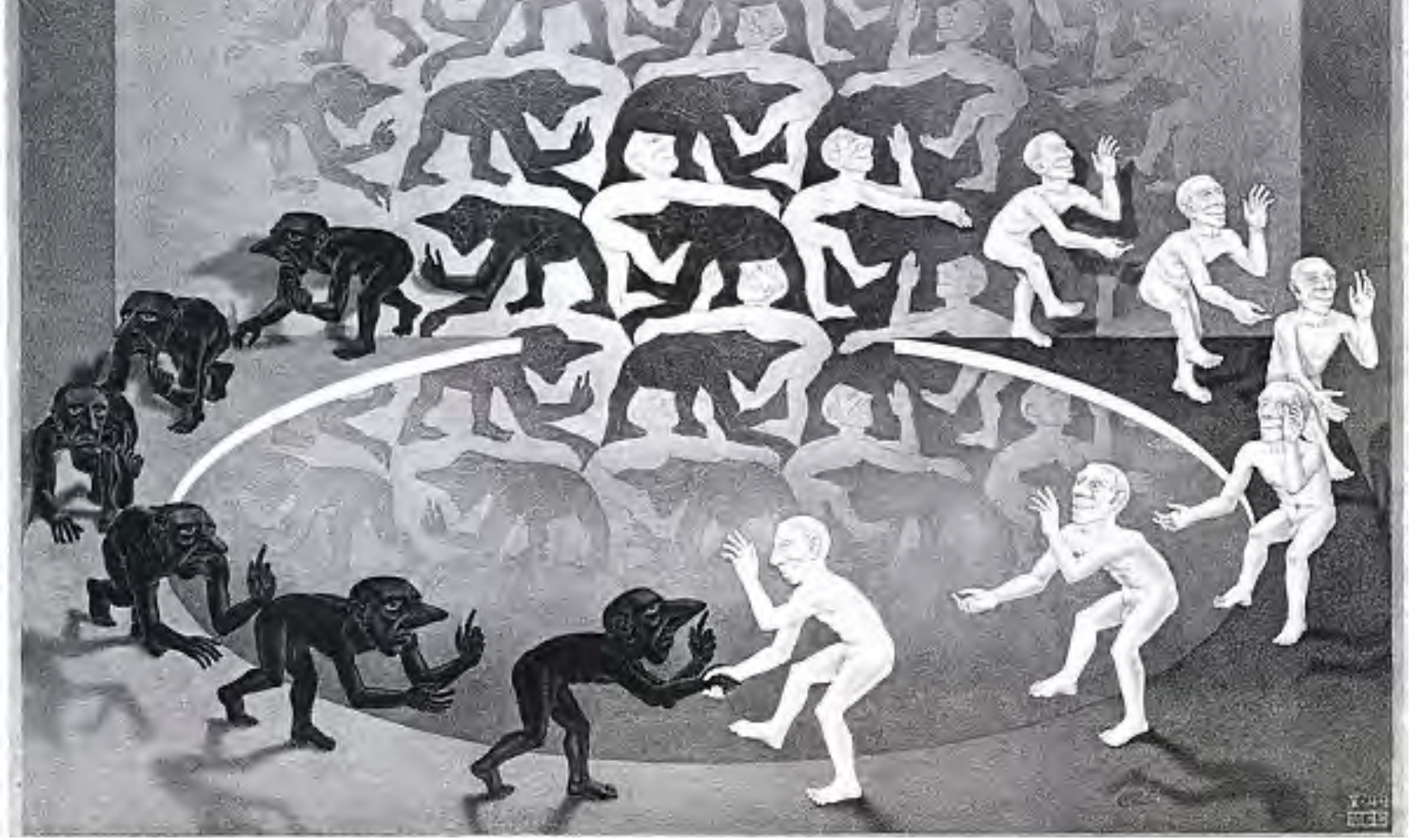
Assistants

Administrative and technical staff in court buildings

Court: A Team Universe???



The lonely planet of the AI



Is there an inherent value in the team work and collegiality?

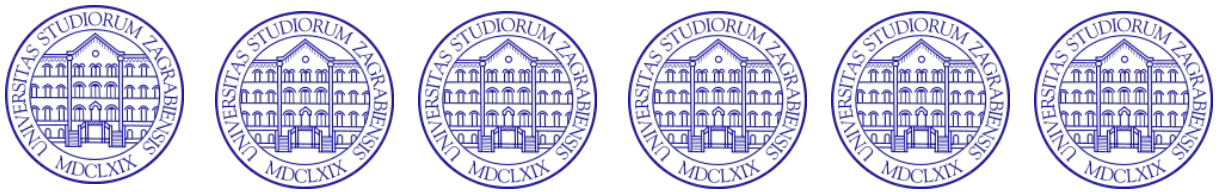
IS THERE A GOOD REASON NOT TO REPLACE THE MOST OF COURT SUPPORTING STAFF BY MACHINE TECH?

What can be the inherent value of team work and collegiality?

1. Is interpersonal communication capable of adding an element of sociality alien to the AI?
2. Are there good arguments to preserve a holistic perception in the judicial process?
3. Where should we preserve the ‘human touch’ and maintain expensive teams of analogue justice?
4. ??

Thank you for your attention! Let’s discuss!

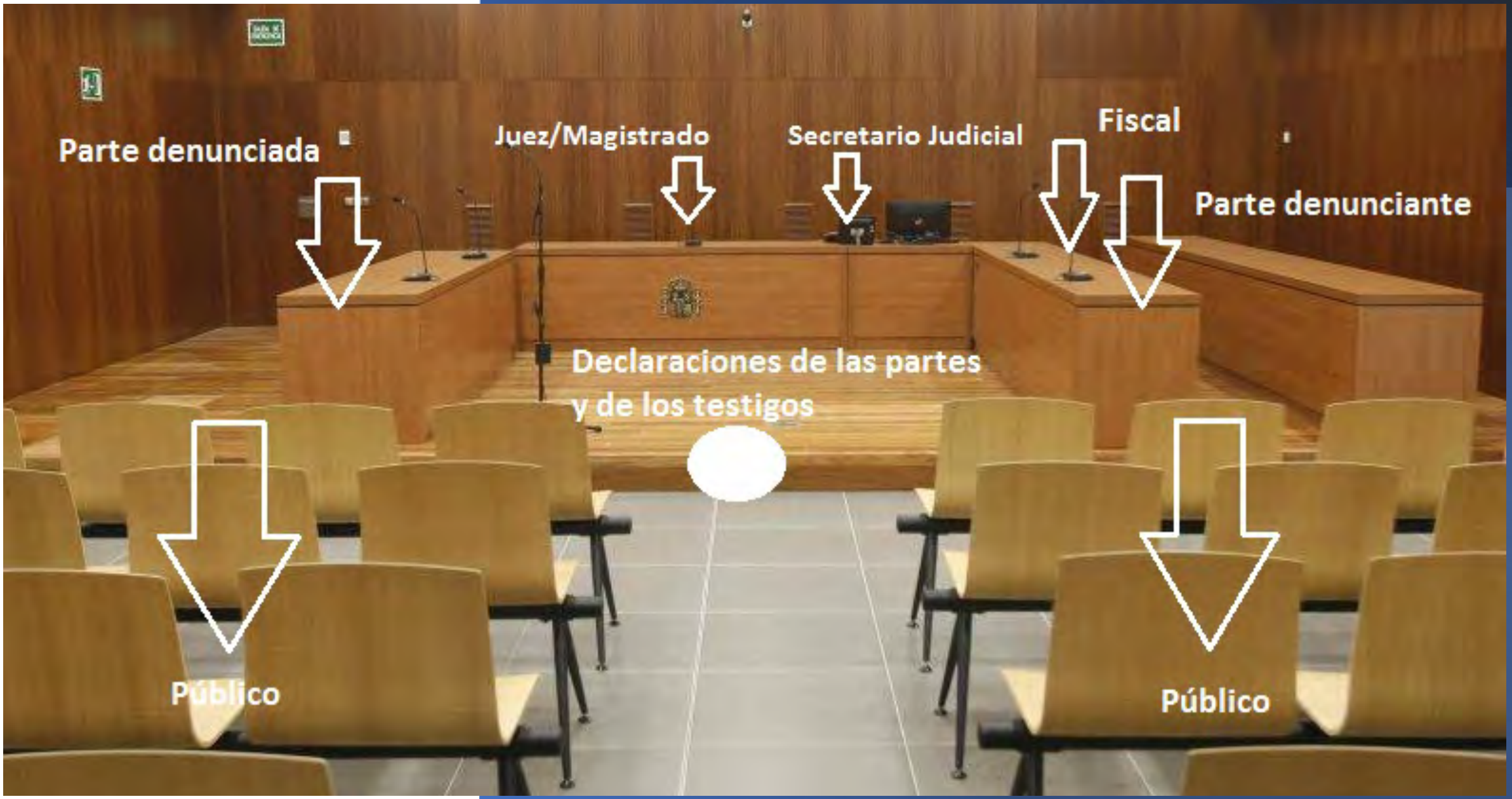
AUZELAC@PRAVO.HR



Judicial Secretaries in Spain: between bycephaly and frustration

Fernando Gascón Inchausti

Complutense University of Madrid


Parte denunciada
Juez/Magistrado
Secretario Judicial
Fiscal
Parte denunciante
Declaraciones de las partes
y de los testigos
Público
Público

The origins of the current situation:

Judicial Secretaries, from “judicial notaries” into “masters of the procedure”

The Spanish judicial organisation in the first instance: atomised single-judge courts

Primary function of judicial secretaries: authentication role (≅ judicial notaries) and documentation

Increasing functions and converging trends:

- Proposals for decisions
- Enforcement
- Recording of hearings
- Reorganisation of internal court structure (“common services”)

Three main steps in the evolution

- (2003) New Judicial Office (new functions as court managers)
- (2009) New procedural rules: “jurisdictional” decisions v. “procedural decisions” (a complicated and non-well explained distinction…)
- (2015) New name: Attorneys of the Administration of Justice

The current situation: what do they actually do?

- Enforcement proceedings
- Non-contentious proceedings
- Declaratory proceedings: “masters of the proceedings”
  - Admission of the claim
  - Special ways to terminate proceedings
- Order for payment proceedings
- Costs
- Challenging their decisions

The collective frustration

Salary?

2023 strike → paradoxal consequences

Status?

The insolvable problem of independence

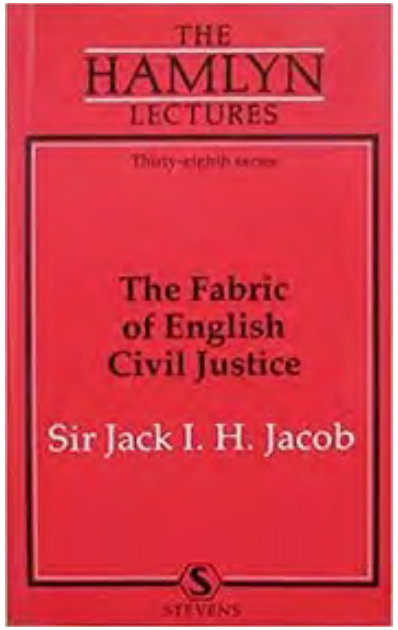
The vanishing relevance of their legal skills in the era of new technologies and AI (recorded hearings; AI transcripts; automated proceedings).

PUBLIC PROSECUTORS, OMBUDSMEN AND SIMILAR INSTITUTIONS IN LATIN AMERICAN CIVIL PROCEDURE

2023 PPJ Conference - IUC in Dubrovnik (29 May to 2 June)

Prof. Dr. Dr. Hermes Zaneti Jr. – Federal University of Espírito Santo/Vitória-Brazil

Justice System: Institutions, Professionals and Procedures

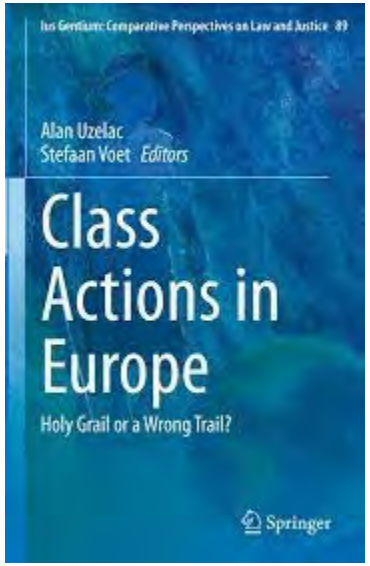


- "we have increasingly been using the expression "civil justice" in place of "civil procedure" to describe the entire system of the administration of justice in civil matters (…) it encompasses the whole area of what is comprised in civil procedural law (…) to consist of **three parts**, namely, the institutional part, the professional part and the procedural part, that is, civil procedure in the narrower sense of the term as the practice and procedure of the civil legal process (…) not separate and self-contained areas of civil justice (…) intermesh and interact (…) as a single organic whole." p. 2/4
- "de-mystify the process, to render it plain, simple and intelligible, to enable not only the experts in other disciplines but also **the man in the High Street to understand and appreciate its operation and in this way to bring justice closer to the common people.**" p. 4.

ZSPE – Zagreb School of Procedural Excellency

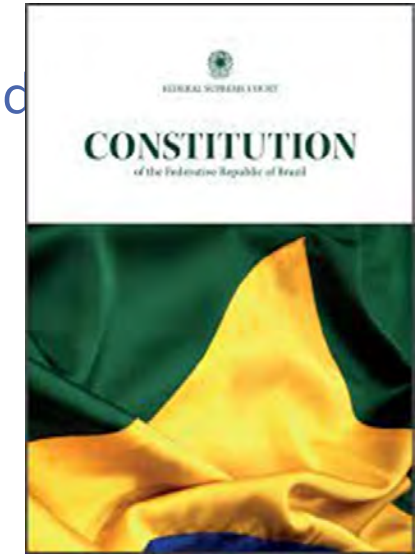
Public and Private Justice – PPJ/IUC and Legal Clinic

Inter University Centre Dubrovnik
An independent, international centre for advanced studies
IUC

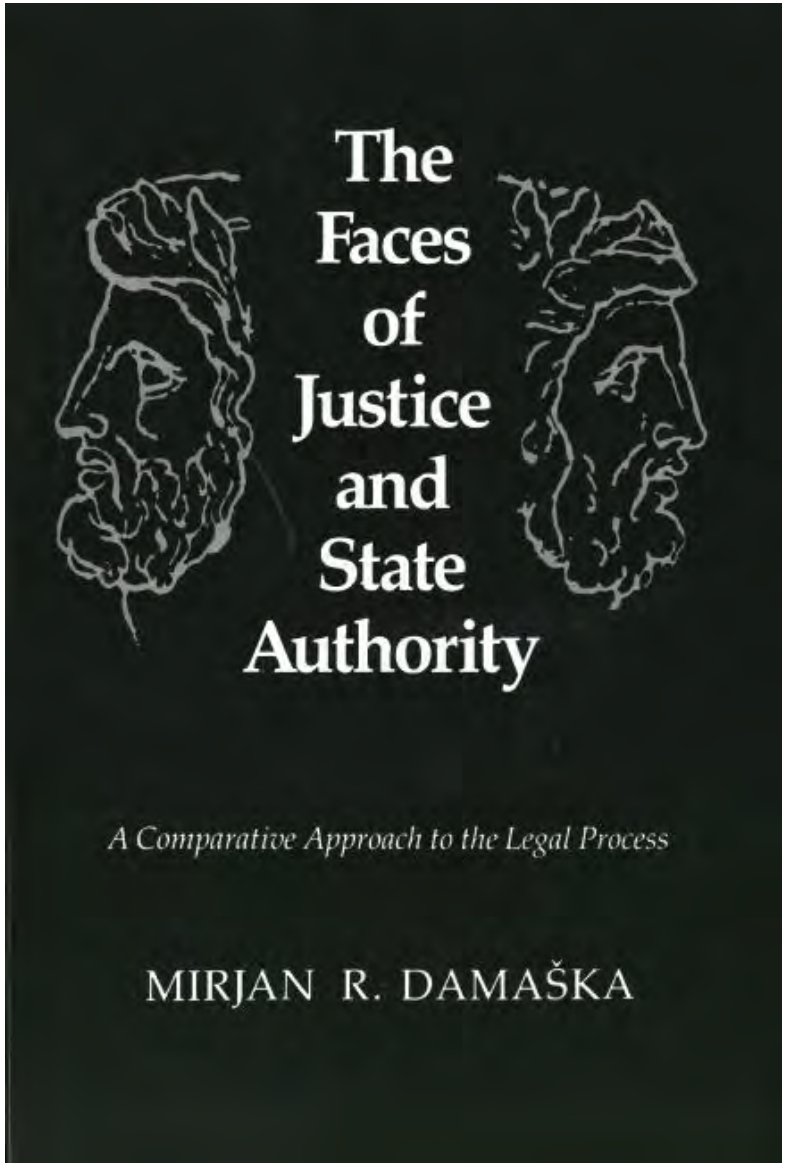


HUMAN AND FUNDAMENTAL RIGHTS – PUBLIC INTEREST LITIGATION

- Constitutionalization of the law
- Internationalization of human rights
- European Court of Human Rights and Interamerican Court of Human Rights
- Civil Procedure? Broad sense of civil justice (public policies)
- Brazilian Public Prosecutors Office as an institution of Acess to Justice and Protections of Human and Fundamental Rights (IPA or Ombudsman)
- **Title II – Fundamental Rights and Guarantees (Articles 5 to 17)**
- **Chapter I – Individual and Collective Rights and Duties (Article 5)**



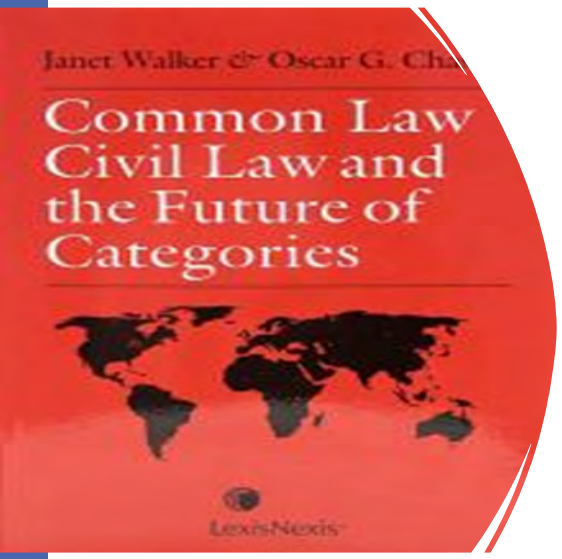
Refining the binary model: the ideal typology?



Credits: Prof. Alan Uzelac, Processo Civil Comparado, Vitoria, UFES

Damaska – Policy-implementing/ coordinate officialdom

- "Where matters involving the state are concerned, a coordinate official is always ready to reconsider his decision if he finds that it was wrong or that it requires modification in light of new circumstances. If he feels that a decision by a parallel official is erroneous, he is ready to block its execution or to contemplate some other constraining action (…) In their scheme of things, such dysfunctions [generalist-judges, part-time draftees, semiofficial procedural protagonists and other authorities as prosecutors], even if clearly perceived, may be an acceptable price for an otherwise desirable state of affairs"p. 228.
- **Internal and external point of view – bureaucratic centralisation – state apparatus** - coordinate authority – federal judges – structural injunction cases – themselves direct and manage the transformation of private and public structures "conjoining of administrative, legislative, and judicial functions" that will **drive Montesquieu in "to despair**", p. 232/233
- "The most **perplexing examples of coordinate policy implementation** are found in the more recent American practice of ***using civil procedure in the 'public interest'.*** These cases take many forms, but the variant of greatest interest here is a lawsuit brought by ***a plaintiff acting on behalf of a large interest group against the mini officialdom of a school, hospital, prison, or independent governmental agency***"(Ibidem, p. 237).



What Brazil, Russia, China and Croatia have in common? Transitional countries between old and new traditions

"For countries undergoing fundamental changes in their economic and political systems, such as Brazil, Russia, China and Croatia, key questions include whether the procedural reforms supporting economic or political transition are taking legal systems closer to the common law or civil law; and whether these jurisdictions in transition are developing a new blend of practices that is better described in ways other than "common law" or "civil law"." CHASE, WALKER, 2009, Introduction, p. lxvi.

"As every legal system may be a more or less *mixed* jurisdiction, every legal system may also be in *transition*."

Writ of Habeas Corpus and the original Habeas Data (creative reception)

"The adoption of procedural reforms by leading countries such as Brazil can increase the likelihood that the reform will be adopted elsewhere" MAIN, Thomas, Country Studies from Beyond the Divide: An Introduction, 2009, 273/274

Methodological paradox

North America
USA

Common Law
Tradition

Europe
Portugal - Italy

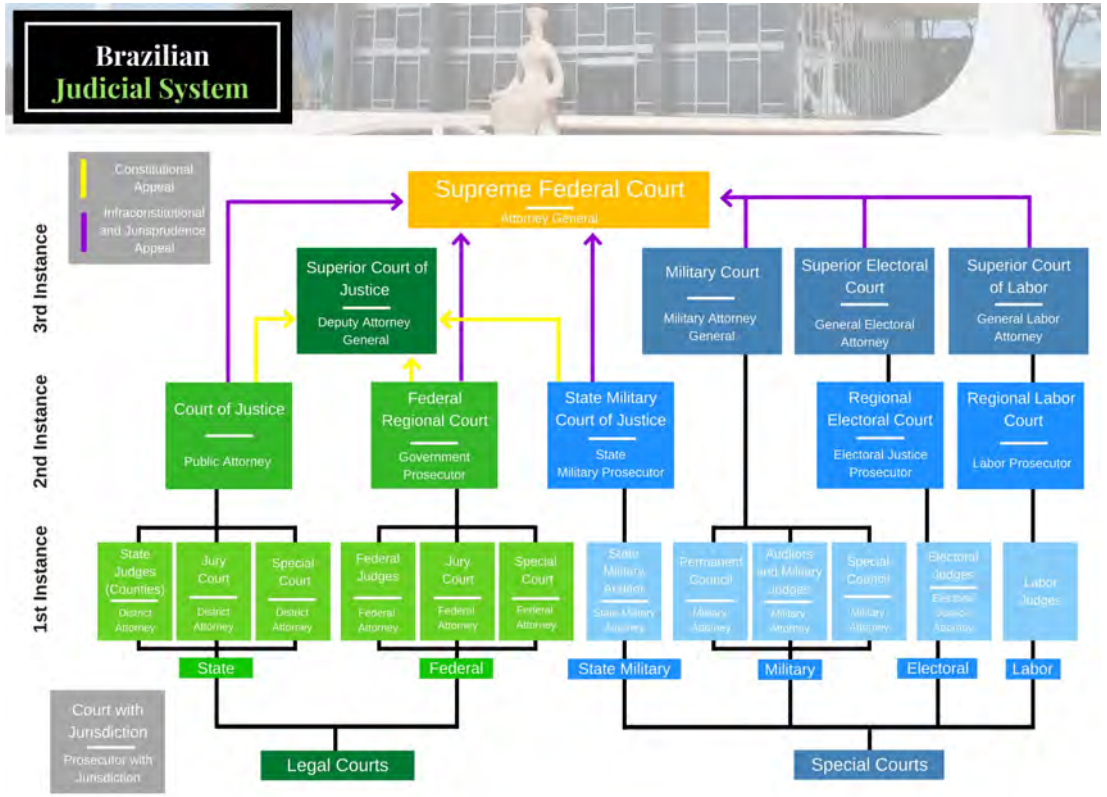
Civil Law
(Romano-canonical)
Tradition

Brazil

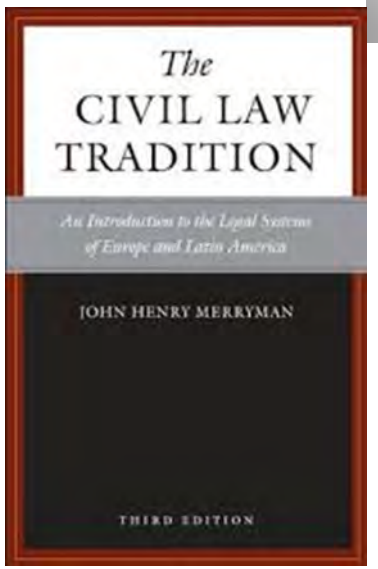
Federative system

1) National substantive and procedural law

1) State-member institutions of government and guarantees



A Common Paradox: Brazil and Argentina Judiciary Systems Inspired in U.S. Constitution



"(...) **Argentine Constitution of 1853**, which was modelled after the U.S.

Constitution; it included a *system of checks and balances that were based on U.S. laws.* Similarly, the Supreme Court of Argentina upholds the tradition of citing prior court decisions from the U.S. Supreme Court." "The Constitution of the **Republic of Brazil of 1891** adopted a federal system of government that has, except for some amendments, remained in effect, **under the direct influence of the U.S. Constitution**"., OTEIZA, 2009, p. 233/234."During the 19th and 20th centuries, **Latin American countries** followed the **French tradition of written codes of law.**" OTEIZA, 2009, p. 235.

Public servants for life-time: **Faceless bureaucrats?** J. H. Merryman

Common law in Brazil?

- **Writs** (since 1891 Civil Habeas Corpus; changed in 1934 to a Writ of Mandamus; and, after 1988 Constitution new procedural constitutional instruments, Habeas Data, Writ of Injunction)
- **Small Claims Court**
- **Class actions (collective redress – 1977/1981/1985 and 1988/1990 – Constitution and Consumers Code)**
- **Injunctions** (experience with court orders of Habeas Corpus, Writ of Mandamus, and Collective Redress)
- **Contempt of Court (Civil)**
- **ADR** (Grinover; Watanabe, 2009, p. 333-340) **– ANPP and ANPC – plea bargain and other forms of pactum de non petendum in criminal and civil courts**
- **CPC 2015 – Binding Precedents**

Brazilian Constitutional Rule of Law – Individual and Collective/Liberal and Social Fundamental Rights

- Federal Constitution 1988
- Paragraph 1. The provisions **defining fundamental rights and guarantees apply immediately**.
- Paragraph 2. **The rights and guarantees established in this Constitution do not exclude others deriving from** the regime and principles adopted by it, or from the **international treaties to which the Federative Republic of Brazil is a party**.
- Paragraph 3. International **human rights treaties and conventions on human rights approved by both Houses of the National Congress**, in two different voting sessions, by vote of three-fifths of their respective members, shall be equivalent to Constitutional Amendments. (CA 45, 2004)
- CPC/2015
- Art. 13. Civil proceedings shall be governed by Brazilian procedural rules, **with the exception of specific provisions set forth in international treaties, conventions and agreements to which Brazil is a signatory.**

Ombudsman and Defensor del Pueblo

- Origins in Sweden
- 1809 – *Justitie Ombudsmen* (Art. 96, 1810, Barón Mannerheim)
- 1974 – New constitution "The Ombudsmen for Justice, supervise "the application of laws and other regulations in public activities". The Ombudsmen can criticise the handling of a matter by a court of law or an administrative authority."
- Latin America – "defensores del pueblo" or "defensores de los derechos humanos"; special procurators for consumer rights etc.; Public Prosecutors
- Special ombudsman (many areas and fields)

"Ombudsman Criollo" – "Transplant" and/or "Cross-fertilization"?

- Jorge Madrazzo "El Ombudsman Criollo", Mexico, 1996

"Anyone who believes that a state body such as the Ombudsman **should be defined and should act as a political enemy of the government, is deeply wrong** (…) The Creole Ombudsman is an intermediary body between society and the government(…) capacity for dialogue and dialogueThat's why we so often repeat that the Ombudsman is a technical instrument and not a political ariete."

Instituto Latinoamericano del Ombudsman
Defensorías del Pueblo

Argentinian "Defensor del Pueblo"

Established in the constitutional reform of 1994.

- The Ombudsman

Section 86.- The Ombudsman is an **independent authority created within the sphere of the National Congress operating with full autonomy and without receiving instructions from any other authority.** The mission of the Ombudsman is the defense and protection of human rights and other rights, guarantees and interests sheltered under this Constitution and the laws, in the face of deeds, acts or omissions of the Administration; as well as the control of public administrative functions.The Ombudsman has capacity to be a party in a lawsuit. **He is appointed and removed by Congress with the vote of two-thirds of the members present of each House.** He has the immunities and privileges of legislators. He shall hold office for the term of five years and may only be re-appointed on one occasion.

The organization and operation of this body shall be ruled by a special law.

Since 2009 without Defensor del Pueblo de la Nación.

Corruption scandals, riots, risks for democracy in the left and right wings

Brazilian "Ministério Público" as Ombudsman?

- "In our view, however, **there is no need to create it.** The body of the **Public Prosecutors Office, in our legal system, has traditionally been responsible for receiving reports of abuses by authorities**, already vested with the power conferred by the State to pursue criminal accountability of such authorities before the Judiciary, a power that is not granted to the ombudsman in countries where it serves as an auxiliary body of the Legislative Power."
- Hugo Nigro Mazzilli, **1985, p. 73.**
- Art. 129, II, Federal Constitution 1988
- MPU - Art. 9º, LC 75/1993 – Procurator of the Citzen Rights "Procurador dos Direitos do Cidadão"

IPA – Independent Pro-Accountability Agencies

- "One of the most popular **pro-accountability reforms** in recent years has been the creation of **Independent Pro-Accountability Agencies ("IPAs")**.
- ***IPAs are autonomous public institutions that are responsible for holding government accountable in a specific issue area.***
- Autonomous
- corruption control bodies,
- independent electoral institutes,
- auditing agencies,
- human rights ombudsmen, and ***"public prosecutors."***
- John M. Ackerman, '*Rethinking the International Anti-Corruption Agenda: Civil Society, Human Rights and Democracy*' (2014) 29 Am U Int'l L Rev 293 p. 311

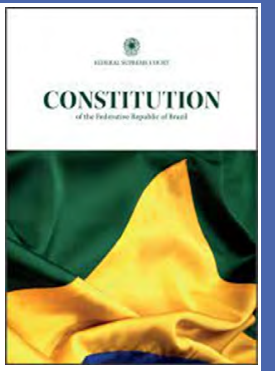
IPA – Independent Pro-Accountability Agencies

- "In recent years, there has been a veritable explosion in the creation of such institutions in the developing world. In Latin America, Belize, **Brazil**, Columbia, Costa Rica, Chile, Peru, and Mexico have all created or revived one or more such independent institutions in the last decade. This trend is also present in Asia, Africa, Australia, and Eastern Europe." John M. Ackerman, '*Rethinking the International Anti-Corruption Agenda: Civil Society, Human Rights and Democracy*' (2014) 29 Am U Int'l L Rev 293 p. 311

Article 129. The following are institutional functions of the Prosecution Office:

- II – to safeguard respect by the public authorities and by the services of general relevance for the rights guaranteed in this Constitution, taking the measures required to guarantee such rights **(ombudsman function);**
- III – to institute a civil investigation and **public civil suit (ação civil pública – Brazilian class actions)** to protect public and social property, the environment and other diffuse and collective interests;
- VI – to issue **notifications in administrative procedures** within its competence, requesting information and documents to support them **(recommendations)**;

Constitutional tasks of the Public Prosecutors in Brazil

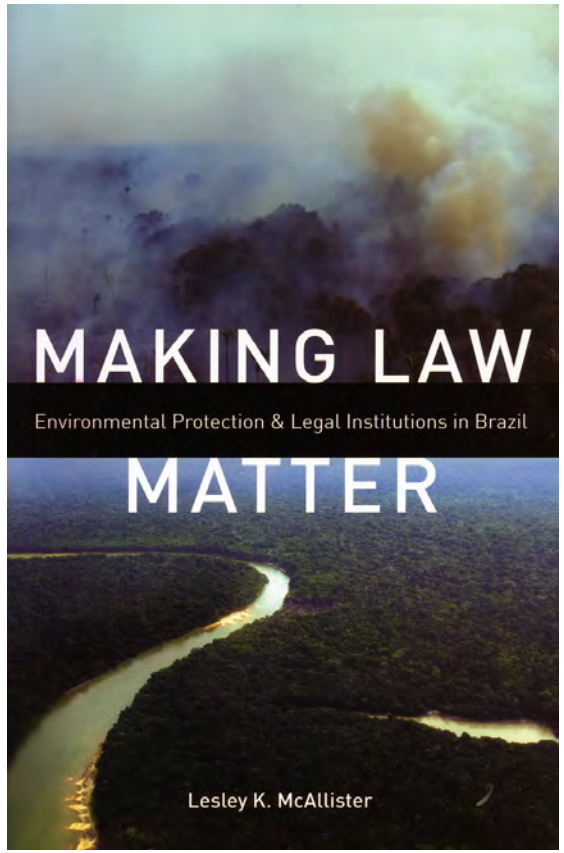


- Article 127. The Prosecution Office is a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the legal order, the democratic regime and the inalienable social and individual interests.
- Paragraph 1. Unity, indivisibility and **functional independence are institutional principles** of the Prosecution Office.
- Ensured **functional and administrative** autonomy
- Propose to the legislative: a) creation and elimination of its offices and auxiliary services; b) selection and appointment by very competitive **public exams and presentation of academic and professional credentials**; c) remuneration policies; d) career plans
- Prepare its budget proposal (at least **2% of the GDP ensured**)

“No King” - public prosecutors as people and fundamental and human rights lawyers

- IX – to exercise other functions which may be conferred upon it, if they are compatible with its purpose, with judicial representation and judicial consultation for public entities being forbidden.

Lesley K. McAllister "MAKING LAW MATTER: ENVIRONMENTAL PROTECTION AND LEGAL INSTITUTIONS IN BRAZIL" (2008)



- McAllister points out that with the **end of dictatorial rule** in many Latin American countries
- "**Brazilian public prosecutors became significant actors in the enforcement of environmental laws and regulations in the 1980s**."p. 4.
- "Almost all Latin American procuracies have undergone reforms as their criminal justice systems have adopted features of the accusatory (or adversary) model."
- "[i]n Brazil, prosecutors also became extremely ***active in civil litigation involving public interests*** such as ***consumer defense, children's rights, disability rights, and worker health and safety as well as environmental protection***." note 1, p. 7.
- Judicialisation of politics: "the 'increased presence of judicial processes and court **rulings in political and social life, and the increasing resolution of political, social or state-society conflicts in the courts.**" p. 8.

Total number of members of the Public Prosecutor's Office in Brazil (2021):

Union Public Prosecutors + 26 Member-states

Total

12.896

Who are the Brazilian Prosecutors and How and Where are they Selected

- "the Ministério Público typically attracts Brazil's ***best and the brightest, top-ranking graduates of its best law faculties.*** These people are accomplished, bright, and ambitious, ***products of the brutally competitive Brazilian university entrance examination-the vestibular-and, later, the equally challenging public employment examination system***."
- "***highly paid*** and, after an initial probationary period, ***exceptionally secure***." p. 621

THE CIVIL INVESTIGATION (PRÉ-TRIAL)

- "**Brazilian lawmakers** chose to give standing to prosecutors to adopt administrative and judicial measures in order to defend diffuse rights and to promote collective rights, taking into consideration that **prosecutors always had been the main protectors of public and social interests within our legal system**"

- "The Civil Investigation is an **administrative procedure conducted by the Public Prosecution to investigate facts and gather evidences** related to violations of diffuse or collective rights as a **preparatory stage** to negotiate an Out-of-Court **Settlement** or to file a **Public Civil Action**."

- **Manuel Pinheiro Freitas**, The role of Public Prosecutors as a Protector of Metaindividual Rights. Civil Investigation and public civil action. (MPCE)

"The procedure of the Civil Investigation was **established in the 1985 Public Civil Action Act**.

"Violations of diffuse or collective rights, prosecutors can dispatch notification to **hear complainants, witnesses, experts and defendants**, can order the **execution of scientific and technical surveys by auditors, engineers, biologists, among other experts**, depending on the kind of right or interest threatened or violated, and **can request information and documents to public and private institutions.**"

"The refusal, retardation or omitting information or documents requested by the Public Prosecution and that are necessary to file a Public Civil Action is considered **crime**. The punishments are: a) **Imprisonment** of 1 (minimum) to 3 (maximum) years; and b) **Fine**: (maximum = US$ 5.000)."

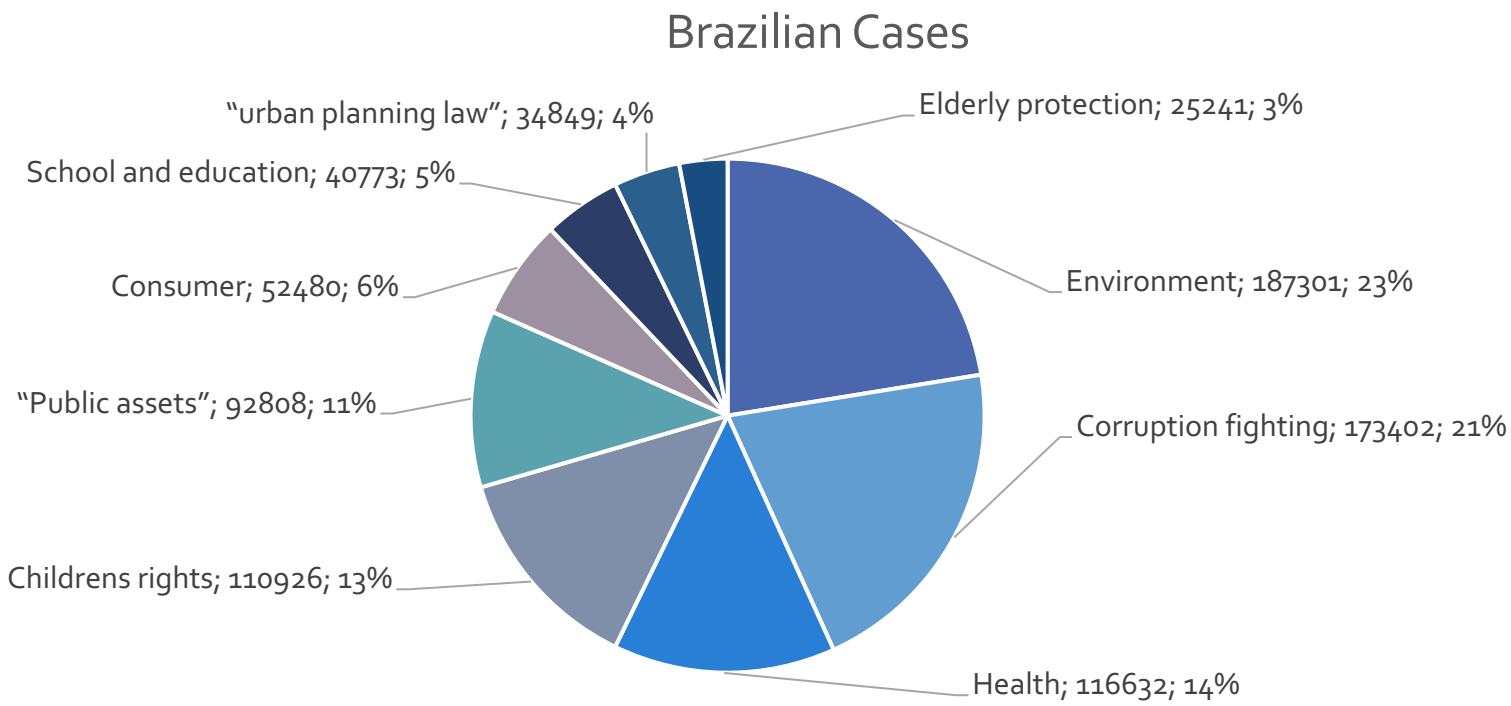
Standing to sue – Collective Redress

- **Public Prosecutors**,
- Civil **associations (NGO)**,
- legal entities of public law as the **Federal State**, the **Member States** of the Federation and **Municipalities** and their autarchies and foundations,
- **Public Defender**
- **80% of the actions are brought by prosecutors**

306.726

Pending Collective Redress Claims

ENVIRONMENTAL PROTECTION, CORRUPTION FIGHTING, HEALTH, CONSUMER RIGHTS ETC.



Frankenstein or Shining Knight? The North-American Big Bad Wolf

- Entrepreneurial lawyering – Not in Brazil – Public Prosecutors are payed by the State
- Contigence fees – Not in Brazil – Waive of fees and *public stimulous to litigation in favor of the public interest* **- Loser pay rule for the defendant**
- Punitive damages – Not awarded in Brazil
- Jury trial – Not in Brazil

Public Prosecutors in Brazil: Independence and Specialisation

Dimensions of Justice (1994)

- "**Various models** have come to the attention. In one model, in which **diffuse interests are considered public**, the **Public Prosecutor is given the right to act for their protection**. This is made possible **by Art. 129, III** of the Brazilian Constitution. **In Europe, however, this solution has proven not to be very efficient.** However, **independence and specialisation are two vital** conditions for the solution's success considered here."

Mauro Cappelletti

IPA – Independent Pro-Accountability Agencies

- "The performance of IPAs varies widely between countries. In many countries there is a long tradition of creating new "independent" bureaucracies in response to problems to ***make the government appear as if it were committed to resolving the issue at hand, whether it be corruption, human rights violations, free and fair elections***, etc. Such institutional innovations ***often successfully deflect criticism from the central bureaucracy***, thereby permitting the government to ***avoid a full reform of the state***. The transparency and openness to participation also varies widely between IPAs. For instance, while ***ombudsmen tend to be open and to provide much needed information to the public, auditing agencies tend to be much more closed-lipped*** (…) there is a direct relationship between the effectiveness of IPAs and the level and intensity of their interaction with society. Those IPAs that ***take their role as bridges seriously are the ones that fulfill their mandates more effectively***, while those that **separate themselves** from either the ***government or society*** tend to end in ***isolation and ineffectiveness." p. 312-313***

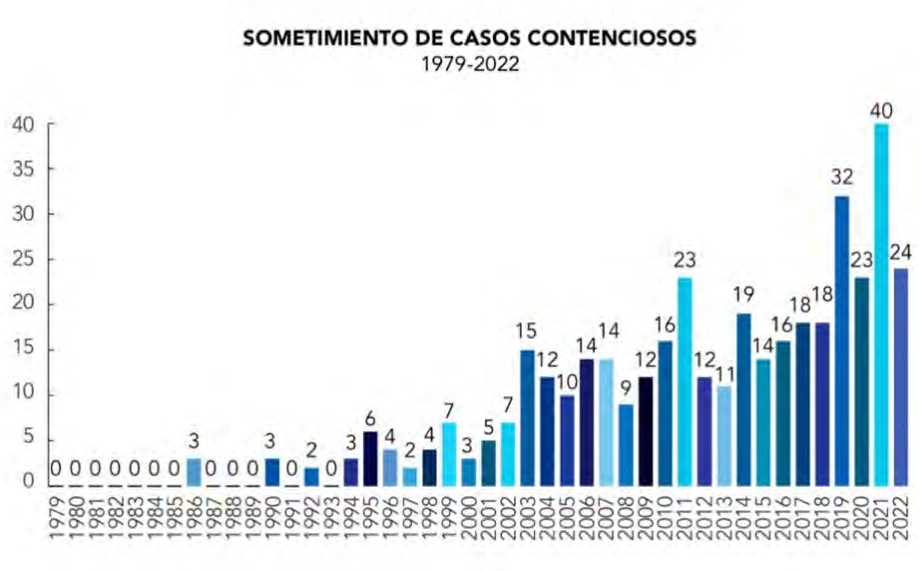
Where are the United States and Canada?

US Ambassador to the United Nations Jeane Kirkpatrick - **social and cultural rights "a letter to Santa Claus"**

US Senate ratifications of major human rights treaties **- not be invoked in civil litigation**.

Outside the superpower (EUA) – The Commission is regarded with greater respect and states dutifully send senior officials to be questioned and directed by members of the Inter-American Commission.

Inter-American System for the Protection of Human Rights



- The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights.
- Commission can impose binding "precautionary measures," ordering states to protect vulnerable individuals or avoid taking irreversible actions. The Commission also **acts as an investigative arm of the system**, makes recommendations to states, and **sends cases to the Court for adjudication when the states don't comply.**
- The Court **acts as a kind of continental Supreme Court** overseeing the human rights of people **(560 million)**

Brazil -

- Art. 62 - ACHR
- 1992 – formal entry of Brazil (7 years after the end of dictatorship in 1985– Dec. n. 678/1992)
- 1998 – acceptance of the IACtHR
- Only for cases after …. 1998
- Exceptions: permanent violations of human rights
- Case Gomes Lund (Araguaia Guerilla) - The forced disappearance of persons (illegal act persists over time, even though the initial unlawful act may have been committed in the past).
- Case Herzog – Torture

Brazilian Cases – Positive Procedural Obligations

- Positive procedural obligations in the Inter-American Court of Human Rights and the European Court of Human Rights refer to the obligations placed on states to ensure effective access to justice and fair legal proceedings. These obligations require states to take **active steps to protect and guarantee the rights** enshrined in human rights instruments, beyond merely refraining from violating them.

Interamerican Convention of Human Rights

- 2006: Case Ximenes Lopes vs. Brazil
- 2009: Case Escher et al. vs. Brazil
- Case Garibaldi vs. Brazil
- 2010: Case Gomes Lund et al. ("Guerrilha do Araguaia") vs. Brazil
- 2016: Case Trabalhadores da Fazenda Brasil Verde vs. Brazil
- 2017: Case Cosme Rosa Genoveva, Evandro de Oliveira et al. ("Favela Nova Brasília") vs. Brazil
- 2018: Case of the Xucuru Indigenous People and its members vs. Brazil
- Case Herzog et al. vs. Brazil
- 2020: Case Employees of the Santo Antônio de Jesus Fireworks Factory and their families vs. Brazil
- 2021: Case Márcia Barbosa de Souza and her family members vs. Brazil

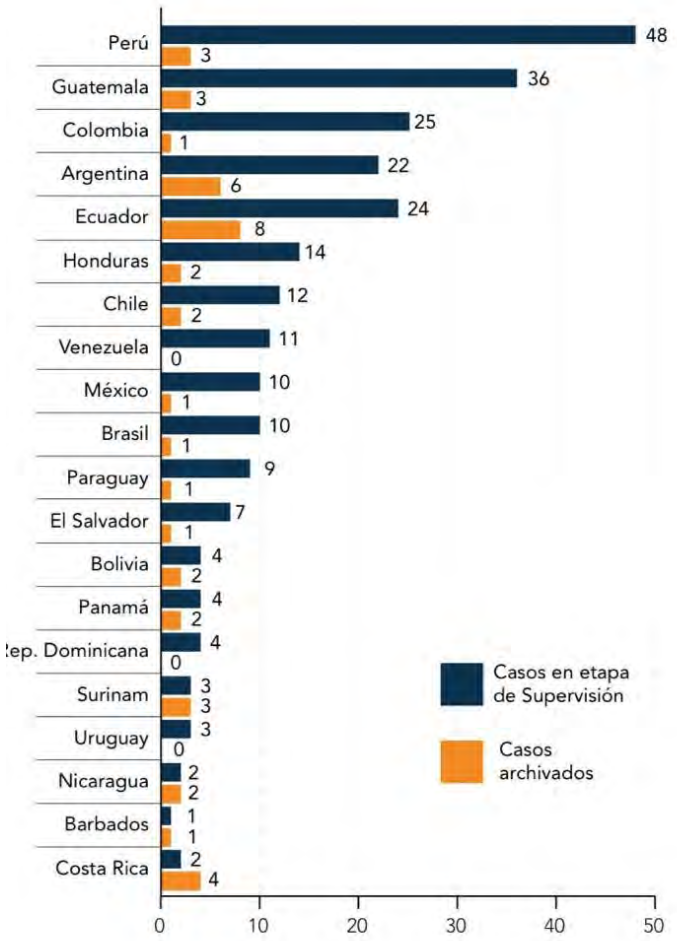
Enforcement

Brazil fulfils convictions for the **reparation of victims with considerable promptness.**

These convictions are paid through presidential decrees that authorise the compensation process.

On the other hand, **obligations that require changes in public policies**, such as in the Case Favela Nova Brasília, which determines limiting police operations with military characteristics and without observing due process of law, take more time to be fulfilled and have **resulted in new domestic convictions for non-compliance with the obligations.**

In the case of **police operations**, the decision of the Inter-American Court of Human Rights was cited by the Brazilian Federal Supreme Court in the ruling of **ADPF 635, which addresses police incursions in favelas and police lethality**.



Conventionality control - 4 Phases

- A) Only **Judges** - Almonacid Arellano and others vs. Chile, § 124.
- B) All **Judicial Power** - "not only a control of constitutionality but also of conventionality ex officio between domestic laws and the American Convention" - Workers Dismissed from Congress (Aguado Alfaro and others) vs. Peru, § 128.
- D) Any judge or **body linked to the administration of justice is obliged to exercise control of conventionality [Interamerican Public Prosecutor and Interamerican Public Defender]** - Inter-American Court of Human Rights, Cabrera García and Montiel Flores vs. Mexico, Reasoned Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, §§ 19-20.
- C) The IACHR prefers to understand that control of conventionality "is the function and task of **any public authority and not just the Judiciary**." Inter-American Court of Human Rights, Gelman vs. Uruguay, § 239.

Due process of law – constitutional and conventional

- As **parameters of conventionality**, international human rights treaties, **jurisprudence**, and **advisory opinions** of the Inter-American Court of Human Rights are considered.
- The Constitution, Brazilian laws (including bills and legislative omissions), decisions of the Judiciary, and judicial practices can be subject to the control of conventionality.
- **All public authorities are authorised to exercise control of conventionality**, including any trial judges (regardless of whether they are federal judges), courts, and even higher courts within their respective competencies. Control of conventionality must be exercised ex officio, with prior adversarial proceedings, regardless of the type and legal procedure provided.
- The "Special" appeal to the Superior Court of Justice (STJ) and the "Extraordinary" appeal to the Supreme Federal Court (STF) are applicable for exercising control of conventionality.

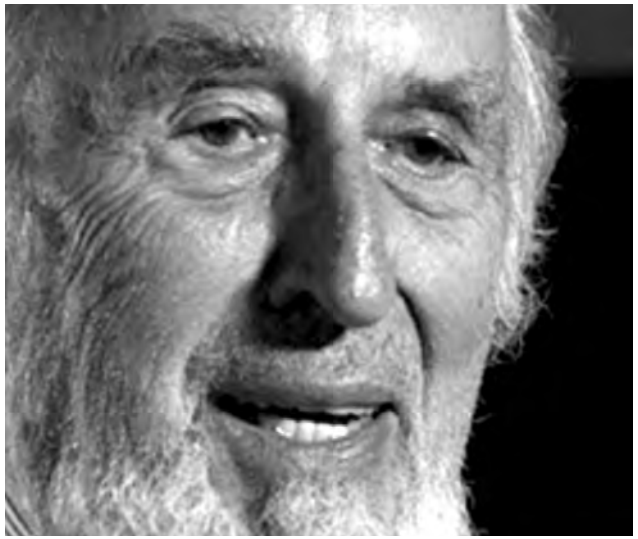
CNMP - National Council of the Public Prosecutor's Office – Rec. nº 96, Feb. 2023

- Article 1: This norm **recommends that the branches and units of the Public Prosecutor's Office observe the international treaties, conventions, and protocols on human rights**, the recommendations of the Inter-American Commission on Human Rights, and the jurisprudence of the Inter-American Court of Human Rights.
- Article 2: It is recommended that the bodies of the Public Prosecutor's Office, within their respective areas of jurisdiction and in all spheres of action, observe:
- II - the **binding effect of the decisions** of the Inter-American Court of Human Rights in cases **where Brazil is a party**, in accordance with Article 68 of the American Convention on Human Rights;
- III - the Inter-American Court of Human Rights **jurisprudence when applicable to the case.**

CNMP - National Council of the Public Prosecutor's Office – Rec. nº 96, Feb. 2023

- Article 3: It is recommended to the **members of the Public Prosecutor's Office**, while respecting functional independence, that:
- I - promote the **control of conventionality of internal norms and practices**;
- II - prioritise **judicial and extrajudicial action in cases related to recommendations to the Brazilian State** issued by the Inter-American Commission on Human Rights, especially regarding precautionary measures;
- III - **prioritise judicial and extrajudicial action to ensure material and immaterial reparation for victims of human rights violations** and comply with other obligations determined by the Inter-American Court of Human Rights to the Brazilian State, including provisional measures.
- Sole Paragraph: The use of **advisory opinions issued by the Inter-American Court of Human Rights** in the reasoning of statements, opinions, and legal or extrajudicial documents **is permitted**.

Globalization of Persuasive Precedents? ECtHR and IACtHR (M. Taruffo)



- "This is an extremely relevant aspect of the **complex phenomenon of judicial globalization**, i.e. of the trend that is **growing in the practice of several supreme, constitutional and supranational courts to make references to the case law and to the precedents of other national or international courts all around the world**, mainly when the subject matter of their decision deals with the **interpretation and the implementation of fundamental rights**. In such a practice these courts go far beyond the boundaries of national law and national jurisdictions and refer to what seems to be a **"common – and hopefully global – core" of fundamental rights.**"

Civil Procedure Review

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- Telegram - @processocomzaneti
- You tube - https://www.youtube.com/user/zaza1803/featured
- Website - https://laprocon.ufes.br/
- Instagram

CLERCKSHIP IN ALL INSTANCES:

A VISION FROM

LATINAMERICA

Álvaro Pérez Ragone

alvaro.perezr@pucp.edu.pe

Dubrovnic 5/2023

1.An approach to the justice organization a MACRO LEVEL VIEW

2. TOMOGRAPHY OF CLERCKSHIP IN SOUTHAMERICA

3. MICRO LEVEL CLERCCKSHIP VIEW

4. THE POOR ATTENTION TO LAW CLERKS: the diversity functions among the instances from first to highest level

PUCP

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SUPPORTING ACTORS IN INTERNATIONAL CHILD ABDUCTION CASES BEFORE BRAZILIAN FEDERAL COURTS

Inter University Centre Dubrovnik (IUC)

17th PPJ Course and Conference (2023) - **The Heroes of Judicial Periphery: Court Experts, Court Clerks and other Actors in the Shadow**

Maurício Magalhães Lamha

29/05/2023

SUMMARY

I - INTRODUCTION – GENERAL CONTEXT - INTERNATIONAL CHILD ABDUCTION (&) CONVENTIONS AND THE BRAZILIAN FEDERAL COURTS

II - TAKING THE SUPPORTING ACTORS OUT OF THE SHADOW – SUPPORTING ACTORS IN BRAZILIAN CIVIL LITIGATION – THE “BAILIFF”, THE MEDIATOR AND THE EXPERTS

III – THE ROLE OF THE SUPPORTING ACTORS IN INTERNATIONAL CHILD ABDUCTION CASES - PRACTICE AND REALITY – IMPORTANCE AND CHALENGES

IV - CONCLUSION

INTERNATIONAL
CHILD ABDUCTION & CONVENTIONS

INTERNATIONAL – CROSS BORDER OR "CROSS CONTINENT"

CHILD – Less than 16 Years old (article 2 Interamerican Convention; article 4 Hague Convention)

ABDUCTION – "wrongful removal"

*(TAKING PARENT X LEFT-BEHIND PARENT)

INTERNATIONAL CHILD ABDUCTION & CONVENTIONS

ABDUCTION – "**wrongful removal**" (*Elisa-Perez Report*)

*(…) removal **from its habitual environment** of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person.*

***(…) the child is taken out of the family and social environment** in which its life has developed.*

*'children must no longer be regarded as parents' property, but must be **recognised as individuals** with their own rights and needs'.*

INTERNATIONAL CHILD ABDUCTION & CONVENTIONS

ABDUCTION

- *Removal of the child before any custody decisions are taken by the local court;*
- *Removal of the child contrary to custody orders;*
- *Retention of the child after a period of legal visiting rights;*
- *Abduction contrary to legal custody rights, but having obtained the legal custody rights in the new country; or*
- *Removal contrary to a removal prohibition*

Dyer Report

INTERNATIONAL CHILD ABDUCTION CONVENTIONS

THE HAGUE CONVENTION (1980)

&

THE INTERAMERICAN CONVENTION (1989)

“prompt return and protection of rights of access”

INTERNATIONAL CHILD ABDUCTION CONVENTIONS

“protect (...) by providing a procedure to bring about their prompt return and ensuring the protection of rights of access”.

Access to justice

Efficient proceeding → Jurisdiction definition

Best interest of the child

INTERNATIONAL CHILD ABDUCTION CONVENTIONS

"PROCEDURAL" CONVENTION

*"On the one hand, it is clear that the Convention is **not essentially concerned with the merits of custody rights** (article 19) (…)".*
*(…) the situations envisaged are those which derive from the use of force to establish **artificial jurisdictional links on an international level**, with a view to obtaining custody of a child.*

Elisa-Perez Report

INTERNATIONAL CHILD ABDUCTION CONVENTIONS

(…) one effective way of deterring [the taking parent] would be to ***deprive his actions of any practical or juridical consequences.***

(…) restoration of the status quo, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'.

(Elisa-Perez Report)

BRAZILIAN FEDERAL COURTS AND CHILD ABDUCTION CASES

Article 109 CFRB/88. The federal judges have the competence to institute legal proceeding and trial of:

I – cases in which the Union, an autonomous government agency or a federal public company have an interest as plaintiffs, defendants, privies or interveners, with the exception of cases of bankruptcy, of job-related accidents, and of those subject to the Electoral and Labour Courts;

III – **cases based on a treaty** or a contract **between the Union and** a foreign State or **international organization**;

TAKING THE SUPPORTING ACTORS OUT OF THE SHADOW

THE BAILIFF

THE MEDIATOR

THE EXPERTS

THE BAILIF

In Brazil, the bailiff is a judicial public employee, selected by the Court (public admission), and is responsible, among other tasks, for the personal service of process and the execution (enforcement) of court's orders.

(Brazilian Civil Procedure Code (CPC/16) article 154, II)

THE MEDIATOR

Acts preferably in cases where there is a previous relation between the parties and helps them to understand the issues and interests in conflict, reestablishing communication and identifying, jointly, consensual solutions that generate mutual benefits.

(CPC/16 article 165, § 3º).

THE EXPERTS

The article 156 (CPC/16) states that “the judge will be assisted by an expert when the proof of the fact depends on technical or scientific knowledge”.

In Brazil, court-appointed experts are not necessarily judicial employees, but can work as public civil servants or in the private sector.

Nonetheless, in the context of the international child abduction cases, some judicial employees – court staff members - (particularly, psychologists and social workers) can help other auxiliaries/supporting actors.

THE ROLE OF THE SUPPORTING ACTORS IN INTERNATIONAL CHILD ABDUCTION CASES - PRACTICE AND REALITY

IMPORTANCE

DOUBLE “AUXILIAIRE” ROLE - RESOLUTION AND ENFORCEMENT

DOUBLE PROTECTION - SUBSTANTIAL AND PROCEDURAL RIGHTS

THE TASK OF THE SUPPORTING ACTORS IN INTERNATIONAL CHILD ABDUCTION CASES - PRACTICE AND REALITY

CHALENGES:

NOT USUAL PRACTICE – “FEDERAL” CASES

“CASE LOAD”

“TEAM INTERDISCIPLINARY-WORK”

REALITY – CONTINENTAL TERRITORY AND BRAZILIAN SOCIAL-ECONOMIC REALITY

SOME “REAL CASES”

CONCLUSION

The Italian Path to Judicial Clerkship

Elisabetta Silvestri

Background

NextGeneration EU → RRF (Recovery and Resilience Facility) and REACT-EU (Recovery Assistance for Cohesion and the Territories of Europe)

RRF for Italy: 191.5 billion euros (to be utilized between 2021 and 2026) → 68.9 billion euros as non-repayable funds; 122.6 billion euros as loans to be repaid

National Recovery and Resilience Plan (PNRR) → innovations & reforms in 6 sectors → for administration of justice at large → a budget of almost 3 billion euros in total

Investments to increase the 'human capital' → 2.26 billion euros allocated to the recruitment of judicial clerks (21,910 staff members → UPP = members of the *ufficio per il processo)* + administrative personnel

Italy's performance according to the EU Justice Scoreboard 2022
Length of civil proceedings

- 1 year and 8 months before the courts of first instance
- 2 years and 8 months before the appellate courts
- Over 4 years before the Court of Cassation

Goals to be reached by 2026 (according to the National Recovery and Resilience Plan)

- By the end of 2024, a reduction of 65% in the backlog of civil and commercial cases pending before the courts of first instance and of 55% in the backlog of cases pending before the courts of appeal
- By mid-2026, a reduction of 90% in the backlog of civil and commercial cases pending before all courts (including cases pending before the Court of Cassation)
- By mid-2026, a reduction of 40% in the length of civil and commercial proceedings

What is a UPP?

UPPs are the operational structures established with a view to ‘guaranteeing the reasonable length of judicial procedures through the innovation of organizational models and a more efficient use of information and communication technologies’.

(Article 2, legislative decree no. 151 of 2022)

The government’s plan

- Recruitment of 16,500 new staff units for the UPPs at Italian courts
- Between 2021 and 2022 → recruitment of 8,000 units; the remaining vacancies will be filled by the end of 2023
- Multiple-choice examination → 40 questions (public law; the structure of judicial organization; and English language) to be answered in 1 hour
- Candidates must hold a law degree, a degree in Economics or Political Science
- Duration of the employment contract: 2 years and seven months
- Average gross salary: 1,700 euros

Tasks of UPP staff members

Preparatory activities:

- the study of pleadings
- drafting memoranda and briefs with information on specific cases
- preparation of hearings
- evaluation of individual cases to determine which cases are suitable for court-ordered mediation
- legal research
- attendance at court hearings in order to record the minutes
- drafting orders and opinions

Further tasks of UPP staff members

- Acting as the interface between the judges and the administrative staff; also, supporting the efficient use of IT
- Creating databases of the judgments and orders issued by the court, and preparing statistical analyses of the case flow to monitor the court's performance
- Devising and implementing new organizational models with a view to improving the 'production capacity' of the court and reducing the backlog of cases
- Specific duties for the UPPs at the Court of Cassation

The results so far

- First semester of 2022: the average length of civil proceedings decreased by only 11.8%
- During all of 2022: the backlog of cases decreased by 9.3% in the courts of first instance and by 28.3% in the appellate courts

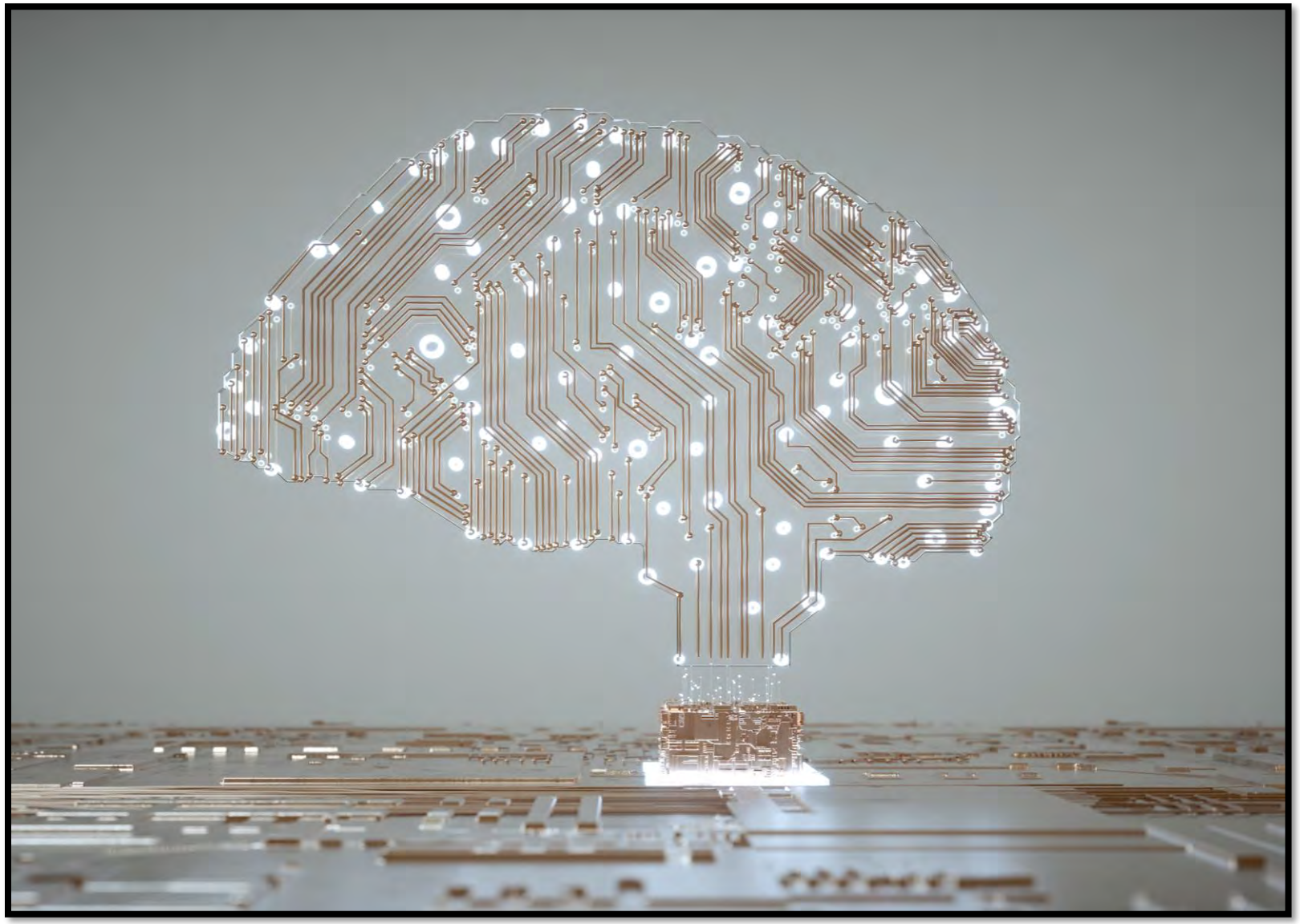
Thank you for your attention

Elisabetta Silvestri

elisabetta.silvestri@unipv.it

'Funded by the European Union. Views and opinions expressed are however those of the author (s) only and do not necessarily reflect those of the European Union or the European Commission. Neither the European Union nor the granting authority can be held responsible for them.'

DIGITALISATION & ACCESS TO JUSTICE RESEARCH GROUP



Beyond Wooden Desks: The Impact of Artificial Intelligence on Reshaping the Role of Court Staff

Professor Gina Gioia

Drs. Sajedeh Salehi

University of Tuscia & Vrije Universiteit Brussel

30 May 2023

Introduction

OECD AI definition: prediction, decision-making, and recommendation

Lack of a comprehensive and standardized definition of AI.

- AI in predictive justice
- AI as a decision-maker
- AI as an administrative assistive tool

- Benefits of AI in civil proceedings
- Challenges

Role of AI in Civil Proceedings

AI as a Tool in Predictive Justice

AI as a Decision-maker

AI as an Administrative Assistant

AI and Predictive Justice

- AI as a predictive justice tool: to enhance functioning of justice systems!
- The potential to improve efficiency, consistency, and accuracy of judicial decision-making.
- AI systems utilizing machine learning algorithms to predict case outcomes.
- Examples of AI-based predictive justice models achieving high accuracy: Predictability of ECtHR decisions 2016/2020 studies

AI as a Decision-Maker Tool

AI systems: Semi-automated and fully automated decision-making processes.

AI systems and judicial responsibilities between the years 2030 and 2040

Advanced progress → AI in non-judicial decision-making process → the Bail Assistant program (AUS)

- **EXPERTIUS system in Mexico** → guidance over pension eligibility

- CREA 2 Project → Algorithmic Dispute Resolution → family law

AI: An Administrative Assistant

- E-Filing
- Natural Language Processing
- AI for Evidence Analysis

E-Filing

- e-filing of **legal documents and their review and analysis**
- **Advantages:**

- Reduce or eliminate the need for physical documents in managing a case
- Helps the staff to reduce errors in filed documents and expedite court processes
- Reduces time of issuing decisions

Examples:

- **UK Crown Court**
- **OCMC UK**
- **US NextGen CM/ECF system**

Natural Language Processing Function

- **ML techniques** → identification, processing, and analysis of languages, facilitating their conversion into different forms (e.g., transforming audio into text)
- **Advantages:** quicker and more effective than traditional methods of document creation, helps managing caseload more efficiently, helps ensuring the accuracy of the hearing report, reduces the risk of disputes over the content of the record.

- Examples:

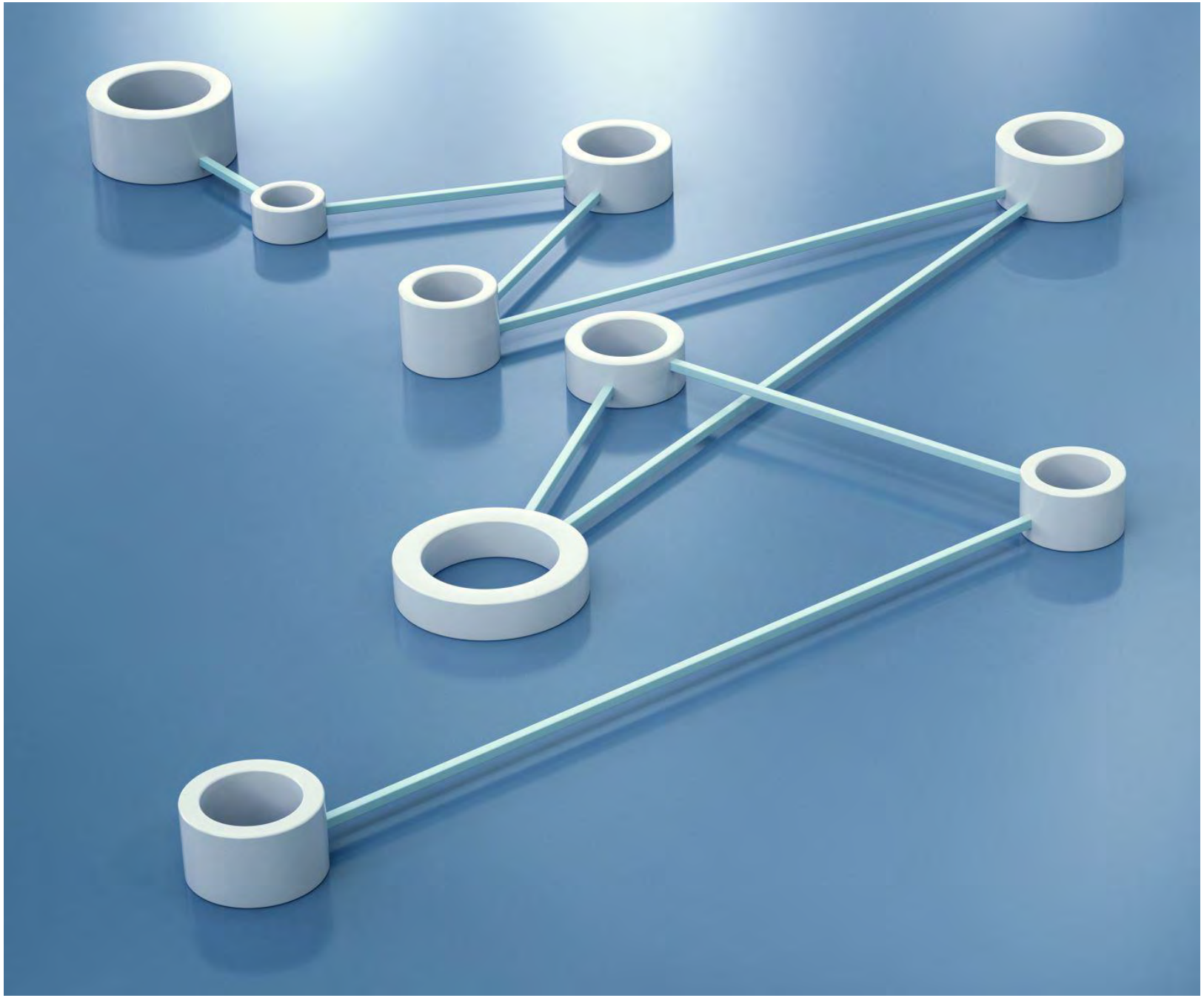
Australia → Auscript, Epiq

IBM NLP programs → with minimum error rate (5.5% (AI) vs. 5.1% (human))

China → China Online Courts (through iFLYTEK company)

AI for Evidence Analysis

- Ability of AI systems to **collected large volumes of data** → offers the possibility to receive extensive data sets, analyze them, and harness the substantial information flow to identify patterns → **extracting evidence**!
- **Presentation of evidence**: to offer the judge a recommendation concerning testimonial evidence!
- The **AI assistant & undertaking a preliminary analysis** of the evidence!



Advantages of AI in Civil Proceedings

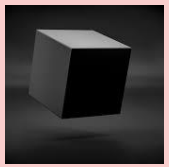
- **Faster resolution** of cases through efficient processing and analysis of legal information.
- **Promoted Consistency** in decision-making.
- **Uncovering correlations and insights** that human judges might overlook.
- **Enhancing the overall quality** of decisions → reduced errors!

Challenges

Lack of transparency and interpretability of AI algorithms.

Potential for algorithmic bias and fairness concerns.

Questions of accountability and responsibility for data processing and AI-driven decisions.



AI & Black Box

Transparency of data processing methods

AI transparency: explainable, interpretable, or/and understandable AI by humans!

Physical and Cognitive elements!

Physical element → the system's capacity to show its inner workings and the origin of training data to the staff as the user of the system.

Cognitive element → the comprehensible explanations that AI systems should provide for their decisions and the involvement of humans in the decision-making process.

Safeguarding transparent data processing: staff awareness of the methods used for processing the data and the associated risks → to ensure that the system and its risks are comprehensible to stakeholders.

Lack of Transparency in civil court proceedings: decrease in citizens confidence and pose a threat to AI sustainability and question the rule of law.

AI and the Right to a Fair Trial (Article 6, ECHR)

- **Council of Europe's Ethical Charter**: AI used in dispute resolution or judicial decision-making should not undermine the right to a fair trial.
- Individual rights enshrined in the ECHR: i.e., the right to a natural judge, an independent & impartial tribunal, and equality in judicial proceedings.
- **Independence** (freedom from external influences) and **impartiality** (absence of prejudice or bias): necessary for functioning of the judicial system.
- **AI & Judicial independence** → human judges may face indirect pressures to rely on AI tools!

Judges should maintain their independence and not blindly follow AI outcomes!

- **AI & Judicial Impartiality** → AI systems can help judges identify and address their own biases!

Promoting a fairer legal system by reducing the impact of irrelevant factors on decision-making!

Conclusion

AI implementation can significantly impact the role of court staff!

Appropriate and Timely measures must be taken!

Further R&D is needed!

(Current examples: SCAN II & CREA2 Projects – VUB. DIKE RG)

''AI in civil proceedings is **still evolving**...''

''AI impact will depend on various factors, including **technological advancements, legal and regulatory frameworks, ethical considerations, and societal acceptance**.''

''The use of AI in civil court proceedings has the potential to **significantly affect the role of court staff** in the future. While the exact impact will depend on the specific implementation and adoption of AI technologies.''

''It's important to note that **AI technology is not meant to replace court staff entirely**, but rather to augment their capabilities and **improve the efficiency and effectiveness** of court proceedings.

''Court staff will likely continue to play vital roles in **managing the legal system**, **overseeing AI systems**, **ensuring ethical standards** are met, and providing **human judgment and empathy** in complex legal matters.''

Some words from OpenAI!

''It will be crucial to strike a balance between leveraging the potential of AI and ensuring human oversight and accountability in the legal system.''

THANK YOU FOR YOUR ATTENTION!

Experts for Legal Issues in Slovenian and Comparative Law

Aleš Galič

Professor of Civil Procedure and International Private Law

University of Ljubljana

Slovenia


Norwegian Sea
Ísland
Iceland
Sverige
Sweden
Suomi
Finland
Norge
Norway
Danmark
Denmark
United
Kingdom
Ireland
Éire
Беларусь
Belarus
Polska
Poland
Deutschland
Germany
Україна
Ukraine
Österreich
Austria
France
România
Romania
Italia
Italy
España
Spain
Portugal
Ελλάδα
Hellas
Greece
Türkiye
Turkey
سورية
Syria
العراق
Iraq
تونس
Tunisia
المغرب
Morocco
الجزائر
Algeria
ليبيا
Libya
مصر
Egypt
الصحراء
الغربية
Western
Sahara
المملكة
العربية
السعودية
Saudi Arabia
موريتانيا

Foreign law: Fact or Law

- Does establishing the content of foreign law amount to taking of evidence
- Is application of foreign law a question of law or a question of fact

Relevant for numerous procedural situations, e.g.

- Can the court apply it on its own motion (ex officio; iura novit curia vs. Parties‘ disposition (Verhandlungsmaxime)
- Time bars relating to bringing forward new facts and evidence?
- Rules concerning Burden of proof & standard of proof?
- International legal assistance?
- Can erroneous application of foreign law be argued in the final appeal on points of law (Slovenia, Croatia: revizija)

- In most civil law legal systems foreign law is still law. *Iura novit curia* applies For example Slovenia notified the following for the e-justice portal:

- ***A court or another competent authority determines upon own motion the content of the foreign law to be applied by using a notification of a foreign law of the ministry responsible for justice or examines its content by some other suitable method. Parties may submit a public or other document of a competent foreign authority or institution on the content of the foreign law. Where the content of the foreign law cannot be determined in a particular case, Slovenian law applies.***
-

Yet, ELI/Unidroit, Commentary Rule 26(2)
Because of the need for expert evidence to be adduced in order to enable courts to determine the content of any applicable foreign law, **nearly all legal cultures consider the determination of such questions to be ones of fact**. Therefore, the law of evidence will apply,

- a court may seek assistance from the Ministry of Justice, which shall communicate with its counterpart in a foreign country concerned pursuant to **European Convention on information on foreign law** in order to obtain information as to the contents of the foreign law).

- No »taking of evidence« takes place in order to obtain information on contents of foreign law.

Common law: UK

UK (for England) notified the following for the e-justice portal:

- ***The content of foreign law is proved as if it were a fact. As such, it is for the parties to prove the content of foreign law; judges are not permitted to investigate the content of foreign law themselves. In the event of conflict between the evidence submitted by the parties, the judge may assess the credibility of the experts and is permitted to consider the primary evidence (e.g. foreign statutes and cases), especially where they are written in English and apply concepts that are familiar to an English judge. The content of foreign law is normally proved by expert evidence***

- The rule established in the case ***Royal Bank of Scotland plc v Geodrill Co Ltd and Others (1993) 1 JSC 753,*** applies, which held that **a party which argues that a foreign law is applicable** to its case must **first make this claim** and then **provide expert evidence** of it to the court's satisfaction. If the court is not satisfied by that evidence or none of the parties makes such a claim, the law of Cyprus shall apply.

- The plea of foreign law is to be proved as a matter of fact and not as a point of law. Maltese Courts are empowered to interpret domestic legislation and are not permitted to interpret content of foreign law themselves. To be able to understand foreign law, experts on foreign law are appointed by the Court. The parties to the suit may also bring forward as part of their evidence, reports drawn up by different experts.The burden of proof is on the party raising such plea, namely the defendant to the suit.

Yet, common law: USA

Rule 44.1 FRCP. Determining Foreign Law

- A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, **whether or not submitted by a party or admissible** under the Federal Rules of Evidence. The court's determination must be treated as a **ruling on a question of law**.

Yet, ELI/Unidroit, Commentary Rule 26(2)
..., nearly all legal cultures consider the determination of such questions to be ones of fact.
Therefore, **the law of evidence will apply**,

.

- Even in some civil law jurisdictions (Sweden, Finland) parties have the burden to establish, by adducing adequate evidence, the content of foreign law. Sweden provided the following information for the E-Justice portal:

In proceedings where the parties would be free to reach a settlement between themselves, the court can leave the investigation largely to the parties.

The Belgian **court may require the parties to establish the content and scope of the foreign law**. The court may also apply the European Convention on information on foreign law, signed in London on 7 June 1968.

Art. 16 Swiss PIL Act

- The content of the **foreign law shall be established by the authorities on their own motion**.

- For this purpose, the **cooperation of the parties may be requested**.

- In matters involving an economic interest, the **task of establishing foreign law may be assigned to the parties**.

When foreign law is still law: can experts be appointed?

- In most countries applying the traditional approach, it is nowadays common that expert evidence is taken in order to obtain information on foreign law (e.g. Germany, Austria).

In some countries though (Slovenia…), a more scholastic (**dogmatic, formalistic, unpractical, ineffective…**) approach is maintained: since foreign law is law, no expert for clarification of (foreign) law can be appointed („the court knows the law“)

- **Article 12**

1. The court or another competent body shall establish ex officio the content of the foreign law that is to be used.
2. The body as described in the first paragraph of this Article may request information on the foreign law from the ministry responsible for justice, or obtain its content in another suitable manner.
3. The parties may during the procedure submit a public or other document, issued by a competent foreign body or institution, on the content of the foreign law.
4. If it is not possible to establish the content of a foreign law with regard to individual relations, then the law of the Republic of Slovenia shall be used.

Court appointed experts for foreign law: an example

WEGEN: 153.112,75 EUR samt Anhang (Schaden aus Verkehrsunfall)

11. Mai 2016

LADUNG
als Sachverständiger

Vor diesem Gericht wird am unten angegebenen Ort eine Tagsatzung zur mündlichen Verhandlung stattfinden:

Ort: Saal 2, Erdgeschoß

Datum: 7. Juli 2016

Beginn: 10:00 Uhr (voraussichtliches Ende 12:00 Uhr)

003 003 CG*** 000097 2012z SV* 002 001 00056 F321 D4 LD Seite 1

3 Cg 97/12z - 107

Sie werden als bereits bestellter Sachverständiger zu dieser Tagsatzung geladen.

Gegenstand Ihrer Tätigkeit wird sein:
Gutachtenserörterung

Beiliegend wird übermittelt:

Nr.	Anhangsart	Datum	ON/Beilage	Beteiligter	Zeichen (Einbringer)
1	Schriftsatz	02.05.2016			267/13
2	Schriftsatz	02.05.2016			267/13
3	Sonstiges	03.05.2016			
4	Schriftsatz	03.05.2016			12/10019

Landesgericht für Zivilrechtssachen Wien
Gerichtsabteilung 3

ELI/Unidroit Rules

- Rule 26. (2) The **court must determine the correct legal basis** for its decision. This includes **matters determined on the basis of foreign law**. It may only do so having provided the parties a reasonable opportunity to present their arguments on the applicable law.

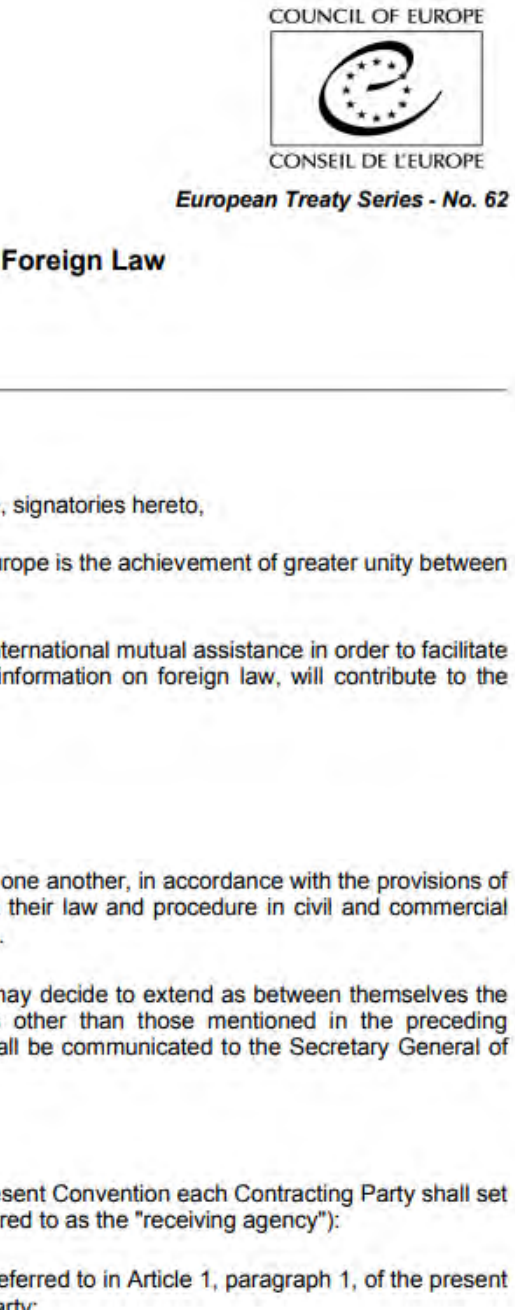
- Rule 120. **Court-appointed Experts** (1) The court may appoint one or more experts to give evidence on any relevant issue for which expert evidence is appropriate, **including foreign law**.

Commentary of Rule 26(2) “the optimum practice adopted by most courts is one that requires extensive co-operation between court and parties (see Rule 3, comment 5), and that this produces the best results concerning the determination of the content of substantive law and particularly substantive foreign law. “

Open issues:

- Rules on expert evidence apply (right to be heard, impartiality and independence, equal treatment of the parties…)
- But in the time of assessment? Free evaluation of evidence, Burden of proof, standard of proof…, judge’s own knowledge about foreign law
- Dillema: when to rule that the content of the foreign law could not be established and thus lex fori shall apply

A cure, a panacea or Junk food: European Convention on Information of Foreign Law



COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

European Treaty Series - No. 62

European Convention on Information on Foreign Law

London, 7.VI.1968

Preamble

The member States of the Council of Europe, signatories hereto,

Considering that the aim of the Council of Europe is the achievement of greater unity between its members;

Convinced that the creation of a system of international mutual assistance in order to facilitate the task of judicial authorities in obtaining information on foreign law, will contribute to the attainment of this aim,

Have agreed as follows:

Article 1 – Scope of the Convention

1 The Contracting Parties undertake to supply one another, in accordance with the provisions of the present Convention, with information on their law and procedure in civil and commercial fields as well as on their judicial organisation.

2 However, two or more Contracting Parties may decide to extend as between themselves the scope of the present Convention to fields other than those mentioned in the preceding paragraph. The text of such agreements shall be communicated to the Secretary General of the Council of Europe.

Article 2 – National liaison bodies

1 In order to carry out the provisions of the present Convention each Contracting Party shall set up or appoint a single body (hereinafter referred to as the "receiving agency"):

a to receive requests for the information referred to in Article 1, paragraph 1, of the present Convention from another Contracting Party;

Hätte sich der Kläger im vorliegenden Fall nach Kenntnis der Arbeitskräfteüberlassung im Mai 2012 für einen Arbeitgeber entscheiden müssen?

b) Wäre die Klage zu Pd 28/2013 bei fristgerechter Klagseinbringung aussichtsreich gewesen? Wenn ja warum. Wenn nicht, aus welchem Grund nicht.

c) Gibt es im slowenischen Recht das Institut der Schadensminderungspflicht?

Wenn es eine Schadensminderungspflicht gibt, hätte der Kläger infolge des rechtskräftigen Urteils zu Pd 149/2011 seine aushaftenden Lohnansprüche für den Zeitraum der Entlassung bis 29.10.2012 (Rechtskraft der Entscheidung) gerichtlich -sei es von der [redacted] d.o.o oder der ~~GEMENARNA~~ Ljubljana d.d- erfolgreich betreiben können. Stellt die Unterlassung der gerichtlichen Betreibung eine Verletzung der Schadensminderungspflicht dar?

d) Kann die Beklagte die Forderung des Klägers mit Selbstbehalten ihres Versicherungsnehmers gegenverrechnen?

Der Sachverständige wird ersucht, seinem Gutachten die relevanten slowenischen Gesetzesbestimmungen (auch Art 204 des Gesetzes über die Arbeitsverhältnisse der Republik Slowenien) sowie die slowenische Judikatur zu den aufgeworfenen Fragen anzuschließen.

Ist die Einhaltung der achtwöchigen Frist nicht möglich, so hat der Sachverständige dies dem Gericht binnen 14 Tagen ab Zustellung des Auftrages mitzuteilen und anzugeben, ob überhaupt und innerhalb welcher Frist die Erstattung des Gutachtens möglich ist (§ 357 Abs.1 ZPO).

Gemäß § 38 Abs.1 GebAG 1975 sind die Gebühren des Sachverständigen binnen 14 Tagen nach Abschluss seiner Tätigkeit bei sonstigem Verlust des Anspruchs bei diesem Gericht geltend zu machen.

Der Sachverständige hat weiters darauf hinzuweisen, wenn sich im Zuge seiner Tätigkeit herausstellt, dass die tatsächlich entstehende Gebühr den Wert des Streitgegenstandes oder erheblich die Höhe des Kostenvorschusses übersteigen wird. Unterlässt er dies, so hat er insoweit keinen Gebührenanspruch.

Den Parteien wurde ein Kostenvorschuss in Höhe von je € 2.000.-- aufgetragen.

59 Cg 88/15a

nunmehr mit der gegenständlichen Klage geltend

Rechtsanwalt Nik

ung bis 29.10.2012

öge nachfolgende Fragen zum slowenischen Recht

ehmer während eines Verfahrens, wenn er Kenntnis

erlangt, entscheiden, ob er das Verfahren gegen den

gen den neuen Arbeitgeber fortführt? Ist solch eine

ers für einen Arbeitgeber für den Arbeitnehmer

Information on national law (information sheets)

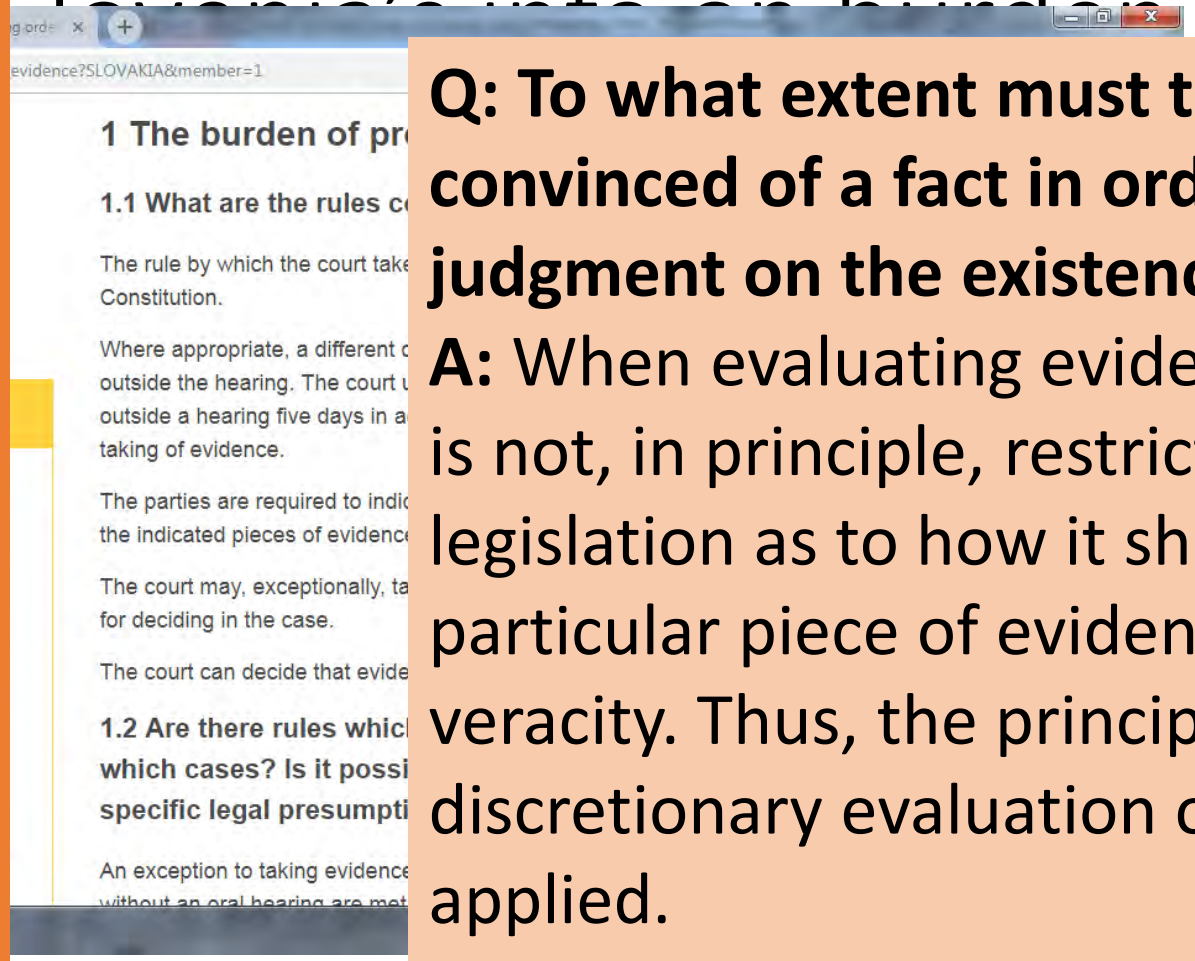
Quick access to a list of information sheets prepared by EJN-civil covering EU, national and international procedures.

The Network establishes and updates universally accessible and free of charge information sheets on Union, international and national law and procedures. They are regularly updated by the national competent authorities coordinated by the national Network's contact points.

- Which country's court is responsible?
- How to bring a case to court
- "Order for payment" procedures
- Small claims
- Divorce and legal separation
- How to enforce a court decision
- Taking of evidence

Slovenia's info on burden of

Q: Are there rules which exempt certain facts from the burden of proof?
A: An exception to taking evidence during a hearing is where the conditions for delivering a decision without an oral hearing are met.



Q: To what extent must the court be convinced of a fact in order to base its judgment on the existence of that fact?
A: When evaluating evidence the court is not, in principle, restricted by legislation as to how it should evaluate a particular piece of evidence in terms of veracity. Thus, the principle of discretionary evaluation of evidence is applied.

Article 25

Information to be provided by Member States

1. By 13 January 2017, the Member States shall communicate to the Commission:

(a) the courts or tribunals competent to give a judgment in the European Small Claims Procedure;

(b) the means of communication accepted for the purposes of the European Small Claims Procedure and available to the courts or tribunals in accordance with Article 4(1);

(c) the authorities or organisations competent to provide practical assistance in accordance with Article 11;

(d) the means of electronic service and communication technically available and admissible under their procedural rules in accordance with Article 13(1), (2) and (3), and the means, if any, for expressing acceptance in advance of the use of electronic means as required by Article 13(1) and (2) available under their national law;

(e) the persons or types of professions, if any, under a legal obligation to accept service of documents or other written communications by electronic means in accordance with Article 13(1) and (2);

(f) the court fees of the European Small Claims Procedure or how they are calculated, as well as the methods of payment accepted for the payment of court fees in accordance with Article 15a;

(g) any appeal available under their procedural law in accordance with Article 17, the time period within which such an appeal is to be lodged, and the court or tribunal with which such an appeal may be lodged;

(h) the procedures for applying for a review as provided for in Article 18 and the competent courts or tribunals for such a review;

(i) the languages they accept pursuant to Article 21a(1); and

(j) the authorities competent with respect to enforcement and the authorities competent for the purposes of the application of Article 23.

Member States shall inform the Commission of any subsequent changes to that information.

2. The Commission shall make the information communicated in accordance with paragraph 1 publicly available by any appropriate means, such as the European e-Justice Portal.

Article 26

Amendment of the Annexes

The Commission shall be empowered to adopt delegated acts in accordance with Article 27 concerning the amendment of Annexes I to

EU Taking of evidence Regulation?

- It cannot be automatically excluded that evidence can also be taken in order to obtain information on foreign law.
- But this does not mean that a requesting court can ask the requested court to provide information on foreign law.
- **Theoretically, a requesting court could ask the requested court to take evidence, e.g. by appointing an expert.**
- But this is practically not a viable approach. If in the country where proceedings are pending it is possible to take evidence (e.g. expert evidence) in order to establish contents of foreign law, nothing prevents the court to appoint an expert itself (if there shall be a court-appointed expert) or to allow parties to submit expert reports of party-appointed experts.

National law: Treatment of „Private legal expert opinions“ in Slovenia

- Even for most complex and specific areas of law (national law, EU law, international treaties): no court-appointed legal experts
- Iura novit curia applies but it is a common practice that parties submit „private legal expert opinions“
- Clearly, this is not expert evidence
- What is it then:

  Documentary evidence

  Evidence sui generis

  A part of party‘s assertions (Slovenia)

Extract from a PO in arbitration

- **The "Expert Opinion (Expertise) related to the Arbitration on …" by Mr. … is not admitted as evidence – either as expert evidence or as a documentary evidence - in this arbitration.**

- **The "Expert Opinion" referred to in Point I of this Order shall be considered as a part of the Party's (Respondent's) own allegations, thus forming a part of Respondent's comments of 15 November 2018 on Prof. Dr. XX's expert report, and shall be considered only insofar as it contains findings and arguments immediately relating to Prof. Dr. XX work and findings to questions, which were put to him.**

Thank you for your attention!

Ales.galic@pf.uni-lj.si

“THE HEROES OF JUDICIAL PERIPHERY COURT EXPERTS, COURT CLERKS AND OTHER ACTORS IN THE SHADOW “

PPJ Conference, Dubrovnik, 29 May – 2 June 2023

Party - appointed vs. Court - appointed Experts: Considerations in Light of the Macedonian Experience

Prof. Dr. Tatjana Zoroska Kamilovska

Background

"The world is facing unprecedented pace of changes as a result of the daily advancement in science and technology. "

Impact on the judIciary in general
Adjudication of civil cases

As in many civil cases judges lack specialist expertise beyond their own field, courts grow increasingly dependent on experts and their reports.

Implications

Pulls the experts out of the judicial periphery and puts them right in the center of carrying out procedural, specifically evidentiary activities and adjudication itself.

Raises some old questions:

1. How to regulate the use of expert evidence, particularly the manner of adducing expert evidence in civil proceedings?
2. Can it be asserted that party-appointed experts are real problem, and court-appointed expert are the only possible solutions, and *vice versa*?

Intense debate ==== Different models of expert evidence

Expert evidence in Macedonian Civil Procedure

Until 2010, Macedonian civil procedure maintained continental legal tradition inherited from Austrian Code of Civil Procedure.

The duty of the judge to manage the process of fact- finding and evidence-taking actively went along with the court-centred approach to expertise.

some delays in proceedings while waiting for expert reports, but generally it fulfill a task in the proceedings

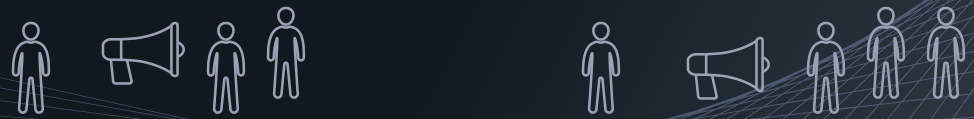
The amendments to MCPA of 2010 - adversarial approach to expert evidence.

Concept of Party-driven experts

the parties appoint and instruct their respective experts

plaintiff

defendant



Introduction of ‘certified’ or ‘licensed’ experts, instead of the previous so-called permanent court experts.

Enactment of the Law on Expertise

The Way of Reform

No debate and no opportunities for criticism from the Macedonian legal profession.

Reactions have come *post festum* and they were very doubtful whether party-driven experts are the best solution for Macedonian civil procedure.

Criticism in 2015

T.Zoroska Kamilovska “The New Rules of Expert Evidence in Macedonian Civil Procedure: are they a failed effort at reform? ”

In

C.H. van Rhee and A. Uzelac (eds.) “Evidence in Contemporary Civil Procedure, Fundamental Issues in a Comparative Perspective”

Intersentia, 2015

Viewpoints in 2015

Explanatory memorandum to MCPA of 2010:

"the general idea of the new concept of expert evidence is to introduce a procedural tool that will raise the capability of civil litigation to deliver a simple, cost-effective and prompt resolution of disputes, so that the court system will be fair and accessible to all",

In–depth analysis of the new rulers

The paper's conclusion:

"Up to now, it is obvious that the new approach to expert evidence has no merit either in accelerating the proceedings or in cutting costs. Rather, it seems that the new concept of the party-appointed expert has become an even bigger source of increased complexity because of the excessive and inappropriate use of experts, and thus of excessive expenses and delays."

Eight years later 2023

Same legal framework

Same thesis:

"At first glance, the new concept of expert evidence seems to be very fair in the sense that it provides both parties sufficient and equal legal opportunities to try to convince the court on the merits of their position."

Add up

the greatest benefit of this approach to expert evidence is in exposing different expert points of view for evaluation by the judge.

New concept should be adequate for the purpose it is introduced

But !!!!!

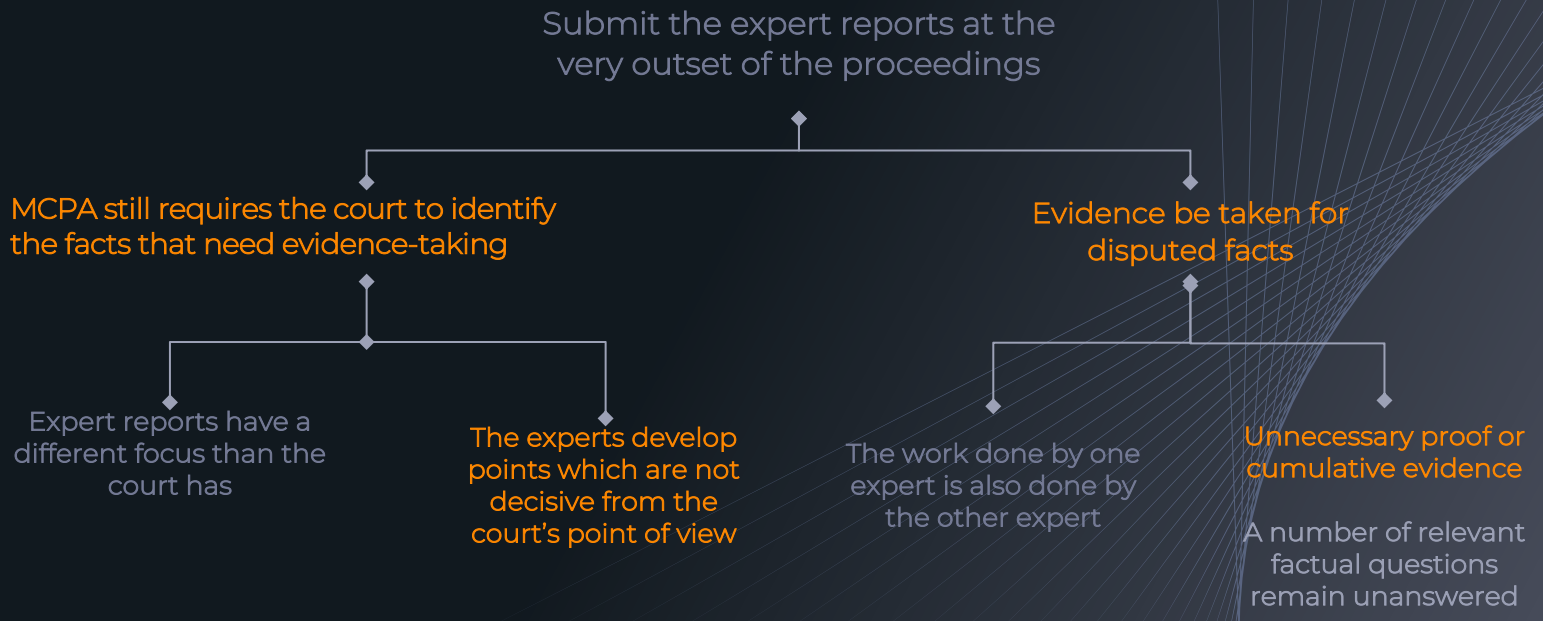
What does experience suggest?

2015-2023

Same drawbecks as previosely detected

The changed position of experts has not lived up to the expected improvement in efficiency and cost cutting, which were the prime reasons for the change.

Let’s reiterate once again



Let's reiterate once again

Abolition of the power of the court to take expert evidence *ex officio*.

This tool is missing in the Macedonian civil procedure

Questions raised by judges:

Is it not the role of experts to help the court, in a fair and impartial manner, in specific fields in which the judges do not themselves have the relevant knowledge?

If so, why do we not have the opportunity to take expert evidence *ex officio* once we have determined the disputed facts?

indicate that judges prefer independent court-appointed experts.

Let’s reiterate once again

Even though expert opinions should be a reliable tag in the balance of justice, they are the first stumbling block when it comes to the objectivity and impartiality of experts.

Not just gossip, but also confirmed cases, about experts as hired guns or paid agents

"Who pays you, owns you" .

The experts give opinions favourable to the respective party because, at least financially, they depend on the parties which influences their objectivity.

Bulks of complaints have been made as to the evidentiary value of the expert reports because they advocate too heavily in the interest of the party presenting them.

Let's reiterate once again

The experts of both parties reach diametrically opposite and hardly reconcilable conclusions

The court is faced with the problem of deciding between the opinions of opposing experts

Difficult/impossible, to bridge the gap between the opposing reports without another expertise

Super-expertise – an expertise of a higher degree
Time-consuming and expensive evidentiary mean.

"Almost every judge will confirm that even in a small claims procedure there is a necessity to order super-expertise and this leads to the absurd situation where in a dispute of 50,000 denari we have 150,000 denari of costs."

More expensive than the use of a single court-appointed expert.

The costs outweigh the benefits of involving party-appointed experts.

Conlusion and step forward

The pure adversarial approach to expert evidence introduced in 2010 is a failed effort at reform.

The draft of the new MCPA (pending in Parliament) provides for a mixed model of court-appointed and party-appointed as more promising one.

Thank you for your attention!

You can find me on

www. pf.ukim.edu.mk

t.zoroskakamilovska@pf.ukim.edu.mk

Faculty of Law, University of Zagreb

Peripheral Actors in Croatian judiciary: Problems and open issues

Marko Bratković
Juraj Brozović
Alan Uzelac

Public and Private Justice 2023
The Heroes of Judicial Periphery

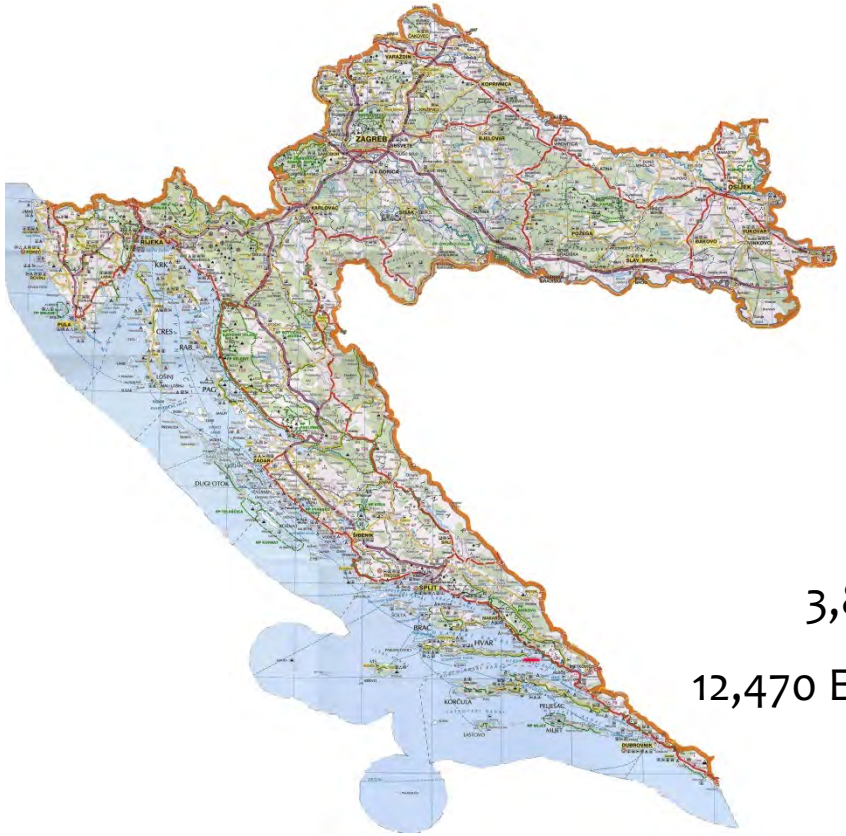
Dubrovnik, 30 May 2023

1,400,000

civil and commercial cases

a year

Croatia



56 594 km² -------- **land area**

3,899,000 ------- **population** (2022)

12,470 EUR --------- **GDP per capita** (2020)

Croatia

It takes a **long time** for a **great number of judges** assisted by a **great number of support staff** to handle a **great number of various court cases** with a rather **unpredictable outcome**.

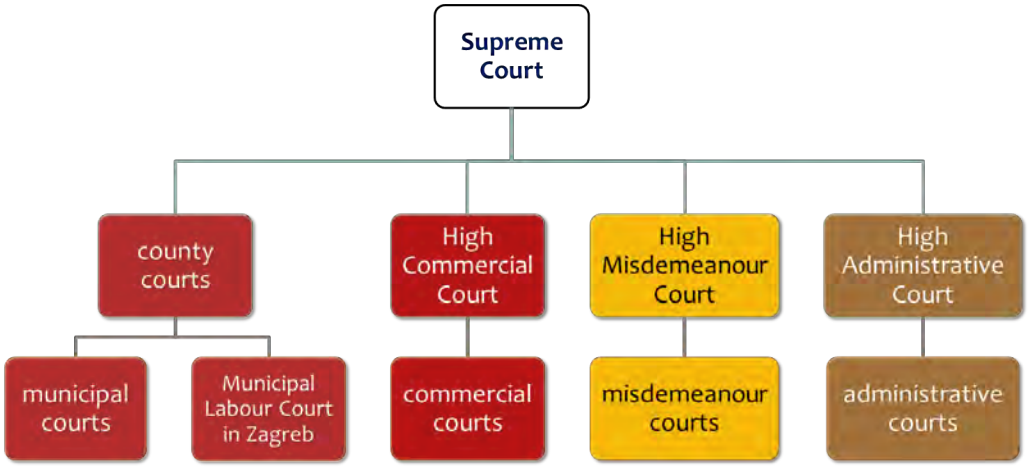
Croatia

In 2019, **80%** of the total court budget – just about **170 million euros** – was related to workforce expenditure

Court structure in Croatia

- county courts
  - municipal courts
  - Municipal Labour Court in Zagreb
- High Commercial Court
  - commercial courts
- High Misdemeanour Court
  - misdemeanour courts
- High Administrative Court
  - administrative courts

Court structure in Croatia

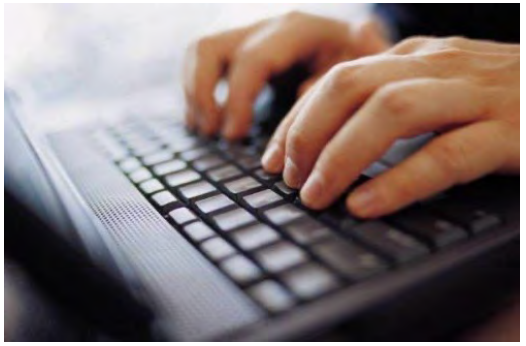


Judges

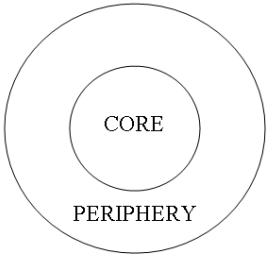
- in 2019 **1,712 people** served in judicial offices
- the number of judges in Europe per 100,000 inhabitants
  - Montenegro (51)
  - Slovenia (about 47)
  - Croatia

Nonjudicial staff

- In 2019, Croatia's courts employed about **6,600 nonjudicial staff**, the majority of whom were **court reporters**.



- about **600 judicial advisers** (*sudski savjetnici*)

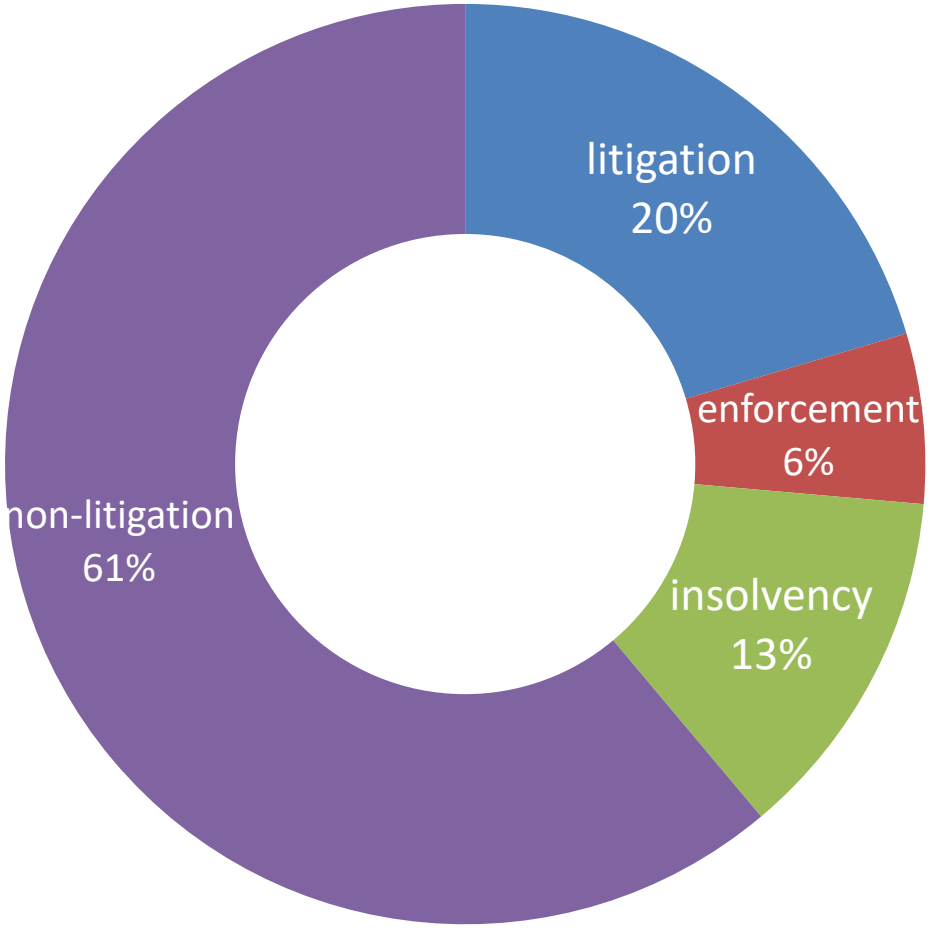


Cases at Croatian courts of first instance in 2019

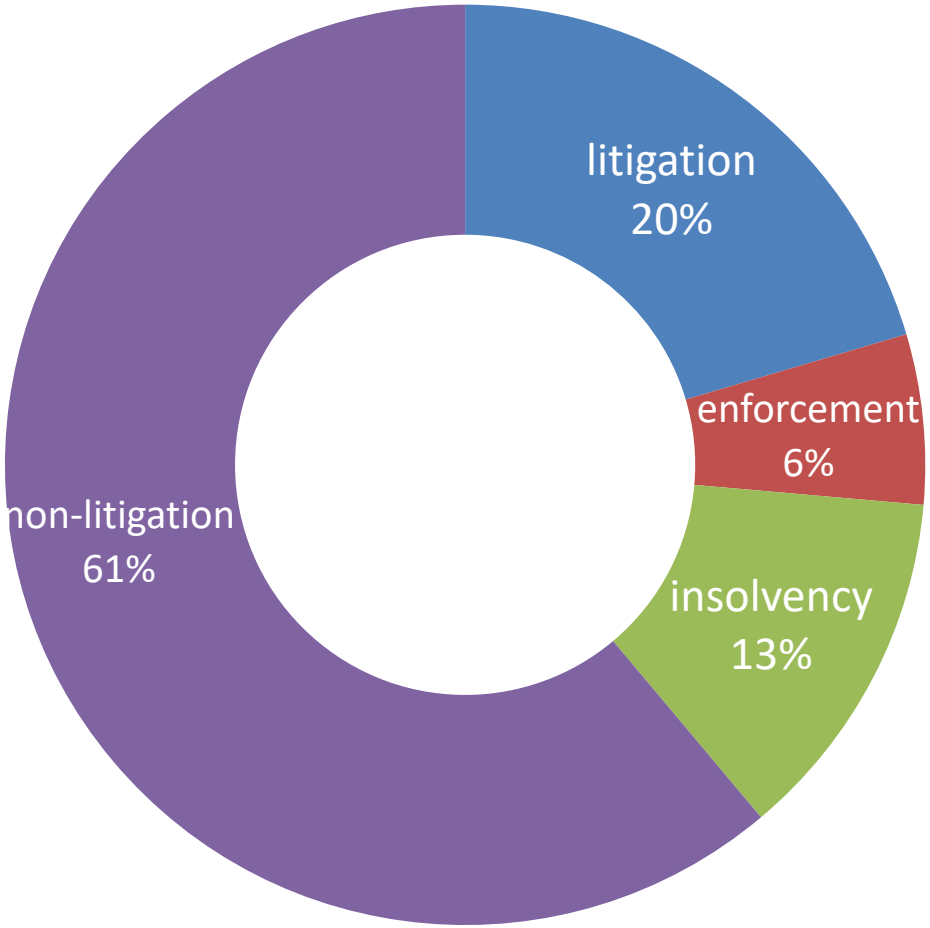
- land registry cases

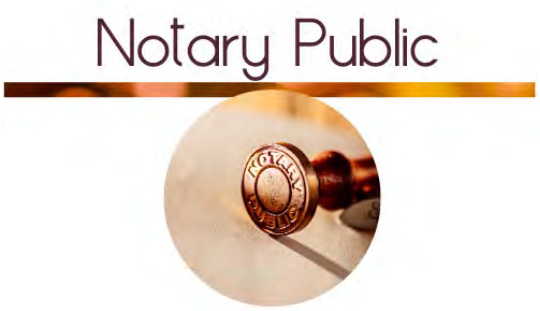
zemljišnoknjižni referenti

- business registry cases
- inheritance cases



Cases at Croatian courts of first instance in 2019





Enforcement based on a *trustworthy* document

petition of claimant

notary public

issue of payment order and enforcement order

failure of service

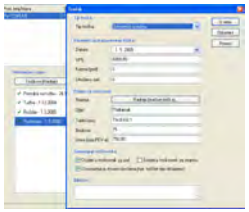
registration of service date

no objection raised

registration of timely objection

service of enforcement order

Why Croatian notaries are not the Court?



Judgement of 9 March 2017, ***Zulfikarpašić***, C-484/15

Judgement of 9 March 2017, ***Pula parking***, C-551/15

- **Regulation** (EC) **br. 805/2004** of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims

- **Regulation** (EU) **br. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters** (**Bruxelles I *bis***)

the principle of mutual trust in the judicial system in the EU

independent and impartial body adjudicating in *inter partes* proceedings

Digitizing notarial payment orders in 2020

petition of claimant

notary public **as officers of the court**

issue of payment order and enforcement order

failure of service

registration of service date

no objection raised

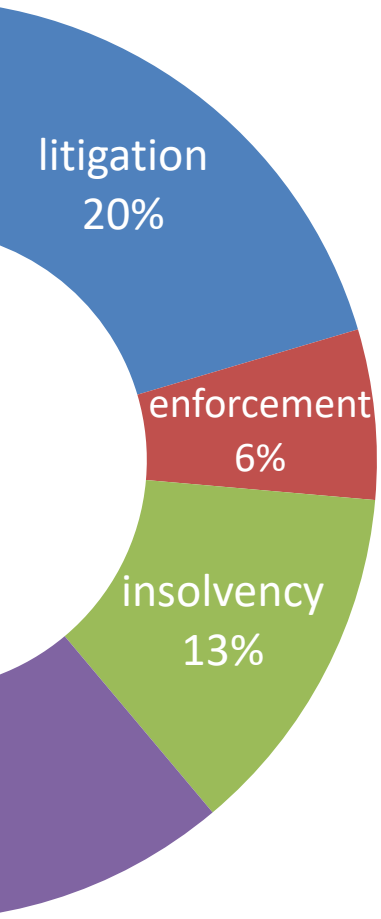
registration of timely objection

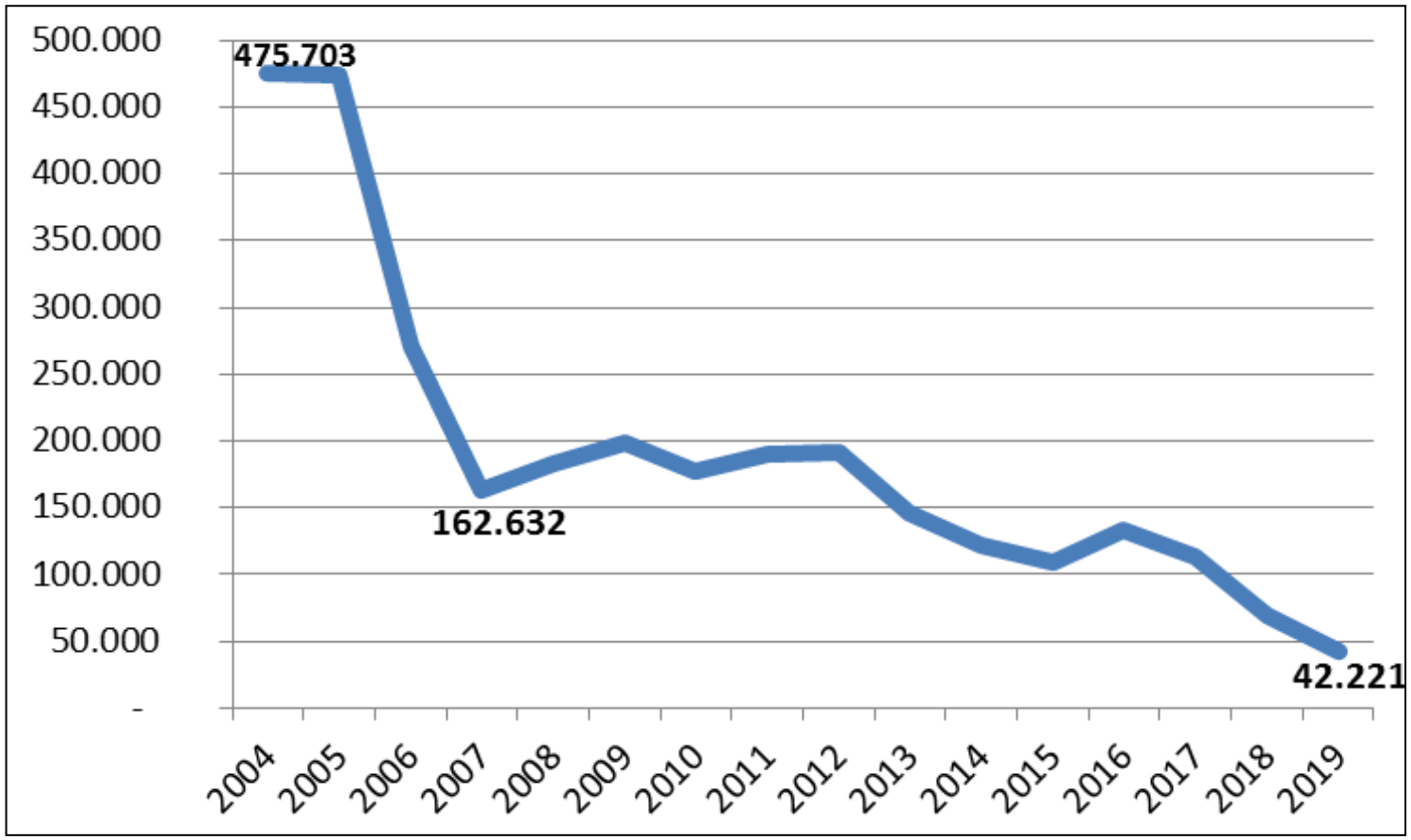
service of enforcement order

electronic form

paper form

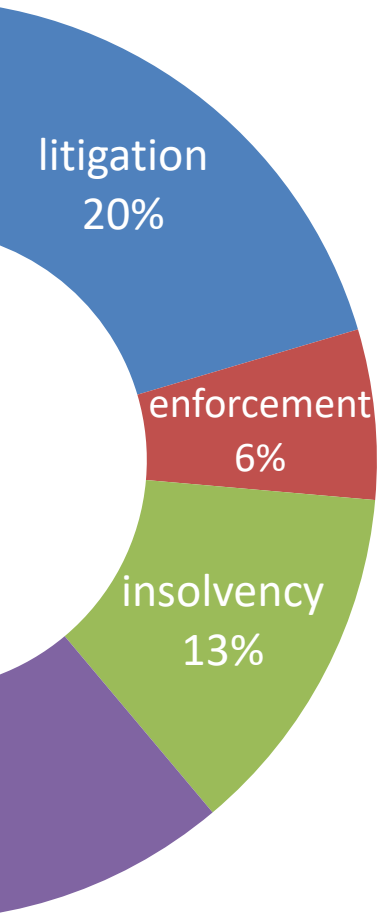
Incoming enforcement cases
at Croatian courts of first instance 2004–2019

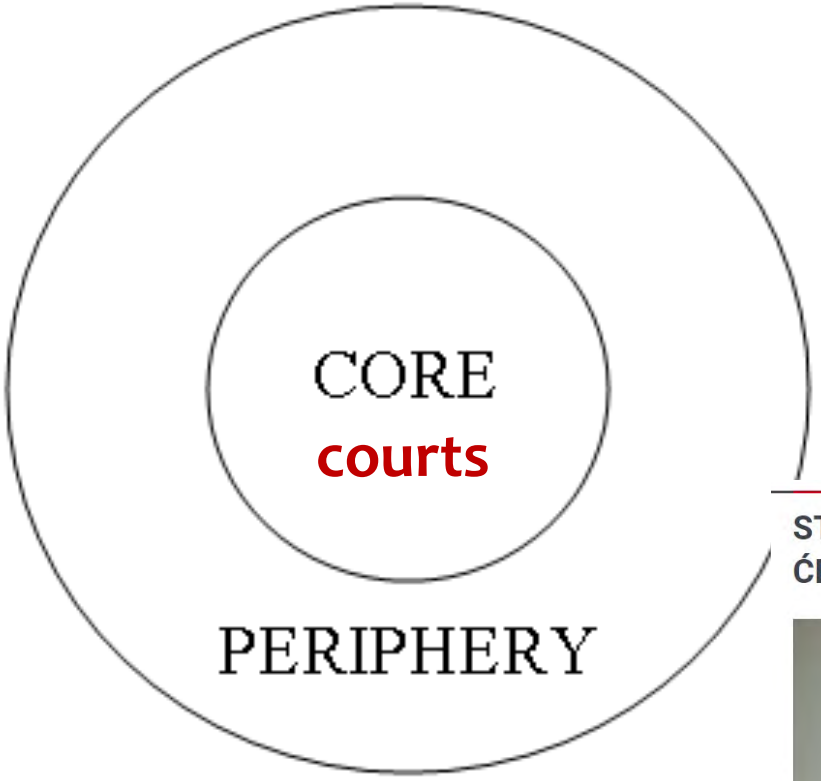




(Report of the President of the Supreme Court, 2020)

Incoming enforcement cases
at Croatian courts of first instance 2004–2019



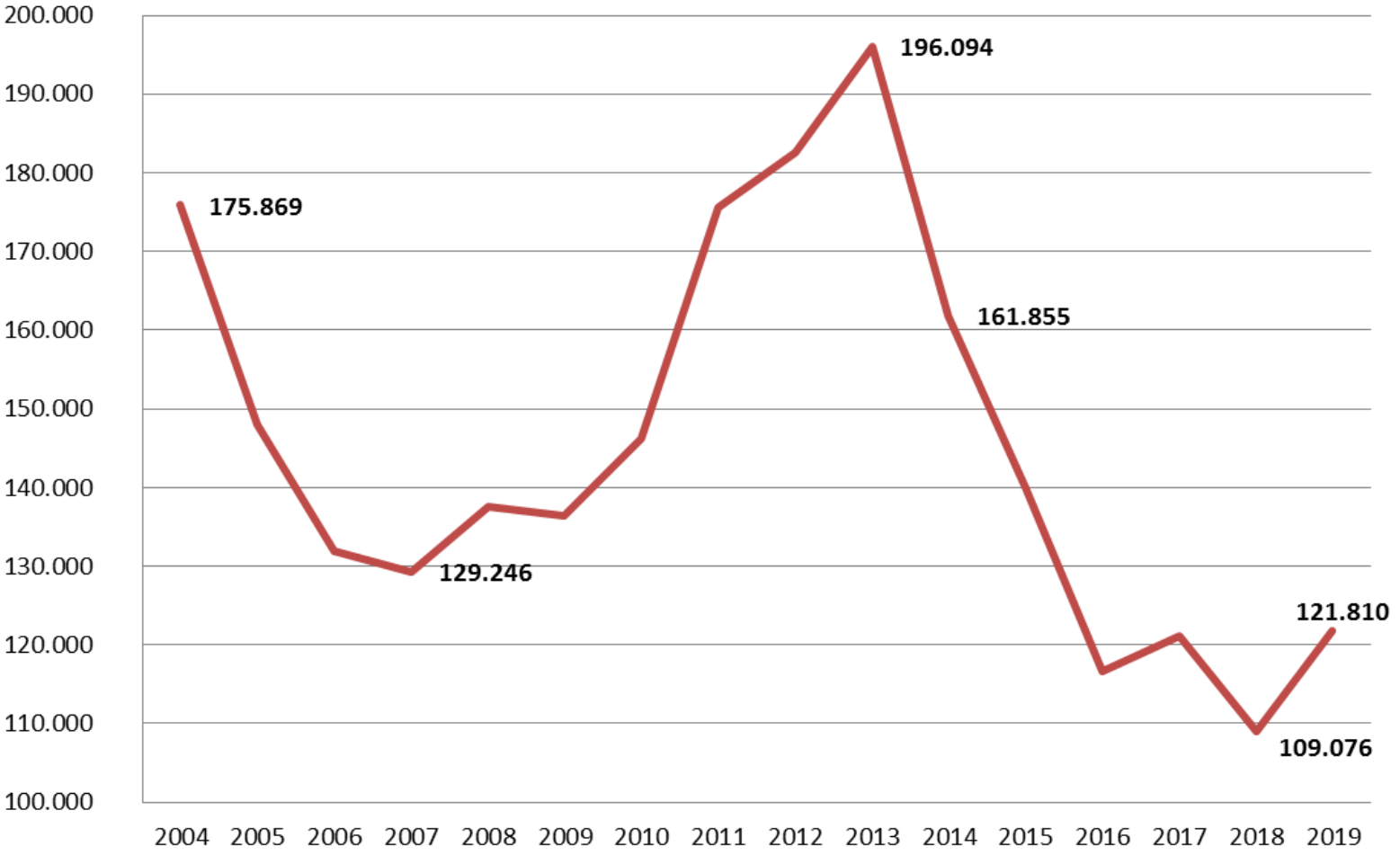


Fina

"SHERIFFS ARE ARRIVING:
PUBLIC EXECUTORS WILL ENFORCE
DEBTS WITHOUT COURTS."

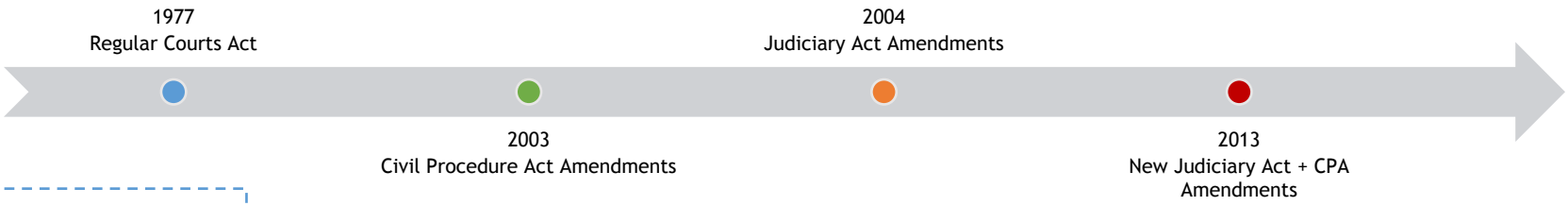
STIŽU ŠERIFI: JAVNI OVRŠITELJI UTJERIVAT ĆE DUGOVE BEZ SUDOVA

Incoming litigation cases at Croatian courts of first instance



(Report of the President of the Supreme Court, 2020)

Judicial advisors: History in short



TASKS:
- judicial support and assistance
- decisions drafting
- recording of the oral statement of claim
- other duties (legal advice, case law, statistics…)

TASKS:
- FIRST INSTANCE: hearings, conducting and evaluating evidence, decision drafting (not signing!) IF VALUE > 50k/500k HRK & APPROVAL OF THE JUDGE
- APPELATE PROCEEDINGS: case reporting, decisions drafting

Contentious proceedings
Enforcement
Inheritance
Land registry
Voluntary jurisdiction
MisdemeanoUr

Judicial Advisors
Higher Judicial Advisors

+ some labor disputes
+ administrative disputes with value >100k
+ business registry disputes
+ summary insolvency proceedings
+ costs

+ Higher Judicial Advisor - Specialist

VALUE > 100k/500k HRK

Judicial advisors v. judges: Appointment

public tender

decision of the president of the court

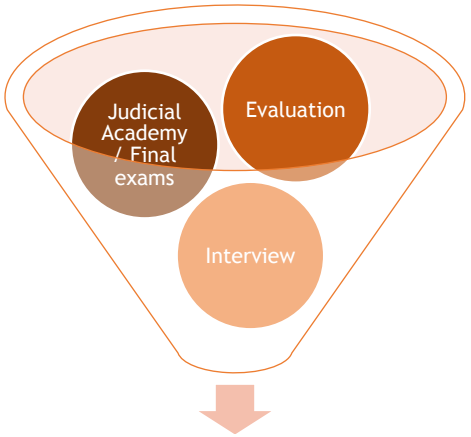
Judicial Advisors	Conditions
Judicial Advisor	Bar exam
Higher Judicial Advisor + Judicial Advisor (Supreme Court)	2 years in judiciary or 5 years for other (with bar exam)
Higher Judicial Advisor - Specialist + Higher Judicial Advisor (Supreme Court)	4 years in judiciary or 8 years for other (with bar exam)
Higher Judicial Advisor - Specialist (Supreme Court)	6 years in judiciary or 10 years for other (with bar exam)

Judicial Academy

10 years experience as a judicial official

12 years experience as a judicial official

15 years experience as a judicial official or an attorney/public notary/professor (with bar exam) or 20 years for other esteemed lawyers (with bar exam)



State Judicial Council

National AVG: 1499 EUR

Judicial advisors v. judges: Status

Judicial Advisors	Average gross salary
Judicial Advisor (MC, ComC, AC & CC)	1400,02 EUR
Higher Judicial Advisor (MC, ComC, AC & CC)	1652,53 EUR
Higher Judicial Advisor - Specialist (MC, ComC, AC & CC)	2031,48 EUR
Judicial Advisor (Higher Specialized Courts)	1750,03 EUR
Higher Judicial Advisor (Higher Specialized Courts)	1968,33 EUR
Higher Judicial Advisor - Specialist (Higher Specialized Courts)	2404,94 EUR
Judicial Advisor (Supreme Court)	2202,09 EUR
Higher Judicial Advisor (Supreme Court)	2625,05 EUR
Higher Judicial Advisor - Specialist (Supreme Court)	3157,28 EUR

Public officers

Government Decree + collective agreement

Public officials

Special Act on Judges Salaries

Judges	Average gross salary
Municipal courts Commercial courts Administrative courts	2223,39 EUR
County courts	2857,75 EUR
High Commercial Court High Administrative Court High Misdmeanor Court High Criminal Court	3580,04 EUR
Supreme Court	4932,26 EUR

Judicial advisors v. judges: Numbers compared

Tablica 4. Struktura kadrova u sudovima

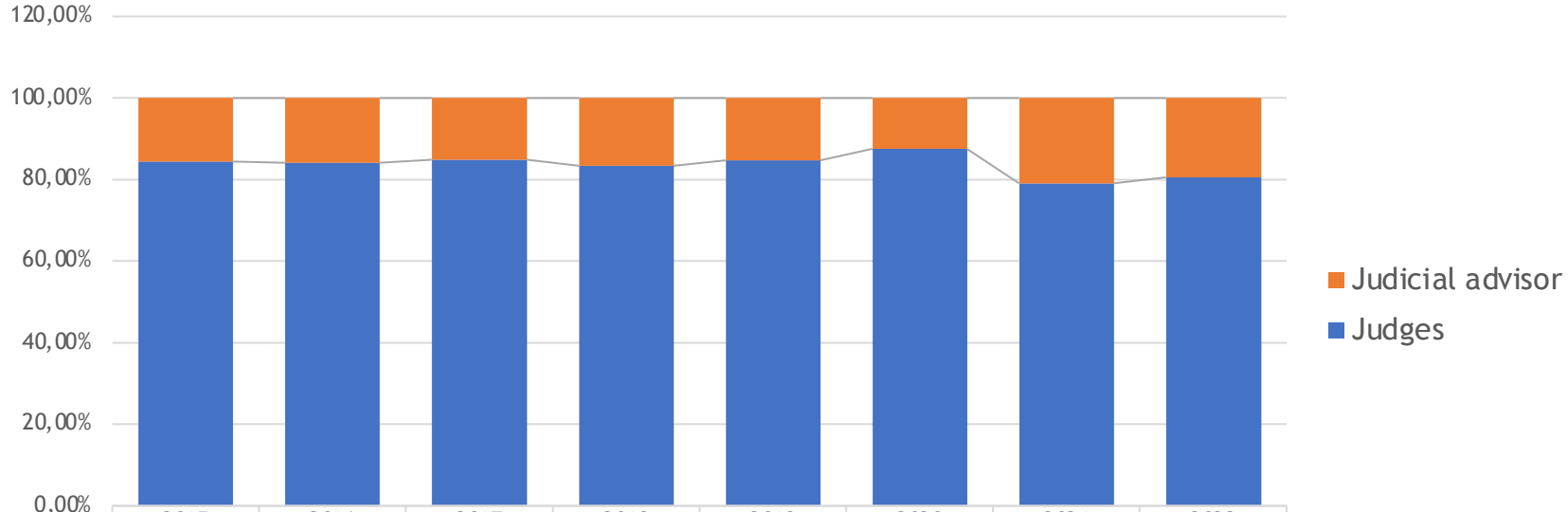
Pravosudna tijela	Pravosudni dužnosnici		Savjetnici i stručni suradnici		Vježbenici		Službenici		Namještenici		Ukupno	
	Žena	Ukupno	Žena	Ukupno	Žena	Ukupno	Žena	Ukupno	Žena	Ukupno	Žena	Ukupno
Općinski sudovi	754	1.006	326	405	19	30	3.442	3.824	300	456	4.841	5.721
Županijski sudovi	243	364	90	105			514	551	73	136	920	1.156
Visoki kazneni sud RH	7	11	5	5			15	16	3	3	30	35
Trgovački sudovi	92	119	36	47	2	4	408	445	32	52	570	667
Visoki trgovački sud RH	23	31	17	22			19	23	2	4	61	80
Upravni sudovi	30	46	7	9	3	4	80	83		1	120	143
Visoki upravni sud RH	18	20	14	20			30	34	8	12	70	86
Vrhovni sud RH	11	36	21	24			32	40	12	21	76	121
Visoki prekršajni sud RH	12	19	7	10			19	22	4	7	42	58
Sveukupno	**1.190**	**1.652**	**523**	**647**	**24**	**38**	**4.559**	**5.038**	**434**	**692**	**6.730**	**8.067**

33,80 v. 29,75%

9,80% v. 27,42%

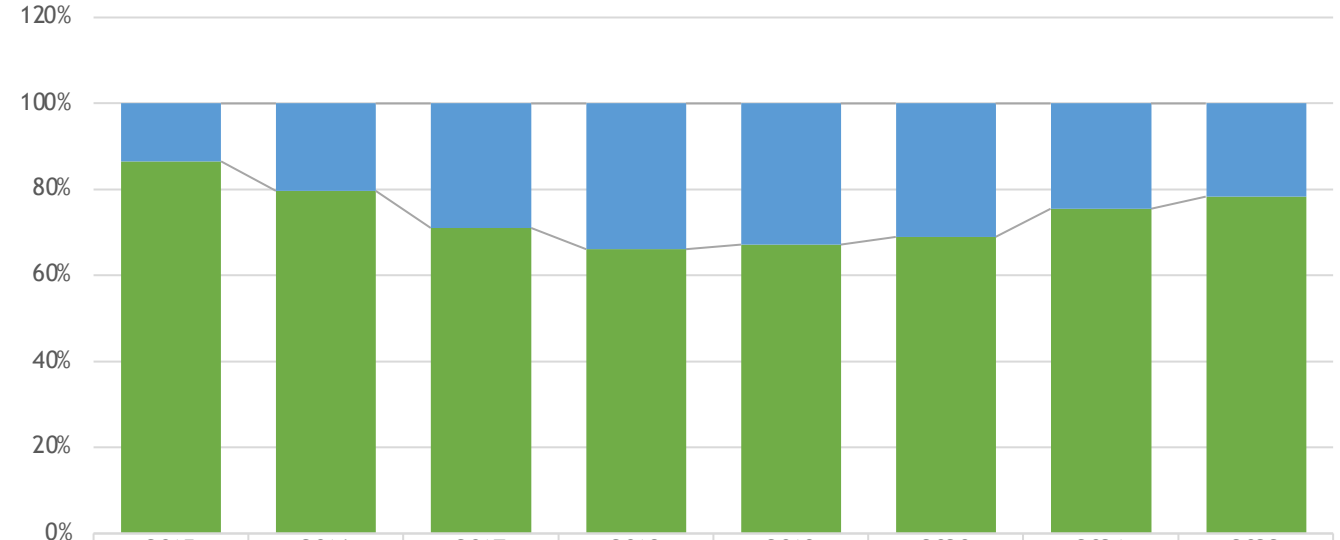
7,07 % v. 17,58%

Distribution of solved cases in municipal courts (2015 - 2022)



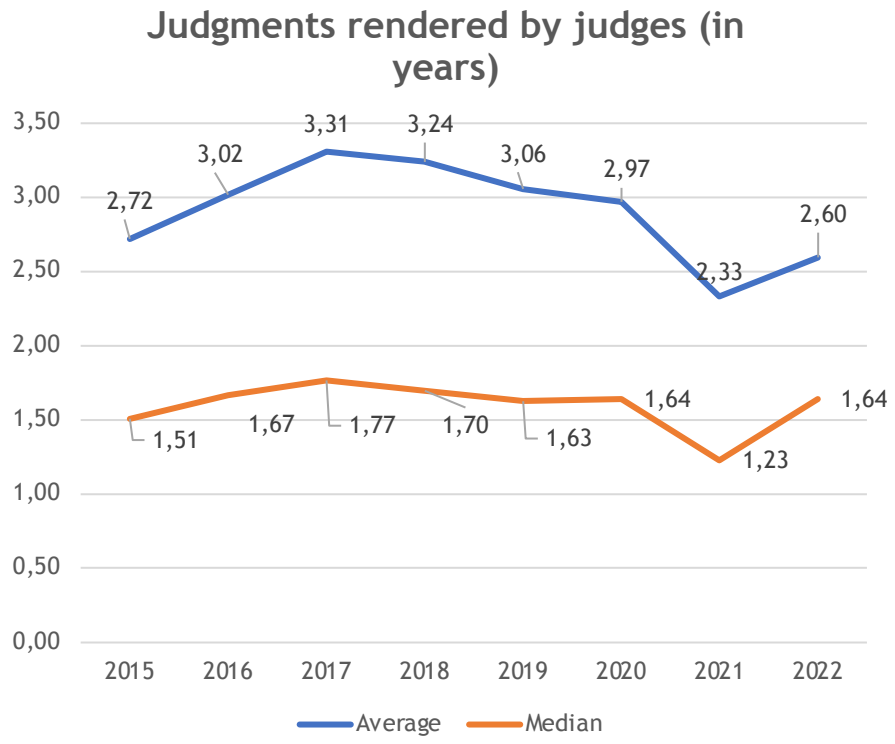
	2015	2016	2017	2018	2019	2020	2021	2022
Judicial advisor	15,61%	15,92%	15,15%	16,66%	15,25%	12,45%	20,91%	19,41%
Judges	84,39%	84,08%	84,85%	83,34%	84,75%	87,55%	79,09%	80,59%

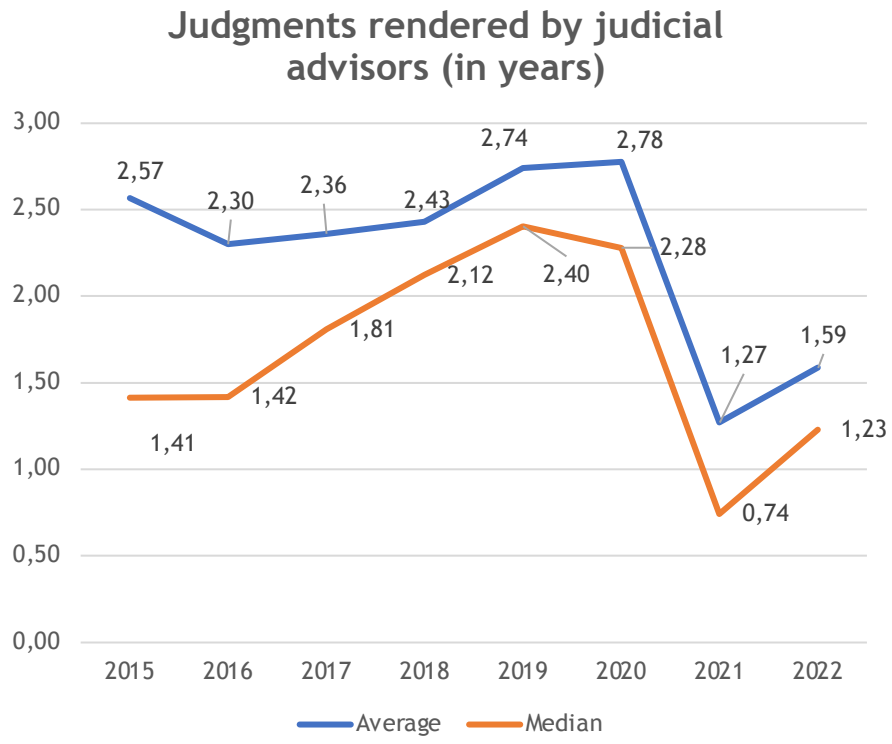
Distribution of solved cases in commercial courts (2015 - 2022)?



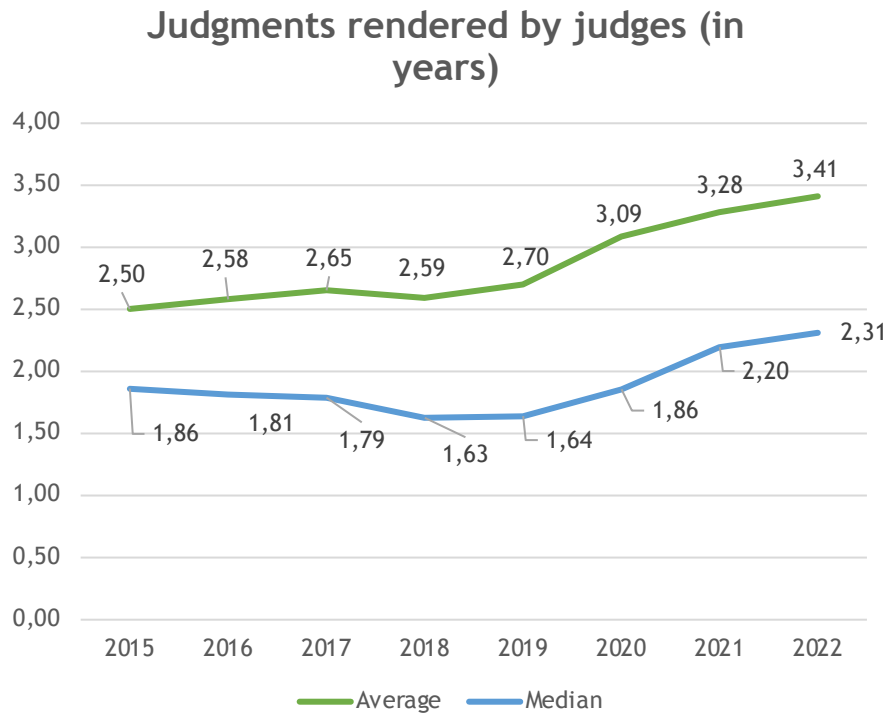
	2015	2016	2017	2018	2019	2020	2021	2022
Judicial advisor	13,46%	20,37%	28,97%	33,90%	32,80%	31,07%	24,45%	21,68%
Judges	86,54%	79,63%	71,03%	66,10%	67,20%	68,93%	75,55%	78,32%

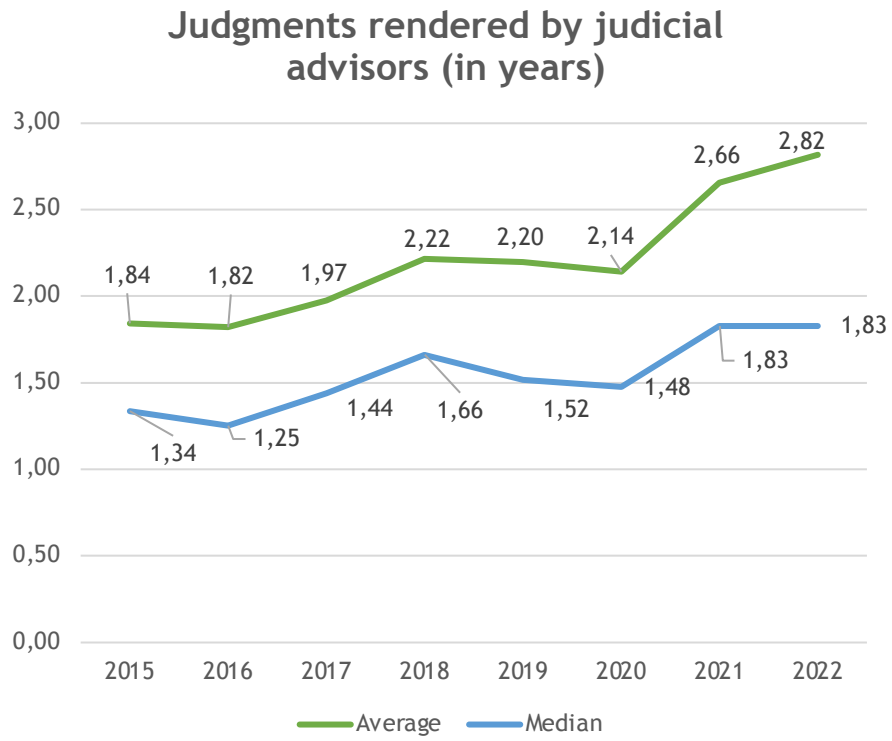
Duration of proceedings in municipal courts (2015 - 2022)



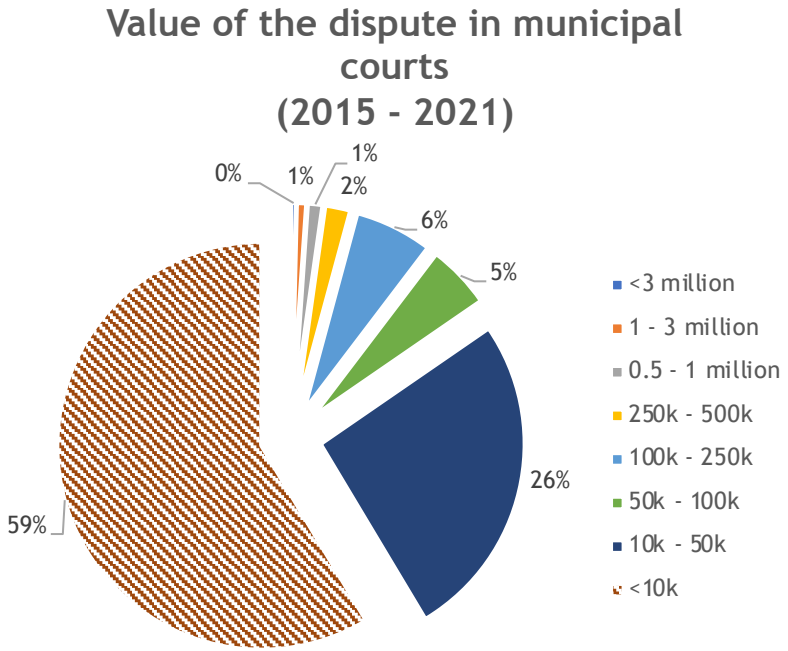


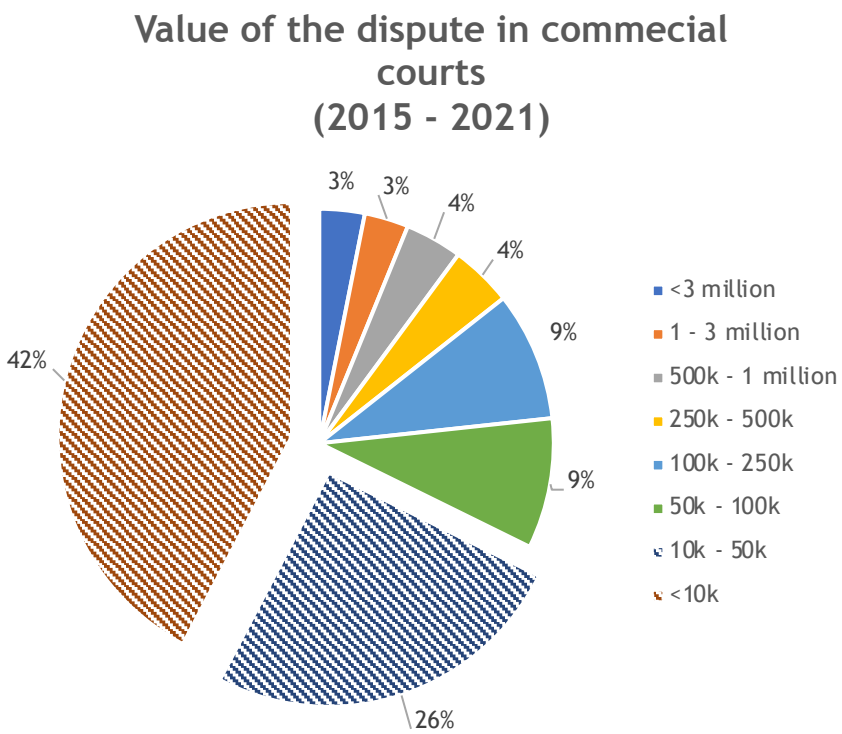
Duration of proceedings in commercial courts (2015 - 2022)





Value of the dispute (2015 - 2021)

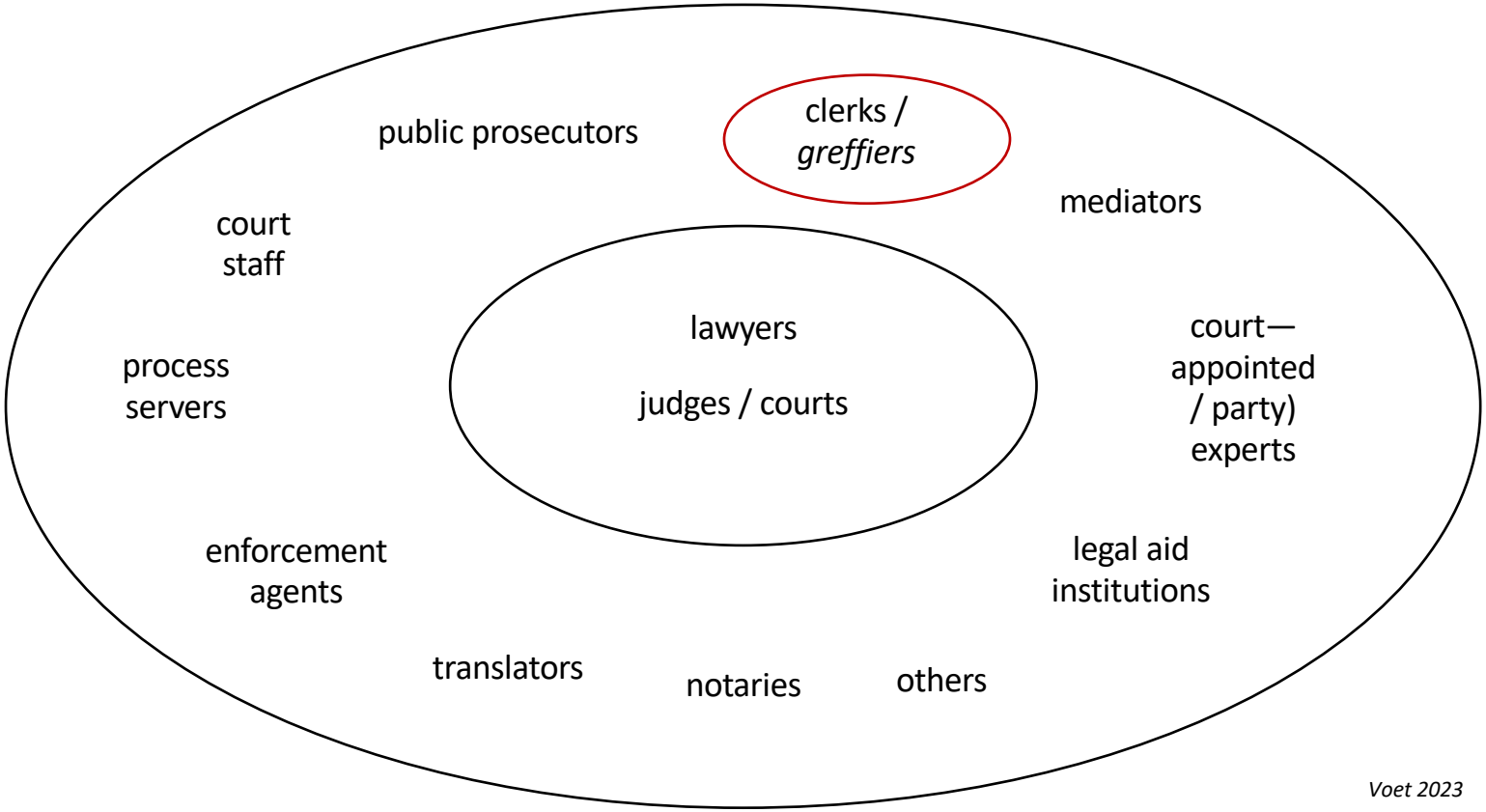




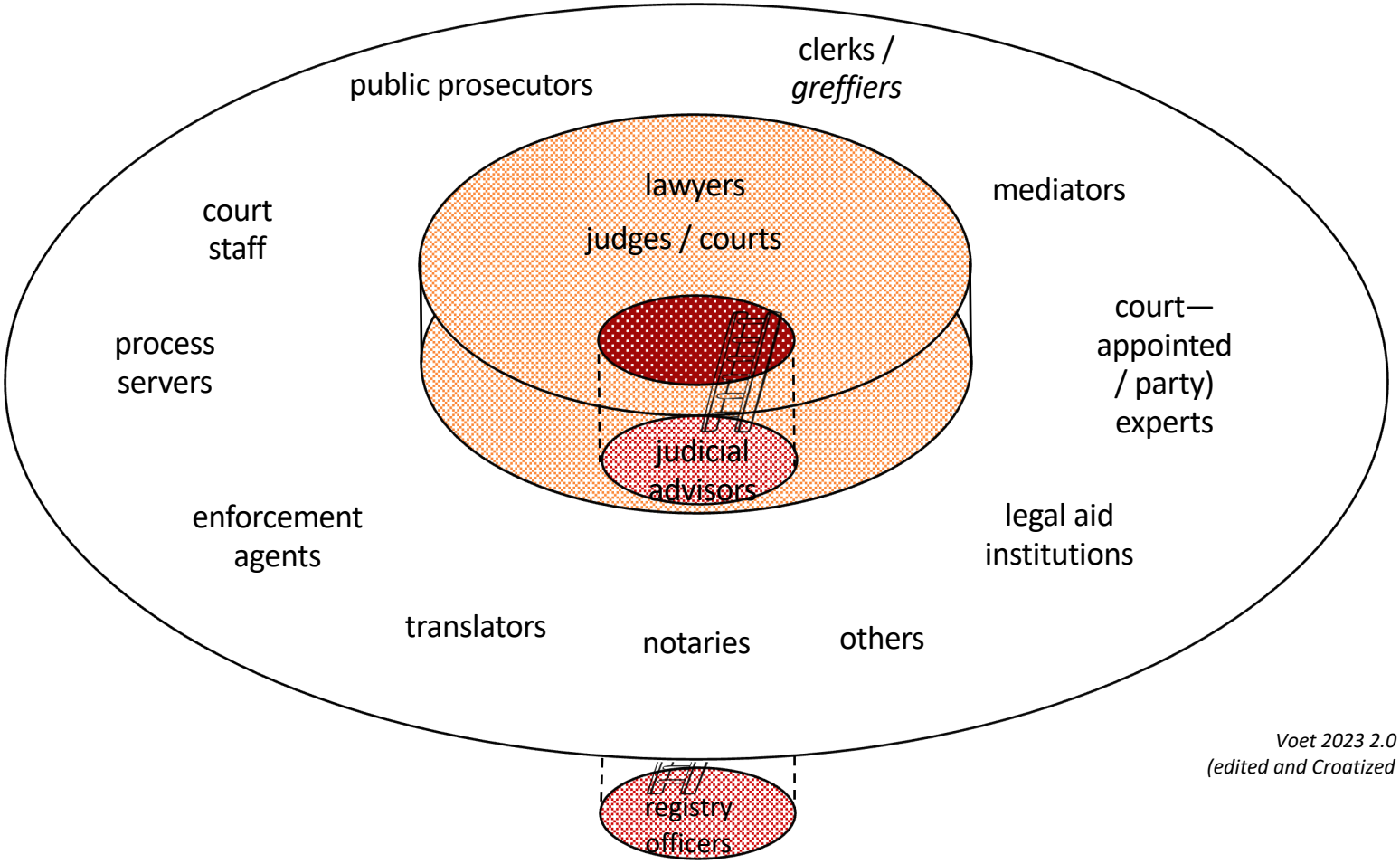
Any other endemic species…?

Simple land registry cases

- Land registry officers
- Authorized land registry officers
- Judicial advisors


public prosecutors
clerks / *greffiers*
mediators
court staff
lawyers
judges / courts
process servers
court—appointed / party) experts
enforcement agents
legal aid institutions
translators
notaries
others

Voet 2023



Voet 2023 2.0
(edited and Croatized version)

Thanks for the attention!

marko.bratkovic@pravo.hr

Expert testimony

Croatian situation

PROF. DR. ALAN UZELAC

SVEUČILIŠTE U ZAGREBU / UNIVERSITY OF ZAGREB

XVII PPJ, 2023

Why are experts so problematic in the South-East Europe?

- Great impact on the length, costs and efficiency
- Almost no systematically collected data
- Low resources, high dependence on organisation
- Failed experiments and a lot of open issues
- Missing link in communicationa and training
- The testbed for the general attitude to litigation

”No stone should be left unturned.”

NCSC on MC Zagreb, John Radway (PPJ 2007)

The impact of experts on the proceedings

- Increased costs
- Protracted proceedings
- Opportunity for abuse and vexation

DEMANDING MEANS OF EVIDENCE WHICH SHOULD BE UTILISED CAUTIOUSLY

New provisions of the CCP pertinent to experts

Small claims and the use of experts

Expert opinion in commercial litigation

The form of reports: oral or written?

Postupak u sporovima male vrijednosti pisani je postupak.

Sud će u postupcima u sporovima male vrijednosti održati ročište ako to smatra potrebnim radi provođenja dokaznog postupka ili ako barem jedna od stranaka podnese takav obrazloženi prijedlog. Sud će rješenjem odbiti prijedlog stranke za održavanje ročišta ako smatra, s obzirom na okolnosti slučaja, da se pravično vođenje postupka može osigurati i bez održavanja ročišta. Protiv rješenja kojim se odbija prijedlog stranke za održavanje ročišta nije dopuštena posebna žalba.

Pisana stručna mišljenja

Članak 492.b

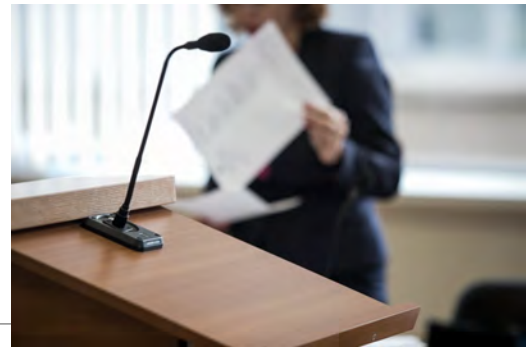
U postupku pred trgovačkim sudovima sud može, po službenoj dužnosti, od trećih osoba, i to osobito od gospodarskih i obrtničkih komora, tražiti stručna mišljenja i potrebne podatke s kojima ne raspolaže o trgovačkim običajima koje trgovci redovito primjenjuju u određenim obveznim odnosima.

Sud će odrediti hoće li vještak iznijeti svoj nalaz i mišljenje samo usmeno na raspravi ili će ih podnijeti i pismeno prije rasprave. Sud će odrediti rok za pismeno podnošenje nalaza i mišljenja koji ne može biti duži od 60 dana.

Vještak mora uvijek obrazložiti svoje mišljenje.

Ako niti jedna od stranaka ne ospori ovjereni pisani iskaz stranke ili svjedoka ili nalaz i mišljenje vještaka i ako sud to ocijeni nepotrebnim, sud neće usmeno saslušati stranku, svjedoka ili vještaka.

Who can be expert? Definition of expert's tasks?



INDIVIDUAL OR INSTITUTION?

Vještaci se određuju u prvom redu iz reda stalnih sudskih vještaka za određenu vrstu vještačenja.

Vještačenje se može povjeriti i stručnoj ustanovi (bolnici, kemijskom laboratoriju, fakultetu i sl.).

Ako postoje posebne ustanove za određene vrste vještačenja (vještačenje lažnog novca, rukopisa, daktiloskopsko vještačenje i sl.), takva vještačenja, a osobito složenija, povjeravat će se, u prvom redu, tim ustanovama.

DUTY TO TESTIFY?

Određeni vještaci dužni su odazvati se pozivu suda i iznijeti svoj nalaz i mišljenje.

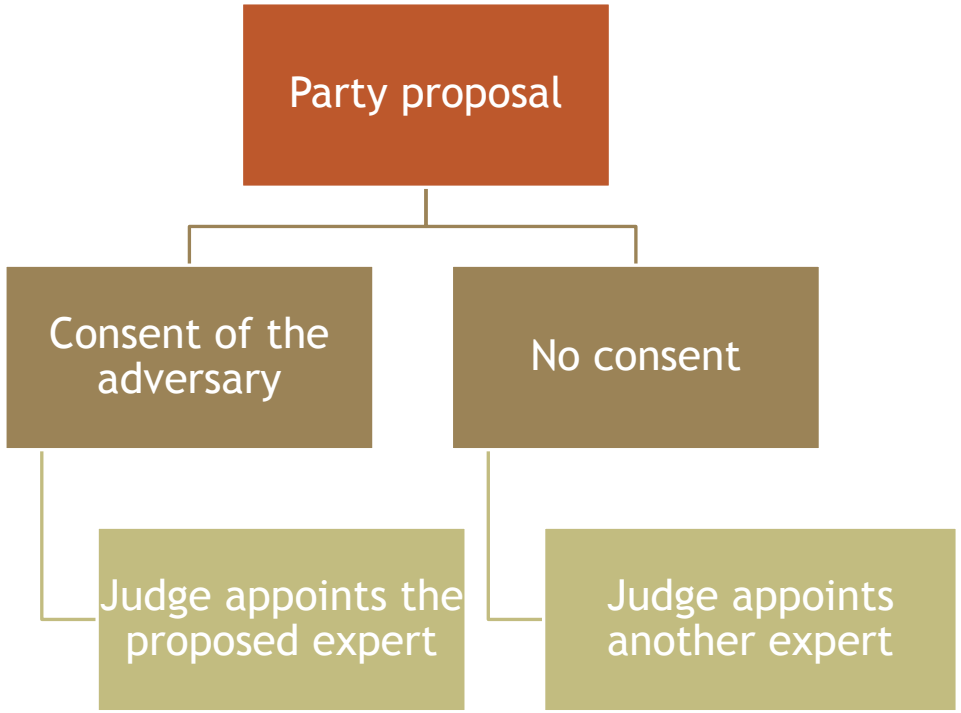
Sud će vještaka, na njegov zahtjev osloboditi dužnosti vještačenja iz razloga iz kojih svjedok može uskratiti svjedočenje ili odgovor na pojedino pitanje.

Sud može vještaka, na njegov zahtjev, osloboditi dužnosti vještačenja i iz drugih opravdanih razloga. Oslobođenje od dužnosti vještačenja može tražiti i ovlaštena osoba tijela ili pravne osobe u kojoj vještak radi.

The control role of the court

One or more experts?
Inconsistencies?

Appointment of experts



Vještačenje, u pravilu, obavlja jedan vještak; a kad sud ocijeni da je vještačenje složeno, može odrediti dva ili više vještaka.

Ako je određeno više vještaka, oni mogu podnijeti zajednički nalaz i mišljenje kad se u nalazu i mišljenju slažu. Ako se u nalazu i mišljenju ne slažu, svaki vještak posebno iznosi svoj nalaz i mišljenje.

Ako se podaci vještaka o njihovu nalazu bitno razilaze, ili ako je nalaz jednog ili više vještaka nejasan, nepotpun ili u proturječnosti sam sa sobom ili s izviđenim okolnostima, a ti se nedostaci ne mogu otkloniti ponovnim saslušanjem vještaka, obnovit će se vještačenje s istim ili drugim vještacima.

Ako u mišljenju jednog ili više vještaka ima proturječnosti ili nedostataka, ili se pojavi osnovana sumnja u pravilnost danog mišljenja, a ti se nedostaci ili sumnja ne mogu otkloniti ponovnim saslušanjem vještaka, zatražit će se mišljenje drugih vještaka.

Time limits and sanctions

Procedural calendar!

Submission of written report: 30 do 60 days → Parties' comments 15 days → No objections

Parties' comments 15 days → Objections → Oral hearing

Sud će kazniti novčanom kaznom od 500,00 do 10.000,00 kuna vještaka koji ne dođe na ročište iako je uredno pozvan, a izostanak ne opravda, vještaka koji bez opravdanog razloga odbije vještačiti te vještaka koji svoj nalaz i mišljenje bez opravdanog razloga ne podnese u roku koji mu je odredio sud.

Na zahtjev stranke sud može rješenjem narediti vještaku da nadoknadi troškove koje je uzrokovao svojim neopravdanim nedolaskom ili neopravdanim odbijanjem da vještači. O takvom zahtjevu sud je dužan odlučiti bez odgode. Žalba protiv toga rješenja ne odgađa ovrhu.

“Free assessment” in specific situation under CCP

NEW TRENDS IN CCP 2008, 2013, 2019, 2022

Free evaluation of evidence ⇔ Free assessment

- Čl. 223. st. 1.: 223. paragraph 1.: If it is determined that the party is entitled to compensation for damages, to a sum of money or to replaceable things, but the **amount or quantity** could only be determined with **disproportionate difficulties**, the court will decide according to its **free assessment**.
- Čl. 223. st. 2.: If decision-making on **some of the claims that are insignificant compared to the total value** of all claims and evidence-taking poses difficulties **disproportionate to the importance of these claims** – the court may decide on them **based on its free assessment**, taking into account the already clarified circumstances, especially the documentary evidence submitted by the parties and the parties’ statements (Article 264).
- Čl. 464.a.: „In **small claims disputes**, if the court deems that the establishment of relevant facts would be connected with **disproportionate difficulties and expenses,** the court may decide on them **based on its free assessment** taking into account the already clarified circumstances, especially the documentary evidence submitted by the parties and the parties’ statements (Article 264).

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B. PROPORTIONALITY

Rule 5. Role of the Court

(1) The court must ensure that the dispute resolution process is proportionate.

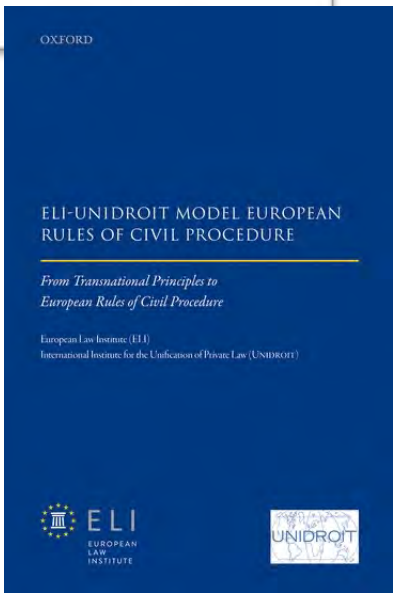
(2) In determining whether a process is proportionate the court must take account of the nature, importance and complexity of the particular case and of the need to give effect to its general management duty in all proceedings with due regard for the proper administration of justice.

Rule 6. Role of the parties and their lawyers

Parties and their lawyers must co-operate with the court to promote a proportionate dispute resolution process.

Rule 8. Proportionality of costs

Costs of proceedings should, in so far as possible, be reasonable and proportionate to the amount in dispute, the nature and complexity of the particular proceedings, their importance for the parties and the public interest.



The role of the court and the parties in promoting procedural proportionality

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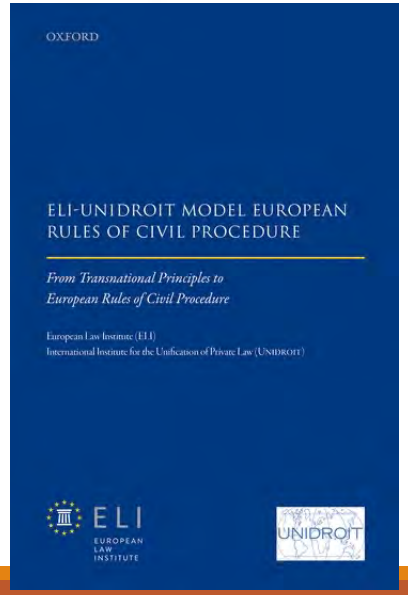
Rule 119. Party-appointed Experts

Parties may present expert evidence on any relevant issue for which such evidence is appropriate. They may do so through an expert of their choice.

3. Where one or more party-appointed experts have submitted their evidence, but the court requires further clarification on the issue upon which they have given evidence, it may order the appointment of a court-appointed expert under Rule 120. It may, also, however consider the issue as not established and thus decide it according to an application of the burden of proof (Rule 25(2)).
4. This Rule must be applied consistently with the general principle of proportionality (Rules 5 and 6). It should not be understood as setting out a general right to adduce evidence from an unlimited number of experts.

Procedural proportionality: Party-appointed experts



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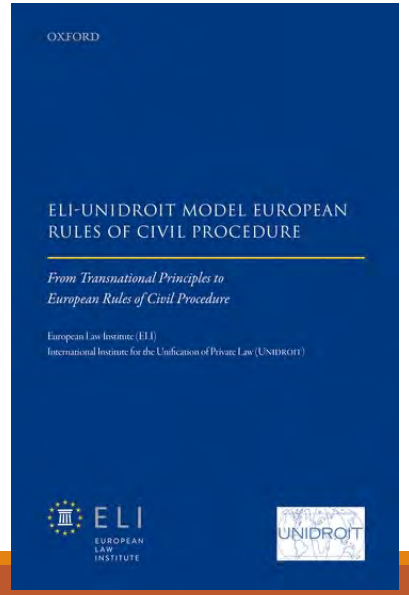
Rule 120. Court-appointed Experts

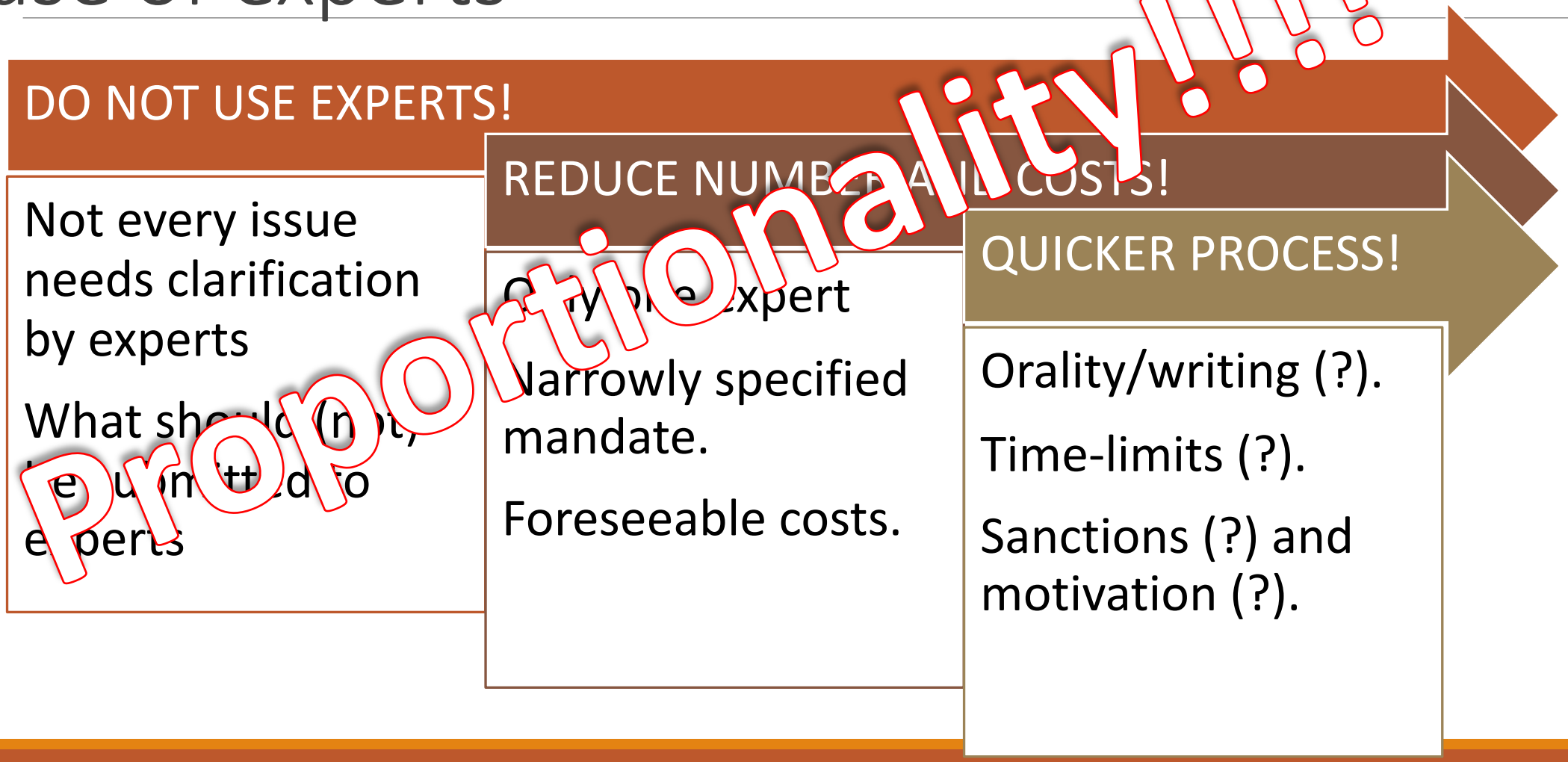
(1) **The court may appoint one or more experts to give evidence on any relevant issue for which expert evidence is appropriate, including foreign law.**

2. Rule 120(1) establishes that the court has the discretion to appoint several experts if necessary. Generally, however, and consistently with the principle of proportionality (Rules 5 and 6) no more than one expert should be appointed on any relevant issue. When considering whether the appointment of more than one expert is justified, the court should bear in mind any increase in costs arising from multiple appointments. In considering the costs, the value of the claim for relief should be a relevant criterion in assessing the proportionality of the cost of such appointments. However, the court should also consider the fundamental importance of reaching a correct decision on the merits in considering these issues.

Procedural proportionality:
Court-appointed experts



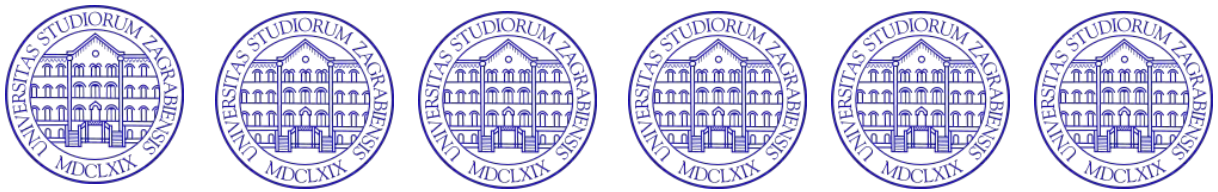
Three ways to increase the efficiency of the use of experts



Proportionality!!!!

Thanks for your attention! Hvala na pozornosti!

AUZELAC@PRAVO.HR



PPJ Course and Conference 2023

The Heroes of Judicial Periphery Court Experts, Court Clerks and other Actors in the Shadow

A (public) litigation fund for collective actions in the Netherlands?

The role of funders in the shadow of the procedure

Xandra Kramer
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www.euciviljustice.eu

Background: collective action & funding

- Collective redress in the Netherlands

  ✓ 1994 – injunctive collective actions
  ✓ **2005 – Act collective settlements (WCAM)**
  ✓ **2020 - Act on Collective Damages in Class Actions**

KEY ISSUE:

- Collective actions notoriously complex and **expensive**

  ✓ ***Rise of third private litigation funding (TPLF*) –** Claim Code
  ✓ Changes litigation landscape and role of private funders
  ✓ Need for additional (public) funding?

Collective actions & funding - EU

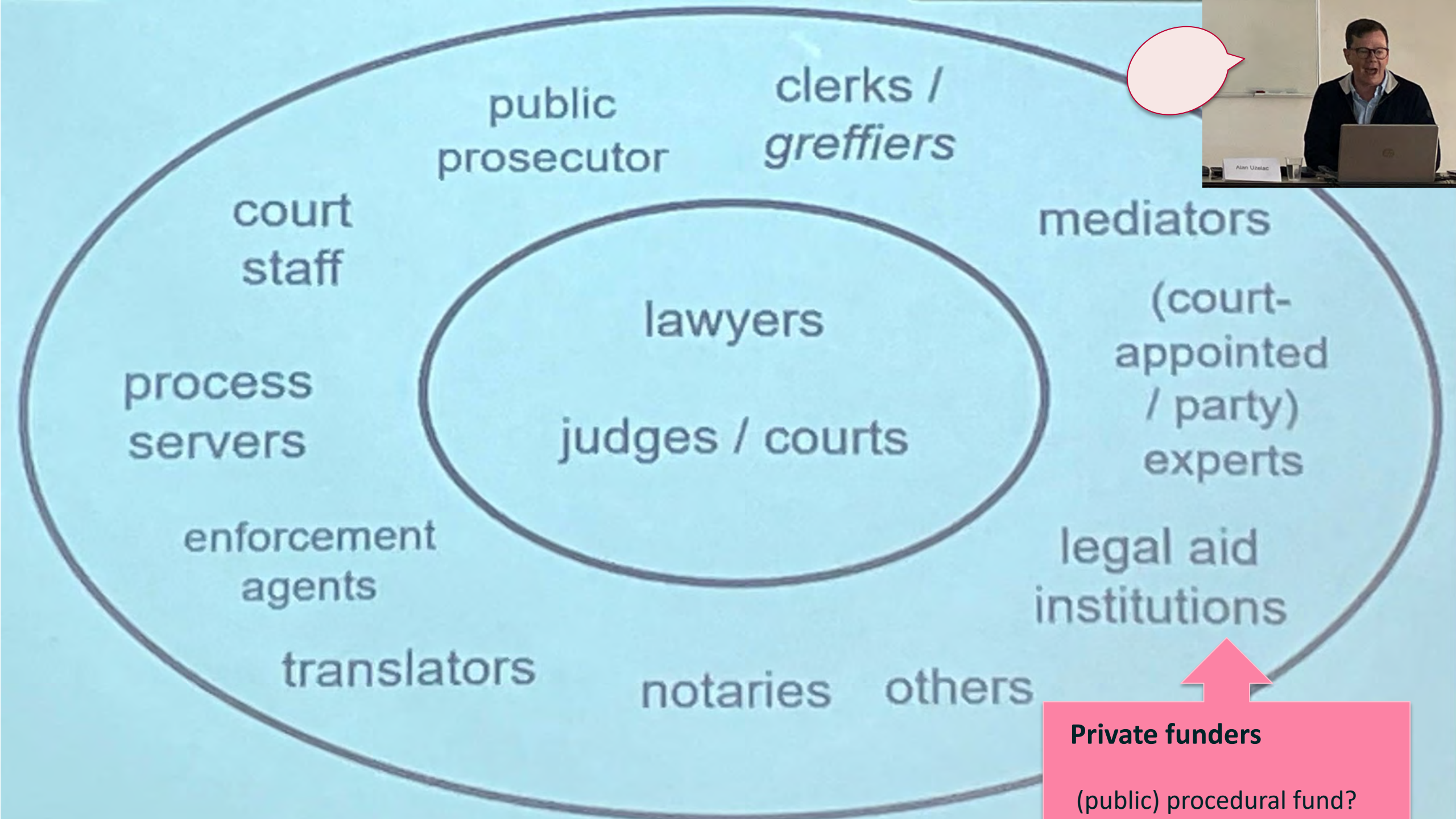
- **EU:** Adoption **R**epresentative **A**ction **D**irective 2020 (RAD)

- RAD requires assistance **Q**ualified **E**ntities (QEs)
  - ✓ Reduce costs and secure funding (*Art. 20, para 1 and 2*)
  - ✓ *Cy pres* enabled - redistribution of unrecovered funds (*Art. 9, para 7*)

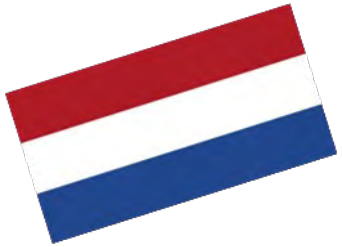
- **TPLF:** EU traditionally reluctant – ***but Art. 10 RAD enables TPLF***

- **Prevent conflict of interests**
  - ✓ *Avoid undue influence* (e.g. settlements) & competition
  - ✓ *This has also resulted in a slight adaptation of Dutch act (art. 305f DCC)*

➢ Pushback: EP Resolution (Voss report) on ***Responsible private funding of litigation***


public prosecutor
clerks / greffiers
court staff
mediators
lawyers
(court-appointed / party) experts
process servers
judges / courts
enforcement agents
legal aid institutions
translators
notaries
others
Private funders
(public) procedural fund?

Dutch Ministry of Justice Quest



Utility, necessity & design of a litigation fund for collective actions

- Context & regulation of collective actions and funding (NL – EU) - **WAMCA**
- Costs involved in collective actions
- Current options & limitations of litigation funding in NL

- The utility of a **litigation fund** as alternative source of financing
- Inspiration from examples abroad
- Possible design of a Dutch (revolving) fund

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Research methodogy

Desk Research

Literature + case law study and current litigation financing options

Comparative research

Literature study funds in Israël, Quebec and Ontario (incl. 8 expert interviews)

(Quantitative) mapping WAMCA and funding

Data from WAMCA Register & Dossier analysis

Interviews with stakeholders

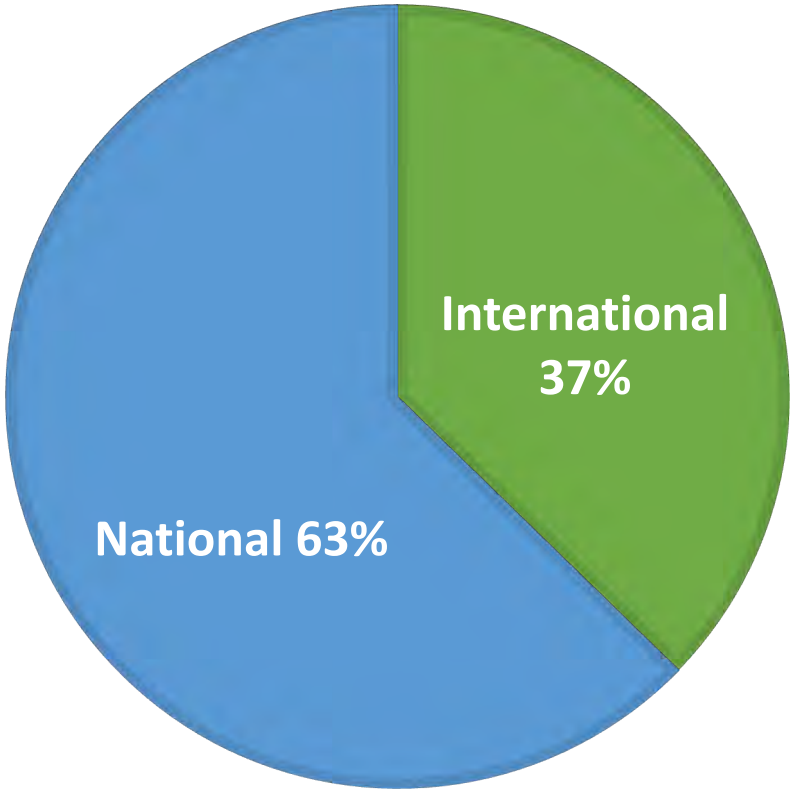
Foundations, Lawyers, Funders (19 respondents total)

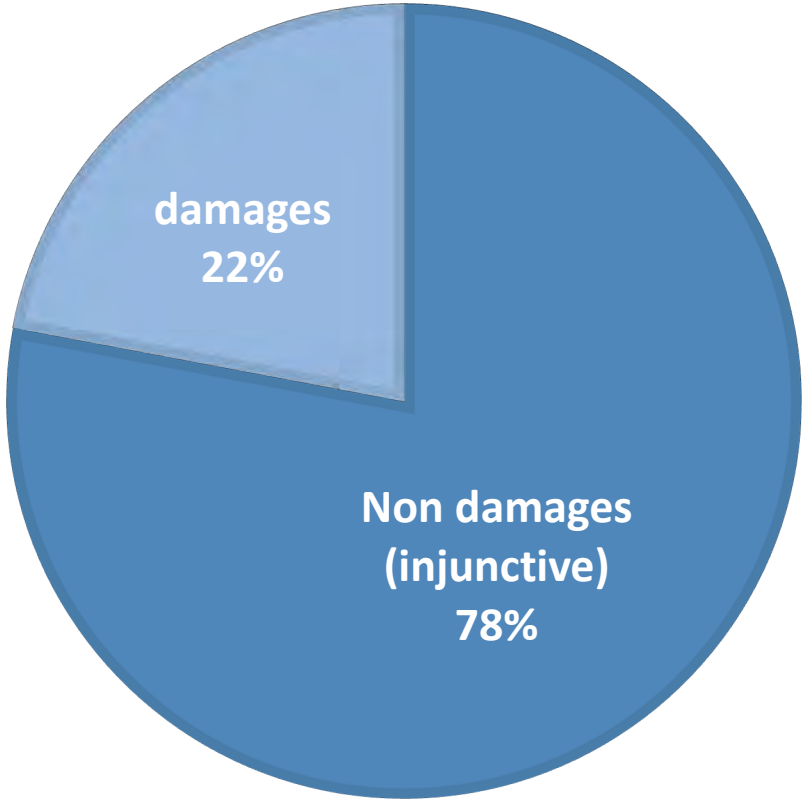
Focus group + Expert meeting

Group meetings with defendant lawyers (5) and experts (9) respectively

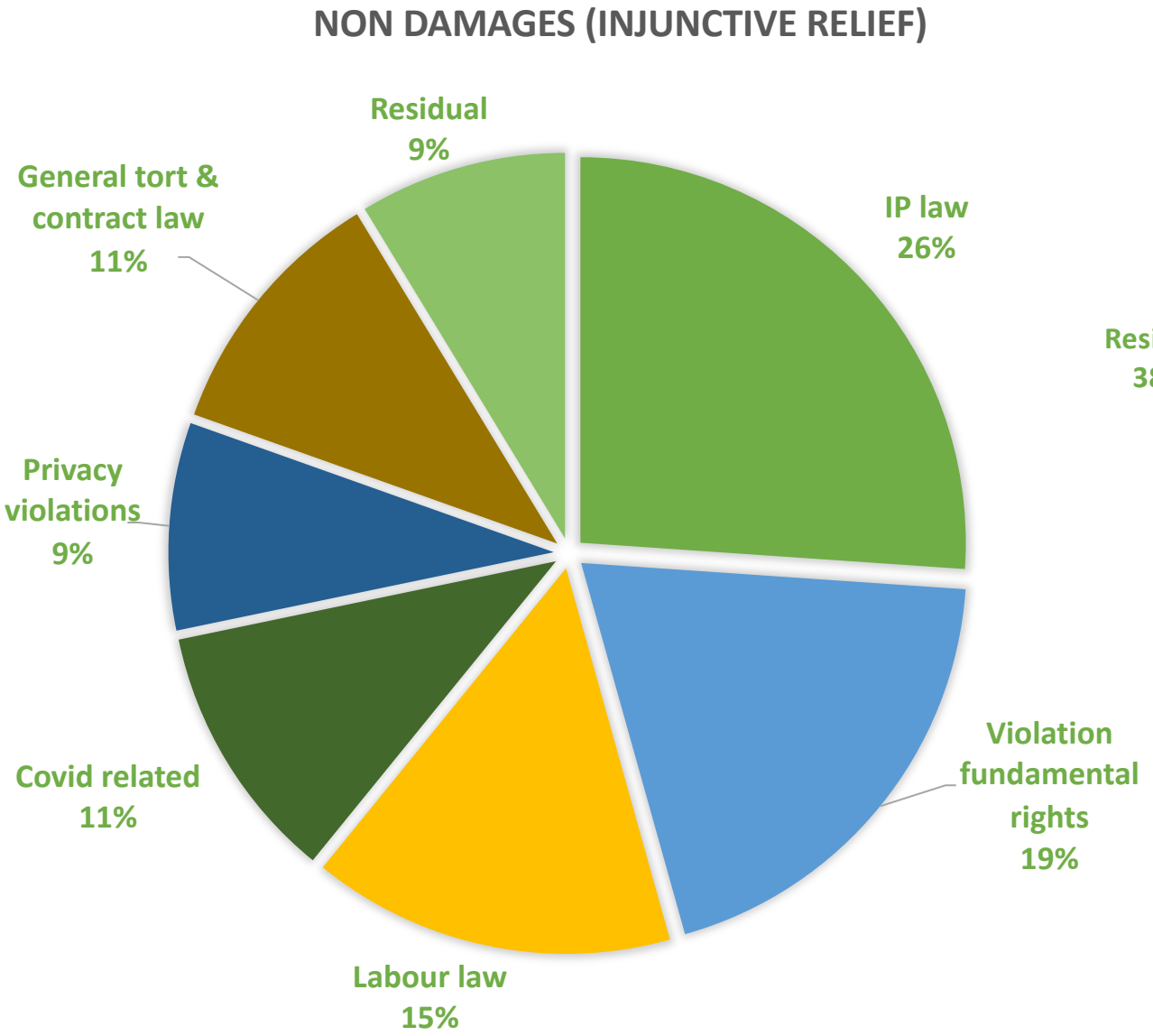
Three years of WAMCA – Some data (I)

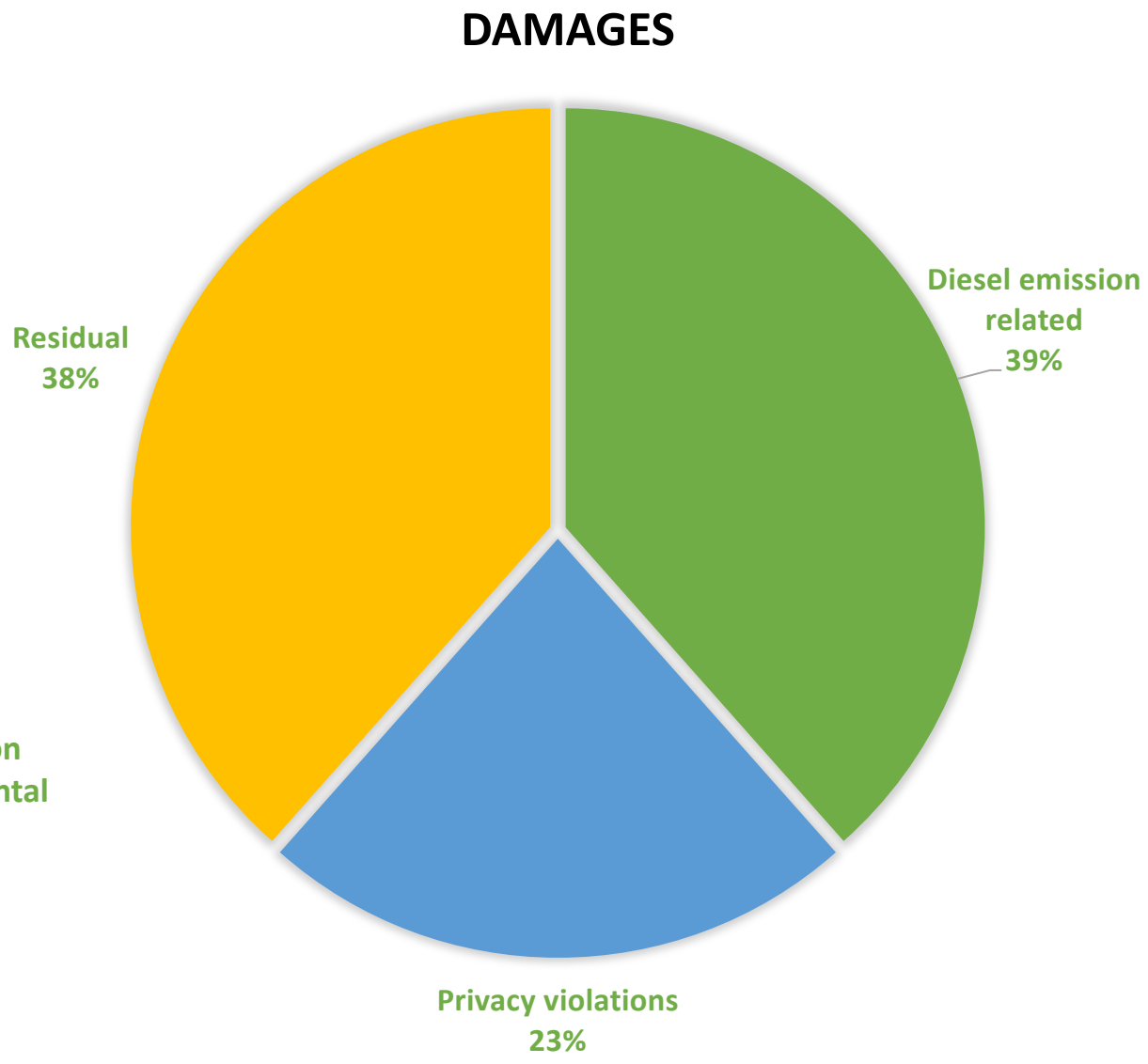
- 63 cases in total (59 analysed in depth) *v.*
- <u>No</u> increase after extending collective redress





Three years of WAMCA – Some data (II)





What the WAMCA data tell us about funding

- **Non damage cases are often brought by repeat players**
  - ✓NONE of these TPLF funded
  - ✓Own funds – foundations have a ‘war chest’ (membership fees)
  - ✓Private donations, crowdfunding

- **Damage cases are usually brought by ad hoc claim organisations**
  - ✓ALL cases funded by TPLF
  - ✓Dutch funders
  - ✓Involvement of foreign law firms and funders

➢Damage collective actions not possible without private funding

Funding problems and developments

- **Traditional funding mechanisms do not suffice** (in the NL)
  - ✓Legal aid and legal aid insurance
  - ✓No win no fee not allowed
  - ✓Loser pays rule – but fixed tariffs

- **Increase in TPLF**
  - ✓Only for damage-based cases with a high value
  - ✓Insecurity about regulatory framework (EU)
  - ✓NL funders and foreign (US/UK) parties
  - ✓ Work methods differ - some extensive in house scoping/due diligence
  - ✓Other market responses: 'entrepreneurial lawyering' - ad hoc funders and foundations (consumers, privacy)

Necessity of a public fund

- **Divided** views on necessity - interviews, focus group, expert meeting

- **Our own assessment**: no evident necessity so far
  - ✓All damage-based cases have attracted multiple funders
  - ✓But repeat players in non-damage cases have to be selected/limited funds
  - ✓Only three years of WAMCA – there may be gaps (public interest cases)

- Organising such fund is **inherently complex** (*next slides*)

- **Alternative options**:
  - Lower/no court fees
  - No loser pays for claimants – full/actual reimbursement if claimant is successful
  - Allow no win-no fee

Design: Class action funds in other countries

Ontario Class Proceedings Fund

- cases having a public interest (approx. 10%)
- costs litigation, excluding attorney fees
- if successful, return contribution + pay 10% to the fund
- limited means and strict selection, financially vulnerable

Quebec Fond d'aide aux action collective (FAAC)

- potentially successful cases (approx. 50%)
- costs, including attorney fees
- reimburse if successful + percentage commission
- all successful cases contribute a percentage

Israel Public Class Action Fund

-cases having a public interest
-limited costs coverage, excluding lawyer costs (max. 7,000)
-fully funded by the government (budget 500.000)

Design and funding of a Dutch fund

- **Requirements**, types of cases and types of costs
- **Revolving fund**: *funding the fund*
  - ✓Percentage of **all** or **only fund-funded** successful cases
  - ✓Cy pres
  - ✓Private donations & crowdfunding
  - ✓Public financing => *avoid state aid* (competition)
  - ✓**In any case: we need TPLF to help fund the fund!!**

- **Organisational embedding**
  - ✓E.g. Council for Legal Aid
  - ✓Required expertise
  - ✓Conflict of interests

Conclusions and further research

- So far **no clear evidence** that NL cases structurally lack funding
- **BUT**: it does not mean all cases can be brought/are funded
- Fund valuable for low value cases or injunctive relief

- Seems **premature** to establish such a public fund
  - ✓Self-sustaining fund difficult in view of number of cases
  - ✓Questionable whether there is sufficient support (solidarity)
  - ✓Organisational issues – *role of such fund*

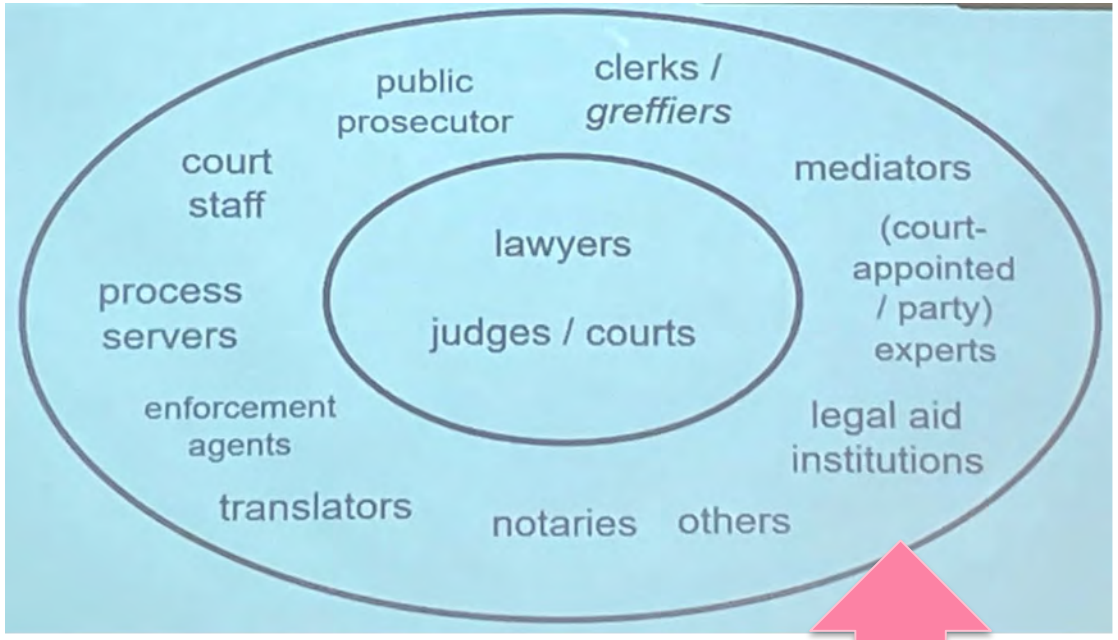
- Research about ***cy pres*** and **experience in other countries**
- Experiments **no cure no pay** and role of **legal aid insurers**

Fundamental questions remain…

- In how far should private funders decide what cases can or cannot proceed to court

- How to balance public and private funding?
Public fund too early or too late?

- How to manage the role of private funders without killing access to justice opportunities?



TPLF-ers
Other private funders

Thank you for your attention

Affordable Access to Justice Team

www.euciviljustice.eu

Rotterdam, 19-20 October 2023

Conference:

Sustaining Access to Justice in Europe: New Avenues for Costs and Funding

Appointment of Experts in Norwegian Civil Proceedings

American versus German advantage

- John Langbein: “The German Advantage in Civil Procedure” (1985)

- Samuel R. Gross: “The American Advantage: The Value of Inefficient Litigation” (1987)

… a modern trichotomy

- Adversarialism
- Inquisitorialism
- Cooperativisme

Roles of Experts in Norwegian civil procedure

- (1) Experts as party-appointed witnesses
- (2) Experts as court-appointed
- (3) Experts as co-judges
- (4) Experts as “contractors“ or “consultants” for the courts

Party-Appointed Experts …. Testimony

Norwegian CCP Section 25-6 (1):

(1) A party may call witnesses to give expert testimony.

(2) An expert witness may attend the entire hearing and may be permitted to ask questions to parties, witnesses and experts. The examination shall, in other respects, be conducted in accordance with the provisions relating to the examination of ordinary witnesses.

… Written Statements

Norwegian CCP Section 21-12:

(1) Written declarations made for the purpose of the case by experts pursuant to Section 25-5 may be presented as evidence.

(2) Written statements made for the purpose of the case by other persons may be presented as evidence if the parties agree or they have the opportunity to examine the person who has made the statement. The evidence shall not be presented until it is confirmed that the person who made it will attend. If it is impossible to examine the person who made the statement, it may be presented as evidence unless it would be contrary to the legislative intent pursuant to Section 1-1.

Court-Appointed Experts

The Norwegian Code of Civil Procedure (CCP) section 25-2 (1):

"The court may appoint an expert when requested by a party or at its own initiative pursuant to Section 21-3 (2) when such an appointment is necessary to establish a sound factual basis for the ruling in the case."

In practice, the decision is taken in cooperation between parties and judges

. . .

- The court may also appoint an expert in order to balance the powers between the parties, see CCP Section 25-2 (2):

"If the case can have consequences beyond the specific ruling for a party and, for that reason, the party wishes to call expert witnesses, the court may appoint experts if this is necessary to ensure balance between the parties in the presentation of evidence."

Typical situation: a personal injury case between one single claimant and a massive pharmaceutical company concerning an injury allegedly caused by a drug produced by that company

… the number of experts to be appointed

Norwegian CCP section 25-3 (1):

“One expert shall be appointed. More than one expert may be appointed if this is justified by the nature of the expert issues, the importance of the case or other circumstances, and provided that it shall not result in undue expense or delay. The court may appoint additional experts to supplement those previously appointed.”

… the choice of expert

- CCP Section 25-3 (2) regulates the choice of expert:

“Persons appointed as experts shall have the necessary skills and experience. If a panel of experts has been established, experts shall be appointed from the panel unless it is desirable to appoint someone else. An expert who is nominated by both parties and who is willing to serve, shall be appointed unless special reasons dictate otherwise.

A person who due to conflict of interest could not have sit as judge in the case, shall not be appointed as an expert. It is not an impediment to appointment that a person has served as an expert in a lower instance.””

• • •

CCP section 25-4 regulates the expert's instructions:

"The court shall determine the issues to be examined by the expert and shall give the necessary instructions. The court may order the parties to prepare draft terms of reference for the experts."

Challenging appointments of Expert

The decision on whether to appoint experts and their mandate shall be taken at the preparatory stage

If a party disagrees on the desicion, the decision shall be taken as a formal court order («kjennelse») which may be challenges by an interlocutory appeal, see CCP § 19-1 (2)

The appellate court may reverse the order, but the competence of that court is quite limited concerning orders taken on basis of reasonableness

uib.no

THE USE OF PSYCHOLOGISTS TO PROVIDE EXPERT EVIDENCE IN CUSTODY AND CHILD PROTECTION CASES

Professor Camilla Bernt

University of Bergen

Faculty of Law

PPJ Conference 2023

Overview

1. Introduction

2. What should experts investigate and how?

3. Issues and criticism in public debate and research

4. Research project: The Use of Expert Reports as Evidence in Child Protection Decision-Making

1. INTRODUCTION

The topic

- Custody Cases:
  - Disputes between parents on the matters of parental responsibility, custody and contact, cf. The Children Act 1981
  - Private law
  - Handled by courts of general jurisdiction in adversarial proceedings, but with indispositive elements.

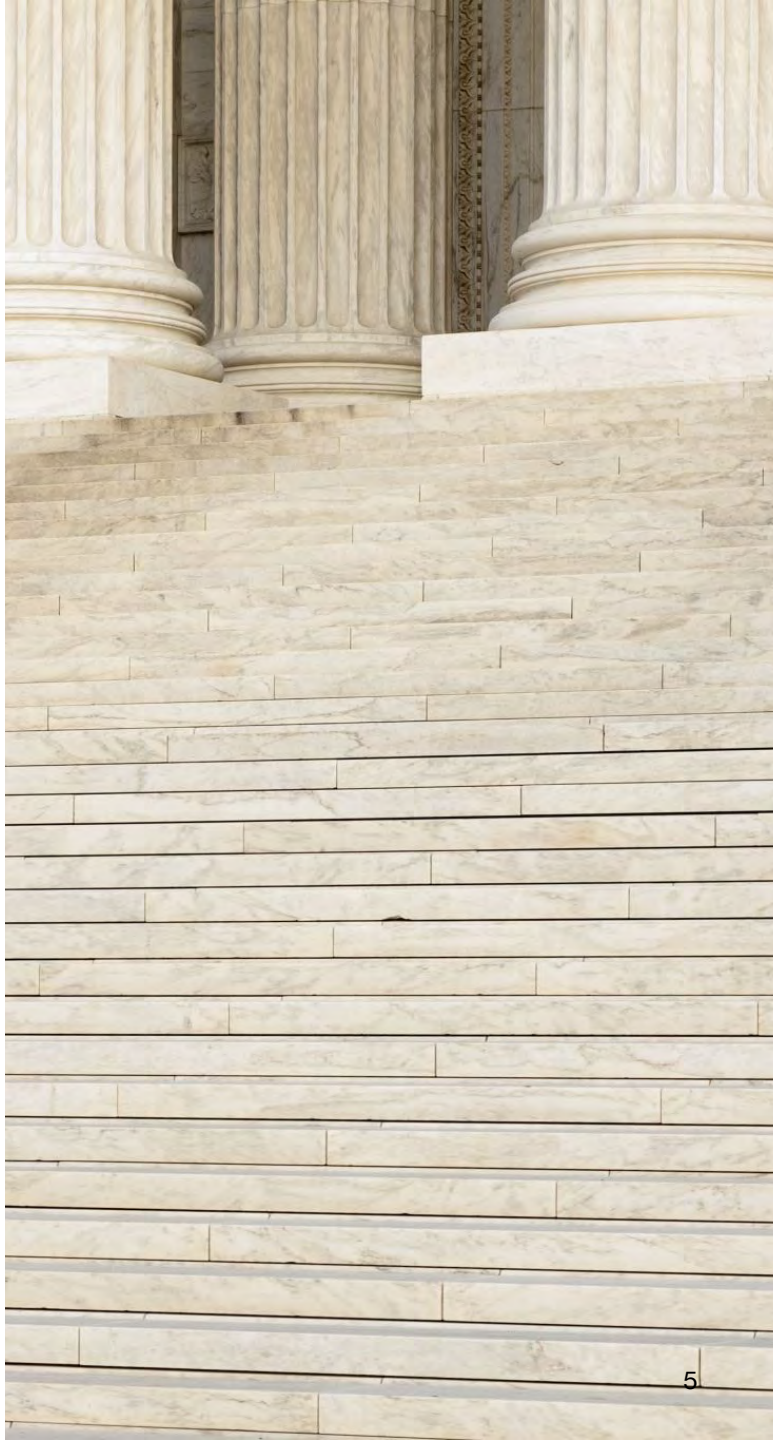
- Child Protection Cases:
  - Disputes between parents (and children) and The Child Protection Services on matters of removal of the child from the home and placement under public care (foster home or institution), contact and removal of parental rights/adoption.
  - Public law
  - Handled by Child Welfare Tribunal (CWT), and may subsequently be brought before courts of general jurisdiction. Indispositive cases.

The Topic

«The use of Psychologists to Provide Expert Evidence»...

- Appointment:
  - In custody Cases:
    - By court (or party)
  - In child protection Cases:
    - Child Protection Services, private party, Child Welfare Tribunal and/or court.

- Expert *evidence* ➔ This presentation does not include the use of experts as judges/part of the tribunal



Who are the experts, and what do they do?

Private practitioners, mostly psychologists

- Many have completed a special training program for experts

Who defines the mandate:

- Client, if party appointed
- When appointed by court or CWT: Court or CWT, with input from parties, c.f. Dispute Act s. 25-4

Investigations:

- Observation in home or other arenas
- Conversations with parties and children
- Tests
- Information from schools, child-care, health care etc., documents and oral

Output and role in tribunal/court hearing:

- Court-appointed:
  - Written report, cf. s. 25.-5- (1)
  - Supplementary oral testimony, cf. s. 25-5- (2)
  - may attend the hearing
  - may consult with other experts
  - may "ask questions to parties, witnesses and other experts if necessary to perform his/her assignment as an expert", cf. section 25-5 (3)
- Party-appointed:
  - Written report will normally be accepted as evidence if supplemented with oral testimony, cf. s. 21-12 (2)
  - "may be permitted to ask questions to parties, witnesses and experts". Cf. section 25-6 (2)
  - Otherwise examined same way as other witnesses

2. WHAT SHOULD EXPERTS INVESTIGATE AND HOW?

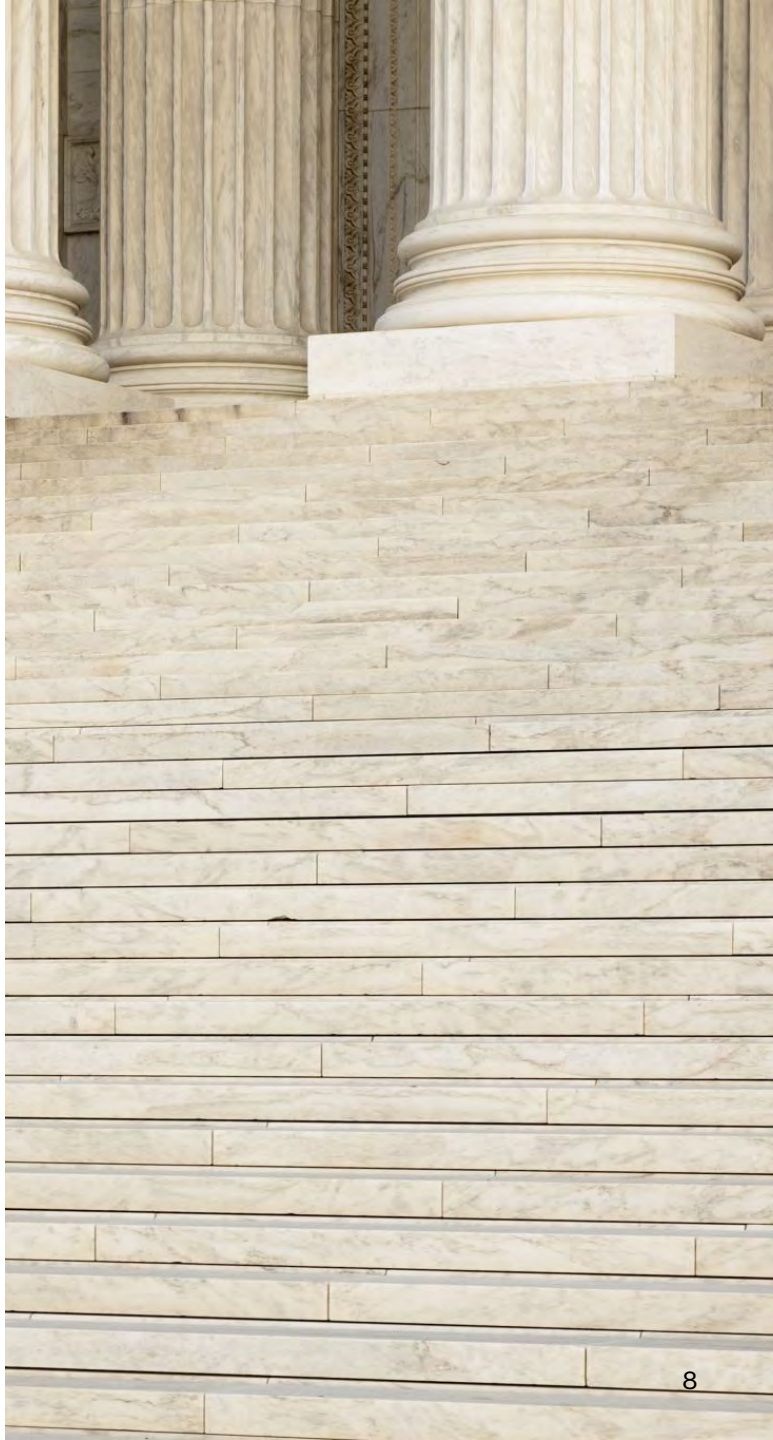
Legislation provides few specific guidelines for experts' tasks and role

- The Dispute Act chapter 25 has general rules for expert evidence
  - Apply in custody cases and child protection cases alike
    (Cf. Child Protection Act sections 12-7 and 12-8)

- "Expert evidence is an expert assessment of factual issues in the case" Dispute Act section 25-1.

- "The court may appoint an expert when requested by a party or at its own initiative pursuant to Section 21-3 (2) when such an appointment is necessary to establish a sound factual basis for the ruling in the case." Section 25-2 (1)

- "A party may call witnesses to give expert testimony."
  Section 25-6 (1)



The Role of the Child Experts' Commission (CWA)

- All expert reports *must* be submitted to CWA before they are used as evidence for courts or child welfare tribunals, cf. Child Protection Act 2021 ss. 12-7 and 12-8 and Children Act s. 61 c.
- *Reports* are evaluated anonymously by two experts and given feedback according to a scale:
  - 1 No remarks
  - 2 smaller remarks
  - 3 remarks
  - 4 supplementary report is recommended
  - 5 serious remarks

So what is the role of the expert under Norwegian law?

- **The expert's role is to provide a type of evidence to supplement other types of evidence, to ensure a sound factual basis for the ruling in the case.**

➔Regardsless of the mandate, it is the judges or CWT chairs who must carry out the assessment of evidence and conclude with regards to which fact has been proven, including the weight of the expert evidence, seen in light of the rest of the evidence presented.

➔It is the role of the judges or CWT chairs to decide on the legal issues:

- «serious neglect» or not?
- Will moving 12 year old Peter from mother to father be «in the best interest of the child»?

➔ <u>The role of the experts is to investigate and evaluate the psychological issues relevant to the case at hand.</u>

➔ Experts should not collect evidence that parties can obtain themselves.

➔ Experts should not make general assessments of evidence

The purpose of the expert evidence should affect...

...the mandates

...how the experts conduct their investigations

...how the expert evidence is used by the courts/tribunals

But to what extent is this done in practice, and how can it be acheived?

3. ISSUES AND CRITICISM IN PUBLIC DEBATE AND RESEARCH

«Input»: Who and what?

- There are no set formal requirements to be allowed as an expert in a custody or child protection case.

- Appointment –the matters of independence, neutrality and impartiality:
  - Experts are self-employed practitioners
  - In child protection cases experts are often appointed by the public party: Child protection Services

- Mandates vary immensely, often without clear connection to the specific issues in different cases

  (Melinder, Koch and Bernt 2021; Melinder and Bernt in press)

How?

The use of specific methods and testing is normally entirely up to the expert to decide ➔ immense variation

Recent study by Melinder and Bernt in press: Tests used less than expected: 9 % of cases.

Hypothesis-confirming reports: The lack of discussion of alternative hypotheses

How?

Theoretical diversity within the field of psychology – not shown in reports

- Some theories are «in fashion» and may be overused/used indiscriminatorily: attachment theory
  - Melinder, van der Hagen og Sandberg, «In the Best Interest of the Child: the Norwegian Approach to Child Protection" i International Journal on Child Maltreatment: Research, Policy and Practice nr. 4 (2021) s. 209-230

Some experts feel compelled to conlude more clearly than they should.

The use of comparatives – ie. witnesses as part of the expert evaluation:

- Melinder and Bernt: Immense variation – most frequently 0, then 9...

«Output»: the use of the expert evidence in tribunals and courts

- The choice in a judgment to emphasize or disregard assessments in expert reports lack sufficient degree of justification (Sandberg 2003)

- Vast variation in the use and evidenciary weight of expert evidence, from agreing with the assessments without further justifications, to more independant and sometimes critical deliberations based on theory or other evidence
  - Løvlie, Evidence in Norwegian child protection interventions – Analysing cases of familial violence. *Child & family social work,* p. 1-12

«Output»: the use of the expert evidence in tribunals and courts

- The significance of the Child Experts' Commision for courts and tribunals (Oxford Research 2015, Augusti, Bernt and Melinder 2017):
  - CEC is consistent in its work
  - Courts and tribunals find CEC feedback helpful to weed out bad reports
  - Assessments are not given independent weight when critized by CEC
  - However: Good reports do not guarantee that assessments are sound

Some brief notes on the criticism in judgments against Norway from the European Court of Human Rights

- Experts should have been appointed when substantial time had passed since last assessment with documented or argued changes in parents' or children's circumstances
  - S.L. vs. Norway 2019, A.S. vs. Norway 2019, F.Z. vs. Norway 2021, E.K vs. Norway 2021

- Expert assessments may be needed to assess certain types of issues:
  - Example: Lack of intuitive parenting skills
    - A.S vs. Norway 2019
  - Example: Reactions after contact – what are the reasons?
    - A.S vs. Norway 2019

- Courts and CWT cannot rely on *general statements* of what is generally in the best interest of a child, but must provide specific reasons for each individual child ➔ expert assessment may be needed
  - Examples: The child is particularly vulnerable, adoption or limited contact is better for stability
  - S.L. vs. Norway 2019, K.O and V.M. vs. Norway 2019, M.F. vs. Norway 2021, E.H. vs. Norway 2021, E.K. vs. Norway 2021

4.
RESEARCH PROJECT: THE USE OF EXPERT REPORTS AS EVIDENCE IN CHILD PROTECTION DECISION-MAKING

A brief overview

The Legal Procedings and Rules

- Theme in the Act
- Mandate
- Precision
- Encourage *child´s best interest*
- Comparative study of European countries' regulation of and approach to expert evaluations

The Assessment

- Theoretical approach
  - Child Interview
  - Documentation and justification
- Use of evidence-based forensic methods
- Notes of child´s expressed views
- Discussion and statements regarding the *best interest of the child*
- Developing and testing of an App for child- interviewing

Legal Outcome

- In the decision/judgment:
- Criteria associated with child´s expressed view
- Discussions and statements on child's expressed views
- Criteria, discussion and statements on *the best interest of the child*
- Discussion and statements on parents´right to familiy life
- References to and the weight of expert evaluation
- Comparison to Sweden

Regulation and practice

- What *are* experts asked to assess?
  - Comparative study of Norway with Sweden, Germany and Britain.
  - What *should* experts be asked to assess?
    - The boundary between matters for psychological assessment and matters of law etc.
    - A comparison with Sweden, Germany and England.
- What effect does using *standard mandates* have?

Research questions

The decisions: How do the courts and CWA boards use the expert reports as evidence?

- How are the mandate, expert asessment and report described in the decisions?
- What is given weight and how much?
- What is the significance of the psychological assessments for the courts' and CWTs' phrasing of the best interest of the child assessment?
- What influences the weighing of the reports?
  - What weight does the court place on the mandate, the theoretical basis it has built on, as well as the choice of interview methods etc.?
  - How independantly do courts and CWTs assess investigations, findings and evaluations in the reports?
  - The amount and weighing of other evidence
- The relationship between witnesses interviewed for the purpose of the expert assessment and other testimony
- What are the similarities and differences between Norwegian and Swedish judgments and decisions regarding the use of expert reports as evidence?

Research questions

Methods: How to we plan to investigate this?

- Comparative legal studies with Germany, England and Sweden.

- Qualitive study where 100 reports based on tradidional individual mandates are compared with 100 based on five different standard mandates of our devising.

- The courts and CWTs:
  - Quantative study of 100 decicions from Norway and 100 from Sweden.
  - Qualitative study of 25 til 35 decicions from each country.

The project webpage

- The use of Expert Reports as evidence in Child Protection Decision-Making - Psykologisk institutt (PSI) (uio.no)

THANK YOU FOR YOUR ATTENTION!

THE BELGIAN COURT STAFF AND THEIR BELGIAN AND EUROPEAN TRAINING PERSPECTIVE

Prof. dr. Judge Raf Van Ransbeeck

Director Belgian Judicial Training Institute (IGO-IFJ)

1st of June 2023

IGO
IFJ

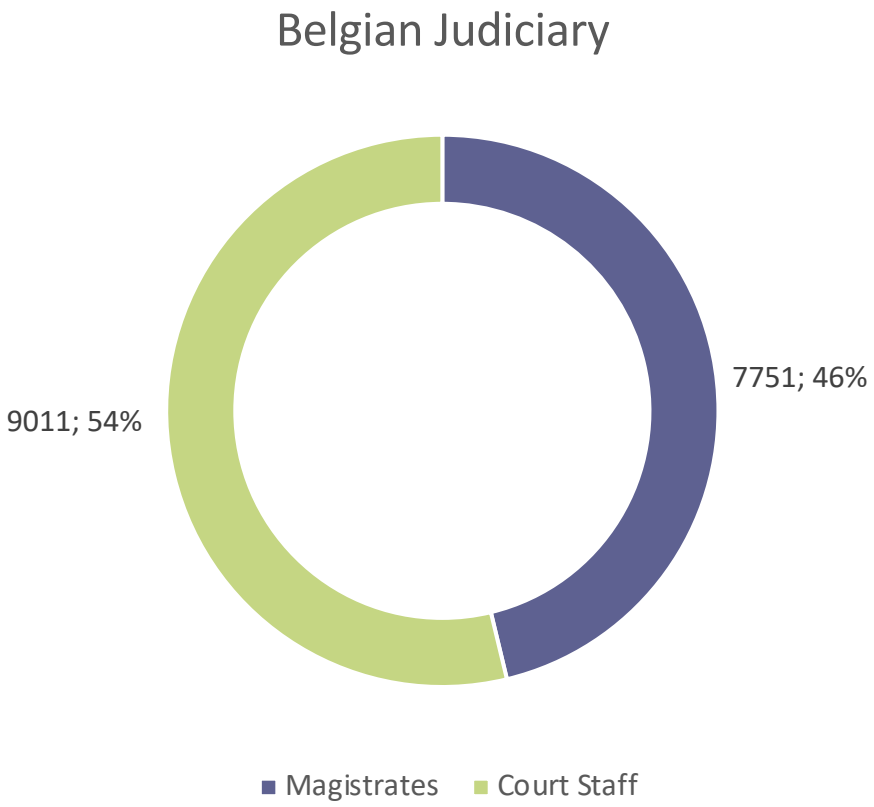
Content

1. Overview of Court Staff in Belgian Judicial System
2. Training of Court Staff in Belgium
3. European Study on the Training Needs of Court Staff
4. Training of Court Staff in a European Perspective: role of EJTN and national providers

1. Overview of Court Staff in Belgian Judicial System

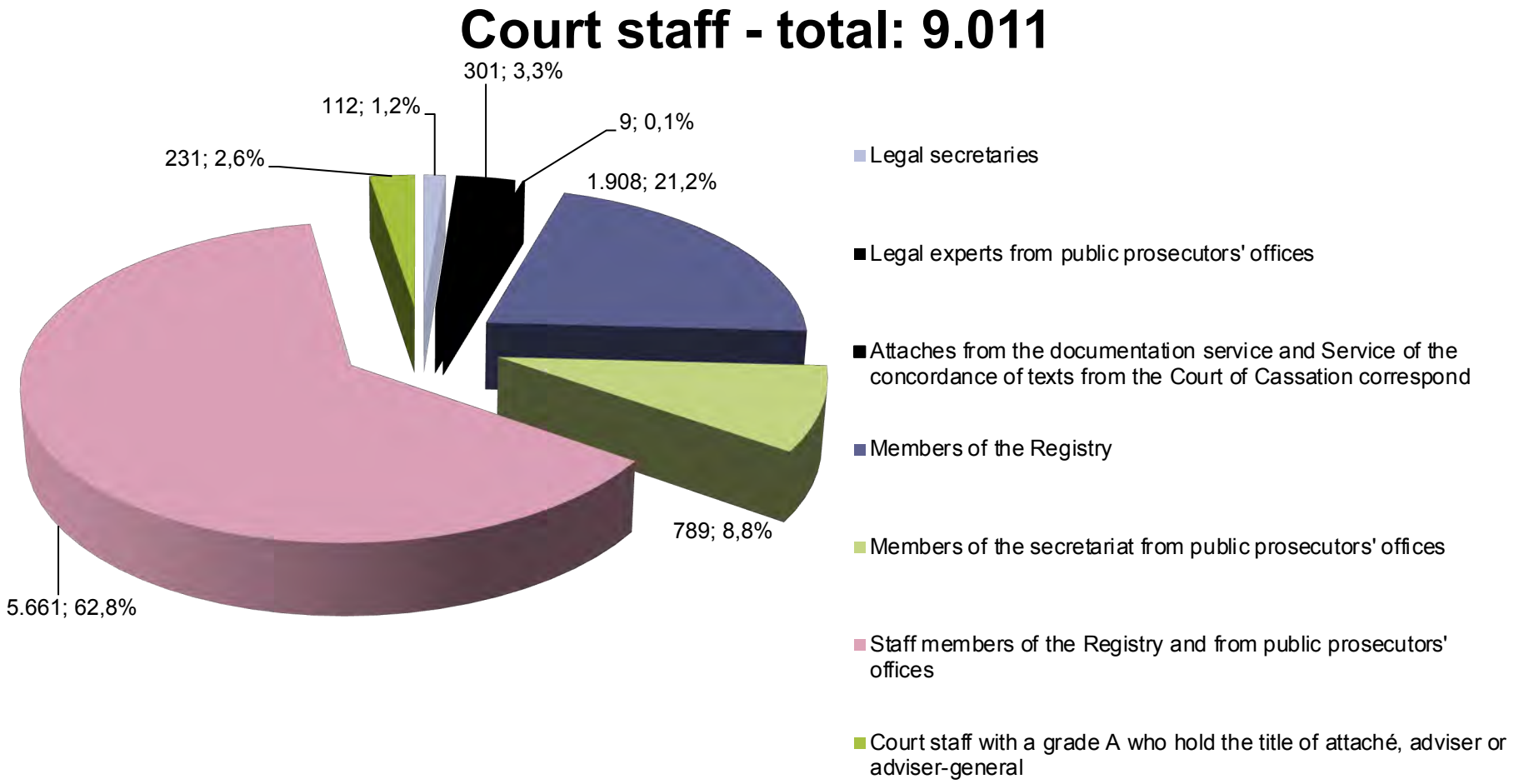
- Belgian Judicial System is a classical Civil Law System inspired by the French Judicial System
- Division between Judges and Public Prosecutors: each type of magistrates have their own support (secretaries for the Prosecutor's offices >< registrars for the courts and tribunals and their staff)

1. Overview of Court Staff in Belgian Judicial System (2)



Figures 2021

1. Overview of Court Staff in Belgian Judicial System (3)



Figures 2021

1. Overview of Court Staff in Belgian Judicial System (4)

Till 2008 : Court staff had a specific status within judiciary

Since 2008 : Removal of differences between the position of Court Staff and other federal civil servants

1. Overview of Court Staff in Belgian Judicial System (5)

Effect of this change :

- Before the reform: working within judiciary and one year of courses with a specific exam before you could become registrar or secretary
- After the reform: Generic mailbox-test to enable other public servants of other federal services to become registrar or secretary without any legal or judicial knowledge

1. Overview of Court Staff in Belgian Judicial System (6)

Conclusion:

- New Court staff entering in the judiciary is less prepared for the job since the reform
- Braindrain

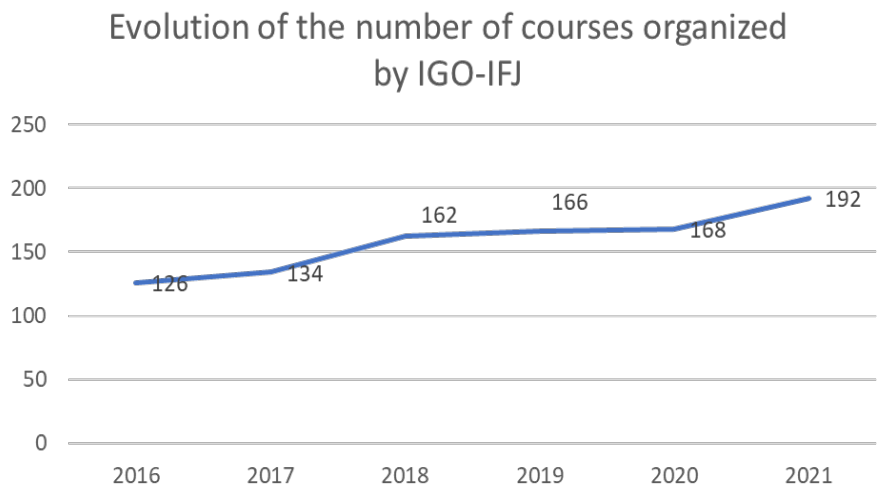

IGO
Instituut voor
Gerechtelijke Opleiding
IFJ
Institut de Formati
Judiciaire

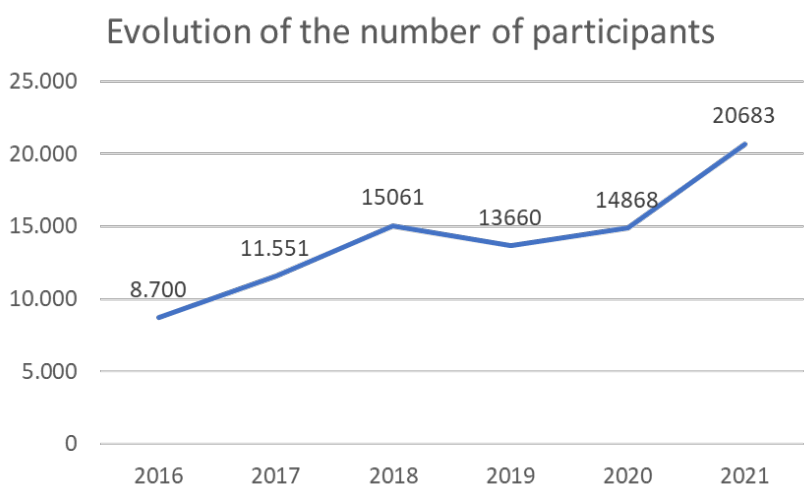
2. Training Belgian Court Staff

2007 : creation of the Belgian Judicial Training Institute (IGO-IFJ: Instuut voor Gerechtelijke Opleiding – Institut de Formation Judiciaire)

- Created by Law of the 31th of January 2007
- Responsible for the national and international training (initial and permanent training) of Magistrates and Court Staff

2. Training Belgian Court Staff (2)





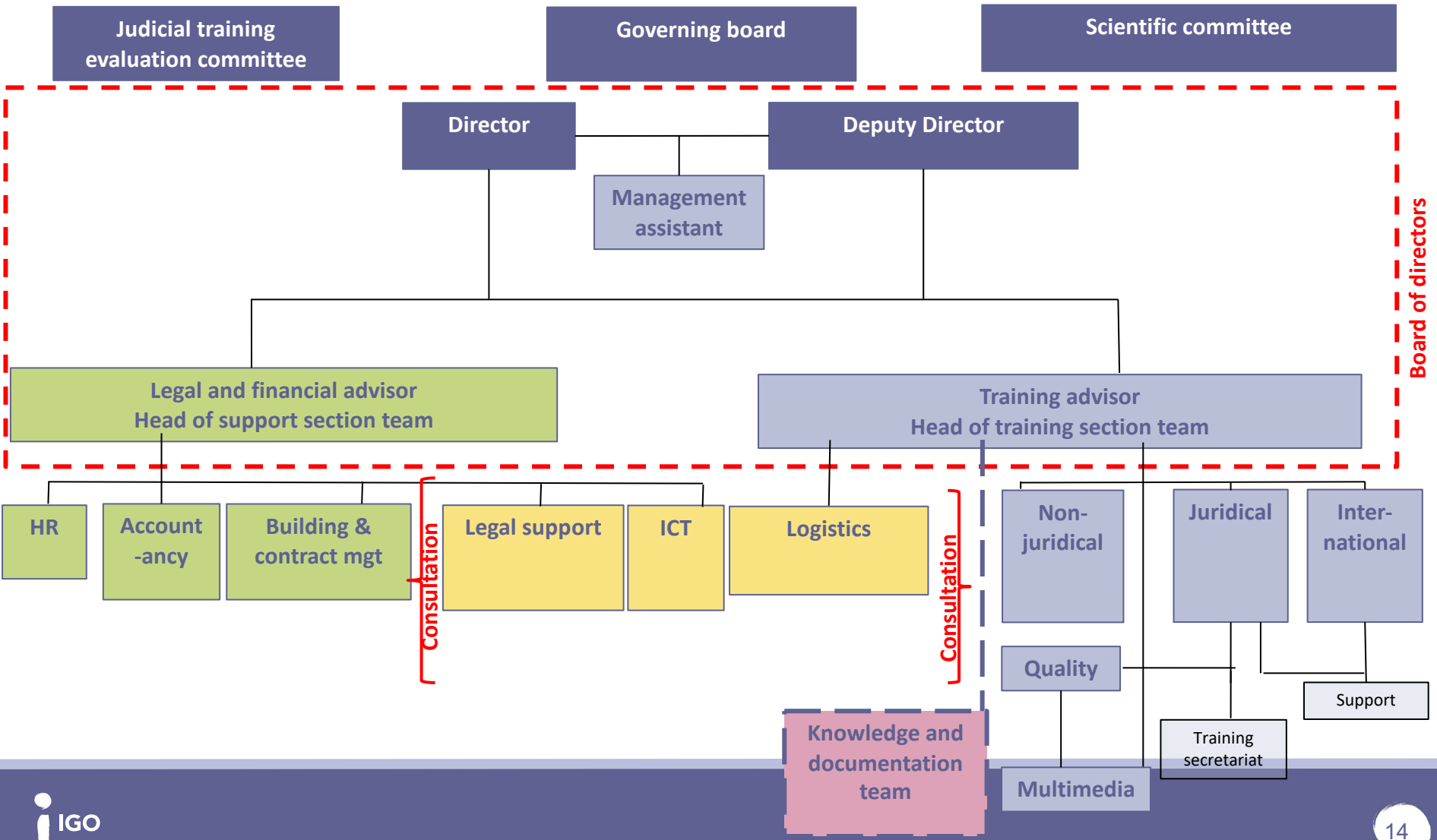
Source: IGO-IFJ annual report 2021

2. Training Belgian Court Staff (3)

The BJTI is a parastatale sui generis, with moral personality but independent of

- Minister of Justice
- High Council for the Judiciary
- College of the Public Prosecutors and the College of the Courts and Tribunals

ORGANISATIONAL CHART



2. Training Belgian Court Staff (4)

CHALLENGES:

- **Reform of the Belgian Justice System**
  - More autonomy, mobility and specialisation
- **Braindrain**
- **Digitalisation**

2. Training Belgian Court Staff (5)

Trainings in three different axes

- Technical-Judicial trainings
- Managerial and organisational trainings
- Socio-communicative trainings

2. Training Belgian Court Staff (6)

Focus on new training methods

Training method*	Before 2010	2010	2013	2017	2020
Classical training (in group)	X	X	X	X	X
Coaching		X	X	X	X
Situational analysis		X	X	X	X
Simulations		X	X	X	X
Intervision		X	X	X	X
Workplace learning			X	X	X
Exchange courses			X	X	X
Elearning				X	X
Livestreaming				X	X
Mobile PC class				X	X
Webinars					X
Hybrid courses					X

*This list is not exhaustive

2. Training Belgian Court Staff (7)

- **Face-to-face trainings**
  - residential
  - non-residential
- **Webinars**
- **Hybrid trainings (mixed)**
- **Decentralised trainings**

2. Training Belgian Court Staff (8)

➢ E-learning

Examples of e-learnings

- Introduction to the Belgian Judicial System
- Introduction to Civil Law
- Council of Europe (HELP) on different topics

2. Training Belgian Court Staff (9)

Flagship Training : Initial Training program for Members of the Registry and Members of the secretariat from public prosecutors' offices

➢ Format

- 9 Face to face modules during six months
- Twice a year

2. Training Belgian Court Staff (10)

1) The role and ethics for Members of the Registry and the secretariat from public prosecutors' offices (1 day)
2) Public Law (2 days)
3) Civil Law (3 days)
4) Civil procedural Law (4 days)
5) Criminal Law (2 days)
6) Criminal Procedural Law (7 days)
7) Social Law and Social Security Law (2 days)
8) Accountancy of the Registry and secretariat from public prosecutors' offices (1 day)
9) Methodology of Law (1 day)


FAQ
créer une faillite ?

3. European Study on the Training Needs of Court Staff

- **Study on on the Training Needs of Court staff (EJTN / EIPA) (2021)**

https://commission.europa.eu/system/files/2021-06/2021-06-14_just2018jaccprcrim0131_study_report_final.pdf

Annexes

https://commission.europa.eu/system/files/2021-06/2021-06-14_just2018jaccprcrim0131_study_annexes_final.pdf

3. European Study on the Training Needs of Court Staff (2)

- Data collection by a team of national coordinators appointed by court staff training providers from each of the 27 EU Members States.

- Three questionnaires

3. European Study on the Training Needs of Court Staff (3)

- **Questionnaire 1** focused on updating the inventory from the Lot 3 Study on the State of Play of Court Staff Training in EU Law and Promotion of Cooperation Between Court Staff Training Providers at EU Level of 2014, e.g. on the different categories of court staff, their functions and the extent to which they apply EU law.
- **Questionnaire 2** focused on the state of the training activities on EU law for court staff.
- **Questionnaire 3** focused on the training capacities and future European networking needs and capacities.

3. European Study on the Training Needs of Court Staff (4)

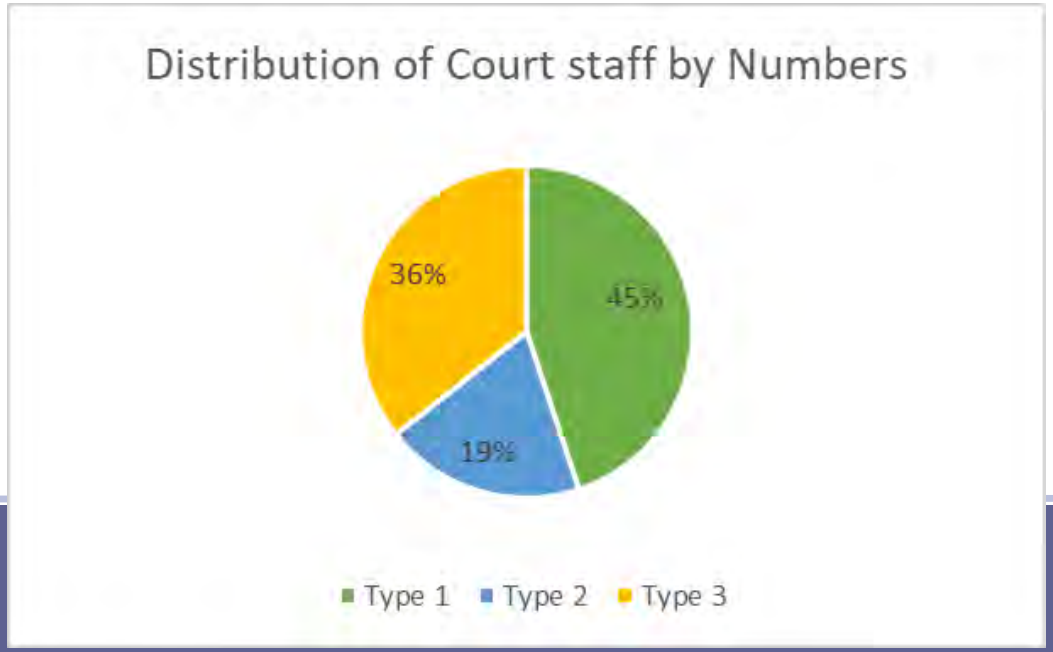
Classification used:

- Type 1: Staff member performs tasks that require the application of EU law.
- Type 2: Staff member performs tasks that might require the application of EU law.
- Type 3: Staff member does not perform tasks that require the application of EU Law.

3. European Study on the Training Needs of Court Staff (5)

Distribution of Court Staff

- 180.471 Court Staff (i.e. 64% of 280.292) need or might need training in EU Law to carry out the tasks associated with their job



3. European Study on the Training Needs of Court Staff (6)

Functions Court Staff type 1 and 2:

GROUP F1 Court staff with functions primarily related to the administration and management of the courts.	GROUP F2 Court staff whose functions include providing assistance to judges and prosecutors in case preparation and research.	GROUP F3 Court staff whose tasks include some judicial functions.	GROUP F4 Court staff whose tasks include procedural functions of a cross border nature.
- General management - HR - E-justice - Organisation of legal registries - Providing information about access to justice and legal aid - ICT system and maintenance - Budget and bookkeeping - Court programming - Secretariat - Collecting documents and statistical data - Organising files and correspondence tasks related to management of courts	- Cross border judicial cooperation in civil, commercial, criminal and family cases - Involvement in research and analyses - Preparing memos on legal questions - Preparing official version of decisions	- Enforcement of court decisions - Service of judicial and extra-judicial documents - Taking of evidence - Judicial decisions in specific cases (e.g. under a value) and/or fields of law	- Cross border judicial cooperation in civil, commercial, criminal and family cases (e.g. completing requests to courts in other countries or receiving such requests from other countries) - Procedures with cross-border impacts, court staff has to fill in forms or prepare the forms that will be signed by the judge - Observance of procedural rights in criminal cases (e.g. Human rights, Access to justice) - Procedures with cross-border impacts, court staff has to fill in forms under his responsibility or prepare the forms that will be signed by the judge - Rights of the child Administrative law and procedures - Competition law and procedures - Environmental law and procedures

3. European Study on the Training Needs of Court Staff (7)

Some recommendations of the Study

- The use and update of the 'Type' and 'Function' classification is encouraged as a way of identifying the court staff who needs or might need training in EU law and to help identify the nature of the training.
- There is a need for a pan-European training programme to support the training of court staff (Types 1 and 2) and to facilitate further networking opportunities.
- Training for court staff trainers is an important aspect and the development of transnational mentorship schemes or cross-border apprenticeships schemes could be explored.

4. Training of Court Staff in a European Perspective: role of EJTN and national providers

EJTN = European Judicial Training Network

- Founded in 2000 only for Judges and prosecutors
- Url: https://ejtn.eu/

4. Training of Court Staff in a European Perspective: role of EJTN and national providers (2)

Change of Statutory Rules

Networking on court staff training and delivering training to court staff is now a new strategic objective of the Network.

4. Training of Court Staff in a European Perspective: role of EJTN and national providers (3)

Definition of Court Staff for EJTN activities

Persons working in courts and prosecution authorities where they form part of the « corps judiciaire », who are not judges or prosecutors, and who have legal training and who either:

(a) Help prepare judgements or prosecuteral decisions

(b) Make judicial or prosecuteral decisions at least at a preliminary phase, or

(c) Play a significant rôle in cross border cooperation

4. Training of Court Staff in a European Perspective: role of EJTN and national providers (4)

Results:

- Opening of a part of the EJTN-offer (exchanges and Programs): target = 15% of participants must be Court Staff
- Presence of Associate members (pure Court Staff Training Institutions) in GA EJTN and the Working Groups (f.e. IT, MLT, FR, RO, PT)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Universität Konstanz

Experts on Foreign Law in German Civil Procedure

Professor Dr. Michael Stürner, M.Jur. (Oxon)

17th PPJ Conference, Dubrovnik, 1 June 2023

Conflict of Laws in Court Practice

Iura novit curia…

- **The court has to know the law (da mihi facta, dabo tibi ius)!**
- **In cross-border cases, conflict of laws rules control the allocation of cases to a particular legal system (principle of closest connection)**
- **Traditionally, they depart from the concept that all legal systems are equal**
- **Conflict of laws rules stem from EU law or domestic law and must be applied ex officio; they are not at the parties' disposition (however, as the case may be, a choice of law may be possible)**
- **The conflict of laws rules may lead to the application of foreign law**

Conflict of Laws in Court Practice

Iura novit curia: case study

A living in Hamburg sues B from Konstanz for fulfillment of a sales contract relating to a piece of land on the Comoros (*Dschuzur al-Qamar*). He claims that they agreed orally on the occasion of a joint vacation stay in the capital Moroni on the sale of the property including a holiday mansion located there and owned by A. B, who meanwhile regrets the unfavorable deal, does not dispute this, but claims that the agreement is invalid. The Regional Court in Konstanz, Germany, would like to decide the case according to German law.

A Leap into the Dark…

Foreign Law in Civil Proceedings

…but not when it comes to foreign law

- German law regards foreign law as law (and not as facts)
- However, the principle iura novit curia does not apply in the strict sense:

Sec. 293 ZPO: Foreign law; customary law; statutes

The laws applicable in another state, customary laws, and statutes must be proven only insofar as the court is not aware of them. In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to use other sources of reference as well, and to issue the required orders for such use.

Foreign Law in Civil Proceedings

Conflict of laws and daily court practice

- **Clearly, the ascertainment and application of foreign law pose practical problems**
- **Commentators see a tendency towards a homeward bias (openly or implicitly)**
- **This could deal a blow to the principle of effectiveness (effet utile) of EU private international law**
- **Against this backdrop, the EU Commission and the Hague Conference wanted to create what was called a "Global Instrument" on the facilitation of access to foreign law (2012)**

Foreign Law in Civil Proceedings

Conflict of laws and daily court practice

- **Socio-legal study on the application of foreign law in German civil proceedings (2018)**
- **Empirical approach with recommendations**
- **Further guidance will be provided by the "Hamburg Guidelines" to be adopted in 2023 under the auspices of the Max Planck Institute Hamburg**

Foreign Law in Civil Proceedings

Some empirical facts (from the 2018 study):

- **Most judges are unfamiliar with the plethora of conflict-of-laws rules from their law studies**
- **A basic command of the subject matter is usually acquired after some time, but the ramifications (preliminary questions, renvoi, public policy) are often unheard of**
- **Generally, modern conflict-of-laws rules are often designed to avoid the application of foreign law in the first place (e.g. Rome III Regulation)**
- **In case foreign law would apply, judges usually do not take a shortcut to forum law (e.g. by implicit choice of law)**
- **It is equally rare that judges urge the parties to settle with a view to the high costs and the complexity caused by the application of foreign law**

The Ascertainment of Foreign Law

Some empirical facts (from the 2018 study):

- Courts are well aware of their responsibility for the ascertainment of foreign law
- Parties may be asked to contribute, but there is no formal burden
- Sometimes courts are familiar with foreign law
- It is quite common for a court to do research on the internet
- Some judges have private networks

Erasmus+

Clearly, judges prefer informal ways to ascertain foreign law

The Ascertainment of Foreign Law

Limiting factor: time

"Then it takes longer, yes. Of course, I assume that every judge has to keep his docket up to date to some extent and then sees to it that he comes to a result at some point. But if it's necessary, it's done."

"You're always a bit under time pressure. And in the end, when you realize: Foreign law – oh God, that's more work again. But I have never cut short anything for time reasons. No, no, the work that you have to put in is put in."

The Ascertainment of Foreign Law

How to ascertain foreign law

“In the best of cases, I may have a lawyer who speaks the relevant foreign language so that he can give me some input, but no one ever actually really pleads on foreign law."

"[...] that I then came across [foreign] sources together with the colleague [...], but they were written [in foreign language] again, and then we simply ran that through the Google language tool.“

"And then you have to see, but of course the aim is always to apply German law when the opportunity arises.”

The Application of Foreign Law

Foreign Court Approach: When in Rome, …

"You always start from your German understanding of the law and the gaps that you then have, you fill with your own understanding of the law."

"If we then said 'In our case it would go like this and like that, do you also think that's reasonable?' And if everyone agrees, and you usually get that discussed with the parties like that, then according to our own [law]."

"Yes, then you inadvertently stumble into German law and it is accepted by everyone."

The Application of Foreign Law

Foreign law: rough justice…

"As I said, when you only have 150 to 160 minutes, you also think about the extent to which you examine this foreign law in depth."

“To be honest, I don’t have time to make myself familiar with the different methods of interpretation there may be with respect to section x of a foreign law. I follow the wording and then apply that rule rather literally.“

"So either I said: I know the law from an earlier expert opinion, now I'm already going out on a limb, or I say, I'll assume that the regulation, what do I know, some right of way rules or something, is similar there, like here, and if everyone then nods in a friendly manner, then the gap is closed."

The Ascertainment of Foreign Law

Some empirical facts (from the 2018 study):

- **Formal ways to establish foreign law are less used**
- **The European Convention on Information on Foreign Law of 7 June 1968 was largely unheard of; but for those who knew it the procedure was considered to be too cumbersome**
- **In many cases an expert on foreign law will be appointed**

The Expert on Foreign Law

Court‘s expert or parties‘ expert?

- **The German ZPO departs from the assumption that experts are appointed by the court**
- **Experts must give a neutral and objective opinion, they owe a duty to the court, not to the parties**
- **Nevertheless, party-appointed experts are quite common; their statements must be taken into account under the right to be heard**
- **In top-notch cases this may lead to a „battle of the experts“**

The Expert on Foreign Law

Court‘s expert or parties‘ expert – comparative perspectives

- **England: traditionally, it was for the parties to adduce expert evidence. As this was a very costly business, the CPR introduced the single joint expert**

- **The ERCP see party-appointed experts and court-appointed experts on equal footing (Rules 119 and 120 ERCP)**
  - It may happen that the court sees no reason to appoint an expert on its own initiative as the matters at issue have been clarified by one or several party-appointed experts.
  - However, if that is not the case, the court may, even without application of the parties, appoint one or several experts.

- **The court-appointed expert‘s statement is by no means superior to that of the party-appointed experts: It is a matter of free evaluation of evidence**

The Expert on Foreign Law

Whom to appoint and why

- **German expert on foreign law?**
  - E.g. university professor; director of Max Planck Institute; senior attorney
  - Advantages: familiarity with German procedural system, native German speakers, best suited to „translate“ the foreign legal concepts to the domestic court
  - Disadvantages: limited access to relevant sources; somtimes only superficial knowledge of foreign legal order (such as the law of the Comores)
  - How does a court find an expert on „exotic“ legal orders (such as the Comores)?

- **Expert from the jurisdiction concerned?**
  - E.g. foreign university professor; comparative law institute
  - Advantages: great familiarity with foreign legal system; native speaker
  - Disadvantages: court files must be sent abroad; potential problems with enforcement of duties of expert (sovereignty); „translation“ issues (lack of familiarity with expectations of requesting court)

The Expert on Foreign Law

The task of the expert

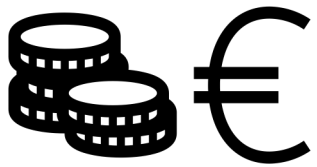
- **Under German law, the expert on foreign law must be formally appointed by order of the court (*Beweisbeschluss*)**
- **In this order, the court must instruct the expert**
- **In practice, this may boil down to „please help me solve the case“**
- **In more complex cases the list of questions put to the expert may run to several pages**
- **Under sec. 293 ZPO, the expert may only be asked to provide guidance on matters of foreign law (not on questions relating to the conflict of laws or to EU law or international law such as the CISG)**

The Expert on Foreign Law

The expert‘s position

- Some experts make their living out of court requests
- Mostly, however, the expert has a primary source of income (e.g. as university professor)
- Under the ZPO, a request to act as an expert can only be refused for compelling reasons (e.g. when the request is outside the area of expertise)
- In practice, any justification for refusing to act as an expert is accepted by the courts (e.g. lack of time)
- It is mostly a matter of negotiation between court and expert how much time the expert gets to render the statement (the standard term seems to be three months)

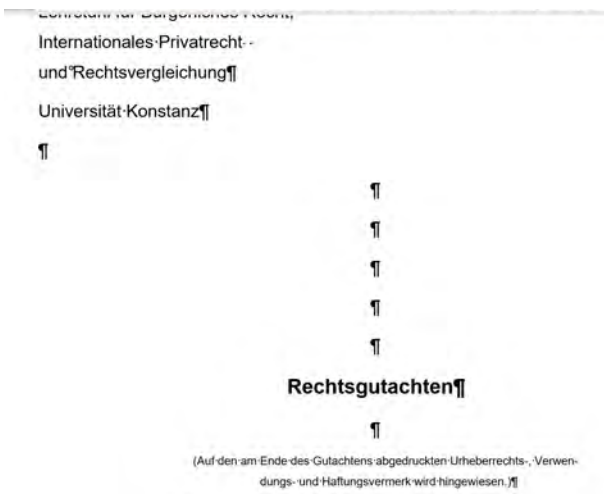
The Expert on Foreign Law



Costs

- The court may ask the parties for an advance on costs before appointing an expert
- Eventually, costs for a court-appointed expert are borne by the losing party
- There is specialist legislation on remuneration of experts (JVEG), which is based on hourly fees, the maximum being 155 Euro
- Costs incurred for private expert statements do not necessarily follow the event, they may be part of a tortious liability of the losing opponent

The Expert on Foreign Law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dungs-·und·Haftungsvermerk·wird·hingewiesen.)¶

The expert opinion

- **The statement is rendered in writing, but the court may, by its own motion or on application of the parties, ask the expert to appear in court to explain the written statement further**
- **The problem of accuracy: The expert is meant to describe the state of the art in foreign law as precisely as possible, taking into account the law as it really stands, including relevant case law**
- **This task may prove to be difficult and time-consuming – the expert is under a duty to report to the court if the sum envisaged by the court will not be enough to cover the remuneration due**
- **There is no strict proportionality cap (e.g. a limit on the expert‘s remuneration in a certain relation to the amount in disute): accuracy prevails**

The Application of Foreign Law

Free evaluation of evidence

- **The court is not bound by the expert opinion, but will freely evaluate the evidence provided**
- **Not infrequently, in the course of the proceedings, further questions arise which make a supplementary expert opinion necessary**
- **This, again, is a matter of judicial discretion (balance of rectitude of decision, time and cost)**
- **In the court practice, the expert opinion will mostly be followed by the court**

Impossibility to Establish Foreign Law

Suppose in the case mentioned at the beginning, the Konstanz Tribunal has appointed Professor S of the local university as an expert on the law of the Comoros. Professor S, well occupied with other tasks, tries his very best to get some information on the pertinent provisions on the sale of land. However, it was impossible to establish whether or not a contract on the sale of land, concluded orally, was valid or not. Can the court reject the case?

Impossibility to Establish Foreign Law

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Of course not!

The parties have a right to a decision of the court

The court must find the next best solution (e.g. application of a pertinent provision from a legal system belonging to the same legal family – here: French law)

Last resort: application of lex fori

The Application of Foreign Law: Appeal

Foreign law before the Federal Supreme Court (BGH)

- **Admissibility of second appeal (Revision)**
  - If the case is of fundamental legal importance or if a decision by the Federal Supreme Court is apt to create greater “unity of law”
  - Explicit permission needed
- **Merits**
  - Appeal can only be based on a violation of procedural or substantive law
  - In principle, parties are not allowed to present new facts
- **According the BGH, a violation of foreign law may not be pleaded on appeal**

Access to Foreign Law: Reform

Reforming conflict of laws rules

- **Private International Law at the disposition of the parties?**
- **Synchronisation of forum and ius (i.e. application of lex fori)**
- **More flexibility in Private International Law (e.g. through escape clauses)**
- **Lex fori as a residual legal order in case of impossibility to ascertain forein law**

Access to Foreign Law: Reform

Enhancing access to foreign law

- More comparative law and conflict of laws in legal education
- Databases on foreign law
- Databases on experts on foreign law
- Specialist institutes (like Swiss Institute of comparative law, Lausanne)

- Preliminary proceedings before foreign court, see e.g. New South Wales UCPR 2005 Rule 6.44(1):
  „The Supreme Court may, on the application of one or more of the parties and with the consent of all of the parties, order that proceedings be commenced in a foreign court in order to answer a question as to the principles of foreign law or as to their application.“


OH, GREAT. IT'S YOU AGAIN.
SPORT
YET ANOTHER APPEAL
DALI MPOFU
HIGH COURT
Rico 2022
BUSINESS MAVERICK

Judicial Power Being Shared
By What Ways, to What Extent, and in What Effect
——A View of the Role of Judicial Assistants in China

Fu Yulin

1 . Judicial Assistants after “Categorized management “after 2018 in China

2. Questions and reflection of the reform From Assistant Judge to Judge Assistant

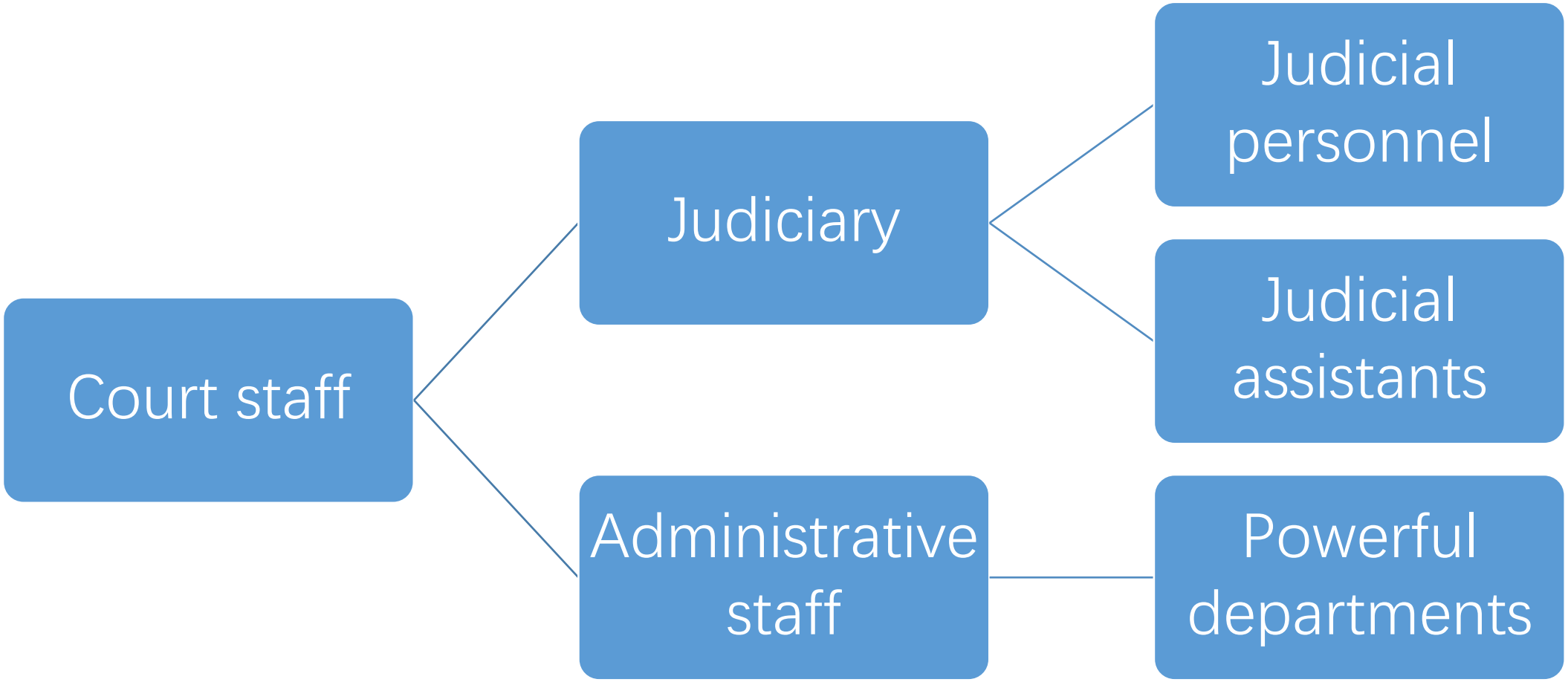
3.Base/Logic of “Categorized management”? --Personnel categorized match matters categorized?

4. **By case categories or/and by matter/power categories**?

5. How judicial power is justified/What factors make judicial power legitimate?

Thanks and ‘conclusive’ Questions

1. A Landscape of Chinese court staff after 2018



1. Categorized management after 2018

- Article 40 The judicial personnel of a court include the president, vice-presidents, members of the judicial committee and judges.
- Article 45 The judges, judicial assistants and administrative personnel of a court shall be subject to categorized management.
- Article 46 A quota system shall be adopted for judges. The quota of judges shall be determined according to the factors such as the number of cases, economic and social development, population size, and trial level of the court.

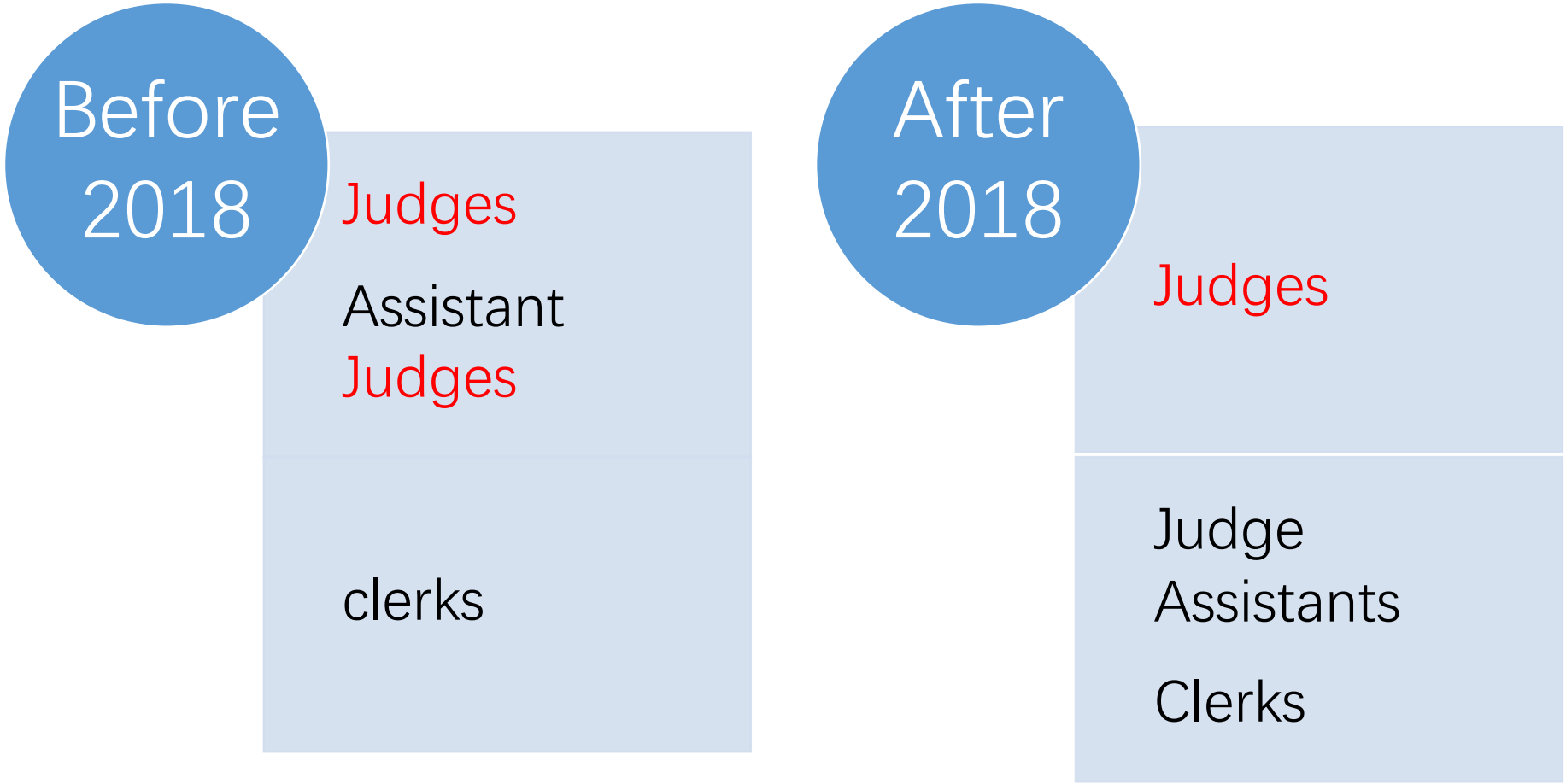
1.1 Judicial personnel

- Article 47 The judges shall be selected from the persons who have acquired the legal profession qualification and meet other conditions as provided by law. Persons to be appointed as judges for the first time shall be subject to the examination of professional competence by the judge selection committee.
- The president of a court shall have professional knowledge of law and experience in legal profession. Vice-presidents and members of the judicial committee shall be selected from judges, prosecutors or other persons who are qualified for the post of judge or procurator.
- The duties, management and quality guarantee of judges shall be subject to the provisions of the Judges Law of the People's Republic of China.

1.2 Judicial assistants

- Article 48 Judge assistants of a court shall, under the direction of judges, be responsible for reviewing case files, drafting legal documents and other assistant affairs. Judge assistants who are qualified for the post of judge may be selected and appointed as judges according to the procedures for appointment and removal of judges.
- Article 49 The clerks of a court shall be responsible for keeping records of the court proceedings and other assistant affairs.
- Article 50 Judicial policemen (omitted here).
- Article 51 A court may, when its judicial work so requires, set up the post of judicial technician, which shall be responsible for the technical matters relating to the judicial work.

1.3. From Assistant Judge to Judge Assistant



1.4 Judge Assistant’ s role in Practice


审判员
审判长
审判员
书记员


审判员
审判长
审判员
书记员
法官助理
旁听席


人民陪审员
人民陪审员
审判长
审判员
人民陪审员
人民陪审员
书记员

2.Base/Logic of “Categorized management”?

--Personnel categoried match matters categorized

Two ways to share judicial burdens by judiciary with ‘limited jurisdiction’

Way1: To share partial cases (By case categories)

full power over partial cases

Q: jurisdiction limited by

-criterion/standard of categories of the case

-procedure rules for diversity of the case

-ways of authority and operation

pattern 1: to excise power independently under authority by law?

pattern 2: to excise power under Judge’ s supervision?

pattern 3: conbine: to allocate power independently by law and excise power under judge’ s supervision?

Way2: To share partial matter/affairs (By matter/affair/ categories)

partial power over partial matter in a case under a judge’ s power

Q: core powers that cannot be shared or alternated;

procedure to check the exercising of the shared power

accountbility and effect

Way1: By case categories

-Criterion 1: Value –Only for money or with multiple value? Only private interests or related to the third or public interests?

  -A1: small claims (Cf. peace justice in the UK)

-Criterion 2: contest/dispute

  -A2: non-contest procedure (Cf. Clerk in Japan)

-Criterion 3: Only for money and minor contest/dispute

  -A3 : Payment Order (Cf. Dunning Procedure in Germany)

-Criterion 4: short-cut / preliminary claim for dispute (share holder’ s right to check the account documents)

  -A4 : Injunction Order (prompt but final)

  Q(Vs). Provisional but discretional injunction ????

-Criterion 5: non-contest resolution to contest dispute

  -A5: Mediation (Cf. Judicial mediation in China)

Way2: By matter/power categories

-Criterion 1: Nature of the objective to be deal with – “Merits” or “formal matter” ? Substantive matter or procedural matter?

-Criterion 2: Nature of the power to be excise- power of manage or power of decision?

- Criterion 3: Combine: fact-finding, law application and reading, claim grant or dismiss?
- Criterion 4: Conclusion or reasoning? (draft judgment?)??????

A1: anticipatable and public authorition (by legislation and legal procedure)

A2: transparency of the specific matters and shared power)

A3: procedure for checking/examing and challenging by the related litigants

A4: effect of and accountability for the alternative ‘decisions’ or behaviors

A5: relief for the alternative decisions or behaviors not meeting A3 and/or A4

3. How judicial power is justified/ What factors make judicial power legitimate?

1.Allocation
- Competence
- Authority legally and public
- Independence?
- Responsible (Evaluable?)

2.Exercise
- Transparency
- Neutral
- Legal Procedure
- Matching?
- Relief

Suitable to other judicial assistants

- Article 55 People's courts shall apply a training system, and judges, judge assistants and administrative personnel shall receive theoretical and professional training.
- Article 56 The staff size of people's courts shall be subject to specialized management.
- Article 57 The funds of people's courts shall be included in the financial budgets according to the principle of division of powers, so as to ensure the supply of funds for the judicial work.