

Elements of Procedural Law

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1 Introduction

In law, there are always at least two sides to every issue: parties to a contract often disagree about its interpretation; heirs have different views on the meaning of a will; the public prosecutor holds the evidence to be sufficient, whereas the suspect denies the charges. Even in cases in which only less specific interests like public order are at stake (when it comes to appointing a guardian for a minor, for instance), the persons concerned will probably disagree about the way those interests tend to overrule their private objectives.

If these issues are indeed of a legal character, ideally there will be a best solution in the eyes of the law; ideally, because all stakeholders will have very good reasons to claim that the solution that fits them best is the solution prescribed by law. To decide these matters, a third person or institution is needed. Leaving the decision to one of the parties involved would indeed be unwise. There is little hope that they will choose the solution that would be in accordance with the law instead of serving their own interests. This is a good reason for any social system with legal rules to have some kind of institution to resolve legal disputes by applying the law, instead of making a choice between the interests of the parties.

There are other good reasons for such an institution. If it would be for settling disputes like the above, this institution would only be necessary if the parties would not be able to solve their disagreements themselves. And indeed, most societies primarily leave it to the parties to find a solution of their own. Maybe somewhat misleadingly this is labeled as «alternative dispute resolution» (ADR), which comes to us in many forms, like arbitration, mediation, and binding advice from—for instance—experts. Other approaches in this vein are *preventative law* (aiming at helping parties to find solutions out of court) and *collaborative law* (where parties even enter a contract enforceable by penalties not to start proceedings).

Speaking of *alternative* dispute resolution is misleading since the genuine way of solving disputes in permissive societies is in fact leaving dispute resolution to the parties themselves. «Primary dispute resolution» would have been a better term. The State institutions that are provided are only there to solve matters people cannot solve themselves. Even the decision to try to find a solution at all is, in most societies, left to the parties themselves, although in socialist settings, State-initiated procedures on behalf of citizens against other citizens are not excluded.

1.1 The Judiciary

Nevertheless, most jurisdictions agree that some decisions should not, under any circumstances, be left to citizens at all. This is especially the case if it is a public policy matter. Family relations, for instance, are defined by law, and it would be a bit odd if we would allow citizens to label themselves at random as the father or mother of someone else. Likewise, if you want to prevent misuse of drastic punishments like imprisonment, it is better to have a State-controlled institution dealing with it, rather than allowing victims setting the level by retaliation.

All these questions are a matter of administration of justice. How can we guarantee that justice will be done in a society in which the law has to be respected by everyone, even the State and the legislature itself? This requirement of the rule of law calls forth the need for an institution that can be relied on as administering justice in accordance with the law in force. This power of deciding on the contents of the law and applying it if necessary is attributed to an institution labeled as «the judiciary» or «the courts».

The way this is done, the scope of the judiciary's powers, and its position within the framework of the State may vary from jurisdiction to jurisdiction and are not even constant within a given jurisdiction. Traffic fines, for instance, were originally a matter of the courts but are now imposed by the administration in most jurisdictions. However, some general principles are generally recognized as suitable or even necessary safeguards for a judiciary that can be relied on as regards respect for the rule of law. These principles can be found in various legal instruments, varying from national constitutions to international treaties and declarations.

Principles

Compare, for instance, Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). These provisions and especially the case law of the European Court of Human Rights (ECtHR) on the latter article allow us to describe these principles in more detail. Case law of the ECtHR is the main source for the concept of a fair trial and related institutional and procedural matters, since it is the only international court that can be appealed to directly by individual citizens complaining about a violation of their rights under the Convention (Article 34 ECHR). This has led to a vast amount of leading case law (► www.echr.coe.int/hudoc), which is accessible in English and French. Some important cases will be mentioned in this chapter.

1.2 Overview

This chapter will first deal with the fundamental principles governing court systems respecting the rule of law. These principles will be divided into institutional principles and procedural principles. This distinction has no legal consequence, but it helps to give a clearer picture of the ways in which safeguards can be obtained.

The principles of independence and impartiality are institutional. They are discussed in ► Sect. 2. Principles with direct consequences for the way legal proceedings are conducted are procedural. They are discussed in ► Sect. 3. The last section of this chapter (► Sect. 4) introduces some general aspects of the administration of justice by courts and court proceedings in general. Court decisions require proceedings, and there are some general aspects to these procedures that are worth remarking on.

2 Institutional Principles

The institutional principles relate to characteristics of the court system itself and are generally considered to be essential for the proper administration of justice under the rule of law. These principles are:

1. Judicial independence
2. Judicial impartiality

2.1 Judicial Independence

The requirement of judicial independence is evident for every legal system that is based on the principle of separation of powers. The balance between the three powers (legislature, judiciary, and executive) is only guaranteed if disputes over the content of law are settled by a power that cannot be influenced by the other powers. This brings the concept of a fair trial (in its broadest sense) to the core of modern, democratic societies. But even apart from constitutional choices, the notions of a proper administration of justice and independence are inseparable. Independence, after all, is equal to the absence of undue influence, thus allowing courts to decide freely on the contents of the law and its just application.

Independence itself can be realized in several ways. In many States, the appointment of judges for life is part of this concept. Judges who are appointed for life will not easily tend

to give decisions that favor the government out of fear of being fired if they do not. In the same vein, decisions about the recruitment of new judges and their discharge are, in most cases, either the exclusive domain of the judiciary itself or done in cooperation with the central government in accordance with strict procedures. Leaving the appointment of judges to the executive alone will give it a powerful tool to influence the policy of a court, as can be learned from the way Justices of the American Supreme Court are appointed (i.e., by the President). Independence of judges can also be guaranteed by the constitutional requirement to regulate their legal position by statute.

Allocation of money to the judiciary forms a related problem. If the central government itself would take all decisions concerning how budgets for the judiciary are fixed, and how the money is spent, these cash flows could easily be directed in the direction of courts taking the most favorable decisions. To avoid this, an institution like a Council for the Judiciary could be positioned in between the central government and the judiciary, with the task to allocate the budgets and to supervise the quality of the courts' output.

Judicial Budget

The notion of «contempt of court» may also be seen as part of the requirement of judicial independence. This notion includes (among other things) that parties, the media, or the public are not allowed to comment on a procedure pending before the court (cases that are *sub judice*) beyond a certain point since these comments could influence the court.

Contempt of Court

The notion is—in varying modalities—part of the law of, for instance, the United Kingdom, Cyprus, Ireland, and Malta: jurisdictions in which the courts have the power to take measures (sometimes draconic, like immediate arrest) in case of contempt of court. Although many countries do without this strict form of contempt of court, the belief that some caution has to be observed when giving an opinion regarding pending cases is generally shared.

2.2 Judicial Impartiality

Human rights treaties stipulate not only that tribunals be independent but that they be impartial as well, for obvious reasons. If we want our courts to decide according to the content of the law, they are not allowed to favor one of the parties in any way.

Having to deal with real people and not with computers, we have to bear in mind that even judges might be tempted to disregard their professional obligations. Therefore, judges should

Recruitment

be carefully selected and schooled. A psychological test could be part of the procedure, as well as interviews and simulations of court sessions with actors. In addition, every candidate should be screened, should be able to present recommendations, and should pass a test.

Remuneration

Guaranteeing impartiality costs money. Judges should not be tempted to take money in exchange for certain decisions because their remuneration is not sufficient to satisfy needs that must be deemed reasonable in relation to their social position. Their salaries should therefore be at least as high as what a private lawyer would gain and preferably slightly higher. Paying less and counting on their magnanimity means asking for trouble.

A fine source for judges' starting salaries can be found in the biannual reports of the European Commission for the Efficiency of Justice (CEPEJ). In Europe, the common law countries remunerate their judges far better, with 4–5 times the national average salary. France and Germany really take risks with only factor 1.1 and 1.0. These figures are food for reflection: what do these differences tell us about the position of the judiciary in the State framework?

Exemption

Judges who feel that their impartiality might be questioned in a certain case should exempt themselves, either by following a formal procedure provided by national law or by arranging informally that he or she will not decide the case.

Challenge

If, nevertheless, parties have good reasons to suppose that a judge trying their case is prejudiced, even though he has not exempted himself, national law should provide a procedure to challenge this judge. Of course, this is a sensitive matter since who should decide on a challenge? Although it is evident that only judges should take the decision, it has the drawback that the impartiality of a judge will be judged by his colleagues. To guarantee their neutrality, challenge chambers can be recruited from judges of other courts. The case itself should be stayed awaiting the outcome of the challenge since a potentially partial judge should not be allowed to take any decision before his impartiality has been established.

After a challenge, impartiality is assessed by applying a double test. The *subjective* test should establish whether the judge acts with personal bias, i.e., on a personal conviction that favors one of the parties. According to the *objective* test, «it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality» (ECtHR 24 May 1989, *Hauschildt v. Denmark*).

Mogens Hauschildt was suspected of a massive tax fraud for which he was taken into detention on remand. The judge who had to decide on orders of further remand in custody also presided over the trial itself. Since the orders of remand were based on an assessment of the evidence against Hauschildt, which had to provide a «particularly confirmed suspicion», the impartiality of this judge became open to doubt and did not pass the objective test.

Safeguarding impartiality also has implications for the private life of a judge. Although most fundamental freedoms are not denied to them, their use of, for instance, their freedom of speech requires some moderation. Strong affiliations with political parties or pressure groups could give rise to doubts about their impartiality and neutrality. Even in their private lives, they should be aware of possible appearances that would undermine their credibility. Playing golf and leaving on holidays with advocates should, in most cases, exclude the handling of cases of those same advocates even if the judge concerned feels completely free to give a judgment in accordance with law.

Private Life

3 Procedural Principles

Procedural principles focus on the proceedings before the courts more than on the organization of the judiciary. These principles should be observed by the legislature, but they can also serve as guidelines for the courts when handling a case. Even parties themselves could be affected since they should not be allowed to frustrate each other's rights to a fair trial. These principles will be discussed under five headings:

1. The right to access to justice
2. The right to a fair hearing—fair trial
3. The right to a public hearing
4. The right to judgment within a reasonable time
5. The right to enforcement of the judgment

Again, this classification does not have legal consequences and treating the right to (for instance) a public hearing as part of the right to a fair trial would not change its scope or meaning.

3.1 Access to Justice

A court system, as perfect as it might be, would be idling if citizens could not get access to it. Procedural codes establishing the most perfect trial imaginable would be useless when they would not open the gates to those who are seeking justice.

Therefore, the right to access to justice is implied in the right to a fair trial even if it is not stated literally in the human rights conventions (ECtHR 21 February 1975, *Golder v. United Kingdom*).

By the 1960s, Parkhurst Prison on the Isle of Wight had developed into a top-security prison. It held Britain's most reputed and dreaded criminals, like «Mad» Frankie Frazer, the Kray twins, and the Yorkshire Ripper. Rules were very tight and visitors were practically not allowed. On October 24, 1969, at 7 pm, an unprecedented prison riot came about. More than a hundred prisoners barricaded themselves in an association room, taking seven prison officers hostage. Syd Golder was falsely accused by one of the wardens of participating and assaulting prison officers. Golder asked for leave to get in contact with his solicitor to commence a civil action for libel, but the answer he received politely informed him that the Secretary of State had considered his petition but had found no grounds to take any action. Golder submitted a complaint to the ECtHR, claiming that his right to a fair trial had been violated. The UK government replied that there had been no trial, so it could not possibly have been unfair. This led the ECtHR to its famous decision that the right to access of justice is implied by the right to a fair trial.

Scope

This calls for a definition of the scope of this right to access to justice since it is obvious that courts are not there to decide on just any matter (like the color of your shoes for the gala dinner). In the introduction to this chapter, we already pointed out that courts are there to settle disputes for those who cannot find an agreement themselves and to decide on matters we do not want to leave to citizens at all. The right to access to justice is therefore usually related to the determination of criminal charges and of civil rights and obligations.

At first sight, this seems to imply that only civil and criminal procedure is affected by this principle. However, since it is such a basic principle, these notions (which are mentioned in the provisions cited in the introduction to this chapter) should be taken in a broad sense. Thus, if private interests of a legal character are at stake, access must be opened to a court, even if the other party is the State itself and not a private person.

Likewise, a right to some sort of judicial review (i.e., the right to annulment of State acts by the judiciary) of certain administrative acts and legislation can be derived from the right to access to justice.

Guaranteeing access to justice implies more than just opening a procedure to have a court decide on a matter. Although somewhat trivial, money should be one of the concerns of each jurisdiction in this respect. Going to court costs money, especially if representation in court is obligatory. To start a procedure, in most jurisdictions, a writ of summons has to be served by a bailiff, and court fees have to be paid in court. Attorneys and solicitors are expensive. What should we do with people who cannot afford to litigate? A right of access to justice entails some kind of facility enabling citizens of little means to start proceedings or defend themselves in court. State-sponsored legal aid could be such a facility.

Legal Aid

Under Irish law, divorce was impossible, but instead a judicial separation could be obtained by a High Court decree on one of three grounds: adultery, cruelty, or unnatural practices. The ground had to be proven by witnesses, which necessitated legal assistance. Mrs. Airey lacked the money to pay a solicitor and thus could not obtain a judicial separation from her violent and alcoholic husband. The ECtHR found a violation of the right to access to justice, thus also imposing on governments a positive obligation to facilitate this access. However, the Court expressly did not set any standard for dealing with this problem. The cases in which and how access has to be guaranteed will depend on the circumstances (ECtHR 9 October 1979, *Airey v. Ireland*).

A more indirect way to guarantee access to justice can be created by allowing «no cure no pay» agreements, contingency fees, or conditional fee agreements (CFAs). What all these lawyer–client agreements have in common is that they are outcome dependent, freeing the client from (part of) his obligation to pay when the case is lost. The risk of losing money by litigating is then shifted from the client to the lawyer. Some countries have accepted these outcome-related fees with the specific objective to guarantee access to justice. On the other hand, most European countries have limited these agreements in some way to obviate immoral conduct of lawyers, the risk being that under an outcome-related fee agreement, lawyers' own interests will prevail over the interests of their clients.

No Cure No Pay

Another issue in relation to access to justice is the application of formal, procedural law. Procedural law always imposes restrictions on access to court. Such restrictions are even called for by its nature, i.e., the nature of the right of access to justice. Access to justice cannot be unlimited and unregulated,

Excessive Formalism

so national law will decide on the procedures to be followed and the time limits, periods, and formalities to be observed. This leaves a certain margin of appreciation since the actual contents of these restrictions are to be chosen and imposed by the national authorities. However, these restrictions

1. May not impair the right of access to justice in its essence (which might be the case if a procedure is only available under conditions that can hardly be met)
2. Must pursue reasonable objectives
3. Must be proportionate to these objectives

Failure to comply with any of these three requirements is labeled as «excessive formalism». Thus, a decision to declare an appeal inadmissible because the number written on the file was erroneous would violate the right of access to justice as a result of excessive formalism even if such a number is required by national law.

Periods for Legal Remedies

A related consequence of the right of access to justice concerns periods and time limits for legal remedies. In every jurisdiction, these time limits tend to be fixed and inflexible. Legal certainty about the status of judgments (i.e., whether they are final or not) is more valued by domestic law than fairness and equal chances. A party who failed to appeal in time will have to bear the consequences of the judgment even if it was legally wrong. However, if the expiration of a period for a legal remedy cannot in any way be imputed to the party concerned, it seems reasonable not to apply these periods in the light of the right of access to justice.

When their father died, the life insurance payment of the Stagno sisters was deposited in their mother's account. Instead of administering this money to the benefit of her daughters, she spent everything. Proceedings were impossible, since the mother was the only one who, according to Belgian law, could represent her minor daughters in an action against herself, which she obviously would never start. A civil action was later dismissed because the limitation period had expired. This constituted a violation of the right of access to justice (ECtHR 7 July 2009, *Stagno v. Belgium*).

3.2 Fair Hearing: Fair Trial

Legal proceedings have to be fair, which means that every party should have a reasonable opportunity to present every relevant aspect of his case to the court. This fairness relates to

all parties equally and refers to all stages of the proceedings. If we describe this by the right to a fair hearing, we should bear in mind that «hearing» is not to be taken literally. And if we use the term «fair trial», then we do not mean a trial in its narrow sense of a court session. In this chapter, the right to a fair trial is broken down into six distinct parts:

1. The principle of *audiatur et altera pars*
2. The right to equality of arms
3. The right to be present at the trial
4. The right to an oral hearing
5. The right to produce evidence
6. The right to a reasoned judgment

From its other Latin version—*audi et alteram partem*—it emerges even more clearly that this principle is actually a command to «hear the other party as well», addressed directly to the courts. Courts should hear both parties and give both parties equal opportunities to react to each other's statements. Just hearing the parties is of course not enough; the courts have to consider the arguments put forward as well.

Audiatur et altera pars

The fear for procedures going on endlessly because of this principle is unfounded. Procedural law respecting the principle of *audiatur et altera pars* is allowed to limit the possibility to introduce new statements, in which case there is no need for another round. If a party comes up with new statements when this is no longer allowed, the judge should ignore those. The justification for this is found in the ancient principle that all proceedings should come to an end at some point (*lites finiri oportet*).

Modern procedural law tends to allow only one round of written statements before «going to trial.» That was quite different in the nineteenth century. In England, for instance, the written part of the proceedings could extend itself from the statement of claim to the statement of defense, the reply, the rejoinder, the surrejoinder, the rebutter and the surrebutter. The situation in other countries was not much different.

The concept of this principle of *audiatur et altera pars* extends to everything that is brought to the attention of the court with the aim of influencing its decision. Thus, the parties have the right to comment on submissions of court advisors like the «advocate general» (ECtHR 30 October 1991, *Borgers v. Belgium*).

Sometimes, hearing the defending party might ruin the case of the other party, especially when merely by informing the party of the request would reveal information that should remain secret for some time (for instance, when a creditor

Right to Equality of Arms

seeks permission to attach the debtor's bank account). In those cases, many jurisdictions allow courts to take decisions on the request of one party (decisions *ex parte*) and hear the other party only afterward.

The right to equality of arms implies that parties should have equal opportunities in presenting their case. If, for instance, one of the parties is granted the right to hear witnesses, the other party should have the same right. The ECtHR derived from this principle the notion that excluding party witnesses from taking the stand amounts to a violation of the right to equality of arms (*Dombo v. the Netherlands*).

Until 1988, the Netherlands did not allow parties to take the stand. Their testimony was regarded as one sided and not trustworthy as of right. This rule was extended to those persons who could be identified with a party, like the managing director of a company with limited liability. When the company *Dombo* commenced proceedings against its bank regarding their financial relationship, it had to prove that a contract had been concluded to extend the existing credit arrangements. On *Dombo's* side this arrangement had been negotiated by its managing director, whereas the bank was represented by one of its employees. Thus the witness of the bank could be heard but not *Dombo's*. The right of equality of arms was violated, which forced the Netherlands to change its rules of evidence (ECtHR 27 October 1993, *Dombo v. the Netherlands*).

The scope of this principle is slightly controversial. Taken in its sense above, it is strictly procedural. Within the procedure, parties should have equal opportunities, but that does not alter the fact that opportunities are not equally distributed in society. Everyone knows that social and economic differences could favor one of the parties, for example, when a multinational is starting legal proceedings against one of its employees. A more material interpretation of the principle would require a procedural remedy for these social and economic inequalities. Usually, the principle is interpreted in its narrow sense, leaving the circumstances of the parties to substantive law.

Interests shared by many citizens can sometimes be bundled in various ways, thus creating «class actions» against mighty opponents who otherwise would not have to fear anything from their customers (think of trifling claims of consumers not worth going to court that, when bundled, represent a lot of money).

From the right to be heard and the right to react to the statements of other parties, it can easily be derived that every party (in criminal as well as civil cases) has the right to be present when it comes to a court session where his case is discussed. But there is more to it. A party has the right to be present when witnesses are heard; he has the right to be confronted with the other parties, to see the judge, and to be seen by the judge. Physical presence and observation of physical appearances can be of utmost importance for the way a case is pleaded.

Procedural law should take care of, first, safeguarding this right and, second, of formulating exceptions in a careful way. Precise rules governing the summons to a trial should guarantee that these summons will actually reach the party concerned and at least stipulate that hearings have to be stayed if this condition has not been met. Court powers to exclude parties from a court session or to deny them from being present should be limited to interests that are undoubtedly of greater weight. Examples can be found in the mental health of victims taking the stand, in due process, or in State security issues.

The same idea underlying the right to be present at trial (i.e., the idea that a direct confrontation with the court, parties, and witnesses could make a difference) leads to the right to an oral hearing. Each party is entitled to «his day in court» before the judgment is given, and courts cannot decide before having heard the parties in a court session. Face-to-face confrontations are useful or even necessary—is the idea—to bring out truth and to help the courts to reach a just and fair decision.

This «principle of orality» is an ancient concept that is easy to conceive since societies existed long before script was invented. This might be the reason why jurisdictions with a demonstrable tendency to conservatism and traditionalism still embrace this principle in a pure form, including all its consequences. In this vein, everything that is shown to American juries should in principle be read out loud. While this may seem time-consuming to continental lawyers, it is clear that a written statement of a witness can never replace a cross-examination when it comes to getting an idea about the reliability of the witness's declaration. Designing procedure therefore means to strike a proper balance between written and oral forms of procedure.

Closely related is the principle of immediacy. According to this principle, everything on which the court should base its judgment has to be produced in the presence of the court in an oral hearing. Even if the principle of orality is not

Right to Be Present at
Trial

Right to an Oral
Hearing

Right to produce evidence

embraced, this could mean that written evidence is only allowed to be used in a judgment if it has been read out aloud in the presence of the parties or accused, who had the opportunity to respond and comment on it. The weight of this principle is valued higher in criminal than in civil cases. Accordingly, many jurisdictions order a retrial if a criminal judge has to be replaced, whereas the substitution of judges in civil cases is often (with exceptions, like Germany) merely considered undesirable but without further consequences.

Claims and defenses are in most cases based on alleged facts. If those alleged facts are indeed underpinning what has been put forward but has been disputed (by one of the parties, by the public prosecutor, or maybe by the court itself), the right to a fair trial entails that these facts will be the object of evidence and (following from the principle of equality of arms) counterevidence. In other words, no claim or defense should be dismissed simply because the court does not believe the alleged facts.

Perić had a contract that stipulated that her neighbors would take care of her the rest of her life in exchange of all her property after her death. She claimed termination of the agreement for a breach of contract. The court ordered hearing of witnesses on both sides. However, after hearing the witnesses of the neighbor, the court decided that the case was clear and that Perić's witnesses would not be heard. Obviously, her claim was dismissed. This violated her right to produce evidence (ECtHR 27 March 2008, *Perić v. Croatia*).

Right to a Reasoned Judgment

Losing a case in court is not an enjoyable experience, but it is even worse if you don't know why. Even winning without knowing why is only a mixed blessing. Court decisions should be verifiable and acceptable, the first requirement allowing one to follow the reasoning and the second requirement allowing one to approve of it, if it is in accordance with the law. Courts should therefore give reasons for their decisions.

The way grounds for decisions are given depends on the domestic legal system, legal culture, and legal tradition and on differences with regard to statutory provisions, customary rules, legal opinion, and the presentation and drafting of judgments. In some civil law jurisdictions, for instance, great importance is attached to the fiction that the judiciary can be seen as a unity, speaking with one mouth and giving its unequivocal opinion. All judgments (civil, criminal, and administrative) are in writing, and they give their reasons in full (discussing all essential statements the parties have

submitted), but if unanimity is not reached, only the opinion of the majority of the judges is published. The publishing of dissenting opinions is even forbidden and constitutes a criminal offense (secret of the deliberations *in camera*).

Common law jurisdictions follow a system that is different but not incompatible with the principle of a right to a reasoned judgment. In those jurisdictions, judgments are often oral and the written version will not contain any reasons at all, just the provisions of the verdict. On the other hand, common law judges often produce a written opinion on the case, either concurring with the outcome of the case or dissenting from it. These opinions tend to investigate all legal dimensions of the problem at hand without entering into a debate with the submissions of the parties. This approach is understandable against the background of common law, where the development of certain fields of law (like tort law) is left to the courts.

3.3 Public Hearing and Public Pronouncement of the Judgment

An administration of justice that is fair can only exist in an open setting. Public and media must be allowed to witness hearings and to comment on them afterward. This way of public control compels courts to stick to the straight and narrow path of justice since deviations will be noticed, criticized, named, and blamed. Exceptions to this rule (closing the doors) should be formulated with caution.

Art. 6 ECHR allows closing the doors only «in the interests of morals, public order, or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice».

In addition, judgments themselves should be given in public. The interest of justice itself is served by public judgments as well since this will help scholars, lawmakers, and courts to develop the law by studying, discussing, and commenting on the reasoning of the courts. In fact, common law could not even exist if judgments were kept secret.

In a modern society, pronouncing every judgment is virtually impossible and at least very impractical. Having regard to the number of cases and the length of the judgments, there is not enough manpower and time to read out loud all judgments. And besides, who would care to come and listen? In European jurisdictions, most judgments are only virtually (by means of a

fiction) pronounced in public. In agreement with the spirit of Article 6 ECHR, the pronouncement in public has been substituted by the much more effective right given to every citizen and organization to demand a certified copy of every judgment they are interested in. In addition, the most important decisions are made available on the Internet without charge (as is the case with the ECLI search engine for the whole European Union).

3.4 Judgment within a Reasonable Time

Justice should not only be just; it should be fast as well. Long delays amount to denying justice since in many cases parties cannot go on with their lives (or with their mutual relation) without a court decision. International human rights treaties therefore stipulate that courts should deal with cases «within a reasonable time», thus forbidding any undue delay.

The circumstances of the case, the nature of the proceedings, and the overall course of the procedure determine the reasonableness of an eventual delay. To assess delays, the entirety of the litigation or procedure, including appeal, cassation, and enforcement proceedings, should be taken into account. The circumstances of the case could include the complexity of the matter at hand, the conduct of the parties and the relevant authorities, and what is at stake in the dispute.

In general, in criminal cases, a delay of 2 years for any step is considered to be unreasonably long. This could lead to the inadmissibility of the claims of the public prosecutor or a milder punishment.

In civil cases, a violation of the right to a judgment within a reasonable time will only follow after approximately 10 years, depending on various circumstances. The consequences of undue delay in civil cases cannot be translated to winning or losing a case since both parties will be the victim of the same violation. The best remedy will be damages to be paid by the State.

3.5 Right to Enforcement

Just as a right to a fair trial without access to justice would be meaningless, the same can be said of a right to a fair trial without means of enforcing court decisions. The right of access to justice would be illusory if court decisions are allowed to remain inoperative. Moreover, the enforcement of the decision should lead to a result without undue delay (ECtHR 19 March 1997, *Hornsby v Greece*).

The means of enforcement can vary from jurisdiction to jurisdiction. Some jurisdictions leave enforcement to the parties (with the bailiff as intermediary); other jurisdictions require a separate order allowing the winning party to take more stringent measures (like attachment of salary) against the losing party.

4 Some General Aspects of Procedures

Rules regulating legal procedures change all the time, but it is not only for that reason that studying procedural law can be quite demanding. Procedural rules are mostly interrelated, and their meaning depends on precise and well-defined concepts. That may lead to puzzles (If A has an inheritance lawsuit against B in court C, can this be combined with a claim of B against D living in district E?) that will bring back unpleasant memories of mathematic exams in junior high school.

What could help is having some insight into what kind of rules and regulations those procedural regulations will usually contain. In fact, codes of procedure are mostly about the same things, regardless of the actual jurisdiction. Realizing this will get you on the way to the core of the meaning of all those rules and will also put you on the trail of the traps that you could encounter on your journey through this jungle. This section is therefore devoted to some general aspects of procedural rules.

4.1 Jurisdiction

The judicature always is composed of different courts with different functions. Each of these courts has its specific jurisdiction. The jurisdiction of a court defines the scope of its judicial powers and activities. For the parties, the designated court is the one that is competent to deal with their case. Regulating jurisdiction is inspired by many, and different, considerations.

For instance, regulating jurisdiction might be called for to avoid backlog and congestion of the court system. If parties would be allowed to choose a court at their convenience, probably after some time, popular courts would be overloaded with work. Parties are economic beings and tend to maximize their profits. If *forum shopping* is not discouraged or impossible, it will certainly happen. Regulations regarding territorial jurisdiction (jurisdiction *ratione loci*), dividing the work between

Territorial Jurisdiction

courts of the same level (like district courts), offer a simple and effective solution. However, the right of access to justice will impose some constraints on the choices to be made: distances between courts and the parties' residence should remain reasonable.

Jurisdiction *Ratione
Materiae*

Another economic reason to regulate jurisdiction can be found in the advantages of the division of labor. By designating specialized courts, the overall level of their judgments will satisfy higher standards against lesser costs. At the same time, if needed, jurisdiction *ratione materiae* (related to the legal nature of the claim) can be accompanied by special procedural provisions to enable these courts to conduct proceedings more suited to the kind of cases they have to handle.

Jurisdiction *ratione materiae* could also be a matter of «internal separation of powers» within the court system. It is probably better not to mix appeal courts with first instance courts to safeguard the professional distance that is needed to judge impartially about a claim to review a decision of colleagues in another court. It is common usage to refer to these relations between courts as those between «higher» and «lower» courts, but this is, after all, merely a figure of speech.

National Jurisdiction

A fundamental jurisdiction problem is at stake when determining the scope of the powers of all courts in a national court system taken together. This national jurisdiction gives an answer to the question which legal issues can be decided by the national courts at all. For example, if a French citizen is killed by an Australian in Argentina, could this crime be tried by the Criminal Court of Singapore where the perpetrator has been arrested when he came off the airplane? And in the case of two women who married in Belgium, can they get their divorce in a Japanese court? These are all questions of national jurisdiction that can be solved at a national level but are also, in many instances, the subject matter of bi- or multilateral treaties or international regulations.

National jurisdiction is a very sensitive matter since States could refuse to accept each other's views on these questions. That explains why there is a national and an international aspect to it. The national legislature can determine the jurisdiction of its own courts but is limited in its possibilities by international law. In the European Union, for instance, many jurisdiction and recognition issues have been settled in EU regulations. And if there is a free margin of appreciation, States do not always accept the way this margin has been used by the courts of another State, stipulating special conditions for the recognition of foreign judgments. The

possibility of enforcement of foreign judgments thus depends on the recognition of these judgments by the national authorities, of course within the framework of the numerous bi- and multilateral treaties that have been concluded regarding this matter.

4.2 Standing

Procedural law imposes restrictions on the possibility to appear in court. Some entities, although existing in some way or another, are not recognized by law as entities with the possibility to start proceedings as a claimant or being summoned into court as a defendant. Some entities, we say, do not have legal standing: they do not qualify as a *persona legitima standi in iudicio*; they do not have a *locus standi*. Animals are a good example. The issue of standing can also depend on the particulars of the case. Generally speaking, a natural person has legal standing, but sometimes he will lack an interest that is sufficient to commence proceedings. All these questions are covered by what is called the «doctrine of legal standing».

Using the word «entity» is unavoidable since lacking standing sometimes implies that we have to do with something rather vague. A neighborhood committee organizing a fancy fair is a good example. Persons working together coordinate their actions, but for most jurisdictions, this does not create shared liabilities or entitlements. The committee will not have legal standing, but the distinct members of the committee do.

On the other hand, jurisdictions might extend the concept of standing—normally reserved for natural and legal persons—to some forms of cooperation. Interest groups and commercial activities can thus be allowed to start proceedings (or have proceedings started against them).

Standing may also depend on the subject matter of the case. He who does not have an interest that is recognized by law will not be allowed to commence proceedings. To express this, often the French adage is used: *Point d'intérêt, point d'action*. Thus in principle it will not be possible to lodge a claim against someone to make him pay his debts to a third party.

Another instance of this rule is related to trifling claims. If the amount of money at stake is too low, the court will not admit the claim. As the Romans said: *De minimis non curat praetor* (the court does not deal with trifling claims).

4.3 Representation by a Lawyer

Procedural and substantive laws can be difficult, which can already be seen from the fact that law is an academic discipline. Allowing parties to conduct proceedings themselves could do much harm to their own interests (missing all the arguments any lawyer would put forward) and to the administration of justice (since much time will have to be spent reacting to pointless motions and elucidating what the layman could have meant with his assertions and claims).

Every jurisdiction will draw a line and will make legal representation at some point obligatory for parties who want to appear in court. Where the line is drawn depends on many factors. One could be the complexity of the procedure, for which reason in as good as every jurisdiction legal representation before the highest court is obligatory. Another factor can be found in the interests at stake.

Legal representation is often monopolized by recognized specialists. This recognition can take the form of providing facilities (access to files, the right to plead, the right to represent clients without proof of power of attorney), but in most countries, the profession is completely regulated and protected by excluding all others from defending clients in court (or even giving legal advice out of court, like in Germany, Italy, and Greece). This has created vast monopolies of professional groups of lawyers. Their names and titles are well known, like the *barristers* and *solicitors* in common law countries; the *avocats*, *avoués*, and *procureurs* in France; and the *abogados* and *procuradores* in Spanish-speaking countries. They are united in associations with names like the Law Society or the Bar Association. Their existence and proper functioning is of mutual benefit to (the administration of) justice, to the public, and to themselves, because specialization costs money and thus has to be paid for.

The public interest involved in the existence of a capable and competent legal profession has given it a very strong position. In the European Union, for instance, the rules of free competition do not apply to the legal profession as long as it can be assumed that fixed or minimum prices for its services serve the interest of quality. At the same time, the monopoly granted to the profession left it with a strong dependency on choices made by the legislature regarding legal representation. Thus, the profession will always be strongly opposed to any liberalization of the rules on obligatory legal representation.

4.4 Commencement of Proceedings

In all jurisdictions, special attention is paid to the way proceedings can be started. As noted above, the commencement of proceedings is closely linked to fundamental principles of

the administration of justice. The way proceedings have to be started determines the scope of the right of access to justice and should also guarantee that the court will listen to both sides, ensuring that the other party (which could also be the accused in criminal proceedings) will somehow get to know what has been submitted to the court.

The first document to commence proceedings is usually highly regulated. In every procedural code, detailed rules will be found with regard to the names of the parties, the grounds of the claim, and the claim itself. That is understandable since the scope of the proceedings will at least initially be determined by this document.

The precise contents of these rules depend on the way proceedings have been shaped. A standard scenario of «claim-defense-oral hearing» will require more detailed grounds than a procedure in which a written reaction to the defense is foreseen. In addition, sometimes formalities have to be observed, like using the right form, sealed paper, and the like.

The first document will have to state the facts of the case and the claim of the plaintiff. Jurisdictions will only differ in the required preciseness of this factual statement. The extensive way of providing a basis for a claim is called «fact pleading». When factual details can be left out (like in the United States), the term «notice pleading» is used.

In addition, mentioning the rules of law on which the claim is based could also be one of the requirements. This might be useful for the defendant or accused since the law is not always clear and could be hard to find. If such a regulation exists, it will certainly not be meant to inform the court about the legal basis of the claim or prosecution. *Ius curia novit*—the court knows the law—is an adage that will almost universally apply. Parties can give their opinion on the law, but the ultimate decisions about its contents will always rest with the court.

Ensuring that the defendant or accused will be informed about the commencement of proceedings is another matter that has to be regulated. The systems followed are diverse. Sometimes this is seen as incumbent on the claimant, who will have to make use of the means of convocation prescribed or facilitated by the law (like recommended letters, electronic summons, summons served by a bailiff or police officers). Another solution is to task State organs with informing the defendant or accused in time.

Commencing proceedings can be subject to additional requirements, like paying court fees. Some jurisdictions feel that civil justice has to be paid for by the claimant (the polluter pays). England, for instance, is aiming at a court fee

Document Initiating
the Procedure

Informing the
Defendant or Accused

Court Fees

system that will cover all court costs. Some countries even claim a court fee from the defendant, although that is an exception (the Netherlands, Scotland).

At the other end of the spectrum, justice is seen as a fundamental right that should be free for all in all circumstances. Thus, France and Spain do not impose any payment for commencing proceedings or filing a defense. In fact, should we not be grateful to the parties that they submit their conflicts to our courts? Without them, the law could not be developed and specified by our judges. This could provide another reason not to impose too many burdens on the parties.

4.5 The Ordinary Course of Proceedings

At first, this might seem a bit peculiar, but essentially all court proceedings are a journey from the law to the facts. First, a selection has to be made of the relevant rules that apply to the case at hand. In most criminal matters, the rules to be applied are pretty obvious and follow directly from the indictment, but even then, sometimes, some hard nuts have to be cracked. In civil matters, selecting the rules (or relevant case law) is sometimes rather complicated. Once the relevant rules have been established, most proceedings enter into a second stage. In that stage, the facts have to be investigated in order to verify if the rules apply or not.

Trial

In common law jurisdictions, a tricky word has been coined to indicate this second stage of investigating the facts: the trial. The word is tricky since many scholars from the civil law tradition have been tempted to use the word for every court session or oral hearing in court. They thus underestimate the connotations that underlie the term, which is heavily linked with passive judges, jury decisions, cross-examinations, battles of experts, and cunning lawyers who try to bend truth to lies and lies to truth. It is better to set the term «trial» aside for this kind of events.

Pleadings

Before entering the stage of fact finding, the parties will exchange their views on the matter at hand, in most cases already handing in documentary and other evidence. Jurisdictions differ in the way this is organized. Again, rather disturbingly, this phase, normally in writing, is usually designated by the word «pleadings». The word «pleadings» has, because of its resemblance with its singular counterpart, a strong oral connotation for those coming from a civil law tradition. Still, pleadings (plural) are always in writing.

In most common law jurisdictions, the phase of the pleadings is preceded or accompanied by requests for information directed toward the other party. In the United States, this procedure is known as «discovery». It is characterized by drastic powers attributed to the parties' attorneys, who may, for instance, subpoena (summon) witnesses to their office to subject them to an oral examination.

Discovery and Disclosure

In England, the term «disclosure» is used. Disclosure is not as party controlled as discovery, although parties can be forced to release information that is not advantageous for their own case.

In civil law jurisdictions, fact finding by the parties is, as a rule, not part of the standard proceedings but can be achieved by following separate procedures leading to interim orders of the court.

When the pleadings are over, the court comes in to decide on the law (selecting the rules) and to see what factual matters still have to be decided. Usually, the court's decision is laid down in a written interim judgment.

Funnel Model

If no factual matters remain (either because there is no course of action or because all defenses have to be rejected), a final judgment puts an end to the case. Otherwise, «the case is sent to trial», i.e., a factual investigation is ordered.

Civil law jurisdictions use a funnel model to make the transition from the legal stage to the factual stage. All alleged facts are filtered by the court, which will expressly state which facts have to be proven *and* what means of proof is to be used. The costs of fact finding can thus be limited in a significant way.

When fact finding is over, the decision about the facts that indeed have been established has to be made. Some jurisdictions think it is best to leave this decision (at least in certain cases) to a jury, i.e., an assembly of laymen, selected from the population at large. The reasons put forward are twofold: firstly, the layman knows what a fact is when he spots one and is not obfuscated by legal reasoning, and, secondly, justice should be as democratic as possible. Doubts regarding the efficiency of jury trials and the correctness of their outcomes pushed most jurisdictions in the direction of totally abolishing them or at least minimizing the participation of laymen in the administration of justice.

Juries

4.6 Law of Evidence

Material and Formal Truth

Fact finding and deciding on matters of fact are not the same. The rules of evidence are in between. Every jurisdiction regulates, in one way or another, how facts can be proven. Fact

finding is always a pursuit of the material truth (i.e., the real state of affairs), but since we can never be sure of what exactly happened in the past, the laws of evidence try to establish standards to exclude uncertainties that are not acceptable in the eyes of the law. In the end, the outcome is the formal, procedural truth that may not coincide with the material truth.

Evidence and Trial

A first category of rules regarding evidence is closely linked to the concept of a fair trial, even at the price of giving up the material truth for higher values. Torturing witnesses or the accused to get the truth out of them could be very effective, but most jurisdictions do not regard this as a valid method of getting evidence. Searches of premises are limited to specified circumstances, and even the way witnesses are examined can be restricted. Exclusion of evidence could be the consequence, although other remedies are used in practice (like reduction of the sentence).

Privileges

Related to this, the law of evidence in many jurisdictions is respectful of the duty of professional secrecy of, for instance, doctors and lawyers. To serve their customers, confidentiality is essential for doctors and lawyers. Patients and clients have to be sure that all information given to their doctor or lawyer is strictly confidential and will not be revealed to anyone else. As a counterpart, the information obtained is sometimes privileged and cannot be revealed in court. Where the line is drawn is different for each jurisdiction.

Means of Evidence

The law of evidence may also limit the means of evidence that are allowed in court. In particular, new technologies are sometimes regarded with distrust. There are still jurisdictions in which photographs and digital media can only be introduced by using detours like an expert's or witness's statement. In fact, the traditional list of acceptable means of evidence only contains witnesses, experts, documents, confessions, and the court's observations. In the French tradition, this can be supplemented by presumptions of fact, inferences made by the court based on undisputed or established facts.

Value of Evidence

Evidence is rarely completely reliable, and in most cases, some extra considerations are needed to choose between the possibilities offered by all means of evidence presented in court. The doctrine of *free evidence* leaves the appreciation of all means of evidence to the court. The court will have to base its decision about the evidence on the scenarios presented by the parties (or the prosecution and the evidence) and the likelihood of each of these scenarios in the light of the evidence that has been produced. The less this appreciation is trusted, the more the judge is curtailed by rules telling him which evidence to discard and which evidence to believe.

A rule found in many jurisdictions is the *unus testis nullus testis* rule, stating that nothing can be proven with only the testimony of one witness. On the other hand, some types of documentary evidence, like deeds written by notaries, often have an imperative probative value.

Evidence in law is not like evidence in mathematics. Proof in law is a matter of excluding other possibilities beyond a certain point, being fully aware that complete certainty about events in the past can never be obtained. Courts therefore developed criteria to set the required level of certainty.

In criminal cases, it is often said that the facts have to be proven «beyond reasonable doubt». That is a high standard, excluding the possibility of a not so exceptional explanation for the same facts other than that the suspect committed the crime.

In civil litigation, the standard of proof is usually the preponderance of the evidence, simply meaning that one party has more proof for its statements than the other party.

Fact finding may be structured when a «burden of proof» model is used. In civil law countries, the rules of evidence indicate which of the parties will have to prove certain statements. Usually, the claimant has to prove all disputed statements on which his claim is based, while the disputed facts underpinning the defendant's defense have to be proven by the defendant.

This *onus probandi* is decisive of the outcome of the case. If a party with the burden of proof fails to come up with sufficient evidence, his claim or defense is rejected. The burden of proof can be shifted to the other party in special circumstances when this would be fairer. The rule *negativa non sunt probanda* (negative statements do not have to be proven) could, for instance, imply that the other party has to prove the positive counterpart.

Standards of Assessment

Burden of Proof

4.7 The Role of the Court and the Parties in Litigation

Both in civil, administrative, and criminal cases, there has to be a certain division of labor between the court and the parties to bring proceedings to an end. Each of them has its specific interests, roles, tasks, and responsibilities, which sometimes coincide but could also be opposed to each other. Directing one's eye toward the court, two different characterizations could be used, corresponding with different approaches: the court as a referee and the court as a manager–

investigator. These approaches will be described by examining the distinction between adversarial and inquisitorial procedures and by exploring the concept of «case management».

Inquisitorial System

A major distinction between types of procedure is between inquisitorial and adversarial systems. In an inquisitorial system, the main roles are for the judge and, in criminal cases, the public prosecution. They have the responsibility to find out whether a crime has been committed and who did it and to get a criminal conviction. It is also their responsibility to avoid punishing innocent persons. The suspect and his counsel play a lesser role in the proceedings.

In civil cases, the judge in an inquisitorial system conducts the fact finding himself, questions witnesses, issues orders to the parties and experts, and could even go beyond the claims of the claimant or beyond the defenses of the defendant if he considers this just.

Adversarial System

In an adversarial system in criminal cases, the public prosecutor and the suspect have (relatively) equal standing. In a sense, each side participates in a contest, with the conviction of the suspect at stake. The judge has to make sure that the contest is fought according to the rules, and the judge or the jury will determine who has won the contest.

In civil cases, the judge is only a referee, leaving the procedure to the parties. The claimant determines what the proceedings will be about, and the scope or contents of each party's defense will not be altered by the court, not even if a strong defense is missed.

It should be emphasized that neither the inquisitorial nor the adversarial system in their pure forms are to be found anywhere. All systems are mixed systems, although the emphasis in the common law tradition used to be more on the adversarial side and in the civil law tradition more on the inquisitorial side. However, this difference in emphasis is gradually becoming less pronounced as civil law countries borrow adversarial procedures (like greater powers for defense counsel and defendant) and the common law countries borrow inquisitorial procedures (cases only decided by judges).

Case Management

Especially in a more or less adversarial civil context, proceedings can last a long time. The court does not take initiatives and just waits until the parties decide to move on. In recent years, this made the call for a form of «case management» by the courts stronger and stronger.

Recognizing that a less reactive and more active judge could save time and money for both the parties and the State, in many jurisdictions, inquisitorial elements have been introduced into

proceedings before the courts. The problem is always finding the right balance between the rights and autonomy of the parties and the powers of the judge.

In England, for instance, much attention is paid to the preparatory phase of proceedings, forcing the parties to explore out-of-court solutions and to submit a file to the court that is already complete. In France, a special judge (*juge de la mise en état*) has been created to supervise civil proceedings.

What is meant by «case management» is therefore rather diverse. However, the core of this notion reflects the insight that adversarial elements in proceedings may be sacrificed for the sake of efficiency.

4.8 Legal Remedies

Even in proceedings before the courts, mistakes can easily be made. Those mistakes could concern the law, as well as the facts, and can be made by the court, as well as the parties. The resulting judgment will not reflect the «real» legal situation, and that is generally felt to be highly unjust. Therefore, all jurisdictions provide for extra procedures to have these erroneous judgments overturned, although not in all cases.

The extra procedures are labeled «legal remedies». They come in an incredible variety of forms. The variety concerns the procedure to follow, the court or instance that has to be applied to, the (legal or natural) person the legal remedy is created for, the time limits to be observed, the relief that can be obtained, and the standards to be applied by the court.

Appeals can be dealt with in two different ways, either as a review of the first instance decision or as a new appraisal of everything the parties have submitted (*novum iudicium*, full appeal). If the appeal is a *revisio prioris instantiae* (review), the case will be remitted to the court of first instance if any mistake is found in the appeal.

Appeal

This can be time-consuming, with cases going up and down the court system without reaching a final judgment. Therefore, many jurisdictions treat the appeal as «devolving», meaning that the entire case is submitted to the appeal court, which will give a final judgment itself.

A special legal remedy is cassation. Cassation is meant to secure the uniform interpretation of the law. A cassation court will therefore be devoid of investigative powers and has to accept the facts as they have been established by the lower

Cassation

courts. This court will decide on matters of law only. Since uniformity is the ultimate aim, logically not more than one cassation court can be created within a single jurisdiction.

Especially countries in the French civil law tradition will have a cassation court. Among them are France (*Cour de Cassation*), the Netherlands (*Hoge Raad*), Belgium (*Verbrekingshof*), and Italy (*Corte di Cassazione*). Other highest courts like the Supreme Court of the United States are not cassation courts, although any fact finding by these courts will be extremely exceptional.

5 Conclusion

The brief overview of elements of procedural law showed an enormous variety in the way litigation can be shaped in different jurisdictions. Nevertheless, the margins are set by the principles discussed in the first sections, which have the objective to ensure that cases will be dealt with in a fair way. This is a guarantee for the parties that they will be proved right when their case is just.

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